Corpus Vile or *Corpus Personae*? The Status of the Human Body, its Parts and Derivatives in Scots Law

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Declaration:

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Abstract

Scots law, as it pertains to the human body, its parts and its derivatives, is said to be 'as settled as the law of England'. It has been juridically asserted that there can be 'no property in a corpse' in either jurisdiction. This rule precluding 'property' in cadavers has been extended, in Anglo-American jurisdictions, to hold that parts of bodies and separated human tissue are also, *prima facie*, legal non-entities. The suggestion that Scots law is as settled as – indeed, is the same as – the law of England in respect of this matter is puzzling, however. Scots property law is 'resolutely Civilian in character': the word 'property' holds a distinctly different meaning to a Scots lawyer than to an Anglo-American lawyer. Furthermore, again due to Scotland's institutional connection to the Civil law, Scots law has the potential to afford redress and remedy in situations in which the Common law has been unable to do so. The *actio iniuriarum* served in Roman law – and serves in modern South African law – as a means of safeguarding the 'dignity' of persons. Scots law, too, thus has the potential to safeguard individuals' interests in 'dignity'. This thesis argues that the distinct legal history of Scotland makes any assumption of commonality between Scots and English law simplistic at best and offers the first comprehensive account of the law relating to the human body, its parts and derivatives in Scotland. Ultimately, the thesis concludes that Scotland's mixed legal heritage affords scope for the law to develop a 'mixed approach': while it can sometimes be appropriate to recognise the human body, its parts and derivatives as 'property', in other cases it is more logical to regard them as continuing to form a part of a legal 'person'.

Abbreviations

Anderson, *Criminal Law*	A. M. Anderson, *The Criminal Law of Scotland*, (Edinburgh: Sweet & Maxwell, 1892)
Anderson, *Criminal Law*, (2nd Edn.)	A. M. Anderson, *The Criminal Law of Scotland*, (2nd Edition) (Edinburgh: Bell and Bradfute, 1904)
Anderson, *Possession*	Craig Anderson, *Possession of Corporeal Moveables*, (Edinburgh: Edinburgh Legal Education Trust, 2015)
Anderson, *Property*	Craig Anderson, *Property: A Guide to Scots Law*, (Edinburgh: W. Green, 2016)
Alison, *Principles*	Archibald J. Alison, *Principles of the Criminal Law of Scotland*, Vol. I, (Edinburgh: Bell and Bradfute, 1832)
Alison, *Practice*	Archibald J. Alison, *Practice of the Criminal Law of Scotland*, Vol. II, (Edinburgh: Bell and Bradfute, 1833)
Austin, *Jurisprudence*	John Austin, *Lectures on Jurisprudence: Or, the Philosophy of Positive Law*, (New Jersey: The Lawbook Exchange, 1885)
Bain *et al*, *Northern Lights*	Douglas Bain, Roderick R. M. Paisley, Andrew R. C. Simpson and Nikola J. M. Tait, *Northern Lights: Essays in Private Law in Honour of Professor David Carey Miller*, (Aberdeen: Aberdeen University Press, 2018)
Bankton, *Institute*	Andrew MacDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights: With Observations upon the Agreement or Diversity Between them and the Laws of England. In Four Books. After the General Method of the Viscount of Stair's Institutions (in Two Volumes)*, (Edinburgh: R. Fleming, 1751)
Bartolus, *Commentaria*	Bartolus de Saxoferrato, *In Primam Digesti Novi Partem Commentaria ad D.41.2.17.1*, (Augustae Taurinorum: apud Haeredes Nicholai Beuiliquae, 1574)
Bayne, *Institutions*	Alexander Bayne, *Institutions of the Criminal Law of Scotland*, (Edinburgh: Ruddimans, 1730)
Berger, *Dictionary*	Adolf Berger, *An Enclyclopaedic Dictionary of Roman Law*, (Philadelphia: The American Philosophical Society, 1953)
Bell, *Crimes*	B. R. Bell, *Commentaries on the Law of Scotland Respecting Crimes by Baron David Hume (in Two Books)*, (4th Edition) (Edinburgh: Bell and Bradfute, 1844)
Bell, *Dictionary*	William Bell, *A Dictionary and Digest of the Law of Scotland: With Short Explanations of the Most Ordinary English Law Terms. To which is Added a Supplement, Containing an Analysis of the Court of Session Act, the Advocation and Suspension Act, the Diligence Act, and the Entail Excambion Act*, (Edinburgh: Bell and Bradfute, 1838)
Bell, *Principles*	George J. Bell, *Principles of the Law of Scotland*, (4th Edition) (Edinburgh: Edinburgh Legal Education Trust, 2010, first published 1839)
Blackstone, *Commentaries*	Sir William Blackstone, *Commentaries on the Laws of England (In Four Books)*, (Oxford: Clarendon Press, 1765)
Buckland, *Roman Law*	William W. Buckland, *The Main Institutions of Roman Private Law*, (Cambridge: Cambridge University Press, 1936)

Buckland, *Textbook*	William W. Buckland, *A Textbook of Roman Law from Augustus to Justinian*, (Oxford: Oxford University Press, 1921)
Burnett, *Treatise*	John Burnett, *A Treatise on the Various Branches of the Criminal Law of Scotland*, (Edinburgh: George Ramsay and Co., 1811)
Cairns and du Plessis, *Casus to Regulae*	John W. Cairns and Paul J. du Plessis, *The Creation of the Ius Commune: From Casus to Regulae*, (Edinburgh: Edinburgh University Press, 2010)
Campbell, *Compendium*	Gordon Campbell, *A Compendium of Roman Law: Founded on the Institutes of Justinian Together with Examination Questions Set in the University and Bar Examinations (with Solutions) and Definitions of Leading Terms in the Words of the Principal Authorities*, (London: Stevens and Haynes, 1878)
Carey Miller *et al*, *Scotland*	David L. Carey Miller, Malcolm M. Combe, Andrew Steven and Scott Wortley, *National report on the transfer of movables in Scotland* in W Faber and B Lurger (eds.), *National Reports on the Transfer of Movables in Europe Volume 2: England and Wales, Ireland, Scotland, Cyprus*, (Munich: Sellier, 2009)
Carey Miller and Irvine, *Corporeal Moveables*	David L. Carey Miller and David Irvine, *Corporeal Moveables in Scots Law*, (2nd Edition) (Edinburgh: W. Green, 2005)
Chalmers and Leverick, *Criminal Law*	James Chalmers and Fiona Leverick, *Gordon's Criminal Law of Scotland*, Volume II (4th Edition) (Edinburgh: W. Green, 2017)
Christie, *Criminal Law*	Michael G. A. Christie, *Gordon's Criminal Law of Scotland*, Volume II (3rd Edition) (Edinburgh: W. Green, 2001)
Craig, *Jus Feudale*	Sir Thomas Craig, *Jus Feudale Tribus Libris Comprehensum*, (3rd Edition), (Edinburgh: Thomas and Walter Ruddimans, 1732)
Coke, *Institutes*, III	Sir Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason and Other Pleas of the Crown*, (London: M. Flesher, 1644)
Descheemaeker and Scott, *Iniuria*	Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Oxford: Hart, 2013)
Donellus, *Commentarii*	Hugues Doneau (Donellus), *Commentarii de Iure Civili*, (Apud heredes Andreæ Wecheli, Claudium Marnium & Ioann. Aubrium, 1589)
Duncan, *Treatise*	John M. Duncan, *Treatise on the Parochial Ecclesiastical Law of Scotland*, (Edinburgh: Bell and Bradfute, 1864)
Dyson, *Tort and Crime*	Matthew Dyson, *Comparing Tort and Crime: Learning from across and within Legal Systems*, (Cambridge: Cambridge Uuniversity Press, 2015)
Erskine, *Institutes*	Sir John Erskine of Carnock, *An Institute of the Law of Scotland*, (John Bell, 1773)
Erskine, *Principles*	Sir John Erskine of Carnock, *Principles of the Law of Scotland*, (14th Edition) (Edinburgh: Bell and Bradfute, 1870)
Evans-Jones, *Civil Law*	Robin Evans-Jones, *The Civil Law Tradition in Scotland*, (Edinburgh: The Stair Society, 1995)
Forbes, *Criminal Law*	William Forbes, *The Institutes of the Law of Scotland, Volume Second, Comprehending the Criminal Law*, (Edinburgh: John Mosman and Co, 1730)

Forbes, *Great Body*	William Forbes, *A Great Body of Scots Law,* (Manuscript: Available at https://www.forbes.gla.ac.uk/contents/)
Forbes, *Institutes*	William Forbes, *The Institutes of the Law of Scotland,* (Edinburgh: Edinburgh Legal Education Trust, 2012)
Forbes, *Private Law*	William Forbes, *The Institutes of the Law of Scotland, Volume First, Comprehending the Private Law to which is Subjoin'd the Constitution of the Session*, (Edinburgh: John Mosman and Co, 1722)
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Gordon, *Criminal Law* (2nd Ed.)	Sir Gerald H. Gordon, *The Criminal Law of Scotland,* (2nd Edition) (Edinburgh: W. Green, 1978)
Gordon and Wortley, *Land Law*	William M. Gordon and Scott Wortley, *Scottish Land Law*, Volume I, (3rd Edition) (Edinburgh: W. Green, 2009)
Grueber, *Commentary*	Erwin Grueber, *The Roman Law of Damage to Property being a Commentary on the Title of the Digest ad Legem Aquiliam (ix. 2) with an Introduction to the Study of the Corpus Iuris Civilis*, (Oxford: Clarendon Press, 1886)
Guest, *Jurisprudence*	A. G. Guest (Ed.), *Oxford Essays in Jurisprudence*, (Oxford: Oxford University Press, 1961)
Have *et al*, *Ownership*	Jos V. M. Welie and Henk A. M. J. Have and Stuart F. Spicker, *Ownership of the Human Body: Philosophical Considerations on the Use of the Human Body and its Parts in Healthcare*, (London: Kluwer, 1998)
Hoffman, *Private Law*	David Hoffman (Ed.) *The Impact of the UK Human Rights Act on Private Law*, (Cambridge: Cambridge University Press, 2011)
Hume, *Commentaries*	Baron David Hume, *Commentarites on the Law of Scotland Respecting Crimes (in Two Volumes)* (2nd Edition) (Edinburgh: Bell and Bradfute, 1819)
Hume, *Lectures*	Baron David Hume's Lectures 1786-1822, Edited and Annotated by G. Campbell H. Paton. In Six Volumes, published by the Stair Society at Edinburgh, 1939-1958
Ibbetson, *Historical Introduction*	David Ibbetson, *A Historical Introduction to the Law of Obligations,* (Oxford: Oxford University Press, 1999)
Johnston, *Ecclesiastical Law*	Christopher N. Johnston, *The Parochial Ecclesiastical Law of Scotland,* (Edinburgh: Bell and Bradfute, 1903)
Jupp *et al*, *Cremation*	Peter C. Jupp, Douglas J. Davies, Hilary J. Grainger, Gordon D. Raeburn and Stephen R. G. White, *Cremation in Modern Scotland: History, Architecture and the Law,* (Edinburgh: Birlinn, 2017)
Lee, *Introduction*	Robert Warden Lee, *Introduction to Roman-Dutch Law,* (5th Edition) (Oxford: Clarendon Press, 1953)
MacCormick, *Instititions*	Sir Donald Neil MacCormick, *Institutions of Law: An Essay in Legal Theory*, (Oxford: Oxford University Press, 2007)

MacDonald, *Criminal Law*	John H. A. MacDonald, *A Practical Treatise on the Criminal Law of Scotland*, (Edinburgh: William Paterson, 1867)
MacKenzie, *Institutions*	Sir George MacKenzie, *The Institutions of the Law of Scotland*, (Edinburgh: John Reid, 1684)
MacKenzie, *Matters Criminal*	Sir George MacKenzie, *The Laws and Customes of Scotland, In Matters Criminal. Wherein is to be seen how the Civil Law, and the Laws and Customs of other Nations do agree with, and supply ours*, (Edinburgh: James Glenn, 1678)
MacKenzie, *Roman Law*	Thomas MacKenzie, Lord MacKenzie, *Studies in Roman Law with Comparative Views of the Laws of France, England and Scotland*, (2nd Edition, 1864)
Metzger, *Companion*	Ernest Metzger (Ed.) *A Companion to Justinian's Institutes,* (London: Duckworth, 1998)
Moyle, *Institutes*	J.B Moyle, *Imperatoris Iustiniani Institutiones Libri Quattuor: With Introductions, Commentary and Excursus*, (3rd Edition) (Oxford: Clarendon Press, 1896)
Neethling, *Delict*, (3rd Edn.)	J. Neethling, J. M. Potgieter and P. J. Visser, *Law of Delict,* (3rd Edition) (Durban: Butterworths, 1998)
Neethling, *Delict*, (4th Edn.)	J. Neethling, J. M. Potgieter and P. J. Visser, *Law of Delict,* (3rd Edition) (Durban: Butterworths, 2001)
Neethling, *Delict*, (7th Edn.)	Neethling, J., Potgieter, J. M. and Visser, P. J., *Law of Delict*, (7th Edition, LexisNexis, 2016)
Nicholas, *Introduction*	Barry Nicholas, *An Introduction to Roman Law*, (Oxford: Clarendon Press, 1962)
Paisley and Cusine, *Unreported Cases*	Roderick R. M. Paisley and Douglas J. Cusine, *Unreported Property Cases from the Sheriff Courts*, (Edinburgh: W. Green, 2000)
Paton and Derham, *Jurisprudence*	George W. Paton and David P. Derham, *A Textbook of Jurisprudence*, (4th Edition) (Oxford: Oxford University Press, 1972)
Pitmedden, *Treatise*	Sir Alexander Seton, Lord Pitmedden, *Treatise of Mutilation and Demembration and their Punishments*, in Sir George MacKenzie, *The Laws and Customes of Scotland, In Matters Criminal. Wherein is to be seen how the Civil Law, and the Laws and Customs of other Nations do agree with, and supply ours,* (2nd Edition) (Edinburgh: Andrew Anderson, 1699)
Rankine, *Land Ownership*	John Rankine, *The Law of Land Ownership in Scotland*, (4th Edition) (Edinburgh: W. Green, 1909)
Reid, *Personality*	Elspeth Christie Reid, *Personality, Confidentiality and Privacy in Scots Law*, (Edinburgh: W. Green, 2010)
Reid, *Property*	Kenneth G. C. Reid, *The Law of Property in Scotland*, (Edinburgh: Butterworth, 1996)
Reid and Visser, *Private Law*	Elspeth C. Reid and Daniel Visser, *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa*, (Edinburgh: Edinburgh University Press, 2013)
Reid and Zimmermann, *History*, I	Kenneth Reid and Reinhard Zimmermann, *A History of Private Law in Scotland, Vol. I: Property*, (Oxford University Press, 2000)

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Thomson, *Delict*	Joe Thomson (Ed.), *Delict*, (Edinburgh: W. Green, 2007)
Stair, *Institutions*	James Dalrymple, 1st Viscount Stair, *The Institutions of the Law of Scotland Deduced from its Originals and Collated with the Civil, Canon and Feudal Laws, and with the Customs of Neighbouring Nations in IV Books*, (2nd Ed.) (Glasgow: University of Glasgow Press, 1981)
Stein, *Regulae Iuris*	Peter Stein, *Regulae Iuris: From Juristic Rules to Legal Maxims*, (Edinburgh: Edinburgh University Press, 1966)
Stewart, *Reparation*	William J. Stewart, *Reparation*, (Edinburgh: W. Green, 2000)
Smith, *Short Commentary*	Thomas Broun Smith, *A Short Commentary on the Laws of Scotland*, (Edinburgh: W. Green, 1962)
Smith, *Studies*	Thomas Broun Smith, *Studies Critical and Comparative*, (Edinburgh: W. Green, 1962)
Thomson, *Delict*	Joe Thomson (Ed.), *The Law of Delict in Scotland*, (Looseleaf) (Edinburgh: W. Green, 2007)
Voet, *Commentarius*	Johannis Voet, *Commentarius ad Pandectas*, (Parisiis: Apud Gauthier Fratres, 1829)
Walker, *Delict*, (2nd Edn.)	David Maxwell Walker, *The Law of Delict in Scotland*, (2nd Edition) (Edinburgh: W. Green, 1981)
Walker, *Principles*, I	David Maxwell Walker, *Principles of Scottish Private Law Book I: Introductory and General*, (Oxford: Clarendon Press, 1988)
Walker and Stevenson, *Criminal Law*	James Walker and D. J. Stevenson, *MacDonald on the Criminal Law of Scotland*, (5th Edition) (Edinburgh: W. Green, 1948)
Whitty and Zimmermann, *Personality*	Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Compararative Perspective*, (Dundee: Dundee University Press, 2009)
Wood, *Institute*	Sir Thomas Wood, *An Institute of the Laws of England (in Four Books)*, (London: Strahan, 1720)
Wood, *New Institute*	Sir Thomas Wood, *The New Institute of the Imperial or Civil Law, Shewing in Some Principal Cases Amongst Other Observations, How the Canon Law, the Laws of England and the Laws and Customs of Other Nations Differs from it (in Four Books)*, (London: Richard Sarf, 1704)
Zimmermann, *Obligations*	Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, (Oxford: Oxford University Press, 1996)
Zimmermann and Visser, *Southern Cross*	Reinhard Zimmermann and Daniel Visser (Eds.), *Southern Cross: Civil Law and Common Law in South Africa*, (Oxford: Clarendon Press, 1996)

Introduction

In 1981, the Australian attorney Russell Scott stated that, due to advances in medical science, the component parts of human bodies, whether dead or alive; born or unborn; regenerative or non-regenerative, have been imbued with an 'intrinsic value' that they did not hold before.[1] In the decades since Scott's statement, this value has only increased due to technical developments in in vitro fertilisation (IVF) techniques, improvements in organ transplantation procedures and the emergence of stem cell research.[2] In the new medical order of the Twenty-First century, human biological material is a resource which can be used to extend life,[3] but which also has an illicit, black market price-tag.[4]

It is now commonly accepted, even by those who argue that the law should not do so,[5] that the law can, and routinely does, consider human biological material to be 'property'.[6] Nevertheless, many still blanch at the idea of categorising the human body – its whole, its parts, and its derivatives – as a 'thing'.[7] Courts in Common law jurisdictions have historically been unwilling to recognise that individuals may enjoy 'property rights' in parts of persons,[8] or in cadavers[9] and, although this state of affairs has changed somewhat in recent years,[10] the rule

[1] Russell Scott, *The Body as Property,* (Allan Lane, 1981) p.3

[2] See D. Gareth Jones and Maja I. Whitaker, *Speaking for the Dead: The Human Body in Biology and Medicine*, (2nd Ed.) (Routledge, 2016), p.ix

[3] *Ibid.,* p.107

[4] *Ibid.,* p.15

[5] Loane Skene, *Raising Issues with a Property Approach,* in Goold *et al*, *Persons, Parts and Property,* p.268

[6] Simon Douglas, *Property Rights in Human Biological Material,* in Goold *et al, Persons, Parts and Property* p.89

[7] T. B. Smith, *Law, Professional Ethics and the Human Body,* [1959] SLT (News) 245; Remigius N. Nwabueze, *Biotechnology and the Challenge of Property: Property Rights in Dead Bodies, Body Parts, and Genetic Information*, (Ashgate, 2013) p.110

[8] Jesse Wall, *Being and Owning: The Body, Bodily Material, and the Law,* (OUP, 2015) p.1

[9] *Williams v Williams* (1882) 20 Ch. D 659; Coke, Institutes, III, p.203

[10] *Roche v Douglas as Administrator of the Estate of Edward Rowan (dec'd)* (2000) WASC 146; *Yearworth v North Bristol NHS Trust* [2010] QB 1; *Jocelyn Edwards; Re the estate of the late Mark Edwards* [2011] NSWSC 478

that there can be 'no property in a corpse'[11] (occasionally expressed as a rule that 'there can be no property in the human body')[12] is regarded as so firmly entrenched that only legislative intervention may alter it.[13]

This 'no property' rule may be well known, and oft repeated, but its existence, and its operation within the law, is far from satisfactory. In his seminal text on property law as it applies to the human body, Rohan Hardcastle concluded that the regulation of biomaterials in the Common law tradition is uncertain and that this ongoing uncertainty has an adverse impact on medical research and individual liberty.[14] Hardcastle's thesis argues that the Anglo-American-Australian law pertaining to human biological materials is unclear, inconsistent, haphazard and in need of review.[15] A superficial examination of English legal history seems to corroborate this and, indeed, the English courts have taken the view that the Common law requires a 're-analysis' in order to reflect Twenty-First century norms.[16]

The law in the mixed jurisdiction of Scotland is no clearer, since the Human Tissue (Scotland) Act 2006 remains silent on the question of who, if anyone, may claim or enjoy 'ownership' of human biomaterials.[17] Indeed, the position of Scots law on this matter might be regarded as even less certain than that in the confused Common law jurisdictions, since there has long been a dearth of specifically Scottish literature on the topic and, indeed, the most authoritative Scots textbook on corporeal moveable property expressly avoids addressing this point in anything other than ancillary detail.[18] The Scottish courts and commentators have,

[11] *Yearworth*, para.32

[12] Wall, *Being and Owning,* p.1

[13] *R v Kelly* [1999] Q.B. 621, p.630 *per* Rose LJ.

[14] Rohan Hardcastle, *Law and the Human Body*, (Hart Publishing, 2007) p.203

[15] *Ibid.*

[16] *Yearworth*, para.31

[17] Its sister-Act, the Human Tissue Act 2004 c.40, provides (in s.32 (9) (c)) that the 'human work or skill' exception recognised in the Australian case of *Doodeward v Spence* (1908) 6 CLR 406 represents the law of England, Wales and Northern Ireland. There is no equivalent section in the Scots Act.

[18] Carey Miller and Irvine, *Corporeal Moveables*, para.1.02

consequently, found themselves looking to English and American legal sources (either explicitly or implicitly) in order to inform their views on the topic.[19]

The influence that English law has exerted on the Scottish position is problematic: There are vast differences between the fundamentals of these legal systems,[20] yet few English works acknowledge, consider, or even entertain the notion that the law is different north of the Tweed.[21] This is compounded by the fact that the Scottish legal position in respect of the human body, its parts and its derivatives may actually be more desirable than the Anglo-American jurisprudence that is supplanting it, particularly given the fact that the English law on this matter is regarded as completely unsatisfactory by academics, judges and lawyers alike.[22] Although there is clearly a strong academic consensus in Scotland that one cannot have 'property' in deceased human bodies[23] (albeit it has been accepted that there might be scope for recognition of 'property' in separated parts and biological material)[24] – a consensus so strong that the Outer House implicitly vindicated it[25] – this conclusion may be mistaken in law.[26]

The case of *Yearworth v North Bristol NHS Trust*, which has attracted a great deal of academic commentary,[27] is commonly referred to as a 'UK case', implying that it reflects the

[19] Jonathan Brown, *Theft, Property Rights and the Human Body – A Scottish Perspective*, [2013] JMLE 43

[20] See, particularly, Walker, Principles, I, p.4, wherein Professor Walker references the English case of *Williams* as authority for the proposition that Scots law does not recognise proprietary rights in human corpses, in spite of Scots authority and *dicta* which indicates the contrary. Note, also, the discussion in Brown, *Property Rights*, *passim*.

[21] See Jonathan Brown, *Review of Persons, Parts and Property: How Should We Regulate Human Tissue in the 21st Century?* [2015] Med. L. Rev 698, p.699

[22] See the discussion in Mark Pawlowski, *Property in Body Parts and Products of the Human Body*, [2009] Liv. L. Rev. 35; Goold *et al*, Persons *Parts and Property*, pp.3-5 and *Yearworth*, para.31, wherein the Court expressed the need for a re-analysis of the English law.

[23] Kenneth G. C. Reid, *Body Parts and Property*, in Bain *et al*, *Northern Lights*, p.245

[24] *Ibid*., p.249

[25] *C v. Advocate General for Scotland* (2012) SLT 103

[26] See Jonathan Brown, *Res Religiosae and the Roman Roots of the Crime of Violation of Sepulchres*, [2018] Edin. L. R. 357, fn.178

[27] See Cynthia Hawes, *Property Interests in Body Parts: Yearworth v North Bristol NHS Trust*, [2010] QB 1; Chris Thorne, *New Era, New Law?*, [2010] C. Risk 19; Remigius N. Nwabueze, *Death of the "No-Property" Rule*

law of Scotland as well as England, Wales and Northern Ireland.[28] In fact, this case turned on the peculiarly Common law concept of bailment and can tell us little about Scots law (which has no such concept).[29] Thus, in *Holdich v Lothian Health Board,*[30] Lord Stewart stated that although, in his view, the pursuer's property-contract argument faced difficulties,[31] he could not say that it was necessarily bound to fail, since the nearest Scottish analogue to bailment – deposit – is contractual in nature. As such, this thesis deliberately avoids the application of English authorities to the Scottish situation in the absence of detailed comparative scholarship; it similarly notes occasions on which earlier Scottish commentators have made use of (potentially inapplicable) English authority when discussing Scots law.

With all of this in mind, this thesis aims to examine, explain, and critique the doctrinal law of Scotland as it relates to the regulation of the human body and its parts and its derivatives. In setting out an understanding of how the law in this area has developed, and might develop in future, the thesis addresses three key questions. First, it asks whether Scots law accepts that property law can be used to regulate the body and its parts and derivatives. Secondly, it seeks to determine whether or not property law *should* govern disputes which concern such material. Finally, by drawing on Scotland's institutional connection to the Roman *actio iniuriarum* and the South African law of 'personality rights', it critically considers alternatives to 'property' which could be applied or developed to regulate the law in this area.

Chapter one assesses the extent to which the 'resolutely Civilian' idea of 'property', as it is known to Scots law, differs from the identically named notion of 'property' which subsists

for Sperm Samples, [2010] KLJ 561; Shawn H.E. Harmon and Graeme T. Laurie, *Yearworth v North Bristol NHS Trust: Property, Principles, Precedents and Paradigms,* [2010] CLJ 476; Muireann Quigley, *Property in Human Biomaterials - Separating Persons and Things?*[2012] OLJS 659, to name but a few.

[28] See Brown, *Review of Persons, Parts and Property,* p.699

[29] *Holdich v Lothian Health Board* [2013] CSOH 197, para.18

[30] *Ibid.*

[31] Though this was particularly so due to the manner in which the case was presented: See *ibid*, para.5: 'I am not necessarily convinced that the property-contract case as currently presented is sound in law'.

in Common law jurisprudence. It considers the influence that Roman jurisprudence has enjoyed in respect of the later Civilian (and, thus, Scots) ideas of *possessio* and *dominium* and examines the extent to which these ideas were accepted into English law. The key points of divergence between Scots and English property law are then noted, and significant notions which were received into Scots law, yet are seemingly absent in English law, are discussed; for example, the concept of *res extra nostrum patrimonium* (things which cannot be held in private patrimony). In recognition of the fact that Scots law expressly recognises concepts which are unknown to English law, it is concluded that the law pertaining to human biological material cannot, without further critical and comparative investigation, be said to be as settled in Scotland as it is in England.

Chapter two begins by considering the roots of the 'no property' rule as it developed in English jurisprudence. Recognising that this rule developed as a quirk of precedent, rather than for any substantive or principled reason, and that the strict application of it has caused notable problems for Common lawyers,[32] this chapter provisionally accepts Professor Reid's assessment that 'property law will always be better than no law'.[33] As such, while the chapter concludes that there is no reason for Scotland to adopt or accept the rule of 'no property' in a corpse on the basis of Anglo-American authority alone, it also recognises that the law of property might not be the most appropriate vehicle for the regulation of matters relating to the human body and biological material.

Although the idea of 'dignity' has been lambasted as a worthless or vacuous concept,[34] the language of 'dignity' is routinely employed in relation to cadavers and human biological

[32] See the discussion in Imogen Goold and Muireann Quigley, *Human Biomaterials: The Case for a Property Approach*, in Goold *et al*, *Persons, Parts and Property*, p.237

[33] Reid, *Body Parts*, p.243

[34] Luís R. Barroso, *Here, There and Everywhere: Human Dignity in Bioethics*, [2012] B.C. Int'l & Comp. L. Rev 331, p.333; Ruth Macklin, *Dignity is a Useless Concept*, [2003] BMJ 1419

material.[35] In Civilian and Civilian-influenced jurisdictions, such as Scotland, 'dignity' does not exist as a mere philosophical construct, but also as a distinct and orthodox legal concept.[36] The *actio iniuriarum* was received into Scots law and serves, as it did in Roman law and does in South Africa, as a means of protecting individual interests in *'existimatio'* (which might be translated as 'human dignity') and '*dignitas'* (which might be understood as 'dignity' in the sense of a protected 'personality interest').[37] Thus, the third chapter of this thesis considers the meaning of 'dignity' and 'human dignity' within the Civil law tradition and discusses the reception of this concept into early modern and modern Scots law.

The notion of 'dignity', as a legal concept, was received into Scots law through that jurisdiction's recognition of the Roman-Dutch *actio iniuriarum*.[38] Though the *actio iniuriarum* is recognised as an important 'legal ancestor',[39] and is said to remain 'unquestionably' available as an action in modern Scots law,[40] this jurisdiction's connection to the Roman and Roman-Dutch law of *iniuria* has atrophied and there now exists only a (very) limited *corpus* of case law concerning the action.[41] In South Africa, however, the action has been revitalised (in spite of the fact that it suffered similar neglect throughout the Nineteenth and Twentieth centuries)[42] and there now exists a robust body of case law, from which it is submitted Scotland might draw in order to develop a means of effectively protecting the dignitary interests of both the living and the dead. Although there are significant differences between Scots and South African law due to the robust written Constitution of the latter jurisdiction, chapter three

[35] See Jonathan Brown, *Dignity, Body Parts and the Actio Iniuriarum: A Novel Solution to a Common (Law) Problem?* [2018] CQHE 522, p.522

[36] See Niall R. Whitty, *Rights of Personality, Property Rights and the Human Body in Scots Law*, [2005] Edin. L. R., 194

[37] Zimmermann, *Obligations*, p.1062, fn.102

[38] See Lee, *Introduction*, p.335

[39] See Reid, *Personality*, para.17-12

[40] Lee, *Introduction*, p.335

[41] See Reid, *Personality*, para.17-12

[42] Jonathan M. Burchell, *The Protection of Personality Rights*, in Zimmermann and Visser, *Southern Cross*, p.639

nevertheless proposes that Scots law would benefit greatly from the development of the *actio iniuriarum* in domestic jurisprudence. It is further submitted that because of the introduction of the Human Rights Act 1998 (which incorporated the European Convention on Human Rights into domestic law), the Scottish courts are *obliged* to develop Scots law in this area.

Having made the case in chapter three that the development of the *actio iniuriarum* in Scots law is both desirable and necessary, chapter four argues that this alone will not be sufficient to afford appropriate protection to the dead human body, body parts and separated biological material in all cases. Damage or injury (in the sense of *damnum*, rather than *iniuria*) caused by negligence, or some *culpa* (fault) falling short of *contumelia* (hubristically reckless or intentional design) cannot be compensated by means of a true *actio iniuriarum*. Though the question of whether or not the body (or biological material) is taxonomically categorised as a 'person' or as a 'thing' is largely moot insofar as the law of *iniuria* is concerned, this question is nevertheless significant in any action for 'damages'. A German case of 1993,[43] which was considered by the Scottish courts in *Holdich*,[44] has the potential to provide a pathway towards the effective protection of individual 'personality interests' in their separated body parts and biological material in actions for damages as well as in actions predicated on the occurrence of *contumelia*. Accordingly, this case – and the discussion of it in the Scottish courts – is critically examined and the potential of the theory of *eine funktionale Einheit* (a 'functional unity' of the separated biological material) to inform Scots law is similarly assessed. Ultimately, it is submitted that this thesis represents the first comprehensive statement of the law relating to human cadavers and biological material in Scotland, and as such, provides an original contribution to the study of Scots law.

[43] BGHZ 124, 52 (VI ZR 62/93), 09/11/1993

[44] At, para.9

Chapter One: 'Property' in Common and Civil Law

1.1 Introduction

'A corpse is no use to anyone';[45] so says the Norse gnomic poem *Hávamál*. This plain statement was generally regarded as a truism throughout Western Europe until the advent of modern medical science,[46] which imbued cadavers with a utility that they had not hitherto held.[47] 'Useful' bodies[48] – which might be understood as any bodies which are inhabited by some 'spirit or soul'[49] – have long been regarded as legal subjects or legal objects,[50] but the corpse, on vacation of this 'habitation', was generally 'excluded from the horizon of the law',[51] or at least, excluded from the horizon of serious legal consideration or debate. Neither clearly person nor thing[52] – and still, in the Twenty-First century, in a prime position to spark debate about its legal status across jurisdictions[53] – the physical existence of cadavers challenges conventional legal wisdom, which holds that the law differentiates between entities according to a neat person/property binary.[54]

[45] *Codex Regius: Hávamál (Sayings of the High One)* verse 71

[46] A similar sentiment is reflected in the Christian bible: See Ecclesiastes 3:20

[47] See Scott, *The Body*, p.3

[48] See Giorgio Agamben, *The Use of Bodies*, (SUP, 2015), p.49

[49] In the words of Smith: *The Human Body*, p.245. In the words of Aristotle, 'the soul commands the body with a despotic command': Aristotle, *Politics*, 1254b 5-16

[50] *I.e.*, as persons (*personae*) and so free legal subjects, or as things (*res*) and so slaves (the object or tool of another)

[51] Robert Esposito, *Persons and Things*, (Polity Press, 2015), p.99

[52] See Caitlin Doughty, *Smoke Gets in Your Eyes: And Other Lessons from the Crematory*, (W. W. Norton and Co., 2015), pp.1-2

[53] See *Agenzia delle Dogane e dei Monopoli v Pilato SpA* (Case C-445/17), in which a reference to the European Court of Justice sought to determine whether hearses were to be taken to be transporting persons (HS8703) or goods (HS8704) for the purposes of EU customs regulations. The court ultimately determined that as 'a human body, even lifeless, cannot be treated in the same way as goods which might be the subject, as such, of commercial transactions… the principle use of hearses is for the transport of persons': para.30

[54] See Esposito, *Persons and Things*, p.10; pp.99-101

The Roman maxim *dominus membrorum suorum nemo videtur* (no one is to be regarded as the owner of their own limbs)[55] has been used to justify the argument that a human body[56] can in no circumstances be conceptualised as 'property'.[57] Indeed, ostensibly on the basis of this apothegm,[58] the law in many jurisdictions has erred on the side of declaring cadavers 'persons',[59] or at least recognising a continuation of the status that the body held before death.[60] Nevertheless, as Professor Esposito notes, treatment of the body as such has had, paradoxically, 'the unintended effect of sending [the body] back to the status of *res*, albeit *extra commercium'*.[61] As implied by Esposito's observation, treating an entity as something other than an object of commerce does not mean excluding said object from the status of 'thing'.[62] Roman law itself recognised that some objects – though *res* (things) were nevertheless *extra commercium* (outwith the sphere of commerce) or *extra patrimonium* (incapable of being held in a private person's patrimony). This did not alter the fact that these entities were 'things' governed not by the *ius quod ad personas pertinet* (law pertaining to persons), but by the *ius quod ad res pertinet* (law pertaining to things).

[55] Dig.9.2.13pr (Ulpian): *"Liber homo suo nomine utilem Aquiliae habet actionem: directam enim non habet, quoniam dominus membrorum suorum nemo videtur. Fugitivi autem nomine dominus habet."* ["Freemen have an *actio utilis*, akin to the *actio Legis Aquiliae* [in cases of 'personal injury', in its modern sense – of which, see p.213, *infra*], in their own name. They cannot have a direct action [on the *lex Aqulia*] because no one is to be regarded as the owner of their own limbs. But a master has [an action] in their own name in the case of a runaway slave."] (Author's translation).

[56] If not that of a slave: See the discussion in *Holdich*, para.40

[57] By Common law courts as well as by Civil law commentators: See, para.32

[58] See the discussion in *Holdich*, para.30; Esposito, *Persons and Things*, pp.99-101 and *infra*.

[59] See *Agenzia delle Dogane e dei Monopoli v Pilato SpA* (Case C-445/17), para.30

[60] I.e., in any system of law which recognises slavery as a legally valid status, a slave would not obtain higher status on death.

[61] Esposito, *Persons and Things*, p.101

[62] *Ibid.*

Like Roman law, Scots law recognises – and has long recognised[63] – that some objects are so socially or religiously important that they exist beyond the bounds of commerce.[64] Similarly, Scots law also recognises (at one time explicitly, now implicitly)[65] that some objects are incapable of being held in private patrimony.[66] Such recognition is a product of Scotland's historical connection to the Continental European legal tradition.[67] The Scots law of property – and corporeal moveable property in particular[68] – remains 'resolutely Civilian in character'.[69] Notwithstanding the Civilian heritage of Scots law, however, in matters pertaining to corpses, body parts and biological material it has generally been assumed that Scots law 'is as settled as'[70] – indeed, is analogous to[71] – that of England and that there can be no 'property' in human bodies, or their parts or derivatives in any of the jurisdictions of the United Kingdom.[72]

The uncritical equation of Scots and English law on this matter seems odd, particularly given that the general property law of Scotland has little in common with English law (or the law of other Anglo-American legal systems)[73] and, indeed, while 'a lawyer trained in Scotland

[63] See *Presbytery of Edinburgh v University of Edinburgh* [1890] SLR 28 – 567

[64] See Mackenzie, *Institutions*, 2, 1, pp.74-76. In a rare example of the adoption of a Latin term in a modern statute, the concept has been placed upon a statutory footing by Schedule 3 para. (d) of the Prescription and Limitation (Scotland) Act 1973 c.52

[65] Brown, *Res Religiosae, passim*.

[66] Mackenzie, *Institutions*, 2, 1, pp.74-76; John Chisholm, *Green's Encyclopaedia of the Law of Scotland,* (Edinburgh: W. Green, 1898), pp.309-311; Johnston, *Ecclesiastical Law*, pp.208-209

[67] As Professor Reid observed on review of Vernon V. Palmer's (Ed.) *Mixed Jurisdictions Worldwide*, (Cambridge: CUP, 2012), 'the law of property in mixed legal systems [of which Scotland's is an example] is always Civilian': See Kenneth G. C. Reid, *Patrimony not Equity: The Trust in Scotland*, in Remus Valsan, *Trust and Patrimonies*, (Edinburgh: EUP, 2015), p.111

[68] Carey Miller and Irvine, *Corporeal Moveables*, para.1.03; William M. Gordon, *Corporeal Moveable Property,* in Reid, *Property*, para.530

[69] Carey Miller *et al*, *Scotland,* p.311.

[70] See *Robson v Robson* 1897 S.L.T. 351, p.353

[71] Indeed, the approach to the regulation of human biological material is generally regarded as so similar to that of England and Wales that the English 'no property' rule is said to be representative of 'UK law', even by academics based in Scotland: See, for example, Thomas L. Muinzer's review of Heather Conway's *The Law and the Dead*, [2017] Med. L.R 505, p.510, wherein Muinzer (then based at the University of Stirling, now based at the University of Aberdeen) states that '[I]n UK law, the human body has conventionally been placed outside of the realm of property'.

[72] See Goold *et al*, *Persons, Parts and Property*, wherein, when treating of this subject, the various contributors consistently speak of the 'law of the UK' (see, also, Brown, *Review of Persons, Parts and Property, passim*)

[73] See Reid, *Property,* para.2

can without difficulty (other than linguistic difficulty) read and understand a book about the law of property in Germany or Japan… he is likely to be perplexed and bewildered by a book on the law of property in England'.[74] Though 'property' holds a central place in moral, legal and political philosophy,[75] the understanding of the nature and extent of the term differs significantly depending on whether one is concerned with the concept in Common or Civil law.[76]

The Roman Civil law recognises a defined notion of *dominium* (ownership).[77] The Anglo-American Common law possesses no comparable concept.[78] In English law, 'possession is considered to be of paramount importance'[79] and operates, in many disputes, as an analogue to 'ownership'.[80] In the Continental European tradition, by contrast, though the legal concept of 'possession' is an important feature of 'property law',[81] it is recognised, in law, that *'nihil commune habet proprietas cum possessione'*: 'ownership and possession have nothing in common with one another'.[82] The differences between the Common and the Civil legal traditions in this area are such that 'it is not just that the individual concepts are different, but that the whole conceptual landscape [is] significantly different [to the extent that] the problem

[74] *Ibid.*

[75] Peter Gerhart, *Property Law and Social Morality*, (CUP, 2014); James Penner and Henry Smith, *Philosophical Foundations of Property Law*, (OUP, 2013), *passim*

[76] Indeed, in the words of Malcolm Combe, 'it can take quite a logical step to get to the idea of ownership as a legal concept in the first place': See Malcolm M. Combe, *Exclusion Erosion – Scots Property Law and the Right to Exclude* in Bain *et al*, *Northern Lights*, p.105; Civil lawyers has long proven prepared to make this logical step, Common lawyers, by contrast, tends to prevaricate about doing so. In respect of 'possession', rather than 'ownership', Anderson notes that 'the two leading traditions diverge in the meaning and the role' of the concept: Anderson, *Possession*, para.1.02

[77] Carey Miller and Irvine, *Corporeal Moveables*, para.1.12

[78] See Barbara Pierre, *Classification of Property and Conceptions of Ownership in Civil and Common Law*, [1997] RGD 235, p.237

[79] Wenwen Liang, *Title and Title Conflicts in Respect of Intermediated Securities Under English Law*, (Cambridge Scholars Publishing, 2013) p.24

[80] W. Swadling, *The Law of Property*, in Peter Birks (Ed.), *English Private Law*, (OUP, 2000) p.220; Jane Ball, *The Boundaries of Property Rights in English Law*, [2006] EJCL; Liang, *Title Conflicts*, p.24

[81] See Anderson, *Possession*, para.1.03. In Scots law, 'possession' is said to exist as a 'distinct lesser right than property', though 'it be more *facti* than *juris'*: Stair, *Institutions*, 2, 1, 8

[82] Dig. 41.2.12.1 (Ulpian). See, also, Alan Watson (trs.), *The Digest of Justinian*, Vol.IV (University of Pennyslavania Press, 1985), p.21.

does not arise conceptually in the same way'.[83] Thus, it is difficult to see how, in the absence of unequivocal precedent or statutory intervention providing such, the law of Scotland can be equated with that of England and Wales where questions of 'ownership' (or otherwise) of bodies and body parts are concerned.

In determining when best to regulate matters pertinent to the human body or biological material *per* the tenets of the law of property, it follows then that the general principles of 'property' jurisprudence must be explored. Scots law, as it relates to human biological material, is evidently caught, at present, between two utterly distinct legal traditions, which each enjoin different conceptualisations of 'property'.[84] Indeed, given that the term 'property' itself has been described as a nebulous and mercurial word which lacks any one universalisable definition[85] (and, indeed, stands as a word which cannot even be 'translated satisfactorily' into other major European languages),[86] consideration of the fundamental nature of 'property' is necessary for the purposes of this thesis.

Before considering the specific relation of property law to dead human bodies, body parts and human biological material in Scots law, therefore, it is imperative that the conceptual differences between 'property law' in Common and Civilian jurisprudence be delineated.[87] This is necessary because, in seeking to establish whether or not an individual can enjoy 'ownership' of a human body, its parts, or its derivatives, it is axiomatic that one must first

[83] To use the words of Bell: See John Bell, *English Law and French Law — Not So Different?,* [1995] Current Legal Problems 63

[84] See Pierre, *Classification*, p.237

[85] Margaret Davis, *Property: Meanings, History, Theories*, (Routledge-Cavendish, 2007), p.3

[86] Andreas Rahmatian, *A Comparison of German Moveable Property Law and English Personal Property Law*, [2008] Journal of Comparative Law 197, p.198

[87] As Lord Drummond-Young observed in *Ted Jacobs Engineering Group Inc v Robert Matthew Johnston-Marshall and Partners* [2014] CSIH 18, 'the translation of legal rules and concepts from one system to another is not a straightforward exercise. The ordinary translation of language frequently presents considerable difficulties. When the language relates to legal rules or concepts those difficulties are compounded, because the rules or concepts derive their existence from a system of law that operates as a self-contained whole, which inevitably differs to some extent from all other legal systems. In translating a legal rule or concept, it is generally functional equivalence rather than linguistic equivalence that matters' – at para.90

seek to elucidate what is meant both by 'property' and by 'ownership'.[88] Since Scots property law, because of its Civilian character, recognises concepts which would be wholly alien to English Common lawyers,[89] any simple assumption of commonality between Scots law and the law of England and Wales is untenable. Consequently, this chapter comparatively considers the general principles of 'property' law within the Civil law (and thus Scots)[90] tradition and contrasts them with the prevailing understanding of 'property' within the Anglo-American legal world.

1.2 'Property' Law

1.2.1 'Property'

Before examining the conceptual understanding of 'property' in any particular legal tradition, it should be noted that certain uses of the term are common to all understandings of the English-language term. Firstly, 'property' might be used to designate the object which is properly the subject of 'property law'[91] – that is, 'property' may be used as shorthand to describe a 'thing' which is the subject of a proprietary interest, right or relationship.[92] Secondly, 'property' might be used to describe that interest, relationship or right.[93] This dual usage means that unhelpful, nigh nonsensical sentences such as 'I have property in my property' are, ultimately, syntactically sound, if practically useless.

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[88] Douglas, *Property Rights*, p.89

[89] Such as, among other things, the concepts of *dominium*, *res extra commercium* and *res extra nostrum patrimonium*. The concept of *res extra commercium* is alien to the English Common law, but its potential utility has been introduced in some legal systems which descended from that legal tradition: See Oliver Metzger, *Making the Doctrine of res extra commercium Visible in United States Law*, [1996] Texas Law Review 615; see also *Bombay v. R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. 699, 720–22 (India). The understanding of what is necessary for a thing to be *extra commercium*, or what the idea itself entails, nevertheless differs greatly between the Roman Civil law and those Common law jurisdictions in which a concept with the same appellation has developed.

[90] See Rahmatian, *Political Purpose*, p.849

[91] Anderson, *Property*, para.1.01

[92] Reid, *Property*, para.3

[93] As Anderson notes, the Sale of Goods Act 1979 used the term 'property' in this sense: Anderson, *Property*, para.1.01

Professor Honoré suggests that 'ownership', *dominium, propriété, Eigentum* and similar words stand not merely for the greatest interest in things in particular systems but for a type of interest with common features transcending particular legal systems'.[94] It has been said, however, that 'ownership' is thought of as a 'primitive, pre-legal concept' by English lawyers;[95] indeed, though the word sometimes 'passes the lips' of English legal commentators, it is not traditionally recognised as a meaningful construct within their jurisprudence.[96] In the words of Lord Justice Auld, 'the English law of ownership and possession, unlike that of Roman law, is not a system of identifying absolute entitlement but priority of entitlement'.[97] The term 'property' is consequently thought preferable to the word 'ownership' by English lawyers, although the Scottish notion of 'ownership', the Roman concept of *dominium* and the French and German conceptions of *propriété* and *Eigentum* are anything but primitive and are most certainly defined legal ideas. This fundamental difference in the understanding of basic concepts belies the discord between the understandings of 'property' in Common and Civil jurisprudence.

Just as the concept of 'ownership' has little place in English law, so too has it been suggested that the English-language term 'thing' has been said to be 'too undignified' a term to refer to such an important concept in such an important area of law.[98] As Reid notes, however, German and South African lawyers explicitly refer to the law of moveable property as 'thing-law'[99] and the Romans concerned themselves not with a 'law of property', but rather with a *ius quod ad res pertinet* (law pertaining to things) which included the law of

[94] Tony Honoré, *Ownership*, in Guest, *Jurisprudence*, p.108

[95] Jesse Wall, *Being and Owning*, (Oxford: OUP, 2015) p.20

[96] See George L. Gretton, *Trust and Patrimony*, in Hector L. MacQueen, *Scots Law into the 21st Century: Essays in Honour of W. A. Wilson*, (Edinburgh: W. Green, 1996), p.183

[97] *Waverley Borough Council v Fletcher* [1996] AC 334, p.335

[98] Reid, *Property*, para.3 (fn.1)

[99] *Sachenrecht* (in German) and *Sakereg* (in Afrikaans); the use of Afrikaans in court is steadily decreasing, however, and Anglophone proceedings in the South African courts employ the terminology of 'property law' in preference to 'thing-law'.

obligations.[100] As such, if one is to gain a full understanding of the concept of 'property' (at least as that concept operates within the Civilian tradition), one must suffer the 'indignity' of using the English word 'things'.[101] Of course, with that said, if the word 'property' may be called an amorphous concept,[102] then the term 'things' can only be categorised as nebulous. A broad or a narrow meaning may be ascribed to the latter, depending on the author's preference.

Professor Austin, for his part, defined 'things' as permanent, perceptible objects (not including persons)[103] and Article 90 of the German Civil Code reflects this point of view.[104] Some commentators consider that the Roman jurists, likewise, had only tangible, corporeal objects in mind when considering the *ius quod ad res pertinet*.[105] This view of Roman jurisprudence is not correct, however. Although some English academics are undoubtedly uncomfortable with the idea of incorporeal objects being categorised as 'property' and maintain that 'property rights' must necessarily relate to some corporeal object,[106] the Romans expressly recognised *res incorporales*[107] and considered *obligationes* to be such.[108] The broad *ius quod ad res pertinet*, as elucidated by the Roman jurists, was thus concerned with a wide array of 'things', many of which are not now regarded as proprietary in contemporary Civilian and Civilian-influenced systems.[109] Indeed, The Roman conception of the term *res* was so broad as to include even non-patrimonial aspects of a person's existence[110] – that which defines 'who a

[100] See Jonathan Brown, *Jus Quaesitum Tertio: A Res, not a Right?* [2019] Jur. Rev. 53, p.69

[101] Reid, *Property*, para.3 (fn.1)

[102] See Paton and Derham, *Jurisprudence*, p.505

[103] Austin, *Jurisprudence*, I, 358

[104] §90 Bürgerliches Gesetzbuch

[105] Buckland, *Roman Law*, p.91; Rudloph Sohm, James Crawford Ledlie, Bernhard Erwin Grueber, *The Institutes of Roman Law*, (Gorgias Press, 2002) p.225

[106] Douglas, *Property Rights*, pp.90-91

[107] J.2.2.14

[108] A.M Prichard, *Leage's Roman Private Law*, (3rd Edition) (MacMillan and Co., 1961), p.153

[109] Geoffrey MacCormack, *Sources*, in Metzger, *Companion*, p.16

[110] Paton and Derham, *Jurisprudence*, p.507

person is rather than what a person has'.[111] In Prichard's words, 'one only has to investigate the term '*respublica'* (often merely *res,* in fact) to see just how far the word could be stretched'[112] and, as Lord MacKenzie observed, 'in legal phraseology the word *res* or thing comprehends not only material objects, but also the actions of man'.[113]

Consequently, Professor MacCormick's definition of 'things' might be thought more in line with the Roman understanding of the term *res*[114] – and, it is submitted, the English language term 'thing' within Civilian systems of property law[115] – than the German or Austinian conception. MacCormick maintained that 'things' are either corporeal or incorporeal objects which are 'durable' – extant in time, even if they have no physicality – and which exist separately from and independent of other objects and persons.[116] In the absence of some juridical pronouncement to the contrary,[117] the term 'thing' is thus practically so broad as to include almost anything[118] – as indicated by the structure of the very word any*thing*. In Roman law – and the Civilian tradition – the status of 'thing' is, therefore, the default state of any corporeal object which might be appreciated by human senses, as well as a status which might be ascribed to some recognised juridical construct.

Recognising the amorphous nature of the Latin term *res*, Professor Buckland sought to narrow the scope of the word by interpreting it as one which always connotes a right (although

[111] Whitty and Zimmermann, *Personality,* p.3

[112] Prichard, *Roman Law,* p.151

[113] MacKenzie, *Roman Law,* p.167

[114] *Ibid*.

[115] There seems to be little doubt that the Anglophone use of 'things' does stretch to the incorporeal, whatever is made, in law, of the term 'property': See Mary Warnock, *Critical Reflections On Ownership,* (Edward Elgar, 2015) p.1

[116] MacCormick, *Institutions,* p.136

[117] *I.e*., in the absence of some analogue to §90 BGB, or indeed §90a which provides that *Tiere sind keine Sachen* – 'animals are not things' (in spite of their corporeal existence).

[118] See the discussion in F. H. Lawson and Bernard Rudden, *The Law of Property,* (3rd Ed.) (Clarendon Press, 2002), p.21

they accepted that not every kind of right was necessarily a *res*).[119] This claim is, however, both curious and questionable: The use of the word 'rights' is particularly egregious since the Roman legal system recognised only relationships[120] and remedies.[121] As discussed in greater detail *infra*, Roman law had no concept of 'rights', whether moral or legal,[122] and so the word 'rights' has no place in discourse concerning the operation of Roman law.

In the Roman conception, that which English-speakers would understand as 'rights *in rem*' – from which the English language conception of 'real rights' stems[123] – referred to actions and relationships between a person and a thing,[124] while the closest counterpart to the phrase 'rights *in personam*' would be used to denote actions and relationships arising in respect of and between either a pursuer or a defender in court.[125] This is evinced by the etymology of *personae.* This word is something of a *faux ami* in the sense that, while it is analogous to 'persons' in a certain sense,[126] in classical Latin the term was used to refer to a theatre mask, or an actor. It is used as such in the *Institutes* and the *Corpus Iuris Civilis* and thus the term must be understood as meaning 'players in a law suit' (ordinarily *paterfamilias*) in Roman legal writing.[127]

As such, Roman reference to *res* or *rem*, in legal writing, denotes a relationship between a thing, in the broadest sense of that term, and a person, in the reduced sense of that term as

[119] Buckland, *Textbook*, p.182

[120] Nicholas, *Introduction*, p.100

[121] George Mousourakis, *Fundamentals of Roman Private Law*, (Springer, 2012) p.119

[122] See, also, Brian Tierney, *The Idea of Natural Rights*, (Eerdmans Publishing Company, 1997) p.1

[123] See Lawson and Rudden, *Property*, p.14

[124] Gaius refers to the *in rem actio* in the *Institutes*: Book IV, 3; no mention is made of the phrase *ius in re.* The *actio in rem* was a 'real action', not a 'real right': Mousourakis, *Fundamentals*, p.149

[125] MacCormick, *Institutions*, p.136; see also Laurent L.J.M Waelkens, *Medieval Family and Marriage Law: From Actions of* Status *to Legal Doctrine*, in Cairns and du Plessis, *Casus to Regula*, p.104, wherein the limited meaning ascribed to the term *personae*, within the *Corpus Iuris Civile*, is discussed.

[126] Nicholas, *Introduction*, p.60

[127] Waelkens, *Medieval Family and Marriage Law*, pp.104-107

outlined above. It does not refer, as 'property' is often characterised by Anglo-American jurists,[128] to a relationship between persons in respect of a thing. Conflating rights with *res* is consequently problematic. The Romans did not regard think of 'property rights' or regard 'ownership' as a *ius in re* or *in rem.*[129] To paraphrase Professor MacCormick, it is not only bad grammar and bad Latin to refer to rights *in rem,* or to consider 'ownership' as such: the 'inconclusive character' of the English-language literature on this topic provides further justification for avoiding the use of the word 'rights' in relation to the Roman *res.*[130]

From the above, it is clear that though there are commonalities between the uses of the word 'property' across legal traditions, such similarities are superficial at best. At a deeper conceptual level, the very meaning of words such as 'property', 'right', 'thing', '*ius*', '*res*' and 'ownership' vary so much between time, space and cultures that it is all but impossible to broadly elucidate the consequences of any overlap in the use of such terms across jurisdictions.[131] Thus, a deeper discussion of such terms within the context of particular legal systems is necessary in order to illustrate fully the depth of the chasm between 'property' in Common law and 'property' in Civil law.

1.2.2 'Property' in the Common Law Tradition

Anglo-American legal scholars often face problems when seeking to define 'property'.[132] Scottish jurists may be able to say, with some confidence, that 'property law is the law of things',[133] but absent any defined concept of 'ownership', and absent any willingness

[128] Laura S. Underkuffler, *The Idea of Property: Its Meaning and Power*, (OUP, 2003) p.12

[129] The phraseology of *ius in re* emerged in the mediaeval period and it is quite clear that 'not all *iura in re* were cases of *dominium*'. 'The notion of a *ius ad rem* would have been utterly incomprehensible to the Roman jurist[s]': Richard Tuck, *Natural Rights Theories: Their Origins and Development*, (Cambridge University Press, 1979), pp.14-15

[130] MacCormick, *Institutions*, p.136

[131] As Tuck notes, Latin had, by the time of Justinian, a longer history as a written language than English has presently enjoyed as a spoken language: See Tuck, *Natural Rights*, p.7

[132] See the discussion in Penner, *Property*, (Clarendon Press, 1997), Ch.1

[133] Reid, *Property*, para.3

to suffer the indignity of using the word 'things', such a simple definition eludes English law.[134] Though many scholars have sought to determine the *sine qua non* of 'property' in their legal system,[135] it is generally (if only tentatively and not universally)[136] accepted that there is no one unifying feature of 'property law'[137] and that, ultimately, if the term means anything at all, it is to be understood as referring not to any one relationship, thing or right, but rather to a disparate 'bundle of rights'.[138]

Within the Common law, the notion that 'property' serves as an umbrella term which encapsulates a 'bundle of rights' has consequently proven enduring since its first exposition,[139] notwithstanding the fact that the 'bundle theory' itself might be described as a no more than a 'befogging metaphor'.[140] The idea has not gained much traction in Scots law or scholarship,[141] nor in Civilian property discourse more generally,[142] but regardless of this, the notion that 'property' is a 'bundle of rights' marks another superficial similarity to the operation and effect of the right of ownership in Civil law. In most iterations of the 'bundle', the essential proprietary 'rights' to which one can lay claim reflect the characteristics of *dominium* as defined by the mediaeval jurist Bartolus, who stated that the term should be understood as *'ius de re corporali perfecte disponendi, nisi lege prohibeatur'* ('the right of complete disposal over

[134] See the discussion in Jerry L. Anderson, *Comparative Perspectives on Property Rights: The Right to Exclude*, [2006] Journal of Legal Education 539, p.539

[135] See, e.g., Thomas W. Merrill, *Property and the Right to Exclude*, [1998] Nebraska Law Review 730; Henry E. Smith, *The Thing About Exclusion*, [2014] Property Rights Journal Conference 95

[136] It has, for example, been suggested that the right to exclude others from one's property is the *sine qua non* of ownership: 'deny someone the exclusion right and they do not have property' – see Merrill, *The Right to Exclude*, p.730; see also Yun-chien Chang and Henry E. Smith, *An Economic Analysis of Civil versus Common Law Property*, [2012] Notre Dame Law Review 1, p.10; see also Thomas W. Merrill and Henry E. Smith, *The Oxford Introductions to U.S Law: Property*, (Oxford: OUP, 2010), pp.4-8

[137] Smith, *The Thing About Exclusion*, p.122

[138] Ball, *Boundaries*, p.4; Honoré, *Ownership*, p.113; Ben McFarlane, *Structure of Property Law*, (Oxford: Hart, 2009), *passim*

[139] See Denise R. Johnson, *Reflections on the Bundle of Rights*, [2007] Vermont Law Review 247, *passim*.

[140] Merrill, *The Right to Exclude*, p.755

[141] Combe, *Exclusion Erosion*, p.104

[142] Chang and Smith, *Civil versus Common Law*, p.5

a corporeal thing, so long as it is not prohibited by law').[143] *Ius disponendi* is not a single 'right', but rather includes, in addition to the 'right of disposal', rights to the fruits of a thing, as well as general rights of use and abuse (*ius fruendi, utendi* and *abutendi*, respectively).[144] The American Encyclopaedia of Jurisprudence mirrors this Civilian conception of 'property', before going on to suggest that this is reducible not to 'ownership' as a concept, but to the nondescript and mercurial bundle: 'in its strict legal sense "property" signifies that dominion or indefinite right of use, control and disposition which one may lawfully exercise over particular things or objects; thus 'property' is nothing more than a collection of rights.'[145]

The above suggests a core commonality between two ostensibly distinct legal traditions, but given the fact that the 'rights' in the bundle are not tied to any irreducible core concept of ownership, the 'principal irreconcilability' of Common and Civilian jurisprudence in this area remains.[146] In the Civil law, the rights which flow from one's *ius disponendi* might be stripped away, or at least limited in their exercise, 'by law or by paction',[147] but so long as a proprietor maintains *dominium* with the thing then that object remains an object of 'property' governed by the *ius quod ad res pertinet.*[148] In the Common law, however, as there is no foundational conception of 'ownership', the absence or removal of 'sticks' from the bundle presents a deeper conceptual problem; take away too many 'sticks' from the bundle and it becomes legitimate to ask whether 'property', in any meaningful sense, remains.[149]

[143] Bartolus, *Commentaria*, fol.73va

[144] Discussed *infra*.

[145] Am. Jur. 2d, Property, § 1; this definition of 'property' was cited with approval by the California Supreme Court in *Moore v Regents of the University of California* [1988] 249 Cal. Rptr., p.504

[146] See Andreas Rahmatian, *A Comparison of German Moveable Property Law and English Personal Property Law*, [2008] Journal of Comparative Law 197, p.199

[147] *Ibid.*

[148] See George Gretton, *Ownership and Insolvency: Burnett's Trustee v Grainger*, [2004] Edin. L. R. 389, p.389

[149] See Honoré, *Ownership*, p.110; Reid, *Body Parts*, p.245

Providing a 'boon for bundle theorists' in his 1961 essay on *Ownership*,[150] Honoré identified eleven 'incidents of ownership' which are indicative of the existence of 'property'.[151] It is notable that, in setting out these incidents, it was stressed that one need not establish that all eleven are present in respect of a 'thing' in order to claim that it exists as property[152] and likewise notable that not all of the listed 'incidents' are 'rights'.[153] Honoré's incidents are as follows:

1. The right to possess: to have exclusive physical control of a thing;
2. The right to use: to have an exclusive and open-ended capacity to personally use the thing;
3. The right to manage: to be able to decide who is allowed to use the thing and how they may do so;
4. The right to the income: to the fruits, rents and profits arising from one's possession, use and management of the thing;
5. The right to the capital: to consume, waste or destroy the thing, or parts of it;
6. The right to security: to have immunity from others being able to take ownership of (expropriating) the thing;
7. The incident of transmissibility: to transfer the entitlements of ownership to another person (that is, to alienate or sell the thing);
8. The incident of absence of term: to be entitled to the endurance of the entitlement over time;

[150] See Honoré, *ibid*., p.113
[151] *Ibid*.
[152] *Ibid*., p.112
[153] *Ibid*., p.113

9. The prohibition on harmful use: requiring that the thing may not be used in ways that cause harm to others;

10. Liability to execution: allowing that the ownership of the thing may be dissolved or transferred in case of debt or insolvency; and,

11. Residuary character: ensuring that after everyone else's entitlements to the thing finish (when a lease runs out, for example), the ownership returns to vest in the owner.[154]

Rather than conceptualising any one of these 'incidents' as the *sine qua non* of 'property', Honoré simply suggests that any legal system which recognises that the above incidents may exist in respect of a thing recognises – either explicitly[155] or implicitly[156] – a '"liberal" concept of "full" individual ownership'.[157] In some cases, so many of the incidents will be absent that 'we shall be tempted to say that the things in question are not or cannot be owned',[158] but this does not detract from the fact that the law could, if judges or legislators were so inclined, act to make such things amenable to Honoré's conception of 'ownership', being that the system ordinarily recognises the operation of such incidents in respect of 'property'.

Honoré's thesis received judicial vindication by the Court of Appeal in the case of *Yearworth v North Bristol NHS Trust*,[159] wherein the *per curiam* judgment made reference not only to idea of 'property' as a 'bundle of rights',[160] but also agreed with Honoré's assessment that should too many of the 'incidents of ownership' be missing, it might be legitimate to hold

[154] *Ibid*., p.113

[155] In the case of Civil legal systems.

[156] In the case of Common legal systems.

[157] Honoré, *Ownership*, p.107

[158] *Ibid*., p.110

[159] [2010] QB 1

[160] *Ibid*., para.28: 'The concept of ownership is no more than a convenient global description of different collections of rights held by persons over physical and other things.'

that a thing is not 'property' in law.[161] Professor Reid, however, has suggested that such an approach seems illogical. 'Rather than the presence of the standard incidents creating ownership, as the argument [in *Yearworth*] supposes, it is ownership that creates the 'standard incidents'.[162] From this, Reid concludes that 'the right to use and enjoy a thing is a consequence of ownership, not its cause'.[163] Such a proposition seems logical and sound (and its manifestly correct within the scope of Reid's thesis), but it is too rooted in a Civil law appreciation of 'ownership' as an unedifying *dominium* to be properly descriptive of 'property' in the Common law tradition – as Reid himself notes.[164] Since 'property' therein, and as conceived in the Common law 'bundle of rights' theory, lacks a unifying concept of 'ownership',[165] it follows that the bundle of rights must, taken together, add up to 'ownership' in the Common law; they do not flow from 'ownership' as they (may) do in the Civil law.

Honoré's essay consequently makes a case that English law implicitly recognises 'ownership' as a legal concept, but ultimately the fact remains that, absent explicit recognition, and in spite of correlation with Civil law concepts, there remains an appreciable 'fault line' between Common and Civil property jurisprudence.[166] The 'incidents' may correlate between legal traditions – *dominium,* in Roman law, may confer (or have the potential to confer) the same incidents upon a *dominus* as 'property' may confer upon an 'owner' in English law – but the absence of the incidents cannot, in Civilian legal systems, be pointed to as indicative of the absence of *dominium* if the law maintains, for whatever reason, that the *dominus* maintains

[161] *Ibid*., paras.41-44

[162] Reid, *Body Parts*, p.244

[163] *Ibid*.

[164] As Reid discusses, the foundationally Common law reasoning of *Yearworth* was utilised again in the Scottish case of *Holdich*, in spite of the fact that 'in the Civil law world to which Scotland belongs, ownership is an idea which is quite distinct from its contents. There were no sticks for the parties in *Holdich* to count: *ibid.*, p.245

[165] See the discussion in Gretton, *Ownership and Insolvency*, p.389

[166] See Chang and Smith, *Civil versus Common Law*, p.4

dominium in that legal system.[167] The implication of commonality between the two major legal traditions presented in Honoré's work can, consequently, only be taken so far before it breaks down.

This submission finds further support in the fact that the meaning of many of the terms to which Honoré refers vary greatly between the major legal families. 'Possession', for instance, is understood, in Civil law (and in Scotland)[168] to be distinct and lesser to 'property'[169] (though it may be held as of right or without right)[170] and afforded protection without reference to any discussion of 'ownership'.[171] In English law, conversely, 'possession' has been deemed no more than 'a functional and relative concept, which gives [judges] some discretion in applying an abstract rule to a concrete set of facts'.[172] Amongst the early writers on English law, there is no general or systematic account of the place of possession;[173] Anderson has posited that this is likely because of the fact that there is no real divide between ownership and possession.[174] In English law, '*de facto* possession is *prima facie* evidence of seisin in fee and right to possession';[175] so too is the simple act of taking possession sufficient to 'bestow a right of exclusive possession'.[176] Absent any defined concept of ownership, there can be no clear divide between 'ownership' and 'possession' and so, in the Common law tradition, possession

[167] Such is particularly so in the case of property held *extra commercium*, or of *res extra nostrum patrimonium*, of which more is said *infra*.

[168] See Anderson, *Possession*, para.1-03

[169] Stair, *Institutions*, 2, 1, 8

[170] Reid, *Property*, para.126

[171] In Scots law, this independent protection of 'possession', without reference to 'ownership' or 'property', is provided by the action of spuilzie: See Kenneth G. C. Reid, *Property Law: Sources and Doctrines* in Reid and Zimmermann, *History*, I, 212

[172] D. R. Harris, *The Concept of Possession in English Law*, in Guest, *Jurisprudence*, p.71

[173] F. Pollock and R. S. Wright, *An Essay on Possession in the Common Law*, (Oxford: Clarendon Press, 1888), p.v

[174] Anderson, *Possession*, para.1.05

[175] See Honoré, *Ownership*, p.115; *NRMA Insurance Ltd. v B&B Shipping and Marine Salvage Co. (Pty.) Ltd.*, (1947) 47 SCR (NSW) 273

[176] Swadling, *Property*, p.220

is ‘sufficient to generate for the possessor a general property right in the thing possessed. This general property right has the content of ownership’.[177]

The place of ‘possession’ at the head of the eleven incidents is consequently significant. Honoré himself suggests that ‘the right to possess… is the foundation on which the whole superstructure of ownership rests’.[178] The right to exclude others from possession of a thing, which axiomatically arises as a result of one’s right of possession,[179] has been said to be the essential feature of ‘property’.[180] In language which accepts a foundational concept of ‘ownership’ (dominion, the Anglicisation of *dominium*), the jurist Blackstone described ‘property’ as the ‘sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.’[181] A right which is enforceable against the world (or, indeed, the whole universe) at large may be termed a ‘real right’[182] (adopting a Latin veneer, such rights might be termed *in rem*)[183] while a right which is enforceable only against a particular person (or class of persons) might be termed a ‘personal right’[184] (or, a right *in personam*).[185] On the Blackstonian view, the right of dominion, as he defined it, is manifestly a right *in rem*.[186]

Scots law (and Civilian jurisprudence) recognises an ‘unbridgeable divide’ between real rights and personal rights,[187] but there is no such gulf in the Common law. Thus, in land

[177] Robin Hickey, *Possession as a Source of Property at Common Law*, in Eric Descheemaeker, *The Consequences of Possession*, (Edinburgh: EUP, 2014), p.77

[178] Honoré, *Ownership*, p.113

[179] *Ibid. Per* Stair, it is an essential element of ‘possession’ (of, at least, a corporeal moveable thing) that one might ‘debar’ others from interacting with the thing possessed: See Stair, *Institutions*, 2, 1, 11

[180] Merrill, *The Right to Exclude*, p.3

[181] William Blackstone, *Commentaries*, 2, 1, 2

[182] Lawson and Rudden, *Property*, p.14; p.65

[183] See Peter Birks, *Unjustified Enrichment*, (Clarendon Press, 2005), p.180; for the inappropriateness of this Latin designation, see the discussion *supra*.

[184] *Ibid.*, p.180

[185] *Ibid.*, p.163; again, for the inappropriateness of this Latin designation, see the discussion *supra*.

[186] Pavlos Eleftheriadis, *The Analysis of Property Rights*, [1966] OJLS 31, p.33

[187] *Burnett’s Trustee v Grainger* [2004] UKHL 8, para.87, *per* Lord Rodger of Earlsferry.

transactions under Scots law, there is a distinction drawn between the contract of sale, which bestows personal rights upon the parties to the contract, and the conveyance, which ends with registration of title in the Land Register.[188] Only after registration of title in the Land Register is the 'real right' of ownership conveyed to the purchaser,[189] but prior to registration (at the date of 'settlement')[190] the purchaser will likely have obtained a personal right to possess the land.[191] This in no way means, however, that they have obtained 'property' in the property at this juncture; in the absence of registration, the purchaser has no more than a personal right against the seller,[192] or at most a limited 'real right' of possession which is liable to be stripped away by a claim by another[193] (e.g., a real right holding creditor of the seller).[194]

In the Common law world, however, the process of the sale of land is very different. Given that there is no unitary form of 'ownership', it is difficult to express, even in non-legal terms, who has 'property' in the land at the intermediary stage of the transaction[195] and especially post-settlement (or completion) but prior to registration.[196] This problem is compounded by the fact that the incidents of ownership might conceivably be split between purchaser and seller, along with third parties such as moneylenders[197] (to say nothing of the 'leasehold' form of 'property' known to English law).[198] Though there is an ever-present

[188] George L. Gretton and Kenneth G. C. Reid, *Conveyancing*, (5th Ed.) (W. Green, 2018), para.2.02

[189] Land Registration Etc. (Scotland) Act 2012 asp.5, s.50

[190] Gretton and Reid, *Conveyancing*, para.2.02

[191] *Ibid.*

[192] George L. Gretton and Andrew J. M. Steven, *Property, Trusts and Succession*, (3rd Ed.) (Bloomsbury, 2017), paras.7.5-7.6

[193] As in German law, the 'lesser' form of 'real right' does not strip anything away from the 'superior' 'right of ownership'; rather, it serves only as a burden (i.e., a limitation) on the undivided core *dominium*: See Bram Akkermans, *The Principle of Numerus Clausus in European Property Law*, [2008] Maastricht University PhD Thesis, pp.191-199; see also Gretton and Steven, *Property*, paras.2.8-2.10

[194] Gretton and Steven, *ibid*, paras.2.8-2.10

[195] Merrill and Smith, *Property*, pp.161-162

[196] Gretton, *Ownership and Insolvency*, p.389

[197] Honoré himself notes this in accepting some of the potential limitations on his 'eleven incidents' thesis: Honoré, *Ownership*, p.111

[198] Again, Honoré also indicates an awareness of the problem of applying the incidents to long-leased property: *ibid.*

danger of exaggerating the differences between 'property law' as conceived in the Civil and Common law,[199] it remains the case that English Common law is doctrinally no more than a source of oxymoronic comparative law for Scottish scholars. The concepts which are at play when an English lawyer employs the term 'property' do not fit within the schema of Scots law, though such is not to say that fruitful comparative work cannot be carried out by interrogating the differing – occasionally parallel – ideas of both systems.

Accordingly, while the debate as to the *sine qua non* of 'property' is likely to continue for a long time in the Common law tradition, the subject matter of this debate is ultimately of little consequence to Scots and Civilian lawyers. Indeed, Civil-trained scholars are likely to be bemused by much of the debate and confused by the contradictory meanings ascribed to many of its terms;[200] the scope to be misled by the differing meanings of 'possession' (as but one example) in Common and Civil law is such that there can be little meaningful dialogue in the absence of robust comparative scholarship.[201] In practice, the courts are not the best place for such rigorous scholarship, given the limitations of the courts as fora for academic debate,[202] yet the courts are nevertheless expected to arbitrate disputes which bring to bear issues of substantive theoretical importance.[203] There is, consequently, a general danger of the law being misapplied or bent out of shape in instances in which English property law precedents are applied in Scottish litigation, given that Scots property law is founded on Civilian principles rather than Common law practice.

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[199] Gretton, *Ownership and Insolvency*, p.389

[200] In the words of Professor Hendry, a 'linguistic translation of foreign legal texts is merely the starting point of the process of comparison'; a comparativist must fully understanding the (often subtle) differences in meaning between the same word in different legal contexts and traditions: See Jennifer Hendry, *Legal Comparison and the (Im)Possibility of Legal Translation* in Simone Glanert, *Comparative Law: Engaging Translation,* (London: Routledge, 2014), p.87

[201] This problem is, perhaps, exacerbated by the fact that 'in unguarded moments, Common lawyers sometimes talk like Civilians': See Gretton, *Ownership and Insolvency*, p.389

[202] *Ibid.*, p.391

[203] *Ibid.*

1.2.3 'Property' in the Civilian Legal Tradition

Prior to the abolition of the feudal tenure of landholding,[204] the Scots law of property was conceived of as a collective name for three fundamentally distinct bodies of rules; the law pertaining to moveable things, immoveable (heritable) things and incorporeal things.[205] This was, in part, justifiable because the rules pertaining to heritage were rooted in feudal law,[206] while those relating to corporeal moveables were quintessentially Roman in character.[207] In the mid-1990s, there was a move towards the recognition of a 'unitary' system of 'property law'; this move was recognised not as an innovation, but rather as a return to the principles that would have been familiar both to the Scottish Institutional writers and the Roman jurists.[208] Since the abolition of the vestiges of the feudal system of landholding, the structure of Scottish land law has been immeasurably simplified;[209] rather than concerning itself now with feudal distinctions between *dominium plenum, dominium directum* and *dominium utile*, the law recognises allodial ownership (that is, ownership without a feudal superior) in all land.[210] Thus, it can be said that general Roman or Civilian principles now govern the law of Scottish heritable property, as well as the law of corporeal and incorporeal moveables.[211]

Although the modern law of corporeal moveables, in particular, is routinely described as Roman in substance and in root,[212] this does not mean that Roman law was received

[204] Effective as of November 28th 2004 *per* the Abolition of Feudal Tenure etc. (Scotland) Act 2000 asp.5, s.1 (the appointed day being set by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (Commencement No. 2) (Appointed Day) Order 2003).

[205] Reid, *Property*, para.1

[206] See Grant McLeod, *The Romanization of Property Law,* in Reid and Zimmermann, *History*, I, 221

[207] Bell posits that the law in this area is arranged 'according to the principles of Roman jurisprudence': Bell, *Principles*, s.636. Stair's system of property, which 'may be taken as definitive of the common law' (*per* David L. Carey Miller, *Derivative Acquisition of Moveables,* in Evans-Jones, *Civil Law*, p.128), is not purely Roman, however, although later writers do make extensive use of Roman rules in this field: See McLeod, *Property Law,* pp.242-244

[208] Reid, *Property*, para.1

[209] Gordon and Wortley, *Land Law*, para.2.02 and the Abolition of Feudal Tenure Etc. (Scotland) Act 2000

[210] *Ibid*., para.2.01

[211] *Ibid.*, para.13.03

[212] Carey Miller, *Derivative Acquisition*, p.128

unaltered into the Scottish legal system.[213] Rather, it means that many of the foundational concepts which underlay the structure of Roman law likewise exist as an undercurrent in Scots law also.[214] The concept of *dominium,* or 'ownership', as mastery over a *res* or 'thing' is common to both systems[215] and, like the Roman jurists, the Scottish Institutional writers were 'not much concerned with setting out a general theory of the content of ownership [or] a restrictive account of the restrictions to which it may be subject'.[216] Accordingly, it follows that in order to understand the meaning of the term 'property' in Scots law, a thorough consideration of the relevant Roman law is necessary.

Positive Roman law divided the law under three main headings: The law of persons, the law of things (contemporaneously understood as 'the law of property') and the law of actions.[217] In the Roman law and the Civilian milieux, as noted, 'property' is generally used in two situational contexts; first, as 'the right of ownership' itself and secondly as the object of a 'right of ownership' held in one's patrimony.[218] 'Ownership' was defined by the Scottish Institutional writer Erskine as 'the sovereign, or primary real right'[219] when speaking of the concept in Scots law. This definition is grounded in the Continental European understanding of 'ownership' and mirrored in many Civilian and Civilian-influenced jurisdictions. In modern South African law, 'ownership' is conceptualised as 'the most comprehensive real right', from which all limited real rights derive[220] and in France 'ownership' is likewise considered to be the most complete right that one can have in a thing.[221] All other proprietary rights are

[213] *Ibid*.

[214] Reid, *Sources and Doctrine,* p.193

[215] Carey Miller and Irvine, *Corporeal Moveables*, para.1.12

[216] David Johnston, *Owners and Neighbours: From Rome to Scotland,* in Evans-Jones, *Civil Law*, p.184

[217] G.1.2.8; reproduced word-for-word in J.1.2.12

[218] Peter Robson and Andrew McCown, *Property Law,* (2nd Edition, W. Green/Sweet and Maxwell, 1998) para.1.02

[219] Erskine, *Institute*, II, 1, 1

[220] J.R.L Milton, *Ownership*, in Zimmermann and Visser, *Southern Cross*, p.699

[221] Françoise Moulin and Edwige Laforêt, *Introduction au Droit,* (Dunod, 2009), p.253

considered *accessoire*; a form of lesser right which attaches to the 'irreducible core concept of property'.[222]

These rights-based understandings of 'ownership' have their roots in Roman law, but they are not at all Roman. The relationship between the 'owner' and their *res* was the salient feature of Roman 'ownership'[223] and, as law, in antiquity, was 'personal' – dependent on one's nationality rather than one's location[224] – the Romans conceived of two distinct types of relationship which could be categorised as 'ownership'. Roman citizens could enjoy full ownership – *dominium* – over any *res*[225] (subject to some notable exceptions);[226] foreigners (*peregrini*) enjoyed only the limited protection offered by the recognition of Peregrine ownership.[227] A third type of 'ownership', 'bonitary ownership', was never regarded as akin to 'ownership' by the Romans, although it is nevertheless termed such in English.[228] This type of ownership did not vest title in the 'owner', but rather simply allowed one who held a *res in bonis* – that is, a thing in one's goods – access to proprietary remedies ordinarily available only to a *dominus*.[229]

Only *dominium* conferred what could be understood as 'sovereignty' upon proprietors. Erskine's definition of 'ownership' as 'the sovereign, or primary real right' does, therefore, offer some guidance as to the Roman understanding of *dominium*,[230] however it is not

[222] Ball, *Boundaries*, p.4

[223] Nicholas, *Introduction*, p.100

[224] *Ibid*., p.57

[225] Later writers have consequently termed *dominium* 'the right of the Quirites' – that being the ancient name for the Roman citizenry: Giambattista Vico, *Universal Right*, (Rodopi, 2000) p.96 – though this analysis is clearly too rights-centric.

[226] See the discussion *infra.*

[227] Peregrine ownership was ultimately abolished by Justinian, though its importance had, earlier, been reduced by the general grant of citizenship by the Emperor Caracalla in 212 C.E: Paul Du Plessis, *Borkowski's Textbook on Roman Law*, (5th Edition) (Oxford: Oxford University Press: 2015) p.160

[228] A.M Prichard, *Leage's Roman Private Law*, (3rd Edition) (MacMillan and Co., 1961) p.162

[229] See Paul du Plessis, *Borkowski's Textbook on Roman Law*, (6th Edn.) (Oxford: OUP, 2020), para.7.2.2

[230] So long as one does discount the fact that the definition is overly rights-centric.

applicable to peregrine or bonitary 'ownership'. One who had *dominium* was, like Erskine's conception of an owner, supreme. That person enjoyed a relationship with their *res* which was not only given the utmost protection by law, but one which also provided them with the naturally unlimited ability to do whatever they so wished with or to the object.[231] Emphasis must be placed on the word 'naturally':[232] Limits could be placed on the activities that could be carried out with regard to an owned *res* by the passing of an enactment or by the creation of a legally-binding agreement, but in the absence of such State-enforced limitations, the *dominus* enjoyed complete control.[233] In Roman law, therefore, 'ownership' could be better understood as *dominium,* which in turn could be defined as the most extensive possible relationship that a *persona* could have with a *res* in respect of their legal case.[234]

1.2.4 *Dominium*

In spite of the primacy of *dominium* in the *ius quod ad res pertinet,* the Romans themselves did not seek to define their idea of this concept.[235] This may be because the jurists recognised and acknowledged Priscus' well-founded statement, that *'omnis definitio in iure civili periculosa est; parum est enim, ut non subverti posset'*[236] ('each definition in the civil law is dangerous, for those which cannot be subverted are rare').[237] This lack of definitional certainty – combined with the fact that, though *dominium* is contemporaneously conceptualised as a 'right', it is not listed as such in the 'Gaian schema' of ownership[238] – has caused subsequent legal commentators some significant difficulty.[239] In the words of Giglio, it is

[231] Mousourakis, *Fundamentals,* p.126
[232] Nicholas, *Introduction,* p.154
[233] Mousourakis, *Fundamentals,* p.119
[234] See Brown, *Jus Quaesitum Tertio,* p.65
[235] Holland, *Jurisprudence,* p.133
[236] Dig. 50.17.202
[237] Author's translation.
[238] G.2.12, repeated word-for-word in J.2.2.1
[239] Giglio, *Pandectism,* p.6

thought 'if not impossible, extremely improbable that the Roman jurist [Gaius] left ownership out [of the schema] because he did not consider it a proper right (*ius*)'[240]

The 'Gaian schema', as elucidated by Professor Gretton,[241] is no more than a shorthand for the basic division of things (*rerum divisione*) present in Gaius' *Institutes* and reproduced in Justinian's work of the same name.[242] The separation of things into tangible and intangible objects set out under the heading *De Rebus Incorporalibus* is identical in both the Justinianic and the Gaian *Institutiones* and is reproduced below:

> *Quaedam praeterea res corporales sunt, quaedam incorporales. Corporales eae sunt, quae sui natura tangi possunt: veluti fundus homo vestis aurum argentum et denique aliae res innumerabiles. Incorporales autem sunt, quae tangi non possunt. Qualia sunt ea, quae in iure consistunt: Sicut hereditas, usus fructus, obligationes quoquo modo contractae.*[243]
>
> Translated, the passage reads:
>
> "There exist some things which are corporeal and others which are incorporeal. Corporeal things are those which are tangible by nature, such as farmland, human beings, clothes, gold, silver, and other innumerable things. Moreover, there are incorporeal [things], which are not capable of being touched. Such things exist only in law [or 'by the law's authority']: such as inheritance, usufruct and obligations, however these are acquired."[244]

[240] Giglio, *Pandectism,* p.8

[241] George Gretton, *Ownership and its Objects,* [2007] Rabels Zeitschrift 803, p.805

[242] J.2.2.1-2

[243] G.2.12-14; J.2.2.1-2

[244] Author's translation.

Since most, if not all, of the enumerated *res incorporales* would now be conceptualised as 'rights',[245] and since *dominium* – which would today be understood as the 'right of ownership' – is absent from the presented list of *res incorporales*, the Gaian schema has been decried by some as useless,[246] by others as illogical[247] and even as utterly incoherent.[248] Professor Nicholas is similarly critical of the Gaian schema, though for different reasons. Nicholas acknowledges that the separation of *res corporales* and *res incorporales* is convenient, but claims that problems arise as the idea that one may '[identify] ownership with the object owned',[249] is 'metaphysically so bizarre that one can hardly believe that it could be accepted'.[250] Metaphysics aside, Nicolas' claim does have a clear practical consequence: The distinction between *possessio* and *dominium* would break down and the possessory interdicts would be redundant if simply asserting *meum esse* – 'the thing is mine!' – established *dominium* over *res.* If 'ownership' is to be fully identified with the object that is owned, then one cannot, in law, say 'I have the thing!' and mean no more than that they have simple factual sovereignty over – or even *possessio* of – a thing; yet having a thing, according to one view of the Gaian schema – the 'merger interpretation' of that schema[251] – necessarily implies ownership. For these reasons, many scholars conclude that the Gaian schema itself is intrinsically flawed.[252]

Each of these issues appear to stem from the very fact that the listed *res incorporales* have been interpreted as 'rights' in the first place.[253] Though this is somewhat justified, as this

[245] See Brown, *Jus Quaesitum Tertio*, p.69

[246] M. Kaser, *Gaius und die Klassiker*, [1953] ZSS 127, pp.142-143

[247] Henri de Page, *Traite Elementaire de Droit Civil Belge V*, (1941) p.5, 536

[248] Giglio, *Pandectism*, p.9

[249] Nicholas, *Introduction*, p.107

[250] Gretton, *Ownership*, p.809

[251] *Ibid*.

[252] *Ibid.*, p.807; H. H. Pflüger, *Über Körperliche und Unkörperliche Sachen*, [1947] Savz/Rom 339; de Page, *Traite*, p.536

[253] See, in particular, the translations of Justinian's *Institutes* by Moyle and (separately) Scott - Moyle *Institutes*, p.217; Samuel P. Scott, *The Institutes of Justinian*, (Cincinnati, 1932) Book II, para.12

is generally how modern jurists would conceptualise things such as *usufructus* today,[254] translations (of the *Institutes* of both Gaius and Justinian) which conceptualise the *res incorporales* as examples of legal 'rights' are exceptionally problematic, no least for the fact that to understand the Roman's juristic conceptualisation of incorporeal things as akin to rights is plainly wrong. It is apparent that the Romans had no concept of subjective 'rights'[255] and that they managed to craft their complex and enduring legal system without any need for recourse to them.[256] Accordingly, the absence of *dominium* from the enumerated list of exemplary *res incorporales* is hardly problematic: not only was *dominium* not considered a 'right' or *'ius'* in Roman law,[257] it was also not considered a *res* by the jurists since a *res* was an entity of some kind over which one enjoyed *dominium*.

The difficulty of what, precisely, *dominium* was considered to be[258] by Roman law has consequently attracted a great deal of academic commentary.[259] Over time, some competing theories – notably the 'merger' interpretation and the 'titularity' approach[260] – have gained mainstream prominence, if not acceptance in academic circles. The aforementioned 'merger interpretation', which was favoured by the German Pandectists,[261] maintains that *res incorporales* are themselves rights – indeed, they may be either what are now considered 'real rights' or 'personal rights' – but that they are also, at the same time, things which (theoretically)

[254] It is natural, when using the English language, to speak of a 'right of usufruct', for example; see also *Burghead Harbour Co. v George* (1908) 8 F. 982, p.996

[255] Michel Villey, *L'idee du Droit Subjectif et les Systemés Juridiques Romains,* [1946] Revue Historique De Droit 201-228; Nicholas, *Introduction*, p.100; Tuck, *Natural Rights*, p.7; Tierney, *Natural Rights*, p.1; Metzger, *Actions*, pp.208-209

[256] Tierney, *Natural Rights*, p.1

[257] Michel Villey, *Du Sens de l'expression* Jus in Re *en Droit Romain Classique,* [1949] *Mélanges Fernand de Visscher,* II, *Revue Internationale des Droits de l'antiquité* 417-436; *Le* 'Jus In Re' *du Droit Romain Classique au Droit Moderene,* [1950] Publications de l'Institut de Droit Romain de l'université de Paris 187-225; Tuck, *Natural Rights*, p.8

[258] *I.e.,* its conceptual existence, rather than its practical effect.

[259] See the discussion in Gretton, *Ownership, passim*

[260] *Ibid*.

[261] Giglio, *Pandectism*, p.7

may be the object of a right of ownership (the 'right of ownership' being, on this view, a right unlike any other).[262] On this view, although the 'right of ownership' itself is an incorporeal thing in ordinary parlance and a 'right' in law, it is ultimately incomparable to other rights and incorporeal things given that it confers sovereignty over a *res* on the one who holds it. When one claims *dominium meum est,* one essentially claims no more than *meum esse.* When one asserts *res meum est* there is an underlying implication that one has a 'right' to the thing, in modern parlance.

The merger interpretation, therefore, fits well with Professor Reid's claim that 'property law is the law of things and of rights in things'.[263] It also reconciles the classical Roman law with the developments occurring in the Civilian tradition which grew out of it. If one accepts the merger interpretation, then according to both the classical Roman law and the later Civilian law, *dominium* confers on the *dominus* a real right to the *res* which grants *ius disponendi* over it to the *dominus*.[264] In addition, though possession is ultimately unrelated to *dominium*,[265] *domini* are generally granted a right to possess their *res.*[266] On this view of the Gaian schema, to legitimately call a thing 'mine' is to have ownership of the thing[267] and to have ownership of a thing is to have the right to use, destroy, or to profit from that thing, in addition to the right of alienation[268] or sale (*commercio*).[269]

[262] Peter Birks, *The Roman Concept of* Dominium *and the Idea of Absolute Ownership*, [1985] Acta Juridica 1, pp.26

[263] Reid, *Property*, para.11

[264] Carey Miller and Irvine, *Corporeal Moveables*, para.8.01

[265] Dig. 41.2.12.1; Descheemaeker, *Consequences*, p.1

[266] *Encyclopaedia of the Laws of Scotland*, Vol.12 (W. Green, 1930) p.205, para.436

[267] Gretton, *Ownership*, p.807

[268] *Anstruther v Anstruther* (1836) 14 S.272

[269] du Plessis, *Textbook*, p.160

In spite of the popularity of the merger interpretation, and its consistency with the understanding of 'property' in Anglo-American law[270] as well as contemporary Civilian jurisprudence, it has not been immune to criticism[271] and it is ultimately evident that it is fatally flawed due to its overly rights-centric nature. By conceding that the *res incorporales* are 'rights', and conceptualising *dominium* itself as a 'right', the merger interpretation fails adequately to describe the Gaian *rerum divisione* in terms consistent with the absence of a language of rights. Additionally, as noted, taken to its logical extreme, the division between *dominium* and *possessio* – two concepts which 'have nothing in common with one another' according to Roman law[272] – could not conceivably exist if the merger interpretation was an accurate reflection of Roman *dominium*. If 'ownership' is to be fully identified with the object that is owned, as the merger interpretation necessitates, then one cannot, in law, say 'I have the thing!' and mean no more than that they have simple factual sovereignty over – or *possessio* of – a thing, since having a thing, on this view, necessarily implies ownership.[273] Thus, in any system in which there exists a divide between 'possession' and 'ownership', the latter concept cannot be fully identified, or 'merged', with the object 'owned'.

The titularity interpretation, pioneered by Professor Ginossar,[274] provides a more appropriately Roman (and so, it is suggested, more Gaian) understanding of *dominium*, and also avoids the linguistic awkwardness which stems from interpreting the concept of 'ownership' as a 'right'. According to this view *dominium*, or 'ownership', is conceptualised

[270] See, for example, the definition of 'property' proffered in the American Encyclopaedia of Jurisprudence: Am. Jur. 2d, *Property*, § 1

[271] See de Page, *Traite*, p.536; Nicholas, *Introduction*, p.107; Paton and Derham, *Jurisprudence*, p.509; Gretton, *Ownership*, *passim*; Giglio, *Pandectism*, p.7

[272] Dig. 41.2.12.1 (Ulpian)

[273] Gretton, *Ownership*, p.807; F.H Lawson, *A Common Lawyers Looks at the Civil Law*, (Michigan: Ann Arbour, 1955), p.112

[274] See S. Ginossar, *Droit Réel, Propriété et Créance: Élaboration d'un Système Rationnel des Droits Patrimoniaux*, (Paris: Librairie Generale de Droit et de Jurisprudence, 1960), *passim*

as the relationship between a person and a thing by which that thing belongs to the person.[275] According to Ginossar's view, the relationship (*dominium*) between the person and the thing confers 'title' to the thing upon the person; this 'title' is recognised by the law and grants an innumerable number of 'rights' to the title-holder, but is not itself a 'right' as it has no correlative obligation.[276] This interpretation explains why *dominium* is omitted from the *res incorporales* by Gaius and Justinian; not because every definition in the Civil law is indeed dangerous, but rather because they saw no need to define the 'right of ownership' as there is no such right.[277] A 'right of ownership', though ostensibly an incorporeal thing, cannot be 'owned' as it is not a *res*: the phrase describes the relationship that one has with a *res.* A 'right of ususfruct', conversely, can be owned as it is simply a *res.* According to this interpretation, *dominium* may be exercised over *res incorporales* as they, just as the innumerable *res corporales,* are capable of forming part of one's patrimony.[278] *Dominium* itself does not form a part of the patrimony; only the thing over which title is enjoyed does so.

Since the Scots and Civilian definitions of 'property' grew out of the Roman concept of *dominium*, and the notion of 'rights' was alien to the Romans, it may be concluded that one ought to avoid the use of the term 'rights' in relation to property, 'ownership' and *dominium* and that Ginossar's titularity interpretation of ownership is to be accepted as accurate. With this in mind, it is submitted that Berger's dictionary of classical Roman law appears to offer a better understanding of Bartolus' definition of *dominium* than those which conceptualise the *ius disponendi* as a 'right of disposal'. He quotes Bartolus' definition almost word for word in

[275] *Ibid.*, pp.46-47
[276] Giglio, *Pandectism* ,pp.11-12
[277] Gretton, *Ownership,* p.807
[278] *Ibid.*

his dictionary of classical Roman law and states that, as a consequence of it, *dominium* ought to be understood as a relationship which grants 'full legal power over a corporeal thing'.[279]

Such an interpretation does not involve stretching the definition of the words used. It is apparent that the word *ius* may be appropriately translated as 'legal authority' or simply as 'authority'.[280] To say that *dominium* is a relationship which confers *ius disponendi* is therefore true in relation to both the Roman law and the continental European legal tradition. In Roman law, the *ius disponendi* can be understood as the legal authority to dispose of a *res*; in the context of the Civilian milieus it can be translated, as it commonly is, as the 'right of disposal' over a *res.* This translation does not change the fact, however, that the Civilian use of the word *ius* is steeped in the Roman understanding of the term. As a consequence of this, the word 'right' operates narrowly here, as a mere synonym of 'authority'. The conceptualisation of *dominium* as a relationship imparting authority over *res* has the same practical implications as the conceptualisation of *dominium* as a relationship which gives rise to rights over *res*, although the theoretical consequences are very wide-reaching.[281]

In eschewing an interpretation of *dominium* which categorises 'ownership' as a 'right', or a relationship which confers 'rights', and instead interpreting it as a relationship which confers legal authority over a thing, one breaks any connection which the positive legal concept of *dominium* may share with the natural 'right' of ownership that liberal philosophy typically ascribes to human beings.[282] 'Ownership' is viewed, in English law, as a 'primitive, pre-legal concept';[283] this implicitly accepts that there is indeed a 'natural' concept of 'ownership', but

[279] Berger, *Dictionary*, p.441; although he does not make mention of Bartolus in his citations: pp.441-442

[280] *Collins Latin Dictionary and Grammar*, (Glasgow: HarperCollins, 1997)

[281] See the discussion in Bret Boyce, *Property as a Natural Right and as a Conventional Right in Constitutional* Law, [2005] ILR 201, *passim*

[282] This natural *dominium* has been said to be limited to those things which are necessary for the sustenance of life, while non-natural *dominium*, which subsists in civil law, may be extended over all corporeal and juristic things: See Tuck, *Natural Rights*, pp.28-29

[283] Wall, *Being and Owning*, p.20

the positive Common law does not recognise a juristic concept of 'ownership' akin to either this or the Civilian notion of *dominium*. To say that *dominium* is a relationship which grants naturally unlimited *ius disponendi* is correct in both positive and natural law, however; according to natural law, all human beings have the right to acquire, to use and to dispose of things as 'property'. According to the positive Roman law – indeed, according to the positive law in many contemporary jurisdictions, including Scotland, England and France[284] – legal persons are granted legal authority, within set parameters (although such parameters may theoretically be absent, even if they are almost never absent in practice), to acquire, use and dispose of those things with which they enjoy a legally recognised proprietary relationship.

Within the context of the positive legal system the 'rights' which a relationship of *dominium* gives rise to are simultaneously limited and guaranteed by the fact that all individuals have relinquished, under the social contract, any natural rights and intrinsic freedom that they may have previously enjoyed. The 'rights' which one enjoys within the confines of the positive legal system cannot consequently be considered 'rights' in any meaningful sense; rather, they must be understood as interests which are legally recognised, authority which is legally conferred, or *potestas* lawfully granted as a result of the decision-making process of the sovereign. The word 'rights' in any dialogue concerning *dominium*, must, therefore, be read as a synonym for 'authority'. Interpreting *ius* as 'authority' instead of as a 'right' explains why one's *ius* over *res* may be limited in law without the occurrence of expropriation. Authority

[284] For Bartolus' definition of *dominium* is reflected in Scots law *per* Erskine; John Erskine of Carnock, *An Institute of the Law of Scotland*, (8th Edition) (J.B Nicholson, 1871) II.i.1, *Alves v Alves* (1861), 23, D. 712 and Carey Miller and Irvine, *Corporeal Moveables*, para.1.12; in Anglo-American law according to Blackstone, *Commentaries*, 2, *1 and the American Encyclopaedia of Jurisprudence and in French law *per* Code Civil Art.544; Version en vigueur au 6 Février 1804.

may clearly be limited by enactment or some other legal change, but 'rights', if such things indeed exist as guaranteed *iure naturalis*, are, and ought to be, considered inalienable.[285]

It consequently appears that Gaius omitted 'ownership' from the *res incorporales* precisely because he did not consider it either a *res* or a *ius*. Accordingly, the definition of *dominium* as a relationship between a person and a thing which legally confers *ius disponendi*, naturally an 'unlimited right' to do as one will with the thing, but in reality and in practice no more than a limited authority within the set parameters of the positive law to do so, upon that person appears accurate.[286] As such, in contrast to the position in the Common law, wherein 'ownership' can only be understood incrementally, as a ranking of entitlement to a thing, *dominium* – in Civil systems – stands as an absolute. One may reduce the benefits that being a *dominus* over a thing might ordinarily impart, but this does nothing to reduce the status of the *res* over which *dominium* is enjoyed as 'property'. So long as an individual or an entity lays claim to *dominium* over a *res*, that thing must be understood as 'property' for the purposes of law.

The significance of this analysis in respect of Scots law cannot be overstated. The Gaian division of *res corporales* and *res incorporales* was evidently received into,[287] and continues to operate within the context of, Scots law.[288] There is Scottish authority to suggest that within Scots law, the division is not strictly one between 'things' and 'rights', as has been suggested

[285] The U.S Declaration of Independence, for example, states that it is a 'self-evident truth' that 'all men' are endowed with 'unalienable rights' by their 'Creator': *The Declaration of Independence: A Transcription*, July 4, 1776. See, also, the discussion in Tierney, *Natural Rights, passim.*

[286] Indeed, Carey Miller and Irvine speak of the 'right[s] deriving from the owner's relationship with the thing' in their authoritative work on corporeal moveables – see *Corporeal Moveables*, para.10.03

[287] Bell, *Commentary*, I, 1

[288] Kenneth Reid, *Property*, para.11

by some commentators in respect of the Roman position,[289] but rather – as is suggested by this thesis – between different types of thing.[290] *Per* Lord Kinnear:

> "*Res corporales* are, according to the legal definition, physical things which can be touched; and *res incorporales* are things which do not admit of being handled, but consist *in jure*".[291]

Lord Kinnear proceeds to note that *res incorporales* might be 'more properly [considered] rights than subjects',[292] but it is submitted that this caveat is to be understood only analogously – and the analogy should be abandoned if it serves to obscure, rather than clarify, the operation of the schema. The *res incorporales* are juristic concepts which often appear, to modern legal scholars, to be analogous to rights, and so such jurists may find it fruitful to talk of a division between 'real rights' and 'personal rights' in further subdividing the *res incorporales.*[293] One must bear in mind, however, that the intention of Gaius, in creating the *rerum divisione*, cannot possibly have been to limit the *res incorporales* to a *numerus clausus* (or even, indeed, an open list) of 'rights'. To say nothing of the fact that the Roman jurists did not think in terms of 'rights', it is manifestly apparent that some of the nominate *res incorporales* cannot rationally be conceived of as 'rights' even within modern jurisprudence.[294]

Thus, to decry the Gaian schema as incoherent for omitting an important 'right' from its purview seems odd, particularly since the espoused list of *res incorporales* evidently contains concepts that are evidently not 'rights' within its ranks. It is trite to say that all rights

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[289] See Giglio, *Pandectism*, p.4 and the discussion in Gretton, *Ownership*, *passim.*

[290] See *Burghead Harbour*, *passim*.

[291] *Ibid*., p.996. Lord Kinnear, of course, was described as a 'recognised authority on Scottish land law' by the late Lord Rodger in the case of *R on the Application of Beresford v City of Sunderland* [2003] UKHL 60, at para.65

[292] *Ibid.*

[293] Kenneth Reid, *Property*, para.11

[294] See the discussion in Tuck, *Natural Rights*, pp.7-12

are, themselves, incorporeal.[295] It is equally trite to say that, simply because all rights are examples of incorporeal things, such does not mean that all incorporeal things are rights. Delictual duties are incorporeal, yet they exist *in jure* and are species of *obligationes.* Such duties cannot, without contortion, be described as 'rights', yet they are named as a quintessential example of a *res incorporalis*. The Gaian schema, therefore, contains juristic objects which are obviously not 'rights'. Likewise, *dominium,* as a concept, is incorporeal and, as established above, cannot be understood as a 'right' within Roman[296] or Scots[297] jurisprudence without introducing nigh insurmountable difficulties to the coherence of the law.[298] Though this concept might well be viewed as a 'right' by modern scholars, its absence from the list of *res incorporales* presents no difficulty when one recognises that the list is not one of 'rights', but of objects; *dominium* is absent from the list, then, because it is not, itself, an object which might be subject to *dominium*.

Though Gaius' list evidently contains concepts which are manifestly not 'rights' and, further, also omits what modern jurists consider to be the 'sovereign or primary real right', such is hardly problematic from the internal standpoint of any Roman lawyer constructing or interpreting the schema itself. Since Gaius was not – indeed, could not have been – thinking in terms of 'rights' when constructing or elucidating the schema, if an issue with the schema arises because of a rights-centric interpretation, that approach must be abandoned in favour of a historical approach to the subject matter. If, to an observer, the Gaian schema appears incoherent because of its apparent mistreatment of certain 'rights', or by ostensibly equating duties and other non-rights as 'rights', then the issue is with the perspective of the observer, rather than the schema itself.

[295] *Burghead Harbour,* p.996
[296] *Supra* para.1.2.1
[297] Rankine, *Land Ownership,* p.99
[298] Giglio, *Pandectism,* p.9

As such if – indeed, when – the analogy between rights and the *res incorporales* breaks down – as it necessarily does when one attempts to explain the absence of *dominium* amongst the *res incorporales* – then it is submitted that the analogy ought to be abandoned since it no longer serves to aid understanding of the true nature of the *res incorporales,* but rather to obscure it. Emphasis is to be placed on the beginning of the relevant paragraph of Lord Kinnear's judgment as this part of the text describes the operation of the Gaian schema in all material aspects. The latter aspect of the judgment can be taken only so far, but then no further, particularly given that 'ownership' is typically described as 'the quintessential right' in Scots property law.[299]

Since, then, the description of *res incorporales* as 'rights' is to be understood as a simple analogy, then it follows that similar discussions of the 'right of ownership' in Scots law can be said to reflect shorthand analogies which likewise shadow the proper understanding of *dominium*. When the 'right of ownership', or its primacy, is spoken of within the context of Scots law, what is meant is that the relationship which exists between a legal person and a *res* (*corporalis* or *incorporalis*) is given primacy as this relationship confers *ius disponendi* – the quintessential mark of 'property'. As in Roman law, an individual may enjoy this relationship with any *res* which is not excluded from the spheres of commerce or private patrimony. Though, as indicated above, many legal commentators have come to regard the Gaian *rerum divisione* (or schema) to be the fundamental division in the *ius quod ad res pertinet,*[300] Gaius himself considered the foundational split to be between the *res divini iuris* and the *res humani iuris*[301] – or between *res extra nostrum patrimonium* and *res in nostro patrimonio*.[302]

[299] Carey Miller and Irvine, *Corporeal Moveables,* para.1.12

[300] See the discussion in Brown, *Res Religiosae,* p.351

[301] Indeed, Gaius describes this division as *summa itaque rerum divisio*: G.2.2

[302] G.2.1

Res divini iuris were things consigned to divine law and so *extra nostrum patrimonium* – unable to be held in private patrimony. *Res humani iuris* – being consigned to human law – were *res in nostro patrimonio* and so form the subject of the *ius quod ad res pertinet*. Since the *res divini iuris* could not be held in private patrimony, such objects were imbued with no economic value; they were *res extra commercium*. This absence of *commercium* – that is, the absence of any incident of transmissibility and execution[303] –indicates that a key feature of what Common lawyers might term 'property' is utterly absent from the legal existence of *res extra nostrum patrimonium*.[304] To suggest that such things are not 'property' in Civil law, however, would be fallacious. The objects were 'things' 'owned', in law, and so they fit within the definition of 'property' as it exists in the Civil law. In classical Roman law, it was thought that the gods themselves enjoyed *dominium* over *res divini iuris*.[305] By Justinian's time, it was recognised that certain public bodies – such as the Church – enjoyed *dominium* over such objects, in the public interest.[306] The *res divini iuris* may not have been amenable to private *dominium*, but they were nevertheless subject, if only in part, to the rules of the *ius quod ad res pertinet*.

1.3 *Res Extra Nostrum Patrimonium* and *Res Divini Iuris*

Gaius principally recognised two types of *res* as consigned to divine providence and so beyond the scope of private law; *res sacrae* and *res religiosae*.[307] The former were things turned over to divine protection only by 'the authority of the people of Rome';[308] the enactment of

[303] Recall Honoré, *Ownership*, p.120-124

[304] See *infra*.

[305] Simon Hornblower, Antony Spawforth and Esther Eidinow, *The Oxford Classical Dictionary*, (Oxford: OUP, 2012) p.362

[306] Imperial control over 'the sacred' was consequently lessened, particularly by Emperor Gratian's express repudiation of imperial control over the *res sacrae*: Lawrence J. Daly, *Themistius' Plea for Religious Tolerance*, [1971] GRBS 65, p.65

[307] G.2.3

[308] *Sed sacrum quidem hoc solum existimatur quod ex auctoritate populi Romani consecratum est:* G.2.5

Senatorial legislation or decree was thus necessary to create such an entity.[309] *Res religiosae*, by contrast, could be created by any private citizen, even without popular or governmental authority.[310] This class of objects consisted of things 'relinquished to the gods';[311] in law, such things were exclusively cadavers which had been reverentially buried or entombed.[312] A third class of *res extra nostrum patrimonium* – the *res sanctae* – was recognised as being in divine providence,[313] although the rationale for such was not overtly religious in character. The city gates and city walls were *sanctae* – and so *res divini iuris* – by dint of their secular importance to Roman society as a whole.[314]

The fact that dead bodies could potentially be removed from the province of the general *ius quod ad res pertinet* is, thus, significant; *prima facie* such implies some commonality with the Common law rule that there can be 'no property in a corpse'.[315] This is so particularly – as indicated above – since the status and nature of the *res extra nostrum patrimonium* in law is such that it is difficult to conceptualise them as falling within the definition of 'property', as that term is understood in Common law jurisprudence.[316] The human corpse itself was not, however, a *res sacrae*, *sanctae* or *religiosae* in Roman law;[317] indeed, the human body was clearly governed by the *ius quod ad res pertinet* in the Gaian *rerum divisione*.[318] Recalling the Gaian schema, Gaius explicitly categorises human beings as *res corporales*; indeed, the human body is not included under the umbrella of the *res corporales* by implication, as if it were one

[309] *Veluti lege de ea re lata aut senatus consulto facto*: G.2.5

[310] G.2.6

[311] *'Religiosae quae diis minibus relictae sunt'*: G.2.4

[312] See the discussion in Brown, *Res Religiosae*, p.352

[313] G.2.8

[314] Brown, *Res Religiosae*, p.352

[315] *Kelly per* Rose LJ, at pp.630-631

[316] See *supra*.

[317] Esposito suggests that corpses themselves were *religiosae* and goes on to aver that the proper province of the body, in law, would be under the heading of *res sacra*, but – for the reasons discussed *infra* (no least because *res religiosae* remained exclusively immoveable in Roman and *res sacrae* have always required consecration to be created) – this cannot be the case: See Esposito, *Persons and Things*, pp.106-107

[318] G.2.13

of the *res innumerabiles* which fall within this category. It is listed as a specific and obvious example of a *res corporalis*. Accordingly (as is obvious when one considers the Roman institution of slavery) human beings – and thus human bodies – were within the ambit of property and ownership in Roman jurisprudence.

Though the body itself was no more than a profane object in Roman law – a *res vile*, to use Smith's words[319] – it could become a part of a *res religiosa* and so be resigned to the *res divini iuris* on its reverential interment.[320] This does not, however, imply that cadavers themselves held any special significance in law; although the division between *res mobiles* and *res immobiles* was of (comparatively)[321] limited importance in Roman law,[322] *res religiosae* were exclusively *immobilis*.[323] The *locus religiosus* – the place in which the body was interred – was the object of significance in law;[324] once removed from its resting place, the body was once again regarded as no more than a profane *res* and subject to the ordinary rules of the *ius quod ad res pertinet*.[325] The unauthorised removal of a body from the *locus religiosus* was, however, a serious crime in post-Classical Roman law.[326] Such was regarded as a *violati maior* (a major violation) within the context of the *crimen violati sepulcri* and was punishable by death.[327]

The Roman sources are unclear as to the means by which *res religiosae* are created. Gaius prescribed almost no formal requirements for the creation of such a thing; all that was needed was the fact of burial combined with an intention, on the part of the burier, to commend

[319] See Smith, *The Human Body*, p.245

[320] As discussed in Brown, *Res Religiosae*, p.352

[321] Carey Miller and Irvine, *Corporeal Moveables*, para.1.03

[322] William Gordon, *Roman Law in Scotland*, in Evans-Jones, *Civil Law*, p.19

[323] James Rives, *Control of the Sacred in Roman Law*, in Olga Tellegen-Couperus (Ed.), *Law and Religion in the Roman Republic*, (BRILL, 2011), p.172

[324] *Ibid.*, p.172

[325] Brown, *Res Religiosae*, p.352

[326] Berger, *Dictionary*, p.767

[327] *Ibid.*

the body to a resting place in the land.[328] There was no need for a state or religious official to be present, still less for one to consecrate the grave-site, as would be required for the creation of a *res sacra*.[329] Accordingly, it is submitted that *res religiosae* were created by the accession (*accessio*) of the corpse to the land in which it was interred.[330]

Accessio was a mode of original acquisition known to Roman law, whereby one *res* (the accessory) accedes to another larger, or more valuable, *res* (the principal) so becoming a part of that greater *res*.[331] In any instance in which a *res mobilis* was affixed to, or combined with, a *res immobilis*, the *res mobilis* would be regarded as the accessory and so accede to the *solum* (soil, or land) in line with the maxim *omne quod inaedificatio solo cedit* (all that is built on soil accedes to the soil).[332] The corpse, when buried, consequently accedes to the land in which it is placed.[333]

The *res religiosa* is, however, a new entity distinct from its constitutive parts. It is, in effect, a *nova species*. Thus, although the operation *accessio* leads two distinct objects to become one when the cadaver is buried, the change in character from profane land and profane corpse to a combined grave-site which is *res religiosa* implies that the process by which the *res religiosa* is created may be *specificatio*, or more properly – as the term *specificatio* was not known to the Roman lawyers[334] – *speciem facere*.[335] *Specificatio* has been said to be difficult to distinguish from *accessio* as the mechanisms are similar in operation and scope.[336] Such should not be surprising; as van der Merwe has illustrated, the Romans did not, themselves,

[328] G.2.6
[329] Brown, *Res Religiosae*, p.352
[330] *Ibid.*, p.353
[331] Nicholas, *Introduction*, p.133
[332] Buckland, *Textbook*, p.212
[333] Brown, *Res Religiosae*, p.354
[334] See C. G. van der Merwe, *Nova Species*, [2004] Roman Legal Tradition 96, p.98
[335] C. G. van der Merwe, *A Re-Assessment of the Requirements of Specificatio*, in Bain *et al*, *Northern Lights*, p.191
[336] A. M. Prichard (Ed.), *Leage's Roman Private Law*, (3rd Edition) (MacMillan and Co., 1961) p.186

recognise *specificatio* as an independent means of original acquisition;[337] rather, *specificatio* was accommodated, by the jurists, under the existing modes of original acquisition, *occupatio* and *accessio*.[338] The Frisian jurist Huber was the first to severally classify *specificatio* as a mode of original acquisition in its own right.[339] This innovation did not occur until the Seventeenth century;[340] 'the modern labour theory that the producer must be rewarded for his labour and skill in producing the new product is not supported by the Roman sources'.[341]

Specificatio describes the process by which a new *res* is created 'by a more or less skilful process'.[342] In such circumstances, the question of who, if anyone, enjoys *dominium* of the newly created object arises. Famously (or infamously) the scope, nature and operation of *specificatio* was the subject of disagreement between the Proculian and Sabinian juristic schools.[343] The Sabinians maintained that *speciem facere* was a mode of *accessio*, given that no *res* could exist without the materials from which it was constituted.[344] Consequently, *dominium* over the *nova species* was enjoyed by the owner of the raw materials from which the new object was made (or, in cases in which the raw materials were each owned by different people, the owner of the principal).[345] The Proculian school, by contrast, maintained that any newly created *res* was naturally ownerless – *res nullius* – and so amenable to acquisition by

[337] van der Merwe, *Specificatio*, p.192

[338] See Thomas Roberts, *A Reassessment of Historical Theories on Specificatio and the Requirement of Good Faith*, [2002] Scottish Law and Practice Quarterly 180, *passim*; Plisecka argues that analysis of the Roman sources indicates that '*accessio* and *specificatio* are circumstances under which ownership is lost rather than acquired'; thus, given that Roman law did not recognise the rule that *quod nullius est fit domini regis*, the 'thing' in in such circumstances becomes ownerless and open to being acquired by means of *occupatio* (the only Roman mode of original acquisition, on her analysis): See Anna Plisecka, *Accessio and Specificatio Reconsidered*, [2006] Tijdschrift voor Rechtsgeschiedenis 45, p.55

[339] See Ulrich Huber, *Praelectionum Iuris Civilis*, (Franequerae, 1698), 2.1.27

[340] Huber was a contemporary of Voet: van der Merwe, *Specificatio*, p.192

[341] van der Merwe, *Specificatio*, p.191

[342] Prichard, *Roman Law*, p.186

[343] See Peter Stein, *The Two Schools of Jurists in the Early Roman Principate*, [1972] Cambridge Law Journal 8, p.8

[344] Dig.41.1.7.7

[345] See Dig.10.4.12.3

means of *occupatio*.[346] Practically, in almost all cases, the first occupier would be the creator of the *nova species* and so the Proculians held that *dominium* over the *res* was enjoyed by the maker of the thing, rather than any previous owners.[347] The Proculian view 'seems to have been more in line with the prevalent societal view in Classical Roman law',[348] but in the post-Classical period the dispute between the schools was resolved by reference to the *media sententia* (middle path) adopted (or originated) by the Emperor Justinian.[349]

Under the *media sententia*, if a *nova species* was reducible to its constitutive parts, then ownership would remain with the *dominus* of the raw materials. If reduction were impossible, the *specificans* would become owner. 'Reducibility, like severability, depended probably on feasibility rather than ultimate possibility'.[350] In the case of an interred cadaver, the *nova species* is evidently irreducible; it is of course, in fact, possible to exhume a body, but to do so would be to destroy the *res religiosa* created by the burial of the cadaver. Thus, on the Sabinian view, the accessory (the corpse) has properly and functionally acceded to the form of the principal (the land) and on the Proculian view the distinct character of the raw materials may be said to have been extinguished, which would ordinarily leave the grave-site amenable to acquisition by *occupatio*.

The distinctive character of a *res religiosa* was such that, although a *nova species* was created by the act of interment, neither the owner of the land nor the burier obtained *dominium* over the *nova species*. Rather, once properly constituted, the *res religiosa* was removed from private patrimony and *dominium* over it was vested in 'the gods below'.[351] On a Proculian

[346] Dig.41.1.7.7; Dig.41.1.3

[347] The owners of the previous material could, however, raise an action (not founded in ownership) against the creator: Dig.47.2.46

[348] van der Merwe, *Specificatio*, p.193

[349] Prichard, *Roman Law*, p.186

[350] *Ibid*.

[351] G.2.4

view, it might be suggested that the *res nullius* was acquired, by means of *occupatio*, by those gods after the body was committed to its grave; on a Sabinian view, the fact that the *res religiosa* could only be created intentionally and with the permission of the landowner suggests that *dominium* over the *res religiosa* was transferred to the gods (*i.e.*, they acquired *dominium* by means of derivative, rather than original, acquisition) by the owners after they deigned to create the new object.[352] Whatever the case, it remains clear that the immovable grave-site, rather than the moveable corpse, constituted the *res religiosa*.

The ease with which *res religiosae* could be created had the potential to undermine the law of private property,[353] but this possibility did not appear to trouble Gaius or the Republican jurists.[354] This may be explained by the fact that, in the Republican era, interference with *res religiosae* carried no secular penalty (other than a potential *actio in factum*)[355] and 'lawyers of that time period were content to leave the gods to take care of their own affairs'.[356] By Justinian's time, however, the prerequisites for the creation of a *res religiosa* were stricter[357] and the penalties for unauthorised interference with one properly constituted were more severe,[358] the aforementioned *crimen violati sepulcri* having been instituted as an *actio popularis* to proscribe such activity.[359]

Notwithstanding some additional requirements, in Justinian's schema, it remained the case that any private citizen could create a *res religiosa*.[360] There was still no need for state

[352] On this analysis, the land owner's consent would be necessary to allow for the transfer of title from the present *dominus* to the Gods; the landowner would own the interred body for a fraction of the smallest possible measure of time until his will to dispone the land to the Gods was legally executed.

[353] See the discussion in Rives, *The Sacred*, p.173

[354] *Ibid*.

[355] See Dig.43.6.1; Dig.47.12.3

[356] Brown, *Res Religiosae*, p.352

[357] J.2.1.9

[358] Rives, *The Sacred*, p.172

[359] Berger, *Dictionary*, p.767

[360] J.2.1.9

sanction or religious consecration. All that was mandated in Justinian's *Institutes* was that the body be interred in land owned by the burier, or interred with the consent of the owner (or any co-owners or holder of ususfruct).[361] As the Empire had been effectively[362] Christian since the conversion of Constantine[363] (the recrudescence, or indeed consolidation,[364] of 'paganism' under Julian the Apostate having little lasting impact on the ultimate development of Rome as a Christian state),[365] the implicitly recognised *dominus* of *res religiosae* had ceased to be the 'gods below', who themselves were not worshipped in Byzantium, by the time of Justinian's consolidation of the *Corpus Iuris Civile*. *Dominium* over *res religiosae* was, rather, vested in the established Church or State, as the Christian god's temporal intermediary.[366] In effect, this meant that grave-sites were regarded as public, rather than private, property (and so not properly the subject of the *Institutes*), although it was possible for particular individuals – say, the relatives of a deceased person – to retain a private interest – that is, an interest in burial in the same land – in respect of the *res religiosa*.[367]

Justinian discussed the division between things which could be privately owned and things which could not in greater detail than his juristic predecessor.[368] Gaius dispensed with the distinction rather quickly,[369] simply separating those things which were in the cognisance

[361] J.2.1.9

[362] Constantine's Edict did not, as is commonly asserted, establish Christianity as the State religion: See Alexander C. Flick, *The Rise of the Mediaeval Church*, (Burt Franklin, 1909), 119

[363] See Francis Opoku, *Constantine and Christianity: the Formation of Church/State Relations in the Roman Empire*, [2015] Ilorin Journal of Religious Studies 17, p.21

[364] See James J. O'Donnell, *The Demise of Paganism*, [1979] Traditio 45, *passim.*

[365] H. Bloch, *A New Document of the Last Pagan Revival in the West 393-394 A.D*, [1945] Harvard Theological Review 199, p.203

[366] Justinian maintained, like Gaius, that *res religiosae* were *nullius in bonis* – in the property of, *i.e.*, owned by, no one, but this was such as a matter of private law. As a matter of public law, the *res* were (inalienably) in the patrimony of the Church or State in the same manner as the *regalia majora* was conceived to be within Scots law until the late Nineteenth century: See Scottish Law Commission Discussion Paper 113, para.3.3

[367] Moyle, *Institutes*, p.200

[368] *Ibid.*, p.197

[369] G.2.1-9

of divine law from those which were not,[370] but Justinian further subdivided the *res extra nostrum patrimonium* and recognised that things other than those consigned to divine law might nevertheless be incapable of being held in private patrimony. According to Justinian, *res omnium communes, res publicae, res universitatis* **and** *res divini iuris* are to be regarded as *extra nostrum patrimonium.*[371] Different rules applied to each of these classes of things.

Though each of the four classes were *extra nostrum patrimonium,* a mode of original acquisition such as *occupatio* could be used to separate and appropriate parts of *res omnium communes*. Thus, while the whole entity (e.g., the flowing water of a river)[372] remained *extra nostrum patrimonium,* parts of *res omnium communes* could become *in nostro patrimonio* when they cease to be in their natural state.[373] *Res publicae* were divisible into two classes: Things which belong to, and may be used by, the State as if it were a private person and things which are *publico usui destinatae*.[374] Things which fall into the former category are not truly *extra nostrum patrimonium* according to Moyle, but they may nevertheless be readily classed as *extra commercium* as they could not be alienated.[375] *Res universitatis* were similar to the former kind of *res publicae;* indeed, both Leage and his later editor, Prichard, note that Gaius saw no need to distinguish them.[376] As in Gaius' account, Justinian's conception of *res divini iuris* included *res religiosae, res sacrae* and *res sanctae*;[377] anything which fell into one of

[370] See the discussion in Viscount Dunedin (Ed.) *Encyclopaedia of the Laws of Scotland,* Volume XII (Edinburgh: W. Green and Sons, 1931), para.437

[371] J.2.1

[372] J.2.1.1

[373] Jill J. Robbie, *Private Water Rights in Scots Law,* [2012] PhD Thesis, Edinburgh University, p.30

[374] Moyle, *Institutes*, pp.197-198

[375] *Ibid.*

[376] R.W Leage, *Roman Private Law: Founded on the Institutes of Gaius and Justinian,* (London: MacMillan and Co., 1906); Prichard, *Roman Law*, p.154

[377] Dig. 1.8.6.2-5; J.2.1.7

these three categories was *nullius in bonis*[378] and such things (generally)[379] remained immoveable even in Justinian's time. In Justinian's account, *res sacrae* were those things which had been duly consecrated by the Pontiff (primarily places of worship and other such sacred buildings),[380] while *res religiosae* remained those pieces of land in which human bodies were reverentially interred.[381] Thus, burial plots, tombs and sepulchres remained the only examples of *res religiosae*.[382]

Some scholars have claimed that all *res divini iuris* can be categorised as *res nullius*,[383] however, to claim this is to miss a subtle, yet vital, distinction. *Res nullius,* such as wild animals, are *in nostro patrimonio* and *in commercio*; they may become *fiunt singulorum* by means of *occupatio*.[384] *Res divini iuris* are not ownerless in this sense. A wild lion is a *res.* Once captured it ceases to be *res nullius* as it has been originally acquired by the captor through the process of *occupatio. Res divini iuris,* conversely, are *res nullius in bonis*; in the patrimony of no private *pater* or *persona* and incapable of lawful appropriation.[385] Yet that notwithstanding, *res sacrae et res religiosae* were nevertheless considered to be legally 'owned', either by the gods themselves (in the case of Classical Roman law)[386] or by the established Church (in the Christian epoch).[387] *Res sanctae* were quite clearly consigned to

[378] Moyle, *Institutes,* p.199

[379] By Justinian's time, given the establishment of the Christian Church, some moveable objects (such as communion cups) were consecrated and so constituted *res sacrae*. These moveable objects could be sold for the purposes of supporting the poor in times of famine or for paying the ransom of soldiers captured in war (*inter alia*): Moyle, *Institutes,* p.199

[380] Campbell, *Compendium*, p.34

[381] *Ibid.*

[382] Rives, *Control of the Sacred,* p.172

[383] Buckland, *Textbook,* pp.184-185

[384] Moyle, *Institutes,* pp.197-198

[385] Moyle, *Institutes,* p.199

[386] Hornblower *et al*, *Dictionary,* p.362

[387] Daly, *Themistius' Plea, passim*.

public (indeed, imperial)[388] control.[389] Thus, the regulation of *res nullius* formed part of the private law, while *res divini iuris* were regulated in the realm of public law. *Res divini iuris* came to belong to the Church in the same way that proprietary rights in *res publicae* which are not *publico usui destinatae* were vested in the State;[390] for this reason, on a secular view of Roman law, *res divini iuris* could be understood as a subcategory of *res publicae*. Indeed, even in the absence of secularisation, *res sanctae* could be more appropriately understood as *res publicae*, since even such profane objects could be protected by threat of sanction.[391]

Moyle claims that Justinian implicitly equates *res extra commercium* with *res extra nostrum patrimonium* in the *Institutes*.[392] It has consequently been suggested that Justinian considered all things incapable of private ownership as *res extra commercium*[393] and, indeed, some later writers have followed this interpretation and ignored the phrase *res extra nostrum patrimonium* altogether.[394] There is, however, an important distinction between *res extra commercium* and *res extra nostrum patrimonium*. The former is regarded as incapable of acquisition by private persons, yet nevertheless may be held in private *dominium* by an owner who cannot transfer their title (generally, though not necessarily, the State or the *civitas*), while the latter is utterly incapable of being held in private *dominium*.[395]

As a corporeal moveable thing, the human body alone was not subject to any of the exceptions to the general rule that any *res* is properly the subject of the *ius quod ad res pertinet*. Roman law considered the human body profane and a *res in commercio*,[396] however its

[388] Rives, *The Sacred*, p.170
[389] Dig. 1.8.9.4
[390] Prichard, *Roman Law*, p.185
[391] Rives, *The Sacred*, p.170; Moyle, *Institutes*, pp.197-198; Dig. 1.8.9.3
[392] Moyle, *ibid.*, p.197
[393] Sohm *et al*, *Institutes*, p.225
[394] *Ibid.*
[395] Moyle, *Institutes*, p.197
[396] J.2.2.1

interment could confer religious and legal protection upon the tomb, sepulchre or other such burial place in which it was placed. This would occur simply when the corpse was interred with the permission of all of those who held a legally recognised relationship with the plot.[397] Although the presence of the body itself was legally required for the creation of *res religiosae*,[398] the corpse itself was never sacred nor a *res religiosa*, even when buried.[399] The consecrated plot was the *locus religiosae* and therefore the *res* consigned to the *ius divinum*; consequently, it was the immoveable land, not the body, which was protected by sanction.[400]

The body could be moved from its resting place on order of the relevant authorities and placed elsewhere;[401] in such instances, the original *locus religiosae* ceased to have any special significance.[402] Rendered moveable by its disinterment, the corpse would similarly cease to be *divini iuris*.[403] If moved from a *locus religiosa*, the placement of the body elsewhere would not confer any enhanced status upon its profane *situs* unless the conditions required for the creation of *res religiosae* were met once again.[404] In order to be constituted as a *res religiosa*, the body had to be interred with the permission of all those with a legal interest in the burial plot[405] within certain defined parameters.[406]

The particular rules relating to the *res extra nostrum patrimonium* were received into Scots law through Canon law,[407] although it has been suggested that after the Reformation

[397] Dig 1.8.6.4; Dig. 11.7.2.7; Dig 11.7.2.8; Dig. 11.7.34
[398] Dig. 11.7.44
[399] Rives, *The Sacred*, p.172
[400] *Ibid*., p.173; the corpse being a mere accessory to the principal.
[401] Dig. 11.7.44
[402] Rives, *The Sacred*, p.173
[403] Georg Wissowa, *Religion und Kultus der Römer*, (2nd Edition) (Munich: C.H Beck, 1912) p.478
[404] Cicero, *De Legibus*, 2.57
[405] Dig 1.8.6.4; Dig. 11.7.2.7; Dig 11.7.2.8; Dig. 11.7.34
[406] Rives, *The Sacred*, p.173
[407] Duncan, *Treatise*, p.705

Scotland 'refused to recognise any burial space as *res religiosa*'.[408] This assertion notwithstanding, it is plain that Scots property law has more in common with the Roman *ius quod ad res pertinet* than the Common law conception of 'property law'. Absolute priority of entitlement (i.e., *dominium* or ownership) is recognised in Scotland, as is the notion that the State (or, indeed, Church) may enjoy inalienable priority of entitlement over certain objects.[409] As such, the extent to which these notions have been received into Scots law merits consideration.

1.4 Scots Law

1.4.1 'Property' in Scots Law

There is a consensus amongst the earliest Scottish Institutional writers as to the authority of Roman law in causes concerning moveable property. Craig's *Jus Feudale* – the work which is widely regarded as the first organised textbook on Scots law[410] – states that, where no answer to a legal problem can be found by reference to native Scots sources, recourse may be had to both Canon law and Roman law.[411] MacKenzie's *Institute of the Laws of Scotland* likewise referred to the authority of Roman law, on the grounds that 'the Civil law is much respected generally, so it has great influence in Scotland except where our own express laws or customs have receded from it'.[412] Stair, though he expresses that Roman law is not binding in Scotland,[413] makes 'considerable use of it in [his] first and second books which deal with obligations and property'.[414] The last of these is particularly significant, as, in 1995, Carey

[408] Jupp *et al*, *Cremation*, p.10
[409] Recall *Presbytery of Edinburgh.*
[410] Carey Miller, *Derivative Acquisition*, p.128
[411] Craig, *Jus Feudale*, 1,8,17; 1, 2, 14
[412] MacKenzie, *Institutions*, 1, 1, p.3
[413] Stair, *Institutions*, 1, 1, 16
[414] Gordon, *Roman Law*, pp.28-29

Miller suggested that Stair's taxonomy of property 'may be taken as definitive of the common law [of Scotland]'.[415]

The later Institutional writers went further in their citation of Roman law, at times, than their predecessors. Bankton, in particular, stated in his *Institute* that 'the Civil law was the wisdom of the ages, the quintessence of the learning of old Rome, in questions concerning right or wrong'.[416] Though Bankton accepts that Scots property law is, in large part, based in feudal law, he 'refer[s] extensively to Roman law for as long as he is dealing with moveable property'.[417] The feudal influence was largely limited to heritage. Indeed, by the latter half of the Eighteenth century, the division in Scots law between heritable and moveable property – which was classically unimportant to the Romans[418] – had become so wide that, in the composition of his own *Institute*, Erskine noted that in any work on Scots property law, the rules relating to heritable and moveable things 'fall now to be handled separately'.[419] As with Bankton, consistent reference is made, by Erskine, to feudal law when dealing with heritage, yet the law pertaining to moveables remains distinctly Roman in Erskine's work.

Hume's comments with regard to the influence of Roman law on Scots mostly mirror those of the earlier Institutional writers: 'So eminent, indeed, is the equity of that system, and so suitable had it been found to our condition of society and affairs, that in many kinds of business it was long ago adopted by our judges as their model and rule of decision'.[420] In this sense, Roman law was, by the time of Hume, so entrenched in the Scottish legal system that much of Scots law could be said to be Roman by dint of the Roman influence on the initial development of the Scottish system alone. Of course, the expression of this opinion has been

[415] Carey Miller, *Derivative Acquisition*, p.128
[416] Bankton, *Institute*, I, 1, 41
[417] McLeod, *Property Law*, p.234
[418] Gordon, *Roman Law*, p.19
[419] Erskine, *Institute*, II, 3, 2
[420] David Hume, *Lectures*, 1, 2

used to argue that Hume doubted the continuing authority of Roman law with respect to the Scottish courts.[421] Such a proposition appears borne out by another statement in the Lectures: 'The obeisance that we pay to the Civil [law] is now, and always has been, a voluntary obeisance, and as a matter of courtesy – depends, in the main, on its agreement with equity and reason, its analogy to the rest of our practice, and its suitableness to our state of things and kinds of business'.[422]

Since much of the Roman law was thought to be in agreement with both equity and reason by Hume's Institutional predecessors and the Scots judiciary of the day, however, it may be submitted that much of the content of the *Corpus Iuris Civile* was received into the main body of Scots law.[423] As such, in any discussion of Scots law, one may – indeed, must, when concerned with the law as it pertains to moveable property[424] – pay heed to the underlying Roman principles in order to make sense of that law. Naturally, 'the use of Roman terminology alone does not necessarily indicate the adoption of a Roman institution'.[425] It must be noted, however, that in the case of moveable property in particular, many of the institutions and principles were received into Scots law. According to Bell, the Scots law pertaining to moveable property is governed according to the principles of Roman jurisprudence.[426] This statement is certainly substantiated with reference to the works of the earlier Institutional

[421] McLeod, *Property Law*, p.240

[422] David Hume, *Lectures*, 1, 13

[423] Indeed, as McLeod expounded in his piece on the 'Romanization' of Scots property law, the Institutional writers consistently referred, specifically, to aspects of Justinian's *Institutes, Digest, Codex* and (even) *Novels* in discussing 'Roman law': See McLeod, *Property Law*, pp.242-243. If the Institutional writers are taken to be authoritative sources of Scots law, it follows too that the *Corpus Iuris Civile* must likewise be regarded as sufficiently authoritative to merit consideration in Scots law in instances in which there is no native authority available for consultation.

[424] It must be noted that Roman law was not, in this area, 'received completely unaltered into Scots law' – Carey Miller, *Derivative Acquisition*, p.128 – but it is certainly the case that the Scots law of moveable property was heavily 'Romanized' by the work of the Scottish jurists here cited: McLeod, *Property Law*, p.244

[425] T. D. Fergus, *Sources of Law (General and Historical): The Historical Sources of Scots Law (1) Roman Law*, in *The Stair Memorial Encyclopaedia*, Vol.22 (LexisNexis, 1986) para.556; Fergus does, however, go on to note that 'it is still possible to trace the influence of Roman law on many branches of Scots law' and singles out the law pertaining to moveable property (*inter alia*) as an example here.

[426] Bell, *Principles*, p.636

writers[427] and is confirmed even in recent commentaries on the subject of corporeal moveables.[428] Some consideration of the key principles of Roman proprietary jurisprudence is, thus, merited.

Unlike the Romans who, as noted, did not deign to define *dominium*, the Scottish Institutional writer Erskine did – drawing on Bartolus – venture to define the term as representative of 'the sovereign or primary real right',[429] going on to say that the right ultimately conferred by property 'is the right of using and disposing of a subject as our own, except in so far as we are restrained by law or paction'.[430] This description was noted, by the Inner House in the case of *Anstruther v Anstruther*,[431] to be 'exactly the language of the civilians, who define *dominium* as *'jus in re corporali, ex quo facultas, de ea disponendi, camque vindicandi, nascitur, nisi vel lex, vel conventio, obsistit'*.[432] The bench attributed this statement to Calvin,[433] but the description of 'property' in such terms permeates Civilian jurisprudence[434] and can be traced, both in substance and in root, Bartolus.[435] Though Bartolus' proffered definition of *dominium* differs very slightly in wording from the aforementioned statement, the substance and core of its proposition is retained.[436] That 'property' is to be understood as enjoying *ius disponendi* over a thing finds support in Scots jurisprudence. In *Corporation of Glasgow v M'Ewan,*[437] Lord Chancellor Halsbury ruled that 'the *ius disponendi*

[427] See the discussion in McLeod, *Property Law*, pp.242-244

[428] Carey Miller and Irvine, *Corporeal Moveables*, para.1.03

[429] John Erskine of Carnock, *An Institute of the Law of Scotland,* (8th Edition) (J.B Nicholson, 1871), 2, 1, 1

[430] *Ibid.*

[431] (1836) 14 S. 272

[432] *Ibid.* p.286

[433] See *ibid.* footnote 23. The Bench do not refer to any work of Calvin, but merely attribute the quotation to him without citation.

[434] Bret Boyce, *Property as a Natural Right and as a Conventional Right in Constitutional* Law, [2005] ILR 201 p.215

[435] See Bret Boyce, *Property as a Natural Right and as a Conventional Right in Constitutional* Law, [2005] ILR 201 p.215)

[436] Recall Bartolus, *Commentaria*, fol.73va

[437] (1899) 2 F (H.L) 25

is the peculiar mark of the right of property and is in fact its essential feature'.[438] Similarly, the court in *Alves v Alves*[439] ultimately held that when liferent[440] and the *ius disponendi* are vested in one person, that person may be termed the proprietor of the *res* over which these are held as 'it is difficult to see what other right a proprietor can have than the full right of enjoyment and the full right of disposal'.[441]

This 'right of disposal' does not merely grant the ability to dispose or alienate; it also confers *ius utendi, ius abutendi*[442] and *ius fruendi*.[443] There terms are, in turn, translated as the right of use, the right of abuse and the right to the fruits [of the thing].[444] 'Liferent' does not confer *ius disponendi*; rather, it allows one to enjoy the fruits and use of a thing for the duration of one's life, so long as one does not destroy, damage, or reduce the substance of the thing.[445] In a sense, it imparts *interim dominus* – making the holder of it 'proprietor for life'[446] – yet it confers no *ius disponendi* on the holder. One may give up the liferent during one's life, or one may lease it to another, but one may not dispone or transfer liferent in succession. As a result of this, liferent and *usufructus* cannot be said to confer 'ownership' on the holder, although

[438] *Ibid.* p.26

[439] (1861) 23 D.712

[440] Analogous to the Roman *usus fructus*: *Encyclopaedia of the Laws of Scotland,* Vol.9 (W. Green, 1930) p.216, para.502

[441] *Ibid.* p.717

[442] Proudhon's definition of *dominium* in the Roman law echoes Bartolus' definition of the same in noting that one's exercise of one's rights over a thing can be constrained by law or by paction, but instead of framing *dominium* as *ius disponendi*, he provides that it is *'ius utendi et abutendi re sua, quatenus iuris ratio patitur'*: Pierre-Joseph Proudhon, *What is Property?,* (1840) p.85 'Use' (*utendi*) and 'abuse' (*abutendi*) are effectively synonymous in this context, however, as Proudhon himself notes: One way or another, the proprietor can do whatever they so like with the *res*: See Peter Garnsey, *Thinking about Property: From Antiquity to the Age of Revolution,* (Cambridge: CUP, 2007) p.177

[443] This tripartite understanding of the *ius disponendi* was incorporated into both the preface of the French *Déclaration des Droits de L'homme et du Citoyen,* 28th August 1789 and Article 544 of the 1804 *Code Civil des Français* (the *Code Napoléon*).

[444] Peter Garnsey, *Thinking about Property: From Antiquity to the Age of Revolution,* (Cambridge: CUP, 2007) p.177

[445] In this sense, *utendi et abutendi* are distinct as they apply to an owner of an *ususfruct*, though not a *dominus*. A *dominus* may do whatever they so wish with their *res* – they may use or abuse it – one who enjoys *ususfruct,* however, may only make use of the property in accordance with the *ususfructus.*

[446] Erskine, *Institute*, II, 9, 41

equally, a *dominus* cannot be said to have a right of *ususfruct* in their owned *res*.[447] The fact that a *dominus* may practically enjoy *usufructus* alongside the *ius disponendi* is a consequence of the right of ownership, not a separate, constitutive element of it.

As indicated, the interpretation of *dominium* as a 'right' within the Roman legal framework is misplaced, particularly when one considers the absence of the idea of 'rights' in the Roman legal lexicon.[448] As Professor Rankine indicates, conceptualising *dominium* as a 'right', or a 'bundle of rights' is likewise problematic within natural law, and indeed Scots law.[449] As alluded above and elsewhere,[450] *dominium,* in law, is better understood as a legally recognised relationship between a person and a *res*, which is wholly distinct from the fact or 'right'[451] of 'possession' of the thing,[452] which confers innumerable (though limitable) benefits upon the *dominus*.[453] As such, the fact that the *dominus* may enjoy *'ius de re corporali perfecte disponendi, nisi lege prohibeatur'* is a consequence of the relationship of *dominium*, not the definitive aspect of it. The *ius utendi*, *fruendi* and *abutendi* which arise out of *ius disponendi* are – even when read extensively – expressly non-exhaustive.[454]

1.4.2 *Res Extra Nostrum Patrimonium* in Scots Law

The *res extra nostrum patrimonium* were recognised, by Rankine, as significant within the context of Scots law and subsequent scholars have noted that the Roman division of *res in nostro patrimonio* and *res extra nostrum patrimonium* has generally been followed in

[447] Rankine, *Land Ownership*, p.99

[448] See Villey, *L'idee*, pp.201-228; Nicholas, *Introduction*, p.100; Tuck, *Natural Rights*, p.7; Tierney, *Natural Rights*, p.1; Metzger, *Actions*, pp.208-209

[449] Rankine, *Land Ownership*, p.99

[450] Jonathan Brown, *Plagium: An Archaic and Anomalous Crime*, [2016] Jur. Rev. 129, p.131

[451] See Roderick R. M. Paisley, *Real Rights: Practical Problems and Dogmatic Rigidity*, [2005] Edin. L. R. 267, p.269, which notes the debate as to whether possession is a 'right or fact'.

[452] Recall D.41.2.12.1 and see Anderson, *Property*, para.3.04

[453] Rankine, *Land Ownership*, p.99; Brown, *Jus Quaesitum Tertio*, p.69

[454] Rankine, *Land Ownership*, p.98

Scotland.[455] '*Res publicae, res universitatis, res sacrae religiosae* or *sanctae* are the property of someone, though it may be under trust for certain purposes. If they are invested in no one else, they are by our feudal plan deemed *regalia*, or rights belonging to the Crown'.[456] Although feudal tenure has since been abolished,[457] 'regalian rights which were unfeued and thus still held by the Crown remain allodial property, as before'.[458] Thus, if (as is submitted) control and ownership of the *res divini iuris* were vested in the Crown under the tenets of the feudal system, then even in light of the abolition of that system the Crown nevertheless retains such ownership and control.

Graves, however, have never, in Scots law, been treated as utterly beyond the scope of commerce,[459] as they were in Roman law.[460] On this basis, it has been argued that the extent to which the notion of *res religiosae* was received into Scotland may be questioned.[461] Similarly, it has been suggested that private burial grounds are never viewed as *res religiosae* in Scotland,[462] however in the case of *H.M Advocate v Coutts*[463] Lord MacLaren held that, at least insofar as the criminal law is concerned, 'the law recognises no distinction between public and private cemeteries'.[464] In addition, it appears that Scots law has consistently recognised two principles 'which operate to exclude churchyards to a great extent from being dealt with as subjects to which the ordinary rights and privileges of proprietorship belong.'[465] The first such principle is concerned, like the Roman law, with the religious character imparted upon the

[455] Robson and McCowan, *Property Law*, para.1.05

[456] Rankine, *Land Ownership*, p.99

[457] Effective as of November 28th 2004 *per* the Abolition of Feudal Tenure Etc. (Scotland) Act 2000

[458] Kenneth G. C. Reid, *The Abolition of Feudal Tenure in Scotland*, (Chatham: LexisNexis, 2003), para.8.3; see also Scottish Law Commission, *Report on the Abolition of the Feudal System*, para.2.22

[459] Jupp *et al*, *Cremation*, p.23; *Patterson v Butler & Anor* [2001] Scot CS 282

[460] Dig.1.8.6.4 (Marcianus); Dig.11.7.2.7 (Ulpian); Dig.11.7.2.8 (Ulpian); Dig.11.7.34 (Paul)

[461] Duncan, *Treatise*, p.220

[462] Johnston, *Ecclesiastical Law*, p.219

[463] (1899) 3 Adam 50

[464] *Ibid.*, p.61

[465] Johnston, *Ecclesiastical Law*, pp.208-209

ground by its having been set aside for an exclusive and hallowed purpose[466] (though, speaking in the context of Scots law, Johnston refers to this as but a *'quasi-religious character'*).[467] The second principle concerns itself to securing the benefit of the churchyard to the community that the parish is intended to serve.[468]

On a Roman analysis, these two distinct principles would appear to indicate that the character of a grave-site, as a sepulchre, is protected as a hybrid of a *res sacrae*,[469] *res religiosae* and a *res sanctae*.[470] *Res sacrae* received the special character – their status as excluded from the law of private property – by virtue of their having been consecrated by a priest or State official;[471] indeed, the *res sacrae* itself was created by the occurrence of such consecration.[472] *Res religiosae* could be created by anyone – there was no need for the creator of a *res religiosae* to possess any religious character, any legal *persona* could create such an object by interring a corpse in land that they owned.[473] *Res sanctae* were those objects that held such significance to the community that interference with them punished with the 'sanction'[474] of capital punishment.[475]

It is apparent that the burial of a corpse in a churchyard may be said to invoke the characteristics of all three aspects of the *res divini iuris*. The burial of the cadaver indicates that the burial ground, once the corpse is interred, may be considered a *res religiosa*;[476] the fact of

[466] Rives, *Control of the Sacred*, p.171-172

[467] Johnston, *Ecclesiastical Law*, p.209

[468] *Ibid.*

[469] 'Sacred things', such as objects – including heritage – consecrated by the clergy and consigned to use for religious purposes: see J.2.1.8

[470] 'Sanctified things' consigned, by dint of their natural purpose, to divine service; interference with such things incurred capital punishment, hence their status as 'sanctioned': J.2.1.8

[471] J.2.1.8

[472] *Ibid.*

[473] *Ibid.*

[474] Used here in the term's sense denoting 'a threatened penalty for disobeying a law or rule.'

[475] *Ibid.*

[476] Dig. 11.7.44 (Paul): *'Cum in diverisis locis sepultum est, uterque quidem locus religiosus non fit, quia una sepultura plura sepulchra efficere non potest: mihi autem videtur illum religiosum esse, ubi quod est principale*

the burial occurring in consecrated ground suggests that the land is *res sacrae*;[477] the importance of the churchyard to the community as a whole ultimately suggests that the land is *res sanctae*.[478] Whichever of these categories reflects the character of the ground in which a body is buried, it is clear that unlawful interference with interred cadavers is prohibited, in Scotland, by the crime of violation of sepulchres and that the underpinning of this crime is the need to ensure appropriate reverence in respect of burial grounds.[479] Indeed, Scots law appears to have commixed the three categories, to a large extent, being that different sources speak of the importance of the churchyard in different ways; the Kirk itself emphasises the community interest in – or what might be understood as the *sanctae* aspect of – the churchyard.[480] The Institutional writers Erskine and MacKenzie emphasise the sanctity – the *sacrae* element – of the land,[481] while, though it is evident that post-reformation Scots law did not recognise the concept of *res religiosa* to the same extent as the Roman law,[482] given the distinction between the criminal treatment of plain theft of an unburied corpse and the rather more serious treatment of criminals who violate sepulchres, it may be inferred that Scots law acknowledges the importance of the burial of the cadaver – the salient element of the creation of any *res religiosa*.[483]

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conditum est, id est caput, cuius imago fit, inde cognoscimur. Cum autem impetratur, ut reliquiae transferantur, desinit locus religiosus esse' ['When a burial has been performed in more than one place, the places are not both made religious, because one burial cannot produce more than one tomb. In my opinion, the place which is religious is the one where the most important part of us is buried, that is, the head from which likenesses are made, by which we are recognized. But when a request for the transfer of the remains is granted, the place ceases to be religious.'] – *per* Alan Watson (trs.), The Digest of Justinian, Vol.I (University of Pennyslavania Press, 1985), p.355.

[477] Consistent with Johnston's first principle: Johnston, *Ecclesiastical Law*, p.209

[478] Consistent with Johnston's second principle: *ibid.*

[479] Chalmers and Leverick, *Criminal Law*, para.51.01

[480] Duncan, *Treatise*, pp.666-668

[481] Erskine, *Institute*, II, 1, 8. Mackenzie is quoted in G. Hutcheson, *Treatise of the offices of justice of the peace* 4 vols. (Edinburgh, 1809), vol. 2, 367

[482] Johnston, *Ecclesiastical Law*, p.207

[483] It has been suggested that Scots law ceased to recognise anything akin to a *res religiosa* after the reformation; as Jupp *et al* note, *'*[an] important aspect of the removal of burial locations from the kirks in towns and cities was that these new spaces should not be consecrated, or considered 'sacred'… the law in post-Reformation Scotland refused to recognise any burial space as *res religiosa'*: Jupp *et al, Cremation,* p.10. This statement appears,

This recognition of the importance of the 'burial of the cadaver' implies some commonality with the root of the English rule that there can be no property in a corpse. The English jurist Coke confined such to 'ecclesiastical cognizance' in his authoritative *Institutes of the Laws of England*.[484] Thus, though there is, conceptually, subtle differences between the operation of Scots and English property law, it may nevertheless be the case that both legal systems have drawn water from the same well in this area and that the 'no property in a corpse' rule, and the substantive justification for it, is common to both jurisdictions. An investigation of this issue consequently forms the subject-matter of the next chapter.

1.5 Conclusion

There are, unquestionably, superficial similarities between the law of 'property' in Common and Civilian jurisdictions, but such are simply that: Superficial. Though the word might be used to refer to both a 'thing' and 'ownership' of that thing in the two largest legal traditions, the extent and meaning of those words varies greatly across jurisdictions. The suggestion that 'ownership' is no more than a 'primitive, pre-legal concept', or a convenient shorthand to describe a 'bundle of rights' cannot conceptually be reconciled with a legal system in possession of a sophisticated concept of *dominium.* The notion that a 'right to exclude', or 'right to possess', or some other right forms the *sine qua non* of 'property', likewise, does not conceptually fit within a legal system which recognises a clear divide between 'possession' and 'ownership'. Thus, though it might be tempting to overstate the differences between Common and Civilian 'property law', it remains the case that lawyers schooled in one tradition generally reason in a manner that is not reconcilable with the alien tradition.

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however, to conflate the importance of consecration with the recognition of *res religiosa*; as noted above, consecration was pertinent only to the creation of *res sacrae*. Any private citizen could create a *res religiosa* by burying a cadaver in their land. In spite of the connotations of the name, consecration was not an essential element of *res religiosae*: See Rives, *The Sacred*, p.173.

[484] Coke, *Institutes*, III, 203

In Scots law, as in Roman law, 'property' might be understood either as a *res* or as *dominium*. *Dominium* can conceivably be described as the 'sovereign, or primary real right', but to understand the notion as such is to mask the salient aspects of the legal concept. At its core, given that Scots law (in common with most developed legal systems) adheres to the 'Gaian schema' of 'property law' and in that schema 'ownership' cannot conceivably be described as a *ius* or 'right', it follows that *dominium* is best defined as a relationship between a person (*persona*) and a thing (*res*). This relationship of *dominium* confers, upon the *dominus*, *ius disponendi* (authority to dispose of the thing), which itself encompasses *ius fruendi*, *utendi* and *abutendi* (authority to claim the fruits of a thing and to use and abuse that thing as one pleases). Though the *iura* (contemporaneously understood as 'rights') which arise from *dominium* may suggest commonality with the Common law conception of 'property' as a 'bundle of rights', this analysis does not imply such; 'rights' are not 'stripped out of the bundle' in Scots or Roman jurisprudence, but rather the *dominus'* ability to exercise unbridled *ius disponendi* may be limited 'by law or by paction'. So long as the law continues to recognise an individual as *dominus*, that individual legally retains 'property' in the thing.

Some things, in Scots and in Roman law, cannot be 'owned' by private persons, however. These things are *res extra nostrum patrimonium* and consequently *res extra commercium*. This does not negate the status of such things as 'property', since they remain 'things' which might be 'possessed' and may be deemed to be 'owned' by the State (or some organ of the State), but rather means that, rather than being subject to the usual rules of the *ius quod ad res pertinet*, they are governed by different rules, once created. The human body, though recognised as a *res* in Roman law (and, by implication, in Scots law also) was not afforded any special status in the *ius quod ad res pertinet*: It was not ordinarily *res extra nostrum patrimonium*. Cadavers could, however, become a constitutive element of a *res religiosa* on their reverential interment. This had the effect of ensuring that, so long as the

sepulchre remained intact, the body buried therein was removed from the ambit of the ordinary rules of 'property law'.

The root of the English rule that 'there can be no property in a corpse' is often traced to the English jurist Coke, who regarded the 'buriall of the cadaver' as a matter relegated to 'ecclesiastical cognizance'. Given that Roman law and Scots law consider buried cadavers to be *res divini iuris*, it might be inferred that there is commonality between the regulation of the human body, after death, in Scots and English law.[485] The foundational distinction between the two systems of rules that govern 'property law' in Scotland and in England and Wales does not necessarily mean that a particular rule, such as there being 'no property in a corpse', is not common to both systems. With that said, however, in order to determine whether or not such a rule can logically operate within both legal systems, one must consider the nature and structure of those legal systems. Given the comparative differences in the interpretation of the word 'property', it must be thought that the implications of such a rule – if such is indeed accepted in both a Common law and a Civil law system of 'property' – must differ depending on the jurisdiction in question. Having carried out such a comparative exercise in this chapter, the next chapter of this thesis shall consider the extent to which this rule can conceivably be said to apply in Scotland.

[485] The Canon law, in England, remains a body of jurisprudence separate from the Common law; unlike the indigenous English Common law tradition, English Canon law remains rooted in principles of Roman and Continental European jurisprudence: See Mark Hill QC, *Ecclesiastical Law*, (4th Ed.) (Oxford: OUP, 2018), paras.1.14-1.16

Chapter Two: 'No Property in a Corpse'

2.1 Introduction

The 'no property in a corpse' rule clearly operates within the law of England and Wales.[486] As the Court of Appeal held in the 1999 case of *R v Kelly*,[487] the preclusion of property in human biological material is now so entrenched that"[I]f that principle is now to be changed, in [the Court of Appeal's] view, it must be by Parliament, because it has been express or implicit in all the subsequent authorities and writings to which [the Court has] been referred that a corpse or part of it cannot be stolen."[488] All of the legal material – whether civil or criminal – cited to the Court of Appeal, from the previous 150 years, supported the 'no property' rule explicitly or impliedly.[489] However, particularly from the time that it became possible to store and transplant organs and tissue, the rule has been subject to sustained and adverse academic criticism[490]

Contemporary academic discourse concerning the law as it pertains to the human body appears, generally, to assume that the law of Scotland is substantially similar to the law of England and Wales and that, as such, there can be 'no property' in the human body, or its parts, or its derivatives – save for in exceptional cases[491] – in this jurisdiction.[492] Certain

[486] Goold *et al*, *Persons, Parts and Property*, *passim*

[487] [1999] Q.B. 621

[488] *Ibid. Per* Rose LJ, at pp.630-631

[489] Per Rose LJ at 630 – 631.

[490] Peter F. Nemeth, *Legal Rights and Obligations to a Corpse*, [1943] Notre Dame Law Rev. 69; P.D.G Skegg, *Medical Uses of Corpses and the 'No Property' Rule*, [1992] Med. Sci. Law 311; Andrew Grubb*, 'I, Me, Mine': Bodies, Parts and Property*, [1998] Medical Law International 299; Vanessa White, Property Rights in Human Gametes in Australia, [2013] JLM 1; Goold *et al*, *Persons, Parts and Property*, pp.1-3

[491] E.g. as in *Holdich.*

[492] Indeed, the approach to the regulation of human biological material is generally regarded as so similar to that of England and Wales that the English 'no property' rule is said to be representative of 'UK law', even by academics based in Scotland: See, for example, Thomas L. Muinzer's review of Heather Conway's *The Law and the Dead*, [2017] Med. L.R 505, p.510, in which Muinzer (then based at the University of Stirling, now of the University of Dundee) states that '[I]n UK law, the human body has conventionally been placed outside of the realm of property'. See also Loane Skene, *Proprietary Rights in Human Bodies, Body Parts and Tissue:*

practitioners,[493] politicians[494] and Senators of the College of Justice have also indicated a belief in the veracity of this assumption. In the 2012 case of *C v Advocate General*[495] Lord Brodie declared, in passing and uncritically, that in law there can be no property in a human corpse.[496] It is, however, difficult to reconcile such a position with the present operation of Scots criminal law.

Unlike in England, where the judiciary have ostensibly prevented the recognition of ownership or property in cadavers since (at least) the Eighteenth century in civil and criminal cases alike,[497] in Scotland there is authority to suggest that human bodies can be the object of theft and, as such, that human bodies can be said to be property for the purposes of the criminal law.[498] Indeed, in spite of the authorities which suggest that the 'no property' rule operates in Scotland as it does in England and the wider Common law world, there is also contradictory authority which suggests that possessory or proprietary rights may be vested in human biological material.[499] As such, unlike in England, the rule cannot be viewed as express or implicit in *all* of the Scottish authorities and writings; the *ratio* of *R v Kelly* can be clearly distinguished on this basis.

For this reason alone, to say nothing of the fundamental structural differences between Scots and English property law, it follows that a consideration of the extent to which the law

Regulatory Contexts and Proposals for New Laws, [2002] Legal Studies 102, p.103, wherein 'Britain' is described as a singular Common law jurisdiction.

[493] *Reclamation of Metals and Other Materials following Cremation Combined advice covering England, Wales and Scotland* [2004]

[494] See HC Deb 20 December 1960 Vol.632 cc1231-58

[495] 2012 SLT 103

[496] *Ibid.* para.63

[497] See *Handyside's Case* (1749) 2 East PC 652, in which Chief Justice Willes expressly stated that no person could be said to hold any property in corpses and *R v Lynn* (1788) 1 Leach 497 which, according to Goold and Quigley, implicitly gave judicial recognition to the rule by the nature of its judgment: See *Human Biomaterials*, p.238

[498] *M'Kenzie* (1899) 3 Adam 57n, *Dewar v HM Advocate* 1945 J.C 5, Burnett*:* See also Brown, *Plagium*, *passim*.

[499] See *Holdich; Dewar* (*ibid*.); *M'Kenzie* (*ibid*.)

of Scotland is 'as settled as the law of England'[500] on this matter is warranted. This chapter consequently does three things. Firstly, it examines the historical development of the 'no property rule' in English law and concludes that the rule become entrenched in the Common law tradition as a result of a historical accident. Secondly, this chapter analyses the sustained academic and judicial criticism of the rule in Common law jurisdictions and concludes that such criticism is both warranted and justified. Thirdly and finally, this chapter examines the basis on which some Scottish judges and commentators have asserted that the rule also forms a part of Scots law and concludes that they are incorrect; further to this, in recognition of the noted problems with the 'no property' rule, the chapter notes that it would not be desirable for Scots law to move to adopt this particular rule.

2.2 English Law and the 'No Property Rule'

2.2.1 Coke and the Origins of the Rule

The Court of Appeal in *R v Kelly* noted that all of the authorities to which Counsel referred to in the course of their submissions expressly stated or implied that cadavers were legally precluded from being the object of theft in English law.[501] The authorities to which the court was referred stretch back over several centuries. In 1857, Erle J held, in deciding the case of *R v Sharpe*,[502] that 'our [English] law recognises no property in a corpse'.[503] This statement was subsequently considered and affirmed in the civil case of *Williams v Williams*,[504] in which Kay J held, on the authority of *Sharpe*, that "[I]t is quite clearly the law of this country that there can be no property in the dead body of a human being".[505] Thus, the 'no property' rule

[500] To use the words of the Sheriff in the case of *Robson*, p.353
[501] *Kelly*, pp.630-631
[502] [1857] Dearsly and Bell 160
[503] *Ibid.* p.163
[504] (1882) 20 Ch. D. 659
[505] *Ibid.* pp.662-663: Kay J. expressly states that the rule was declared in *R v Sharpe.*

has expressly been a part of English law since at least 1857, but the idea that there can be 'no property in a corpse' has a longer history than this.

Though the rule was first expressly affirmed as a principle of English law in the Nineteenth century, the idea that 'there can be no property in a corpse' can be traced back to the beginning of the Seventeenth century.[506] Goold and Quigley note that several commentators have taken the view that the roots of the rule lie in *Haynes's Case,*[507] which was heard in 1613. This case concerned a man (Haynes) who disinterred four corpses and took the burial shrouds in which the bodies were wrapped. After reburying the cadavers, he made off with the sheets. Haynes was subsequently charged with theft and, in sustaining the charge as relevant, the judges ruled that 'the property of the sheets remain in the owners, that is, in him who had property therein, when the dead body was wrapped therewith; for the dead body is not capable of it'.[508]

This judgment is often interpreted as authority for the claim that the dead body is not capable of being property.[509] On analysis, the words used do not appear to suggest this. Rather, it seems the judgment simply posits the proposition that dead persons are not capable of proprietorship.[510] That this is the correct interpretation of the judgment is evidenced by the fact that the judges referred to *Corven's Case*[511] as authority for the posited proposition; this case was not concerned with the question of whether or not dead bodies could be held as property, it simply held that the property of a deceased person transfers to their heir on death, as the dead

[506] Dianne Nichol, Don Chalmers, Rebekah McWhirter and Joanne Dickinson, *Impressions on the Body, Property and Research* in Goold *et al*, *Persons, Parts and Property*, p.13; see also Daniel Sperling, *Posthumous Interests: Legal and Ethical Perspectives*, (CUP, 2008), p.88

[507] (1613) 12 Coke Reports 113

[508] *Ibid*.

[509] Imogen Goold, *Flesh and Blood: Owning our Bodies and their Parts,* (Hart Publishing, 2017)

[510] Walter F. Kuzenski, *Property in Dead Bodies,* [1924] Marq. L. Rev. 17, p.18; TMK Chattin, *Property in Dead Bodies,* [1968] West Virginia Law Rev. 377 and J. Kenyon Mason and Graeme Laurie, *Consent or Property? Dealing with the Body and its Parts in the Shadow of Bristol and Alder Hey,* [2001] Mod L. Rev. 710, p.714

[511] (1604) 12 Coke Reports 105

are not capable of holding things in their patrimony.[512] That this interpretation of *Haynes's case* is correct is also indicated by the writings of Coke, who consulted with the judges from *Haynes's Case* and thereafter stated, in his *Institutes,* that the case was decided as it was because 'the dead body is not capable of any property, and the property of the sheets must be vested in some body'.[513] It seems that Coke considered that, since the law considered the burial sheets to be 'things' for the purposes of law, they necessarily had to be held in the patrimony or estate of some legal person, as they were not *res nullius*. The use of the word *'must'* certainly suggests an imperative; by definition, the term expresses necessity.

Although Coke ostensibly maintained that all things must, necessarily, have an owner (or at least capable of becoming *fiunt singulorum* by way of *occupatio* if they temporally exist as *res nullius*), he also stated that the human corpse was *nullius in bonis* – 'in the property of no-one'.[514] As such, many commentators hold that both Coke, and early English law more widely, considered the body to be more than a mere 'thing'[515] and that, as an entity distinct from profane objects, cadavers were not subject to the ordinary rules of property law. In deciding the case of *In re Johnson's Estate,*[516] Surrogate Delahanty expressed the view that considering a 'sacred object' such as the human body to be no more than a piece of mere property would have been 'unthinkable' for Lord Coke, or his contemporaries.[517] 'A man had the right to the decent interment of his own body in expectation of the day of resurrection'.[518]

[512] *Ibid.* p.105

[513] Coke, *Institutes*, III, 110

[514] *Ibid.*, p.203

[515] Jay L. Garfield, Patricia Hennessey, *Abortion, Moral and Legal Perspectives*, (Lexington: UMP, 1984) p.284, note 114; see, also, *In re Johnson's Estate* (1938) 7 NYS 2d 81

[516] (1938) 7 NYS 2d 81

[517] *In re Johnson's Estate* (1938) 7 NYS 2d 81

[518] *Ibid.*

The notion that the human body holds a special significance is consistent with the Christian theological concept of the *imago dei*;[519] the notion that 'man'[520] is made in, or reflects, the image of God, ultimately ensuring that the human body is sacrosanct.[521] Likewise, as stated in Corinthians 6.19, orthodox Christian theology holds that a person's body is not 'their own' and that the human body is the 'temple of the Holy Ghost'.[522] Indeed, such was recognised in the case of *Yearworth v North Bristol NHS Trust*,[523] Lord Judge LCJ, Wilson LJ and Sir Anthony Clarke MR each noted that Coke's claim appears to imply that he placed a special significance on the body, since 'the body was the temple of the Holy Ghost and it would be sacrilegious to do other than to bury it and let it remain buried'.[524] It is for this reason that these judges believed Coke consigned the interment of the cadaver 'to ecclesiastical cognizance'[525] and (partially) on this basis that the judges sought to justify the operation of the 'no property' rule within English law.[526]

The human body itself was not afforded any special status in Roman law; as noted, it was not until the cadaver was reverentially interred that it would be turned over to the *ius divinum*.[527] Alone, the body was not regarded as *res sacrae, res religiosae* nor *res sanctae* by the Romans. Rather, recalling the Gaian schema[528] – which has proven enduring in English as

[519] See Nico Vorster, *Created in the Image of God: Understanding God's Relationship with Humanity*, (Wipf and Stock Publishers, 2011), p.5; Genesis 1:26-28

[520] Used in a broad, all-encompassing sense which includes women: A.H. Konkel, *Male and Female as the Image of God*, [1992] Didaskalia 3/2; Henri Blocher, In the Beginning (Leicester: Inter-Varsity Press, 1984) pp.81-82; Genesis 1:26

[521] Ryan Klassen, *As The Image: A Functional Understanding of the* Imago Dei, [2004] Quodlibet Journal: Volume 6 Number 3

[522] *Yearworth v North Bristol NHS Trust* [2010] Q.B 1, para.31

[523] *Ibid.*

[524] *Yearworth*, para.20

[525] Meaning that disputes concerning cadavers were to be dealt with in accordance with Canon law in the Church courts, as opposed to by common law in the secular courts: Coke, *Institutes*, III, p.203

[526] See *Yearworth* para.31 and para.3.2.1, *infra*.

[527] See 1.4.2, *supra*.

[528] See *ibid*.

well as in Civil law[529] – human beings were seen as among the plainest of examples of corporeal things.[530] The human body is not included among the *res incorporales* by implication, as one of the *res innumerabiles*. Rather, it is explicitly listed as an obvious example of a tangible thing. Accordingly (as is obvious when one considers the Roman institution of slavery) human beings – and thus human bodies – were within the ambit of property and ownership in Roman jurisprudence.

With that said, although the human body held no special status to remove it from the ordinary rules of property law (unless that body was living and its inhabitant was regarded as a *persona*), a cadaver could be removed from the sphere of ordinary property law if it were interred with the permission of all those with a legal interest in the burial plot[531] within certain defined parameters.[532] In such instances, a *res religiosa* was created and the corpse and its resting place ceased to be separate entities and became one. The doctrines of *accessio* and *specificatio* were received into the Common law, as well as Civilian legal systems;[533] indeed, there is authority from the US which suggests that a cadaver accedes to its grave.[534] In Roman law, it is apparent is that, although the presence of the body itself was legally required for the creation of *res religiosae*,[535] the corpse alone was never considered sacred.[536] The consecrated plot, where the body was interred, was the *locus religiosus* and therefore the *res* consigned to

[529] Gretton, *Ownership*, p.805

[530] See para.1.2.4, *supra*.

[531] Dig.1.8.6.4 (Marcianus); Dig.11.7.2.7 (Ulpian); Dig.11.7.2.8 (Ulpian); Dig.11.7.34 (Paul)

[532] Olga Tellegen-Couperus, *Law and Religion in the Roman Republic*, (BRILL, 2011) p.173

[533] Carey Miller and Irvine, *Corporeal Moveables*, para.3.01

[534] See *Meagher v Driscoll* 1868 99 Mass 281, where Foster J declared that 'after burial it [a dead body] becomes a part of the ground to which is has been committed… Any person in the actual possession of the land may maintain this action [trespass quare clausum] against a wrongdoer' (at p.284). Subsequent US cases vindicated this analysis, as noted in an anonymous case comment published in the Virginia Law Review: *Dead Bodies, Damages: Recovery Allowed for Mental Suffering Where Widow's Right in Husband's Body Was Infringed*, [1950] Virginia Law Review 1114, p.1114

[535] Dig. 11.7.44

[536] Rives, *Control of the Sacred*, p.172

the *ius divinum*; put plainly, it was the immoveable land, when combined with the interred body, which was of religious significance and consequently protected by sanction.[537]

There is a close parallel between this Roman conception of *res religiosae* and Coke's consignment of (specifically) 'the buriall of the cadaver' to the realm of ecclesiastical law. Coke's use of the phrase *nullius in bonis* indicates that he was considering Roman or Civilian sources in framing this part of his *Institutes*.[538] The fact that he consigns the 'buriall' of the cadaver, and not simply the 'cadaver', appears to suggest that, as for the Romans, it was the *nova species* (new entity) created by the interment of the body in its resting place which held significance as a sacred object. The corpse itself was incidental. It existed as a mere thing until its interment. Thereafter, the body ceased to be an item of 'property' as it became a constituent part of a *res religiosa*.

This view is supported by a plain reading of Coke's *Institutes.* There, the author does not appear to have considered the corpse itself to be significant; he notes that in English law the bodies of living prisoners 'until execution remaineth [their] own',[539] but that thereafter the Crown attains full and unfettered *ius disponendi* over the bodies and body parts of those executed prisoners.[540] *Ius disponendi,* understood as the authority to dispose of a thing, is often said to be a – if not *the* – salient feature of *dominium*.[541] Thus, by recognising that the Crown was invested with *ius disponendi* over the human body, it appears that Coke considered unburied cadavers to be no more than *corpus vile*, a base object within the ambit of the law of property.

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[537] *Ibid.* and see Dig.11.7.2.1 (Ulpian): *'"in locum alterius" accipere debemus sive in agro sive in aedificio'* ["To a place belonging to another person" should be understood to denote either a piece of land or a building] – *per* Alan Watson (trs.), *The Digest of Justinian*, Vol.I (University of Pennyslavania Press, 1985), p.355.

[538] Justinian uses this phrase in describing the nature of the *res extra nostrum patrimonium*: See J.2.1.9

[539] Coke, *Institutes*, III, p.215

[540] 2 Haw. 443

[541] See para.1.2.4, *supra*.

It is also noteworthy that Coke describes the corpse as no more than *caro data vermibus* – 'flesh [or meat] given to worms'.[542] A folk etymology suggests that the word 'cadaver' itself stemmed from an abbreviation of this phrase, which is found in other sources,[543] however it has been established that the word actually derives from the verb *cadere* – to fall.[544] Although it is unclear whether Coke is utilising the phrase *caro data vermibus* as a rhetorical flourish or as a denigration of the body as worthless, it is submitted that he would not have described the corpse as such if he did consider the dead human body to be a sacred object.

This submission finds support in earlier sources. The judges of *Haynes's Case* clearly did not ascribe to the view that human corpses exist as entities imbued with any value, as they describe the dead human body as nought 'but a lump of earth'.[545] This notion is grounded in the Old Testament; the prophet in Ecclesiastes proclaims: *'*All go unto one place; all are of the dust, and all turn to dust again'.[546] Thus, it appears that early English law held that the living human body, as 'the habitation of a spirit or soul' to use the words of T. B. Smith,[547] reflected the *imago dei* (in the view of the law)[548] and the fact that the body was in the patrimony of God while 'inhabited' by the human spirit (and the Holy Ghost), while the dead body, absent such divine essence, was merely *corpus vile*.[549]

The suggestion that the act of burial may serve to change the legal character of the area in which the corpse is interred finds support in Anglo-American, as well as Roman, law.

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[542] Coke, *Institutes*, III, 203

[543] ***Ca****ro* ***da****ta* ***ver****mibus*; see James Edelman, *Property Rights to our Bodies and to their Products,* Plenary presentation at the Australian Association of Bioethics and Health Law Conference, 3 October 2014, p.18

[544] *Ibid*.

[545] (1613) 12 Coke Reports 113

[546] Ecclesiastes 3:20

[547] Smith, *The Human Body*, p.245

[548] The existence of the *imago dei* was, prior to the reformation, exclusively justified by reference to the fact that humans have 'reason, intentionality and intellect' – J. Wentzel van Huyssteen, *Alone on the World? Human Uniqueness in Science and Theology,* (William B. Eerdmans Publishing Company, 2006), p.127 – thus, it is not the *corpus* which exists in the *imago dei,* but rather the whole human person as a living, thinking creature.

[549] J. Wentzel van Huyssteen, *Alone on the World? Human Uniqueness in Science and Theology,* (GrandRapids: William B. Eerdmans Publishing Company, 2006), p.161

Drawing on Coke, the court in the Massachusetts case of *Meagher v Driscoll*[550] suggested that a cadaver accedes to the burial-site once interred.[551] This analysis was followed in the Missouri case of *Guthrie v Weaver*[552] and – though America never had any ecclesiastical courts – it has been noted elsewhere that these cases adhered to a 'strict Common law [*i.e.*, English law] view' which stressed the removal of grave-sites from the law of property only after the interment of the cadaver.[553] Although the reasoning in *Meagher* and *Guthrie* was conducted in a jurisdiction furth of England, the decisions of the respective courts were founded upon the principles of English law as it was espoused by Coke.

Thus, though Coke might be cited as the progenitor of the 'no property' rule, it is plain that he and his contemporaries did not intend to ascribe any specific or special significance to dead human bodies, save in the specific circumstances in which those bodies were properly and respectfully buried. Indeed, it appears clear that Coke did not declare or establish that there could be 'no property in a corpse'; rather, he simply emphasised the fact that, as for the Romans, a cadaver ceased to subsist within the ambit of property after its burial. This fact appears to have been overlooked by later writers and, as the 'no property' rule became entrenched, the Roman roots of the notion that buried bodies are *nullius in bonis* since they are a part of a greater *res divini iuris* have been forgotten. Indeed, even the mere parallels which can be drawn between the Roman law and Coke's consignment of (specifically) the 'buriall of the cadaver… to ecclesiastical cognizance'[554] are rarely noted and it seems that later English law ultimately moved away from Coke's thinking on this matter.

[550] 1868 99 Mass 281

[551] *Meagher*, p.284

[552] 1 Mo. App. 135 (1876)

[553] See the discussion led by the aforementioned anonymous author in the Virginia Law Review: Virginia Law Review: *Dead Bodies, Damages: Recovery Allowed for Mental Suffering Where Widow's Right in Husband's Body Was Infringed*, [1950] Virginia Law Review 1114, pp.1114-1115

[554] Coke, *Institutes*, III, 203

It is significant that, as the 'buriall of the cadaver' was given over to the Ecclesiastical courts, these courts determined much of the law pertaining to cadavers in addition to the general principles of Ecclesiastical law concerning the safeguarding the protection of consecrated ground.[555] The English Ecclesiastical courts operated – indeed, continue to operate – on the basis of Civilian procedure and jurisprudence.[556] Doctors' Commons was routinely referred to as 'the College of Civilians' for this reason.[557] In determining the consistency and conformity of English law with the principles espoused above, the writings of English Civilists and Canonists merit consideration.

2.2.2 Wood, Blackstone and the Arresting of Corpses

At the turn of the Eighteenth century, the English jurist Thomas Wood published his first significant treatise: The *New Institute of Imperial or Civil Law*. This scholarly contribution was followed, in 1720, by Wood's *Institute of the Laws of England*. In the latter, Wood sets out the legal consequences of *Haynes's Case* in plain terms: 'He who takes off a shroud from a dead corpse may be indicted as having stol'n it from the executors or administrators or other owner thereof when it was put on. For a dead man is not capable of having any property'.[558]

Although Wood clearly elucidated the *ratio* and effect of *Haynes's* case in terms akin to those discussed above, elsewhere in his text, he undermines the earlier suggestion that an interred corpse accedes to the grave in which it is interred and posits the 'no property' rule in the plainest possible terms: *'*the dead body belongs to no one; but the coffin, shrowd [sic] etc... belong to the executors or administrators or other owner'.[559] In listing the component pieces of

[555] See the judgment of Sir William Scott, Lord Stowell, in the case of *Gilbert v Buzzard* (1820) 3 Phil 335, pp.344-362

[556] See the discussion in F.W Maitland, *Roman Canon Law in the Church of England*, (1898)

[557] < https://www.londonremembers.com/subjects/doctor-s-commons?memorial_id=2079>

[558] Wood, *Institute*, III, 368

[559] Wood, *Institute* I, 67

a properly interred cadaver severally, Wood implicitly indicates that he does not consider the interred corpse to have acceded to the grave-site.

With that said, in positing the 'no property' rule, Wood cites, in support of his proposition, *Corven's Case*,[560] which, as noted *supra*,[561] was not concerned with the question of whether or not corpses themselves could be owned. Nothing in the reported decision suggests that cadavers have no proprietary characteristic and so Wood's citation must be read only as applying to the latter half of his statement; that is to say, the citation of *Corven's Case* provides authority only for Wood's proposition that 'the coffin, shrowd [sic] etc... belong to the executors or administrators'.[562]

Wood's positing that 'the dead body belongs to no one' can, thus, be read in one of two ways. Firstly, it may be read as the first plain statement of the 'no property' rule; the ancestor or progenitor of the modern common law rule. Secondly, and more conservatively, it may be read as an affirmation of the already extant rule that the corpse, *once buried*, ceases to exist within the ambit of property law. The latter point receives support from the fact that, read within the context of the text as a whole, Wood is clearly discussing the law as it pertains to burial when he posits the statement. There is nothing to suggest that his statement can be (in context), or is to be, taken as applicable in respect of unburied cadavers.

As might be suggested by the nature of the two distinct *Institutes* which he authored, Wood stood 'with a foot in both of the camps of English law – Common and Civilian'.[563] Indeed, in his text on the Civil and Canon law, Wood directly illustrates his understanding of the *res religiosae*:

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[560] (1604) 12 Coke Reports 105

[561] See para.2.1.1

[562] Wood, *Institute* I, 67

[563] Robert B. Robinson, *The Two Institutes of Thomas Wood: A Study in Eighteenth Century Legal Scholarship*, [1991] Am. J. Legal Hist 432, p.432

> "*Res Religiosae*, or religious things, are those places into which the body, or principal part of the body such as the head, bones or ashes of a dead man, are brought to be perpetually buried there by him that has a right to bury in that place. Every private person may make a religious place by his own authority, provided he has the whole right of ground in himself, or leave from the lawful owner." [564]

This account of the operation of *res religiosae* draws on the *Digest* as authority[565] and is consistent with the account of the *res divini iuris* discussed *supra*.[566] By Wood's account, the law relating to the *res religiosae* operated within the context of English Canon law.[567] Accordingly, given that the 'burial of the cadaver' was within 'ecclesiastical cognizance', and as the concept of *res religiosae* operated within the law governing ecclesiastical cognizance, one must understand Wood's claim that 'the dead body belongs to no one' within the context of the complex interrelation between Common, Civil and Canon law which existed within the common law of England at the time of Wood's writing. From this, it must be emphasised that Wood cannot be considered a firebrand who lit the torch-paper of the 'no property' rule. Rather, he and his work on this topic must be read narrowly; the legal position with respect to the base, unburied cadaver was not espoused in his works. His comments concerned only the dead body when it was respectfully interred. Ultimately, in spite of initial appearances, it seems that the 'no property' rule cannot be regarded as having received its first articulation in the work of Wood.

Certain statements made by Blackstone in his *Commentaries on the Laws of England* are often cited as providing an authoritative proclamation in favour of the 'no property' rule. Blackstone considered that the heirs to an estate hold 'no property' in the 'bodies or ashes' of

[564] Wood, *New Institute*, II, 86
[565] Dig.11.7.3 (Ulpian); Dig.11.7.41-43 (Callistratus, Florus and Papinian, respectively)
[566] Para.1.3, *supra*.
[567] Wood, *New Institute*, II, 86-87

their ascendants[568] and that the illicit taking of a corpse is not to be regarded as actionable as theft unless the grave clothes were carried off with the body.[569] As with Coke[570] and Wood,[571] the grave-side monuments were regarded, by Blackstone, as property within the cognisance of common law,[572] but unlike Coke, Blackstone does not expressly limit his comment on the subject to 'the buriall of the cadaver';[573] ergo, at first sight, the question of the status of the grave-site itself ostensibly remains unanswered in his *Commentaries*.[574] One might suggest that there is consequently some degree of ambiguity as to whether Blackstone regarded the consecrated ground in which a cadaver was respectfully interred to be akin to a *res religiosa*, in which there could be no property in the common law, or whether the *terra* in which the cadaver was interred was more akin to the monument than the body (i.e., amenable to secular property law).

Like Wood, Blackstone, of course, was a Doctor of Civil Law and it can thus be inferred that he would have been in possession of some learned knowledge and understanding of the *ius commune*.[575] Unlike Wood, Blackstone did not deign to comment, at length, on the operation of Civil or Canon law within England, practising, as he did, at the Common law bar and, later, as a Common law judge, but it might be thought that he would have laid claim to knowledge of Roman concepts such as that of *res religiosae* and that, as a trained Civilian, he would have understood the consequences of relegating the 'buriall of the cadaver' to ecclesiastical cognizance. It is, of course, not safe to assume that Blackstone necessarily

[568] Blackstone, *Commentaries*, II, 429

[569] *Ibid*., 236

[570] Coke, *Institutes*, III, 203

[571] Wood, *Institute*, p.67

[572] Blackstone, *Commentaries*, II p.429

[573] *Ibid.*

[574] Blackstone says that the heir can bring no civil action against one who disturbs the remains of his ancestors, but this does not answer the question of what status the body holds in ecclesiastical law: *Ibid.*

[575] William B. Odgers, *Sir William Blackstone*, [1918] Yale L.J 599, p.611

remembered all aspects of his Civil law training when composing his *Commentaries*, however the fact that he emphasised that interference with the interred body could not form the basis of a civil action in the common law certainly leaves open the possibility that some remedy under ecclesiastical law (beyond the scope of Blackstone's treatise) was envisaged.

As such, Blackstone's *Commentaries* on this subject can be read as making essentially the same point as that made by Coke and Wood – that a properly interred corpse is outwith the ambit of property law. Consideration is limited to the body after its burial; nothing is said of the act of stealing a cadaver *prior to* its burial. Thus it might be suggested that Blackstone's jurisprudence also corresponds to Roman legal thought insofar as it concerns this matter. It cannot be confidently said that Blackstone misunderstood or misconstrued the principles of the either the Common or the Civil law.[576] As a learned scholar, it is likely that he would be aware of the full effect, and the purpose, of leaving the cadaver to ecclesiastical cognizance. The same, however, cannot be said of those Common law practitioners who succeeded him.

Whatever the original intention of Coke, Wood and Blackstone, by the mid-Eighteenth century the seeds of the 'no property' rule, in its present form, began to properly germinate. East reports that in the 1749 case of *Exelby v Handyside*,[577] Lord Chief Justice Willes held that 'no person had any property in corpses',[578] although it appears that this case was never

[576] Hardcastle did postulate that Blackstone misinterpreted the significance of *Haynes's Case* in holding that 'stealing the corpse itself, though an act of great indecency, is no felony unless some of the gravecloths be stolen with it' (Blackstone, *Commentaries*, IV, 2). In the alternative, it is here suggested that Blackstone, in limiting his discussion to the operation of the common law, actively and acutely avoided a discussion of the legal position in respect of the ecclesiastical law and so simply did not deign to discuss the reason that carrying off a dead body from a gravesite was not a matter for the secular courts. Indeed, given that 'felonies' (as opposed to 'misdemeanours'), in English law, were denoted capital crimes, humane lawyers and jurists were incentivised to find that certain activities which, on the face of it, would appear felonious were in fact (for some particular technical reason) not so. By finding that interference with a buried cadaver was not a felony, for the technical reason that such cases were not in the cognisance of the Common law courts, those accused of tampering with grave-sites would be spared execution.

[577] (1749) 2 East PC 652

[578] *Ibid.* p.652

officially reported[579] and no judgment was ever officially given.[580] This case consequently has no value as a precedent, but with that said, the very fact that the Lord Chief Justice deigned to pass comment, in this manner, cannot be overlooked. The statement is wider in scope than any that came before it, applying, as it stands, to corpses generally and the case was not concerned with the burial or interment of the dead bodies in question.[581] Thus, while '*Exelby v Handyside* is a palpably unsatisfactory case upon which to base a 'no property' rule for unburied corpses [as] it is not a decision on the point, let alone one binding on courts to follow it',[582] the case can certainly be held to mark 'the earliest direct English authority'[583] in favour of the 'no property' rule.

The later criminal case of *The King v Lynn*[584] concerned a ressurectionist (Lynn) charged with the disinterment and carrying off of a cadaver. Although the cadaver was carried off by Lynn, the question of ownership of the corpse was not raised at any time in the trial and so Lynn was not charged with any larceny or any other crime against property. The case itself, therefore, provides no positive authority for the proposition that, by this time, English criminal law recognised 'no property in a corpse', in spite of certain claims to the contrary.[585] Indeed, Goold and Quigley note that 'the report of *Lynn* is consistent with the interpretation of Coke as simply denoting jurisdictional boundaries between ecclesiastical and common law'.[586] In further support of that proposition, it should be noted that Wood's treatise on the Common law

[579] Hardcastle, *The Human Body*, p.26

[580] Susan Pahl, *Whose Body is it Anyway?*, <http://www.vanuatu.usp.ac.fj/courses/LA300_Property_Law_1/Readings/LA300_pahl_whosebody.html>

[581] (1749) 2 East PC 652. The case of *Exelby v Handyside* concerned the father of conjoined twins who had died at birth. The midwife had carried off and kept the infants' corpses; the father, in response, raised an action of conversion. As a part of this action, it was necessary for the father to establish that he had some property right to the object of the alleged conversion. The court rejected the father's claim that conversion had occurred.

[582] Paul Matthews, *Whose Body? People As Property*, [1983] Curr. Legal Prob. 193, p.208.

[583] M. Hudson, *Rights of Possession in Human Corpses*, [1997] J. Clin. Pathol. 90, p.90

[584] (1788) 2 TR 733, 100 ER 395

[585] See Goold and Quigley, *Human Biomaterials*, pp.238-239

[586] *Ibid*., p.238

recognises that "to take away goods, whereof the Owner is Unknown, sometimes is no felony'.[587] Thus, the reason for the lack of a larceny indictment may be explained by the operation of that particular principle of criminal law, as no one in Lynn sought to claim possession of the corpse and the courts had no reason to determine who may have hypothetically owned it at the time that Lynn took it.

That the 'no property' rule did unquestionably form a part of the common law of England in the Eighteenth century is consequently unclear. In spite of the above mentioned strands of legal thought, which indicate that the 'no property' rule was at least thought, by some judges, to form a part of English law, the English courts did recognise certain features of 'property' in corpses *per* the civil law, if not necessarily the criminal, prior to the turn of the Nineteenth century.[588] Corpses could be arrested to secure the payment of debts until the 1804 case of *Jones v Ashburnham*,[589] in which Lord Ellenborough ruled that such arrests were unlawful on grounds that they were *contra bonos mores*.[590] In Kuzenski's view, it is difficult to conceptualise the purpose of this right to arrest, 'which is legally but an attachment of the body', if corpses had neither economic value nor a proprietary characteristic.[591]

The arrestment of corpses was a common and established practice in England prior to the Nineteenth century.[592] The practice was not exclusive to England and the wider Common law world; it was also known to occur in the Netherlands and other jurisdictions of the

[587] Wood, *Institute*, III, 368

[588] Kuzenski, *Property*, p.18

[589] (1804) 4 East 469

[590] *Redfield's Surr. Rep.* Vol.4, p.527

[591] Kuzenski, *Property*, p.18. As Steven notes (Andrew J. M. Steven, *Pledge and Lien*, (Edinburgh Legal Education Trust, 2008), para.12-01) there exists American authority that an undertaker cannot exercise a lien over a corpse (*Morgan v Richmond* 336 So 2d 342 (La Ct of App., 1976) and, logically, if a body cannot be 'owned' in law then it follows that 'security rights over it must also be incompetent'. It may, then, be suggested here that the arrestment of a cadaver is closer in form to an arrestment of a person to secure the payment of debt. The English courts, however, employed the language of 'things' and 'possession' in dealing with cases concerned with such 'attachment of the body' – see *infra*.

[592] Kuzenski, *Property*, p.18

Continental European legal tradition (though not, according to the Faculty of Advocates, Scotland),[593] even in spite of the fact that the jurists of the *ius commune* condemned the practice as 'irrational'.[594] At this time, the human body – living or dead – could potentially be imbued with a commercial purpose or economic value; either by being relegated to the status of a slave,[595] or by being arrested to secure the payment of debt.

In the Seventeenth century case of *Quick v Copleton*,[596] Chief Justice Hyde noted that an authoritative precedent had accepted that a woman was held liable to pay in consideration of forbearance to arrest the corpse of her son before such a time as it could be buried. Notably, in the Eighteenth century, the funeral of a deceased aristocrat was halted by an arrest of his dead body[597] (although the legal legitimacy of this occurrence is questioned by Phillimore, the body itself was referred to as a 'thing').[598] As noted, Lord Ellenborough ruled the practice of detaining corpses for the payment of debt *contra bonos mores* in 1804,[599] however it appears to have continued extra-judicially for some time in the Nineteenth century, even after his judgment. In the case of 1841 *R v Fox*,[600] a jailer refused to deliver the body of a deceased prisoner to the executors of the former prisoner's estate until the executors satisfied several outstanding claims against the prisoner. The executors refused to do so and instead the

[593] Faculty of Advocates, *Anent the Arresting of Corpses,* [1677] in Mungo P. Brown and William M. Morison, *Supplement to the Dictionary of the Decisions of the Court of Session*, Volume 3, (Edinburgh: W.C and Tait, 1826) p.136. If the practice pervaded Scotland in fact, it evidently did so without legal sanction.

[594] To use the words of the Faculty: Faculty of Advocates, *Anent the Arresting of Corpses,* [1677] in Mungo P. Brown and William M. Morison, *Supplement to the Dictionary of the Decisions of the Court of Session*, Volume 3, (Edinburgh: W.C and Tait, 1826) p.136; Wood commented on the fact that, though the law of the Twelve Tables ostensibly appeared to permit the practice, 'dead bodies ought not to be hindered from burial, or stopt upon any account, no not for debt, as vulgarly supposed': Wood, *Institute* I, 87. Although the practice was said, by the Faculty of Advocates, to be condemned in Civilian jurisprudence, it was evidently permissible within English common law: See *Quick v Coppleton* 1 Keble 866; (1664) 1 Levinz 161

[595] Though, it must be noted, that the 1687 case of the 'tumbling lassie' – *Reid v Scot of Harden* (1687) (Mor. 9505) – held that 'we have no slaves in Scotland, and mothers cannot sell their bairns', thus providing authority for the proposition that the human body was, in Scotland, entirely *extra commercium* even by this time.

[596] 1 Keble 866; (1664) 1 Levinz 161

[597] *Turner* (1784) *Redfield's Surr. Rep.* Vol.4, p.532

[598] Robert Phillimore (Ed.) *Ecclesiastical Law*, (London: Sweet and Stevens and Norton, 1842), [259]

[599] *Jones v Ashburnham* [1804] *Redfield's Surr. Rep.* Vol.4, p.527

[600] (1841) 2 Q.B 246

Solicitor-General raised a claim for a peremptory mandamus to command delivery of the body to them. In spite of the earlier ruling in *Jones v Ashburnham*, the court in *Fox* held that the defendants were permitted to give answer to justify the attachment of the body,[601] although ultimately they did not choose to do so.

In 1842, as recorded in the case of *R v Scott*,[602] the jailer involved in the case of *Fox* was indicted. Here, the court accepted that the body of the deceased prisoner was 'in the possession of [the] defendant'.[603] This turn of phrase is significant: In English property law, 'possession is considered to be of paramount importance and title i.e., right to possession, counts in disputes over a thing'.[604] Indeed, as it is absent a defined concept of 'ownership' or *dominium*, English law seeks to resolve proprietary disputes by asking which of the parties has the better 'right to possess', in any given vindicatory action,[605] rather than asking who the true 'owner' of the thing in question actually is.[606] That a cadaver was judicially recognised as 'in the possession of' another person is, thus, significant: It indicates that, in spite of *Exelby v Handyside*, the 'no property' rule did not necessarily feature in judicial consciousness where civil cases were concerned; in the words of Pollock and Wright, 'possession is presumed from detention… possession in fact, with the manifest intent of sole and exclusive dominion, always imports possession in law'.[607]

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[601] 'I think this is a case in which… the mandamus should be peremptory in the first instance. If Scott has any answer to give, he can do so, not by way of return, but in shewing cause why an attachment should not issue': *Fox*, p.247 *per* Lord Denman C.J.

[602] (1842) 2 Q.B 248n

[603] *Ibid.*

[604] Liang, *Title Conflicts*, p.24; see also para.1.2.1, *supra*.

[605] As there is no 'ownership' in English law, there is consequently no real *actio rei vindicatio* in that legal culture: See *ibid*. Any claim that one is the better possessor of a thing than another is under English law is practically analogous to a Civilian vindicatory action, however, although it must be stressed that this analogy should not be carried too far.

[606] Swadling, *Property*, p.220; Ball, *Boundaries*, p.18 and *ibid.*, p.24

[607] Frederick H. Pollock and Robert S. Wright, *Possession in the Common Law*, (Oxford: Clarendon Press, 1888), p.20

In her 2016 monograph, Heather Conway expressed the view that 'possessory entitlement [to a corpse for the purposes of burial] is an exception to the general rule that there is no property in a corpse'.[608] This equiparating of possession with 'property', understood widely, is indicative of one of the prime difficulties with the 'no property' rule; namely, that it is exceedingly difficult, if not impossible, to avoid using the language of 'property' when one is concerned with disputes concerning cadavers.[609] Though Dr Conway's framing of possessory interests in cadavers as an 'exception' to the 'no property' has been criticised as a distortion of the present legal position,[610] it appears, from the above analysis, to be the most natural outcome of the treating of a cadaver as an object which may be lawfully 'possessed'. Indeed, Conway is not alone in advancing this understanding of the significance of the 'right of possession'.[611]

That is not to say that such a view has not been criticised. In his 2013 article, Thomas Muinzer posited that 'it is established that ... personal representatives have a right to guardianship or possession over the body as [no more than] a necessary and logical element of the carrying out of their duty to bury'.[612] On this basis, in his later published review of Conway's monograph, Muinzer proceeded to argue that this 'necessary and logical obligation alone cannot amount to something that expressly converts a corpse to property'.[613] In support of this position, Muinzer cites the Scottish case of *Holdich v Lothian Health Board,*[614] in which

[608] Heather Conway, *The Law and the Dead,* (Routledge, 2016) p.60

[609] See the discussion *infra*.

[610] Thomas L. Muinzer, *Review of Heather Conway's The Law and the Dead*, [2017] Med. L.R 505, pp. 509-510

[611] Richard Taylor, *Human Property: Threat or Saviour?*, [2002] MurUEJL 44 paras.13-15; Daniel Sperling, Posthumous Interests: Legal and Ethical Perspectives, (Cambridge: CUP, 2008) p.94

[612] Thomas L. Muinzer, *A Grave Situation: An Examination of the Legal Issues Raised by the Life and Death of Charles Byrne, the "Irish Giant"*, [2013] 20 Int'l J of Cultural Property 23, p.29.

[613] Thomas L. Muinzer, *Review of Heather Conway's The Law and the Dead*, [2017] Med. L.R 505, p.510

[614] [2013] CSOH 197

Lord Stewart noted that 'possessory remedies ... are available for corpses ... but that fact of itself does not make the objects of the remedies property'.[615]

The position espoused by Lord Stewart is certainly true within the context of Scots law, which, as a result of its Civilian heritage recognises a sharp divide between the concepts of *dominium* and *possessio*.[616] In the absence of any defined conception of 'ownership' in English law, and in recognition of the fact that 'possession is of paramount importance' therein,[617] however, the significance of the use of language of 'possession' in respect of cadavers cannot be overstated. In the words of Lord Justice Auld, 'the English law of ownership and possession, unlike that of Roman law, is not a system of identifying absolute entitlement but priority of entitlement'.[618] Scotland – as an example of a 'living Roman legal system',[619] where there remains 'a dogmatic distinction between ownership and possession'[620] – cannot be said to provide authority which is of any utility in discerning quite what is meant by 'ownership' and 'possession' in the context of a wholly foreign Common law legal system.

If, unlike in Roman law and Civilian jurisprudence, the English words 'ownership' and 'possession' can be said to share certain key characteristics,[621] then possession must, at the very least, be recognised as an indicator that 'property' law, is, in some form, in play. Indeed, recalling Honoré's 'eleven incidents of ownership',[622] it is notable that possession – and the right to it – is given prime place in the list and can is said to be the keystone of the whole

[615] *Ibid.* para.49

[616] In the words of Ulpian, 'ownership has nothing in common with possession': Dig.21.12.2.1; see also para.1.2.1 and para.1.4.1, *supra*.

[617] Liang, *Title Conflicts*, p.24

[618] *Fletcher*, p.335

[619] In the words of Descheemaeker and Scott, *Iniuria*, p.2

[620] Carey Miller and Irvine, *Corporeal Moveables*, para.1.18

[621] Indeed, in an English case, the Appellate Committee of the House of Lords actively equated possession and ownership in stating that 'no-one is to be regarded as the owner of his own limbs, says Ulpian in D.9.2.13. Equally, we may be sure, no-one is to be regarded as being in possession of his own limbs'. *R v Bentham* [2005] [2005] UKHL 18 para.14; in addition, in *Fletcher*, Lord Justice Auld explicitly spoke of 'ownership and possession' as contradistinguished from the Roman conception of the same: *Fletcher*, p.335

[622] See para.1.2.2, *supra*.

system of 'property'.[623] Clearly, not all of Honoré's eleven incidents of 'ownership' are applicable to the control that may be exercised over dead bodies, body parts or human biological material but as noted, one need not link all eleven incidents to a 'thing' for there to be 'property' in that object.[624] As such, the fact that the primary incident can lawfully be exercised in respect of cadavers, in English law, cannot be overlooked.

In respect of the possessory interest enjoyed by the jailer in respect of the deceased prisoner in *R v Scott,* it is plain that the first of Honoré's incidents could, potentially, have been fulfilled in full; the court juridically recognised the nature of the dispute as possessory.[625] Indeed, at least prior to Lord Ellenborough's ruling of 1804, it is evident that any individual who lawfully arrested a corpse could be said to have enjoyed not only some right to possess the body, but also in a sense a right to the income arising out of their possession of it[626] – given that the purpose of arrestment was to secure payment of money[627] – in addition to rights of security and management. The incident of the absence of term could also be said to exist in respect of arrestors; the term of arrestment may be naturally limited by the body's process of decomposition, but legally speaking the arrestor could retain the cadaver until the payment of the debt.[628]

Honoré's 'incidents of ownership' prohibit 'harmful use' of the thing 'owned', yet it is, however, plain that the only reason that the jailer[629] maintained possession of the prisoner's

[623] Honoré, *Ownership,* pp.113-115

[624] *Ibid*., p.112

[625] See, also, the comments of Griffith CJ from the case of *Doodeward*, p.414: "I do not know of any definition of property which is not wide enough to include such a right of permanent possession. By whatever name the right is called I think it exists, and that, so far as it constitutes property, a human body, or a portion of a human body, is capable by law of becoming the subject of property".

[626] As Honoré notes, the line between 'earned' and 'unearned' income arising from a thing cannot neatly be drawn: Tony Honoré, *Ownership,* p.115-116

[627] Kuzenski, *Property,* p.18

[628] Kuzenski, *Property,* p.18

[629] And thus, by extension, all those who preceded him and had lawfully arrested cadavers to secure debts.

corpse was to cause harm to the family of the deceased by refusing them access to the body of their loved one.[630] With that said, however, this particular incident of ownership has been rejected by many later property theorists.[631] Breakey notes that 'it is of course agreed that an owner may not use her property in ways that harm others, most theorists see this constraint as a reflection of a prior and ongoing duty all people have not to harm others, and so as not a feature of property *per se*'.[632] Thus, it was only when the arrestment of corpses was finally and unequivocally prohibited, and the act categorised as a legally recognised form of harm as such, that the arrestment of corpses became legally problematic. Prior to this, no legally recognised harm occurred – however morally repugnant the practice may have been regarded[633] – and so even incident number nine can said to have been complied with.

Ultimately, Scott lost his civil case as the executors who petitioned him to return the body to them were also able to claim a – better – right to possession and were awarded a peremptory *mandamus* in their favour.[634] In failing to respond and set out his justification for possession, Scott similarly failed to establish that he had a better right to possess the body than the executors,[635] though prior to the decision of Lord Ellenborough in *Jones v Ashburnham* he evidently could have made a case for this.[636] As, by default, it was established that the executors

[630] So as to secure what here might be termed 'income'.

[631] Hugh Breakey, *Property: Full Liberal Ownership,* IEP accessed 19/05/2020 <http://www.iep.utm.edu/prop-con/>

[632] Hugh Breakey, *Property: Full Liberal Ownership,* IEP accessed 19/05/2020 <http://www.iep.utm.edu/prop-con/>

[633] Faculty of Advocates, *Anent the Arresting of Corpses,* [1677] in Mungo P. Brown and William M. Morison, *Supplement to the Dictionary of the Decisions of the Court of Session,* Volume 3, (Edinburgh: W.C and Tait, 1826) p.136

[634] (1841) 2 Q.B 246

[635] (1841) 2 Q.B 246

[636] See *supra.*

enjoyed the better right to possess the corpse, Scott was prosecuted for failing to deliver the cadaver to them, within a reasonable length of time, when they repeated their request.[637]

Consequently, Muinzer's argument that possession is permitted only insofar as such is necessary in order to deal with the practicalities of burial does no more than explain the process by which the English judiciary have employed 'creative judicial reasoning', to use the words of Goold and Quigley,[638] as a means of circumventing some of the more absurd consequences of the 'no property' rule. By recognising that a key incident of ownership exists in respect of cadavers, yet denying that the corpse is actually 'property' for the purposes of law, the courts were able to ostensibly uphold the rule while simultaneously undermining its unimpeded operation. This situation is discussed in greater detail in the course of the next section.[639]

It is evident, therefore, that the law of England, in the first half of the Nineteenth century, at least, recognised a number of 'incidents of ownership' in respect of cadavers and that consequently the law can be understood as having recognised at least some degree of 'property' in corpses. A distinction must be drawn here between a general proprietary characteristic and a commercial proprietary characteristic. Honoré's incidents apply in respect of the former.[640] With the cessation of the arresting of corpses to secure the payment of debt, it is plain that the latter did not persist in respect of human remains. The Anatomy Act 1832 did not expressly create 'property rights' to cadavers, however the legislation allowed any person 'having lawful possession of the body of any deceased person… to permit the Body of such deceased Person to undergo Anatomical Examination' unless the deceased had expressly stated that they did not wish this to occur or if the family of the deceased intervened in some

[637] (1842) 2 Q.B 248n; it is submitted that such highlights the proprietary nature of the dispute, as English law did not recognise Scott's conduct as specifically tortious, but rather wrongful due to the failure to render the cadaver to the executors.

[638] Goold and Quigley, *Human Biomaterials*, p.237

[639] See para.2.2.3, *infra.*

[640] See para.1.2.2, *supra*.

way.[641] This invocation of 'possession' is, again, significant, illustrating that the human corpse was treated *de facto* as an object amenable to possession and thus amenable to dispute regarding possession. In vesting the executor, or other party in lawful possession, with the power to transfer custody of the body to medical examiners for anatomical purposes, the law likewise implicitly recognised the incidents of the rights of management and transmissibility discussed by Honoré. The commercial aspect of 'property' was not, however, recognised by the Act[642] and, by the time of its passing, the arresting of corpses was judicially disparaged, even if such practices still persisted in fact.[643]

Thus, many of Honoré's incidents – particularly those pertaining to commerce – were absent both as a result of statute and as a result of common law developments. In the 1851 case of *R v Vann*,[644] in discussing the duty of a father to bury his deceased child, Lord Chief Justice Campbell noted that the father, though bound to dispose of the body by Christian burial if he had the means, did not enjoy either any commercial interest nor unfettered *ius disponendi* in respect of his child's cadaver, declaring that 'he cannot sell the body, put it into a hole, or throw it into the river'.[645] The more general question of whether or not 'property', in the former sense, operated with respect to the child's body was not raised, but with that said, as there is an absence of any developed doctrine of *res extra commercium* in English common law, *R v Vann* certainly marks a strengthening of the presumption that there can be 'no property in a corpse' even in the more general sense of the term.

As indicated at the start of this section,[646] the case of *R v Sharpe* provided the first solid judicial recognition of the 'no property' rule. This case concerned an individual – Sharpe –

[641] Anatomy Act 1832, s.VII
[642] Hardcastle, *The Human Body*, pp.25-28
[643] Kuzenski, *Property*, pp.18-19; *Fox* and Scott, p.248n
[644] (1851) 2 Den. 325
[645] *Ibid.*, p.256
[646] *Supra.* p.3

who, after the death of his father, disinterred the corpse of his mother and had it transported towards another churchyard, wherein he intended to bury his father's corpse alongside it.[647] The judge at first instance found that 'the defendant acted throughout without intentional disrespect to anyone, being actuated by motives of affection to his mother and of religious duty',[648] however he nevertheless directed the jury to convict Sharpe of a trespassory misdemeanour if they believed the salient facts of the case to be proven.[649] The defendant was subsequently convicted, and bound on his recognizance to appear if called on, though he maintained that the conviction was wrong in appearing, in person, before a panel of five judges.

It is noteworthy that, in delivering the *per curiam* opinion of the court, Erle J saw fit to punish Sharpe on the grounds of trespass, being that as 'there is no authority for saying that [a familial] relationship will justify the taking a corpse away from the grave where it has been buried'.[650] The defendant had claimed that the law recognised a child's right to claim the corpse of their parent, but the court dismissed this view.[651]

Accordingly, interference with the grave-site was deemed criminal, as misdemeanour trespass, by common law, Sharpe was fined a 'nominal' amount of one shilling[652] and the 'no property' rule appeared, for the first time, in judicial precedent. Although the court set forth the view that there was no property in a corpse at common law, the judge in *Sharpe* illustrated an understanding of the protection afforded to the grave-site by ecclesiastical law; later authorities and commentators often fail to do so, treating the 'no property' rule as if it exists within a vacuum. It is noted that the rise of the prominence of the 'no property' rule correlates with the decline in Civilian learning in England. It may be no more than coincidence that the

[647] *Sharpe*, p.162
[648] *Ibid.*
[649] *Ibid.*
[650] *Ibid.*, p.163
[651] *Ibid.*
[652] *Ibid.*

same year as the dissolution of Doctors' Commons, the 'no property' rule received its first official judicial recognition in *R v Sharpe*, but it is plain that this decline in consideration of Civilian learning in the Common law courts has since served to obscure the roots of the rule.

Although, from the above, it is evident that the origins of the 'no property' rule are suspect, and that the rule itself enjoyed no more than a shadowy existence until the middle of the Nineteenth century, the rule itself was entrenched in the consciousness of Common lawyers before its first judicial confirmation. In commenting on s.25 of the Burial Act 1857, Jones suggested that:

> "Grave robbers unscrupulously took advantage of the common law rule that there is no property in a dead body. If a dead body does not belong to anyone then it cannot be stolen. Grave robbers could therefore dig up a body and sell it on to the medical school with impunity. Section 25 was intended to prevent this."[653]

As the 'no property' rule had not been expressed in any binding precedent during the formulation of the Burial Act 1857, and given that the practice of arresting corpses in order to secure debt pervaded until (then) rather recently, Jones' suggestion that the offence of removal of a body from a burial ground was specifically created to counter problems presented by the operation of the 'no property' rule seems strange at first sight. The explanation for this likely lies in the fact that, though the law itself had not yet unequivocally expressed that there could be 'no property in a corpse', the prevailing view held by legislators, as well as barristers and other court-pleaders of this time, presumed that this was the case. In a legal culture which relies

[653] Philip Jones, *The Burial Act 1857: A Grave Offence,* [2017] <https://ecclesiasticallaw.wordpress.com/2017/05/20/the-burial-act-1857-a-grave-offence/>

primarily on precedent, an incorrect, though widespread, belief can transform fiction into fact; hence the old Scots truism *communis error facit ius* (common error makes the law).[654]

Ecclesiastical jurisdiction over cadavers was explicitly recognised by the common law courts and it was a well-established since the time of Coke that secular courts would not interfere in any instance pertaining to the burial of the dead.[655] There was consequently no need for Common lawyers, pleading in the secular courts, to engage with Civilian jurisprudence. Cases which provided no actual authority for the proposition that there can be 'no property in a corpse', such as *Exelby v Handyside*[656] and *The King v Lynn,*[657] evidently captured popular legal imagination. These cases, combined with consistent misinterpretations of jurists including Coke[658] and Blackstone[659] and the lack of consideration for the Civilian learning of these commentators, facilitated the wide acceptance of what was, until 1857, a curious and unsubstantiated proposition. As a result of *stare decisis*, starting with the case of *R v Sharpe*, the proposition that there could be 'no property in a corpse' became an established juridical fact.

In spite of the fact that the rule precluding 'property' in corpses appears to have arisen by nothing more than a quirk of English common law, many modern legal commentators and judges have attempted to justify the existence of the rule by reference to its perceived venerable historicity.

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[654] See William M Gordon, *Communis Error Facit Ius,* in Andrew Burrows, David Johnston, QC, and Reinhard Zimmermann, *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry,* (Oxford: OUP, 2013), p.448

[655] *R v. St. Peters, Thetford* 5 T. R. 364; *R v Taylor* (1809) 1 Burn. Eccl. L. 258; *R v Coleridge* (1819) 2 B & Ald 804; 106 ER 559

[656] (1749) 2 East PC 652

[657] (1788) 2 T.R 733, 100 ER 395

[658] See Edelman, who lays the charge of 'mistranslation' at Coke's door: Edelman, *Property Rights*, p.18

[659] Hardcastle, *The Human Body*, pp.25-28

2.2.3 Exceptions to, and the Scope of, the Rule

Since receiving explicit judicial recognition in 1857, the 'no property' rule has proven problematic. Faced with the wholesale gap in the law left by removing a corporeal object from the ambit of property law, the courts in Common law jurisdictions have found it necessary to introduce various exceptions to the rule. Most prominent amongst these exceptions is the 'human work or skill' rule introduced in the Australian case of *Doodeward v Spence*.[660] This case concerned a stillborn baby, which had been born malformed, with two heads, in 1868. In the forty years between the birth of the baby and the calling of the *Doodeward* case, the body of the infant had been preserved in nondescript 'spirits' and sold at auction on the death of the attending physician in 1870. The attending physician had taken and retained (the court presumed) lawful possession of the preserved body until his death.[661] At some point thereafter, the preserved body came into the possession of Doodeward, who put the cadaver on public display and was ultimately arrested for outraging public decency. The police inspector who dispossessed Doodeward of the body retained possession of the body and so Doodeward brought an action of detinue to secure the return of his 'property'.

A strict application of the 'no property' rule – which the lower courts had endorsed – would have seen Doodeward's action fail. The Australian High Court, however, held that since the body of the baby had 'acquired some attributes differentiating it from a mere corpse awaiting burial', it could be deemed to be an object of property for the purposes of law.[662] The case of *Doodeward*, therefore, created an exception to the general 'no property' rule which could be invoked in cases in which 'human work or skill' was applied to human biological material. The opinion of Griffith CJ has been given a great deal of weight by subsequent

[660] (1908) 6 CLR 406
[661] *Ibid.*, p.411
[662] *Ibid.*, p.414

judicial decisions within and outwith Australia.[663] Several points in the judgment are of particular interest, and so a particularly notable paragraph is reproduced below:

> "If, then, there can, under some circumstances, be a continued rightful possession of a human body unburied, I think, as I have already said, that the law will protect that rightful possession by appropriate remedies. I do not know of any definition of property which is not wide enough to include such a right of permanent possession. By whatever name the right is called, I think it exists, and that, so far as it constitutes property, a human body, or a portion of a human body, is capable by law of becoming the subject of property. It is not necessary to give an exhaustive enumeration of the circumstances under which such a right may be acquired, but I entertain no doubt that, when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial, but subject, of course, to any positive law which forbids its retention under the particular circumstances".[664]

Several matters in the above passage are pertinent to the consideration of the 'no property' rule which has been thus-far conducted in this thesis. Firstly, Griffith's comments pertain specifically to the *unburied* cadaver; a corpse which has not been interred in consecrated ground and so passed over to the protection of ecclesiastical cognizance.[665] Accordingly, his opinion that the law will 'protect the rightful possession [of unburied

[663] See *infra*.

[664] *Doodeward*, p.414

[665] It should be noted that it was decided, in Australia, that no church could be designated either National Church or State institution (*Attorney General (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559) and that all churches in that jurisdiction are treated, in law, as voluntary organisations: *Cameron v Hogan* (1934) 51 CLR 358, pp.370-371.

cadavers] by appropriate remedies' is further indicative of the suggestion that the Common law tradition implicitly recognises 'property' in unburied cadavers even in spite of its explicit claims to the contrary. By limiting the discussion to the unburied cadaver, it might be inferred that Griffith was of the opinion that his purported exception to the 'no property' rule would not apply in respect of the interred cadaver (or pieces of it), being that this would ordinarily be under the protection of ecclesiastical law, rather than common law. In this, he was thus making a point which was of significance to the wider Common law family, rather than to Australian law alone, which correlates with the later influence of this decision on the wider Common law tradition.

The 'non-exhaustive' nature of the list of potential 'exceptions' to the 'no property' rule must be emphasised; though it is the 'work or skill' exception that captured the imagination of lawyers in Common law jurisdictions,[666] it is plain that Griffith envisaged a number of situations in which it would either be necessary or logical to circumvent the broad 'no property' rule. In this, his judgment may be considered prescient, as indicated by late Twentieth and early Twenty-First century Common law jurisprudence.[667] Griffith likewise emphasises, in his judgment, the intimate link between the concept of 'property', as it exists in the Common law, and the notion of legal possession. Thus, a particular difficulty with the 'no property' rule itself can be gleaned from the judgment; it is submitted that the Common law rule is incoherent, since the Common law conception of 'property' emphasises the importance of 'possession' on one hand,[668] and accepts that cadavers may, in some circumstances, be lawfully possessed,[669]

[666] See the Human Tissue Act 2004, s.32

[667] See, e.g., *Kelly*, p.631 and *Yearworth*, para.45

[668] *Fletcher*, p.335

[669] *R v Scott* (1842) 2 QB 248n; *R v Vann* [1851] 169 ER 523; *R v Feist* (1858) D & B 590; *Williams*; *Doodeward*, p.414: See also the general rule of the Common law that the executor (if the deceased left a will), or the 'highest ranking presumptive administrator' (the deceased's closest next of kin, within terms of s.46 of the Administration of Estates Act 1925 c.23) has a limited right to possess the body for the purposes of securing its burial: See Heather Conway, *The Law and the Dead*, (Routeledge, 2016), p.92

yet nevertheless denies that there is any aspect of 'property' in cadavers on the other hand even in spite of this recognition.[670] In the absence of any doctrine akin to the Civilian conception of *res extra nostrum patrimonium*, the 'no property' rule, as interpreted by Griffith, is a legal anomaly.

It should be noted that Griffith's judgment implies that no great amount of work or degree of skill is required to effect the transformation of a cadaver into 'property'.[671] All that is required is the occurrence of some change which distinguishes the body from a 'mere corpse awaiting burial'; thus, on Griffith's understanding, it would appear that any part severed from a cadaver would be capable of being owned (although the body – if still otherwise primed for burial – would not be).[672] This would place the corpse (awaiting burial) on the same legal footing as the *res communes* known to Roman law.[673] *Res communes* such as the air and sea were, as a whole, 'common to all mankind' by the *ius naturale* and so *res extra nostrum patrimonium*,[674] but parts of the greater thing could be removed from the whole (e.g., by scooping seawater into a container) and so subsumed into private patrimony by way of *occupatio*.

English law, and by association the Common legal tradition, did not either expressly receive, or deign to develop, any rational notion of *res extra nostrum patrimonium* or *res extra commercium*.[675] India, however, has come to recognise the concept of *res extra commercium*

[670] *Halsbury's Laws of England,* (5th edition), vol 24 title Cremation and Burial, para 1103

[671] See Adam Johnstone, *How does the Common Law look at (a) the body and (b) property as it might relate to the body or body parts, cells or cellular information?* [2010] University of New England LLM Thesis, p.33

[672] Though Conway contends that the severed part of the body must obtain some 'independent use value' to be 'property' under the *Doodeward* exception (see Heather Conway, *The Law and the Dead,* (Routeledge, 2016), p.74) the definition of 'independent use value' seems broad and might include existence for the mere purpose of aesthetic gratification.

[673] See J. 2, 1, 2

[674] See Robson and McCowan, *Property Law*, para.1.04

[675] See Craig Forrest, *International Law and the Protection of Cultural Heritage*, (Routledge, 2010), p.205

explicitly,[676] while New Zealand and some US jurisdictions implicitly recognise the doctrine.[677] Just as there exists *de facto* recognition of the doctrine of *res extra commercium* in the US, – in line with Metzger's argument[678] – it is here submitted that English law, in following the judgment in *Doodeward*, has come to practically recognise that some things are *extra nostrum patrimonium* in the Roman sense. The human body, when dead, is such a *res*. It is not, however, *sacra, sanctae* or *religiosa*, as might be expected, but rather functionally regarded as a *res communis*, as a thing common to all of humanity. This is consistent with Esposito's claim that 'the body owes its inviolability to the fact that it is eminently common'[679] and explains why, though the body is treated by English law as an object like no other, there are nevertheless few, if any, civil or criminal sanctions attached to gross interference with cadavers.[680]

The above analysis may be criticised as an attempt to rationalise the irrational. The Justinianic *res communes* are not known to English law and so it may be thought unlikely that they have been imperfectly received by a judiciary which has not discussed them. This process of seeking to rationalise the Common law rule has, however, been adopted by the English courts, who have sought to use 'creative judicial reasoning' to mitigate some of the more absurd consequences of the strict 'no property' rule,[681] and to rationalise the rule as something more than a simple, accidental, product of precedent.

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[676] See Aditya Kalra, *With Roman Law Doctrine, India Moves to Stub out Tobacco Industry Rights*, [2018] Thomson Reuters Business News: https://www.reuters.com/article/us-india-tobacco-exclusive/exclusive-with-roman-law-doctrine-india-moves-to-stub-out-tobacco-industry-rights-idUSKBN1FI2SQ; Arvind P. Datar, *Privilege, Police Power and "Res Extra Commercium" – Glaring Conceptual Errors*, [2009] National Law School of India Review 133

[677] Sara Gwendolyn Ross, *Res Extra Commercium and the Barriers Faced When Seeking the Repatriation and Return of Potent Cultural Objects*, [2017] American Indian Law Journal 299, p.363

[678] See Metzger, *Res Extra Commercium, passim*.

[679] Esposito, *Persons and Things*, p.107

[680] See Imogen Jones, *A Grave Offence: Corpse Desecration and the Criminal Law*, [2017] Legal Studies 599, p.600

[681] Goold and Quigley, *Human Biomaterials*, p.237

2.3 'Creative Judicial Reasoning'

2.3.1 Justifying the Rule in the 21st Century

The courts of the Twenty-First century have suggested that the 'no property' rule is justifiable on historic grounds, but ultimately their reasoning has been ahistorical. As the *per curiam* judgment of the Court of Appeal held in *Yearworth*:

> "There were at least three reasons for the rule that a corpse was incapable of being owned. First, in that there could be no ownership of a human body when alive, why should death trigger ownership of it? Secondly, as implied by Coke and Blackstone, the body was the temple of the Holy Ghost and it would be sacrilegious to do other than to bury it and let it remain buried… Thirdly, it was strongly in the interests of public health not to allow persons to make cross-claims to the ownership of a corpse… there was an "imperious necessity for speedy burial"[682]

The first ground is historically suspect; it was not until *Somerset's Case*[683] in 1772 that English law ostensibly took the view that one cannot own a human being and even this proposition is suspect, being that a volume of scholarship suggests that far more was read into *Somerset's Case* by those advocating the abolition of slavery, and indeed the wider public, than was ever intended by the judges of that case.[684] Absent any consideration of the law pertaining to the inheritance of the bodies of slaves, the Court of Appeal's comments, here, cannot be said to justify the existence of the rule.[685]

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[682] [2010] Q.B 1, para.21

[683] *Somerset v Stewart* (1772) 98 ER 499

[684] John W. Cairns, *After Somerset: The Scottish Experience*, [2012] Journal of Legal History 291

[685] Canon law, in recognising the decree of St. Paul that 'in Christ there is neither free nor slave', did not differentiate between the bodies of free and deceased persons (though it did recognise and accept slavery as an institution) and so, turning the Court of Appeal's judgment on its head, one might ask why, if the body was owned in life, it cease to be so on death? See R. H. Helmholz, *The Spirit of Classical Canon Law*, (Athens: University of Georgia Press, 2010), p.68

As for the second ground; it has been established that Coke certainly implied no such thing and that Blackstone's writings can be understood in a manner wholly consistent with Coke's Civilian reading of the law. Though the human body may have been juristically recognised as 'the temple of the Holy Ghost' this recognition was not extended to cadavers; only the living, inhabited body could be considered such. This imputation of the Court of Appeal consequently appears to be a second species of retroactive justification for an already extant rule which ultimately exists only by virtue of *stare decisis*.

In respect of the third ground, it is plain that the practice of detaining corpses to secure the payment of debt is inconsistent with the claim that the 'no property in a corpse' rule derives from the *'*imperious need for a speedy burial', as was suggested by Mr Justice Higgins in the case of *Doodeward v Spence*[686] and affirmed as an accurate account of the reason for the rule by the English courts in *Yearworth.*[687] Higgins suggested that, as the possibility of cross-claims as to ownership of corpses could endanger public health by causing the body to remain unburied for a prolonged period, the question of 'ownership of the body' was to be entirely circumvented by application of the 'no-property' rule.[688] This judgment was handed down at a time by which the 'no property' rule was firmly embedded in Common law jurisprudence. Higgins' statement consequently marks a Twentieth century innovation and a retroactive justification of the rule,[689] rather than an elucidation of the logic underpinning it. As can be seen from the above discussion, the rule certainly does not derive from recognition of any principle pertaining to public health.

[686] *Doodeward*, at p.422

[687] [2010] Q.B 1, para.20

[688] *Doodeward*, p.422

[689] Recall that the court in *Vann* found that a corpse could well remain unburied even if such was likely to cause a private nuisance – see para.2.2.3, *supra*.

In addition to the above, Higgins' logic is also questionable on the grounds that it is unclear that the 'no property' rule actually possesses the potential to facilitate an expeditious burial. In *R v Vann,* it was held that:

> "It is true, that a man is bound to give Christian burial to his deceased child, if he has the means of doing so; but he is not liable to be indicted for a nuisance, if he has not the means of providing burial for it. He cannot sell the body, put it into a hole, or throw it into the river; but unless he has the means of giving the body a Christian burial, he is not liable to be indicted, even though a nuisance may be occasioned by leaving the body unburied, for which the parish officer would probably be liable."[690]

The absence of the use of the language of 'property law', in the course of this judgment, does not appear to have had any effect on the ultimate outcome of the case. Maintaining that there can be 'no property in a corpse' does not preclude the possibility of the private nuisance of leaving a body unburied (when one lacks the means to properly inter the cadaver), nor does it legally incentivise one to hygienically or respectfully dispose of the corpse, as Higgins suggested the rule was designed to do. The assessment of Mr Justice Higgins, and the English Court of Appeal in *Yearworth,* consequently appears to be mistaken in holding that the 'no property' rule exists to expedite the burial of cadavers. Indeed, as Edelman notes:

> "The common law rule is *almost* inexplicable. Even if it might have been re-rationalised as based upon some policy about the sanctity of the human body, the policy would be self-defeating for the very reasons that David Hume gave in *A Treatise on Human Nature*: it allows the very acts that the policy is designed to prevent".[691]

[690] *Vann*, pp.525-526

[691] Edelman, *Property Rights*, p.19

From the above, it is clear that the origins of the 'no property' rule are suspect. In the words of Goold and Quigley, 'the no-property rule appears to have had unconvincing origins, [but] it was, nonetheless, proving influential by the end of the Nineteenth century'.[692] This is so in spite of the fact that a procession of authoritative English lawyers and judges quite consistently expressed the view that it unquestionably formed a part of English law, even at a time in which there was no clear precedent stating such. Whatever the historicity of the judicial appeals to the venerability of the rule, it was, by the late Nineteenth century, firmly entrenched in precedent as well as legal (and public) consciousness.[693]

As with his predecessor, Wood, whatever the original intent of Blackstone, it is apparent that his *Commentaries* set the stage for the wider adoption of the 'no property' rule in Anglo-American law. The court in *R v Sharpe* was evidently aware of the contradistinction between common law and ecclesiastical protection of grave-sites, but the court in *Williams v Williams* indicated no understanding of, or willingness to engage with, the reason that the common law deemed that there was no property in cadavers. Rather, they merely applied the common law as they understood it and so, as is often the case in the English legal schema, 'reason [became] the slave of precedent'.[694] One can utilise reason to discern some sense or meaning in otherwise illogical precedent, but that later application of reason need not proceed on the same grounds as the reasoning of the judges involved in the case. As was suggested above, it would appear that the 'no property' rule emerged as a result of common error.[695] As noted by Edelman, in support of this statement, 'the common law evolves slowly. An error in the common law due to the writings of jurists as brilliant [or who enjoy a reputation as

[692] Goold and Quigley, *Human Biomaterials*, p.239

[693] See the discussion in Daniel Sperling, *Posthumous Interests: Legal and Ethical Perspectives*, (Cambridge: CUP, 2008), p.88

[694] Peter Birks, *The Foundation of Legal Rationality in Scotland*, in Evans-Jones, *Civil Law*, p.97

[695] Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law*, (Oxford: OUP, 2009)

'brilliant'], such as Blackstone and Coke, takes a long time to eradicate'.[696] It is submitted that errors caused by misinterpretations of those jurists are equally difficult to eradicate. If it is indeed the case that the 'no property' rule was received into English law by dint of error, then the rules' recorded propensity for causing problems is at least partly explained.[697] The problems themselves are legion. They are set out and analysed in the next section of this chapter.

2.3.2 The Problems with the Rule

Given the rather suspect origins of the rule, and the fact that it appears to have become entrenched in English law as a result of a quirk of the doctrine of *stare decisis,* rather than as a conscious addition to the *corpus* of the law, the 'no property' rule has been widely considered by writers on Anglo-American law to give rise to problems.[698] If the rule's existence can be said to be 'almost inexplicable',[699] then it is fair to describe some of the consequences of its operation in the same manner. This section considers some of the more absurd consequences that the rule has given rise to, before noting some of the common objections which are raised in respect of the continued observance of the rule within Common law jurisdictions.

A particular problem with the observance of the rule was observable even before the emergence of modern medical technique. Indeed, this problem has been implicitly recognised in the discussion above:[700] As a result of the operation of the 'no property' rule, those individuals who carried off a body as part of a grave-robbery could not be tried or convicted of theft, having appropriated an object which was technically not 'property' for the purposes of law.[701] In the case of *R v Price,*[702] Stephen J. remarked that 'the act done [in *R v Lynn*, in 1788]

[696] Edelman, *Property Rights*, p.21

[697] See para.2.3.2, *infra*.

[698] See Goold and Quigley, *Human Biomaterials, passim*

[699] Edelman, *Property Rights*, p.19

[700] See *supra*

[701] (1884) 12 QBD 247; this is true notwithstanding the fact that the act of carrying off the body would otherwise perfectly correspond to the definition of 'theft' in English law: Theft Act 1968 c.60, s.1

[702] (1884) 12 QBD 247

would have been a peculiarly indecent theft if it had not been for the technical legal reason that a dead body is not the subject of property'.[703] Thus, from the outset, the 'no property' rule was recognised as serving to frustrate the interests of justice by permitting wrongdoers to escape culpability for heinous acts on the grounds of a mere technicality. Such recognition did not, however, prompt the judiciary to dilute the strict application of the rule.

This matter aside, perhaps the most significant problem which arises out of the operation of the rule has only become apparent in the past forty or so years. The problem concerns the extension of the rule from cadavers alone to all products and derivatives of human bodies, subject to the limited 'human work or skill' exception developed by the court in *Doodeward.*[704] In the words of Edelman:

> "The greatest difficulty that the 'no property' principle causes (without rationalisation on the basis of legal personality of a corpse) is that the implication of the no property principle might appear to be that any severed part, or product from a corpse is also incapable of ownership".[705]

The issue identified by Edelman can be seen, in action, in the Australian cases of *Jocelyn Edwards; Re the estate of the late Mark Edwards* and *Re H; AE (No 2).*[706] The former concerned a couple who had been trying to conceive a child. Mr. Edwards died before the child was conceived. After his death, Mrs. Edwards petitioned the court to have Mr. Edward's sperm extracted from his body; this extraction was carried out and the sperm was stored with the intention of its finding use in the course of treatment for assisted reproduction. Mrs. Edwards had not, however, obtained written consent from her husband permitting his sperm to be used

[703] *Ibid*, p.252
[704] [1908] 6 CLR 40; the exception itself is discussed, in greater detail, *infra*
[705] Edelman, *Property Rights*, p.18
[706] [2012] SASC 177

in such treatment after his death and so, *per* ss.17 and 23 of the Assisted Reproductive Technology Act 2007 (NSW) she was not entitled to use her husband's sperm for IVF treatment within the state of New South Wales. Mrs. Edwards consequently raised an action to claim possession of her husband's sperm and to obtain permission to undergo assisted reproductive treatment either in New South Wales or in some other jurisdiction.

Hulme J., in deciding the case in favour of Mrs. Edwards, was nonetheless reticent in relation to the question of 'property' in the stored human tissue.[707] He ruled that the sperm ought to be recognised as 'property' for the purposes of assisted reproductive treatment, but did not comment on the legal position beyond the narrow confines of that particular 'exception' to the general rule precluding 'property' in human biological material, stating that 'the conclusion of property in the present case can be made … without any need for further exploration of the limits of the law'.[708] The court was able to make judicious use of the 'work or skill' exception pioneered by the court in *Doodeward*. As noted, though the judgment suggests that there might be innumerable ways in which a corpse can become 'property', in law, those situations in which 'human work or skill' is applied to a deceased human body part or human body have become synonymous with the '*Doodeward* exception'.[709] In *Edwards,* Hulme J. held, it was plain that Mr Edward's sperm was 'property' for the purposes of law on the basis of this '*Doodeward* exception'.[710]

The fact that the sperm was 'property' for the purposes of law did not necessarily indicate that it was the property of Mrs Edwards, however. The court held that the sperm had not been the property of Mr Edward's in life and so it cannot be said to have formed a part of

[707] *Edwards*, paras.78-84
[708] *Ibid.* para.84
[709] *Doodeward*, p.414
[710] *Edwards*, para.79

his estate on death.[711] This would imply that the fertility service provider, who extracted and stored the sperm, would obtain the proprietary interest in the sperm, being that they were the party who utilised 'human work or skill' in respect of the sperm and so first made it 'property' for the purposes of law.[712] The court was able to escape the implications of this reasoning by looking to the purpose for which the sperm was extracted; the fertility service provide obtained no proprietary claim to the sperm as they had been acting on the instructions of Mrs Edwards in extracting and storing it. Thus, in effect, the provider was 'acting as [Mrs Edwards'] agents and so did not acquire any proprietary rights for their own sake'.[713] It followed from this that Mrs Edwards was able to claim an entitlement to the sperm, though not as the executrix of the estate of her husband. Rather, her property right stemmed directly from the result of her status as a Principal in an agency relationship between her and the fertility service provider, combined with the operation of the *Doodeward* exception to the 'no property' rule. As proprietor of the sperm, Mrs. Edwards functionally enjoyed *ius disponendi* over the sperm; ultimately, it was her choice as to whether the sperm ought to be destroyed or whether it ought to be used, as intended, in an in vitro fertilisation (IVF) procedure.[714]

Although this 'creative judicial reasoning'[715] was employed by the court in *Edwards*, in the previous case of *Bazley v Wesley Monash*,[716] it had been held that a man's sperm was to be regarded as his property in life and ownership of the same was – in instances in which it

[711] *Ibid.*, para.87

[712] See *Doodeward*, p.414, in which Chief Justice Griffith held that 'when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body… **he** acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial' (author's emphasis).

[713] *Edwards*, para.91

[714] *Edwards*, para.149 – the significance of 'possession' as it exists in the Common law tradition is emphasised in this paragraph: 'another matter that I have taken into account is that there is no suggestion that anyone other than Ms Edwards claims any entitlement to possession of the sperm. The person who is currently holding the sperm, IVF Australia, has not suggested that it has any interest in it, proprietary or otherwise. Putting it bluntly, only two outcomes are possible: Ms Edwards takes possession of the sperm or it is destroyed'.

[715] See Goold and Quigley, *Human Biomaterials*, pp.237-245

[716] [2011] 2 Qd R 207

was separated from his body – vested in his personal representatives on death.[717] White J., in cutting this metaphorical Gordian knot, was emphatic, holding that 'the conclusion, both in law and in common sense, must be that the straws of semen currently stored with the respondent are property, the ownership of which vested in the deceased while alive and in his personal representatives after his death'.[718] This judgment was deemed 'persuasive' by Hulme J. in *Edwards*,[719] but only insofar as it provided support for the proposition that human tissue ought to be considered 'property' for the purposes of assisted reproductive treatment.[720]

The issue with the expansion of the 'no property' rule can be seen by contradistinguishing *Edwards* and *Bazley*. It is apparent, from the discussion in the previous section, that the 'no property' rule was originally confined to interred cadavers; the extension of this to unburied cadavers which exist outside of the protection of ecclesiastical cognizance represents a distortion of the principles behind the rule as it was initially conceived. The further extension of the 'no property' rule to cover not only unburied cadavers, but also parts and derivatives of the human body, led directly to the litigation in *Edwards*. Had the legal position been clearer – and had it been accepted from the outset that parts and derivatives of the human body, being tangible 'things', are amenable to 'property law' – then there would have been no need for the parties nor for the court to apply 'creative judicial reasoning' in order to avoid an absurd outcome.[721] If the position expressed in *Bazley* were to be adopted wholesale, then it would necessarily follow that, in the presence of a clear structure of property law rules, the 'owner' of human tissue could be discerned fairly quickly and effectively. It appears, then, that a prime problem with the 'no property' rule is the fact that it results in unnecessary litigation.

[717] *Ibid*. para.33

[718] *Ibid.*

[719] *Edwards*, para.82-85

[720] *Ibid.* para.84

[721] As (it is submitted) would have occurred if the fertility service provider – an entity with no expressed interest in this case – had ultimately been held to be the 'owner' of Mr Edward's sperm.

This problem is combined with the fact that the implicit denial of the legal existence of a corporeal thing is necessarily absurd.[722]

The facts of *Edwards* – and consequently the problems noted in respect of that case – were mirrored in *Re H*. This second case gives rise to a number of other problems connected with the operation of the 'no property' rule, however, and so it too merits deeper discussion. Some key differences must first be noted. The dispute in *Re H* occurred in the state of South Australia. The relevant legislation was thus the Assisted Reproductive Treatment Act 1988 (SA). This Act governed the rules pertaining to the provision of assisted reproductive treatment, but did not directly concern itself with those persons seeking to obtain such treatment.[723] In *Re H,* as opposed to in *Edwards*, when permission was provisionally granted by the court to allow the extraction of the deceased's sperm, it was 'further ordered that the sperm not be used for any purpose without an order of the Court'.[724] Thus, when an action seeking recovery of possession of the sperm was raised, the applicant was only able to take control of the sperm for the purposes of use in a manner approved by the court.[725] Gray J held that:

> 'The Court exercised its jurisdiction to authorise the preservation of the sperm and it appears that its authorisation has now been sought for the creation of life. It is these circumstances that compel the conclusion that the Court, in its inherent jurisdiction, retains control of the use of the sperm.'[726]

In extracting and storing the sperm in *Re H,* it would appear that the fertility service provider was acting as an agent of the court, rather than the applicant. Accordingly, the

[722] See *Roche*, para.23-24
[723] See the discussion in *Re H*, para.7
[724] *Ibid*. para.2
[725] *Ibid.* para.63
[726] *Ibid.* para.62

applicant did not enjoy *ius disponendi* in relation to the sperm; the authority to use or dispose of the sperm was, instead, vested in the State acting through the courts:

> 'This is not a case where the sperm was the property of the deceased. The Repromed[727] staff who exercised work and skill did so not for their own purposes, but performed these functions as a consequence of the orders of the Court. They were acting as agents and did not acquire any entitlement to the sperm in their own right.'[728]

That the 'no property' rule, as extended to human biological material more widely, yet limited by the operation of the *Doodeward v Spence* exception, serves to undermine the principle of legal certainty is, thus, evident.[729] Categorising human biological material as 'property' as a rule, rather than an exception, would have allowed for consistency between *Bazley*, *Edwards* and *Re H* as it would have permitted 'property' to vest in the (ultimately successful) applicants of each case even in the absence of protracted litigation. The claim that the 'no property' rule is problematic for the reasons set out by Edelman is consequently further substantiated: Denying the proprietary nature of corporeal things such as sperm or body parts is, as suggested by White J, contrary to common sense[730] and it is difficult to see how the rule that there can be 'no property' in the human body, its parts and its derivatives can continue to

[727] A limited company providing specialist fertility treatment.

[728] *Ibid.* para.60

[729] In the Civil law, the principle of 'legal certainty' is said to be 'supreme': See John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, (4th Edn.) (Standford: SUP, 2018), p.48; this perhaps might be regarded as an overstatement, however there is no doubting the importance of 'legal certainty' as a desiderata within Civil law systems. From this, it follows that a rule of law which serves to undermine legal certainty to the degree that the 'no property' rule does within the Common law should not be deemed acceptable in any Civil law jurisdiction. While in general, in the 'certainty' *contra* 'flexibility' divide Scotland cane be said to be 'more in the Common law camp' (see Niall R. Whitty, *From Rules to Discretion: Changes in the Fabric of Scots Private Law*, [2003] Edin. L. R. 281, p.295, since Scots property law is 'resolutely Civilian in character' (see para.1.1, *supra*), it appears that the fact that the 'no property' rule should be repudiated by Scots law for this reason, even if no other.

[730] *Bazley*, para.33

operate in a legal system which recognises this difficultly.[731] Ultimately, Edelman's conclusion is difficult to dispute. He notes that:

> "The recognition and expansion of this principle [the 'work or skill exception'] has the potential to undermine entirely the application of 'no property' to any severed body part or product of the human body for several reasons. First, it is very difficult to see how the mere preservation of gametes in cases like *Edwards* or *Re H*, creates a new thing… Secondly, unlike in *Doodeward*, the work or skill exception is not being used to determine who owns the new thing.".[732]

As such, in addition to the above, a number of other discernible issues may be noted (and several of the issues noted above appear to recrudesce) in a succession of English cases starting from the turn of the Twenty-First century, most of which arise directly as a result of the 'greatest difficulty' identified by Edelman. There are four English cases – *Dobson v North Tyneside Area Health Authority*,[733] *R v Kelly, AB v Leeds Teaching Hospital*[734] and *Yearworth v North Bristol NHS Trust* – which merit consideration here. The first of these concerned a woman who collapsed at work and was taken to hospital as a result. Though she was initially discharged, she was re-admitted two months later, at which point it was discovered that she was afflicted with two brain tumours. An operation was scheduled, but the woman died before it was performed. A post-mortem was conducted and the woman's brain was preserved in paraffin by a doctor, to facilitate the possibility of further investigation. The woman's body was, *sans* brain, returned to her family, who buried it. The brain was eventually disposed of by the hospital.

[731] See *Roche*, para.23-24
[732] Edelman, *Property Rights*, p.23
[733] [1997] 1 W.L.R. 596
[734] [2004] EWHC 644

Dobson, the plaintiff, was the mother of the deceased woman. She raised an action against the hospital after her grandson, the son of the deceased woman, likewise developed brain tumours and it was discovered that not only had the brain of the mother been destroyed, but the hospital had not taken any sections of the brain tumours, thus depriving Dobson and the grandson of important medical evidence in a separate civil suit. In rejecting the appeal by Dobson, the Court of Appeal held that as there was no property in a corpse, the appellants could not demonstrate any right to possession or ownership of the brain.[735] Absent any nominate tort concerned with wrongful interference with a dead body, there was likewise nothing to say that, by the law of England, the hospital had done anything wrongful.[736]

In recognising that the hospital was entitled to destroy the brain, the court evidently accepted that one of the key incidents of 'ownership' was present in this case. To reiterate the definition of 'property' put forth in the American Encyclopaedia of Jurisprudence, 'in its strict legal sense "property" signifies that dominion or indefinite right of use, control and disposition which one may lawfully exercise over particular things or objects; thus "property" is nothing more than a collection of rights.'[737] If 'property' is to be so understood, then the hospital's right to continuously possess the brain until such a point as they deigned to dispose of it must be understood as describing a relationship of property, whatever the words used by the courts to describe this situation may have been. Indeed, it is notable that even after the 'no property' rule was first stated in judicial precedent, in the 1958 case of *R v Feist*[738] the court continued to make use of the language of 'legal possession of a body'.[739] Likewise, in 2004 it was noted that

[735] *Dobson*, p.602, *per* Lord Justice Gibson

[736] *Ibid*. There would have been scope, under Scots law, to argue that the destruction of the brain amounted to an *actio iniuriarum*, on the authority of *Stevens v Yorkhill NHS Trust* 2006 SLT 889.

[737] Recall para.1.2.2 *supra*.

[738] (1858) D & B 590

[739] *Ibid.*; see also *Re Organ Retention Litigation* [2004] EWHC 644, para.139

s.1 (7) of the Human Tissue Act 1961 necessarily implies that 'when a person dies in hospital the hospital has the legal right to possess the body at least initially'.[740]

The incoherence of the 'no property' rule is thus demonstrated: The inescapable reality of the existence of human biological material as corporeal 'things' is plain to see and the need for such things to be governed by 'property law' is evident. As the hospital was able to retain possession of, and dispose of, the deceased's brain, they must have been able, at some time in their handling of the brain, to claim some 'priority of entitlement' to the brain, in the words of Auld LJ.[741] Since English law thus implicitly recognised that there was some right to possess the brain vested in the hospital, yet simultaneously expressed that there could be 'no property' in either the brain or the body of the deceased, English law can be said to be incoherent in relation to this matter as 'possession' is intimately related to 'property' within this legal system.[742] That the operation of the 'no property' rule gives rise to such confusion is one reason that it can be said to be problematic, even within the confines of its native legal system.

The second of the above-named cases concerned a spate of thefts from the Royal College of Surgeons. Kelly (an artist), with assistance from Lindsay (a technician at the college), made away with a selection of body parts which had been stored by the college. Both were subsequently convicted of theft at first instance, but appealed their sentence to the Court of Appeal on the grounds that, in recognition of the rule that there could be 'no property' in human remains, the body parts that they had taken could not be categorised as 'property' for the purposes of the Theft Act 1968.[743]

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[740] *Re Organ Retention, ibid*.

[741] *Fletcher*, p.335

[742] See para.1.2.2 *supra*.

[743] c.60; 'property' is defined, in s.4 (1) of this Act, as 'money and all other property, real or personal, including things in action and other intangible property'.

As indicated above, the Court of Appeal upheld the general rule that there could be 'no property in a corpse',[744] but made use of (what might be described as) 'creative judicial reasoning' in order to dismiss the appeal and uphold the convictions of Kelly and Lindsay.[745] The court utilised the aforementioned Australian precedent, *Doodeward v Spence*, as authority for the proposition that, though there could be no property in the human body, there could be property in human biological material in instances in which some 'human work or skill' was applied to preserve, or otherwise alter, the natural make-up of the material.[746]

The Court of Appeal in *Kelly* also made plain that they saw the potential for further problems arising as a result of the operation of the 'no property' rule. The court attempted to leave the door to deviation from the 'no property' rule as wide-open as they could, within the confines of the doctrine of *stare decisis*, ruling that:

> "The common law does not stand still. It may be that if, on some future occasion, the question arises, the courts will hold that human body parts are capable of being property for the purposes of section 4 [of the Theft Act 1968], even without the acquisition of different attributes, if they have a use or significance beyond their mere existence. This may be so if, for example, they are intended for use in an organ transplant operation, for the extraction of DNA or, for that matter, as an exhibit in a trial".[747]

The need for the exercise of *'creative judicial reasoning'* can thus be said to be yet another problem attributable to the operation of the rule. The courts should not be forced to jump through hoops by paying lip-service to the existence of a rule on the one hand, while actively trying to subvert the operation of that rule on the other. As the courts have been forced

[744] *Kelly*, pp.630-631
[745] Goold and Quigley, *Human Biomaterials*, pp.237-245
[746] *Kelly*, p.631
[747] *Ibid*.

to do this in order to avoid potentially absurd outcomes,[748] it may be said that the 'no property' rule has consequently had a negative impact on legal certainty in those jurisdictions in which it operates.

In the third of the cited cases, *AB v Leeds Teaching Hospital,*[749] yet another problem with the 'no property' rule became apparent.[750] This case concerned the removal of organs from deceased children in the absence of authorisation from the parents of those deceased children. The parents raised a group action in respect of psychiatric injury sustained as a result of the alleged negligence of the hospital, as well as the wrongful interference with the bodies. The claim of wrongful interference was based on the grounds that the organs of the children were removed from their bodies, retained by the hospital and subsequently disposed of by the hospital with neither the knowledge nor consent of the parents, as ss.1-2 of the Human Tissue Act 1961[751] required.[752]

Gage J ruled that the proscription of 'property' in cadavers was a 'firm proposition' that was, in any case, not disputed by the parties in *AB.*[753] Nonetheless, he noted that it was recognised that, in circumstances akin to those in *Kelly,* property could be vested in parts of cadavers.[754] The existence of this exception to the general 'no property' was accepted by Counsel, but the question of whether or not that exception could be applied in the case at hand, and the significance of the doctrine if it was so applied, was disputed.[755]

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[748] Goold and Quigley, *Human Biomaterials,* pp.237-245

[749] *Sub Nom Re Organ Retention*

[750] The facts of this case may be directly compared with those which arose in respect of the Scottish case of *Stevens v Yorkhill NHS Trust* 2006 S.L.T. 889. The ultimate decision of the respective Scottish and English courts can just as clearly be contradistinguished. This contradistinction shall be drawn later in the thesis, *infra.*

[751] The Human Tissue Act 2004 was not in force at the relevant time, nor at the time of the calling of the case.

[752] *Re Organ Retention,* para.4

[753] *Ibid*., para.135

[754] *Ibid.*

[755] *Ibid*.

Ultimately, it was held that, as 'to dissect and fix an organ from a child's body requires work and a great deal of skill, the more so in the case of a very small baby',[756] and as 'the Kelly case establishes the exception to the rule that there is no property in a corpse where part of the body has been the subject of the application of skill such as dissection or preservation techniques',[757] it necessarily followed that the organs of the children were to be considered 'property' for the purposes of law, though the cadavers from whence the organs were removed were not to be viewed as such, particularly and especially after the corpses were buried.[758] As the individual who carries out the necessary act of human work or skill acquires original ownership of the *nova species* – the body or body part that is 'worked' on – the hospital were to be regarded, in law, as the 'owners' of the organs once its employees conducted the necessary 'work' on the bodies.[759] Once the cadavers of the children were buried, the parents lost even any residual right to make a claim of rightful possession of the organs.[760]

The plaintiffs in *AB* were thus unable claim remedy in either property law or in tort law.[761] Indeed, as a result of their absence of 'property' in their children's organs, combined with the absence of any nominate tort concerned with wrongful interference with the body, the plaintiffs had no remedy in tort law at all.[762] This outcome is indicative of yet another problem with the 'no property' rule; it has, by its operation (and by connected innovation of necessary 'exceptions' to mitigate its consequences), led to the occurrence of inequitable judicial decisions. When the comparable Scottish case of *Stevens v Yorkhill NHS Trust*[763] was heard in

[756] *Re Organ Retention*, para.149

[757] *Ibid.*

[758] *Ibid.*, para.296

[759] *Doodeward*; *Kelly*; *Re Organ Retention*, para.296

[760] *Ibid.*

[761] *Re Organ Retention*, para.296

[762] See Rachael Mulheron, *Principles of Tort Law*, (Cambridge University Press, 2016), p.7; *Re Organ Retention*, paras.295-296

[763] 2006 S.L.T. 889

the Outer House, the Scottish courts were able to avoid the issue of 'property' in respect of the body of the child due to the structure of the law of delict. The unauthorised removal of the child's organs was not expressly regarded as a proprietary issue.[764] Rather, the operative interest was the personality rights of the parents – the juridical basis for any such right of action, in Scots law, was the *actio iniuriarum*.[765] Having access to no comparable mechanism to allow for a claim of this kind,[766] English law was unable to offer remedy and so it can be said that the 'no property' rule is not cogent even with the norms of its native legal system.

The last of the four English cases here cited, *Yearworth,*[767] concerned neither cadavers nor deceased and separated human tissue, but rather a 'living' derivative product of the human body: Sperm. Unlike in the comparable Australian cases involving sperm, the men from whom the tissue was taken were still alive at the time of the case and the case itself was one of negligence arising out of the destruction of the sperm resulting from problem with the storage system.[768]

The court in *Yearworth* did not simply expand the extant exceptions to the 'no property' rule while paying respectful lip-service to the more general preclusion of 'property' in cadavers;[769] rather, the *per curiam* judgment made clear that the Court of Appeal itself found the 'no property' rule to be unnecessarily restrictive and illogical in the Twenty-First century:

> "In this jurisdiction developments in medical science now require a re-analysis of the common law's treatment of and approach to the issue of ownership of parts or products

[764] The actual status of the child's body, in law, was unclear and the question was not addressed by the court – the 'personality rights' of the child's parent were the ultimate concern in this case (see para.4.2.2, *infra*) and the wrong effected to the child's body may have been deemed actionable whether the body was conceptualised as 'property' or not: See para.4.3.2 *infra*.

[765] *Stevens*, para.62

[766] *Ibid*.

[767] *Yearworth*, para.45

[768] *Ibid*., pp.1-2

[769] As indicated *supra*, the Court of Appeal did ostensibly attempt to justify the original inclusion of the 'no property' rule in English law: *Yearworth*, para.31

> of a living human body, whether for present purposes (viz. an action in negligence) or otherwise... However, as foreshadowed by Lord Justice Rose in *R v Kelly*, we are not content to see the common law in this area founded upon the principle in the Doodeward case, which was devised as an exception to a principle, itself of exceptional character, relating to the ownership of a human corpse. Such ancestry does not commend it as a solid foundation. Moreover a distinction between the capacity to own body parts or products which have, and which have not, been subject to the exercise of work or skill is not entirely logical. Why, for example, should the surgeon presented with a part of the body, for example, a finger which has been amputated in a factory accident, with a view to re-attaching it to the injured hand, but who carelessly damages it before starting the necessary medical procedures, be able to escape liability on the footing that the body part had not been subject to the exercise of work or skill which had changed its attributes? So we prefer to rest our conclusions on a broader basis."[770]

The 'broader basis' on which the decision of the Court of Appeal rested was the decision that ownership of the sperm vested in the men from whom the sperm was ejaculated at the moment of ejaculation.[771] Their rights of 'property' – including, it must be inferred, any claimed *ius disponendi* – was limited by the operation of the Human Tissue Act 2004, but such statutory intervention did not negate the proprietary character of the sperm or of the relationship between the claimants and the sperm. In such circumstances, the claimants were able to establish the existence of a gratuitous bailment and lay claim to compensation from the NHS Trust as a result.[772]

[770] *Yearworth*, para.45
[771] *Ibid.*
[772] *Ibid*., para.60

The 'no property' rule might, then, be criticised by reference to the fact that it has been judicially noted as problematic. If the law, as a whole, requires a re-analysis as the result of the operation of this rule, then it must be inferred that the rule, in its present form, does not promote the interests of justice. Not only that, as has been alluded to throughout this chapter, the 'no property' rule is also unsatisfactory from the standpoint of semantics. The fact that one is obliged, by the constraints of the English language, to make use of the language of property when dealing with deceased or separated human tissue is inescapable: Indeed, the authors of Halsbury's Laws of England, like the court in *R v Fox,* were forced to make use of the term 'possession' in relation to cadavers, stating that 'there is a duty to dispose decently of a dead body on the personal representatives or person lawfully in possession of the corpse'.[773] Nevertheless, the same work goes on to affirm that 'the general rule of common law still stands, that there is no property in a dead body'.[774]

In commenting upon the rule pertaining to possession as it is stated in Halsbury's Laws, Jones notes that:

> "This rule applies to bodies buried on ecclesiastical premises. The duty to dispose of the body gives to those responsible a right of possession of the corpse. Once the corpse has been buried, however, this right of possession ceases, as the duty has been completed."[775]

This position seems consistent with the views set forth by Coke, Wood and Blackstone, which are, as discussed,[776] to varying extents consistent with the Roman law approach; that is to say that the corpse is profane prior to burial and part of something akin to a *res religiosa*

[773] 5th edition, vol.24 title Cremation and Burial, para 1103

[774] *Ibid.* para.1105

[775] Philip Jones, *Ecclesiastical Burial: Disposal, Decency and Disturbance*, [2015] <https://ecclesiasticallaw.wordpress.com/2015/07/03/ecclesiastical-burial-disposal-decency-and-disturbance/>

[776] *Supra*

thereafter. There was no reason for the common law of England to extend the rule that an interred cadaver is not an item of 'property' in secular law to corpses which were not yet interred and even less reason still to extend that rule to separated human body parts and derivatives of living human bodies. This state of affairs has, as demonstrated, led to unjust outcomes in cases concerning the theft of corpses and wrongful interference with dead bodies and has given rise both to a lack of constancy in the lawand to a lack of legal certainty.[777] It has likewise led to problems due to its natural conflict with the reality of modern medical science; by its implicit extension to human biological material as a whole, the Common law courts are likely to be forced to continue to undermine the now-established principle in novel and complex cases.

If a rule of law is so consistently undermined, apparently by necessity, then it cannot be said to be a good – or, indeed, useful – rule of law. Thus, the unworkability of the 'no property' rule in modern medical science must be deemed to be one of the key problems with the rule. The present and recorded[778] eagerness of the Common law judiciary to escape from the confines of the 'no property' rule has been noted. Having extended the 'no property' rule from buried to unburied cadavers, and then from unburied cadavers to human biological material more widely, the Common law precipitated the problems discussed above. In the case of *Roche v Douglas*, Master Sanderson opined that:

> "In the wider sense, it defies reason to not regard tissue samples as property. Such samples have a real physical presence. They exist and will continue to exist until some step is taken to effect destruction. There is no purpose to be served in ignoring physical reality. To deny that the tissue samples are property, in contrast to the paraffin in which

[777] See *supra*; it was also noted, in *Yearworth,* that 'the distinction between the capacity to own body parts or products which have, and which have not, been subject to the exercise of work or skill is not entirely logical' – at para.45(d)

[778] See *Kelly,* p.631; *Yearworth,* para.45

the samples are kept or the jar in which both the paraffin and the samples are stored, would be in my view to create a legal fiction. There is no rational or logical justification for such a result".[779]

The courts have accepted such, implicitly in the case of *AB* and rather more explicitly in the case of *Yearworth*. It seems apparent, in the context of these recent judicial statements that the present direction of travel, by the judiciary, is away from a strict application of the 'no property' rule.[780] In recognising that the rule has been problematic in the past and that it is likely to continue to be problematic in the future, the courts of the Common law world appear to have taken steps to recede from the rule.[781] Unfortunately, as the progenitors of the rule seek to move away from it, the courts and legal profession of Scotland seem content than ever to embrace it.[782] Although it is evident, from the above discussion, that the 'no property' rule is not cogent even within the context of its own, native, legal system, the extent to which the rule exists already within Scots law remains unclear. Thus, the extent to which it has been received (if at all) in this jurisdiction should be discussed.

2.4 Scotland and the 'No Property' Rule

2.4.1 Criminal Law

Unlike in England, where there was, by the late Nineteenth century, binding judicial authority which enshrined the 'no property' rule in law,[783] there was no comparable Scottish civil or criminal case asserting the 'no property' principle until 1897,[784] when Hawick Sheriff Court held that the law of Scotland was 'as settled as the law of England' on this matter.[785]

[779] *Roche*, para.23-24
[780] See *Re Organ Retention*, para.148; *Yearworth*, para.45
[781] *Yearworth*, para.45
[782] *C v Advocate General For Scotland* 2012 SLT 103, para.63; Reid, *Body Parts*, p.245
[783] Recall *Sharpe* and *Williams.*
[784] *Robson v Robson*, p.353
[785] *Ibid*.

This Sheriff Court judgment appears anomalous, however; the Institutional writers, and contemporary Nineteenth century commentators,[786] appear to have taken precisely the opposite view, expressly holding that a corpse could be stolen prior to its burial.[787] This proposition was affirmed again after *Robson* in a succession of academic commentaries[788] and in one significant Court of Criminal Appeal case,[789] as well as in one unreported case from Aberdeen Sheriff Court in which Sheriff Scott noted that 'it is true that a dead body can be stolen, before burial'.[790]

The significance, for the purposes of this thesis, of the fact that corpses may be the object of 'theft' in Scots law cannot be overstated; theft, in the early Twentieth century, if not necessarily in the Twenty-First,[791] necessarily involved the unauthorised taking of a thing which was both corporeal[792] and moveable[793] and which was 'property' owned by another.[794] This proposition may be substantiated by reference to the structure of the authoritative textbooks on Scottish Criminal law. In the 2nd edition of Gordon's *Criminal Law* (published 1978), the author notes that 'ownership of the goods in question is of paramount importance in theft'.[795] Having emphasised that 'a man can steal only that which belongs to someone else'[796]

[786] With some exceptions: see Bell, *Dictionary*, p.254; Bell appeared, however, to believe that interference with a corpse before burial could be tried as an instance of the crime of violating sepulchres, but it is submitted here that this belief was erroneous – see *infra.*

[787] Bell, *Crimes*, p.85; Alison, *Principles*, p.280; MacDonald, *Criminal Law*, p.21. These sources were not cited before the court in *Robson*.

[788] Anderson, *Criminal Law*, (2nd Edn.), p.175; Walker and Stevenson, *Criminal Law*, p.21

[789] *Dewar*

[790] See *Catherine Evans v Jessie McIntyre* A498/80: Date of Judgment, March 28th 1980 – reported in Paisley and Cusine, *Unreported Cases*, pp.49-54. Sheriff Scott did, however, note that 'none of the authorities in the criminal law are of any assistance in determining to whom, if anyone, the dead body belongs' – at p.52

[791] Chalmers and Leverick, *Criminal Law*, para.21.12

[792] *Ibid*.

[793] Items of heritage can be stolen, but only if they are separated from the land and thus made moveable by the 'act and deed' of the thief: In the words of Burnett, 'everything that is moveable may be the subject of theft, whether it is moveable property strictly so called, or made moveable by the act and deed of the away taker' – Burnett, *Treatise*, p.124

[794] Chalmers and Leverick, *Criminal Law*, para.21.12; See also Walker and Stevenson, *Criminal Law*, p.16

[795] Gordon, *Criminal Law*, (2nd Edition), para.14-39

[796] Gordon, *Criminal Law*, (2nd Edition), para.14-39

and that, in theft, the 'goods' which are stolen 'must be owned',[797] Gordon subsequently goes on to note that, while 'it is settled that to remove a body from its grave is not theft… It is said also to be settled that to take a body before burial from those entitled to deal with it is theft.'[798] Thus, just as in England, where it followed from the 'no property' rule that a corpse could not be said to be the object of theft,[799] it necessarily follows that in Scotland, since a corpse can be stolen, there does subsist at least some aspect of 'property' in corpses.[800]

The opinion of the Institutional writers was said, by MacDonald[801] and Gordon,[802] to rest on the authority of the case of *Donald M'Kenzie*, a 1733 case in which M'Kenzie and others were indicted for their part in breaking into the home of the pursuer and carrying off a dead body that was being prepared for burial in the pursuer's home.[803] Although the salient elements of theft were evidently present in this case,[804] Gordon and his successors[805] note that the charge in *M'Kenzie* was one of 'ryot and violence' rather than plain theft,[806] indicating that the theoretical matter of whether or not 'property' is vested in the human corpse can be said to have been sidestepped in this indictment.[807] With that said, a further reading of *M'Kenzie* appears to indicate that the court entertained the accusation of theft as 'ane aggravation' of the charge of ryot and violence and that Lord Milton ultimately found the panels guilty of 'any of the said crimes relevant to infer ane arbitrary punishment';[808] theft being implicitly included

[797] Gordon, *Criminal Law,* (2nd Edition), para.14-40

[798] Gordon, *Criminal Law,* (2nd Edition), para.14-44

[799] See *R v Price* (1884) 12 QBD 247, p.252

[800] See Brown, *Property Rights*, p.44

[801] Walker and Stevenson, *Criminal Law*, p.21

[802] Chalmers and Leverick, *Criminal Law*, para.21.26

[803] See *M'Kenzie,* p.57n

[804] *Ibid.*, 57n-59n

[805] M. G. A. Christie (3rd Edn.), 2001 and James Chalmers and Fiona Leverick (4th Edn.), 2017

[806] Chalmers and Leverick, *Criminal Law*, para.21.26; this comment mirrors those made in the 1st (1967), 2nd (1878) and 3rd (2001) editions of the work.

[807] *Ibid.*

[808] An 'arbitrary punishment' was one which granted the judge or decision-maker discretion in determining what form that the punishment should take; thus, the punishment of theft in Scots law at this time can be contrasted

among such relevant crimes, given that the panel had explicitly argued that any charge of theft ought to be deleted from the indictment.[809] In addition, the 'theoretical difficultly' identified by Gordon – that a corpse might be stolen before burial, but not after – may be explained by reference to the suggestion that burial serves to fundamentally alter the character of a cadaver by reason of the body and the land in which the corpse was interred fusing to create a *res divini iuris*;[810] hence, the appropriation of a buried corpse is not theft, but rather violation of sepulchre, given the unauthorised tampering with, or destruction of, the *locus* of a *res religiosa*.

M'Kenzie may not be the most solid basis on which to argue that the law of Scotland recognises that cadavers may be stolen, but there is further binding authority in support of this proposition. While Anderson had expressed the view that 'a dead body not yet buried may be stolen' a mere seven years after *Robson v Robson* was heard,[811] the opinion of the Sheriff in that case was also juridically confirmed as incorrect by the Court of Criminal Appeal in the 1945 case of *Dewar v HM Advocate*. Therein, Lord Moncrieff expressed the view that 'a body that has been consigned for burial ceases to be subject to theft only when interment is complete; and if the doctrine is now to be applied in the case of body consigned for cremation, I think that the proper parallel would be that theft should be regarded as having ceased to be practicable once the body has been enclosed in the furnace.'[812] In the fourth edition of *The Criminal Law of Scotland*, Leverick and Chalmers note 'that the approach of the court in *Dewar*, therefore, confirms the view that a human body, at least prior to burial, can be owned, and so can be stolen.'[813] Accordingly, human cadavers can be said to have a key characteristic of 'property'

with the relevant English law, which held theft to be a felony (and so set the death penalty for all such offences – see *supra*).

[809] *M'Kenzie*, p.58n

[810] Recall para.1.4.2, *supra*.

[811] Anderson, *Criminal Law*, (2nd Edn.) p.175

[812] *Dewar*, p.14

[813] Chalmers and Leverick, *Criminal Law*, para.21.26

prior to interment; the criminal law offers protection to the owner of a corpse by proscribing the unlawful appropriation of uninterred dead bodies.

The remarks made by Lord Moncrieff in *Dewar* are self-evidently *obiter*; the issue at hand in that case was not the theft of a cadaver, but rather the theft, from a crematorium, of coffins and coffin lids. The accused had claimed that since he had believed the coffins/lids to be abandoned, he could not be charged with the crime of theft for appropriating them.[814] This argument was repelled as having no sound basis in law,[815] since 'the coffin and its contents were entrusted or delivered to the Crematorium Company (which means for the purposes of this case, to Dewar), for the limited purpose of having that coffin and its contents transformed into ashes'.[816] They could not, therefore, be said to have been 'abandoned'. Even if the coffins had been abandoned, however, it is difficult to see how Dewar might have claimed to enjoy ownership of them, as property which is abandoned does not become *res nullius* (and so capable, once again, of being lawfully appropriated by *occupatio*), but rather falls to the Crown as a result of the maxim *quod nullius est fit domini regis*.[817]

The operation of this maxim ensures that, in contrast to the position in both Roman and English law,[818] there exists a general principle that 'once a thing becomes the subject of ownership it can never be ownerless.'[819] Accordingly, it cannot be said – as Gordon and his later editors mooted – that a cadaver is abandoned on its or interment, as such would not satisfactorily explain why the body ceases to be protected by the law of theft and receives, instead, protection by means of the crime of violation of sepulchres.[820] As has been submitted

[814] *Dewar*, p.6
[815] *Ibid*., p.8
[816] *Ibid*.
[817] See the discussion in *Kane v Friel* 1997 SLT 1274
[818] Scottish Law Commission Memorandum No.29, *Corporeal Moveables: Lost and Abandoned Property*, (1976), p.2
[819] *Ibid*. and *Discussion Paper on Prescription and Title to Moveable Property*, (2010) (Discussion Paper No 144)
[820] See Jonathan Brown, *Res Religiosae*, p.363

elsewhere, this is better explained by the claim that a *res religiosa* is created on the reverential burial of the body in the grave.[821] The same holds true of cremated human remains, which have been juridically said to be 'sacred wherever they are interred'.[822]

Since the primary feature of any *res religiosae* is not the human vessel, but rather the *locus religiosus*, in the absence of any *locus religiosus* it follows that there cannot be a *res religiosa*.[823] Ashes which are later buried may be said to accede to the land and so create a *res religiosa* – thus, the destruction of a garden of remembrance might be tried as violation of sepulchre – but in the absence of any connection to land or heritage a charge of violation of sepulchre ought not to be regarded as competent. An urn filled with ashes, being corporeal and moveable, is better afforded protection by the law of theft than the law pertaining to violation of sepulchres;[824] indeed, such finds support in the *dicta* of Lord Normand, who noted in *Dewar* that "it may be argued that the ashes are capable of being stolen, and that it is not until the ashes are interred or disposed of in accordance with the wishes of the relatives that the crime of violation of sepulchres can take place."[825] Thus, until interred, ashes are better regarded as ordinary property, rather than an entity removed from the ordinary rules of property law.

Although it has been possible to maintain that 'the position of human remains in the law of theft is not altogether clear'[826] over the course of the past fifty years, it nevertheless remains clear that uninterred human cadavers can be 'stolen', and so may be deemed 'property', in Scots criminal law.[827] Likewise, on the basis of Lord Normand's view as

[821] See *ibid.*

[822] See Note by Sheriff A. M. Cubie in *the Application by the Diocese of Glasgow and Galloway of the Scottish Episcopal Church for the Disinterment of Cremated Remains at the former Holy Cross Church* [2019] SC GLA 33, para.20

[823] Brown, *Res Religiosae*, p.353

[824] See the discussion in Chalmers and Leverick, *Criminal Law*, para.21.26

[825] *Dewar*, p.11

[826] This statement appeared in the 1st edition of Gordon's *Criminal Law* and remains present and unchanged in the 4th edition: See Gordon, *Criminal Law*, p.430; Chalmers and Leverick, *Criminal Law*, para.21.26

[827] Walker and Stevenson, *Criminal Law*, p.21; Chalmers and Leverick, *ibid.*

expressed in *Dewar*, it might be inferred that ashes which have not been interred may also be the object of theft. This is markedly different to the prevalent position in the law of England and Wales, where – in the absence of any invocation of a *Doodeward* exception[828] – human remains cannot be stolen and so are not 'property' for the purposes of criminal law.

It is submitted that the Scottish position, as expressed above, is preferable to the present English position; as Gordon and his later editors note by way of several examples, 'the need to protect specimens in laboratories and exhibits in museums is itself a strong argument for treating a body as capable of being owned. It seems unreasonable to suggest that a museum has no property in its mummies, or that an anatomical laboratory has no property in parts of a body it has dissected, and which it has preserved for exhibition'.[829] Although these examples may be (somewhat) satisfactorily answered by an application of the 'work or skill' exception, it appears that this is not broad enough, by design, to capture all eventualities. The appropriation of a body from a funeral home, for instance, would not engage the *Doodeward* exception or any analogue to it, but nevertheless ought to be tried as theft. In the absence of 'property' in human remains, a legal 'black hole' remains. This black hole has the potential to give rise to absurd consequences which might otherwise be circumvented by the simple application of extant legal rules to the situations at hand; as Professor Reid indicated, 'property law will always be better than no law'.[830]

2.4.2 Cadavers – 'Possessed', but not 'Property'?

Notwithstanding the difficulties that the 'no property' rule has caused in English civil and criminal law, Professor Reid nevertheless suggested that it is 'satisfactory' to suggest that

[828] Whatever 'work and skill' the undertakers demonstrate in preparing a corpse for burial, they are by definition *not* acting to imbue the corpse with attributes distinguishing it from a mere corpse awaiting burial, as the *Doodeward* exception requires – recall *Doodeward* at p.414.

[829] Chalmers and Leverick, para.21.26

[830] Reid, *Body Parts*, p.243

an intact human corpse is not to be regarded as 'property' in Scots law.[831] This suggestion was justified, by Reid, by reference to the claim that, should bodies be considered 'property', they would in principle form a part of the deceased's estate and so fall to be distributed to the legatees or beneficiaries in line with the ordinary rules of succession.[832] While this would indeed be true if the body were to be regarded as the property of its former inhabitant on the death of that inhabitant, since one cannot logically be regarded as the 'owner' of one's own body in life,[833] there is no reason to treat the body as forming a part of the deceased's patrimony on their death. The rules of succession pertaining to the division of the estate of the *de cujus* [*i.e.*, the deceased in any given case of succession] are not, therefore, necessarily engaged in respect of the body.

Given that Reid's objection to the categorisation of a 'complete' deceased body as 'property' can be circumvented by this reasoning, and given that there exist good reasons for holding that a body should be subject to the ordinary rules of property, at least to ensure that the misappropriation of it amounts to 'theft' in criminal law, it cannot be said that it is 'satisfactory' to regard a dead body as wholly outwith the sphere of the *ius quod ad res pertinet*. Property law is, indeed, better than 'no law',[834] although this is not to say that 'property' is the ideal legal solution to problems of this kind. Indeed, in accepting that the *living* body is not 'owned' by the person embodied in it, so that it cannot be said to form part of their estate on their death, further problems arise. If neither the deceased in life, nor their beneficiaries, can be regarded as having (or having the right to obtain) ownership of the dead body,[835] the question of who might have a better claim to *dominium* over the corpse arises. In the absence of

[831] *Ibid*., p.249

[832] *Ibid*., fn.84

[833] See Diego Gracia, *Ownership of the Human Body: Some Historical Remarks*, in Have *et al*, p.69

[834] Reid, *Body Parts*, p.243

[835] See Lord Hill Watson, *Burying-Places*, in *Greens Encyclopaedia of the Laws of Scotland*, Vol.2, para.1289; *C v Advocate General*, para.63

'property' in the *living* body, it cannot be said that the body has been 'abandoned', and so have fallen to the patrimony of the Crown,[836] on death. Accordingly, the potential problems with a proprietary analysis of whole cadavers merits consideration.

It is possible to regard the body as *res nullius* on the death of its inhabitant. Such would be problematic, however, as it would render the corpse liable to appropriation into the patrimony of whoever obtained first possession of it: *quod nullius est fit primi occupantis*.[837] This problem might be answered by reference to the possessory interests of (historically) an executor or, since 2016, the 'nearest relative' of the deceased.[838] Prior to the enactment of the Burial and Cremation (Scotland) Act 2016, the executor obtained, *de jure*, a right to possess the body for the purposes of securing its burial.[839] This possessory right is now, in the absence of an 'arrangements on death declaration',[840] vested in the deceased's 'nearest relative',[841] who may be – *inter alia* – their spouse, cohabitant or child (if the deceased were an adult)[842] or their parents, grandparents or siblings (whether the deceased were an adult or a child at the time of their death).[843] If the legal right to possess enjoyed by the executor, or by the deceased's 'nearest relative' or nominated person, precipitates at the time of death, then logically the executor, relative or nominated person would obtain first lawful possession of the cadaver at that moment and so, effectively, become *dominus* of it through the operation of *occupatio*.[844]

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[836] See the discussion in *Kane*

[837] Stair, *Institutions*, 2, 1, 3

[838] See the Burial and Cremation (Scotland) Act 2016, ss.65-68

[839] See *C v Advocate General*, para.60

[840] Of which, see s.65 (8) of the 2016 Act and *Burial and Cremation (Scotland) Act 2016 (Legislative Comment)*, [2017] S.P.C.L.R. 3, p.4

[841] See s.65 (2) for the law as it stands in the case of adults and s.66 (2) for the law as it stands in the case of children. At common law, the 'nearest relatives' of the deceased were recognised as having an interest in the bodies of their kin, though this interest was conceived of as notably distinct from the interests of the executor. As noted by Lord Brodie: 'in Scots law I would see near relatives as well as the executor or prospective executor as having rights or interests in respect of the body of the deceased… The near relative has an interest which is personal to himself as an individual': *C v Advocate General*, para.60

[842] See s.65 (3) (a), (b) and (c).

[843] See s.65 (3) (d), (e) and (f); s.65 (a), (b) and (c).

[844] Carey Miller and Irvine, para.2.03

This is untested in respect of the new arrangement under the 2016 Act, but it has been said to be 'well-established' that the executor is not the owner of the cadaver of the *de cujus* in Scots law.[845] Quite why this is the case merits consideration. Historically, the executor has been conceptualised as more than the mere custodian of the property of the *de cujus* – although it has been said that 'death gives rise to transfer, from the dead to the living',[846] no transfer of property, in fact, occurs between the deceased and their executor. Instead, there is a transfer of personality. The executor, in law, adopts the *persona* (that is, the 'mask', recalling the observations of Waelkens)[847] of the deceased, becoming *eadem persona cum defuncto* [the same person as the deceased].[848] This means, in effect, that the human being known as the executor has two legal personalities (that is, they carry two distinct 'masks' which they might alternatively wear in court): their own ordinary day-to-day *persona* (the executor *qua* their own name: say, here, 'John Smith') and that of the deceased (the executor *qua* executor).[849] There is no pragmatic or legal difficulty in this analysis; 'the law of Scotland, like the Roman law, has always recognised the existence of jural or fictitious persons, which... [are] managed or represented by one or more individuals acting in a capacity quite distinct from their private *personae'*.[850]

These two separate personalities each have their own separate patrimonies,[851] which are of course practically controlled by one and the same human being, but are nonetheless in

[845] *C v Advocate General*, para.63

[846] George L. Gretton, *Quaedam Meditationes Caledoniae: The Property/Succession Borderland*, [2014] EPLJ 109, p.114

[847] See p.27, *supra* and Laurent L. J. M. Waelkens, *Medieval Family and Marriage Law: From Actions of Status to Legal Doctrine*, in John W. Cairns and Paul J. du Plessis, *The Creation of the Ius Commune: From Casus to Regula*, (Edinburgh: Edinburgh University Press, 2010), p.104.

[848] See Stair, *Institutions*, 3, 4, 23; Robert Bell, *A Dictionary of the Law of Scotland: Intended for the Use of the Public at Large, as Well as of the Profession*, Vol. II (Edinburgh: John Anderson & Co, 1815), p.771

[849] It must be noted, here, that though a plurality of Scottish sources state that the executor (or, historically, the heir as universal successor) is *eadam persona cum defuncto*, 'the logical implications of this position tend not to be followed through' in practice: See Gretton, *Quaedam*, p.120

[850] J. K., *On the Liability of Trustees* [1878] Jour. Jur. Sc. 617, p.621

[851] This notion is, in part, an expansion of the 'dual patrimony' theory of trust law developed by Professors Gretton and Reid (see George L. Gretton, *Trust without Equity*, in Remus Valsan, *Trust and Patrimonies*, (Edinburgh:

law viewed as utterly distinct from one another. Hence, the 'personal' insolvency of the executor *qua* 'John Smith' (that is, the insolvency of the executor's day-to-day *persona*) has no bearing on the estate of the deceased. The sequestration of the everyday *persona* of the executor will not allow the appointed trustee to seize the patrimony of the deceased, just as the sequestration of a trustee, in their personal capacity, will not prejudice the separate patrimony held in trust.[852] The objects in the deceased's patrimony are owned by the executor *qua* executor; they are not owned by the everyday legal *persona* of the executor.[853]

As the executor *persona* of the man we know here as 'John Smith' is *eadem persona cum defuncto*, this *persona* has control of the objects in the deceased's patrimony in the same terms as the deceased.[854] In other words, the executor *qua* executor can obtain no greater right

EUP, 2015), p.89). While that theory, in preserving a cardinal rule of Scots property law (that 'ownership' cannot be split between different persons), breaks another cardinal rule of Civilian jurisdictions ('the idea that each person has a single, indivisible patrimony': see Remus Valsan, *The Trust as Patrimony: An Introduction*, in *Trust and Patrimonies*, (Edinburgh: EUP, 2015), pp.7-8) the present theory chooses instead not to make peace with the sacrifice of principle (see the discussion in Lionel Smith, *Scottish Trusts in the Common Law*, [2013] Edin. L. R. 283, p.286) but rather to advance the view that a single human being can, in law, wear different masks (*i.e.*, be juridically recognised as representing different *personae*) *in addition to* being recognised as a distinct legal *persona* in their own right. In effect, the theory is that while there is duality of patrimony without duality of ownership, this is so only because there is duality of personality: one human being acts as two (or more) distinct *personae*.

[852] As Professor Gretton has, himself, noted, the 'net effect' of the 'special patrimony' theory 'is to make a trust into something very like a separate juristic person': George L. Gretton, *Scotland: The Evolution of the Trust in a Semi-Civilian System*, in Richard Helmholz and Reinhard Zimmermann, *Itinera Fiduciae: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, 1998), p.511

[853] That trusts, in Scots law, may be conceived of as *personae* distinct from the trustees who inhabit their offices, has been recognised by the Court of Session. For instance, a mortification established by George Heriot was recognised, in the mid-Eighteenth century, as a 'community' – which in this context means a juristic person: See *The Merchant Company and Trades of Edinburgh v The Magistrates and Governors of Herriot's Hospital* [1765] Mor 5750 and the discussion in Gretton, *ibid.*, p.535. Executry is, itself, said to be 'regarded as a trust, but a special sort, to which special rules apply' (Gretton, p.541) and these special rules do not affect the juridical basis of the analysis presented here; s.2 of the Executors (Scotland) Act 1900 c.55 and s.20 Succession (Scotland) Act 1964 c.41 provide that, respectively, executors nominate and dative are granted 'the whole powers, privileges, and immunities, and be subject to all the limitations and restrictions' of trustees. Hence, it is submitted that if, in Scots law, a trust might be regarded as a separate juristic person, the executor *qua* executor must likewise be so conceived.

[854] An oddity does arise, in Scotland, by virtue of the fact that the executor will not be regarded as 'owner' of any land owned by the deceased until his (in his capacity as executor) title to it is registered in the Land Register. This state of affairs evidently flows from Scotland's longstanding tradition of 'no registration, no real right'. But that this is no more than a quirk of the Scots system of registration is readily revealed by the fact that even without registration of the title in his own name, the executor may pass ownership of the land to the legatee (or to a third party purchaser) by signing a deed of transfer to the legatee. 'When the legatee (or buyer) registers in the Land Register, ownership passes': here, the transfer can be conceptualised as from a *hereditas jacens* to the legatee (or

to the objects in the deceased's patrimony than the deceased held themselves at the time of their death, because the deceased's *persona* was not extinguished by their death. The role is now simply filled by the executor *qua* executor, rather than by the deceased acting in their own capacity. Thus, the objects in the deceased's patrimony are still owned by the *persona* of the deceased until the executor effectively divides the patrimony according to the provision of the will, or in accordance with the rules of intestacy.[855] In essence, though it is true to say that property is transferred following the death of the deceased, the transfer is, in law, effected by the *persona* of the deceased. The executor we know as John Smith never takes ownership, *qua* John Smith, of the deceased's property and so does not transfer anything, in his capacity as John Smith, to any of the successors. He instead executes the will of the deceased acting practically as his representative, but in law as the *persona* of the deceased him or herself.

With the executor thus conceptualised, it is small wonder that the law has not developed so as to regard him as owner of the deceased's corpse. The deceased did not own their body in life and so the executor *qua* executor cannot logically obtain any greater right to it than that *persona* had prior to their death. Thus, at first sight, it seems that there is no reason to regard the executor *qua* executor as owner the deceased's cadaver, since this is an object that the deceased did not own in life. With that said, provided that the deceased was recognised, by law, as a 'person' in life, the body of the deceased was not a *res* in life. The bodies of all legal *personae* are removed from the ambit of the *ius quod ad res pertinet* as living persons are instead governed instead by the *ius quod ad personas pertinet*.[856] At the time of death, the body

purchaser) or from the *persona* of the deceased to the legatee (or purchaser). In either case, the transfer is practically effected by the executor *qua* executor: See Gretton, *Quaedam*, p.118

[855] This correlates with the juridical nature of the *hereditas jacens* in Roman law; such was described, by Gretton, as a 'self-owning juristic person': Gretton, *Quaedam*, p.116. The phrase 'self-owning' is, of course, a misnomer – *dominus membrorum suorum nemo videtur* – this phrase should be interpreted, here, as denoting the existence of a *persona* with its own patrimony, rather than as the oddity of a thing which owns things.

[856] See Jonathan Brown, *Servitude, Slavery and Scots Law: Historical Perspectives on the Human Trafficking and Exploitation (Scotland) Act 2015*, [2020] Legal Studies 1, pp.5-8 (Firstview: accessible at https://doi.org/10.1017/lst.2020.4 (accessed 19/05/2020)

of the deceased ceases to be inhabited by a legal subject and thus becomes, at the point of death, a thing.[857] This thing, having never been owned previously, must logically be conceptualised as *res nullius* in the absence of any specific rule of law serving to remove the object from the ordinary law pertaining to things.

As a matter of law, then, it must be asked whether there is any operative rule of law which serves to remove the cadaver from the ordinary law of things. In Scotland, the answer to the first question appears in the negative, as is discussed above.[858] Cadavers may be removed from the *ius quod ad res pertinet* by their interment, but prior to this point they may clearly be the object of theft and are, thus, axiomatically regarded as an object of property. The reason that the executor *qua* executor has, historically, been regarded as having no *dominium* in the cadaver is thus apparent; they do not obtain ownership of the corpse by virtue of their office (*i.e.*, their *persona* of the deceased) because the executor *qua* executor obtains ownership of the property of the *de cujus* only for the purposes of dividing the deceased's patrimony amongst the beneficiaries. The cadaver has no destination in the law of succession; its destination, in the eyes of the law, is the grave (or, more commonly in modern times, the crematorium).

If, however, the intact corpse is governed by the ordinary law pertaining of things, then as indicated above it must be possible for it to become *fiunt singulorum* by way of *occupatio*. It should here be borne in mind, however, that the question of who obtains first possession is not merely one of objective fact: possession, in Scots law, denotes a legal concept as well as a set of factual circumstances.[859] The question of who, in law, obtains first possession and so becomes owner of the cadaver may be descriptively termed one of fact, but 'fact' here must be understood as including facts deemed true by means of some legal fiction – thus regarded, not

[857] Recall the *Institutes* of Gaius and Justinian, which hold that human beings are quintessentially examples of *res corporales*: see G.2.12-14; J.2.2.1-2 and the discussion at para.1.2.4 *supra*.

[858] See para.2.4.1, *supra*.

[859] See Anderson, *Possession*, para.1-03

as fictions, but as 'institutional facts'.[860] Thus, although any particular person may, as a matter of pure factual circumstance, obtain first physical control of a cadaver after the deceased's death, this does not necessarily mean that this person obtained, on taking physical custody, legal 'possession' of the corpse. As Anderson cautions, 'not all holders are possessors'.[861]

The legal right to possess the cadaver has historically been recognised as vesting in the executor *qua* executor notwithstanding that the body itself might be in the custody of a third party. This right of possession was not conferred by virtue of any entitlement to the body which the *de cujus* enjoyed in life. Rather, it was an entitlement which arose severally from the executor *qua* executor's assumption of the *persona* of the *de cujus*, stemming from the executor's duty to ensure the respectful and reverential disposal (this term used here to include, *inter alia*, burial and cremation) of the deceased's body.[862] Where any person is placed under a duty to execute some action in law, they must also necessarily be given the attendant rights and powers necessary to execute that duty.[863] It is, thus, on this basis that the executor historically held the right to possess the cadaver of the *de cujus*,[864] and on this basis that the attendant right to possess has passed to the person nominated in an 'arrangements on death declaration', whom failing, the 'nearest relative(s)'.

That the necessary right to possess the cadaver was enjoyed by the executor, and is now enjoyed by the 'nearest relatives', or by the person nominated in an arrangements on death

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[860] See Neil MacCormick, *Institutions of Law: An Essay in Legal Theory*, (Oxford: OUP, 2007), pp.136-137

[861] Anderson, *Possession*, para.1-09

[862] Executors were, at common law, burdened to take into account the views and interests of the close family members of the deceased: See *C v M* 2014 S.L.T. (Sh Ct) 109, para.47

[863] An analogy might be drawn, here, with the recognition afforded in *Moncrieff v Jamieson* 2008 S.C. (H.L.) 1 that 'there are cases where a right is implied because it is "reasonably necessary" for the "exercise or enjoyment" of an expressly granted right' (para.112, *per* Lord Neubeurger). As the right to possess the cadaver is 'reasonably necessary' to 'exercise' the express duty to dispose of it (as one cannot arrange disposal without an entitlement to physical control) it might be said that the right to possess the body is a necessary incident of the duty to arrange for its disposal. See, also, *Moncrieff v Jamieson* 2004 S.C.L.R. 135, para.4

[864] Executor-creditors are not held under this duty, as their confirmation as executor is 'limited to the amount of the debt and sum confirmed to which such creditor shall make declaration': See Confirmation of Executors (Scotland) Act 1823 c.98, s.4

declaration, does not necessarily mean that these persons axiomatically obtained or obtain, in law, *first* possession of the cadaver, however. Ergo, that they obtain lawful possession of the cadaver on confirmation or declaration of the court does not necessarily entail that they become, at this time, *dominus* of it.[865] For the executor *qua* executor, 'nearest relative' or appointed person to become *dominus* by *occupatio* effected by seizing first possession in all cases, the possessory right would need to be vested them at the very moment of the death of the deceased. Otherwise, it would be possible for some intervenor to seize first possession of (and so obtain *dominium* over) the corpse by taking custody of it *animo domino* [with the intention to hold as owner],[866] or at least in the manner of one asserting a real right.[867] This, *prima facie*, would potentially lead to the realisation of a plethora of absurd possibilities, such as that of a thief obtaining a greater real right to a cadaver than that enjoyed by the executor, appointed person or nearest relatives.[868]

To suggest, however, that the appointed person or nearest relative (or, historically, the executor) obtains (or obtained) possession at the time of the deceased's death also appears absurd, given that in the case of an executor (whether nominate or dative),[869] individuals nominated under arrangement on death declarations and 'nearest relatives' alike there must be a process of court confirmation or appointment.[870] There is thus, in all cases, at least some

[865] Possession, after all, has nothing in common with ownership: D.41.2.35 (Paul)

[866] See Carey Miller and Irvine, para.1.18

[867] Anderson, *Possession*, para.1-13; Reid, *Property*, para.117

[868] The thief, in this situation, would not in fact be a thief as they would not have deprived any person of the enjoyment of their property; instead, the 'thief' would simply be an appropriator. Indeed, as Carey Miller observes '*occupatio* is applicable as a proprietary concept, and the taker's intention to make himself owner of a thing open to acquisition is effective regardless of the fact that the taking can be obtained through an unlawful activity': Carey Miller and Irvine, para.2.03

[869] *I.e.*, whether the executor was confirmed in the context of a testate succession (in which case, they are termed 'executor nominate') or confirmed in the case of an intestate succession (in which case they are termed 'executor dative'): See Gretton, *Quaedam*, p.120

[870] Under s.68 (1) of the 2016 Act, any 'person claiming an interest' must apply to the court from an order from the Sheriff to the effect that 'the person specified in the order is entitled to make arrangements for the burial or cremation of the remains of the deceased'. In the case of executors, confirmation must be sought within terms of the Confirmation of Executors (Scotland) Act 1858 c. 56 (as amended). Executors (nominative and dative) are obliged to lodge with the court an 'inventory' of the deceased's estate and, by way of the operation of a rule

temporal gap between the factual event of the death of the deceased and the confirmation of the executor or the judicial recognition of the entitlement of the relevant person (i.e., the person entitled to make arrangements under ss.65 or 66 of the 2016 Act).[871] In cases in which there has been no 'arrangments on death declaration', and in those cases prior to 2016 in which there was no executor nominate, the notion that first possession is obtained by the individual with the enduring right of possession seems even more untenable, since there may be dispute as to who is entitled to make funeral provision. Multiple persons might simultaneously fit the definition of the deceased's 'nearest relative'.[872] In such circumstances, prior to the granting of the Sheriff's order, the person with the entitlement (and thus the duty) to make arrangements for disposal is not, and until the declaration is made cannot be, known.[873] If the identity of the person with the entitlement to dispose of the cadaver cannot be ascertained without delay (or without the resolution of dispute), then it would seem impossible to hold that the person ultimately placed under the duty to make funeral arrangements obtained, after the granting of the relevant court order, 'first' possession of the body in those circumstances in which some interloper seized possession in the interim.

'which is hard to reconcile with the *eadem persona* idea', the effect of the confirmation is limited to the inventoried assets: See Gretton, *Quaedam*, p.120.

[871] It should be stressed, here, that this temporal gap gives rise to no conceptual difficulties in day-to-day situations in which a third party, such as a physician, undertaker or the police authorities, hold custody of a cadaver, as it is well-established in Scots law that 'one who holds entirely on another's behalf is not a possessor. Such a holder is said only to have custody, and is known as a custodier'. A custodier does not have legal possession and so cannot be said to have obtained 'first possession' as is required to effect *occupatio*: Anderson, *Possession*, para.1-13. If the relevant person maintains physical control of the cadaver only with the intention of passing it to the possession of the executor, nominated person or 'nearest relative' on confirmation or the declaration of the court, then they are not possessor and so cannot become owner through *occupation*. *Occupatio* occurs when 'the taker, intending to become owner, acquires on the basis of an act giving him sufficient physical control in the circumstances': Carey Miller and Irvine, para.2.05

[872] Say, in circumstances in which the nearest relative is, under s.65 (3) (c) the children of the adult, who each have divergent views on funeral arrangements. As noted in the legislative comment published in the Scottish Private Client Law Review, provisions of the 2016 Act 'would not preclude some of the difficulties that arose in the case of *C v M* [2014 S.L.T. (Sh Ct) 109] where there are apparently conflicting funeral wishes in existence.'

[873] What is said here is true, also, in cases of the appointment of an executor dative prior to the 2016 legislative reforms.

This difficulty can, however, be averted by regarding the duty to dispose of the cadaver as vested, not in the executor or nearest relative, but *in hereditas jacens* [in the patrimony of the 'jumping heir'].[874] This is on the face of it an imperfect solution, not least because 'an obligation for which nobody (for the time being at least) is liable is an odd idea'[875] and there exists a 'shocking silence as to' the juridical nature of the concept of *hereditas jacens* in this jurisdiction.[876] Yet the prospect must be thought at least somewhat attractive as it mitigates against the absurdity of allowing for an interloper to become owner of a cadaver simply by seizing first possession. As noted, it is possible, in Scots law, for an object to be stolen where the identity of the *dominus* is not known; there is, thus, no principled reason why it should not be possible for an object to be held in custody on behalf of an unknown or uncertain *dominus*.[877]

On confirmation of an executor, or on the court's declaration to the effect that a particular nominated person or 'nearest relative' is imbued with the duty, and corresponding power, to make funeral arrangements, possession of the cadaver moves from the *hereditas jacens* to the relevant *persona*. *Dominium* need not pass over on the passing of this right of possession, however – again because the concepts of ownership and possession are, in Scots law, distinct. This analysis thus neatly explains why executors have not historically been conceived of as the *domini* of the bodies of the *de cujus* and suggests that the relevant person under ss.65 or 66 of the 2016 Act might not obtain ownership of the cadaver either; the *hereditas jacens* seizes first possession and becomes owner and retains this ownership until the

[874] See James Lorimer, *A Hand-book of the Law of Scotland,* (2nd Edn.) (Edinburgh: T&T Clark, 1862), p.156

[875] Gretton, *Quaedam,* p.115. Of course, there is no intellectual difficulty if the *hereditas jacens* is conceived of as a juristic person as a matter of institutional fact, like it was in Roman law.

[876] *Ibid.*

[877] Indeed, as Gretton observes, 'Scots law must accept some sort of a hereditas jacens following the death' due to the temporal gap between the event of natural death and the confirmation of the executor(s): See George L. Gretton, *The Succesion/Property Borderland: A View from Scotland,* [2013] 18th *Ius Commune* Conference (Maastricht, 28th-29th November) accessible at http://www.iuscommune.eu/html/activities/2013/2013-11-28/workshop7a_Art.%20G.L.%20Gretton.pdf (accessed 20/05/2020)

cadaver is reverentially disposed of (at which time it, and its place of interment, become *res divini iuris*).

Since little has been written, or decided, on the subject of the juridical nature of the *hereditas jacens*, it cannot be said, with confidence, that Scots law has taken, or can take, the step of recognising the *hereditas jacens* as a separate juristic person, as the Romans did. Few modern systems of law permit the existence of the *hereditas jacens*,[878] however, so it might here be suggested that – in the absence of any statutory intervention designed to obliterate the *hereditas jacens* – the lead should be taken from Roman law. In any case, for as long as the juridical nature of the *hereditas jacens* remains undertheorised in Scots law, it remains difficult to determine which *persona* has *dominium* over dead bodies. The question of the juridical nature of the ownership of the cadaver – indeed, the question of the juridical nature of the *dominus* itself – thus remains open.

This is not as problematic, in this jurisdiction, as it might appear at first sight. As Lord Stewart noted in the case of *Holdich*, it does not at all follow from the fact that cadavers might be possessed in Scots law that they can actually be owned in Scots law.[879] As emphasised, ownership and possession have nothing in common with one another. The recognised right of possession may, however, afford some redress sufficient to remove the 'legal black hole' that would otherwise emerge in the complete absence of 'property'.[880] Scots law has long recognised the existence of legal remedies for the protection of the real right of *possessio*,[881] prime amongst them being the action of spuilzie.[882] Unlike a vindicatory action, an action of

[878] Gretton, *Quaedam*, p.115

[879] *Holdich*, para.49

[880] To paraphrase Reid, the law of possession is better than no law.

[881] See Anderson, *Possession*, para.1.30

[882] Reid, *Property*, para.161; Anderson, *Possession*, para.1.30. Practically, of course, victims of spuilzie are, today, more likely to conceive of the wrong that they have suffered as an instance of theft and consequently contact the police in lieu of raising a private law action: Carey Miller and Irvine, *Corporeal Moveables*, para.10.25

spuilzie is not concerned with the question of ownership; indeed, the action may be raised by one dispossessed by the *dominus* of the object that was taken from them.[883]

Spuilzie, therefore, might be used to afford remedy to a family member who is dispossessed of the deceased's corpse, or to the proprietor of a funeral home from which a corpse is illegitimately removed. The question of 'ownership' in the body is not, however, answered by reference to, or the availability of, this possessory remedy. Spuilzie can do no more than mitigate some of the more absurd consequences of a general 'no property' (better expressed as 'no ownership') rule, if such is accepted. Although the fact of possession is not necessarily indicative of the existence of 'ownership',[884] since the body has a tangible existence as a corporeal thing and is not otherwise *extra nostrum patrimonium*, it remains the case that – absent some *sui generis* rule – the body must be owned by someone.

The benefits of developing the concept of *hereditas jacens* in such a manner as to recognise it as *dominus* of the cadaver of its deceased are, thus, manifest. The need for a *sui generis* rule can be avoided, the integrity of the possession (or custody) of the corpse can be maintained through possessory actions and the criminal law and there remains, juridically, no need to expressly place all of the incidents of *dominium* into the hands of a particular (or particular group (of) human being(s). Indeed, the general objections to the recognition of 'ownership' of bodies[885] are not as forceful where the cadaver is conceived of as held in the patrimony of a *hereditas jacens*. Since the *hereditas jacens* is not a private *persona* (that is, as it is not a *persona* controlled by a private person or group of persons), there can be no commercial exploitation, or commodification, of the cadaver.

[883] Bankton, I, 10, 110

[884] *Holdich*, para.49

[885] Recall Skene, *Raising Issues*, pp.268-273; Wall, *Being and Owning*, p.1

Here it should be noted that whether or not the above analysis is accepted, and whether or not the Anglo-American 'no property' rule is substituted in its place, Scots law need not in any case face the same issues as those encountered in Common law jurisdictions. Through the recognition of the 'personality rights' of the surviving relatives of the deceased, Scots law has the potential to mitigate some of the more absurd consequences of any 'no property' rule. As Sheriff Scott observed in *Evans v McIntyre*, although the Scottish criminal law authorities are of no utility in determining who a 'stolen' cadaver might belong to, there is authority at common law in Scotland to the effect that 'the spouse or child of a deceased can recover damages for an unauthorised post-mortem'.[886] This, as he notes however, does not allow for the court to determine who – if anyone – enjoys *ius disponendi* over the body,[887] though it does indicate that the law recognises the importance of familial relationships in disputes concerning cadavers. The importance of these familial interests have been confirmed in subsequent case law and in statute;[888] if these interests are not proprietary in nature, then (being that they are 'personal [to the relative] as an individual'), they ought to be regarded as 'personality rights, as Whitty would propose'.[889]

The cases cited as authority for Sheriff Scott's proposition – *Pollok v Workman*[890] and *Hughes v Robertson*,[891] along with a third (*Conway v Dalziel*[892]) which went unmentioned by Sheriff Scott – each found that the wives and children of deceased workmen were entitled to claim *solatium* in circumstances in which there had been some unwarranted or unauthorised interference with the deceased's cadaver. The basis for the recognition of this action does not

[886] See *Evans v McIntyre* A498/80, p.52
[887] *Ibid*.
[888] *C v Advocate General*; *C v M* 2014 S.L.T. (Sh Ct) 109; Burial and Cremation (Scotland) Act 2016, ss.65-68
[889] *C v Advocate General*, para.60
[890] (1900) 2 F 354
[891] 1913 SC 394
[892] (1901) 3 F 918

lie in property law, however, but rather in the *actio iniuriarum*.[893] The *actio iniuriarum* is unknown to the Common law tradition,[894] but was received into Scots law in the institutional period.[895] Though Scotland's connection to this action has been neglected over the course of the past two centuries, cases such as *Stevens v Yorkhill NHS Trust* illustrate that the mechanism may be useful in the Twenty-First century; indeed, it is submitted, cases such as this demonstrate that if Scotland were to adopt or observe the 'no property rule', a mechanism like the *actio iniuriarum* could be employed to mitigate the (potentially absurd) consequences of that rule.

Thus, though property law may indeed be better than 'no law',[896] such does not obviously mean that property law is the 'best' means of regulating this particular matter. There may be no impetus for Scotland to expressly adopt the 'no property' rule, and there can be no doubt that Scots law is not as 'settled' as the law of England and Wales in respect of this matter, but that is no reason to force the body into the sphere of property law if there is a more appropriate means of governing disputes concerning the human body (or its parts, or its derivatives). Indeed, as noted,[897] the case of *Stevens v Yorkhill NHS Trust* may be contrasted with the aforementioned English case of *AB v Leeds Teaching Hospital*, since Scotland's jurisdictional connection to the *actio iniuriarum* allowed for the court to grant the pursuer a remedy, in the absence of a property paradigm, in factual circumstances in which the English courts could not do so.

The *actio iniuriarum*, in the Civil law, developed to afford redress in a wide range of circumstances. Initially conceived as a delict proscribing (contumeliously inflicted) minor

[893] Whitty, *The Human Body*, p.216; *Stevens*, para.62

[894] Descheemaeker and Scott, *Iniuria*, p.2

[895] Hector L. MacQueen, *Case Comment: Actio Iniuriarum and Human Organ Retention*, [2007] Edin L. R. 5; see also MacKenzie, *Matters Criminal*, p.303; Bankton, *Institute*, I, 10, 21-39

[896] Reid, *Body Parts*, p.243

[897] See para.2.3.2 *supra*.

physical attacks,[898] eventually 'its scope came to comprise all attacks on dignity'.[899] This is notable since even in the Common law tradition, in which 'dignity' has not been historically recognised as a legally protected interest,[900] courts and commentators, in matters concerning the human body, have found themselves making use of the language of 'dignity'.[901] From this, it has been argued that the notion of 'human dignity' ought to act as a moral guide or arbiter in mediating disputes relating to the human body and its parts and derivatives.[902] Since in Scotland, unlike in the Common law world, there exists an institutional connection to the *actio iniuriarum*, Scots law presently has the potential to develop a robust means of protecting the 'dignity' of the dead and their relatives – and, for that matter, the 'dignity' of living individuals from whom parts, derivatives or tissue have been separated – in a logical, coherent and systemised manner. Thus, it may be thought that pressing this development, while at the same time recognising possessory interests in human cadavers, would remove (or at least alleviate) the need to determine who ultimately 'owns' a human cadaver, or the juridical nature of this 'ownership', should the *hereditas jacens* analysis be accepted, in any particular case.

2.5 Conclusion

Since the property law of Scotland remains 'resolutely Civilian',[903] and the English conception of 'property' is, in fact, alien to the Scottish understanding of that term, it may be suggested that a peculiarly Common law rule of law, such as the 'no property' rule, is not cogent with the structure of Scots property law. The rule is purely a creature of precedent, rather than principle, in spite of the principled and historical gloss which subsequent Anglo-

[898] Peter Birks, *The Early History of Iniuria*, [1969] The Legal History Review 163, pp.163-164

[899] Descheemaeker and Scott, *Iniuria*, p.2

[900] Bede Harris, *A Roman Law Solution to an Eternal Problem: A Proposed New Dignitary Tort to Remedy Sexual Harassment*, [2017] Alternative Law Journal 200, p.202

[901] See the discussion in Charles Foster, *Dignity and the Ownership and Use of Body Parts*, [2014] Cambridge Quarterly of Healthcare Ethics Vol.23, Issue 4, 417; see also *Larson v Chase* (1891) 47 Minn. 307

[902] See Foster, *ibid.*

[903] See para.1.1, *supra*.

American commentators have added to it, and there is ample evidence that the courts in Common law jurisdictions wish to escape the confines of the rule, and the (often) absurd consequences that a strict application of it might bring. The Court of Appeal in the case of *Yearworth*, for instance, expressly noted that there is a need for a 'reanalysis' of this rule in the Twenty-First century.

As the language and operation of English law is fundamentally irreconcilable with the principles of Scots property law, it might be suggested that Scots law cannot be said to be as 'settled' as the law of England and Wales and that there is no good reason for holding that it is impossible to claim ownership of a corpse in this jurisdiction. Scots property law remains fundamentally Roman in character; while the 'no property' rule appears to have arisen, in English law, as a result of an imperfect reception of the notion of *res religiosae* (or *res divini iuris* more widely), these concepts were fully received into Scotland and continue to inform the operation of modern law, particularly through the operation of the crime of violation of sepulchres. While it is the case that a buried cadaver, or the interred remains of a cremated body, can be said to be *res extra nostrum patrimonium* in Scotland, and the law has evolved to deal with the consequences of this, unburied human remains (and cremains) are quintessential examples of profane *res corporales*.[904] This suggests that, absent any *sui generis* rule, they ought to be considered amenable to ownership.

There are good reasons for categorising dead bodies as 'property', since such ensures that they might be the object of crimes and that civil remedies might be exercised in respect of them. With that said, however, recognising cadavers as 'property' in a Civilian-influenced jurisdiction naturally begs the question of in whom the ownership right is vested. While

[904] As Sheriff Cubie observed, human 'remains including cremains are sacred wherever they are interred'; by implication, then, uninterred remains are profane until such a time as they are placed to rest and – together with the *locus* into which they are placed – create a *res religiosa*: *Holy Cross Church*, para.23

possessory remedies – separated, as they are, from foundational questions of 'ownership' – might allow Scots law to avoid some of the more absurd consequences of a 'no ownership' rule in practice, the recognition of possessory remedies nevertheless leaves the question of ownership open. As such, for as long as there is uncertainty as to the juridical nature of the Scottish *hereditas jacens*, it might yet be suggested that it is not appropriate to categorise cadavers as an altogether ordinary object of 'property'.[905]

The question of which alternatives to 'property law' might be best used to resolve issues pertaining to dead bodies, as well as separated human tissue and bodily derivatives, thus falls to be considered. While there is no rational reason for Scotland to adopt the 'no property' rule simply because there is English – and some domestic[906] – precedent to suggest that it has a place in Scots law, there may nevertheless exist sound reasons for holding that the body ought not to be treated as a mere *res vile*.[907] Scots law has indeed recognised that there exists an ongoing (non-proprietary) relationship between the body of a deceased person and their family which allows for the family to successfully pursue a claim for *solatium* where the cadaver has been maltreated: human corpses (buried or unburied), then, are not as sequestered from the cognisance of law as they may be in the Common law world.

The basis of the right of action enjoyed by the deceased's family in cases of maltreatment is rooted in the *actio iniuriarum*,[908] which developed as an action to protect 'dignity'. Although the concept of 'dignity' has been variously criticised as 'vacuous' and 'useless' by some commentators,[909] the term has nevertheless found use in cases concerning

[905] That is to say that though it is logically necessary to regard the cadaver as a 'thing' in law, the question of whether to treat it as a *res extra commercium*, or *res extra nostrum patrimonium*, rather than as an entity which is governed by usual rules of property law, remains open.

[906] *Robson*, p.353 (although this is, of course, a Sheriff's decision).

[907] To use the words of T. B. Smith: See Smith, *The Human Body*, p.245

[908] *Stevens*, para.34

[909] See, e.g., Ruth Macklin, *Dignity is a Useless Concept*, [2003] BMJ 1419

cadavers and so it might be thought that notion of ‘dignity’ or ‘human dignity’ may have some role to play in mediating disputes concerning the human body. For this reason, the next chapter of this thesis seeks to determine the place of ‘dignity’ in Scots law and to determine whether or not this controversial concept does, indeed, have the potential to act as a guide in determining the purpose of the law regarding the human body, its parts and its derivatives.

Chapter Three: 'Dignity' – A Better Baseline?

3.1 Introduction

The late Lord Bingham of Cornhill regarded the rule of law as an 'ideal' which is manifestly 'worth striving for'.[910] In his exegesis of the concept, he held the first principle of that rule to be that 'the law must be accessible and so far as possible intelligible, clear and predictable'.[911] As Lord Mance observed, 'these are characteristics which are the essence of certainty'.[912] In recognition of the desirability of 'legal certainty',[913] it follows that, insofar as the regulation of the human body and human biological material is concerned, property law *must* be 'better than no law', as Professor Reid suggests.[914] It does not follow from this, however, that property law should be regarded as the ideal law to be employed in this context, since 'better' obviously does not mean 'best'. Although placing the human body within the sphere of 'property' is preferable to 'excluding it from the horizon of law',[915] given that the latter would leave matters relating to biological material utterly uncertain, this does not mean that a regime of proprietary regulation will lead to just and/or desirable outcomes in legal cases concerning the body and biological material.[916] The human body, it is often contended, is more than a mere *res vile* and 'deserves' to be treated as distinct from base objects of property.[917]

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[910] Tom Bingham, *The Rule of Law*, (London: Penguin, 2010), p.174

[911] *Ibid.* p.37

[912] Jonathan Mance, *Should the Law be Certain?*, [2011] The Oxford Shrieval lecture given in the University Church of St Mary The Virgin, Oxford on 11th October 2011, para.2 (accessible at https://www.supremecourt.uk/docs/speech_111011.pdf, accessed 20/05/2020)

[913] *Ibid.*, para.46

[914] Reid, *Body Parts*, p.243 and recall paras.2.4.1 – 2.4.2, *supra*.

[915] Esposito, *Persons and Things*, p.99

[916] Indeed, as Lord Mance notes, 'certainty is not the ultimate or wholly achievable aim of the law… the judicial role often involves the identification, evaluation and application of fundamental societal principles, with all the room for disagreement that this involves': Mance, *The Law*, para.46

[917] See the discussion in Jos V. M. Welie and Henk A. M. J. Have, *Ownership of the Human Body: The Dutch Context*, in Have *et al*, p.108; see also Susan C. Lawrence, *Beyond the Grave –The Use and Meaning of Human Body Parts: A Historical Introduction*, in Robert F. Weir (Ed.), *Stored Tissue Samples: Ethical, Legal, and Public Policy Implications*, (Iowa: UIP, 1998), P.111

In his 1959 article on *Law, Professional Ethics and the Human Body*, Professor T. B. Smith expressed the view that the human body must be regarded as an 'object of dignity and respect'.[918] Smith here limited the scope of his observation to the living body,[919] however subsequent commentators have conceptualised cadavers and body parts, as well as whole living persons, as entities imbued with, or entitled to enjoy, at least some measure of 'dignity'.[920] As Christison and Hoctor concluded in a 2007 article, 'although the dead are incapable of enforcing the right to dignity (and in a technical legal sense, of possessing it)[921] it is submitted that society as a whole has an interest in the preservation of dead persons' dignity and the state a role as the custodian of this right'.[922] To this end, they proposed that illegitimate interference with dead bodies should be regarded as criminal on grounds of the 'indignity' effected by such conduct.

This notion that the abuse of a dead body may constitute an affront to the 'dignity' of the dead, and, by association, to the relatives of the dead, has been explored in numerous Common law cases,[923] as well as in legislative instruments,[924] notwithstanding the fact that the Anglo-American legal tradition has not traditionally recognised 'dignity' as a expressly protected legal interest or right.[925] Indeed, this has occurred also in spite of the fact that the

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[918] Smith, *The Human Body*, p.245

[919] In full, Smith observes that the body, 'as the habitation of a spirit or soul, [is] the proper object of dignity or respect': See the discussion *ibid*. Note, however, MacIntyre's observation that 'the Greek word for 'soul', *ψυχή*, means originally simply that which makes the difference between life and death, between a man and a corpse': Alasdair MacIntyre, *A Short History of Ethics*, (Routledge, 1967), p.37

[920] See Foster, *Dignity*, *passim*.

[921] That this is the case may be queried if the *persona* of the deceased continues after death and is inherited by the heir, executor or *hereditas jacens*: see para.2.4.2, *supra*.

[922] Andrew Christison and Shannon Hoctor, *Criminalisation of the Violation of a Grave and the Violation of a Dead Body*, [2007] Obiter 23, pp.35-36

[923] *Gilbert v Buzzard*; *R v Stewart and Another* (1840) 12 A & E 773 (113 ER 1007) *Griffith v The Charlotte, Columbia and Augusta Railroad Co.* 23 S.C. 25, 39–40 (1885); *Larson v Chase*; *Sanford v Ware* 191 Va. 43 (1950)

[924] See, e.g., the Canadian Criminal Code penalises anyone who 'improperly or indecently interferes with or offers any **indignity** [present author's emphasis] to a dead human body or human remains, whether buried or not'; s.182 (b), Criminal Code (R.S.C., 1985, c. C-46)

[925] Bede Harris, *An Eternal Problem*, p.202

philosophical idea of 'dignity' itself has been described as a 'hopelessly amorphous',[926] 'vacuous concept' which should be 'discarded as a potential foundation for rights claims, unless and until its source, nature, relevance and meaning are determined'.[927] Whether or not there is any philosophical merit in the abstract concept of 'dignity', however, and whatever the position of Anglo-American law in respect of this notion, a defined legal notion of 'dignity' has long subsisted as a feature of Roman law[928] and, as a consequence, in Civilian and Civilian-influenced jurisdictions including Germany, Scotland and South Africa.[929] Indeed, in the latter two jurisdictions, it is clear that a distinct Roman legal mechanism – the *actio iniuriarum* – survives[930] (and in the case of South Africa, thrives)[931] as a means of pursuing remedy in respect of instances of indignity.[932]

If wrongs effected against cadavers may be juridically recognised and described as 'indignities' even in jurisdictions which possess no legal concept of 'dignity', it follows that in jurisdictions which do possess such a legal concept, it may sometimes be more appropriate to invoke dignity-based actions in respect of wrongs to cadavers than to invoke actions based on the law of property.[933] Accordingly, this chapter will first make the case that the concept of 'dignity' has a role to play in disputes concerning the human body and body parts, examining the place of 'dignity' in Roman jurisprudence and assessing the potential for the dignity-based

[926] Foster, *Dignity*, p.45

[927] Mirko Bagaric and James Allan, *The Vacuous Concept of Dignity*, [2006] J. Hum. Rights 257, p.269

[928] See Zimmermann, *Obligations*, ch.31

[929] For Scotland, see *Stevens*; for South Africa, see *Le Roux v Dey* [2011] ZACC4. For Germany, see the discussion in Allyson F. Creasman, *Fighting Words: Anger, Insult and 'Self-Help' in Early Modern German Law*, [2017] Journal of Social History 272, p.276

[930] See Kenneth McKenzie Norrie, *The Actio Iniuriarum in Scots Law: Romantic Romanism, or Tool for Today?* in Descheemaeker and Scott, *Iniuria, passim*; Elspeth C. Reid, *Personality Rights: A Study in Difference*, in Vernon V. Palmer and Elspeth C. Reid, *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland*, (EUP, 2009), pp.394-395

[931] See the discussion in Reid, *Personality*, para.17.12

[932] See Jonathan Brown, *Revenge Porn and the Actio Iniuriarum: Using 'Old Law' to Solve 'New Problems'*, [2018] Leg. Stud. 396, p.396; Brown, *Dignity*, p.522

[933] As the *Holy Cross Church* case demonstrates, the Scottish courts consider treating human remains – and indeed cremains – with 'dignity and respect' to be a matter of the utmost import: See para.23

claims to be raised in respect of interferences with dead bodies. It will then consider the notion of 'dignity' which subsisted in Roman law through the lens of the *actio iniuriarum* and seek to determine the whether and to what extent this conceptualisation of 'dignity', within the context of this specific legal action, might prove useful in disputes concerning the human body and human biological material. Having shown that the Roman *actio iniuriarum* may well be of practical utility in the Twenty-First century, the chapter will proceed to consider the place of the action within modern Scots law. It will conclude that the Scottish courts and legal profession ought to recognise the need for a robust system of protecting personality interests, both in general, and particularly in cases pertaining to the human body.

3.2 Dignity and the Dead

3.2.1 Property Law and Dead Bodies: An Undignified Solution?

The inadequacy of property law in cases of wrongdoing in relation to dead bodies was highlighted by the Supreme Court of Minnesota in the case of *Larson v Chase*.[934] In this case, the court was faced with a legal problem which was compounded by the State's recognition and observance of the 'no property in a corpse rule'. The plaintiff had claimed damages as a result of the unlawful mutilation, dismemberment and dissection of her deceased husband's body.[935] The defendant contended that no widow had any legal interest in, or right to, her deceased husband's cadaver since the body was not 'property', nor was it a person, in law. From this proposition, it was said to follow that 'mental anguish and injury to the feelings, independent of any tangible injury to person or property, constitute no ground of action'.[936]

Although recognition of the body as 'property' would have allowed the plaintiff to claim damages in tort law, the Minnesotan court did not regard the language of 'property' to

[934] (1891) 47 Minn. 307
[935] *Larson*, p.307
[936] *Ibid.*, p.307

be appropriate in cases of this kind. That said, the court ultimately engaged in a process of 'creative judicial reasoning' which allowed the plaintiff to claim for damages 'merely [for] mental suffering and injury to feelings',[937] notwithstanding the technical arguments raised by the defence. In setting out the reasons for the court's decision (that is, for awarding the plaintiff more than nominal damages),[938] Mitchell J noted that, in the earlier case of *Meagher v Driscoll*,[939] the Supreme Court of Massachusetts had held a similar wrong to be actionable on the grounds of the trespass to the land which occurred before the body was exhumed.[940] This, however, was regarded by the Minnesotan court as 'a reproach to the law', since it was felt utterly unsatisfactory that 'a plaintiff's right to recover for mental anguish, resulting from the mutilation or disturbance of the remains of his dead, should be made to depend upon whether, in committing the act, the defendant also committed a trespass upon the plaintiff's premises'.[941] This was said to be the case since 'everybody's common sense would tell him that the real and substantive wrong was not the trespass on the land, but the indignity to the dead'.[942]

A legal proposition which, according to the Minnesotan court, would appear to be in line with 'everybody's common sense' was set out by Ulpian in D.47.10.1.4. Therein, the jurist directed that a contumeliously inflicted injury[943] (such as that which occurred in *Larson*) effected to a cadaver would give an action, in the heir's own name, to the heir of the deceased.[944] This action was not predicated on the law of property, nor on the *crimen violati*

[937] See the discussion in *Right to Possession of Dead Body, Action for Mutilation: Damages in the case of Larson v. Chase, 50 N. W. Rep. 238*, [1892] Yale L. J. 137, p.138

[938] See *Larson*, p.311

[939] (1868) 99 Mass. 281

[940] See *Meagher*, *per* Foster J at p.284

[941] *Larson*, p.312

[942] *Ibid.*

[943] "*Specialiter autem iniuria dicitur contumelia*": 'But when we say injury, we specifically mean *contumelia*', says Ulpian in Dig.47.10.1pr. *Contumelia* is a difficult word to translate see David Ibbetson, *Iniuria, Roman and English*, in Descheemaeker and Scott, *Iniuria*, p.40 and the discussion *infra*.

[944] *"Et si forte cadaveri defuncti fit iniuria, cui heredes bonorumve possessores exstitimus, iniuriarum nostro nomine habemus actionem: spectat enim ad existimationem nostram, si qua ei fiat iniuria."*: 'And if, by chance, a dead body [to whom I am good heir] should suffer injury, I have an action for that injury in my own name, for

sepulcri (which protects the land in which the corpse is interred, rather than the corpse itself),[945] but was rather a delictual *actio iniuriarum*. As recorded in Dig.47.10.1.2, all *iniuriae* (described in Scottish legal writings as 'injuries')[946] pertain – in Ulpian's taxonomy – either to a harm inflicted upon a (living) body (*corpus*), an individual's reputation (*fama*), or an individual's 'dignity' (*dignitas*). Thus, it appears that Roman law – and by association Roman legal systems – had the scope to avoid classifying human remains as 'property', yet nevertheless afford protection to the 'dignity' of the dead in the manner thought desirable by the court in *Larson*.

Both the nominate delict *iniuria* and the Roman (neo)-Aquilian action for the reparation of *damnum injuria datum* (the *actio de damno dato* – action for damage done)[947] were received into Scots law. The action based on the *lex Aquilia*, which is said to underpin the modern law of reparation in Scotland,[948] lost the penal characteristic which it had possessed in Roman law at a relatively early stage in its development.[949] By the Seventeenth century, throughout Continental Europe, the 'object' of the neo-Aquilian *actio de damno dato* (action for damage done) had come to be viewed primarily as 'exacting compensation for loss resulting from a wrongful act'[950] (that is, for compensating a wronged party who suffered *damnum injuria datum* which resulted from the defender's *culpa*).[951] Thus, presently, if an object of property is damaged or destroyed, the objective of the Scottish courts, in allowing an action for reparation,

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we observe that it affects our own *existimatio* [that is, our own social standing or 'dignity'] if any injury be done to [the corpse]*"* (author's translation).

[945] See para.2.4.1, *supra*.

[946] See MacKenzie, *Matters Criminal*, Tit. XXX, I (p.303) and *infra*.

[947] See Christian Thomasius, *Larva Legis Aquiliae: The Mask of the Lex Aquilia Torn off the Action for Damage Done*, (Halle: Hendal Press, 1703), para.1. Thomasius' enquiry is ostensibly limited to the place of the action in German law, however his argument is predicated upon premises which make the work relevant to any jurisdiction rooted in the Continental European legal tradition.

[948] Donna W. McKenzie and Robin Evans-Jones, *The Development of Remedies for Personal Injury and Death*, in Evans-Jones, *Civil Law*, p. 277

[949] *Ibid*., p. 279

[950] *Ibid*.

[951] Zimmermann, *Obligations*, p.1014; *Commentary*, Com.46

is not to juridically vindicate the punishment of the defender.[952] There is clear authority to the effect that damages may not be 'punitive' or 'exemplary';[953] as such, it is often (though not without controversy)[954] claimed that the purpose of the payment of damages, in all actions for reparation, is to effect *restitutio in integrum* (*i.e.*, to restore the pursuer to the position that they would have been in had the damage never occurred).[955]

The remedy for a successful *actio iniuriarum* was, by contrast, in Roman law and in the *ius commune*, penal in form and in substance.[956] In Scotland, the action possessed the character of a crime/delict into the Nineteenth century,[957] when the modern Scots law of delict began to emerge.[958] Consequently, rather than damages, the remedy afforded to one who suffered 'injury', in the sense of *iniuria*, was *solatium* only.[959] The purpose of this award of *solatium* was not to effect *restitutio in integrum*, since the latter was deemed impossible, due to the inestimable value of human personality.[960] Rather, extracting the payment was a purely punitive measure.[961] As Descheemaeker notes, however, the object of *solatium* was 'effortlessly reinterpreted as being purely compensatory when the time came for legal writers to fit the *actio iniuriarum* into the modern theory of Scots delict'.[962] Compensatory *solatium* is

[952] See *Gibson v Anderson* (1846) 9 D. 4; *Muckarsie v Dixon* (1848) 11 D. 4; *Morton v Edinburgh and Glasgow Railway Co* (1854) D. 488; *Black v North British Railway Co.* (1908) SC 444

[953] John Blackie and James Chalmers, *Mixing and Matching in Scottish Delict and Crime* in Dyson *Tort and Crime*, pp.277-278; Professors Blackie and Chalmers suggests that Scots law is similarly hostile to the notion of 'aggravated' damages, however in 2016 Lord Glennie considered such to be a competent remedy in Scotland: See *Adebayo Aina v Secretary of State for the Home Department* [2016] CSOH 143

[954] Stewart, *Reparation*, para.18-3

[955] Robin M. White and Michael J. Fletcher, *Delictual Damages*, (Edinburgh: Butterworths, 2000), p.9

[956] Descheemaeker and Scott, *Iniuria*, p.8

[957] Blackie and Chalmers, *Mixing and Matching*, p.286

[958] Robin M. White and Michael J. Fletcher, *Delictual Damages*, (Edinburgh: Butterworths, 2000), p.9

[959] Eric Descheemaeker, *Solatium and Injury to Feelings: Roman Law, English Law and Modern Tort Scholarship* in Descheemaeker and Scott, *Iniuria*, p.73; the term '*solatium*' is somewhat anachronistic in this context, as it did not appear in Scots legal literature until 1751, at which time it came to be used in a manner comparable to the concept of 'dolor' or 'smert' in Roman-Dutch law: See John Blackie, *Unity in Diversity: The History of Personality Rights in Scots Law*, in Whitty and Zimmermann, *Personality*, pp.84-90.

[960] *Ibid.*, p.85

[961] Niall R. Whitty, *Overview of Rights of Personality in Scots Law*, in Whitty and Zimmermann, *Personality*, p.217

[962] Descheemaeker, *Solatium*, p.73

now (potentially) afforded in recognition of the fact that a wrong has occurred; there is no need for a pursuer to prove that they suffered loss as a result of the defender's conduct (if such amounted to 'injury').

In Scotland, then, the term 'injury' consequently carries three altogether distinct meanings.[963] When one simple word is imbued with three different definitions, confusion is almost certain to follow. To paraphrase Descheemaeker, we cannot expect ideas to be differentiated from one another 'when the very words we use to think about them are not'.[964] For that reason, before we can satisfactorily address the question of to what extent Scots law might afford remedy for injured *dignitas* or 'dignity', we must first clarify the nature and meaning of 'injury' within this juridical system. In this context, this means providing an account of the designation of delictual actions within Scots law, given that the remedies that are afforded to wronged parties must evidently and notably differ depending on the juridical nature of the wrongdoing effected by the defender.

As a matter of law, whether within the context of the Aquilian action or the *actio iniuriarum,* it is plain that the term 'injury' is not used in the sense of bodily wounds, as the term is most likely to be understood as denoting in plain and everyday descriptive English today.[965] Such wounds, rather than being understood as 'injuries' ('personal' or otherwise), are rather manifestations of *damnum*, or 'loss'.[966] 'Injury' or *'iniuria'*, by contrast, must be

[963] Two of these meanings were discussed by the Inner House of the Court of Session in *McFarlane v Tayside Health Board* 1998 S.C. 389: Speaking of the definition of *'iniuria'* within the context of the *damnum iniuria datum*, Lord McCluskey noted that *'iniuria'* does not mean injury in the ordinary sense of a material prejudice to an interest that the law recognises as a legal interest' (at p.398). *Per* the decision of the Outer House in *Stevens*, it is apparent that the meaning of *'iniuria'* within the context of the *actio iniuriarum* differs from the terms discussed in *McFarlane* and that this distinction remains relevant in modern Scots law.

[964] Descheemaeker, *Solatium*, p.71

[965] *McFarlane*, p.398 *per* Lord McCluskey

[966] The matter is, of course, confused further by legislation which employs the now-common phrase (borne of the ordinary law of reparation) 'loss, injury or damage' (see e.g., s.11 (1) of the Prescription and Limitation (Scotland) Act 1973); all three of these terms are aspects of *damnum* for which there is no readily available English term: *ibid.*, p.400 *per* Lord McCluskey

understood as ‘wrongful conduct’ (broadly defined). Although this is its meaning both in the context of *actiones de damno dato* and in the context of *actiones iniuriarum,* the requirements for establishing legally actionable ‘wrongful conduct’ differ substantially between the two types of claim. To be actionable *iniuria* in an *actio de damno dato,* the defender must be at fault (*culpa*) for the *iniuria*. For a successful *actio iniuriarum,* the defender must have treated the wrongful party contumeliously (*contumelia*) in affronting their interests.

As has been noted,[967] *contumelia* is a complex word which, for the Romans, would have been understood in terms of the Greek concept of *ὕβρις* (*hubris*).[968] The term ‘hubris’ is itself problematic in this context, as the modern English meaning of that word is now divorced from the original meaning of the Greek word ‘*ὕβρις*’. As a concept, rather than a mere word, *ὕβρις* ‘had overtones of a lack of an appropriate respect due from one person to another’ – hence, rather than translating the Latin term *contumelia* into the Greek *ὕβρις* and thereafter conceptualising *contumelia* as ‘hubris’ in the modern English-language sense of that term, Ibbetson suggests that ‘a better translation into English is something like “disrespect”’.[969] Thus, for one to demonstrate that an individually treated another contumeliously in effecting affront, it must be shown that the wrongdoer exhibited some kind of ‘hubristic’ – that is, ‘disrespectful’ – disregard of the interests of the wronged party. The ‘disrespectful disregard’ of the interests of another is the essence of *contumelia*; thus, as the English-language term ‘contumelious’ is etymologically descended from the Latin phrase, and carries a broad meaning which comprehends a wide range of conduct, much like its Latin ancestor, the term ‘contumelious’ or ‘contumeliously’ is used, in this thesis, to describe behaviour which might give rise to an *actio iniuriarum*.

[967] See fn.943, *supra.*

[968] David Ibbetson, *Iniuria*, p.40

[969] *Ibid.*

As the *actio iniuriarum* allows for a pursuer to raise a claim for *solatium* without alleging monetary loss, it might be thought that this legal mechanism is able to better act as a legal safeguard of individual's interests in human bodies, separated body parts and biological material than actions based on Aquilian liability. Proof of loss is a prerequisite in any *actio de damno dato*. In cases concerning 'damage' to dead human bodies, separated body parts or human biological material, such would necessarily involve attaching some pecuniary value to an entity which is thought to hold a value which cannot be matched by any mere monetary payment. Indeed, as Greasley indicates, though one of the most common moral objections raised in respect of attempts to include bodies, their parts and derivatives within the schema of property law is that to do so is to 'improperly commodify that which ought to remain non-commodified… where the human body itself is the commodity in question, a significant part of the supposed wrong of commodification is what seems to be a more intrinsic kind of wrong: that of objectification'.[970]

An *actio iniuriarum* might be raised to vindicate a person's claim to *dignitas* without the occurrence of either commodification or objectification. The action serves to protect 'personality', rather than patrimonial, interests[971] and so there is no need for the body to be conceived of as a mere thing, or a simple commodity, in such a claim. In such a claim, the 'personality rights' of the family of a deceased person might be sufficient to redress the occurrence of wrongdoing directed towards the cadaver, even if the body itself is 'excluded from the horizon of [property] law'.[972] Indeed, under the schema of the *actio iniuriarum*, as Christison and Hoctor allude, although it may be thought that the dead themselves might lack

[970] Kate Greasley, *Property Rights in the Human Body: Commodification and Objectification*, in Goold *et al*, *Persons, Parts and Property*, p.67

[971] See Whitty and Zimmermann, *Personality*, p.3

[972] To again borrow, and slightly twist, the words of Professor Esposito: Robert Esposito, *Persons and Things*, (Cambridge: Polity Press, 2015), p.99

the ability to press (or, indeed, possess) a legal claim to dignity,[973] it is nevertheless distinctly possible for the law to recognise the enduring juristic 'personhood' of deceased human beings.[974] Such would, in turn, permit any temporal representative of the deceased to bring an action, in the name of the deceased, to vindicate the deceased's personality rights.[975] If, then, the real and substantive wrong in cases in which bodies, their parts and derivatives are unwarrantedly interfered with might indeed be said to be 'the indignity to the dead', it follows that the utility of an action which expressly serves to protect *dignitas* ought to be examined, since such might provide a better means of preserving individual interest in the human body than property law.

3.2.2 'Dignity', 'Honour' and 'Trespass'

The term *'dignitas'* is etymologically connected to the English word 'dignity', but this does not in and of itself indicate that the Romans recognised a concept of 'human dignity' in the modern sense.[976] Indeed, the Latin term *'dignitas'* has been said to be something of a *faux ami* and to have more in common with the English term 'honour' than the word 'dignity'.[977] As Professor Norrie notes, in any morally pluralistic society, 'honour is an entirely self-defined notion with no generally accepted social content'.[978] Thus, the term might be justly criticised and regarded with 'deep suspicion',[979] since 'at its most benign, "honour" is characterised by

[973] Christison and Hoctor, *Criminalisation*, pp.35-36

[974] See *Agenzia delle Dogane e dei Monopoli v Pilato SpA* (Case C-445/17), *passim* and para.2.4.2, *supra*.

[975] Indeed, de Villiers notes that as *heres necessarius* a son may, in Roman law, have been entitled to sue on account of an injury inflicted against his deceased father, although the son himself was not immediately affected by the wrongdoing: Melius de Villiers (trs.), *The Roman and Roman-Dutch Law of Injuries: A Translation of Book 47, Title 10 of Voet's Commentary on the Pandects (With Annotation)*, (Cape Town: Juta, 1899), p.66. The juridical basis of this action was the *actio iniuriarum*.

[976] See A. C. Steinman, *The Legal Significance of Human Dignity* [2016] North-West University PhD Thesis, pp.35-36

[977] William Miller, *Humiliation: And Other Essays on Honour, Social Discomfort and Violence*, (Ithaca: Cornell University Press, 1993), p.116; Amanda Barratt, *Transforming Dignitas into Dignity? A Case Study of Adultery in South African Law*, Paper presented at the 2nd International Private Law Conference, University of Nicosia, September 2011, p.1

[978] See Norrie, *Actio Iniuriarum*, in Descheemaeker and Scott, *Iniuria*, p.63

[979] *Ibid.*

pomposity and self-regard', but 'at its most malign, we are too distressingly used to hearing about "honour killings" and the like to be much attracted to "honour" as a legally protected interest'.[980]

Although there might be good reason to be wary of the utility of 'honour', as a concept, in law, this notion did subsist as a legally recognised interest protected under the broad heading of the law of 'trespass' from the earliest days of the Common law tradition.[981] This interest was, however, jettisoned from the law of trespass at a comparatively early stage of the action's juridical development, as the English courts came to exclude civil remedy for affronts to honour and injuries to feelings.[982] Though the term 'trespass' has proprietary connotations to those outwith Common law jurisdictions,[983] and though the law of trespass was seemingly denigrated by the court in *Larson*,[984] within English law the word does not merely denote interference with heritable property.[985] In the taxonomy of English law, 'trespass' serves as a high-level umbrella term, under which lie various causes of action; trespass to land, goods (chattels, i.e., moveables) and persons.[986] These causes of action can, themselves, be further sub-divided into different forms of action;[987] 'conversion' is a specific tort which falls under the heading of trespass to goods,[988] while 'assault' (threats of force) and 'battery' (actual infliction of force) are causes of action which lie under the heading of 'trespass to the person'.[989]

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[980] *Ibid.*

[981] See John S. Beckerman, *Adding Insult to Iniuria: Affronts to Honor and the Origins of Trespass* in Morris S. Arnold, Thomas A. Green, Sally A. Scully, Stephen D. White, *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne*, (UNCP, 1981), *passim*.

[982] See *ibid.*

[983] And, indeed, to laypersons within Common law jurisdictions: Ibbetson, *Historical Introduction*, p.160

[984] *Larson*, p.312

[985] See Eric Descheemaeker, *The Division of Wrongs: A Historical Comparative Study*, (Oxford: OUP, 2009), p.196

[986] See William L. Prosser, *Transferred Intent*, [1967] 45 Tex. L. R. 650, pp.655-656

[987] Geoffrey Samuel, *Taking Methods Seriously (Part Two)*, [2007] J. Comp. L. 210, p.220

[988] Lord Hailsham, *Halsbury's Laws of England,* (4th Ed.) (Butterworths, 1985), para.1422

[989] See Mulheron, *Tort*, p.689

Since the birth of the term of art in English law, 'the history of the word "trespass"', says Descheemaeker, 'is one of continual narrowing'.[990] In lay language, 'to trespass' initially meant to commit a wrong of any kind;[991] as Birks observed 'the trespasses of the Lord's prayer are wrongs, in the widest sense'.[992] The narrowing of 'trespass' from a broad catch-all word to describe wrongdoing to a technical term of English lawyers' art mirrors a similar process of narrowing experienced by the Latin term *iniuria* in Roman law,[993] although in the case of trespass 'a further shrinkage happened' as a result of the fact that actions for trespass were less procedurally attractive to plaintiffs than actions on the case.[994] Yet just as 'trespass' initially encompassed all forms of wrongdoing when it first emerged as an actionable tort, so too was the Latin term *'iniuria'* first used in the same sense, to denote 'the trespasses of the Lord's prayer, unfair acts, injustices'.[995]

This was not, however, the meaning ascribed to the term *iniuria* in the XII Tables.[996] In this source, the term denotes a specific delict (the commission of a minor act of violence) with a specific penalty (a requirement to pay 25 *asses* – pieces of copper).[997] It might be mistaken, however, to equate the lay term *iniuria* with the concept of *iniuria* which operated, in a technical sense, within the *actio iniuriarum* and influenced later Civilian thought.[998] The distinction drawn between the XII Tables notion of *iniuria* and the edictal conception, in Birk's words, set 'as wide a gap between Roman lay and legal usage as ever divided the two English concepts of "trespass"'.[999] The parallel between the English law of 'trespass' and the Roman

[990] See Descheemaeker, *Division*, p.196
[991] S. F. C. Milsom, *Trespass from Henry III to Edward III*, [1958] LQR 195
[992] Birks, *Iniuria*, p.163
[993] Descheemaeker, *The Division*, p.196
[994] *Ibid*.
[995] Birks, *Iniuria*, p.163
[996] *Ibid.*, pp.163-164
[997] Tab. VIII, 4 (*si iniuriam faxsit, XXV poenae sunto*).
[998] Birks, *Iniuria*, p.163
[999] Birks, *Iniuria*, p.164

law of *iniuria* has consequently been described as 'striking'.[1000] Moreover, there is a further correlation between the Anglo-American law of trespass and the Civilian law of *iniuria* within the *actio iniuriarum*; just as the former gave rise to tortious liability as a result of the affront effected to the 'King's peace',[1001] so too was the latter rationalised (ostensibly) on the grounds that attacks on the personality interests of individual legal subjects were wrongful due to the fact that such attacks were liable to destabilise society.[1002]

Historically, trespass developed as a penal action for any transgression which fell short of amounting to a felony.[1003] As one of the earliest actions known to the Common law,[1004] the law in this area evolved as a means of protecting disparate interests in response to disputes brought before the English courts; from its infancy, it was a creature of precedent rather than principle. Accordingly, it can be said that in the early history of trespass 'there is no suggestion of any underlying theory unless the general maxim of the common law that no wrong shall be without a remedy can be called a theory'.[1005] This notwithstanding, Beckerman has demonstrated that the Roman *actio iniuriarum* provided 'much of the common-form vocabulary for the fully evolved action of trespass'.[1006] This, it is submitted, explains why English language writers have largely been unable to resist the temptation of conceptualising the Roman concept of *dignitas* as 'honour': there has, since the earliest days of English law, existed a notable correlation between the native action for trespass and the Roman *actio iniuriarum*.

[1000] Descheemaeker, *Division*, p.196
[1001] F. W. Maitland, *The Forms of Action at Common Law*, (1909), Lecture IV
[1002] See Norrie, *Actio Iniuriarum*, fn.13
[1003] Maitland, *Forms of Action*, Lecture IV
[1004] *Ibid*.
[1005] George F. Fraser, *The Development of Principle in Trespass*, [1917] Yale Law Journal 220, p.220
[1006] See Beckerman, *Iniuria*, p.160

The correlation between the English action of trespass and the Roman *actio iniuriarum* is, however, 'disharmonious', as 'two different conceptions of dishonour are in issue'.[1007] The Roman notion of *dignitas* is quite notably distinct from the Germanic-influenced concept of 'honour'. A claim to 'honour', unlike a claim to 'dignity', is always 'implicitly a claim to excel over others'.[1008] In the Germanic conception of that term, which influenced the development of English law in its earliest stages,[1009] it was presumed that the law would be invoked only to deal with affronts to honour effected by those of equal, or near-equal, social standing to the offended party: 'offensiveness [by an inferior] to a superior should be met with physical retribution; to complain of such behaviour, let alone to make it the subject of a lawsuit, was in itself demeaning and served merely to underline the lower status of the complainant'.[1010] The corollary of this is that offensiveness by a superior to an inferior is no affront at all, but rather, simply a fact of life to be borne with good grace.[1011]

By contrast, in Roman law, a social superior might affront an 'inferior's' *corpus, fama* or *dignitas* and so become liable under an *actio iniuriarum*, just as that individual might be affronted by the actions of a social inferior.[1012] Raising a legal claim was regarded as preferable to initiating a blood feud or taking some other action that might destabilise society; as noted above, though individual interests were protected by the delict of *iniuria*, the overarching interest that the law sought to protect was good social order. Only slight remedy might be

[1007] Ibbetson, *Historical Introduction*, p.16

[1008] Julian Pitt-Rivers, *Honour and Social Status*, in J. Peristiany (Ed.), *Honour and Shame: The Values of Mediterranean Society*, (London: Weidenfeld and Nicolson, 1966), p.23

[1009] Ibbetson, *Historical Introduction*, p.16

[1010] *Ibid*., pp.16-17

[1011] 'The power to impinge the honour of another man… depends on the relative status of the contestants. An inferior is not deemed to have sufficient honour to resent the affront of a superior': Julian Pitt-Rivers, *Honour and Social Status*, Julian Pitt-Rivers, *Honour and Social Status*, in J. Peristiany (Ed.), *Honour and Shame: The Values of Mediterranean Society*, (London: Weidenfeld and Nicolson, 1966), p.31

[1012] James Gordley, *Reconceptualising the Protection of Dignity in Early Modern Europe: Greek Philosophy Meets Roman Law* in M Ascheri et al (eds.), *Ins Wasser geworfen und Ozeane durchquert*, (Böhlau Verlag Köln Weimar, 2003), p.286

afforded in the case of a patrician affronting a plebeian,[1013] but nevertheless such remedy would be provided, whether the *corpus, fama* or *dignitas* of that plebeian were affronted.

The 'asymmetry' of *dignitas* within the context of the nominate delict *iniuria,* was a consistent feature of Roman law;[1014] that is to say, the concept was, within the *actio iniuriarum,* intimately connected with social rank. Since our contemporary sensibilities instinctively reject any suggestion that the quantity of 'dignity' to which persons might be entitled may vary depending on that individual's social standing or rank,[1015] it might be thought that the term *dignitas* ought to be understood as some analogue to 'honour' and duly 'associated with ideas of pompousness and self-importance'.[1016] The equation of *dignitas* and 'honour' ought, however, to be rejected on the grounds that the notion of *dignitas* is capable of being – indeed, through the efforts of jurists such as Donellus,[1017] was – 'levelled-up' in the sense described by Whitman;[1018] that is to say that while a person's enjoyment of unimpeachable *dignitas* was once a consequence of high status, the term has since come to be conceived of as denoting a feature accorded equally to, and shared by, all in society.[1019]

By the time that this process of 'levelling-up' had begun to occur, reparation for affronts to 'honour' had ceased to be afforded in English law. Indeed, in discussing the 'raggedness' of Bracton's perceived attempt to bring together Roman actions for, property damage and personal injury under one heading in the Common law in the thirteenth century, Ibbetson notes that 'the falseness of Bracton's echo [of the Roman *lex Aquilia* and *actio*

[1013] *Ibid.*

[1014] See Descheemaeker and Scott, *Iniuria,* p.19

[1015] *Ibid.*

[1016] *Ibid.*

[1017] See Jacob Giltaij, *Existimatio as 'Human Dignity' in Late-Classical Roman Law,* [2016] Fundamina 232 and *infra*. Hugues Doneau (Donellus) was a 16th century French humanist jurist born in Chalon-sur-Saône in 1527: see Doneau, Hugues (1527–1591) in *The Oxford Encyclopaedia of Legal History* (OUP, 2009)

[1018] See James Whitman, *Human Dignity in Europe and the United States,* in G. Nolte (Ed.), *Europe and U.S. Constitutionalism* (Council of Europe Publishing, 2005), p.97

[1019] *Ibid.*

iniuriarum] suggests that he was merely using the vocabulary of his Roman sources, and that the concept of dishonour was no longer, for him, a substantial feature of liability for wrongs'.[1020] Whether or not the concept of dishonour had ceased to be legally significant at the time of Bracton's work, however, it is clear that (certainly) from the beginning of the Fourteenth century the action of trespass developed and matured into one concerned only with pecuniary – and primarily physical – loss,[1021] with the specific law pertinent to defamation emerging (in the Royal courts) only in the Sixteenth century.[1022]

The position of Scots law may here be contrasted with that of English law. Although the Anglo-American terminology of 'assault and battery' is habitually utilised by judges and jurists in Scotland,[1023] the legal understanding of these terms north of the Tweed remains rooted in the Roman *actio iniuriarum*.[1024] Similarly, the Scots law of defamation ultimately derives from the nominate delict *iniuria*,[1025] hence why Professor D. M. Walker was able to describe 'assault' as a delict 'closely akin to defamation'.[1026] The language of 'trespass to the person' was, notably, never imported into Scots law;[1027] similarly, as noted by Lord Dunedin, 'trespass as to a chattel in a Scottish lawyer's mouth is a perfectly unmeaning phrase'.[1028] Thus, there is – arguably – in Scotland a greater connection to the Roman view of *dignitas* as a protected feature of all *personae* than of an analogue to the Anglo-Germanic concept of 'honour'. The

[1020] Ibbetson, *Historical Introduction*, p.17

[1021] This was, as Lambert notes, 'remarkable in the European context', as English law was, at this time, alone in refusing to recognise affronts as actionable, and in only allowing for the recovery of material loss: See Tom Lambert, *Law and Order in Anglo-Saxon England*, (Oxford University Press, 2017), p.359

[1022] Ibbetson, *Historical Introduction*, p.112

[1023] Blackie, *Unity in Diversity*, p.104

[1024] Brian Pillans, *Delict: Law and Policy,* (5th Ed.) (W. Green, 2014), para.6-13

[1025] See Beckerman, *Iniuria*, p.160

[1026] Walker, *Delict*, p.488 (1981). See also Whitty, *Overview*, p.167 (2009).

[1027] John Blackie, *The Protection of Corpus in Modern and Early Modern Scots Law*, in Descheemaeker and Scott, *Iniuria*, p.159; Whitty, *The Human Body*, pp.214-215

[1028] *Leitch & Co v Leydon* 1931 SC (HL) 1, p.8

specifically Roman understanding of *dignitas* as it subsists in Civil law, rather than through the lens of Common lawyers, consequently merits further examination.

3.2.3 Dignitas, Existimatio and Iniuria

The Roman *actio iniuriarum*, which emerged in the edictal phase of Roman law,[1029] developed to protect the non-patrimonial (or, indeed, 'dignitary')[1030] interests of legal *personae*.[1031] The *actio legis Aquiliae* served as a counterpart in respect of patrimonial loss;[1032] it allowed for claims to recover damages in respect of proprietary loss caused by wrongful conduct to be brought under the *Lex Aquilia*.[1033] As a result of Ulpian's aforementioned maxim (*dominus membrorum suorum nemo videtur*),[1034] free persons could not claim for loss caused as a result of injury to their own body under an *actio legis Aquiliae*,[1035] but rather had to establish, in raising an *actio iniuriarum,*[1036] that the delinquent contumeliously affronted one of their non-patrimonial interests.[1037] The former action, therefore, can be said to protect 'who a person is', while the latter served to safeguard 'what a person has'.[1038]

[1029] See the discussion in Birks, *Iniuria*, p.165

[1030] See Whitty and Zimmermann, *Personality*, p.3

[1031] See the discussion in Brown, *Revenge Porn*, p.397

[1032] McKenzie and Evans-Jones, *Personal Injury*, p.280

[1033] The *Lex Aquilia* was 'undoubtedly the most important statutory enactment on Roman private law subsequent to the XII Tables' (see Zimmermann, *Obligations*, p.953) and serves as 'the Roman ancestor of our [Scots] action of reparation': See T. B. Smith, *Designation of Delictual Actions: Damn, Injuria, Damn*, [1972] SLT 125, p.125. 'By the start of the third century AD, it could be said that the *lex Aquilia* was not simply one source of liability for the wrongful causation of damage to property: rather, according to Ulpian, it had superseded all previous laws on the subject so that there was no longer any need to mention them': See David Ibbetson, *How the Romans did for us: Ancient Roots of the Tort of Negligence*, [2003] UNSW Law J 475, p.480

[1034] Dig. 9.2.13 18

[1035] Zimmermann, *Obligations*, p.1014; Grueber, *Commentary*, Com.46

[1036] McKenzie and Evans-Jones, *Personal Injury*, p.280

[1037] See the discussion in Walter Pollack, *Civil Liability in the Law of South Africa for the Wrongful Causing of Death*, [1930] Journal of Comparative Legislation and International Law 203; Paschalis Paschalidis, *What did iniuria in the lex Aquilia actually mean?*, [2007] Revue Internationale des droits de l'Antiquité 321, p.341

[1038] Whitty and Zimmermann, *Personality*, p.3

The lack of any requirement to establish *contumelia* under an *actio legis Aquiliae*[1039] meant, in effect, that the law – certainly by the time of Justinian[1040] – offered more scope for litigants to obtain redress in respect of proprietary damage than in respect of 'personal injury' to *personae*.[1041] The use of the term *persona* is key here;[1042] in Roman law (as in almost all modern legal systems), the term 'person' (i.e., *persona/ae*) was not at all synonymous with 'human being'.[1043] As Professor MacCormick discussed in his *Institutions of Law*, in Roman law, as in modern law, 'being a person is additional to being a human being'.[1044] The Latin term *'persona'* is not synonymous with '*homo*', just as the English word 'person' is not identical to the term 'human being' in historical, nor indeed modern, Scots law. While the scope of the word 'person' has now been extended to encompass incorporeal entities such as incorporated companies and business partnerships,[1045] and in some jurisdictions the legal status of 'person' has been conferred upon natural resources and landmarks,[1046] in Roman law the term *persona* was much narrower in scope.[1047] It was not, as Professor Nicholas suggested in his *Introduction to Roman Law*, a word with no technical meaning, denoting only 'as "person" does in ordinary speech today, a human being, whether capable of holding rights and duties or

[1039] Although the *lex Aquilia* required *iniuria* – in the sense of wrongful conduct – the *iniuria* could be done in a blameworthy manner (*culpa*) as well as by deliberate conduct (*dolo*). Ibbetson implies that the requirements for the establishment of *iniuria* were, in early Roman law, analogous in respect of both *actiones legis Aquiliae* and *actiones iniuriarum*: See Ibbetson, *Negligence*, p.485

[1040] Paschalidis, *Iniuria*, p.323

[1041] McKenzie and Evans-Jones, *Personal Injury*, p.280. In early Roman law, the intentional infliction of injury to another, free, person was penalised by the requirement of a payment of a fixed penalty: See the discussion in Ibbetson, *Negligence*, p.476

[1042] Recall the discussion in Chapter 1, *supra*.

[1043] See Waelkens, *Medieval Family and Marriage Law*, p.104

[1044] See MacCormick, *Institutions*, p.77

[1045] Care should be taken to avoid categorising such extension of 'personhood' to incorporeal entities as a legal 'fiction', as Professor MacCormick cautions: See *ibid.*, p.84

[1046] See the discussion in Erin L. O'Donnell and Julia Talbot-Jones, *Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India*, [2018] Ecology and Society 7

[1047] *Per* Horsman and Korsten, the term *persona* 'distinguish[ed] holders of full civil rights from those who lacked such civil personhood': See Yasco Horsman and Frans-Willem Korsten, *Introduction: Legal Bodies: Corpus/Persona/Communitas*, [2016] Law and Literature 277, p.277

not'.[1048] Rather, recalling the observations of Waelkens, 'in legal texts the word was used for the actors in a law suit. When the word occurs in the *Corpus Iuris Civile*, it has thus to be understood as referring to one of the men present in court'.[1049]

Consequently, though the question 'why does a human have a right that a stone does not have?' may puzzle philosophers,[1050] it need not trouble lawyers. The notion of a legal 'person' is such that it is almost trite to say that the concept can operate to exclude certain classes of human beings,[1051] as well as being extended to afford legal standing, and so 'dignity' in the eyes of the law,[1052] to non-human – even incorporeal – entities.[1053] The distinction between the included and the excluded may be philosophically arbitrary,[1054] but provided that it is observed as a matter of law by 'good' citizens and state officials, then it cannot be categorised as legally incoherent or arbitrary as there exists process-driven reasons for the distinction.[1055] Accordingly, while an ethical thinker may levy the charge of arbitrariness, or 'speciesism', against one who enjoins slavery,[1056] or affords 'dignity' only to human beings,[1057]

[1048] Nicholas, *Introduction*, p.60

[1049] Waelkens, *Medieval Family and Marriage Laws*, p.104

[1050] Foster, *Dignity*, p.417

[1051] *I.e.*, slaves.

[1052] Whether implicitly by operating as the governing norm of the legal system itself, or by serving as a high level category under which specific actions might be brought – or indeed explicitly by serving as a doctrinal working tool: See Whitty, *Overview*, p.161

[1053] See, for instance, the separate legal personality of companies, partnerships and limited partnerships in Scots law: David Cabrelli, *The Case against 'Outsider Reverse' Veil Piercing,* [2010] Journal of Corporate Law Studies 343, *passim.*

[1054] Consider the (apocryphal, unsourced, yet oft-repeated) account of a dialogue between Alexander the Great and the Greek philosopher Diogenes: When the high-born nobleman found Diogenes intently examining a collection of human bones and questioned him about this task, Diogenes explained, "I am searching for the bones of your father but cannot distinguish them from those of a slave."

[1055] W. Bradley Wendel, *Lawyers, Citizens and the Internal Point of View,* [2006] Fordham Law Review 1473, p.1473

[1056] As the Roman legal system did: It should be noted, however, that the Romans themselves regarded slavery as contrary to the *ius naturale* and a creation of the *ius gentium*. Essentially, as a matter of moral reason, slavery might be regarded as unethical, but internally and as a matter of law it was permissible on the grounds that every country took slaves as the spoils of war: See Berger, *Dictionary*, p.702; C. W. Westrup, *Some Notes on the Roman Slave in Early Times: A Comparative Sociological Study*, (København, 1956), p.19

[1057] As Kant did; see the critique of Kant set forth by Kain: Patrick Kain, *Kant's Defense of Human Moral Status,* [2009] Journal of the History of Philosophy 59, p.69

such considerations would be irrelevant to a lawyer (provided that lawyer is thinking about the issue from a solely legal, and not an ethical, perspective). 'Persons', as a matter of law, are tautologically persons who have been recognised as such by law; no more, no less.[1058]

Rather than finding use as a device to extend the benefits of 'personhood' to entities other than human beings, the status of *persona* was, in Roman law, fundamentally exclusive. In addition being restricted in scope only to 'natural' legal persons,[1059] the designation of 'persons' also served as a primarily procedural status which distinguished those who held full entitlements under the civil law from those who did not.[1060] In modern legal systems, by means of Article 6 of the Universal Declaration of Human Rights, every human being has a (philosophical, if not juridical) claim-right to this 'additional recognition';[1061] in Roman law, by contrast, a highly significant number of human beings were denied even this most basic legal status.[1062] Slaves, as 'non-persons' (i.e., 'things' or *res*),[1063] could not bring an *actio iniuriarum* against one who acted contumeliously towards them[1064] and so the law did not recognise them as objects of 'dignity' or as individuals who enjoyed any measure of *dignitas*.

Recognition of one's juridical 'personhood' did not imbue that individual with an absolute quantity of inviolable *dignitas* in Roman law. As noted above, it was recognised that the quantity of *dignitas* with which a particular *persona* was imbued was variable and dependent on the social standing of that *persona*.[1065] This did not mean that one of low rank

[1058] See Brown, *Plagium*, p.133

[1059] Nicholas, *Introduction*, p.61

[1060] See Yasco Horsman and Frans-Willem Korsten, *Introduction: Legal Bodies: Corpus/Persona/Communitas*, [2016] Law and Literature 277, p.277

[1061] See MacCormick, *Instititions*, p.77

[1062] Alan Watson, *Roman Slave Law*, (Baltimore: JHUP, 1987), p.2

[1063] See Moyle, *Institutes*, p.111

[1064] The *actio iniuriarum* was an action available to redress harm to free persons only. Affront effected to a slave could be deemed injurious, but the victim of such *iniuria* would be the master, not the slave: See Matthew Perry, *Sexual Damage to Slaves in Roman Law*, [2015] Journal of Ancient History 55, p.64

[1065] Jeremy Waldron, *Dignity, Rank, and Rights*, (The Tanner Lecture on Human Values, University of California, Berkeley, April 21–23, 2009), p.225

could not suffer an indignity by the conduct of one of a higher rank: 'In principle, everyone's dignity was protected [by *iniuria*], but one's degree of dignity, and consequently the level of protection which one enjoyed, differed with societal status'.[1066] Thus, while the seriousness of any particular instance of *iniuria* would be determined by reference to the status of the victim,[1067] the occurrence of an *iniuria* would not (necessarily) be negated by the perpetrator demonstrating that they were in possession of 'more' dignity than the wronged party.[1068] If the conduct were held to amount to affront, the law would afford remedy, albeit slight remedy, in the case of a master beating a servant (though obviously not a slave).[1069]

Though, in light of the above discussion, the Roman concept of *dignitas* does not appear to be analogous to the modern concept of 'dignity', such does not mean that the *actio iniuriarum* cannot serve to protect general human dignitary interests. On further examination of the context of the *actio iniuriarum*, it is plain that, within the context of Roman law, the interpretation of *'dignitas'* appears to be much broader than the word's connection to the concept of social rank suggests. While it has been suggested that the usage of the word within Ulpian's tripartite categorisation was first limited in scope to the specific dignity attached to one of significant social standing by virtue of his or her societal position,[1070] or to 'honour' in

[1066] Gordley, *Dignity*, p.286

[1067] *Ibid.*

[1068] Jane Isobel McCarthy, *Speech and Silence: Freedom of Speech and Processes of Censorship in Early Imperial Rome*, [2013] KCL PhD Thesis, p.138

[1069] Since the slave was not a *persona*: See *supra*. Interestingly, a slave who insulted his master would often be thought more amusing than contemptuous, indicating that those of no status were perceived as not only incapable of legally receiving affront, but of effecting it (socially) also: See Seneca, *Constant*, 11.3: *"eadem causa est, cur manciporum nostrorum urbanitas in dominos contumeliosa delectet, quorum audacia ita demum sibi in convivas ius facit, si coepit a domino."*

[1070] Peter Berger, *On the Obsolescence of the Concept of Honour*, in Michael Sandel (Ed.), *Liberalism and Its Critics*, (New York: New York University Press, 1984), p.176

the Anglo-Germanic sense,[1071] it is now thought that the term ought to be regarded as a *nomen collectivum*; a general clause:[1072]

> "Although one may identify… *corpus* and *fama* as independent personality rights with a more or less fixed meaning, the same cannot be said of *dignitas*… Dignitas was a collective term for all personality interests, excluding *corpus* and *fama*, which in Roman law had not yet been clearly distinguished and independently delimited".[1073]

Within the context of Roman law and the later *ius commune*, the term *'dignitas'* was clearly utilised as 'an all-embracing interest, capable of extending so as to protect a wide range of rights'.[1074] *Dignitas* is, then, distinguishable from the concept of 'honour', the latter term being necessarily tied to the concept of social standing. Nevertheless, it is plain that the word *dignitas* lacked any approximation of a meaning of 'the dignity of "man as such"' in Roman law. It was not until the late Fifteenth century that such an understanding was ascribed to the Latin term.[1075] As discussed above, in Roman law and society the term was used only in the sense of the dignity of specific legal *personae* and the quantity of *dignitas* enjoyed by those *personas* would differ depending on the individual's social standing. This is not, however, to say that the Romans did not recognise the 'human dignity' to be an extant interest or concept.

As Giltaij explored in his 2016 article on the topic of *Human Dignity*,[1076] it appears that the Latin term *dignitas* is something of a *faux ami* for Anglophones and that 'for indicating "human dignity" the Romans actually used a term different from *dignitas*'.[1077] Giltaij asserts

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[1071] Miller, *Humiliation*, p.116; Amanda Barratt, *Transforming Dignitas into Dignity? A Case Study of Adultery in South African Law*, Paper presented at the 2nd International Private Law Conference, University of Nicosia, September 2011, p.1

[1072] Zimmermann, *Obligations*, p.1084

[1073] Neethling, *Delict*, (4th Edn.), p.14

[1074] Harris, *An Eternal Problem*, p.202

[1075] Giltaij, *Existimatio*, p.233. The ascription, as noted, was said to have been effected by Donellus.

[1076] *Ibid*.

[1077] *Ibid*., p.234

that the term *existimatio* was used in the sense of 'human dignity' by the Romans and, to illustrate this claim,[1078] cites the fact that the Sixteenth century humanist jurist Donellus drew on Callistratus' definition that term,[1079] as used in Dig.50.13.5.1, when formulating his discrete 'right to dignity' within his *Commentarii de Iure Civili*.[1080]

Both *existimatio* and *dignitas* were occasionally used as non-technical, non-legal terms by Roman lawyers,[1081] writers and jurists alike,[1082] although it is likewise plain that the terms could also be used in a distinctly legal sense. As noted above, *dignitas* was recognised, by Ulpian, as a specific, legally protected, interest, yet as Giltaij notes, '*iniuria* as a delict sanctioning transgressions against someone else's *existimatio* could [also] be traced back as far as Labeo or even earlier in the late Republic'.[1083] In the juristic sense, *existimatio* and *dignitas* were symbiotically connected: The jurist Callistratus defined *existimatio* as a 'position of unimpaired *dignitas*, which is established by law and custom'.[1084] Greenidge consequently defined both *dignitas* and *existimatio* as terms which denote a concept of 'civil honour',[1085]

[1078] Giltaij stresses that he is 'using Donellus here as a tool to clarify a particular problem for Roman law, without suggesting whether he is of any value for the content of the Roman legal sources as such': *Ibid.*, p.235

[1079] *'Existimatio est, sinitore Callistrato, in laesae dignitatis status legibus et moribus comprobatus'*: Donellus, *Commentarii*, Vol.I, (6th Edn., 1822), 2, 8. 3. As discussed *infra*, this definition is taken from Dig.50.13.5.1

[1080] Donellus, *Commentarii*, 2, 8, 3: *'Vitam quidem natura hominis esse propriam, facile est intelligere: quippe quam omnibus mortalibus largitur deus, etiam iis, qui ceterarum rerum omnio nihil possident'* ['indeed, [*existimatio*] is characteristic of life and human nature, this is easy to understand: surely such is granted by God to all mortals, even to those who otherwise possess nothing'] (author's translation). Donellus goes on to identify *existimatio* – along with safety (*incolumitas*) and libtery (*libertas*) – as one of three characteristics of humankind bestowed on all humankind by God and the *ius gentium*.

[1081] *E.g.*, Cicero, in *de Officiis*, conceptualised *dignitas* as an obligation placed upon man, because of man's ability to reason, to live in accordance with austere stoic Roman principles: See *De Officiis*, 1, pp.105-107. This definition was obviously not meant in a legal sense.

[1082] Indeed, Kaser argued that *existimatio* was used in an exclusively non-technical sense by the jurists: See the discussion in Max Kaser, *Infamia und Ignominia in den Römishen Rechtsquellen*, [1956] Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung 220, p.231; such does not, however, appear to be the case, as demonstrated by Giltaij: *Existimatio*, p.236

[1083] Giltaij, *Existimatio*, p.236

[1084] *'Existimatio est dignitatis illaesae status, legibus ac moribus comprobatus, qui ex delicto nostro autoritate legum aut minuitur aut consumitur'*: Dig.50.13.5.1

[1085] Abel H. J. Greenidge, *Infamia: Its place in Roman Public and Private Law*, (Oxford University Press, 1894), Ch.2

since both were connected, in Roman society, to social standing.[1086] As discussed above, however, all *personae* were entitled to claim redress for affronts effected to their *dignitas,* even if the supposed affront was effected to one of comparably low social standing by one of higher standing.[1087]

Existimatio – linked to *dignitas* as it was – could be 'diminished' (*minuitur*) by a legal sanction which inflicted some lawful indignity on the individual;[1088] Callistratus suggests being barred from public office as but one example of such.[1089] In law, it could be removed entirely if the individual were deprived of their liberty by being deported or astricted to work in the mines.[1090] As Giltaij notes, 'it is clear that the notion of *existimatio* that Callistratus refers to in this text… goes far beyond "reputation"',[1091] societal 'reputation' being the key component of 'civil honour' in the sense discussed by Greenidge.[1092] Both Kaser and Giltaij make the case that *existimatio*, as it appears here, appears to refer to 'human dignity in a general [though nevertheless strictly confined to a 'legal' sense']'[1093] sense, transgressed upon by the catalogue of penalties'.[1094] Given that even slaves may have been deemed to possess some measure of *existimatio*, depending on one's reading of Dig.48.19.28.2-5,[1095] the term would consequently appear to denote some overarching interest in life, limb, liberty and reputation, as well as the

[1086] It should be recalled that, in Roman law, 'Roman citizenship… was a highly prized possession that conferred important rights and privileges upon the holders. Hence, it was jealously guarded': Watson, *Slave Law*, p.35

[1087] Jane Isobel McCarthy, *Speech and Silence: Freedom of Speech and Processes of Censorship in Early Imperial Rome*, [2013] KCL PhD Thesis, p.138

[1088] Dig.50.13.5.2

[1089] Dig.50.13.5.2

[1090] Dig.50.13.5.3

[1091] Giltaij, *Existimatio*, p.239

[1092] *Ibid*., p.236

[1093] *Ibid*., fn.48

[1094] *Ibid.*, p.239; Max Kaser, *Infamia und Ignominia in den Römishen Rechtsquellen*, [1956] Zeitschrift der Savigny- Stiftung für Rechtsgeschichte: Romanistische Abteilung 220, p.266

[1095] Giltaij, *ibid.*, though there appears to be a typographical error in the text as Giltaij refers, here, to Dig.49.19.28, which does not exist. Lenel, to whom Giltaij refers, discusses Dig.48.19.28 at the section cited and it seems clear that this is the section which Giltaij intended to refer to. If Dig.48.19.28.2-5 is read as a single text – given that Dig.48.19.28.4 refers to slaves – then it appears that Callistratus at least implicitly recognises the *existimatio* of slaves.

myriad of 'personality rights' which the term *'dignitas'* might be used to denote, which was possessed by all human beings, regardless of their place in society.[1096]

The *actio iniuriarum*, then, served then to protect 'dignity' on a twofold conceptual level.[1097] At a high (*i.e.*, general) level, it served to protect *existimatio*,[1098] which is to say that any affront to a particular, 'lower-level' (*i.e.*, specific) personality interest (*e.g.*, to the body or to one's reputation) could be conceptualised as an infringement of not only that specific personality interest, but the *existimatio* of the affronted party also.[1099] Thus, an injurious physical attack (for example) could be considered as much an attack on the victim's *existimatio* as it was on his body.[1100] At a lower level of generality – that is, as a 'doctrinal working tool'[1101] – the Roman *actio iniuriarum* also served to protect the *dignitas* of *personae*.[1102] This concept of *'dignitas'*, as discussed, serves as a shorthand for all of the general dignitary (*i.e.*, personality) interests enjoyed by *personae* and protected by law.[1103]

As the concepts of *existimatio* and *dignitas* are evidently connected,[1104] there is a notable linguistic problem attached to the act of conceptualising the basis of an action under the *actio iniuriarum*: It is difficult to express the fact that the *actio iniuriarum* is an action which serves to protect the reputational honour of an individual by affording protection to their body, reputation and honour, since such appears tautological. It appears less problematic to say

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[1096] Of course, although slaves might have been said to possess (at least some small measure of) *existimatio*, the law nevertheless did not extend to protect the *existimatio* of slaves from affront.

[1097] Zimmermann, *Obligations*, p.1062, fn.102

[1098] The terms *'existimatio'* and *'dignitas'* appear in Latin throughout this section due to their etymological complexity. Though this section seeks to define these terms, such definition cannot be plainly set out without due contextual discussion.

[1099] See Jonathan Brown, *O Tempora! O Mores! The Place of Boni Mores in Dignity Discourse*, [2020] CQHE 144

[1100] Indeed, in speaking of the *actio iniuriarum*, McKechnie noted that 'the essence of assault [a sub-species of iniuria] is insult rather than actual physical hurt': See *Green's Encyclopaedia of the Law of Scotland*, vol.12 (Edinburgh: W. Green, 1931), para.1124

[1101] *I.e.*, in a manner virtually synonymous with freedom from insult: See Whitty, *Overview*, p.161

[1102] Descheemaeker and Scott, *Iniuria*, p.13

[1103] Neethling, *Delict*, (4th Edn.), p.14

[1104] Dig.50.13.5.1

that the *actio iniuriarum* serves to protect the *existimatio* of individual legal *personae*, by affording express protection to individual interests including *corpus, fama* and *dignitas*, but if these Latin terms are translated as in the previous sentence, in line with Greenidge's suggestion, the problem clearly recrudesces. To regard *existimatio* and *dignitas* as related, yet fundamentally distinct, concepts solves this issue; there is no tautology in the claim that the law protects the human dignity of legal persons by remedying infringements of their bodies, reputations and general dignitary interests.

Thus, though to say that the *actio iniuriarum* was an action to protect 'dignity' in the sense of social standing is correct, as the Roman conception of this notion was asymmetrical, it is also accurate to say that the action served to protect 'dignity' in the sense of one's personal status as an entity worthy of respect, since the term was 'levelled-up' and refined, by jurists such as Donellus to, operate in the wider (and more modern) sense of 'dignity'. One's social standing may be prejudiced by harm effected to one's body or reputation, or indeed by an act which affronts their feelings or violates their privacy; such is the top-level justification for the existence and operation of the *actio iniuriarum*. It is submitted, therefore, that *dignitas* is best translated, not as 'honour', but as 'dignity' in the broadest possible sense of that word, since *dignitas* ultimately represents the interest in one's state or quality of being worthy of respect.[1105] Potentially any action which infringed this state or quality could be deemed *iniuria* and so actionable under an *actio iniuriarum*.[1106] Likewise, although the *actio iniuriarum* itself has 'historically been entwined' with an asymmetrical conception of *existimatio* and *dignitas*, 'asymmetry cannot be regarded as constitutive of *iniuria*' since the action 'can perfectly exist

[1105] See the discussion in Brown, *O Tempora!*, CQHE 144, *passim*.

[1106] Descheemaeker and Scott, *Iniuria*, p.21

as the attack on [a person's] dignity considered in and by itself, even if it [that is, dignity] is taken to be held in the same measure by all'.[1107]

Drawing on the above discussion, 'human dignity' can consequently be understood in this context to mean the absolute minimum standard of respect which individuals are entitled to be afforded in society, while 'dignity' (in the sense of the nominate personality interest which forms a part of the Ulpianic triad) may be understood as a protected general interest in the integrity of one's esteem – self and societal. In Roman law, *Personae* enjoyed both *dignitas* – general dignitary interests – and *existimatio* – human dignity – but slaves enjoyed only (extremely limited) *existimatio* which could be further diminished by public punishment for wrongdoing.[1108] In modern legal systems which retain a connection to the Roman *actio iniuriarum*, it is submitted that all natural legal persons can be said to enjoy recognition of both *existimatio* and *dignitas*, being that all human beings are afforded the 'additional status' conferred by recognition of 'personhood' in law.

If the taxonomy of *iniuria* is to be regarded as a taxonomy of protected interests, it appears that the most significant interest protected in that taxonomy is *existimatio*, in much the same way as the 'King's peace' may be taken as the salient interest protected by actions of trespass.[1109] In line with Callistratus' definition of the term *'existimatio'*, the word can be understood as the standing associated with 'civil honour' or socially recognised 'human dignity', of which unimpaired *dignitas* – and, indeed, *corpus* and *fama* – was an essential element.[1110] It is for this reason that an heir could raise a competent *actio iniuriarum* in respect of wrongdoing to the cadaver of their relative.[1111] As indicated above, Ulpian recognised that

[1107] *Ibid.*, p.13

[1108] See D.49.19.28.2-5

[1109] Naturally, the reason that Roman law sought to protect *existimatio* was to safeguard the peace also, as discussed.

[1110] Watson's translation of the *Digest* reflects this: *Existimatio* is conceptualised as 'standing' throughout.

[1111] Forbes, *Criminal Law*, p.131; Bayne, *Institutions*, p.188

contumelious treatment of a cadaver might give the heir of the deceased cause to raise an *actio iniuriarum* against the wrongdoer, *spectat enim ad existimationem nostram, si qua ei fiat iniuria* (for it affects our own *existimatio* if any *iniuria* be effected [to the corpse]).[1112]

The grounds for this action might be rationalised differently, depending on how the term *'existimatio'* is understood. If the term is thought analogous to standing'[1113] or 'civil honour',[1114] then the basis of the action may be thought to lie in the fact that in Roman society 'public honours and statues marking a person's public memorial were central to familial status'.[1115] Conversely, on the basis of the above discussion it may instead be submitted that there exists some legally recognised dignitary interest (though one possessed by the family of the deceased, rather than the deceased person themselves) in the preservation of the peace and rest of the dead. *Existimatio* and *dignitas* were linked to societal standing in Roman law and society, but these concepts need not be exclusively tied to any asymmetric notion in the law of *iniuria*. Even in a society which possesses a symmetrical conception of the dignity of humankind as such, it might be said that 'it affects our own *existimatio*' if another behaves contumeliously towards the cadaver of a relative.[1116]

3.2.4 The Dead, their Heirs and *Actiones Iniuriarum*

It has been said that in considering the question of the nature of wrongs occurring in respect of the human biological material, both lawyers and ethicists are faced with a 'seemingly

[1112] Dig.47.10.1.4; author's translation.

[1113] As Watson's translation of the Digest does – see Alan Watson (trs.), *The Digest of Justinian*, Vol.IV (University of Pennyslavania Press, 1985), p.285.

[1114] As Greenidge suggests – see the discussion at para.3.2.3 *supra*.

[1115] Kieran McEvoy and Heather Conway, *The Dead, the Law, and the Politics of the Past*, [2004] Journal of Law and Society 539, p.553

[1116] Indeed, as Whitty observes 'it is thought incidentally that both the broad and the narrow meanings of "dignity" would cover the three Scottish post-mortem cases [said to be predicated on the *actio iniuriarum per* Temporary Judge Macaulay QC in *Stevens*]': Whitty, *The Human Body*, p.206. The three 'Scottish post-mortem cases' alluded to by Whitty are *Pollok*, *Conway* and *Hughes*, discussed in para.2.2.4, *supra*.

unsolvable series of problems'.[1117] Lawyers, though, 'struggle less than the ethicists, since they are concerned primarily with the adequacy of a remedy, and can therefore paint the philosophical nature of the wrong with a broader brush than can the ethicists'.[1118] This charge is accepted and, indeed, it may be added to it that Scots and South African lawyers may struggle even less than their counterparts in other jurisdictions due to their systems' living institutional connection to the Roman *actio iniuriarum*. Since this action affords protection to individual interests in *existimatio* and *dignitas*, it might be contended that the *actio iniuriarum* has the potential to afford adequate remedy in innumerable conceivable cases which concern wrongdoing directed towards cadavers.

That an individual might feel that they have suffered an affront as the result of maltreatment of their relative's cadaver is clear. Unwarranted interference with a cadaver was manifestly *iniuria*, in the nominate sense of that term, in Roman law.[1119] The question of the *existimatio* or *dignitas* of the deceased might be thought to have been rendered moot in such circumstances, since the wrongdoing was deemed to be directed towards the living, rather than the dead, as the dead body was regarded in D.47.10.1.4 as the object of the wrong rather than the subject.[1120] As Ulpian explains in Dig.47.10.1.6, however '*quotiens autem funeri testatoris vel cadaveri fit iniuria, si quidem post aditam hereditatem fiat, dicendum est heredi quodammodo factam (semper enim heredis interest defuncti existimationem purgare)*' (Moreover, whenever there be any contumelious wrongdoing at the testator's funeral or towards his corpse, if it occurs after the inheritance has been accepted, it must be said that, in

[1117] Charles Foster, *Dignity and the Use of Body Parts*, [2014] J. Med. Ethics 44, p.44
[1118] *Ibid*., p.44
[1119] Dig.47.10.1.4 (Ulpian); Dig.47.10.1.6 (Ulpian)
[1120] Dig.47.10.1.4 (Ulpian)

a sense, the insult is to the heir [for it is always the heir's obligation to vindicate the dignity (*existimatio*) of the deceased]).[1121]

Roman law, then, deigned to protect the dignity of both the heir to a deceased and the deceased themselves by dint of the *actio iniuriarum*. Of course, for the *existimatio* of a dead person to be vindicated by means of an *actio iniuriarum*, that dead person would require a living intermediary (indeed, an heir)[1122] to bring the action. This marks a contrast between the protection afforded to a reverentially interred dead body (a *res religiosa* left in the province of the gods or religious authorities)[1123] and that granted to an unburied cadaver by means of a competent *actio iniuriarum*. As previously noted,[1124] the *crimen violati sepulcri* was an *actio popularis*,[1125] which could be raised against a purported wrongdoer by any Roman citizen. The nature of this form of wrongdoing was the interference with the *res religiosa*, which was outwith the scope of private patrimony and wholly within religious cognizance.[1126] By contrast, so far as the *actio iniuriarum* was concerned, 'the heir [acquires] the action through the inheritance'.[1127] In the absence of an heir to vindicate the *existimatio* of the deceased, no action could be brought. Such did not mean that the *iniuria* inflicted upon the cadaver was warranted or justifiable, but rather that there was simply no extant individual in possession of the requisite standing to vindicate the deceased's *existimatio* in a private action.

Just as the Roman jurists conceptualised unwarranted interference with cadavers as *iniuriae*, so too did early modern Scottish jurists view affronts directed towards deceased persons as 'injuries' in the specific, nominate sense.[1128] Even when the law of *iniuria* has not

[1121] Author's translation.
[1122] Dig.47.10.1.6 (Ulpian)
[1123] G.2.4; J.2.1.9
[1124] See Ch.1, *supra*.
[1125] Berger, *Dictionary*, p.767
[1126] Melius de Villiers, *The Roman and Roman-Dutch Law of Injuries*, (Juta, 1899), p.63
[1127] Dig.47.10.1.6 (Ulpian)
[1128] Forbes, *Criminal Law*, p.131

specifically been invoked, however, the language of *iniuria* continues to find a place in dialogue concerning wrongdoing effected towards cadavers. Such is made clear by the findings of the 2003 'McLean report'[1129] which sought to 'clarify and reinforce the very real interests that parents have in their children, even after their death'.[1130] That report found that 'many parents felt the need to continue to protect the child after death' and that 'they saw [past post-mortem practice] as an insult in addition to their grief'.[1131] As Professor Whitty indicated in a 2005 article, 'the word "insult" matches exactly the affront which triggers the *actio iniuriarum*'.[1132] Although the report itself 'was not sufficiently thorough' as it did not deign to discuss the Scots law of *iniuria*, Whitty put forth a convincing case that this work was ultimately 'striving to create, from the [European Convention on Human Rights] and non-legal materials, established legal principles which already do underlie the existing Scots private law right of action for *solatium* for wounded feelings arising from affront'.[1133]

This Scottish action for *solatium*, discussed above, is predicated on recognition of the 'dignity' of the family unit.[1134] As the three Scottish 'post-mortem' cases – *Pollok v Workman*,[1135] *Conway v Dalziel*[1136] and *Hughes v Robertson*[1137] – demonstrate, Scots law, like Roman law, recognises that a child has a continuing interest in the preservation of the integrity of their father's dead body. 'By parity of reasoning, [this] rule must also apply to actions by

[1129] *"Final Report" of the Independent Review Group on Retention of Organs at Post-Mortem* (Nov 2001) (available at http://www.show.scot.nhs.uk/scotorgrev/). The group was chaired by Professor Sheila McLean of the University of Glasgow. For convenience sake, Professor Whitty nominated the shorthand reference to 'the McLean report' in his 2005 Edinburgh Law Review piece (at p.196) and this appellation is adopted for the purposes of this thesis.

[1130] *McLean Report*, para.14

[1131] *McLean Report*, para.9

[1132] Whitty, *The Human Body*, p.235

[1133] *Ibid*., pp.236-237

[1134] *Ibid*.

[1135] (1900) 2 F 354

[1136] (1901) 3 F 918

[1137] 1913 SC 394

parents in respect of the body of their deceased child'.[1138] The private law action which allows for the vindication of the 'dignity of the family unit' was found, by the Outer House, to be based on the *actio iniuriarum*.[1139] The Scottish courts may, therefore, avoid the 'reproach to the law' complained of in *Larson*.[1140] There is no need to conceptualise the relationship between a person and the cadaver of their family member as proprietary in nature, nor to rely upon minor technicalities or 'creative judicial reasoning', for a remedy to be afforded in cases concerning unwarranted interference with cadavers. Instead, by relying upon its institutional connection to Roman law, there is scope for Scots law to vindicate directly, expressly and unashamedly the dignitary interests of deceased persons and their heirs where contumelious wrongdoing has occurred.

With that said, it has been contended that 'it is questionable whether [the *actio iniuriarum*] offers a sustainable model for the development of personality rights protection… Whereas in South Africa, the modern development of the *actio iniuriarum* has been informed by a copious and vigorous case law, in the Scottish courts the terminology of "Vinnius and the *Corpus Juris*" has long ceased to be regularly applied'.[1141] Though critical of the ongoing importance of the *actio iniuriarum* to modern Scots law, Professor Reid nevertheless concedes that 'there is no doubting its importance as a source' and that 'the *actio iniuriarum* must clearly be acknowledged [by Scots lawyers] as an important legal "ancestor"'.[1142] Since, in light of the above discussion, it appears clear that the *actio iniuriarum* could well serve as an effective mechanism to afford reparation in instances of contumelious treatment of cadavers, it follows

[1138] Whitty, *The Human Body*, p.236
[1139] *Stevens*, paras.34, 62.
[1140] *Larson*, p.312
[1141] Reid, *Personality*, para.17-12
[1142] *Ibid*.

that due consideration should be paid to the place of the nominate delict *iniuria* within the general schema of Scots law.

3.3 Dignity, *Iniuria* and Scots Law

3.3.1 *Iniuria* as a 'Legal Ancestor'

The importance of the *actio iniuriarum* as a legal 'ancestor'[1143] of the modern Scots crime and delict of assault has long been recognised by legal commentators,[1144] but it is evident that the ancestry and influence of the action extends beyond the confines of this single nominate wrong. The Roman-Dutch notion of *iniuria* as the deprivation of a natural right (*e.g.*, to one's body (*corpus*), limbs (*membra*), reputation (*fama*), honour (*honor*) or actions (*actiones*) as in Grotius)[1145] evidently influenced the Scottish Institutional writers Stair, Bankton and Erskine,[1146] who each conceived of a broad range of legally protected interests, infringements of which could be actionable as *iniuriae,* or 'injuries'. Earlier jurists such as MacKenzie regarded 'injury' as a wide category of wrongdoing[1147] which, in the specific sense of *iniuria,* was divisible into sub-species of wrongdoing effected by *contumelia*:[1148] 'injuries' inflicted by words (*iniuria verbalis*) and 'injuries' inflicted by physical acts (*iniuria realis*).[1149]

[1143] *Ibid*.

[1144] Walker, *Delict*, p.488; Alasdair Maclean, *Autonomy, Consent and the Body in Delict* in Thomson, *Delict*, para.11.07; Blackie, *Unity in Diversity*, p.103; Pillans, *Delict*, para.6-13

[1145] See Hugo Grotius, *De Iure Belli ac Pacis*, (Amsterdam: Joannem Blaev, 1690), 2, 21, 11

[1146] See Reid, *Personality*, para.1-03

[1147] 'Injury then, in its more comprehensive sense, may give a name to all crimes; for all crimes are injuries, but injury as it is the Subject of this Title [*iniuria*], is the same thing with contumely or reproach': MacKenzie, *Matters Criminal*, p.303

[1148] MacKenzie, *Matters Criminal*, p.303

[1149] For a full discussion of the taxonomy of *iniuria* in early modern Scots law, see Blackie, *Unity in Diversity, passim*.

As a preliminary matter, it should be noted that, during the 'institutional period' of Scots law[1150] (as in Roman law),[1151] there was no clear divide between criminal and delictual matters[1152] and so, as a matter of convenience, any legal wrongdoing recognised by the Institutional writers (unless otherwise indicated) may be categorised as crime/delict.[1153] The substantive law pertinent to both subjects was functionally identical, save (perhaps) in respect of the law of negligence.[1154] For this reason, although many of the writers considered below are concerned primarily with matters of criminal law in discussing *iniuria*, such does not detract from the claim that the roots of the contemporary Scottish delict of *iniuria* can be traced to these texts.

MacKenzie's description of 'injury' within the context of Scots law evidently reflects the Roman conception of *iniuria*. Though MacKenzie does not name the interests that the law pertinent to injury seeks to protect,[1155] and though the specific examples of conduct amounting to *iniuria* which he provides are limited,[1156] from the significance that is placed on *animus iniuriandi* in this title of *Matters Criminal*[1157] it may be inferred that, as in Roman law, MacKenzie considered that 'as long as the wrongdoer's purpose was to bring his victim into disrepute, his conduct – whatever it was – was potentially actionable' as injury.[1158] It should be noted, however, that MacKenzie's discussion of *animus iniuriandi* appears expressly limited

[1150] See William M. Gordon, *A Comparison of the Influence of Roman Law in England and Scotland*, in David L. Carey Miller and Reinhard Zimmermann, *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays*, (Duncker and Humboldt, 1997), p.140

[1151] Most matters which would be clearly considered crimes today could be disposed of in a delictual action and the matter of public law (of which criminal offences form a part) seemingly received less attention from the Roman jurists than did the private aspects of crimes and delicts: See Andrew M. Riggsby, *Roman Law and the Legal World of the Romans*, (CUP, 2010), p.195

[1152] See John Blackie, *The Interaction of Crime and Delict in Scotland*, in Matthew Dyson (Ed.), *Unravelling Tort and Crime*, (CUP, 2014), p.358

[1153] Blackie and Chalmers, *Mixing and Matching*, p.286

[1154] See Blackie, *Crime and Delict*, p.358

[1155] See Blackie, *Unity in Diversity*, p.94

[1156] *Ibid*., p.95

[1157] MacKenzie, *Matters Criminal*, pp.304-305

[1158] Descheemaeker and Scott, *Iniuria*, p.13

to the heading under which *iniuria verbalis* is discussed. Though MacKenzie notes that 'injuries are estimat according to the design of the offender',[1159] it follows from this only (though 'naturally') that 'men who are fools, idiots, very young, or very drunk, are not punishable for verbal injuries'.[1160] No mention is made under the equivalent title for *iniuria realis* of any requirement of *animus iniuriandi* and, given that real and verbal injury were tried before different courts at his time of writing,[1161] such may be thought to be significant.

The absence of any discussion of *animus iniuriandi* under the heading of *iniuria realis* does not, however, imply that such was not required to render the injury actionable. Rather, it might simply be taken as a reflection of the fact that there were no sub-categories of *iniuria verbalis* at MacKenzie's time of writing.[1162] By contrast, being that there were recognised sub-categories of *iniuria realis* at this time (though innominate forms of *iniuria realis* were also actionable),[1163] the Scottish sources of this time would generally consider the specific sub-category without expressly laying out the taxonomy of *iniuria* or identifying the wrongdoing as a species of *iniuria realis*.[1164] Where a sub-category of *iniuria* (*i.e.*, where *iniuria verbalis* or *iniuria realis*) was demonstrable, 'there would have been no need expressly to refer to iniuria as the top level category. It was implied'.[1165] So too was the occurrence of *iniuria realis* implicit in any infliction of one of the sub-categories of *iniuria realis*.[1166] Accordingly, it appears that MacKenzie would have regarded *animus iniuriandi* as an essential prerequisite of the occurrence of any innominate form of *iniuria realis*; indeed, it has been said that, certainly, by

[1159] MacKenzie, *Matters Criminal*, p.304

[1160] *Ibid.*

[1161] *Ibid.*, pp.305-306

[1162] See Blackie, *Unity in Diversity*, p.77

[1163] *Ibid.*

[1164] *Ibid.* pp.75-76

[1165] *Ibid.*, p.75

[1166] Reference to the higher-level category of *iniuria realis* would generally be necessary only in cases in which the question of jurisdiction arose, as it would then be necessary to determine whether the exclusive jurisdiction of the Justiciary Court over cases of real injury ought to be exercised, or if the matter was one of verbal injury and so justiciable in the Commissary Courts: See *Ibid.*, p.76

the Nineteenth century, 'it seems to have always been taken for granted that an injurious intention was required' in all matters pertinent to the infliction of injury.[1167]

Among the specific forms of *iniuria realis* discussed by MacKenzie are hamesucken,[1168] *raptus* (or 'ravishing', akin to the modern crime of rape)[1169] and adultery.[1170] Other forms of *iniuriae realis* are treated as innominate wrongs. Pitmedden's 1699 appendix to MacKenzie's work, the *Treatise of Mutilation and Demembration*, treats of a further two specific forms of *iniuria realis* (unsurprisingly, those named in the title of his piece). Other than noting that these forms of wrongdoing are properly categorised as species of *iniuria*,[1171] and that the commission of these crimes/delicts must be 'voluntary' in order to be actionable,[1172] Pitmedden does not discuss the general nature of *iniuria realis* or *verbalis* in any detail. Nor does he provide a general schema of protected personality rights and so it can be concluded that at the beginning of the Eighteenth century, *iniuria* remained conceptualised as a general crime/delict which could be committed by any means, in any form, so long as the motivation of the wrongdoer was to contumeliously cause affront to the wronged party.[1173]

Stair's methodology in his *Institutions of the Law of Scotland* evidently sprung from a school of thought different from than that of MacKenzie and Pitmedden;[1174] this is unsurprising given that he was not primarily concerned with delictual or criminal considerations in the

[1167] Grant Barclay, The Structure of Assault in Scots Law: A Historical and Comparative Perspective, [2017] University of Glasgow LLM Thesis, p.50; *Roy* (1839) Bell's Notes, 88

[1168] MacKenzie, *Matters Criminal*, pp.163-169

[1169] *Ibid.*, pp.218-223

[1170] *Ibid.*, pp.169-185

[1171] Pitmedden, *Treatise*, [2]

[1172] *Ibid.*, [8]

[1173] *I.e.*, anything innominate fell into the 'residual category' discussed by Blackie: See Blackie, *Unity in Diversity*, p.38

[1174] As Blackie indicated, there were – broadly – two approaches to the analysis of the law pertinent to personality rights. Certain jurists – including MacKenzie – would provide multifarious examples of the delict or crime and so infer its general application from such examples. Others, notably Donellus and Grotius, who each heavily influenced Stair, would begin their approach by enumerating the rights protected by the law in theory and proceeding from this enquiry to the establishment of practical legal protection: See *Ibid.*, p.93

composition of his text.[1175] In Book I, he treats of 'reparation, where of delinquence, and damages thence arising' and under this heading notes the four specific and nominate delicts of Roman law: *furtum, rapina, damnum* and *iniuria*.[1176] Stair was less concerned, however, with the taxonomy of wrongdoing as he was with the 'rights and enjoyments' against which damage and delinquency could be effected.[1177] He states that 'the obligation of delinquence is that whereunto injury or malefice doth oblige, as the meritorious cause thereof'[1178] and recognises, as what might be termed 'personality rights', rights to one's life, members (limbs) and health as among the most valuable rights which a person may enjoy,[1179] along with one's right to liberty, fame, reputation and honour.[1180] A fourth trio of rights – to 'content, delight or satisfaction' – pertains not strictly to personality, but – being concerned with the *pretium affectionis* (the price of affection) – ostensibly relates to one's patrimony as well;[1181] the final rights mentioned by Stair under this heading – to goods and possession – are clearly not pertinent to personality, but are obviously patrimonial in nature.

Stair appears concerned only with those interests which can be 'damnified', which is to say those interests in respect of which compensation is payable should *damnum injuria datum* be suffered. Indeed, in his treatment of 'injurious words', Stair regards that 'such actions upon injurious words, as they relate to damage in means, are frequent and curious among the English; but with us there is little of it accustomed to be pursued though we own the same grounds and would proceed to the same effects with them, if questioned'.[1182] The caveat 'as they relate to

[1175] It has been said that MacKenzie's work *'fits better than that of Stair into the general European patterns of Institutional writings'*: Hector MacQueen, *Scottish Legal History Group (Mackenzie Tercentenary),* [2007] Journal of Legal History 84, p.84

[1176] Stair, *Institutions* I, 9, 4

[1177] *Ibid.*

[1178] *Ibid.* I, 9, 2

[1179] Stair regards the value of these interests as 'inestimable' and indicates that though they cannot be said to have a base pecuniary value, reparation is due to one who suffers infringement thereof regardless: *Ibid.*, I, 9, 4

[1180] *Ibid.*

[1181] See Bell, *Dictionary*, (1838), p.778

[1182] Stair, *Institutions*, I, 9, 4

damages in means' is evidently of the utmost importance in this passage; as English law lacked any conception of *dignitas* and had developed a law of libel and slander concerned with patrimonial loss rather than indignity,[1183] the legal consequences of a contumeliously effected verbal insult would not be the same in Scotland as in England.[1184] The practical consequences of slander or libel giving rise to pecuniary loss resulting from damage to reputation may have been, however, practically analogous.

That 'actions upon injurious words' of a kind common in England were rare in Scotland is thus unsurprising, since Scots law had at that time a means of repairing verbal injuries in the absence of pecuniary loss while English law did not. In England, one who suffered as a result of a fraudulent or slanderous statement by another would have to prove that they were damnified by that statement. This would, then, involve a claim based on 'injurious words' in the sense described by Stair.[1185] In Scotland at the time of Stair's writing, reparation for wrongdoing effected by 'injurious words' could be obtained by establishing that the statement was contumeliously made, though the forum for such a claim would be in some venue other than the Court of Session.[1186] The Court of Session did not have jurisdiction in cases of *iniuria* but did in cases of economic loss.[1187] Thus, though there was nothing in principle to prevent (say) a businessman whose business or reputation suffered as a result of slander from raising proceedings on the basis of slander, there would be no need for that businessman to predicate his claim for reparation upon the damage done to his business or to raise his claim in the Court

[1183] John S. Beckerman, *Adding Insult to Iniuria: Affronts to Honor and the Origins of Trespass* in Morris S. Arnold, Thomas A. Green, Sally A. Scully, Stephen D. White, *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne*, (UNCP, 1981)

[1184] Smith, *Short Commentary*, pp.724-725

[1185] That Stair noted commonality between Scots and English law on the point of reparation for defamatory statements prompted Counsel to refer to 'England from whence Lord Stair says we borrow our law of slander': See *Landless v. Gray* (1816) 1 Murr 7. 9, *per* counsel for defender *arguendo* at 81

[1186] A wide range of courts could potentially claim jurisdiction, but 'it seems that most cases came before the commissary courts': See John Blackie, *Defamation*, in Reid and Zimmermann, *History*, II, 641-642

[1187] *Ibid.*, p.653

of Session; he could seek to obtain redress – and, indeed, to punish the wrongdoer – through raising an action based on *iniuria* in the sense spoken of by MacKenzie.

Given the fact that Stair's consideration of 'verbal injury' is limited to occasions in which patrimonial loss is suffered, it appears clear that Stair was not, here, concerned with 'who a person is, rather than what a person has',[1188] but rather that his focus on reparation is confined to occasions in which estimable pecuniary loss is caused by wrongdoing. Such is not surprising; in writing the *Institutions*, Stair was primarily concerned with matters of law which fell within the jurisdiction of the Court of Session.[1189] As this court did not have jurisdiction in cases of 'injury' in the sense of *iniuria*, Stair did not need to consider this crime/delict to achieve the goals of his work.

The treatment of 'injury' in Stair's *Institutions*, then, appears to be concerned with the reparation of loss (*damnum*), rather than with contumeliously effected *iniuria*. This is so notwithstanding the consideration given to interests such as 'life, members and health' as well as 'liberty, fame, reputation and honour', which manifestly appear, to the modern reader, to be 'personality rights'. Interests such as these appear to have been included in Stair's consideration because he considered that – in spite of initial appearances – they could be damnified. Indeed, in recognising that the value of the first trio of interests is 'inestimable', Stair notes that damages (*damnum emergens* and *lucrum cessans* – not *solatium*)[1190] would nonetheless be payable for injury to these interests.

This development might be rationalised as an extension of Aquilian liability and indeed the right to 'reparation' in Scots law has been said to be unquestionably Aquilian in nature.[1191]

[1188] As reparation under the *actio iniuriarum* is: See Whitty and Zimmermann, *Personality*, p.3

[1189] Blackie, *Defamation*, 652

[1190] When speaking of 'reparation for real injury', Bankton explicitly nature of the reparation as being *in solatium*: Bankton, *Institute*, I, 10, 35

[1191] Smith, *Short Commentary*, p.653

That Stair himself considered his conceptualisation of reparation in Roman terms is doubtful, since he explicitly steered away from the quadripartite division of Roman delicts. In any case, Stair's work provides little insight into the position of *iniuria* in early modern Scots law, but unlike Stair, subsequent Scottish jurists took an interest in courts other than the Court of Session and so did not omit a consideration of an intentional affront-based conception of 'injury' from their consideration.[1192]

Forbes and Bayne, the first Professors of Scots law at Glasgow and Edinburgh respectively, each published separate *Institutions* of Scots criminal law in 1730[1193] and in their works treated 'of crimes and offences committed against one's fame or honour, called injuries'.[1194] In each text, it is again noted that 'all crimes are injuries in an extensive sense',[1195] but that there is a specific species of wrongdoing known to the law of Scotland by that same word.[1196] Although in the case of Forbes this treatment of the subject-matter may be rationalised by reference to the claim that his text was little more than an unoriginal rehash of MacKenzie,[1197] Bayne certainly went further than his juristic predecessors in providing, in addition to examples of *iniuria,* a schema of what might be termed personality rights.[1198] Unsurprisingly, given his focus on criminal law and the superficial similarity between his work and that of MacKenzie, Forbes marked a return to a description of the nature of wrongdoing

[1192] The absence of a consideration of 'injury', in the sense of the nominate crime/delict, in Stair's work may be explained by the fact that his *Institutions* largely eschews consideration of the criminal law and *iniuria*; the subsequent writers (with the exception of *Bankton*) discussed *infra* were not merely concerned with civil law and the jurisdiction of the Court of Session, but with criminal law also.

[1193] Forbes' *Institutes* were reprinted by the Edinburgh Legal Education Trust in 2012: William Forbes, *The Institutes of the Law of Scotland,* (Edinburgh: Edinburgh Legal Education Trust, 2012); Bayne's work has not (yet) been republished.

[1194] Forbes, *Criminal Law*, p.130; Bayne, for his part, notes that *'the law extends its protection to our reputation and to our good name'* under the heading of 'injuries': Bayne, *Institutions*, p.174

[1195] Forbes, *Criminal Law*, p.130; interestingly, Bayne utilises the term 'trespass' in describing this, noting that *'every unjust action which trespasses upon the right of another man, done designedly, may well be called an injury'*, but that his title is, at this juncture, concerned with *iniuria*: See Bayne, *Institutions*, p.175

[1196] Forbes, *Criminal Law*, p.130

[1197] See Barclay, *Assault*, p.12

[1198] See Blackie, *Unity in Diversity*, p.98

by reference to the nature of specific crimes/delicts rather than a description couched in terms of rights which might be infringed.

The influence of Forbes' *Institutes* on Scottish legal thought can, at its highest, be described as 'muted',[1199] however a consideration of his work – and, indeed, that of Bayne – is required in order to fill the gap between the publication of the work of Stair at the end of the Seventeenth century and that of Bankton in the middle of the Eighteenth.[1200] In Book IV of his text, Forbes treats the forms of *iniuria realis* according to sub-category, severally addressing wrongdoing such as rape[1201] and mutilation and dismembration,[1202] as one might expect of a book concerned with the taxonomy of criminal law. Like MacKenzie, Forbes recognises the innominate wrongs *iniuria verbalis* and *iniuria realis*.[1203] Intentionally inflicting an 'indignity' upon a person by means other than words was constitutive of *iniuria realis* of an 'ordinary' sort.[1204] Forbes gives no indication of the 'right' infringed by real injury, but it may be inferred from the emphasis that he places on 'affront' and 'indignity' that he is here concerned with non-patrimonial and non-pecuniary considerations and, thus, that a concern for the *existimatio* of legal *personae* might be imputed. Given the breadth of conduct which Forbes considered to amount to *iniuria realis*,[1205] it may be further claimed that the specific interest infringed in each

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[1199] See Hector MacQueen, *Introduction* in Forbes, *Institutes*, p.vi

[1200] *Ibid*., p.xiv

[1201] William Forbes, *The Institutes of the Law of Scotland*, (Edinburgh: Edinburgh Legal Education Trust, 2012), p.645. Interestingly, Forbes maintained that *'by our law, a woman may commit a rape upon a man, as well as a man may upon a woman'*.

[1202] William Forbes, *The Institutes of the Law of Scotland*, (Edinburgh: Edinburgh Legal Education Trust, 2012), p.647

[1203] William Forbes, *The Institutes of the Law of Scotland*, (Edinburgh: Edinburgh Legal Education Trust, 2012), p.654

[1204] William Forbes, *The Institutes of the Law of Scotland*, (Edinburgh: Edinburgh Legal Education Trust, 2012), p.656. 'Extraordinary injuries' were those which were *'those considered by the law as such'* and might be said to be aggravated forms of ordinary injury – the aggravation arising either as a result of the place in which the injury was effected (e.g., injury inflicted in the victim's home might be regarded as *hamesucken*) or as a result of the extended *existimatio* of the person wronged (e.g., conduct effected in order to affront the King or his Counsellors, judges or magistrates was a more serious affront than the same conduct directed at one of lesser social standing): See Forbes, pp.658-667

[1205] Such conduct included, but was not limited to painting a person in 'fools colours', affixing a 'shameful sign' to their door, spitting in their face, giving them 'medicaments to affront him', hindering them, removing their seat in church, wearing the Coat of Arms of another or following an 'honest' woman in such a way so as to imply

of these occurrences might be said to be the *dignitas* of the *personae* affronted by the wrongdoing.

In his more extensive – though unpublished – work, the *Great Body of Scots Law*, Forbes also considered the taxonomy of *iniuria*,[1206] as might be expected since his *Institutes* were essentially a condensed version of this *opus*.[1207] The distinction between *iniuria verbalis* and *iniuria realis* is again present,[1208] along with his novel distinction between 'ordinary' and 'extraordinary' injury.[1209] It should be noted, however, that chapter 9 of Book IV is not the only heading under which 'injuries' are discussed. In Chapter 3 of Book I, concerning obligations arising from wrongdoing, Forbes describes 'offences or trespasses tending to the prejudice or injury of private man'.[1210] The implicit recognition that trespass might cause 'injury' to the person implies English influence. It certainly illustrates, again, the similarity between the Roman *actio iniuriarum* and the Common law action of trespass; indeed, in justifying the rationale underlying the Scottish action for injury, Forbes utilises terms consistent with the action of trespass, noting that the provocation inherent in injury would likely prompt a drive for revenge in the wronged party (and, indeed, in their friends and family) which might escalate to the point that 'it could not be constrained by the sovereign';[1211] the law, consequently, sought to afford remedy to those affronted by injury as a means of protecting the King's peace.[1212]

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harlotry: See William Forbes, *The Institutes of the Law of Scotland*, (Edinburgh: Edinburgh Legal Education Trust, 2012), pp.656-657

[1206] Forbes, *Great Body* IV, pp.440-449

[1207] Hector MacQueen, *Introduction* in William Forbes, *The Institutes of the Law of Scotland*, (Edinburgh: Edinburgh Legal Education Trust, 2012), p.vi

[1208] Forbes, *Great Body* IV, pp.440-449

[1209] *Ibid*., pp.449-462 (ordinary injuries); pp.462-479 (extraordinary injuries).

[1210] *Ibid*., I, pp.927-1004

[1211] Forbes, *Great Body*, IV, p.440

[1212] As Professor Cairns notes, though this is an 'Anglo-Saxon notion', the idea of 'the king's peace play[ed] a major role in the development of Scots law': See John W. Cairns, *Historical Introduction* in *A History of Private Law in Scotland*, Vol. I (Oxford: OUP, 2000), p.18

The obligations arising from wrongdoing in Forbes' schema under chapter 3 might be compared to the obligations of reparation for wrongful conduct discussed by Stair; Forbes defines 'damage' (in general) as *damnum* 'any diminution of a man's stock or goods'.[1213] It is therefore apparent that Forbes is limiting his enquiry into obligations arising from crimes to matters of Aquilian fault and it might be inferred that, given that Forbes consistently recognised that all crimes might be generally described as 'injuries',[1214] he intended the word 'injury' to be used only in the general sense of the term within the context of chapter 3 of Book I. It is consequently submitted that one cannot read too much into Forbes' word-choice in this section, as the term 'injury' appears, here, in a descriptive, rather than legal, sense. It is also worth noting that, in the manuscript copy of the *Great Body,* the term 'or trespasses' is a latter addition included above a caret.[1215]

'Trespass' does not appear, in any technical sense, in Bayne's consideration of 'injuries',[1216] however the word is utilised by this author in a broad and non-technical sense.[1217] Bayne notes that the rationale underpinning the extension of the law's 'care and protection' to those who suffer injury to 'reputation and good name' is the Sovereign's interest in the public peace, as wronged persons (and their friends and families) would be apt to avenge slight injuries with undue severity 'if the lesser injuries offered to them were accounted beneath the observation of the law'.[1218] Like MacKenzie and Forbes, Bayne, too, illustrated – and, indeed, emphasised[1219] – the generality of *iniuria*,[1220] though unlike MacKenzie he espoused a list of

[1213] Forbes, *Great Body*, I, p.927

[1214] In both the *Institutes* (p.650) and the *Great Body* (Book IV, p.440)

[1215] Forbes, *Great Body*, IV, p.440

[1216] See Bayne, *Institutions*, pp.175-191

[1217] 'Every unjust action which trespasses upon the right of another man, done designedly, may well be called an injury': This definition, however, does not denote 'injury as it is taken in this title', which instead is deemed to be *iniuria realis et verbalis* in the sense of the nominate delict *iniuria.* Bayne, *Institutions*, p.175

[1218] Bayne, *Institutions*, pp.175-176

[1219] Bayne, *Institutions*, p.175

[1220] Bayne, *Institutions*, p.175

particular 'personality rights' which the *actio iniuriarum* could be said to protect,[1221] among which, in common with Forbes, was one's *existimatio*.[1222]

The infliction of 'indignity' is, again, understood as the essence of *iniuria realis*,[1223] which is itself again divided into ordinary and extraordinary kinds (although Bayne's terminology is not this, but rather 'atrocious' and 'not atrocious').[1224] The English term 'assault' had clearly become entrenched in the Scottish legal lexicon by the time of Bayne's writing.[1225] Like MacKenzie and Forbes,[1226] Bayne described the 'most atrocious' of the *iniuriae realis* – hamesucken – as 'the violent assaulting a man in his own house'[1227] and stated that 'as defined in our law, [hamesucken] is an assault committed upon a man in the house where he ordinarily resides, and where he is considered as at home'.[1228] While the former might imply only that the English term had entered common language in Scotland by the early Eighteenth century, the latter definitional description of hamesucken evidently establishes that the term had a particular legal significance in Scots law – at least in a descriptive aid – at this time, even if it was still not yet a nominate delict.[1229]

Bankton utilised the taxonomy of *iniuria* as MacKenzie, Forbes and Bayne had done, however by the time of his writing the term reference to the term 'assault' was clearly well-established within Scots legal practice.[1230] In setting out 'fame' (which as with Forbes and Bayne, might again be understood as *existimatio*), reputation and dignity as legally protected

[1221] Bayne, *Institutions*, p.9

[1222] Forbes uses the term 'honour', Bayne the phrase 'good name', but both of these concepts may be regarded as aspects of, or analogous to, the concept of *'existimatio'* discussed *supra*.

[1223] Bayne, *Institutions*, p.180

[1224] Bayne, *Institutions*, p.180

[1225] Bayne, *Institutions*, pp.182-184

[1226] Forbes, like MacKenzie, speaks of 'assaulting' a man in his home as the salient element of hamesucken: See Forbes, *Criminal Law*, p.139

[1227] Bayne, *Institutions*, p.182

[1228] Bayne, *Institutions*, p.182

[1229] See Blackie, *Unity in Diversity*, p.104

[1230] Bankton, *Institute*, I, 10, 21-39

interests,[1231] Bankton described noted that an 'assault' was an example of *iniuria realis* effected by threats and that 'battery' 'is a high injury to the person, and is more or less atrocious, according to the circumstances of the case'.[1232] As both were species of the same kind of nominate wrongdoing – *iniuria* – it can be inferred that this division between 'assault' and 'battery' did not have the same meaning or utility as such did (and does have) in English Common law. The term 'indignity', as the salient aspect of *iniuria realis*, disappears from the lexicon in Bankton, however the variable *existimatio* of individuals in society, and the potential aggravation of *iniuria* by directing the injury towards one of high social standing (indeed, 'high dignity') is recognised.[1233] Unlike in the works of his predecessors, however, Bankton expressly refers to 'dignity' – clearly meant in the sense of *dignitas* rather than *existimatio* – as an interest against which injury might be inflicted;[1234] that 'indignity' is not described as a manner in which *iniuria realis* might be inflicted is, thus, not surprising; it is implicit in Bankton's discussion of the crime/delict.

Bankton's conception of *iniuria* thus protected not only the social standing of individuals within society, but also a general interest in one's own esteem. The need for the aggrieved party to personally feel resentment in order for *iniuria* to be effected is also emphasised.[1235] Although Bankton notes that 'an injury is extinguished by the death of the injured or injurer',[1236] consistent with the English legal maxim *'actio personalis moritur cum persona'*,[1237] his conceptualisation of *iniuria* remains consistent with the Roman position espoused by Ulpian in D.47.10.1.4 and D.47.10.1.6. Like Ulpian, Bankton, for his part,

[1231] Bankton, *Institute*, I, 10, 21

[1232] Bankton, *Institute*, I, 10, 22

[1233] Bankton, *Institute*, I, 10, 36

[1234] Bankton, *Institute*, I, 10, 21; infringements of bodily integrity are not mentioned as protected interests by Bankton, however he does treat such under the heading of 'injury': See Blackie, *Unity in Diversity*, p.100

[1235] Bankton, *Institute*, I, 10, 38

[1236] Bankton, *Institute*, I, 10, 39

[1237] See *Pinchon's Case* (1611) 9 Rep. 86; Theodore Frank and Thomas Plucknett, *A Concise History of the Common Law*, (5th Ed.) (Boston: Little, Brown and Co., 1956), pp.376-378

maintains that 'injury may not only be done to the living, but also in a manner to the dead… the children or next of kin may prosecute the injuries done to the remains of their parent or relation… but if there is an heir, the action is competent to him'.[1238] Bankton subsequently goes on to mirror the language of Ulpian, noting that 'it is always in the interest and concern of the heir that the character of the deceased be vindicated'.[1239] Thus, it follows that one may not only be injured by wrongdoing suffered directly, but also indirectly, should the injury is inflicted on another with whom one is 'specially concerned'.[1240]

The means by which a deceased may be injured are evidently not limited to a *numerus clausus* of incidents; though Bankton provides examples of wrongful conduct directed towards corpses (including detaining the bodies from burial, exhuming them from their resting places, or defacing their gravestones or mausoleums), this is evidently – as with MacKenzie – no more than a list of illustrative examples of the occurrence of *iniuriae* inflicted against the dead. Being that dignity – both in the sense of *existimatio* and in the specific sense of *dignitas* – is afforded protection under the law of *iniuria* in Bankton's schema, it can be concluded that potentially any conduct – if sufficiently contumelious in design and effect – could amount to actionable *iniuria*, whether directed against a living person or a dead body.

Like Stair, Bankton is concerned, in his *Institutes,* with private law rather than primarily criminal matters. It is consequently worth noting that, unlike Stair, Bankton explicitly divided between injury and damage, treating each under distinct sections under Title X.[1241] For Bankton, property damage, destruction or spoliation effected without benefit to the wrongdoer was distinct from injury 'properly so termed' and from nominate crimes such as theft and robbery; in the context of his discussion in Section IV, Bankton is explicit that the 'damage'

[1238] Bankton, *Institute*, I, 10, 29
[1239] Bankton, *Institute*, I, 10, 29
[1240] Bankton, *Institute*, I, 10, 30
[1241] For injury, see Section III, for damage, see Section IV.

so-called therein, properly understood, 'must be *damnum injuria datum*' – *i.e.*, *damnum* in the sense that the term was employed in context of the *lex Aquilia*.[1242] Unlike Stair, who presented no clear taxonomy of injury, or indication that the specific legal concept was in any way distinct from Aquilian liability, Bankton expressly confirmed that modes of liability could arise according to either Roman action – an *actio iniuriarum* or an *actio legis Aquliae* – depending on the nature of the wrongdoing and the question of any loss suffered and he differentiated the nature of the remedy available according to each action.

In his treatment of criminal law within the *Institutes,* Erskine – like his predecessors – divides the crime/delict of *iniuria* into the taxonomical categories *verbalis* and *realis*.[1243] His earlier *Principles* – published, unlike the *Institutes,* during his own lifetime (in 1754)[1244] – also drew this distinction.[1245] The conceptualisation of *iniuria* in Erskine's work is, again, broad; *animus iniuriandi* must be established to prove the occurrence of the technical wrongdoing, but the means utilised to effect affront are irrelevant, so long as affront is ultimately effected. The enumerated examples of *iniuria realis* provided by Erskine are 'standard *ius commune* examples',[1246] but it is noted that 'real injuries are committed by doing whatever may either hurt one's person… or may affect his honour or dignity'.[1247] Such evidently extends to contumelious attacks effected against the cadavers of one's relatives.

Still within the context of criminal law, the divide between real and verbal injury survived in the 14th edition of Erskine's *Principles*,[1248] published in the same year that the delictual *actio iniuriarum* was miscategorised in the case of *Eisten v North British Railway Co*

[1242] Bankton, *Institute*, I, 10, 40

[1243] Erskine, *Institute*, p.731

[1244] See Kenneth G. C. Reid, *Introduction,* in John Erskine, *An Institute of the Law of Scotland,* (Edinburgh: Edinburgh Legal Education Trust, 2014) xiii

[1245] The *Principles* were first published in 1754.

[1246] Blackie, *Unity in Diversity*, p.114

[1247] Erskine, *Institute*, p.731

[1248] W. Guthrie (ed.): Erskine, *Principles*, IV, 4, 45

(1870).[1249] The centrality of *existimatio* and *dignitas* is still emphasised, with the essence of 'real injury' described as the infliction 'by any fact by which a person's honour or dignity is affected'.[1250] Such correlates with the description of injury contained in the chapter on reparation; therein, it is noted that reparation is due to those who suffer injury to their 'character' or 'feelings' as well as – or instead of – their patrimony.[1251] With that said, given the subject-matter considered under the heading of reparation pertains to injuries inflicted on the person, property or character of a person,[1252] it may be inferred that the term 'injury' is, here, employed only in its general sense, rather than in the sense of specific wrongdoing.

The law of delict and the criminal law ceased to be exactly equated at the beginning of the nineteenth century.[1253] Nevertheless, the close connection – indeed, the interrelation – between the law of delict and the criminal law is directly alluded to in Hume's *Lectures.*[1254] As a general rule of Scots legal practice, said to be rooted in 'reason and justice', Hume maintains that every 'wrong or criminal act' which afflicts injury on the property, person 'or other material' gives rise to two distinct actions: criminal and civil.[1255] Although there was no systemic or theoretical analysis of the 'goals' of delict and crime in Scotland until the late Nineteenth century,[1256] a justification for the duality of actions, drawing on the divide between public and private wrongdoing, is presented by Hume.[1257] Hume posits that the criminal action arises *'ad vindicatam publicam* for the sake of example to others and (if the conclusion is not capital) for the reformation of the offender', while the private action arises either (or jointly)

[1249] *Eisten v North British Railway Co*. (1870) 8 M. 980
[1250] Erskine, *Principles*, IV, 4, 45
[1251] *Ibid*., III, 3, Note F
[1252] *Ibid*.
[1253] Blackie, *Crime and Delict*, p.358
[1254] Hume, *Lectures*, III, 120
[1255] *Ibid*.
[1256] See Blackie, *Crime and Delict*, p.356
[1257] Hume, *Lectures*, III, 120

for the recovery of reparation of patrimonial loss or 'for an award of the trouble and distress that [the wronged party] suffered on the occasion'.[1258] This basic divide between breach of public duty and commission of a private wrong has not been greatly expanded upon in almost two centuries,[1259] although it is now generally accepted that a clear distinction between the fields lies in the fact that the Scots law of delict does not set out to punish wrongdoing.[1260]

Hume's *Lectures* do not expressly afford treatment to *iniuria realis* as a wrong giving rise to *obligations ex delicto* (the law of *iniuria verbalis* is, however, discussed in detail under this heading),[1261] but it is noted therein that 'a tradesman who has been assaulted and disabled from working at his trade… has a claim to be indemnified of this patrimonial damage, and expense in his cure, and even a claim for a sum of money in *solatium* of his pain and distress, though not capable of a precise estimation',[1262] thus illustrating the continuing link between the law of *iniuria* and that of assault in Scotland. Hume's *Commentaries* go further in their consideration of real injury;[1263] indeed, therein, *iniuria realis* is among the principle subjects with which Hume is concerned and the *ius commune* sub-categories are set out in full[1264] (though it is noted that even if 'the injury do not come under any of those terms of style, nor be such as can be announced in a single phrase, this circumstance in nowise affects the competency of a prosecution').[1265]

From this, it is evident that Hume recognised, as many of his predecessors had done, that *iniuria realis* could be inflicted in innumerable creative ways, so long as the designs of the

[1258] *Ibid*.

[1259] Consider R. A. Duff and S. E. Marshall, *Public and Private Wrongs*, in James Chalmers and Fiona Leverick, *Essays in Criminal Law in Honour of Sir Gerald Gordon*, (Edinburgh: EUP, 2010), pp.70-85

[1260] See Blackie, *Crime and Delict*, p.357

[1261] Hume, *Lectures*, III, 133-164

[1262] *Ibid*., p.120

[1263] Hume, *Commentaries*, I, IX

[1264] Hume, *Commentaries*, I, IX, 5

[1265] *Ibid*.

wrongdoer remained the affliction of affront. In general, the law recognised a sufficient number of sub-categories of *iniuria realis* to render reference to the higher level category redundant save in the most imaginative cases. In his wide-ranging work on the history of personality rights in Scots law, Blackie identified 'invading', 'hurting', 'wounding' 'effusion of blood', 'mutilation' and 'demembration' – among other things – as specific forms of wrongdoing that could be categorised as sub-categories of *iniuria realis* in Eighteenth century Scotland.[1266] In line with these subcategories, Hume records that, by the beginning of the Nineteenth century, some words (descriptive of species of *iniuria*) 'commonly employed in libels, such as assault, invasion, beating and bruising, blooding and wounding, stabbing, mutilation, demembratiori, and some others'.[1267] Each of these terms appears synonymous with an early Eighteenth century comparator identified by Blackie.[1268]

Hume, however, posited that in instances in which an occurrence of *iniuria realis* could not be made to descriptively fit within one of the nominate sub-categories, the 'general term stellionate, borrowed from the Roman practice, may be used in such a case', provided that the charge was appended with a comprehensive description of the injury.[1269] In support of this proposition, Hume noted that, in the case of *James Campbell*,[1270] when one prisoner was accused of torturing the other, the charge of 'stellionate' was brought against the delinquent with a description of the injuries inflicted included in the charge. The description of innominate forms of *iniuria realis* as 'stellionate' appears curious however. Although the term certainly was known to both Roman and Scots law, it pertained to acts of fraud or deceit,[1271] rather than

[1266] Blackie, *Unity in Diversity*, p.38

[1267] Hume, *Lectures*, III, 120

[1268] Blackie, *Unity in Diversity*, p.38

[1269] *Ibid*.

[1270] (1722) Hume; this case does not appear to be reported elsewhere and Hume provides no citation for it.

[1271] Though an 'innominate type' of such: See Whitty, *Stellionate*, in Stair Memorial Encyclopaedia, *Criminal Law* (Reissue), para.204

physical injury.[1272] Speaking of stellionate in *Matters Criminal*, MacKenzie noted that 'to infer this crime, it is requisite that there be a cheat or fraud used'.[1273] Erskine evidently considered fraud to be the salient feature of the wrong.[1274] That Hume should regard it as a species of innominate *iniuria realis* seems almost inexplicable,[1275] particularly given that the term was, prior to this time, particularly associated with (what is oft referred to as) the Stellionate Act 1540,[1276] legislation which was primarily concerned with the issue of fraudulent double-grants of titles to land.[1277]

Hume's taxonomical innovation is repeated in the works of Alison.[1278] Alison's twin texts – the *Principles* and *Practice* of the criminal law of Scotland – were published between 1832 and 1833. The influence of the emergent nominate wrong of assault is also plain in Alison's text; in the index to his *Practice*, under the entry for 'real injury', the reader is re-directed to 'assault'.[1279] The crux of criminal assault is taken to be the occurrence of violence – attempted or inflicted[1280] – rather than the effecting of affront through interference with the body of another. For Alison, the crime could be aggravated by various factors, including

[1272] Kames, *Principles of Equity*, Vol. II (3rd Ed.) (1778), p.40; see also John MacLeod, *Fraud and Voidable Transfer: Scots Law in European Context*, [2013] University of Edinburgh PhD thesis, p.217

[1273] MacKenzie, *Matters Criminal*, p.286

[1274] Erskine, *Institute* IV, 4, 78

[1275] Whitty observes that the innovation of using 'stellionate' to hold any wrong criminal, even if such has never been so held before, may be supported by Dig.47.20.3 (Ulpian): *'Stellionatum autem obici posse his, qui dolo quid fecerunt, sciendum est, scilicet si aliud crimen non sit quod obiciatur: quod enim in privatis iudiciis est de dolo actio, hoc in criminibus stellionatus persecutio. ubicumque igitur titulus criminis deficit, illic stellionatus obiciemus'* [It should be known that this charge can be leveled against those guilty of fraud but against whom no specific offense can be alleged. For what the action for fraud is in the field of private litigation, that is, the prosecution of *stellionatus* in the matter of offenses. And so, wherever the name of a specific offense is lacking, there we can charge *stellionatus*]. Ulpian is here, though, clearly limiting his consideration to what might contemporaneously be described as 'crimes of dishonesty', so Hume's usage of 'stellionate' within the taxonomy of 'real injury' remains unclear.

[1276] 1540 c 105, RPS 1540/12/77

[1277] John MacLeod, *Fraud and Voidable Transfer: Scots Law in European Context*, [2013] University of Edinburgh PhD thesis, pp.217-218

[1278] See Alison, *Principles*, p.196

[1279] Alison, *Practice*, p.715

[1280] *Ibid.*, p.175

evidence of an intention to rob[1281] or ravish[1282] the victim, the use of weapons leading to the effusion of blood[1283] or, in a significant deviation from past practice, the social position of the victim[1284] or the degree of wounds that they sustained.[1285] The nominate sub-categories identified as being in use throughout the Eighteenth century by Blackie[1286] were consequently, in Alison, considered to be sub-categories of the wrong of assault, rather than the more general *iniuria*.

Assault itself remained a species of *iniuria realis* at this time, as Blackie identified.[1287] *Iniuria* remained the high-level category under which specific categories of wrongdoing could be said to lie, but the schema of actions protecting personality rights had changed. Wrongdoings including mutilation (now reconceived as stellionate), invasion and acts effecting the effusion of blood were no longer tertiary sub-categories of the high level category of *iniuria*, but quaternary sub-categories of injury lying under the tertiary sub-category of assault. Such specifically protected one's interest in bodily integrity[1288] – and at a higher level, being species of *iniuria* – one's *existimatio* and so *bonos mores*. At the time of Alison's writing, however, *iniuria* could no longer be described as a crime/delict in the sense in which it may have been understood prior to the beginning of the nineteenth century. By 1826, consistent – if not comprehensive – reports from the criminal courts began to be published;[1289] this led to a gradual process of divergence of criminal and delictual doctrine.

[1281] *Ibid*., pp.188-193
[1282] *Ibid*., pp.184-188
[1283] *Ibid*., p.181
[1284] *Ibid*., pp.193-195
[1285] *Ibid*., pp.195-196
[1286] Blackie, *Unity in Diversity*, p.38
[1287] *Ibid*., p.103
[1288] *Ibid*.
[1289] Blackie, *Crime and Delict*, p.358

Insofar as the civil law was concerned, Bell – as Professor of Scots law at Edinburgh University – published the first edition of his *Principles of the Law of Scotland* as a putative successor to Erskine's longstanding work in 1829.[1290] The text went through four editions in Bell's lifetime, with the 4th edition 'containing his final thoughts on the innumerable topics covered in the Principles'.[1291] In part IV, pertaining to the rights of persons, Bell sets out a schema of what might be termed personality rights, including 'safety, freedom and reputation'.[1292] Reputation, evidently, was to be understood broadly as 'character';[1293] such might evidently be described as *existimatio* and so reputation, in Bell's writing, may be understood as a broader right or interest than the general connection between the term 'reputation' and the Roman *fama* might initially suggest.

Unlike Alison, who was primarily concerned with criminal law, Bell's main focus pertains to civil law, though the (potential or actual) significance of criminal law is not ignored.[1294] Though it was maintained that the wrongful infringement of one (or more) of the enumerated personality rights *or* property rights would lead to a justifiable claim of reparation, perhaps in addition to a criminal action,[1295] a clear divide was drawn between claims for damages, or reparation, and claims for *solatium* in cases of verbal injury[1296] and the distinction between claims for damages and claims for *solatium* is recognised throughout.

Just as the early law of trespass (in England) could be conceptualised as a broad analogue of *iniuria*,[1297] it remains the case that 'Bell's general structure [concerning the rights

[1290] See Reid, *Introduction,* in Bell, *Principles,* pp.vi-vii
[1291] *Ibid.*
[1292] Bell, *Principles*, IV, 2027
[1293] *Ibid*., 2043
[1294] See, e.g., *Ibid.*, 2032; 2057
[1295] *Ibid*., 543
[1296] *Ibid*., 2043
[1297] See para.3.2.2, *supra*.

of persons] is consistent with analysis on the basis of *iniuria'*.[1298] Though actions for damages and for non-patrimonial loss are discussed in respect of the infringement of 'personality rights', Bell evidently recognises the significance of 'affront' where personality rights are infringed.[1299] It is notable that, though the availability of *solatium* for wrongs such as assault and verbal injury is recognised, the purview of the remedy is also extended beyond the purview that it had previously possessed. While once confined to actions arising out of the effecting of intentional affront, Bell considered that injuries arising as a result of negligence might merit an award of *solatium*,[1300] implying that a negligent act might juristically effect affront in spite of the absence of any intent. Likewise, an action of assault may give rise to a claim for patrimonial damages, in spite of the fact that the core of the wrongdoing is the infringement of one's 'safety'[1301] (and, by association, one's *existimatio* or social standing).[1302] Like Bracton in the Thirteenth century, then, Bell's approach might therefore be described as 'a rather ragged attempt' to bring together Aquilian liability and liability for *iniuria* under the heading of a single action for reparation in Scots law.[1303]

The publication of Bell's *Principles* is regarded as a milestone in Scottish legal history;[1304] its appearance is said to mark the end of the 'institutional' period of Scots law.[1305] Just as Bracton's ragged attempt to both introduce and unify *iniuria* and the *lex Aquilia* to and in English law might be regarded as a success,[1306] albeit one that came at the expense of

[1298] Blackie, *Unity in Diversity*, p.141

[1299] Bell, *Principles*, IV, 2032

[1300] *Ibid.*, 2031

[1301] *Ibid.*, 2032

[1302] See para.3.2.3, *supra*.

[1303] Recall Ibbetson, *Historical Introduction*, pp.14-16

[1304] The text was significantly changed over the course of the four editions that were published (during the author's lifetime) between 1829 and 1839: Kenneth G. C. Reid, *From Text-Book to Book of Authority: The Principles of George Joseph Bell*, [2011] Edin. L. R. 6, pp.12-14

[1305] See *Ibid.*, p.6

[1306] Ibbetson, *Historical Introduction*, p.17

recognition of *dignitas* as a worthwhile protected interest,[1307] so too might it be said that Bell's commixture of Aquilian and *iniuria*-based fault ultimately afforded the shape to the Scots law of delict which ultimately led to the *actio injuriarum* being erroneously categorised in *Eisten v North British Railway Co*.[1308] In spite of this confusion, it is apparent that the *actio iniuriarum* survived its mistreatment and that it continues to serve – implicitly and unseen, as the higher organising categories *iniuria* and *iniuria realis* had done as crime/delicts even in the Seventeenth and Eighteenth centuries – as the framework for specific delicts such as assault[1309] and its associated wrongs.[1310] Though the term verbal injury is not now generally used in the sense of *iniuria verbalis*, but rather (misleadingly)[1311] in the context of specific non-defamatory, yet nevertheless actionable, claims,[1312] the judiciary has left the door open for the development of actions based on *iniuria verbalis* in this classical sense.[1313]

Thus, as indicated, the taxonomy of *iniuria* remained a feature of the civil law in the nineteenth century and was evidently still influential in criminal matters at the time of Alison's writing. Discussion of *iniuria,* as understood above, is however all but absent from MacDonald's treatise on criminal law.[1314] The term 'real injury' is used twice throughout the first edition of the text as a whole; in a descriptive sense in the chapter on homicide[1315] and in its legal sense in respect of the crime of stellionate.[1316] 'Stellionate', as here understood, was

[1307] *Ibid*.

[1308] (1870) 8 M 980 488; Smith, however, noted that this commixture was added by a later editorial hand, rather than being a feature of Bell's original designs.

[1309] Maclean, *Autonomy*, para.11.07

[1310] See *ibid.*, para.11.79

[1311] See Kenneth McK Norrie and Jonathan Burchell, *Impairment of Reputation, Dignity and Privacy*. In: Reinhard Zimmermann, Daniel Visser and Kenneth Reid, *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa*, (Oxford: OUP, 2004), fn.129

[1312] See Kenneth McK Norrie, *Actions for Verbal Injury*, [2003] Edin. L. R. 390, p.390

[1313] See *Martin v McGuinness* 2003 S.L.T. 1424

[1314] There is no entry in the index of either the 1867 edition (the 1st) or the 1948 edition (the 5th and final) pertinent to real injury: See MacDonald, *Criminal Law*, index; Walker and Stevenson, *Criminal Law*, index

[1315] MacDonald, *Criminal Law*, p.137. In the 5th edition, the phrase 'real injury' is not employed, but the authors nevertheless note that 'the injury inflicted must be real': Walker and Stevenson, *Criminal Law*, p.87

[1316] In the first edition only: MacDonald, *Criminal Law*, p.186

synonymous with the Eighteenth century crime/delict of mutilation[1317] and – thus – evidently regarded as a species of *iniuria*, but – although there were certainly occurrences of conduct amounting to stellionate between the publication of Hume's treatise and 1842,[1318] MacDonald found no record of the term being used in practice after the 1842 case of *Brown and Lawson*.[1319] Nevertheless, in Anderson's 1892 treatise, reference is made to stellionate as real injury 'of a serious nature, such as severe burning, thrusting needle into the eye, or any grave injury which took effect internally, as through the operation of drugs'.[1320]

The reverse-image of MacDonald's relegation of 'real injury' to the erroneously-categorised *nomen iuris* of stellionate appears in the first edition of Gordon's *Criminal Law* (published 1967).[1321] A generic conceptualisation of 'other forms of real injury' – understood as 'all intentional infliction of physical injury'[1322] – is discussed and stellionate is described as a species of such, though one which is no longer described in such terms.[1323] The relevant section of Gordon's work remained identical in later[1324] – and the most recent – editions of the text[1325] and was endorsed in a 2014 Sheriff Court case.[1326] Therein, Sheriff Jamieson (though noting that the term was no longer in general use and recognising its necessary connection to contrivance to deceive)[1327] described stellionate as 'the name given to any crime involving dishonesty or real injury not covered by any recognised nominate crime'.[1328] In describing the

[1317] Alison, *Principles*, p.196
[1318] *Mitchell*, (1833) Bell's Notes 90; and *Buchan and Hossack* (1840) Bell's Notes 90
[1319] *Robert Brown and John Lawson* (1842) 1 Broun 415; MacDonald, *Criminal Law*, p.186
[1320] Anderson, *Criminal Law*, (1st Edn.), p.81
[1321] Gordon, *Criminal* Law, p.779
[1322] See Chalmers and Leverick, *Criminal Law*, para.33.46
[1323] *Ibid*.
[1324] Gordon, *Criminal Law*, (2nd Ed.), para.29-48; Christie, *Criminal Law*, para.29-47
[1325] Chalmers and Leverick, *Criminal Law*, para.33.46
[1326] *The Principal Reporter v N* 2014 WL 4636822, paras.189
[1327] *Ibid*., paras.187
[1328] *Ibid*.

crime as such, the Sheriff emphasised (citing MacKenzie)[1329] that 'some form of deceit is essential to the crime' and posited that 'deceitfully intoxicating another to render him powerless, then torturing him' was an example of the wrong.[1330] As noted above, however, at no time does MacKenzie describe stellionate as a form of real injury – indeed, he does not even deign to describe stellionate as a form of 'injury' in its descriptive sense – and so the Sheriff's conceptualisation of the crime must be taken to be an attempt to reconcile Hume's understanding of the crime as a form of mutilation with the proper conceptualisation of the wrong as a kind of fraud.

The status of *iniuria* as an organising category in criminal law is presently unclear, but it might be suggested that *iniuria* continues to be a feature of Scots criminal law capable of development. Its potential has not, however, been grasped in the literature and criminal case law of the Twentieth and Twenty-First centuries. 'Real injury' remains prominent in significant works including all successive editions of Gordon's *Criminal Law*.[1331] In their leading student textbook, Jones and Taggart likewise note that assault, in particular, can be distinguished from 'other forms of real injury'.[1332] Rather than utilising the term 'real injury' itself, however, Jones and Taggart prefer the term 'non-intentional injury',[1333] which certainly serves to obscure the fact that the taxonomy of crimes which they describe under this heading evidently have their basis in the crime/delict *iniuria*. Similarly, although the case of *Khaliq v H.M Advocate*[1334] sustained a charge of 'causing real injury',[1335] which ostensibly suggests that the influence of the organising category of *iniuria* has not been excised from Scots criminal law, such is

[1329] MacKenzie, *Matters Criminal*, pp.286-290

[1330] *Principal Reporter*, paras. 188

[1331] See Chalmers and Leverick, *Criminal Law*, Ch.33

[1332] Timothy H. Jones and Ian Taggart, *Criminal Law*, (7th Ed.) (Edinburgh: W. Green, 2018), para.9.04

[1333] In spite of the fact – which the authors recognise – that 'the judicially have generally expressed that 'non-intentionally caused injuries are not criminal at common law unless the conduct of the accused went well beyond carelessness': See Jones and Taggart, *Criminal Law*, para.9.31

[1334] 1984 J.C. 23

[1335] *Ibid.*, p.33

described as 'reckless injury' in Cubie's text on criminal law[1336] and Jones and Taggart narrowly construe this case (and the later case of *Ulhaq v H.M Advocate*)[1337] as pertinent only to the specific offence of supplying potentially noxious substances.[1338] Christie's introductory text presents a halfway-house between the position expressed by Cubie and that of Jones and Taggart, categorising culpable infliction of injury in the *sui generis* category 'other offences'.[1339] Only Gordon's textbook contains any express link between crimes of injury other than assault and the classical notion of *iniuria realis*;[1340] therein, the connection between the crime/delict and contemporary crimes such as abduction, drugging and human trafficking can be inferred from the fact that each of these offences would have been actionable as *iniuria* within the framework discussed above.[1341]

From the above, it is apparent that the crime/delict of *iniuria* was received into Scotland law at a critical period in the development of this jurisdiction's legal system. The taxonomy of *iniuria* was of vital importance during the Seventeenth and Eighteenth centuries, but the importance of the sub-categories of *iniuria*, as a descriptive schema pertinent to various kinds of wrongdoing, seemingly declined throughout the nineteenth as the Anglicised term 'assault' grew in importance. Although there exists a perception that the nominate sub-categories of *iniuria realis* and *iniuria verbalis* came to be regarded as distinct wrongs, or aggravations of distinct wrongs, rather than as species stemming from a single taxonomic family, it is

[1336] Sheriff Andrew M. Cubie, *Scots Criminal Law,* (Bloomsbury, 2016), para.9-12

[1337] 1991 SLT 614

[1338] Timothy H. Jones and Ian Taggart, *Criminal Law,* (6th Ed.) (Edinburgh: W. Green, 2015), paras.9.37-9.39

[1339] Sarah Christie, *An Introduction to Scots Criminal Law,* (Dundee: DUP, 2009), p.136

[1340] Chalmers and Leverick, *Criminal Law*, Ch.33

[1341] The crime of abduction is functionally identical to the crime of *plagium*, which was not – initially – a crime against property, but – with *raptus* – a wrong concerning the deprivation of liberty (see Brown, *Plagium*, p.140); human trafficking, though unknown in such terms to the writers of the *ius commune,* evidently causes the deprivation of liberty and so would amount to actionable *iniuria* and, as indicated above, 'drugging', in this context, appears akin to stellionate and so is clearly a form of actionable *iniuria.*

nevertheless apparent that the organising category of *iniuria* retains a significance in Scottish civil and criminal law, even if the fact of the connection has been obscured.

The contemporary crime and delict of assault manifestly remains a tertiary sub-category of *iniuria* and so, for this reason alone, it may be concluded that the *actio iniuriarum* is more than a mere 'legal ancestor'. The modern delict of assault has been, in civil law, expressly described as an *actio iniuriarum* and so *iniuria* must be regarded as a contemporary contextual category of Scots civil law, if one which is only now implicitly influential. In recognition of the fact that common law doctrines cannot fall into desuetude,[1342] combined with the fact that the courts have expressed an interest in developing the Scots law of privacy by utilising the institutional connection to the *actio iniuriarum*,[1343] there is some indication that *iniuria* may yet grow in importance in Scotland.[1344] In criminal law, though the connection is only (again implicitly) recognised in one (leading) textbook, the *iniuria*-based root of modern crimes such as abduction, rape (prior to the passing of the Sexual Offences (Scotland) Act 2009)[1345] and 'reckless injury' can be inferred by a consideration of the context from which these crimes developed.

Scottish criminal law 'matured much later than the civil law'[1346] and – because criminal law remains primarily based on common law rather than legislation[1347] – it might be thought that the subject remains intimately tied to the common law of delict to this day,[1348] although

[1342] See *McKendrick v Sinclair* 1972 SC (HL) 25

[1343] *Martin*, para.29

[1344] See Brown, *Revenge Porn*, *passim.*

[1345] Though see *DC v DG and DR* 2018 S.C. 47, paras.267-268

[1346] Smith, *Short Commentary*, p.116

[1347] See James Chalmers, *Developing Scots Criminal Law: A Shift in Responsibility?* [2017] Jur. Rev. 33

[1348] The subject of rape and other sexual offences is an exception to this general rule, due to the enactment of the Sexual Offences (Scotland) Act 2009): See Blackie and Chalmers, *Mixing and Matching*, p.286

the extent of this interrelation has not been generally studied.[1349] With that said, though *iniuria*, as an organising category, influenced both the civil and the criminal law of Scotland, these two branches of the law have not developed in lockstep with one another.[1350] Such is manifestly evident because of the absence of anything akin to *iniuria verbalis* in modern criminal law. The extent to which the law of *iniuria* may be said to be useful insofar as matters concerning human bodies and biological material are concerned depends on the operation of the concept in both civil and criminal law; thus, a consideration of the place of *iniuria* in law as a modern organising category, or specific crime or delict, merits consideration.

3.3.2 *Iniuria*: Crime or Delict?

By the Twentieth century, the law of *iniuria* in Scotland was divergent depending on whether it was used within a criminal or civil context. Though an innominate form of wrongdoing which effected affront might give rise to a delictual *actio iniuriarum*, in the criminal law, the definition of real injury had ossified into a narrower form and the matter of verbal injury (save in some specific contexts, such as the issuing of threats of violence)[1351] had ceased to be treated as a concern of the criminal law.[1352] That the declaratory power of the High Court of Justiciary has seemingly slid into abeyance[1353] serves to curtail the potential for innominate, yet clearly injurious, conduct to be declared criminal in the absence of an expressed taxonomy of *iniuria*;[1354] though it is still considered open 'for the High Court of Justiciary to discover common law crimes of whose presence even the general legal community

[1349] In the words of Blackie and Chalmers, 'in research terms, there would appear to be no academic writer who has made major contributions to both [delict and criminal law]': Blackie and Chalmers, *Mixing and Matching*, p.272

[1350] *Ibid*., p.271

[1351] MacDonald, *Criminal Law*, pp.200-201

[1352] Barclay, *Assault*, p.83

[1353] See, generally, Robert S. Sheils, *The Declaratory Power and the Abolition of the Syllogism*, [2010] SCL 1; M. G. A. Christie , *Criminal Law*, in *The Laws of Scotland: Stair Memorial Encyclopaedia* (reissue, Butterworths, 2005) para.15

[1354] See the discussion in Chloe Kennedy, *Declaring Crimes*, [2017] Oxford Journal of Legal Studies 741, p.765

had not been especially aware', this discovery is limited to cases in which there exists a source of prior authority.[1355]

Kennedy has argued that the general principles of Scots law ought to be considered a legitimate source of prior authority for such purposes.[1356] Such an argument seems sound; if the declaratory power of the High Court is limited to affirming that rarely prosecuted or 'forgotten' crimes are still proscribed, the power essentially loses its defining characteristic and becomes nothing more than a contrivance to justify the selective application of the doctrine of *stare decisis*. This could lead to outcomes no less absurd than the widest possible exercise of the power could do. The crime of blasphemy, for example, has never been expressly abrogated,[1357] yet despite its technical persistence, has not been prosecuted for over a century.[1358] On Christie's analysis, however, given that there are clear cases in which blasphemy has been successfully libelled as a crime,[1359] it would be open for the High Court to 'rediscover' these crimes, should an unfortunate blasphemer be dragged before the bench.

Kennedy's conceptualisation of the declaratory power, however, appears more rational; in her words, the declaratory power 'represents a distinctive example of the more general idea that the courts might decide cases in accordance with law whilst nevertheless departing from, or having no recourse to, posited law'.[1360] If the declaratory power of the High Court retains a place in Scottish jurisprudence - which, in the absence of legislative abrogation or judicial renunciation, it must formally do[1361] - its place ought not to be in reviving archaic or anomalous

[1355] M. G. A. Christie , *Criminal Law,* in *The Laws of Scotland: Stair Memorial Encyclopaedia* (reissue, Butterworths, 2005) para.15

[1356] Kennedy, *Declaring Crimes*, pp.765-769

[1357] See Stair Memorial Encyclopaedia, *Criminal Law (Reissue)*, section 17, *Crimes Against Public Order and Decency*, para.19

[1358] Callum Brown, Thomas Green and Jane Mair, *Religion in Scots Law*, (Edinburgh: Humanist Society Scotland, 2016), p.205

[1359] The last reported cases were *Thomas Paterson* (1843) 1 Broun 629 and *Henry Robinson* (1843) 1 Broun 643

[1360] Kennedy, *Declaring Crimes,* p.744

[1361] As a creature of the common law, it is submitted that the power cannot fall into desuetude: Recall *McKendrick*

crimes. Rather, it should serve to ensure the security of *bonos mores* in the sense elucidated by Strauss in respect of the *actio iniuriarum*; that is to say, the power should be used to ensure that grossly egregious conduct which is manifestly *contra bonos mores*, yet 'difficult to class as any one crime',[1362] is nevertheless penalised, even if the activity in question does not correspond with any particular known *nomen iuris*.

The need for such flexibility in matters concerning the human body is manifestly demonstrated by the lack of legal response to the desecration of Habiba Mohammed's corpse in England and Wales.[1363] While one might be sympathetic to the view, expressed by Lord Lucas, that 'there are many ways in which one can mutilate and dishonour a corpse… Why do we need a separate offence for something that is probably extremely rare, particularly given the fairly rare opportunities in our current society to commit that sort of offence?',[1364] such is no argument for eschewing criminalisation of the multifaceted abuses which cadavers might be subjected to. At most, Lord Lucas' comments may be taken as an argument against attempting to draft specific legislation to contain this kind of conduct; such legislation would be unnecessary in Scotland, should the declaratory power be recognised as a legitimate means of responding to novel immoral conduct, and such legislation would be unnecessary in any jurisdiction which possesses a flexible conception of *iniuria* in its criminal law.

Although, presently, the place of *iniuria* in Scottish criminal law can be described as residual at best or vestigial at worst, the Scots delict of *iniuria* retains the potential to affect the development of the civil law in this jurisdiction.[1365] *Iniuria*, in the sense of specific wrongdoing, can therefore be termed a feature of Scottish civil law (though there is limited

[1362] Recall the discussion concerning the body of Habiba Mohammed, *supra*.

[1363] See Jones, *Corpse Desecration*, pp.599-601; Chris Millar, *Family Sues over Body's Desecration*, Evening Standard, Tuesday, 6 April 2004.

[1364] *Hansard* HL Debate 19th May 2003, col.576

[1365] Brown, *Revenge Porn, passim*.

case law concerning the wrong in modern times)[1366] yet little more than an ancestor to the various nominate crimes known to Scottish criminal law. In South Africa, however, the action of *iniuria* has retained its character as both a civil and a criminal action; this jurisdiction has developed a copious corpus of civil case law pertaining to the *actio injuriarum*[1367] and, in parallel with this, recognises *iniuria* as a public wrong by means of the *crimen injuria*.[1368]

The potential utility of a criminal action to punish a wrong inflicted on a cadaver by *iniuria* is plain, given that the *existimatio* of the deceased might be said to be affronted even if they had no surviving relatives, but at present it seems that – unless the declaratory power is used – Scots law is unlikely to avail itself of this potential avenue for development. Nevertheless, as the private law action has the potential to vindicate the dignitary interests of a deceased person, provided that the deceased had some surviving family with sufficient standing to raise an *actio iniuriarum*, consideration of the continuing relevance of *iniuria* since the development of a discrete law of delict (as opposed to a general law of crime/delict) is warranted.

3.3.3 *Iniuria* in Modern Scots Law

The *actio iniuriarum* was referred to by name, in the Scottish courts, throughout the late Nineteenth and early Twentieth century, however the case law concerning which utilises this terminology – even for some time after the 1972 case of *McKendrick*,[1369] which served to clarify the law in this area significantly[1370] – is of little utility in understanding the place of the *actio iniuriarum* in Scots law. In spite of appearances, this case law was primarily concerned

[1366] Reid, *Personality*, para.17.12

[1367] See J. R. Midgley and J. C. Van Der Walt, *Principles of Delict,* (4th Ed.) (LexisNexis, 2016)

[1368] Gerhard Kemp (Ed.), *Criminal Law in South Africa,* (2nd Ed.) (Oxford: OUP, 2016)

[1369] See T. B. Smith, *Damn Injuria Again,* [1984] SLT (News) 85; see also *McManus' Executrix v Babcock Energy Ltd* 1999 SLT 655, p.660, wherein Lord Kingarth referred to the (by then) discredited notion of the *actio injuriarum* as a mechanism to afford redress for wounded feelings, howsoever caused.

[1370] See Smith, *Damn, Injuria, Damn*, p.125

not with the Roman delict itself, but rather a home-grown namesake which co-opted the action's identity after the *Eisten* case.[1371] Unlike the *actio iniuriarum* proper, which had come, by the time of its reception into Scots law, to essentially require *animus iniuriandi* and primarily concerned instances of affront rather than patrimonial loss,[1372] the misnamed Scottish *'actio injuriarum',* the development of which may be traced to the Lord President Inglis' 'inexplicable lapse in terminology' reported in the *Eisten* case,[1373] was founded upon the principle of *culpa*, thereby making it a relative of the *lex Aquilia* (and thus the law of negligence) rather than intentional wrongdoing.[1374]

The Scottish *actio injuriarum* was described by Lord President Inglis as 'a well-known class of actions in the civil law' and 'an action of damages to repair bodily injuries'.[1375] While the former statement is demonstrably true, any learned Civilian lawyer would be confused to see the *actio iniuriarum* conceptualised as a means of achieving reparation or damages.[1376] Actions for damages have, as their ancestor, the *actio legis Aquiliae* rather than the Roman *actio iniuriarum*,[1377] notwithstanding the fact that most systems of the Continental European tradition 'grafted onto the action for *culpa* an element of *solatium* for killing or injuring a free man'.[1378] This phenomenon was a product of customary or Canon, not Roman, law.[1379] The effect of the mislabelling of the *actio iniuriarum* was to create a novel and nominate action allowing the relatives of a deceased person to bring a claim for both patrimonial loss and for *solatium* in respect of the injuries suffered by the deceased – essentially, a claim akin to the

[1371] See Smith, *Damn Injuria Again*, *passim*.
[1372] See para.2.2.1, *supra*.
[1373] Smith, *Damn, Injuria, Damn*, p.125
[1374] Smith, *Short Commentary*, p.283
[1375] *Eisten v North British Railway Co.* (1870) 8 M. 980, p.984
[1376] See Zimmermann, *Obligations*, p.1084, fn.264
[1377] Smith, *Short Commentary*, p.657
[1378] *Ibid.*
[1379] *Ibid.*

modern action for 'personal injury', in the sense of reparation for bodily wounds. In respect of this, Smith tentatively submitted that 'the courts tended to designate actions for damages for personal injuries generally as *'actiones injuriarum'* for no better reason than that such actions in Roman law admitted a claim for *solatium*, and Scottish law had also grafted a claim for *solatium* (of non-Roman origin) onto the action based on culpa'.[1380]

Development of a cogent and cohesive conception of the *actio iniuriarum* which could serve to protect 'dignity' as an aspect of personality was, however, unquestionably impeded by this historical accident of the late Nineteenth century.[1381] In holding that the *actio injuriarum* was a reparation action which barred the family of a deceased person from recovering when the deceased's death was caused by the *culpa* of the defender,[1382] a widespread belief that the action of assythment (itself misconceptualised by the courts) had been superseded by the erroneously-named *actio injuriarum* emerged.[1383] This misrepresentation – or misunderstanding flowing from a mistaken interpretation[1384] – of the nature of the *actio iniuriarum* was combined with an increasing tendency, throughout the latter half of the Nineteenth century and well into the Twentieth, to regard actions averring patrimonial loss as instances of 'verbal injury'.[1385] Such confusion served to create difficulties in 'the study of the law of delict for intrants to the profession of the law [so] as to induce either mental confusion or contempt for the system or both'.[1386] Fortunately, the decision of the House of Lords in the

[1380] Smith, *Short Commentary*, p.720

[1381] Smith, *Damn, Injuria, Damn*, p.125

[1382] *Eisten v North British Railway Co.* (1870) 8 M. 980, p.984

[1383] See the defender's contention in *McKendrick* and the comments of Lord Avonside on the defender's appeal to the House of Lords: 1972 S.C. (H.L.) 25, p.29

[1384] T. B. Smith queried the possibility that Lord President Inglis' *dicta* was misreported: See Smith, *Damn, Injuria, Damn*, p.125

[1385] *Ibid.*

[1386] *Ibid.*

case of *McKendrick v Sinclair*[1387] served to stem the tide of this 'abuse of terminology'.[1388] Therein, Lord Kilbrandon expressed that, in cases of non-criminal negligence, 'the correct analogue is not the *actio injuriarum.* This was truly based on insult or affront'.[1389] The *'actio injuriarum'* was consequently juridically recognised as it ought to be;[1390] as an intentional delict concerned with the affliction of affront. That which Lord President Inglis had termed a species of *actio injuriarum* was subsequently recognised as being rooted in the *lex Aquilia*.[1391]

To paraphrase Justice Edelman of the Australian High Court, since 'the common law evolves slowly', an error in the common law due to a judgment from a 'great Civilian'[1392] such as Lord President Inglis takes a long time to eradicate.[1393] In the case of *Black v North British Railway Co.*,[1394] in his judgment (with four Senators of the College of Justice unequivocally concurring),[1395] the Viscount Dunedin uncritically accepted Lord President Inglis' conceptualisation of *Eisten* as the occurrence of an *actio injuriarum*. In the 1913 case of *Leigh's Executrix v Caledonian Railway Co.*, however, counsel for the pursuer argued that the *'actio injuriarum'* discussed in *Eisten* was no such thing and that the action in the case at hand was 'not an *actio injuriarum* in the sense of the Roman law, for the pursuer sought to recover damages for loss to the estate of the deceased by his death'.[1396] On the basis of this argument, Lord Kinnear explicitly recognised that the Scottish *'actio injuriarum'* was not connected to

[1387] 1972 S.C. (H.L.) 25

[1388] See Hector McKechnie, *Delict and Quasi-Delict*, in Various, *An Introduction to Scottish Legal History*, (Stair Society, 1958), p.277

[1389] *McKendrick*, p.66

[1390] Stewart, *Reparation*, para.A1.005

[1391] *Robertson v Turnbull* 1982 S.C. (H.L.) 1

[1392] As Lord Kinnear described the erstwhile Lord President in *Leigh's Executrix v Caledonian Railway Co*. 1913 S.C. 838, p.847

[1393] See Edelman, *Property Rights*, p.21 and para.2.3.1, *supra*.

[1394] 1908 S.C. 444

[1395] Lords Kinnear, Low, Stormonth-Darling and Pearson. Lords M'Laren and Ardwall added some comments of their own to the judgment, but substantively agreed with the judgment of the then-Lord President.

[1396] *Leigh's Executrix*, p.841

the Roman delict or action for remedy, and that 'the words [*actio injuriarum*] are used simply as a convenient Latin term for expressing a class of actions known to our own law'.[1397]

In the 1943 case of *Stewart's Executrix v London Midland & Scottish Railway Co*., Lord Macmillan also queried the accuracy of the designation of such actions for patrimonial loss as *actiones iniuriarum*, (correctly) suggesting that the Scottish action appeared to have more in common with the *utilis actio legis Aquiliae* than the *actio iniuriarum*.[1398] Lord Macmillan did not, however, counter the opinion of Sheriff McKechnie who had, in the *Encyclopaedia of the Laws of Scotland*, (erroneously) maintained that both negligently inflicted *damnum* and distress intentionally inflicted were species of *culpa*.[1399] McKechnie later corrected himself in his chapter *Delict and Quasi-Delict* in the *Introduction to Scottish Legal History*,[1400] however this extra-judicial correction – and subsequent academic commentaries on the true place of the Roman *actio iniuriarum* in Scots law – did not receive juridical approval until the case of *McKendrick.*[1401]

In spite of the difficulties that Lord President Inglis' 'inexplicable lapse in terminology'[1402] caused, it is thus clear that even prior to the decision in *McKendrick,* the academic branch of the Scottish legal profession,[1403] as well as some in the Scottish judiciary,[1404] recognised both that the prevalent usage of the term *actio injuriarum* was erroneous and that Scots law nevertheless recognised that intentional affront remained actionable as *iniuria*.[1405] The decision by the House of Lords in *McKendrick* simply served as

[1397] *Ibid*., p.847

[1398] 1943 SC (HL) 19, p.39

[1399] Green's Encyclopaedia of the Laws of Scotland (1932)

[1400] McKechnie, *Delict*, pp.275-277

[1401] See the discussion in Smith, *Damn, Injuria, Damn*, p.125

[1402] *Ibid*.

[1403] See McKechnie, *Delict*, p.277

[1404] See Lord Macmillan in *Stewart's Executrix v London Midland & Scottish Railway Co.* 1943 S.C. (H.L.) 19, pp.38-39

[1405] McKechnie, *Delict*, p.277

another[1406] – though not the final – nail in the coffin for the home-grown, yet improperly conceptualised and indelicately named, Scottish *actio injuriarum*.[1407] As a result of the decision of the Outer House in the case of *Stevens v Yorkhill NHS Trust* and the Inner House in *CG v Glasgow City Council*,[1408] it is plain that the true, Roman, *actio iniuriarum*, as an action to protect one's interests in one's dignity (*inter alia*), remains present and of use and value in modern Scots law.[1409] From the case of *Martin v McGuiness*,[1410] it is equally apparent that Scotland both can and ought to make use to the existing principles of its law so as to afford remedy to those who have suffered affront to their dignity.[1411]

For these principles to develop into a practically useful means of achieving remedy in cases of inflicted indignity, however, Scotland must begin to generate a stronger body of case law returning the *actio iniuriarum* to its true Roman roots. Indeed, given that the rights protected by the European Convention on Human Rights (ECHR) – which has since been incorporated into domestic Scots law by means of the Human Rights Act 1998[1412] – correlate to some extent with those interests which might be afforded protection by means of the *actio iniuriarum*,[1413] it might be suggested that the use of a domestic legal action such as the *actio* is the best means of abiding with the requirements of Convention.[1414] As Whitty observed,

[1406] Though certainly not the final: Recall Smith, *Damn Injuria Again*

[1407] Stewart, *Reparation*, para.A1.005

[1408] 2011 S.C. 1

[1409] The action was also raised by a party litigant in the case of *Ewing v Times Newspapers Ltd.* 2010 S.L.T. 1093, however that action arose 'because the pursuer came to Scotland to acquire a cause of action… If he should have suffered hurt feelings when he read the article here, his hurt is self-inflicted.' The court, consequently and understandably (if unfortunately from an academic perspective) did not engage with the merits of his claim, but rather dismissed the action so as to 'bring down the curtain on [the pursuer's] action before further time and money are wasted'.

[1410] 2003 SLT 1424 (OH)

[1411] See the comments made by Lord Bonomy in *Martin*, para.29

[1412] Human Rights Act 1998, c.42

[1413] See Olivier Moréteau, *Book Review: Niall R. Whitty and Reinhard Zimmermann, Rights of Personality in Scots Law: A Comparative Perspective*, [2011] Journal of Civil Law Studies 217, pp.219-220

[1414] Taken at the lowest possible level, the courts are under (at least) a duty to respect the standards set by the ECHR: See Jane Wright, *Tort Law and Human Rights*, (Hart, 2017), p.24

'philosophical writings [and] the ECHR no doubt reinforce the existing law, but are no substitute for it'.[1415] The ECHR should not be held as the 'gold standard' of rights which a civilised democratic nation might afford; rather, it ought to be recognised that the Convention merely sets out the *minimum* standard of protection which signatory states are expected to afford to human beings within their jurisdiction.[1416]

Guidance in this area can be found in South African law. This jurisdiction – as noted – has generated a 'copious' body of jurisprudence concerning the *actio iniuriarum*,[1417] particularly since the establishment of the Republic's Constitution,[1418] having previously neglected the action during the time of apartheid.[1419] As Scotland and South Africa share a foundational connection to Roman-Dutch law, it is thought that there is great scope for fruitful comparative consideration of case law between these two jurisdictions.[1420] Burchell, for instance, posits that 'Scots law, using the Roman and South African *actio iniuriarum* as inspiration, could immediately craft a viable remedy for invasions of privacy'.[1421] With this being the case, there is no reason to suspect that Scots law could not utilise its institutional connection to the *actio iniuriarum* to develop a wider doctrine of protected personality rights, nor to presume that Scots law cannot serve to protect interests in dignity in respect of the human body, separated body parts, or human biological material.

[1415] Whitty, *The Human Body*, p.235

[1416] *R v Special Adjudicator ex parte Ullah* [2004] UKHL 26, para.20

[1417] Reid, *Personality*, para.17-12

[1418] Jonathan M. Burchell, *Personality Rights in South Africa: Re-Affirming Dignity*, in Whitty and Zimmermann, *Personality*, p.353

[1419] *Ibid*., p.354

[1420] See T. B. Smith, *Scots Law and Roman-Dutch Law: A Shared Tradition*, in Smith, *Studies*, pp.46-61

[1421] Burchell, *Re-Affirming Dignity*, pp.353-354

3.4 Conclusion

Conceptualising dead human bodies – and, indeed, separated human bodily material – as 'property' is undoubtedly better than regarding such as legal non-entities, but this does not necessarily mean that property law affords the best means of regulating the real interests that individuals – and society – have in respect of deceased persons and separated body parts. Common sense dictates that the 'indignity to the dead' is the 'real and substantial' wrong in cases concerning the abuse of cadavers; technical legal remedies afforded in the law of property do not necessarily reflect this and so alternatives must be considered. One such alternative option is the Roman *actio iniuriarum*. This action – received into Scots and South African law – was conceived as a means of remedying affronts to the *corpus*, *fama* or *dignitas* of a legal *persona*. Although the Latin word *'dignitas'* has been commonly translated as 'honour', rather than 'dignity', by Anglophone legal scholars, it appears that within Roman law itself the word did not imply, as 'honour' necessarily does, a claim to excel over others. Rather, though the quantity of *dignitas* which a *persona* was thought to possess was variable and differed depending on the social standing of that *persona*, a social 'inferior' might have a claim for affronted *dignitas* even if said affront was effected by a social 'superior'. The protected interest was, consequently, far wider than the term's ostensible connection to the notion of 'honour' might suggest.

Though the asymmetry of *dignitas* was a consistent feature of the true Roman *actio iniuriarum,* this asymmetry is not an essential feature of the concept of *dignitas* within this legal action and it is entirely possible for the term to be 'levelled-up' in the sense described by Whitman. Rather than being a consequence of high status or social rank, *dignitas* may now be conceived, in 'living Roman legal systems', as an interest enjoyed, by all human beings in society, in equal measure. This process of 'levelling-up' occurred, in large part, due to Donellus' development of a discrete 'right to human dignity', as something conferred on all of

mankind, in the sixteenth century. As Giltaij noted in 2016, however, in developing this nominate right, Donellus did not draw upon the term '*dignitas*', but instead used the Latin term *existimatio*, which – like *dignitas*, a term to which *existimatio* was expressly connected – has been commonly translated as denoting 'civil honour' or 'standing' in society and similarly able to be vindicated by means of an *actio iniuriarum*.

Certainly within the context of a modern *actio iniuriarum*, drawing on Donellus, *existimatio* might be conceptualised as 'human dignity' – a personality interest possessed by all human beings. The action for *iniuria*, then, protects 'dignity' on a twofold level; any affront to the body, reputation, or general dignitary interest of a *persona* might be understood as an affront to the *existimatio* of that *persona*. As is clear from the *Digest*, contumelious conduct directed towards cadavers might be said to affront both the *existimatio* of the heir of the deceased, as well as the deceased themselves. This position has been preserved in Scots law, wherein – although the ongoing utility of the *actio iniuriarum* has been called into question – the courts have afforded remedy to family members who have been wronged as a result of interference with the bodies of their loved ones and they have done so on the basis of this Roman legal action.

Since the Scottish *actio iniuriarum* has been sorely neglected (to the extent that the McLean report, which was convened expressly to 'clarify and reinforce the very real interests that parents have in their children, even after their death', did not deign to consider it) and the Scottish courts have not generated the vigorous body of case law which the courts of South Africa has produced, the place of *iniuria* within Scots law is presently uncertain. This chapter, then, examined the importance of *iniuria* was a 'legal ancestor' and traced its development through the early modern period to the present day. From this, it is apparent that the crime/delict of *iniuria* is an ancestor of – indeed, is the progenitor of – a number of nominate forms of wrongdoing known to Scots law. The schema of *iniuria* identified by Blackie evidently

operated throughout the Seventeenth and Eighteenth centuries and, even when the origins of *iniuria*, in the sense of the specific wrong, became obscured in the Nineteenth century, the sophisticated taxonomy of 'injury' as representing a wrong effected against one's 'personality rights' persisted, even if such ceased to be clearly articulated in law.

During the institutional period of Scots law, there was no well-defined divide between criminal and delictual matters; hence, *iniuria* in this time period existed as both a crime and a delict. The presence of *iniuria* is now – at most – residual in Scots criminal law, however the delictual *actio iniuriarum* remains an important feature of the civil law, with the leading textbook on Scottish delict describing the civil action for assault as such. Though there is now limited scope for the development of *iniuria* in Scots criminal law, the prospect of a renaissance of the *actio iniuriarum* in civil law is distinct and welcome. Indeed, it is submitted that it is not merely desirable for the Scottish courts to buttress and develop the *actio iniuriarum* as a means to protect personality rights generally, and dignitary issues in respect of the human body specifically, it is now necessary taking into account the constitutional obligations of the courts to develop the common law in a manner which affords protection to human rights. Although Scotland has not generated a significant 'native' case law in the Twenty-First century, lessons may well be learned from South Africa, which – though geographically distant – remains Scotland's closest legal neighbour.

For that reason, the next chapter of this thesis shall consider both the extent to which Scots law may be said to be bound to develop a robust means of protecting 'personality rights', as well as the extent to which jurisprudence from the South African courts might aid the development of these protections. That said, although this chapter has sought to make the case that the *actio iniuriarum* serves as a prime example of an instance in which the law directly and explicitly serves to protect interests in human dignity, it is nevertheless acknowledged that other areas of law equally have the potential to indirectly or implicitly support the dignity

interests of individuals. Likewise, it is acknowledged that, though potentially useful for the reasons outlined in this chapter, the *actio iniuriarum* is too limited in scope to provide universal or universalisable protection to individual and societal interests in dead bodies, body parts and human biological material. For that reason, having considered the desirability of the *actio iniuriarum* within Twenty-First century Scots law, the next chapter of this thesis thereafter moves to delineate the limitations of that action as a means of preserving dignitary interests.

Chapter Four: Persons, Parts and Personality Rights

4.1 Introduction

It has been said that 'death transforms the human body from a person to an object',[1422] however, as Greasley observed, 'the objectification of human beings is a serious source of objection to legal property rights [being vested in] the human body'.[1423] The Scottish courts have acknowledged this concern; in the 2013 case of *Holdich v Lothian Health Board*, Lord Stewart stated that 'one anxiety attaching to the treatment of body parts as property is that it will take us… back to an acceptance that bodies can be commodities, back, in other words, to slavery'.[1424] As a matter of law,[1425] slaves were institutionally denied personhood,[1426] objectified and commodified.[1427] Understood to be *res* rather than *personae*,[1428] slaves were not regarded as having any justiciable interests of their own,[1429] thus it was not possible for a slave to raise an *actio iniuriarum* against one who contumeliously affronted them.[1430]

[1422] See McEvoy and Conway, *The Dead*, p.540, citing Thomas Nagel, *Mortal Questions*, (Cambridge: CUP, 1979), p.7. Nagel, for his part, observes that 'when a man dies, we are left with his corpse, and while a corpse can suffer the kind of mishap that may occur to an article of furniture, it is not a suitable object for pity'. This observation seems to be at odds with 'common sense', according to the court in *Larson*, p.312.

[1423] Greasley, *Commodification*, pp.67-68

[1424] *Holdich*, para.40

[1425] It has been contended that we should not elevate 'one of the ugliest of human perversities, slavery, to the status of "law"' as slavery is not and cannot be a legal relationship' (see Jeremy M. Miller's review of Alan Watson's *Roman Slave Law*, [1988] Legal Stud. F. 389, pp.389-391), however this normative objection does not alter the reality of the fact that 'slavery', according to the 'classical' definition (of which, see *Siliadin v France* (Application no. 73316/01) 26/10/2005, para.122), was quintessentially a legal relationship: See Allain, J., The *International Definition of Slavery and its Contemporary Application*, in Jean-François Niort, Olivier Pluen (Eds.), *Esclavage, Traite et Autres Formes D'Asservissement et D'Exploitation*, (Dalloz, 2018), p.289

[1426] See the discussion in Alan Watson, *Rights of Slaves and Other Owned-Animals*, [1997] Animal Law 1, pp.1-6

[1427] '[The slave] always remained for the Roman, firmly and realistically, corporeal property whose value could be measured in monetary terms': Watson, *Slave Law*, p.46

[1428] See Moyle, *Institutes*, p.111

[1429] See the discussion in Ch.3, *supra*.

[1430] Indeed, the slave was not capable of suffering affront, although a 'master' might be entitled to raise an *actio iniuriarum* if affronted by another's treatment of his slave: See Matthew Perry, *Sexual Damage to Slaves in Roman Law*, [2015] Journal of Ancient History 55, p.64. For the use of the term 'contumeliously' here, recall the discussion in para.3.2.1, *supra*.

Provided that a judicial 'person' is deemed to exist, however,[1431] the Roman *actio iniuriarum* has the potential to serve as an effective legal mechanism to vindicate an individual's dignitary interests. Historically – in both Roman and Scots law – *actiones iniuriarum* could be raised, by the heirs of the deceased person in question, as a means of pursuing remedy for any contumelious insult directed at a dead body.[1432] Logically, this right of action, if still extant, must now be thought to vested in the 'nearest relatives' of the deceased.[1433] This action might be raised because it affects the heir or relatives own dignity, or 'standing',[1434] should indignity be inflicted upon the cadaver,[1435] but likewise it might be justified on the grounds that the heir (or legal representative) is obliged to vindicate the dignity of their benefactor.[1436] In any case, it is apparent that the Roman legal tradition developed a means of preserving and protecting (*inter alia*) the 'very real interests' that individuals have in their relatives, even after their death,[1437] without forcing the human body itself, or any part of it, into any proprietary paradigm.[1438]

Notwithstanding the potential benefits of the action, however, the *actio iniuriarum* has not received much use in modern Scots law. Though the delict of *iniuria* was of vital importance prior to the turn of the Eighteenth century,[1439] by the Twentieth century it had

[1431] And in modern Scots law all human beings are axiomatically deemed to be 'persons': Though there exists the curiousity of *plagium* – see Brown, *Plagium, passim*.

[1432] Dig.47.10.1.4 (Ulpian); Dig.47.10.1.6 (Ulpian); Forbes, *Criminal Law*, p.131; Bankton, *Institute*, I, 10, 29

[1433] See *para.*2.4.2, *supra*.

[1434] Here one might recall Ellroy's observation that 'dead people belong to the live people who claim them most obsessively': See James Ellroy, as quoted in Katherine Verdery, *The Political Lives of Dead Bodies: Reburial and Post-Socialist Change*, (New York: Columbia University Press, 1999), p.23

[1435] Dig.47.10.1.4 (Ulpian); in this instance, the heir is the subject of the wrong and the desecrated body is the object of the wrong.

[1436] Dig.47.10.1.6 (Ulpian); in this instance, the deceased is the subject of the wrong and the heir merely serves to bring the action on their behalf.

[1437] To adopt and adapt the words of the *McLean Report*, para.14

[1438] Scots law has followed this position, with the relevant right now apparently vested in the deceased's 'nearest relative', rather than in the executor: see *C v Advocate General*, para.60 and the discussion at para.2.4.2, supra.

[1439] For the position in Scots law, see Blackie, *Unity in Diversity*, *passim*; for South Africa, see Burchell, *Personality Rights*, p.640

become so neglected that even when cases concerning conduct which could clearly be described within the taxonomy of *iniuria* called before the courts,[1440] no mention was made of the delict. Consequently, it was thought that the influence of the English notion of 'strict liability' in civil wrongdoing was so great that 'it had become too late to develop a wider concept of *iniuria'*.[1441] Indeed, not only did the use of the language of *iniuria* fall into abeyance in Scots and jurisprudence during the Twentieth century, but the potential loss of a viable remedy for affront to dignity was not mourned by some Civilian scholars. In his introduction to Roman-Dutch law, Lee noted that general private actions offering recompense for affront 'are not action[s] which one would wish to see encouraged'.[1442] Nevertheless, in condemning those who would seek to bring such a 'squalid' action,[1443] Lee recognised that it remains 'unquestionably'[1444] available in Scots and South African law,[1445] even if it remains out of sight (and, it seems, out of mind)[1446] in the Scottish legal landscape.[1447]

Though there is, admittedly, a dearth of modern Scottish authority pertinent to the *actio iniuriarum*,[1448] it is submitted that this deficiency might be remedied by means of comparative law. In contrast to Scotland, South Africa possesses a plethora of ever-growing jurisprudence concerning the action.[1449] Like Scotland, South Africa is an uncodified 'living Roman legal system';[1450] as such, in assessing the ongoing – and potential future – value of the *actio*

[1440] As in *Crawford v Mill* (1830) Murr. 215

[1441] See Blackie, *Defamation*, p.666

[1442] Lee, *Introduction*, p.335

[1443] See Zimmermann, *Obligations*, p.1091 and the discussion therein.

[1444] Lee, *Introduction*, p.335

[1445] Citing *MacKay v McCankie* (1883) 10 R. 537 in respect of the Scottish position and *Whittington v Bowles* [1934] EDL 142,

[1446] Recall Blackie, *Defamation*, p.666

[1447] Lee, *Introduction*, p.335

[1448] Reid, *Personality*, para.17-12

[1449] The *actio iniuriarum* now, in South Africa, 'forms the basis of the modern South African protection of personality rights': See Burchell, *Re-Affirming Dignity*, p.351

[1450] See Descheemaeker and Scott, *Iniuria*, p.2. See also John W. Cairns and Paul Du Plessis, *Ten Years of Roman Law in the Scottish Courts* 2008 SLT 191; David Walker, *The Scottish Legal System: An Introduction to the Study*

iniuriarum within Scots law, jurisprudence from the comparable jurisdiction of South Africa ought to be considered. In recognition of this, this chapter examines the nature and use of the *actio iniuriarum* in South African law, with a view to determining the extent to which this jurisdiction's understanding of this action might inform Scots law.

Though South Africa's legal system is juridically similar to that of Scotland, it is noted that the similarities are diluted somewhat by the fact of South Africa's robust Constitution,[1451] which expressly affords justiciable protection to human dignity within its incorporated Bill of Rights.[1452] Scotland lacks any legal instrument which is comparable in scope or application to the South African Constitution;[1453] nevertheless, it is undeniable that the Human Rights Act 1998 brought about significant changes in the Scottish legal landscape.[1454] Indeed, it has been suggested that Article 8 of the European Convention on Human Rights (ECHR) has the potential to serve as an effective 'legal vehicle for the [realisation, in law, of the] idea of human dignity'.[1455] As such, the significance of the 1998 Act, which served to 'bring rights home' to Scotland and the rest of the United Kingdom, is assessed in this chapter and it is submitted that the 1998 Act might well provide the Scottish courts with an impetus to revitalise the *actio iniuriarum*.

Although this impetus may well exist, however, it is accepted, in this chapter, that the *actio iniuriarum* cannot effectively afford protection to dead bodies, body parts and separated human biological material in all cases in which such protection might be thought desirable. For

of Scots Law (8th ed) (W. Green, 2001), p.41; Smith, *A Shared Tradition*, pp.46-61 and Lord Normand of Aberdour, *Foreword*, in Muirhead, *Outline*.

[1451] The Constitution of the Republic of South Africa 1996 came into force on the 4th of February 1997, succeeding the interim Constitution of 1993 – which was brought into force on the 24th April 1994.

[1452] The Bill of Rights comprises ss.7-39 of the 1996 Constitution. The 'Right to Dignity' is enshrined in s.10.

[1453] See Elspeth Reid and Daniel Visser (Eds.), *Introduction*, in *Private Law and Human Rights*, (Edinburgh: EUP, 2013), p.5

[1454] See Jim Murdoch (Ed.), *Reed and Murdoch: Human Rights Law in Scotland*, (London: Bloomsbury, 2017), para.1.01

[1455] See the discussion in Charles Foster, *Human Dignity: Be Philosophical and European, but not Scottish*, [2019] Cambridge Quarterly of Healthcare Ethics 534, p.539

an *actio iniuriarum* to succeed, there must be some contumelious conduct on the part of the defender; thus, the possibility of an *actio iniuriarum* would not be open to the pursuer in a case such as *Holdich*, in which the pursuer perceived that he had suffered loss and 'injury'[1456] as a result of the defender's negligence.

The limits of the *actio iniuriarum*, as a mechanism for regulating the treatment of dead bodies, body parts and human biological material, are consequently explored in this chapter. The potential benefits of regulating such material within the schema of property law are considered and weighed against those of the *actio*; ultimately, it is accepted that allowing individual legal subjects to enjoy ownership and possession of bodies, body parts and human biological materials is, in some cases, beneficial and, indeed, might even serve to enhance individual dignitary interests. With this in mind, this chapter concludes by addressing the central question of the thesis head-on; it seeks to determine, with reference to the preceding chapters, when it might be thought best to regulate dead human bodies, and their parts and derivatives, as property and when it may be thought better to treat such materials within the scheme of personality rights.

4.2 Lessons from South Africa

4.2.1 From Crime/Delict to Crime and Delict

The civil remedy which might be pursued to protect against infringements of dignity, available as a result of the *actio iniuriarum*, has been termed 'undoubtedly one of the most impressive and enduring legacies of Roman law'.[1457] The delict *iniuria*, however, has been 'squeezed of its substance' in Civil law jurisdictions such as France,[1458] neglected in the mixed

[1456] In the sense of some harm or *damnum*, not in the nominate sense of *iniuria*.

[1457] Burchell, *Personality Rights*, p.650

[1458] Descheemaeker and Scott, *Iniuria*, p.26

jurisdiction of Scotland[1459] and, even within South Africa – the jurisdiction in which it is now and remains most well-established – made 'only staccato progress in the nineteenth and twentieth centuries'.[1460] While actions in respect of the specific delict were, at one time,[1461] brought 'frequently and indiscriminately'[1462] in Holland and Germany,[1463] codification in these jurisdictions was perceived as marking the death of the delict,[1464] which had been the subject of deep and cutting criticism throughout the Eighteenth and Nineteenth centuries.[1465]

Zimmermann indicates that much of the criticism of the *actio iniuriarum* arose as a result of the move from a system which penalised wrongs which caused 'injury' (in the sense of the nominate delict) by way of the civil (private) law to a system which publically penalised such conduct by way of the criminal (public) law.[1466] 'Within a law of delict increasingly directed towards the compensation for loss sustained, [*iniuria*] was bound to remain something of a *corpus alienum*';[1467] throughout the Nineteenth century, the German states gradually abolished the *actio* until, finally, 'the [Reich's] penal code of 1872 sounded its death-knell'.[1468] Nevertheless, just as the *actio iniuriarum* survived in Scots law, and saw its 'entirely' penal remedy 'effortlessly reinterpreted as being purely compensatory',[1469] so too did the civil

[1459] See *supra*.

[1460] Burchell, *Personality Rights*, p.639

[1461] During the height of the *usus modernus pandectarum* in the Sixteenth and Seventeenth centuries: See Zimmermann, *Obligations*, p.1085

[1462] To use the words of Professor Zimmermann: *Ibid.*

[1463] Lee, *Introduction*, p.334

[1464] Zimmermann, *Obligations*, p.1089

[1465] See, e.g., Justus Henning Boehmer, *De Iniquitate et Injustitia Actionum Injuriarum*, in Augustin Leyser, *Meditationes ad Pandectas,* (Franckenthalii, 1778) Spec. DXLII, I and the discussion *Ibid*.

[1466] Zimmermann, *Ibid*., p.1089

[1467] *Ibid*.

[1468] *Ibid*.

[1469] Descheemaeker, *Solatium*, p.73

concept of *iniuria* subsist in South Africa[1470] even as jurists and other legal commentators throughout Continental Europe railed against it.[1471]

The survival of the *actio iniuriarum* within South Africa is, in large part, a result of the nation's history as a Dutch colony that was later incorporated into the British Empire.[1472] As a Dutch colony until 1795 (and again from a short period from 1802 until 1806),[1473] Dutch law, of course, applied throughout the territories which that Empire held control over,[1474] but Dutch law, during the period in which it influenced the development of South African jurisprudence, 'was not peculiarly Dutch but formed part and parcel of the European *ius commune*'.[1475] Roman legal ideas, filtered through the lens of Dutch jurists (particularly those from Holland),[1476] were received into the legal life of the Cape colony and, in spite of the efforts of the British colonial administrators, remained entrenched even after the territory passed into the control of the British Empire.[1477]

[1470] 'It is a truism that the modern South African law of delict is based substantially on the Roman *actiones legis Aquiliae* and *iniuriarum*, as well as on the action for pain and suffering developed in classical Roman-Dutch law': See Annél van Aswegen, *Aquilian Liability I (Nineteenth Century)* in Zimmermann and Visser, *Southern Cross*, p.599

[1471] Until the process of codification abrogated the delict, however, most jurists considered that – however contemptible they personally found the delict – it was '*juste tamen*' (nevertheless [still] law): See Zimmermann, *Obligations,* p.1089

[1472] 'The Civil law', as Smith observed, 'consolidated its influence in those parts of the world first settled by the Dutch, Spanish and the Portuguese': T. B Smith, *Centenary of the Faculty of Law of Cape Town University*, [1959] SLT 217, p.217

[1473] The colony was under the administrative control of the Vereenigde Oostindische Compagnie (VOC) – the Dutch East India Company – until 1795; from 1802-1806 the colony was controlled by the Batavian Republic.

[1474] By the mid-1670's, the Cape's natives – the Khoikhoi – 'became subject to the law and legal procedure introduced at the Cape by the Dutch': See Eduard Fagan, *Roman-Dutch Law in its South African Historical Context*, in Zimmermann and Visser, *Southern Cross*, pp.37-38

[1475] See H. J. Erasmus, *The Interaction of Substantive Law and Procedure*, in Zimmermann and Visser, *Southern Cross*, p.144

[1476] See Fagan, *Roman-Dutch Law*, pp.41-45. The narrow use of material produced only by jurists from Holland is, however, 'historically insupportable'; ultimately, 'the legal tradition which was transplanted to South Africa was a supra- or pre-national tradition'.

[1477] There was a conscious and notable attempt to Anglicise the Cape, but full Anglicisation did not occur as the first Charters of Justice mandated that the South African courts exercised their jurisdiction 'according to the laws now in force within our said Colony and all such other laws as shall at any time hereafter be made'. Although it was always the intention to ultimately supplant the 'laws now in force' with English law, ultimately, within the jurisdiction, the rise of Afrikaner nationalism in the early Twentieth century frustrated this endeavour: *Ibid.*, pp.56, 62

It is notable, then, that 'the flowering of South African law came after the parent system had passed away'.[1478] In 1809, Napoleon instituted his *Code Napoléon* in the Netherlands, thus ending the operation of Roman-Dutch law in its native jurisdiction.[1479] Since South Africa was under British control at this time, however, the imposition of the Napoleonic Code did not have any impact on legal practice at the Cape;[1480] South African law remained (and as to this day, remains) uncodified.[1481] Corresponding with the position in early modern Scotland,[1482] there was originally no neat divide between the law of crime and the law of delict in early modern South Africa.[1483] By the turn of the nineteenth century, throughout Continental Europe, the demarcation of crime/delict into crime and delict was facilitated by the process of codification.[1484] Though cut off from this avenue of development, the South African courts were nevertheless able to draw a distinction between crime and delict on the basis of their own authority[1485] – occasionally rationalised by their interpretation and understanding of English law[1486] and Roman-Dutch sources.[1487]

Though some early writers on South African law considered that English influence allowed for the divide between crime and delict to be demarcated,[1488] at least 'according to the

[1478] Smith, *Centenary*, p.217

[1479] Smith, *A Shared Tradition*, p.55

[1480] Fagan, *Roman-Dutch Law*, p.57; the fact of codification in the Netherlands, combined with the fact that 'Britain was reaching its Imperial zenith', meant that the local courts were readily able to look to English law to 'complement Roman-Dutch law… where [it] was found wanting'.

[1481] Zimmermann and Visser, *Southern Cross*, p.5

[1482] Blackie, *Crime and Delict*, p.356

[1483] There being no such clear divide in Roman-Dutch law: J. W. Wessels, *The History of Roman-Dutch Law*, (Grahamstown: African Book Co. Ltd., 1909), p.704

[1484] The fact of separate Civil and Criminal Codes in the jurisdictions throughout Europe which embraced codification axiomatically allowed for a clear divide between delict and crime to be recognised, even if that divide ultimately began to 'blur' in some jurisdictions: See Lorena Bachmeier-Winter, Carlos Gomez-Jara Diez and Albert Ruda-Gonzalez, *Blurred Borders in Spanish Tort and Crime* in Dyson, *Tort and Crime*, p.223

[1485] See *Hare v Kotzé* (1840) 1 Menz 372; *Eaton v Moller* (1872) 2 Roscoe 85; *Mostert v Fuller* (1875) 5 Buch 23

[1486] See *Schoeman v Goosen* (1883) 3 EDC 7

[1487] See *Engelbrecht v Estate Van der Merwe* (1889) 10 NLR 117

[1488] See the discussion in van Aswegen, *Aquilian Liability I*, p.567. The divide between tort and crime emerged at a comparatively early stage in English law: See Matthew Dyson and John Randall, *England's Splendid Isolation*, in Dyson, *Tort and Crime*, p.19; *Atchison v Everitt* (1775) 1 Cowp. 382, p.391 *per* Lord Mansfield.

South African judges of the [nineteenth century], the Roman-Dutch sources distinguished with sufficient clarity between criminal and civil liability to keep these forms of liability apart from one another'.[1489] The analysis present in the Roman-Dutch sources was, however, limited to the observation that some remedies (particularly those under the *lex Aquilia*)[1490] were severally available to a private litigant, whatever position prevailed in respect of criminal sentence.[1491] In respect of the nominate crime/delict *iniuria*, since no (British) Imperial statute (criminal or otherwise) contradicted the definition of 'injury' which subsisted in Roman-Dutch law,[1492] the civil remedy available by means of the *actio iniuriarum* (or *actio injuriarum*) was able to develop freely alongside a notion of *crimen injuria*.[1493]

The South African Law Reform Commission (SALRC), in their issue paper on *Stalking*, defined *crimen injuria* as any unlawful and intentional act which seriously infringes the dignity of another person.[1494] The nature of this requirement of 'seriousness', in the occurrence of *crimen injuria*, has been questioned;[1495] Van der Berg suggests that, historically, it 'seems to be that non-serious *iniuriae* were regarded as crimes, but were, as a matter of policy, infrequently prosecuted'.[1496] Nevertheless, subject to the *de minimis* rule,[1497] the South African

[1489] van Aswegen, *Aquilian Liability I*, p.567

[1490] *Ibid*., pp.567-658

[1491] See Blackie, *Crime and Delict*, p.356

[1492] Wessels, *History*, p.710. It might be suggested that, as English law knew of no crime akin to the *crimen injuria*, nor any tort akin to *iniuria*, it was ignored – or overlooked – by the colonial administrators: See Van der Berg, *The Criminal Act of Violation of Dignitas*, [1988] SACJ 351, p.355. Certainly, no prosecution for *crimen injuria* occurred in the nineteenth century, during the height of British control over South Africa: See Jonathan Burchell, *Protecting Dignity under Common Law and the Constitution: The Significance of Crimen Injuria in South African Criminal Law*, [2014] SACJ 250, p.251 – it was not until 1909 that it was found that serious *iniuriae* were – in principle – criminal: *R v Umfaan* 1908 TS 62, p.67

[1493] See the discussion in *Ryan v Petrus* 2009 Case No.: CA 165/2008, p.8; *Sokhulu v New Africa Publications Ltd t/a "The Sowetan Sunday World" and Others* [2002] 1 All SA 255 (W), p.259c-d (*per* Goldstein J); *Walker v Van Wezel* 1940 WLD 66 p.69 and *R v Walton* 1958 (3) SA 693 (SR), p.695B

[1494] SALRC, *Issue Paper on Stalking*, [2004] Project 130, para.2.01

[1495] *Hoho v S* [2008] ZASCA 98, para.22; *S v Bugwandeen* 1987 1 SA 787 (N), p.796A-B

[1496] John Van der Berg *Is Gravity Really an Element of Crimen Injuria and Criminal Defamation in our Law?*, [1988] THRHR 54 p 59

[1497] On the authority of *S v Kgogong* 1980 (3) SA 600 (A) pp.603G-604A and *S v A and another* 1993 (1) SACR 600 (A), p.607d-f

Supreme Court has noted that it has been juridically 'accepted that seriousness is a requirement for the crime of *crimen injuria*',[1498] though it remains the case that 'it is not clear what the test for seriousness is'.[1499] Nor, indeed, is it clear that 'seriousness' is, in fact, a necessary element of a modern *crimen injuria*; as Professor Burchell observes, 'the Supreme Court of Appeal [in *Hoho*] assumed, but did not decide, that an element of seriousness was required'.[1500] The civil *actio injuriarum* and *crimen injuria* consequently retain much in common with one another.

In the SALRC report on *Stalking*, Burchell is quoted as saying that '*crimen injuria* can be committed where there is an invasion of privacy, or an impairment of the complainant's dignity, and the courts have given a broad meaning to dignity, which includes not just self-esteem, privacy and reputation but also individual autonomy'.[1501] This affirms the definition of *crimen injuria* set forth in the issue paper. The follow-up report notes that Burchell expressed the view that even one instance of unwarranted conduct might be sufficient to meet the crime's threshold of 'seriousness' and indeed that 'the criminal sanction for *crimen injuria* applies even where the victim is unaware that his or her privacy is being invaded'.[1502] This correlates with the position in civil law in respect of the *actio injuriarum*.[1503] Within modern South African law, then, there exists both a public and a private action to vindicate the dignitary rights of an individual, where such are infringed by means of contumelious conduct.[1504]

[1498] On the authority of *Bugwandeen*, pp.794D-796E

[1499] *Hoho*, para.22

[1500] Burchell, *Protecting Dignity*, p.260

[1501] South African Law Reform Commission: Project 130, Stalking, Report: November 2006, para.2.26. In asserting this, Burchell stood by his 1998 monograph on 'the modern *actio injuriarum*': See Jonathan Burchell, *Personality Rights and Freedom of Expression – The Modern Actio Injuriarum*, (Juta, 1998), pp.139, 328

[1502] South African Law Reform Commission: Project 130, Stalking, Report: November 2006, para.2.28. With this in mind, it might be suggested that an infringement of the dignity of a dead person might then give rise to criminal sanction, though said dead person cannot possibly know that someone has acted to infringe their dignity – see *infra*.

[1503] Provided, of course, that the affronted party later finds out about the intrusion and deigns to raise an action: See the discussion in Neethling, *Delict*, (7th Edn.), pp.341-372

[1504] See *Dendy v University of the Witwatersrand and Others* [2005] ZAGPHC 39

Like its civil law counterpart,[1505] the *crimen injuria* now exists as a means of protecting individual's dignity.[1506] Though it has been said that 'dignity', in this sense, is to be understood 'as that aspect of the human personality that is not part of the concepts of *corpus* and *fama*'[1507] (i.e., that 'dignity', here, is to be understood as '*dignitas'* rather than as '*existimatio*'), the term 'dignity' must, especially since the inception of the Republic of South Africa's post-apartheid Constitution, be given a broader meaning than this.[1508] Indeed, given that the *crimen injuria* serves to protect both the 'dignity' and 'privacy' of a person,[1509] it appears – *prima facie* – that the overarching interest protected by the South African *crimen injuria* (and, by association, the South African *actio injuriarum*) is – as in Roman law – individual *existimatio* – in the sense of 'human dignity' elucidated by Giltaij.[1510] Indeed, within the South African schema of protected interests, it has been said that 'dignity' 'is the underlying principle within which concepts such as privacy, self-esteem and reputation are located'.[1511]

Since the purview of the term 'dignity' remains wide in scope, even in instances in which the concept is employed as a specific doctrinal tool (i.e., as *dignitas*),[1512] rather than a

[1505] See *ibid.*, in which it was held that 'the protection of human dignity under section 10 of the Constitution encompasses something broader than the Roman Law concept of *dignitas*'. This notwithstanding, on occasion (as in that case) 'there [may be] little difference between the right to dignity as it is comprehended under the Constitution and its common law counterpart'. If, as discussed in the previous chapter, *'existimatio'* is to be understood as 'human dignity' in its broadest sense, such would accord with the definition of that term within section 10 of the Constitution. See the discussion *infra*.

[1506] Neethling, *Delict*, (7th Edn.), pp.341-372

[1507] See Murdoch Watney, *Crimen Iniuria: Its Role Vis-à-Vis Sexual Offences Legislation*, [2017] TSAR 405, p.407; *Aphane v S* [2009] ZAGPPHC 264, para.9

[1508] See *Dendy*, para.11. Though the court is referring, here, to the operation of the civil *actio iniuriarum*, as *per* the decisions in *Ryan*, p.8 (citing *Van Wezel*, p.69 and *Walton*, p.695B), it has been held that 'the elements of *injuria* are the same whether it be punished civilly or criminally'.

[1509] See Murdoch Watney, *Crimen Iniuria: Its Role Vis-à-Vis Sexual Offences Legislation*, [2017] TSAR 405, p.406

[1510] See Giltaij, *Existimatio*, p.235 and the discussion in para.3.2.3, *supra*.

[1511] See Norrie and Burchell, *Impairment* in Zimmermann *et al*, *Mixed Legal Systems*, p.13 (citing R. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, [1986] Cali. L. R. 691; T. Gibbons, *Personality Rights: The Limits of Personal Accountability*, [1998] Yearbook of Media and Entertainment Law 53, pp.61-66; *Dawood v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC), para.34 and *Khumalo v Holomisa* 2002 (8) BCLR (CC) paras.26-27

[1512] As it expressly is in cases of *crimen injuria* – recall *Umfaan.*

high-level umbrella-term (i.e., as *existimatio*), it is difficult to determine ahead of time what conduct may be said to amount to a serious violation of dignity.[1513] As such, it is consequently difficult to describe the extent to which the crime operates and it is almost impossible to exhaustively list the conduct which may give rise to an instance of criminal *injuria*;[1514] 'there are an infinite number of ways in which a person may be insulted'.[1515] Nevertheless, the scope and purview of *iniuria*, within South African law, is well understood and a number of necessary features, in any case of civil or criminal *iniuria*, can be identified.

4.2.2 Iniuria, Consent and Boni Mores

In instances of civil and criminal *iniuria* alike, the South African courts claim to apply a bipartite subjective/objective analysis as a means of determining the existence of actionable *iniuria*.[1516] For a plaintiff or prosecutor to demonstrate that *injuria* has occurred, it has been held that the victim must be both aware of the wrongdoing of the accused at the relevant time and they must feel 'degraded or humiliated' by the purported instance of injury.[1517] This subjective feeling of affront is not sufficient to establish criminal conduct, however; the law does not seek to protect the 'hyper-sensitive' from all possible offence.[1518] A prosecutor must, consequently, also establish that the purportedly wrongful conduct was 'of such a nature that it would offend the feelings of a reasonable person'.[1519]

This dual requirement of objective and subjective affront was implicitly present in Roman law. In *Digest* 47.10.33, for instance, the Jurist Paul notes that if something subjectively

[1513] Indeed, given that infringements of dignity are easier to detect than to define, this is unsurprising: See Foster, *Dignity*, p.421

[1514] South African Law Reform Commission, *Issue Paper on Stalking*, [2004] Project 130, para.2.22

[1515] Neethling *Delict*, (3rd Ed.), p.353, cited with approval by the South African High Court in *Maithufi v Minister of Safety and Security of the Republic of South Africa* [2007] ZAGPHC 163 at para.30

[1516] *Aphane*, para.9

[1517] *S v A* (1993), p.610 e-f; *S v A* 1964 (3) SA 319 (T), p.321B; *R v van Tonder* 1932 TPD 90, p.94

[1518] *Aphane*, para.9

[1519] *Ibid.*, paras.9-10

injurious is done, such might not give rise to an *actio iniuriarum* if that thing was done in the public interest and according to 'good morals' (*boni mores*).[1520] Since, for a thing to be injurious, the act must be *contra bonos mores* as well as committed contumeliously, a parallel with the practice of the South African courts might be drawn. As implied by Ibbetson's analysis of *Digest* 47.10,[1521] it seems that the requirement for the demonstration of *contumelia* coincides with the subjective aspect of the test for *iniuria*, while the requirement that the contumelious conduct be done *contra bonos mores* correlates with the objective wing of the test.

In Ulpian's conception of *iniuria*, however, 'the impropriety of the defendant's conduct was bundled up in his notion of *contumelia*';[1522] that is to say that for Ulpian, sufficiently contumelious conduct was axiomatically *contra bonos mores*.[1523] Beating one's own slave, for instance, is only *iniuria* if done vitiously enough to render the conduct *adversus bonos mores*,[1524] but contumeliously attacking a freeman is always, by the nature of the action itself, *contra bonos mores*, since displaying disrespect towards one who is due consideration under the law is invariably immoral.[1525] Consistent with this approach, Professor Strauss expressed – in discussing the place of 'consent' as a defence to bodily injury – that *'*the more valuable the object [that is, the personality interest possessed by the person] attacked - e.g. life, liberty,

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[1520] *'Quod rei publicae venerandae causa secundum bonos mores fit, etiamsi ad contumeliam alicuius pertinet, quia tamen non ea mente magistratus facit, ut iniuriam faciat, sed ad vindictam maiestatis publicae respiciat, actione iniuriarum non tenetur'*. As Ibbetson notes, 'the Latin of this text is not good' and 'it is likely that it has undergone some abbreviation': See David Ibbetson, *Iniuria, Roman and English,* in Descheemaeker and Scott, *Iniuria*, p.43

[1521] See the discussion in Ibbetson, *ibid*.

[1522] *Ibid*.

[1523] Indeed, Ulpian stresses, at Dig.47.10.15.23, that *'meminisse autem oportebit non omnem, qui adsectatus est, nec omnem, qui appellavit, hoc edicto conveniri posse… sed qui contra bonos mores hoc facit'* [not everyone who follows or accosts is caught by this edict… but only those who do so contrary to good morals]: See Alan Watson (trs.), *The Digest of Justinian*, Vol.IV (University of Pennyslavania Press, 1985), p.292. Though here speaking of a particular form of *iniuria*, it appears that what Ulpian states here may be read as of more general application to the general *actio iniuriarum*.

[1524] Dig. 47.10.15.2 (Ulpian)

[1525] C.9.35.6: *Cum nec patronos iniuriam facere libertis iuris aequitas permittat* [the law and equity do not permit a patron to injure their freedman, and I declare that the heir of the patron] (author's translation).

bodily integrity - the more likely it is that the aggression will be deemed in conflict with good morals'.[1526]

Although the South African courts have maintained that *injuria* is demonstrated by means of a dual objective/subjective test, it appears that the objective 'wrongfulness' element of this test may be given more weight in criminal prosecutions.[1527] Indeed, the 'victim' of an injurious act need not be aware of the fact that the contumelious conduct occurred either at the relevant time or *ex post facto*. Thus, in the report on *Stalking*, the SALRC noted that in spite of the train of authority which suggests that the victim must be aware of – and offended by – the injurious conduct for *iniuria* to be established,[1528] 'the criminal sanction for *crimen injuria* applies even where the victim is unaware that his or her privacy is being invaded'.[1529]

Indeed, not only is it the case that *crimen injuria* might be perpetrated without the knowledge of the subject of the wrong,[1530] but so too is it the case that the infliction of sufficiently gross indignity might be deemed injurious even if such was inflicted with the express consent of the 'victim'.[1531] As the English courts observed in *R v Coney*,[1532] while an individual may waive their own rights (*e.g.*, by brushing off insult, or refusing to regard himself a subjectively harmed), they are not empowered to waive those of society.[1533] Insofar as civil *iniuria* is concerned, it might be said that, as in English law, 'consent can in all cases be given so as to operate as a bar to a civil action',[1534] however where the criminal concept of *iniuria* is concerned, conduct which is both contumelious and *contra bonos mores* may nevertheless be

[1526] S. A. Strauss, *Bodily Injury and the Defence of Consent*, [1964] S. African L. J. 179, p.183.

[1527] See SALRC: Project 130, Stalking, Report: November 2006, para.2.28

[1528] This test was clearly set out, in such terms, in *Delange v Costa* 1989 (2) SA 857 (A), p.862F

[1529] South African Law Reform Commission: Project 130, Stalking, Report: November 2006, para.2.28

[1530] As in *R v Holliday* 1927 CPD 395

[1531] See *S v D* 1963 (3) SA 263 (E), though compare *R v Sagaye* 1932 NPD 236, p.237

[1532] (1882) 8 QBD 534

[1533] *Ibid.*, p.567 *per* Chief Justice Coleridge.

[1534] *R v Coney* (1882) 8 QBD 534, p.553 *per* Hawkins J. This English judgment reflects the operation of the Civil law maxim *volenti non fit iniuria*: See Dig.47.10.1.5 (Ulpian); Dig.39.3.9.1 (Paul)

prosecuted (even notwithstanding the consent of the 'victim') 'in exceptional circumstances'.[1535]

In Burchell's words, then, 'the ultimate criterion for determining an impairment of dignity is not the sensibility of the plaintiff or complainant… but that of the reasonable person'.[1536] In this sense, then, it appears that the dual objective/subjective test can be considered, in fact, doubly objective. Where *crimen injuria* is alleged, the courts must determine whether or not the conduct complained of is 1) objectively wrongful[1537] and 2) whether or not the reasonable person would have been objectively affronted by the conduct or not.[1538] Subjective affront suffered by a purported victim may be indicative of objective wrongfulness, but not conclusive of it.[1539]

Accordingly, *iniuria* may be inflicted against those who are unable to cognise, or appreciate the wrongfulness of, the conduct in question,[1540] such as young children,[1541] those who suffer from some mental impairment,[1542] or (it is submitted) the dead.[1543] As Strauss demonstrated in his article on *Bodily Injury and the Defence of Consent,* in determining whether or not an 'injury' has been committed in cases of this kind (as, indeed, in any case of purported *iniuria*), the courts ultimately have recourse – like Paul and the Roman-Dutch jurists

[1535] Burchell, *Protecting Dignity*, p.258

[1536] *Ibid*.

[1537] In South Africa, 'wrongfulness is a necessary condition for delictual liability' and so such may be established in accordance with defined rules, but it is recognised that 'wrongfulness' in the specific sense is also 'on occasion determined by the exercise of judicial discretion': Anton Fagan, *Rethinking "Wrongfulness" in the Law of Delict*, [2005] SALJ 90, p.90

[1538] The reasonable person may not have been affronted by objectively wrongful conduct if, say for example, the one subjected to the conduct consented to it: Strauss, *Consent,* p.183

[1539] That is to say, a person who complains of subjective affront, if sufficiently sympathetic, may persuade a court that they suffered criminal *iniuria*, even if the court would not be moved to find that a different person in the same situation would have suffered such. Relevant subjective factors may be the age, mental state or intoxication of a particular individual who subjectively considers that they have been the victim of *iniuria*.

[1540] Burchell, *Protecting Dignity*, p.258

[1541] *Mugridge v S* [2013] ZASCA 43

[1542] See *R v M* 1915 CPD 334, p.342

[1543] See Christison and Hoctor, *Criminalisation,* pp.35-36 and the discussion *infra*.

– to the 'admittedly vague', though decidedly Roman,[1544] standard of 'good morals'.[1545] Neethling, Potgieter and Visser, in their standard text on *Delict*,[1546] concurred that this standard of *boni mores* was paramount in cases of *iniuria*[1547] and this view subsequently received vindication by the High Court in *Maithufi v Minister of Safety and Security of the Republic of South Africa*.[1548]

The standard of *boni mores* does not, in this context, mean 'the customs of society', nor 'all of the ethical rules prevailing in a society', but rather should be understood as 'the prevailing views of society on what conduct is lawful and what is unlawful'.[1549] Though this interpretation of *boni mores*, proffered by Strauss, appears almost tautological and provides little guidance as to what metric ought to be employed to determine what should and should not be lawful, it has received some judicial vindication. It was implicitly endorsed by the Appeal Court in *Delange v Costa*,[1550] which held that the test for *injuria* requires 'the conduct complained of to be tested against the prevailing norms of society (*i.e.*, the current values and thinking of the community) in order to determine whether such conduct can be classified as wrongful'.[1551] Within the academic sphere, Neethling, Potgieter and Visser, for their part, expressly define the term as one representing 'the violation of a legal norm'.[1552]

The significance of this concept of *boni mores* can most clearly be seen in considering cases pertaining to bodily injury, though – given the link to other legally protected interests such as reputation, dignity and privacy within the schema of *iniuria* – it is submitted that the

[1544] See William A Joubert, *Grondslae van die Persoonlikheidsreg*, (A. A. Balkema, 1953), pp.109, 128; Hendrick J. O. van Heerden, *Grondslae van die Mededingingsreg*, (Kaapstad; H.A.U.M, 1961), p.99
[1545] Strauss, *Consent*, p.183
[1546] *Law of Delict*, (7th Edn.) (Durban: LexisNexis, 2015)
[1547] Neethling, *Delict*, (7th Edn.), p.353
[1548] [2007] ZAGPHC 163, at para.30
[1549] Strauss, *Consent*, p.183
[1550] 1989 (2) SA 857 (A)
[1551] *Delange*, p.862E-F
[1552] Neethling, *Delict*, (7th Edn.), p.353

consideration given to *boni mores* in cases of bodily wounding is relevant, by analogy, to all other cases of *iniuriae*. The notion of *boni mores*, when used in the sense expounded by the South African courts and jurists, is no doubt amorphous, however it is ultimately no less vague than the standard of 'the public interest' or 'public policy' which finds favour in the Anglosphere. Indeed, the Roman notion of *boni mores* was expressly likened, by Strauss, to these similarly broad English-language concepts.[1553]

The concept of the 'public interest' and 'public policy' alike have been employed in determining the lawfulness (or otherwise) of potentially injurious conduct in Scotland. In the 1975 case of *Smart v HM Advocate*,[1554] the accused was charged with assault – which, in the Scottish context, retains an unbroken (if overlooked) link to the historic crime/delict *iniuria realis*[1555] – in spite of the fact that the 'victim' had consented to a 'square go' (*i.e.*, a 'fair fight'). The Court of Criminal Appeal found that the 'victim's' consent to the assault was immaterial; the panel's actions were injurious to society as a whole, as well as the person wounded by the assault. In delivering the *per curiam* opinion of the court, Lord Justice-Clerk Wheatley made clear that 'that apart from the private interests involved in this case, it is in the public interest that it should be decided and made known that consent to a "square go" is not a defence to a charge of assault based on that agreed combat'.[1556] The prevailing views of Scottish society, now as in 1975, may countenance agreed-upon combat in the form of a sport such as boxing, but they would not consider agreed-upon combat which might interfere with public order to be legitimate – hence, though no 'injury' – in the nominate sense of that term –

[1553] Strauss, *Consent*, p.182; it should be recalled here that Paul, too, made reference to 'the public interest' in Dig.47.10.33

[1554] 1975 J.C. 30

[1555] See the discussion in Jonathan Brown, *When the Exception is the Rule: Rationalising the Medical Exception in Scots Law*, [2020] Fundamina: A Journal of Legal History (forthcoming), *passim*.

[1556] *Smart*, p.34

is inflicted upon either combatant, the view is taken that society itself is nevertheless 'injured' by such conduct.

In Roman law proper, 'bodily harm caused to a consenting person was generally not unlawful, except in isolated cases'[1557] and, in line with the maxim *volenti non fit iniuria*, a consenting party could not suffer actionable injury.[1558] Notwithstanding this, in Roman-Dutch law, consent did not necessarily negate the occurrence of injury.[1559] Drawing on Ulpian's maxim in *Digest* 9.2.13, Matthaeus[1560] held that, since an individual is not the owner of their own limbs, their consent to bodily injury is immaterial[1561] and so (for example) voluntary castration was punishable regardless of the consent of the subject.[1562] Within the same intellectual tradition, Stair took the view that individual legal subjects were under an 'obediential obligation', owed to God, to preserve their own life and members;[1563] thus, no person could authorise another to cause harm to their *corpus* (save in the interests of 'preserving the whole').[1564]

On the face of it, these positions are difficult to reconcile with the taxonomy of *iniuria*. Logically, in any purported case of *iniuria*, consent should negate the occurrence of the delict since one cannot logically suffer an affront if one has expressly allowed or permitted the occurrence of the supposed affront.[1565] As, however, the obediential obligation which is

[1557] Strauss, *Consent*, p.179

[1558] Dig.47.10.1.5 (Ulpian); Dig.39.3.9.1 (Paul)

[1559] Strauss, *Consent*, pp.179-180

[1560] Antonius Matthaeus (1601-1654) – known as Matthaeus II to distinguish him from two other related Dutch jurists of the same name – was a 17th century Dutch jurist and the author of 'one of the earliest treatises we possess on criminal law as administered in Holland [which] is still frequently [as of 1908] referred to in the South African Courts': see Wessels, *History*, p.296

[1561] Antonius Matthaeus, *De Criminibus ad Lib. XLVII et XLVIII Digest Commentarius, Trajecti ad Rhemum (Utrecht), 1644, Ionnis a Waessberge, Prologemena, Cap. III, Adver. Quos Crim. Admit. Pos*. pp.38, 39. 40 and 41, para.3

[1562] See Joos de Damhauder, *Praxis Rerum Criminalium Iconibus Materiae Subjectae Convenientibus*, (Antverpiae: Ioannem Bellerum, 1554), cap. 81

[1563] Stair, *Institutions*, 1, 2, 5

[1564] Stair, *Institutions*, 1, 2, 5

[1565] In other words – the subjective element of the offence cannot possibly be demonstrated.

breached by the *iniuria* is owed, by the person who suffers bodily harm, to God, rather than to themselves, the incongruity resolves itself. The *iniuria* in a case of self-castration, or consensual harm, is not suffered by the party who is bodily wounded, but is rather inflicted upon the Christian God or his Church, which (like 'society' in modern secular states) is a third-party to the self or consensual harm.

The determination of what constitutes an 'affront' or 'injury' consequently remains tied to the standard of *boni mores*. While in classical Roman law, consent to a wrong could potentially serve as a full excuse for in any instance of ostensible *iniuria*, since the 'public interest' would not be harmed if a private individual elected to die or to harm himself,[1566] in the Christian epoch – in which time consistorial courts claimed temporal and spiritual jurisdiction[1567] – as a matter of 'public policy' (in the sense here defined), all citizens in society were expected to live in accordance with Christian precepts.[1568] To do otherwise was to act *contra bonos mores*, as it was seen as being in the public interest that parishioners be morally upstanding and Christian.[1569] Thus, in recognition of the fact that Ulpian himself clearly did not intend to limit the general rule *nulla iniuria est quae in volentem fiat*,[1570] as subsequent jurists did,[1571] by reference to his maxim in *Digest* 9.2.13,[1572] it is submitted that the Roman-

[1566] *Iniuria*, as has been noted, served as a means of preserving public order and preventing the emergence of blood-feuds; there could be no cause for a feud – as there could be no contumelious insult – in circumstances in which an individual willingly submitted to death or injury: See Ch.3, *supra*.

[1567] In Scotland, the Commissary Courts (which succeeded the earlier consistorial 'Court of the Official' (see F. P. Walton, *Lord Hermand's Consistorial Decisions 1684-1777*, (Stair Society, 1940), p.xiii) 'protected most of those personalities rights which were recognised [until the Nineteenth century], other than those of bodily integrity and physical liberty': Blackie, *Unity in Diversity*, p.35. As Ollivant notes, 'a large proportion of official's court business had very little to do with what might be imagined to be the direct interests of the church': Simon Ollivant, *The Court of the Official in Pre-Reformation Scotland*, (Stair Society, 1982), p.4

[1568] This consistorial tradition was not confined to Continental Europe even in the early mediaeval period; the *curia* tradition of deliberation within the (Roman Catholic) Church, which evolved into the mediaeval and early modern consistorial courts, was familiar to England, as to elsewhere in Christendom: See Ollivant, *ibid*, pp.41-42

[1569] See the discussion in Thomas Green, *The Court of the Commissaries Of Edinburgh: Consistorial Law and Litigation 1559–1576*, [2010] University of Edinburgh PhD Thesis, pp.225-226

[1570] As Strauss observes 'clearly all that Ulpian wanted to convey was that a proprietary right could exist only in things outside the subject's body': See Strauss, *Consent*, fn.13

[1571] See the discussion *supra*.

[1572] Strauss, *Consent*, fn.13

Dutch jurists' use of this Pandect as a means for doing just that exemplifies the shifting nature of *boni mores* across different societies.[1573]

As the Ninteenth century writer Lecky notes, 'the wide divergence from the classical from the [Roman] Catholic [and, indeed, the Orthodox, Protestant and Presbyterian] conception of death appears very plainly in the attitude which each system adopted towards suicide'.[1574] Within the pre-Christian cultural milieu, suicide and self-harm were not expressly proscribed.[1575] Soldiers were not permitted to intentionally wound or kill themselves – such was tantamount to desertion[1576] – but a private citizen could, if they so desire, bring about their own death or self-harm (or consent to being bodily harmed by another).[1577] The Stoics, for their part, 'admitted that it would be wrong to commit suicide in cases where the act would be injurious to society',[1578] though the strongest advocates of this philosophy were – and remained – apologists for suicide.[1579] In light of the latter fact, the lack of any legal norm proscribing

[1573] It should here be noted that the following provides only a simplified snapshot; by its very nature, the conception of *boni mores* is liable to change rapidly within a generation, to say nothing of changes which might occur across multiple generations. The examples given demonstrate, simply, that at times conduct which is considered so *contra bonos mores* as to warrant proscription has been thought innocuous, or even laudable.

[1574] William E. H. Lecky, *History of European Morals from Augustus to Charlemagne*, Volume 1 (New York: D. Appleton and Co., 1876), p.223

[1575] In Roman law, the lawfulness of suicide was 'by no means accepted as an axiom', but 'generally the law recognised it as a right': *ibid*, pp.225, 230. To describe suicide as a 'right' is, at once, an anachronism as well as an overstatement, however the general point that – other than in express circumstances – suicide was not proscribed by Roman law holds. In the *Digest*, the jurists hold that the wills of *felones de se* remained valid unless arraigned or caught red-handed in the commission of a crime (Dig. 48.21.3 (Marcian)) and the position of Roman law appears to have correlated with the view of the stoics that *'si quis impatientia doloris, aut taedio vitae, aut morbo, aut furore, aut pudore, mori maluit, non animadvertatur in eum'* ('if anyone, impatient with grief or boredom with life or disease, or madness, or shame, prefers to die, no judgement should be passed on them'): See Dig. 49.16.6.7 (Menenius) and Blackstone's comments pertaining to this Pandect (Blackstone, *Commentaries*, IV, 189

[1576] Lecky, *ibid*., p.230

[1577] On grounds of the maxim *nulla iniuria est quae in volentem fiat*: Dig.47.10.1.5 (Ulpian)

[1578] Lecky, *History*, p.225, fn.3; such, of course, correlates with the fact that suicide might be proscribed when, on this analysis, it might be deemed *contra bonos mores* (see, e.g., Dig.48.16.3pr. (Marcian))

[1579] See Seneca, *Epistulae Morales Ad Lucilium* Liber VII, Epistle LXX.15: *'placet vive non placet licet eo reverti unde venisti'* ('live, if you wish; if not, you may return to the place whence you came').

suicide in all but limited circumstances is to be expected; 'when a society once learns to tolerate suicide, the deed, in ceasing to be disgraceful, loses much of its actual criminality'.[1580]

Judeo-Christian ethics, in stark contrast to stoicism, expressly forbade suicide and circumscribed self-harm.[1581] Nevertheless, the Stoic acceptance that suicide *may* be deemed wrongful if it proves injurious to the community was accepted and expanded so as to include *all* circumstances by Aquinas.[1582] In justifying the proscription of suicide and self-harm, Aquinas expressed the view that such conduct was wrong *'quia per hoc fit iniuria communitati, cuius est ipse homo et omnes partes eius'* ('because this would involve an injury to the community, to whom the man and all his parts belong').[1583] Against this background,[1584] the converse of Lecky's observation holds true: In condemning suicide, it is to be expected that judicial and juristic attitudes would develop (as they did) in such a way so as to hold that deliberate acts of self-harm were *contra bonos mores*: Even English law, with its different legal tradition, conceived of self-injury as a public wrong on the grounds that one who commits suicide 'is guilty of a double offence; one spiritual, in invading the prerogative of the Almighty… the other temporal, against the King, who hath an interest in the preservation of all his subjects'.[1585]

Insofar as the criminal law is concerned, in the Anglo-American legal tradition, as in the Civil law and in mixed jurisprudence, it seems that the standard of *boni mores* – or 'the

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[1580] Lecky, *History*, p.226

[1581] An early Christian Father, Origen, was condemned and sentenced to be deprived of his Order for self-castration in 230: See William Smith and Samuel Cheetham, *Encyclopaedic Dictionary of Christian Antiquities*, Vol. I, (New Dehli: Logos Press, 2005), pp.243; see also p.244 of the discussion in that text.

[1582] Alfred J. Freddoso, *New English Translation of St. Thomas Aquinas's Summa Theologiae (Summa Theologica)*, accessible at https://www3.nd.edu/~afreddos/summa-translation/TOC.htm (updated January 10, 2018, accessed 25/05/2020), Book 2, Part 2, Question 65.

[1583] *Ibid*.

[1584] Mackenzie, for his part, justifies the proscription of self-murder on the grounds that a man's limbs do not belong to him, and considers that 'he who kills himself, kills God's subject… The law likewise considers him who would kill himself, as one who would spare none else, and condemns an humour which is so dangerous': Mackenzie, *Matters Criminal*, p.146

[1585] William Blackstone, *Commentaries*, IV, 189

public interest' – is pertinent to cases of bodily 'injury' (in the sense of 'wounds' or *damnum*).[1586] At first sight, it is not clear why this should be so; the legal action to repair bodily injury is, in civil and criminal English law, rooted in the taxonomy of 'trespass', rather than *iniuria*.[1587] In any case of trespass, whether to land, or to chattels or to persons, consent ostensibly negates the occurrence of the tort since, in the presence of consent, there is no transgression of the subject's person or property.[1588] This notwithstanding, there have been occasions on which the English courts have refused to uphold 'consent' as a defence to bodily injury.[1589] Thus, even in the Common law tradition, there are clear limits to the curative property of consent insofar as trespass is concerned.[1590] Other than in 'exceptional circumstances',[1591] one cannot consent to serious bodily injury,[1592] nor to conduct deemed injurious to the public as well as to the person,[1593] nor to conduct which is tantamount to a breach of the peace.[1594] The metric which has been invoked, in case law, to determine the acceptability (or otherwise) of acts causing bodily wounds is that of the 'public interest' or 'public policy'.[1595]

[1586] Strauss, *Consent,* p.182

[1587] At common law, in any case – see Graham McBain, *Modernising the Common Law Offences of Assault and Battery*, [2015] International Law Research 39, fn.2. There now exist numerous statutes which proscribe 'offences against the person', such as the eponymous Act of 1861.

[1588] Lord Hailsham, *Halsbury's Laws of England,* (4th Ed.) (London: Butterworths, 1985), para.1312

[1589] See *R v Brown* [1993] UKHL 19;

[1590] The justification for the penalisation for such conduct correlates with that present in the Civil tradition; as Smith and Hogan observe, as a matter of military law 'maiming, even with consent, was unlawful because it deprived the king of a fighting man: See John C. Smith and Brian Hogan, *Criminal Law*, (1st edn) (London: Butterworths, 1965), p.268

[1591] See Rachel Clement, *Consent to Body Modification in Criminal Law*, [2018] Cambridge Law Journal 451, p.452

[1592] *R v Brown* [1994] 1 A.C. 212; *R v BM* [2019] Q.B. 1

[1593] *State v. Chicorelli*, 129 Conn. 601, 30 A.2d 544 (1943); Lord Devlin, *The Enforcement of Morals*, [1959] Proceedings of the British Academy 129, pp.133-34; see also the dissenting judgment of Lord Denning in *Bravery v. Bravery* [1954] 3 All E.R. 59

[1594] See *R v Coney*, *passim*.

[1595] Penney Lewis, *The Medical Exception*, [2012] Current Legal Problems 355, p.358

Whether in the Scottish, South African or English legal tradition, then, at first sight 'the term assault of itself involves the notion of want of consent. An assault with consent is not an assault at all'.[1596] On closer examination, however, it appears that the effect of consent as a means of precluding the occurrence of assault is altogether more limited than this observation suggests. The standard of *boni mores* – whether it goes by its Latin moniker or the English-language guise of either 'public policy' or the 'public interest' (both used in the sense of *legal* policy, *i.e.*, what the law holds to be 'right' in a particular case) – may serve to limit the curative potential of 'consent'.[1597] As indicated above, the Scottish courts have expressly made reference to the criterion of the 'public interest' in holding that an 'assault' (*i.e.*, an *iniuria*) may be committed even where the victim has consented;[1598] this is consistent with the Civil law tradition, in which injurious self-harm even by one's own hand might well be proscribed on similar policy grounds.[1599] Within the Common law tradition, the fact that the courts make recourse – expressly or otherwise – to the notion of *boni mores* as described by Strauss can be seen by contrasting two similar English cases: *R v Brown* and *R v Wilson*.[1600]

Both of these cases occurred in the mid-1990's. The former (*R v Brown*) concerned a group of men who were engaged in sadomasochistic homosexual relations with one another. The group were charged with, and convicted of, assault occasioning actual bodily harm; the fact that each of the men had expressly consented to said harm was not deemed to be a defence to the charge. The Appellate Committee of the House of Lords ultimately determined that 'it is not in the public interest that people should try to cause, or should cause, each other actual

[1596] *Coney*, p.553 *per* Hawkins J.; *Schloss v. Maguire* (1897) Q.C.R. 337, p.339; see also Maclean, *Autonomy*, para.11.10, wherein it is noted that 'although it probably makes very little difference in practice, it should be noted that, in principle, consent is not a defence' to assault.

[1597] See SALRC, *Discussion Paper 71: Project 86 Euthanasia and the Artificial Preservation of Life*, [1997], para.3.7

[1598] *Smart*, p.34

[1599] See John Blackie, *Doctrinal History of the Protection of Personality Rights in Europe in the Ius Commune: General Actions or Specific Actions?* [2009] EJCL Vol.13.1, fn.34

[1600] [1997] Q.B. 47

bodily harm for no good reason and that it is an assault if actual bodily harm is caused (except for good reason)'.[1601] In *R v Wilson*, however, actual bodily harm was occasioned, yet the consent of the 'so-called victim'[1602] was deemed to negate the occurrence of assault. Like the men in *Brown*, the accused in *R v Wilson* was also charged with the crime of assault occasioning actual bodily harm. The charge arose after he and his wife engaged in a sadomasochistic sex act with one another, which resulted in her scarification. In this case, however, the fact that Wilson's wife had consented to the act was a full defence to the charge, since it was held to be 'not in the public interest that activities such as the appellant's in this appeal should amount to criminal behaviour'.[1603]

That the courts in each of these cases were guided by the standard of *boni mores* is readily apparent; indeed, reference is made throughout both cases to considerations of the 'public interest'. Lord Mustill, who gave a dissenting judgment in *Brown*, dissented on the grounds that 'the activity is not itself so much against the public interest that it ought to be declared criminal'.[1604] Lord Jauncey, in delivering a speech which aligned with the view of the majority, held by contrast that 'when considering the public interest potential for harm is just as relevant as actual harm'[1605] and that the court had to determine not only whether or not the defendants' conduct was injurious to the individuals wounded, but also to determine whether or not the conduct was 'injurious… to the public interest'.[1606] If, as Strauss contends, the concept of *boni mores*, in law, is akin to that of the 'public interest', it follows that the decision of the court in *Brown* ultimately turned on the question of whether or not the conduct of the

[1601] *Brown*, p.245 (*per* Lord Lowry)
[1602] In the words of the court: See *Wilson*, p.48, *per* Russell LJ.
[1603] *Ibid*., p.50
[1604] *Brown*, p.275
[1605] *Ibid*., p.246
[1606] *Ibid*., p.246

men in question was so to be deemed so (objectively) wrongful as to be deemed *contra bonos mores* and thus unlawful.

A 2001 study by Brants supports this assertion: As indicated by Professor Brants in that piece, the decision in *Wilson* clearly 'reveals that the infliction of pain or even actual bodily harm, [was] not the issue at stake [in *Brown*]'.[1607] Such can evidently be established by the fact that, unlike the men in *Brown*, who did not require medical attention as a result of their sadomasochistic acts,[1608] Mrs. Wilson did need to see a doctor as a result of the bodily wounds that she suffered.[1609] Though Mrs. Wilson appears, then, to have suffered a greater degree of bodily harm than the men in *Brown*, and though the prosecution of Mr. Wilson came after the clear and authoritative (if not uncontroversial) decision of the House of Lords in *Brown*, the Court of Appeal contrived[1610] to quash Wilson's conviction for purely policy reasons.[1611] *Brown* and *Wilson* may be distinguished from one another, but only in the sense that 'the difference is that these men [the men in *Brown*] were homosexuals, that there were more than two of them and that this conduct was therefore regarded as degrading, immoral, not in the public interest and the legitimate subject of prosecution',[1612] while in *Wilson* the conduct was between two heterosexual persons within the context of a married relationship. Unlike the relationship between the men in *Brown*, the relationship between husband and wife was

[1607] See the discussion in Chrisje Brants, *The State and the Nation's Bedrooms: The Fundamental Rights of Sexual Autonomy* in Peter Alldridge and Chrisje Brants (Eds.), *Personal Autonomy, the Private Sphere and Criminal Law: A Comparative Study* (Hart, 2001), p.134.

[1608] *Ibid.*, p.127

[1609] *Ibid.* p.134: Indeed, it was seemingly Mrs. Wilson's physician who alerted the police to the case.

[1610] As Roberts notes, 'from the first few lines of his short, three-page judgment… it is clear that his Lordship [Russell LJ] was minded to allow the appeal [in *Wilson*]': Paul Roberts, *Consent to Injury: How Far Can You Go?* [1997] LQR 27, p.28

[1611] Indeed, the Court expressed its view that 'had it been necessary for us to consider sentence we would have granted the appellant an absolute discharge', since it was 'firmly of the opinion that it is not in the public interest that activities such as the appellant's in this appeal should amount to criminal behaviour': *Wilson*, p.51

[1612] See the discussion in Brants, *Sexual Autonomy*, p.134

deemed to merit protection from State interference; if anything, it seems that the Court considered it to be *contra bonos mores* for the State to seek to meddle in this relationship.[1613]

While the metric of *boni mores* can said to be central to the decision-making process in claims of both *iniuria* and trespass, 'consent', in situations in which conduct which is explicitly *contra bonos mores* is absent, is thus a relevant consideration only insofar as individual autonomy is respected within the particular society in question. 'In a society where the freedom of the individual is esteemed highly, he will be accorded a greater measure of autonomy in waiving his interests';[1614] by contrast, in a paternalistic (or puritanical) society, a greater amount of private conduct will be deemed injurious to the public and so an individual will have less scope to consent to conduct which is socially disapproved of. The corollary of this is the fact that within the former society, slightly invasive conduct which occurs in the absence of consent is more likely to be considered *contra bonos mores*, while in the latter, since the rights of the individual are of limited consequence, a minor invasion of a particular personality interest, in the absence of consent, would likely be deemed *de minimis*. In any case, the ultimate outcome of the particular instance will depend on the attitudes of the decision-maker and the balancing act between individual and the 'public' interest.

Due to the enactment of the Human Rights Act 1998 throughout the United Kingdom, there has been a judicial recognition of the fact that in any discourse concerning the human body, 'the starting point… has to be the right of all human beings, male and female, to decide what shall be done with their own bodies'.[1615] This notwithstanding, in 2018 the Court of

[1613] *Ibid*.

[1614] Strauss, *Consent*, p.183

[1615] *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27, para.6. Prior to the sea-change marked by the case of *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, the law of Scotland tended to give precedence to the views of physicials over those of the persons treated by them, as discussed by Meyers – David W. Meyers, *T.B Smith: A Pioneer of Modern Medical Jurisprudence* in Elspeth C. Reid and David L. Carey Miller, *A Mixed Legal System in Transition: T. B. Smith and the Progress of Scots Law*, (Edinburgh: EUP, 2005), p.208 – and incidated by the decision in *Moyes v Lothian Health Board* 1990 SLT 444, at 449 (*per* Lord Caplan).

Appeal – in suggesting that bodily modification procedures such as tongue-splitting are 'incomprehensible to most'[1616] – upheld the conviction of a man who had (*inter alia*) 'carried out body modifications on his customers, including the removal of a customer's ear, the removal of a customer's nipple and the division of a customer's tongue to produce an effect similar to that enjoyed by reptiles'. Ultimately, in a *per curiam* judgment, it was held that 'the personal autonomy of his customers does not provide the defendant with a justification for removing body modification from the ambit of the law of assault'.[1617] Very limited consideration was given to *Wilson* (considerably more was given to *Brown*); it was simply noted that it had previously been held that 'consensual activity between husband and wife in the matrimonial home was not a matter for criminal investigation and prosecution'.[1618]

As Clement demonstrated soon after the decision in *R v BM*, the reasoning of the Court of Appeal in that case is not consistent with the law as earlier stated in *Brown* and *Wilson*.[1619] Indeed, the court's treatment of the latter case is described as 'misleading',[1620] for if its interpretation of this judgment were to be accepted, it would follow that "branding", at least, is lawful when it is performed between a married couple in the privacy of their own home, but not when performed by a registered tattoo or piercing artist in studio. Clearly this is not correct: if branding and, arguably, scarification is lawful in private, it must be so in the studio'.[1621]

This state of affairs is not, as Clement suggests, 'inconsistent', however, and it is far from clear why conduct which is considered lawful if done in private must also be thought lawful when done in public. If, as is argued here, the standard used to decide the lawfulness or otherwise of certain conduct is the judicial notion of *boni mores*, or 'public policy', then the

[1616] *R v BM*, para.43
[1617] *Ibid*., para.44
[1618] *Ibid*., para.33
[1619] Clement, *Consent*, *passim*.
[1620] *Ibid*., p.453
[1621] *Ibid*., p.454

judiciary have a wide discretion in determining what conduct is to be deemed criminal in the eyes of society. Branding of an unmarried woman by her lover in private may be deemed criminal, while (as indicated by *Wilson*) branding of a wife by her husband may be thought unobjectionable. Such does not imply inconsistency in the law, simply that there is an element of arbitrariness built-in to the judicial standards for the determination of criminal conduct. Indeed, such was implicitly recognised by the Court of Appeal in *BM*, which regarded that this very fact is problematic, stating that 'the criminal trial process is inapt to enable a wide ranging inquiry into the underlying policy issues' and suggesting that such issues 'are much better explored in the political environment'.[1622]

Thus, though the law relating to assault developed, in the Anglo-American legal tradition, from the law of 'trespass' rather than *iniuria*, it appears that the standard of *boni mores* – Anglicised as 'public policy' or the 'public interest' – operates within English law in respect of cases of bodily injury, just as it does in South Africa. There is consequently some cross-jurisdictional commonality as regards the metric, and method of reasoning, which is to be used in determining whether or not certain conduct must be held to be objectively wrongful or not;[1623] indeed, although 'dignity' is not an expressly protected interest in the Common law tradition, Common law courts continue to – on occasion – employ *iniuria*-like terms in dealing with cases in which the standard of *boni mores* is explicitly and offensively transgressed. Such can be seen in the Ohio Court of Appeals case of *Leichtman v WLW Jacor Communications Inc*., in which it was held that the blowing of smoke into the face of an anti-smoking activist

[1622] *BM*, para.41

[1623] Indeed, in *Brown*, reference is made to the Southern Rhodesian case of *R v McCoy* 1953 (2) S.A. 4. English law and South African law consequently coincide (insofar as reasoning – not outcome – is concerned) in respect of this matter. The 'legal history of Zimbabwe, although unique and independent, is interconnected and interrelated to the history of South Africa's legal developments… Zimbabwe relied on precedents of South African origin' and 'the common law of Zimbabwe is primarily the Roman-Dutch Law as applied at the Cape of Good Hope': See Otto Saki and Tatenda Chiware, *The Law in Zimbabwe*, [2007] Hauser Global Law School Program accessible at https://www.nyulawglobal.org/globalex/Zimbabwe1.html

could be actionable as battery since 'the gesture was designed to insult… and was therefore offensive to a reasonable sense of personal dignity'.[1624]

In line with the claim that the law proscribing bodily injury – whether rooted in the tradition of trespass or of *iniuria* – seeks to proscribe conduct which is *contra bonos mores*, that which is 'offensive to the feelings of a reasonable person' may be understood as conduct which transgresses the *mores* of any given society as determined by a judicial authority figure. Any conduct perceived (in accordance with the *mores* of the decision-maker) to be sufficiently contumelious might be naturally regarded as *contra bonos mores*, while even conduct which is not effected with any express hubristic design to insult or affront a particular person might be proscribed if it is deemed sufficiently 'injurious to society' (and so *contra bonos mores*). Thus, although *iniuria* was never received into Anglo-American law, it appears that the judiciary in the Common law world nevertheless employ a process of legal reasoning which is akin to that employed by South African judges in cases of *iniuria*.

Since 'dignity' is a nominate interest which is expressly protected under the umbrella of *iniuria* however, it is readily apparent that South African law possesses greater potential to protect purely dignitary interests than does English law.[1625] As in Scotland,[1626] the concept of 'trespass', in its sense as a term of art, was not received into South African jurisprudence.[1627] In the 1979 case of *Hefer v Van Greuning*,[1628] the Appellate Division (now the Supreme Court of Appeal of South Africa) held that the introduction of the English conception of 'trespass'

[1624] *Leichtman v WLW Jacor Communications Inc* 92 Ohio App.3d 232, p.235

[1625] Though, as has been noted at intervals throughout this thesis, the courts in Common law jurisdictions have, at times, sought to protect dignitary interests, it remains the case that 'whatever common law protection of dignity there is depends on the expansive, judicial interpretation of existing torts or, in the case of the United States, constitutional interpretation': See Burchell, *Personality Rights*, p.650

[1626] Blackie, *The Protection of Corpus*, p.159

[1627] See Erasmus, *Law and Procedure*, pp.153-154

[1628] 1979 (4) SA 952 (A)

was neither desirable nor appropriate.[1629] The South African conception of 'assault' remains as distinct from the English conception as does the Scots; in neither Scotland nor South Africa is any distinction now drawn between 'assault' and 'battery'.[1630]

Within the civil and criminal sphere, then, the Roman *actio iniuriarum* remains, in South Africa, a 'legal ancestor' of the crimes and delicts of assault, defamation and *crimen injuria* (*inter alia*). Each of these forms of wrongdoing consequently pertain, on the face of it, to a person's 'dignity' in the sense of *existimatio*, since any attack on an individual's *corpus*, *fama* or *dignitas* injures this high-level interest.[1631] In determining whether or not a specific personality interest – whether it be in the body, or in privacy, or in 'dignity' in its indeterminate sense as a catch-all term[1632] – has been affronted, reference must be made – expressly or implicitly – to the standard of *boni mores*. Actionable wrongdoing is thus limited (in cases where there has been subjective affront) or expanded (in cases where there has been no subjective affront) to those instances in which the act complained of (either by private party of prosecutor) is 'perceived (at least by the judiciary) to involve objectively unreasonable conduct'.[1633]

Within modern legal systems, whether drawing from the Common, Civil, or mixed jurisprudence, the concept of 'good morals', which remains an essentially legal criterion akin to the notion of 'public policy' or 'the public interest',[1634] is said to serve as a check on overly subjective decision making.[1635] That it does serve as such might be doubted, considering the contrasting decisions of cases such as *Brown* and *Wilson*, and indeed the criticism levied

[1629] *Ibid*., p.960F

[1630] See Shannon V. Hoctor, *Criminal Law in South Africa*, (Kluwer Law, 2017), paras.284-287

[1631] See Ch.3, *supra*.

[1632] That is, as *dignitas* in the sense of a 'collective term for all personality rights': See Neethling, *Delict*, (4th Edn.), p.14

[1633] Burchell, *Protecting Dignity*, p.261

[1634] Strauss, *Consent*, p.183

[1635] *Ibid*.

towards the *status quo* by the Court of Appeal in *BM*.[1636] Writing before these decisions, however, Strauss does make the case that 'the standard of *boni mores* serves as a constant reminder to the courts that the arbitrary, subjective judgment of a judge or a jury may not be the decisive factor';[1637] at the very least, the courts are obliged to find some reason to hold certain conduct to be contrary to the public interest and so unlawful.

For there to be an actionable *iniuria* in the law of South Africa, then, a plaintiff of prosecutor must establish firstly that the wrongdoer behaved contumeliously towards the 'victim' in committing a wrongful act. In practice, in line with the above analysis, this means that it must be shown that the defender engaged in conduct which was sufficiently contumelious, by an objective metric, to render the act in question *contra bonos mores* and that the act itself was so objectively unwarranted as to be itself *contra bonos mores*. The concept of *contumelia*, then, is not demonstrated by analysing the mind-state of the wrongdoer; thus, to state that *animus iniuriandi* is a prerequisite of *iniuria*[1638] is indeed an 'ahistorical generalisation', as claimed by Zimmermann.[1639] The intention of a wrongdoer may be relevant in determining whether or not the act was contumelious, but it is not conclusive of that fact;[1640] as demonstrated, even where the design of the 'wrongdoer' is not to insult or affront, but to gratify, the 'victim', the actions of said 'wrongdoer' may be deemed criminal.

This analysis is relevant to the law of Scotland. In the 2006 case of *Stevens v Yorkhill NHS Trust*, the Court of Session expressly held that Scots law continued to recognise the *actio*

[1636] *R v BM*, para.41

[1637] Strauss, *Consent*, p.183

[1638] See the discussion in Ch.3, *supra*.

[1639] Zimmermann, *Obligations*, pp.1059-1061

[1640] As a matter of criminal law in South Africa, *animus iniuriandi* evidently exists as the *mens rea* of *crimen injuria*, but such does not indicate that the crime is one of 'intention' in the ordinary sense. Rather, as a *mens rea* requirement, it simply necessitates that the purported wrongdoer have the requisite criminal capacity to, as a matter of law, appreciate the wrongfulness of their actions: 'Knowledge (or at least foresight) of unlawfulness is, according to general principles, a part of intention'; see Burchell, *Protecting Dignity*, p.261. In line with the maxim *ignorantia iuris non excusat*, one who intends to inflight something which is objectively injurious cannot be excused by a claim that the wrongdoer did not know, at the time of the act, that the action was proscribed by law.

iniuriarum in its Roman sense and that the facts of that case amounted to an *iniuria* in that sense.[1641] In coming to this decision, the court drew upon Professor D. M. Walker's treatise on the law of delict,[1642] in which Walker had expressed, with little justification, the view that, though it may be inferred that the action in Twentieth century case of *Pollok v Workman*[1643] had proceeded upon the basis of assythment,[1644] 'this right of action could equally, or better, be sustained on the ground that this is an actio injuriarum, for affront, shock and hurt feelings to the surviving relatives'.[1645] Walker's argument, advanced by the pursuer's counsel in *Stevens*, evidently convinced Macaulay QC, who ruled that he was 'bound to say that this does appear to be the better explanation for the basis of that decision'.[1646] Macaulay QC noted that, in deciding *Pollok,* Lord Kyllachy emphasised the injury to the pursuer's feelings, indicating a connection to the *actio iniuriarum*.[1647] This, combined with the fact that by the time of the *Pollok* judgment, the action of assythment had been described as no more than a 'worn-out analogy',[1648] led the court in *Stevens* to hold that 'the underlying legal basis of the pursuer's claim in *Pollok v Workman* lay in the *actio injuriarum'*.[1649]

Whatever was the case in *Pollok* though, there is little to suggest, in the facts of *Stevens*, that the defenders had in any sense intended to contumeliously affront the pursuer. In other words, there was no suggestion that the defenders had demonstrated the requisite 'intention',[1650] which is said to be at the core of the concept of *animus iniuriandi*,[1651] which is

[1641] At para.34
[1642] Walker, *Delict*, p.671
[1643] (1900) SLT 338 (IH, (2 Div.))
[1644] An action since abolished by s.8 of the Damages (Scotland) Act 1976.
[1645] Walker, *Delict*, p.671
[1646] *Stevens*, para.34
[1647] *Ibid*.
[1648] *Per* Lord Watson in *Darling v Gray and Sons* [1892] A.C. 576, p.581
[1649] *Stevens*, para.34
[1650] In this case, to harm the family's interests in the body of the deceased child.
[1651] *'Animus iniuriandi'* ordinarily being interpreted as 'intention to injure'.

ordinarily said to be a prerequisite for proof of *iniuria*. The case had arose after an infant child, who had died as a result of the authorised withdrawal of life-support, was subjected to an authorised post-mortem. In the course of this post-mortem, the child's brain was removed without the knowledge or consent of the mother. The body of the child – which was 'still wearing the bonnet' that the mother had placed on the baby's head immediately after the child's death[1652] – was returned to the pursuer and buried near her home, with no mention having been made of the removal or retention of any of the child's organs. The mother was later notified that the child's brain had been removed and retained and, as a result of the discovery of this information, 'was horrified, distressed and shocked'.[1653] In addition to a claim predicated upon the law pertaining to negligence, the pursuer averred that 'the removal and retention of body parts… were acts which were unlawful in the absence of consent of the pursuer'.[1654]

There was no suggestion or indication that the physicians who had removed and retained the child's brain had intentionally sought to cause affront or injury to the pursuer; nevertheless, the conduct of the physicians was deemed to be actionable as *iniuria*. The rationale for this decision is consistent with the analysis of *iniuria* given above. Within a schema of medical law which regards patient autonomy as 'being sovereign among the ethical principles governing medical practice',[1655] it follows that the actions of physicians, if not conducted with the express consent of all relevant parties,[1656] will be deemed *contra bonos mores* and so injurious to those patients. The act of removing an organ from a dead body is

[1652] *Stevens*, para.5

[1653] *Ibid*., para.6

[1654] *Ibid*., para.8

[1655] Veronica English, Rebecca Mussell, Julian Sheather and Ann Sommerville, *Autonomy and its Limits: What Place for Public Good?* in Sheila McLean, *First Do No Harm: Law, Ethics and Healthcare,* (Aldershot: Ashgate, 2006), p.117

[1656] Although 'the doctrine of "informed consent" [in the sense in which it has been employed in American jurisprudence] has not found its way into Scots law', it is clear that the Scottish courts consider that the patient must be provided with sufficient knowledge of the process to give true consent. In *Stevens,* for instance, it was relevant that 'Dr Haddock… did not tell Ms McDonald [the pursuer] that the post mortem would involve the removal of organs or the retention of organs' was certainly relevant to the decision: See *Stevens,* paras.8, 82

(*prima facie*) objectively wrongful and, ergo, *contra bonos mores* in the absence of some good reason (that is, a curative factor, with 'consent' being but one among many potential such curatives).[1657] Thus, since the actions of the defenders in *Stevens* were doubly unreasonable in the eyes of the court (and the pursuer felt sufficient subjective affront as to raise a civil action) it followed from those facts that the physicians' acts were injurious (in the sense of the nominate delict).

On the basis of the above, it is thus submitted that Scots law can inform its concept of *iniuria* by means of South African jurisprudence and comparative scholarship. Although it might be contended that the lessons which might be drawn from South Africa are limited, since that jurisdiction knows of a concept of *crimen injuria* which has been excised from Scots law and has developed, as a result of its Constitution, a notion of 'dignity' that is ultimately distinct from that which emerged from the *ius commune* alone, these objections are not fatal to the claim that lessons might be learned from this jurisdiction. The notion of *iniuria*, in South Africa, is the same whether one is concerned with the civil action or the criminal. As has been demonstrated, the metric of *boni mores* which is employed in cases of *iniuria* is analogous to the concept of the 'public interest' which has been employed in Scots law and in the Anglo-American legal tradition alike. Thus, it is submitted that South African jurisprudence concerning *iniuria* can evidently serve to inform the Scottish courts, should they choose to make use of such material.

4.2.3 *Crimen Injuria* and Cadavers

Unlike in Scotland, wherein the criminal law's connection to the nominate crime/delict of *iniuria* atrophied and the concept of 'real injury' which subsists in the Twenty-First century

[1657] Although 'consent' may be the most significant (potential) curative in our current cultural milieu, others may exist – a physician who acts in the 'best interests' of an unconscious or incapable patient will also not be deemed to act *contra bonos mores*, even if they have not obtained the consent of their patient: J. Kenyon Mason and Graeme Laurie, *Mason and McCall Smith's Law and Medical Ethics*, (11th Ed.) (Oxford: OUP, 2019) para.9.02

looks little like the early modern conception of *iniuria realis*,[1658] the South African crime *and* delict of *iniuria* remains distinctly and notably Roman (or at least Roman-Dutch) in character. The mistreatment of cadavers can clearly amount to *crimen injuria* (and so, by association, an *actio iniuriarum* in civil law). This is demonstrated by the cases of *R v Letoka*[1659] and *R v Sephuma*.[1660] The former concerned the violation of a number of graves and the mutilation[1661] of the corpses therein. In deciding the case, van den Heever J noted that interference with a corpse was of itself an abomination and a wholly separate matter from the crime of grave-violation[1662] (that is, violation of sepulchres).[1663] The crime of violation of sepulchres was manifestly concerned with the protection of the grave-site as a *locus religiosus*;[1664] to do as little as 'dividing the ground' in which the body lies at rest is to commit the crime.[1665] Conversely, it follows that, should the body be unburied prior to mutilation, one who effects disgrace upon a corpse will not commit this offence, yet even in the absence of any wrongdoing in respect of the body itself, the crime of violation of graves (or sepulchres) will be committed by the act of interfering with the grave-site alone.[1666]

The latter case, *Sephuma*, shared similar facts to those in *Letoka*, yet although the crime of violation a grave was held to have been committed here as well, Price J went further in his condemnation of the accused's conduct, perhaps because of the fact that it had been the duty

[1658] Though the connection nevertheless remains: See the discussion in para.3.3.1, *supra*.

[1659] 1947 3 SA 713 (O)

[1660] 1948 3 SA 982 (T)

[1661] In the ordinary sense of that term; the court in *Letoka* used the language of 'mutilation', though not, seemingly, in the peculiar sense that the term possessed in Scots law.

[1662] *Letoka*, p.715

[1663] The crime was, here, thought to have been received from Roman into South African law, although (*per Cape Town and District Waterworks v Executor of Elders* 1890 8 SC 9) South Africa did not recognise *res religiosae* as a concept by this time.

[1664] Recall para.1.4.2, *supra*.

[1665] *Letoka*, p.716

[1666] *Ibid*., p.717

of the accused, in this case, to safeguard the cemetery.[1667] Though Price J noted the absence of 'criminal' intent,[1668] the accused's actions in breaking into a grave and severing a portion of an infant's face (to make 'medicine') was 'a gross outrage to the feelings and sensibilities of the relatives of the child.' It followed that '[the accused] must be punished accordingly and made to understand that decent people look upon this sort of conduct with horror and detestation.'[1669]

Formally, being that the accused had clearly committed a nominate crime in violating the grave, and the later mutilation of the body was not a feature of this crime, there was no reason for Price J to go so far in his condemnation of the accused's conduct, nor to raise the matter of the *dignitas* of the deceased infant's relatives. That he elected to do so, however, demonstrates that the conduct complained of in this case was closer in nature to a *crimen injuria* than to a *crimen violati sepulcri*. The jurist Johannes Voet[1670] had distinguished the violation of graves from the violation of corpses[1671] and had clearly treated the latter as a species of *iniuria*;[1672] the former was in Roman law (and remains in Scots law) distinctly a proprietary crime,[1673] albeit a crime committed in respect of a particularly special kind of property (a *res divini iuris*).[1674] This was recognised by the court in the 1951 case of *Dibley v Furter*,[1675] which

[1667] See *Sephuma*, p.383: Price J noted (in referring to *Letoka*) that 'it seems to me that such a sentence is too mild, more particularly in this case where it was one of the accused's duties to look after the cemetery and to preserve it from desecration, which duty he shamelessly betrayed and became himself the desecrator'.

[1668] The motivation lying behind the commission of this crime was superstition, which is a recognised defence in some situations, but certainly not one of this kind: See the discussion in *S v Simbande* 1975 (1) SA 966 (RA)

[1669] *Sephuma*, p.383

[1670] Johannes Voet (1647-1713) was a Dutch jurist and the son of Paul Voet (1619-1677), who was also a jurist. Johannes Voet was the author of, *inter alia*, the authoritative *Commentary on the Pandects* cited below: See Wessels, *History*, p.320

[1671] Johannis Voet, *Commentarius ad Pandectas*, (Parisiis: Apud Gauthier Fratres, 1829), 47, 10, 5 (see, also, Melius de Villiers (trs.), *Translation of Voet's Commentary on the Pandects: Book 47, Title 10 (De Injuriis et Famosi Libellis) with Annotations and Excursus*, s.5, pp.62-64)

[1672] *Ibid*., p.63

[1673] In the words of Thomas, *'violatio sepulchri* concerned only objects – materials, stones, ornaments. From this perspective, to exhume the body was to put the tomb itself to death': See Yan Thomas, *Res Religiosae: on the Categories of Religion and Commerce in Roman Law*, in Alan Pottage and Martha Mundy, *Law, Anthropology and the Constitution of the Social: Making Persons and Things*, (CUP, 2004), p.63

[1674] See Brown, *Res Religiosae*, p.361

[1675] 1951 (4) SA 73 (C)

unequivocally held that both *Letoka* and *Sephuma* were wrongly decided on the grounds that 'the violation of graves is no longer a crime because the *actio sepulchri violati* is inextricably bound up with the idea that graves are *res religiosae,* which is no longer applicable in our [South African] law'.[1676]

To say that *Letoka* and *Sephuma* were 'wrongly decided' is to put the matter too strongly, however. In a 2007 article, Christison and Hoctor elucidated a convincing argument that *Sephuma,* in particular, was correctly decided in principle, even if the substance of the law expressed therein was somewhat erroneous.[1677] The Roman-derived crime of violation of graves or sepulchres is not now known to South African law,[1678] but the crime of violation of a corpse was held to be so in 1991[1679] and the existence of such is predicated on the basis of the *crimen injuria*.[1680] That Price J made reference to the affront effected to the family of the deceased is said to indicate the fact that the general criminalisation of interference with dead bodies in South Africa may be understood as such 'clothed' 'in a manner that is compatible with [South African] law's present conception of legal personality'.[1681]

In deciding the case of *S v Coetzee*, Roos J endorsed the *dicta* of Price J and held that 'cutting into a dead body is prima facie an improper or indecent interference or an indignity'[1682] and that such must be regarded as criminal in the absence of justification.[1683] Such was regarded as an authoritative statement of the law in the 2015 case of *S v Chimboza*,[1684] wherein it was stated that the accused could have been charged with the crime of violation of a corpse (though

[1676] 1951 (4) SA 73 (C), p.74
[1677] Christison and Hoctor, *Criminalisation,* pp.35-36
[1678] *Dibley v Furter* 1951 (4) SA 73 (C), p.74
[1679] See *S v Coetzee en 'n Ander* 1993 2 SACR 191 (T)
[1680] Christison and Hoctor, *Criminalisation,* pp.35-36
[1681] *Ibid*., p.36
[1682] *Coetzee,* pp.194-195
[1683] *Ibid*., p.195
[1684] 2015 ZAWCHC 47

he was not) for the act of removing the victim's heart and eating it after he had stabbed the victim to death.[1685] Binns-Ward J indicated that the prosecution had erred in regarding the potential pursuit of this competent and separate charge as an 'improper splitting of charges',[1686] and that the conduct in question would ordinarily merit a harsher sentence, but that ultimately 'it would not be appropriate in the circumstances to apply the facts related to an offence of which the accused has not been convicted to justify a heavier sentence in respect of the offence of which he has been convicted'.[1687]

Given that modern South African criminal law has a specific mechanism designed to ensure the protection of dignity, it appears plain – and is submitted – that this mechanism can, and ought to be, used in instances in which dead bodies or human body parts are intentionally abused. Christison and Hoctor's conclusion that 'society as a whole has an interest in the preservation of dead persons' dignity and the state a role as the custodian of this right'[1688] appears, then, to align with the practice of the South African courts. Indeed, as might be inferred from Mitchell J's observation that, even when it is open to a court to rule that some technical lesser nominate wrong has been committed, 'the real and substantial wrong [in cases concerning the abuse of cadavers is] the indignity to the dead',[1689] it would appear that the practice of the South African courts aligns 'with everyone's common sense'.[1690]

In light of this, the absence of a comparator to the South African *crimen injuria*, in Scots law, appears to be remiss. The declaratory power of the High Court has the potential to

[1685] *Ibid*., para.14
[1686] *Ibid*., fn.1
[1687] *Ibid*., para.14
[1688] Christison and Hoctor, *Criminalisation*, pp.35-36
[1689] *Larson*, p.312
[1690] See the discussion in para.3.1.2, *supra*.

fill this gap;[1691] indeed, the 'flexibility' or 'adaptability' of Scots criminal law – understood as the ability to respond to 'changing needs of the community as they arise'[1692] (or, at least, 'judicial perceptions of contemporary social attitudes')[1693] – has long been commended by Scots lawyers. Accordingly, due to the institutional connection to the crime/delict of *iniuria*, it might be suggested that the recognition of a truly flexible criminal action akin to the South African *crimen injuria* is not only desirable, but remains possible in modern Scotland. If faced with a case involving conduct such as that which occurred in *Letoka*, *Sephuma*, *Coetzee* and *Chimboza*, it might be thought open to the courts, at common law, to develop a means of preserving society's interest in preserving the dignity of the dead.

Of course, in making this suggestion, one must be way of Sir Gerald Gordon's caution that it follows from 'application of *nullum crimen* [that is, the maxim *nullum crimen sine lege*] that it is important to divide the criminal law into specific disparate offences, and that it is a breach of the principle to create a situation in which conduct which does not fit into any clearly defined crime can be gathered into a general ragbag'.[1694] Presently, the South African *crimen injuria* (like the *actio iniuriarum* in South African, Roman and Scots civil law) exists as such as 'general ragbag'. Though the flexibility of the concept of *iniuria* is commendable within the context of the civil law, in recognition of Stair's observation that there be innumerable such acts which the malice and cruelty of men can invent',[1695] in criminal law the stakes are necessarily higher and the State, rather than the individual who directly suffers the wrong, holds the primary interest in proceedings. It might be thought that if the State has not seen fit to

[1691] In this instance, given the existence of prior authority (see the discussion in Ch.3), the High Court could potentially deign to declare interference with a dead body to be criminal as some form of nominate 'injury': See the discussion in Kennedy, *Declaring Crimes*, pp.765-769

[1692] *Ibid*., p.742

[1693] Lindsay Farmer, *The Genius of our Law . . .': Criminal Law and the Scottish Legal Tradition*, [1992] Modern Law Review 25, p.25

[1694] Sir Gerald H. Gordon, *Crimes without Laws*, [1966] Jur. Rev. 214, p.216

[1695] Stair, *Institutions*, IV, 40, 26

expressly legislate to prohibit particular conduct, having had ample opportunity to do so, the State cannot claim to be affronted when such conduct occurs.

With that said, in any jurisdiction which does not base its criminal law fundamentally on a Code, there must be some scope for the development and evolution of common law crimes. Such is acknowledged by Gordon, who nevertheless contends that 'we have surely now reached a stage at which Parliament is sufficiently respectable and the common law sufficiently formed, for there to be no longer any need for the judicial creation of crimes'.[1696] As MacCormick notes, however, 'to regard legislation as *par excellence* the source of valid law is a distinctively modern view'.[1697] Stair, for his part, noted that 'the nations are more happy whose laws have been entered by long custom… in statutes the lawgiver must at once balance the conveniences and inconveniences; wherein he may and often doth fall short'.[1698] MacCormick's wry observation that 'the more one looks at the statute book of the Twentieth century, the more, perhaps, one is inclined to see Stair's point'[1699] is – if anything – more relevant in the Twenty-First than it was at the time that it was penned. As Watney has observed, 'the existence of a common law offence [akin to *crimen injuria*]… enables a more supple approach than would be possible [in jurisdictions] where a casuistic approach through legislative intervention' has been employed.[1700]

Even if it is no longer possible (or, indeed, if it is not thought of as desirable) to develop a criminal law mechanism akin to *crimen injuria* in Scots criminal law, it is submitted that – since the civil and criminal conceptions of *iniuria* are identical in South African law – cases such as have been described in this section might prove instructive in Scottish civil cases.

[1696] Gordon, *Crimes without Laws*, p.217

[1697] Neil MacCormick, *Legal Reasoning and Legal Theory*, (Oxford: Clarendon, 1978), p.58

[1698] Stair, *Institutions*, 1.1.15

[1699] MacCormick, *Legal Reasoning*, p.59

[1700] Murdoch Watney, *Crimen Iniuria: Its Role Vis-à-Vis Sexual Offences Legislation*, [2017] TSAR 405, p.408

Following the decision in *Stevens*, it is open for the Scottish courts to hold that physical attacks directed at a cadaver (or, indeed, any other form of suitably contumelious affront directed towards a dead body) amount to actionable wrongs in civil law. In holding such, it should be open for the Scottish courts to consider cases such as *Letoka* and *Sephuma*, notwithstanding the presence of the crime of violation of sepulchres in this jurisdiction. With that said, however, although comparative consideration of this kind would be beneficial to Scottish jurisprudence, there exists little guidance in the South African case law to suggest what the juridical nature of the cadaver actually is. That is to say, in other words, that though *iniuria* is a delict which is designed to protect an individual legal person's non-patrimonial interests, it is not clear whether the cadaver which is subjected to maltreatment is regarded as a piece of property to which the affronted party holds a particular interest (whether proprietary or otherwise), or as a legal 'person' in its own right.

Although *prima facie* it might seem that the cadaver cannot possibly be 'property' on an *iniuria*-based analysis, it is clear that harm to a non-patrimonial interest might be effected by directing wrongdoing towards a person's property. In Roman law, beating another's slave, if done 'atrociously and manifestly in contempt of the owner',[1701] was *iniuria*.[1702] The slave itself was and remained a mere *res* – an object of property in the patrimony of the master – but since the wrongdoer, in this instance, proceeded with a design of affronting the honour, standing or dignity of the *dominus* (*i.e.,* a legal person), the act was injurious.[1703] In effect, the slave was the object of the wrong in such instances of *iniuria*; the *dominus* the subject of it; such correlates with Ulpian's observation that attacks on cadavers were actionable as *iniuria* *'*for it affects our own *existimatio* if any *iniuria* be effected [to a corpse to which we hold some

[1701] *'Ita cum quid atrocious commissum fuerit et quod aperte ad contumeliam domini respicit'*: J.4.4.3

[1702] *Ibid.*

[1703] See Moyle, *Institutes,* p.543

significant legal relation]'.[1704] On this view, the corpse which is mutilated or otherwise affronted is, like the slave described in Justinian's *Institutes*, merely the vessel through which the attack on the interests of a legal person passes.

Since this analysis does evidently 'take us full circle back to Ulpian's frame of reference… to slavery',[1705] it might be thought preferable to regard the dead as having some residual 'personality' – and ergo non-patrimonial 'dignitary' interests – of their own.[1706] There is no obvious bar to this, as legal 'personhood' need not necessarily be attached to a living human being, but the law need not, in fact, take the step of maintaining that an individual's legal personality survives their biological death.[1707] It would be sufficient for the law to maintain, as Feinberg advocates,[1708] that the 'interests' of the deceased be taken to remain relevant even after the end of life.[1709] This 'realisation that some interests survive death does not necessarily lead to the conclusion that all interests must or should survive death'.[1710] On the basis of *Digest* 47.10.1.6, in which Ulpian maintains that 'it is always the heir's obligation to vindicate the dignity (in the sense of *existimatio*) of the deceased', it might be suggested that, within the schema of *iniuria*, an individual's *existimatio* is an interest which should and does continue to subsist after the death of the subject. Just as it might be the obligation of an heir to raise a civil *actio iniuriarum* to vindicate the interests of their benefactor, so too might

[1704] Dig.47.10.1.4

[1705] *Holdich*, para.40

[1706] Recall the discussion in para.2.4.2, *supra*.

[1707] Though it has been said that to do so would run contrary to the general proposition that 'personality' begins with life and ends with death (see Kritanjali Sarda, *Legal Status of Dead Persons*, [2017] World Journal on Juristic Polity 1, p.1), it would nonetheless be consistent with the notion that an heir or executor is *eadem persona cum defuncto* – that is, it would be consistent with the position theoretically maintained in the Scots law: *ibid*.

[1708] Joel Feinberg, *Harm and Self-Interest* in *Rights Justice and the Bounds of Liberty: Essays in Social Philosophy*, (Princeton: PUP, 1980), pp.59-68

[1709] 'Interests' are here comparable to the concept of 'personality rights' spoken of in South African law: See the discussion in Kirsten Rabe Smolensky, *Rights of the Dead*, [2009] Hofstra Law Review 763, p.764

[1710] *Ibid*., p.771

it be thought the obligation of the state to vindicate this interest by means of public prosecution for wrongdoing.[1711]

Since the Roman law itself was unclear on the juridical nature of the cadaver (and, on the above analysis, one jurist afforded two contradictory views on the subject), insofar as *iniuria* is concerned, it is perhaps not surprising that the South African courts have not clarified this. Adversarial debate in the courts is, to adapt the words of the Court of Appeal in *R v BM*, 'inapt to enable a wide ranging inquiry into the underlying policy issues'.[1712] Concerned with legal practice rather than legal theory, the courts are naturally more concerned with the adequacy of remedy in particular cases than with addressing questions which are fundamentally moot. Since it practically does not matter whether one chooses to apply a proprietary or a 'personality interests' based analysis in cases of this kind, the courts have had little reason to explore this question; remedy can be provided (in cases of civil *iniuria*) or prosecution can be sustained (in criminal cases) whether the body which is attacked is conceived of as a *res* with which a person has a legally recognised relationship, or as a judicial 'person' with surviving legal interests.

On the face of it, it appears that the latter conception of the cadaver is preferable; indeed, this position accords with the jurisprudence of the European Court of Justice, which considers that 'a human body, even lifeless, cannot be treated in the same way as goods'.[1713] Continuing to recognise the *existimatio* of persons, even after their death, avoids the issue of objectification (and so circumvents any question of commodification) entirely. It also allows for any relative of the deceased (or, indeed, the State) to seek to vindicate the interests of the deceased without

[1711] Christison and Hoctor, *Criminalisation*, pp.35-36

[1712] *R v BM*, para.41

[1713] *Agenzia delle Dogane e dei Monopoli v Pilato SpA* (Case C-445/17), para.30

having to prove any form of proprietary relationship with, or right over, the cadaver.[1714] Though the relative's own non-patrimonial interests might be vindicated by a successful *actio iniuriarum*,[1715] or by witnessing a successful state-sponsored prosecution of the wrongdoer, conceptualising the dead person themselves as the subject of the *iniuria* is preferable to regarding them as an object, since such recognises not only the (admittedly 'very real')[1716] interests that a family member has in the body of their loved one, but also the interests of society, as a whole, in preserving the dignity of the dead.[1717]

Much of the jurisprudence pertaining to *iniuria* – and so 'dignity' – under the present heading of this chapter has concerned case law which developed prior to the introduction of the post-apartheid South African Constitution and its attendant Bill of Rights. Accordingly, although the courts have expressed the view that the notion of 'dignity' (as it evolved in Roman-Dutch jurisprudence) does not seamlessly connext with the concept which subsists in modern South African law,[1718] it is nevertheless submitted that South African jurisprudence may remain instructive in determining the meaning of 'dignity' in Scots law. Indeed, such is true not only of pre-Constitutional South African law; as was been discussed in the previous chapter,[1719] the concept of *existimatio*, within the taxonomy of *iniuria*, may be interpreted as 'human dignity' and denotes a high-level personality interest which is protected in law. Any infringements of a lower-level personality right, such as one's rights to privacy or 'dignity' in the more limited sense of *dignitas*, may be conceptualised as a harm to individual *existimatio*, as well as the particular interest in question. This, it is submitted, accords with the current conception of 'human dignity' within the modern South African Constitution; thus, the *actio*

[1714] Such thus allows for the action to be brought without contradicting the Scottish authority which holds (whether erroneously or otherwise – see Ch.2, *supra*) to the idea that there can be 'no property' in a corpse.

[1715] See Niall Whitty, *The Human Body*, p.235

[1716] See *McLean Report*, para.14

[1717] See Christison and Hoctor, *Criminalisation*, pp.35-36

[1718] *Dendy*, para.11

[1719] See Ch.3, *supra*.

iniuriarum serves as an effective means, at common law, of giving protection to an interest expressly protected by the Bill of Rights.

4.2.4 *Existimatio, Dignitas* and the Constitution

The revitalisation of the South African *actio iniuriarum* and *crimen iniuria* has been supplemented by the 'Constitutional revolution'[1720] brought about by the post-apartheid Bill of Rights and attendant Constitution.[1721] In this legal system, the delict of *iniuria* stands alongside Aquilian liability and the action for pain and suffering as one of the three 'pillars' of the law of delict[1722] and, as discussed above, a means of prosecuting *iniuria* as a crime exists. As in Roman law, the action (criminal or civil) for *iniuria* serves to protect the non-patrimonial interests of legal persons;[1723] drawing on the work of Johannes Voet,[1724] Ulpian's trio of 'personality rights' – *corpus, fama* and *dignitas*[1725] – are afforded express protection,[1726] but the collection of recognised interests now extends beyond the foundational triad. 'Privacy' is now said to have grown into a recognised category of its own,[1727] however it must be recognised that 'the compartments of dignity, reputation and privacy are porous and an impairment of dignity might also lead to a lowering of the plaintiff in the eyes of right-thinking persons… or also involve an invasion of privacy'.[1728]

[1720] Lourens W. H. Ackerman, *The Legal Nature of the South African Constitutional Revolution*, [2004] 2004 N. Z. L. Rev. 633

[1721] See *supra*.

[1722] Neethling, *Delict*, (4th Edn.), p.8

[1723] Descheemaeker and Scott, *Iniuria*, p.2

[1724] Voet, *Commentarius*, 47, 10, 7. Voet here notes that all injuries *'ac vel ad corporis, vel ad dignitatis, vel ad famae laesionem pertinet'* [pertain either to one's body, or to one's dignity or to one's reputation] (author's translation).

[1725] Dig. 47.10.1.2

[1726] Burchell, *Re-Affirming Dignity*, p.351

[1727] Burchell, *Personality Rights*, p.652

[1728] Burchell, *Re-Affirming Dignity*, p.353

'Dignity', in the sense there used, is to be understood as '*dignitas*' (*i.e.*, as a shorthand form of describing all general personality interests).[1729] As the High Court of South Africa noted in the 2005 case of *Dendy*, there is clearly 'a difference in scope and content between the concept of dignity under the Constitution and the [concept of *dignitas* in the] common law'.[1730] As noted, the introduction of the post-apartheid Constitution effected a 'Constitutional revolution',[1731] which saw the introduction of a wide-ranging, and 'horizontally' applicable,[1732] right to 'human dignity' in this jurisdiction.[1733] Within the South African context then, 'dignity', in its broadest sense, must therefore be understood as a 'foundational constitutional value'.[1734] Guidance for the definition of 'dignity' in South African law is not, therefore, purely to be found in Roman (or Roman-Dutch) legal sources, nor indeed, strictly, in the work of philosophers – although each of the aforementioned sources are significant and highly relevant – but rather in the jurisprudence of the courts when such are concerned with Constitutional matters.

The preamble of the Constitution makes no mention of the term 'dignity', but the first section of the document records that the Republic of South Africa is founded on values including 'human dignity, the achievement of equality and the advancement of human rights and freedoms'.[1735] This section appears ahead of that which proclaims that the Constitution is the supreme source of law in this jurisdiction.[1736] The first section of the Bill of Rights 'affirms the democratic values of human dignity, equality and freedom';[1737] the second, in setting out

[1729] Neethling, *Delict*, (4th Edn.), p.14

[1730] *Dendy*, para.11

[1731] Of which, see Ackerman, *Constitutional Revolution*, p.633

[1732] See Elspeth Reid and Daniel Visser (Eds.), *Introduction*, in *Private Law and Human Rights*, (Edinburgh: EUP, 2013), pp.7-9

[1733] Constitution of the Republic of South Africa, 1996, s.10

[1734] *Khumalo*, para.26

[1735] Constitution of the Republic of South Africa, 1996, s.1 (a)

[1736] Constitution of the Republic of South Africa, 1996, s.2

[1737] Constitution of the Republic of South Africa, 1996, s.7

the scope of the document, holds that 'the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'.[1738] The importance of dignity is further underlined within the context of the Constitution and the Bill of Rights by s.10, which carries over – word-for-word – the provision of the provisional 1993 Constitution and provides that 'everyone has inherent dignity and the right to have their dignity respected and protected'.[1739] The right to dignity is non-derogable, even in cases of national emergency.[1740]

The seminal case of *S v Makwanyane*[1741] retains relevance as the starting point in this enquiry into the meaning of 'dignity' in South African law.[1742] Therein, the Constitutional Court set out its understanding of 'dignity' as follows: "Recognition of the right to dignity [in the Constitution] is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern".[1743] This, it is submitted, adheres to the 'position of unimpaired *dignitas*, which is established by law and custom' said by Callistratus to be the essence of *existimatio*.[1744] Such finds support in the 2011 decision of the Constitution Court in *Le Roux v Dey*,[1745] although the Court in that case did, as in *Dendy*, draw a contradistinction between the concept of 'dignity' as outlined in the Constitution and the concept of 'dignity' as it exists in the common law:

> "In terms of our Constitution, the concept of dignity has a wide meaning which covers a number of different values. So, for example, it protects both the individual's right to

[1738] Constitution of the Republic of South Africa, 1996, s.8; any provision of the Bill of Rights also, *per* s.8 (2) 'binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.

[1739] Constitution of the Republic of South Africa, 1996, s.10

[1740] Constitution of the Republic of South Africa, 1996, s.37

[1741] 1995 (3) SA 391 (CC)

[1742] See Abraham Klaasen, *Constitutional Interpretation in the so-called 'Hard Cases': Revisiting S v Makwanyane*, [2017] De Jure 1, p.2

[1743] *S v Makwanyane* 1995 (3) SA 391 (CC), para.144

[1744] *'Existimatio est dignitatis inlaesae status, legibus ac moribus comprobatus, qui ex delicto nostro autoritate legume aut minuitur aut consumitur'*: Dig.50.13.5.1

[1745] [2011] 3 SA 274 (CC)

reputation and his or her right to a sense of self-worth.[1746] But under our common law "dignity" has a narrower meaning. It is confined to the person's feeling of self-worth. While reputation concerns itself with the respect of others enjoyed by an individual, dignity relates to the individual's self-respect. In the present context the term is used in the common law sense. It is therefore used to the exclusion and in fact, in contradistinction to reputation, which is protected by the law of defamation."[1747]

In holding that 'dignity', at common law, holds a narrower meaning than the term enjoys within the Constitution, it is evident that the court is concerned with that term in the sense of *dignitas*; the plaintiff in that case had alleged an infringement of his *dignitas* and ultimately it was held that 'in dignity claims, the injured interest is self-esteem, or the injured person's feelings'.[1748] The 'wide meaning' ascribed to 'dignity', in its constitutional sense, at the start of this paragraph does correlate with the recognition of *existimatio* as a high-level interest;[1749] just as the constitutional concept of 'dignity' 'has a wide meaning which covers a number of different values', so too does *existimatio* serve as an umbrella term under which (*inter alia*) Ulpian's triad of *corpus, fama* and *dignitas* can be placed.[1750] Regardless of the disparate interests recognised and protected by the *actio iniuriarum*, it remains the case that 'dignity' – in the sense of *existimatio* – stands as the prime protected interest linking all of the 'personality rights' together.

That the South African concept of *iniuria* serves to protect *existimatio* explicitly was recognised prior to the enactment of the Constitution (and indeed prior to the existence of the

[1746] Citing *Khumalo*, para.27

[1747] *Le Roux*, para.138 (opinion of Acting Justice Brand with Chief Justice Ngcobo, Deputy Chief Justice Moseneke and Justices Khampepe, Mogoeng and Nkabinde concurring).

[1748] *Ibid.*, para.179

[1749] Zimmermann, *Obligations*, p.1062, fn.102

[1750] See Jonathan Brown, *O Tempora! O Mores! The Place of Boni Mores in Dignity Discourse*, [2020] CQHE 144, p.144

apartheid state) in the case of *National Press Ltd. v Long*.[1751] In this case, the court held that any injurious infringement of a person's dignitary interests was an affront to *existimatio*, in defining *iniuria* by citing the German pandectist Ferdinand Mackeldey with approval:[1752] *'sensu autem strictiore et quidem speciali respectu existimationis hominis cujusdam, intellitur quodlibet factum, quo bona existimatio, quae alteri debetur animo injuriandi laeditur'*[1753] (moreover, in its strict and indeed its special sense [of a delict designed to protect] someone's human dignity (*existimationis hominis*), [*iniuria*] is understood to mean anything that occurs with a design on affronting the good social standing (*bona existimatio*) [of that individual]).

This decision was cited with approval in the case of *South African Broadcasting Corporation v O'Malley*,[1754] though it does not appear that the idea of *existimatio* as 'human dignity' took hold in the South African courts (the term is, in that case, as indeed in *National Press v Long*, interpreted as 'honour' and 'good reputation').[1755] This notwithstanding, since *existimatio* is capable of being ascribed 'a wide meaning which covers a number of different values', it is submitted that the Constitutional concept of 'dignity' and 'human dignity' finds a parallel in this Roman-Dutch idea, even if the South African courts did not expressly ascribe this meaning to the term when it was juridically discussed. Thus, though the Constitution certainly did provide the concept of 'human dignity' with a place of prominence in South African law, it appears that the common law nevertheless recognised – and implicitly afforded protection to – this interest, even in the absence of any explicit legislation on the subject.

Since the introduction of the Constitution, it is no longer necessary for the courts to develop (nor even to expressly discuss) the common law notion of *existimatio* into a robust

[1751] 1930 AD 87

[1752] Ferdinand Mackeldey, *Systema Iuris Romani Hodie Usitati*, (Lipsiae: Sumtibus 10 Conr. Henrichsii, 1847), p.436, §455. As authority for his propostion, Mackeldey cites, amongst others, Gaius (G.3.220) and Donellus.

[1753] *National Press Ltd. v Long* 1930 AD 87, p.99

[1754] [1977] ZASCA 1

[1755] [1977] ZASCA 1

notion of human dignity; such is already provided for by the Bill of Rights. Since Scotland lacks a foundational document which purports to extol the importance of the right to, and value of, dignity,[1756] it may be concluded that the South African experience is too distinct for the jurisprudence of this jurisdiction to be usefully comparable. Such a conclusion does not account for the fact that, though the influence of the *actio iniuriarum* was muted under the South African apartheid regime,[1757] this legal mechanism nevertheless served to protect individual *existimatio* even under such a profoundly immoral administration.[1758] Indeed, it is clearly not the case that the concept of *existimatio* is no longer of importance in South African law. Rather, it seems that, since this Roman-Dutch concept correlates with the Constitutional ideal of 'human dignity', it might be thought that in modern cases of *iniuria*, the South African courts are now simply at liberty to use the English-language terms 'dignity' and 'human dignity' to express the meaning exhibited by the Latin word.

Accordingly, though Scotland lacks any foundational or constitutional document that is in any way comparable to the South African Constitution, since the notion of *existimatio* within the delict *iniuria* adheres to the notion of 'human dignity' present in the South African Constitution, and since Scotland maintains an institutional connection to the *actio iniuriarum*, it is submitted that Scots law may develop to afford robust protection to 'human dignity' even in the absence of legislation. As Lord Reed observed in *A v British Broadcasting Corporation (Scotland),*[1759] '[the common law] can also develop having regard to the approach adopted in other common law [in the sense of uncodified] countries, some of which have constitutional texts containing guarantees comparable to the [ECHR] Convention rights'.[1760] There may be a

[1756] See, generally, F. D. J. Brand, *Privacy,* in Reid and Visser, *Private Law,* p.168

[1757] Burchell, *Re-Affirming Dignity,* p.354

[1758] See (*e.g.,*) *Goldberg v Minister of Prisons* 1979 (1) SA 14 (A), which saw the *actio iniuriarum* being used to successfully defend the dignity of incarcerated prisoners and (according to Burchell), by means of such, further prisoners' rights: See Burchell, *Re-Affirming Dignity*, p.355

[1759] *A v BBC* 2014 S.C. (U.K.S.C.) 151

[1760] *Ibid.*, para.40

paucity of modern case law concerning the *actio iniuriarum* and the protection of *existimatio* and *dignitas* in Scotland, but in recognition of Lord Reed's judgment, it appears that this lack of native jurisprudence might be supplemented by reference to South African sources. Given that the Scottish sources concerning the *actio iniuriarum* cannot be said to have fallen into desuetude,[1761] until the action is specifically disapproved of in court, or abolished by statute, this avenue of development must be thought to remain open.

Thus, although the *actio iniuriarum* has been neglected in Scots law, the potential for a revival of the action remains. Such finds support from academic commentators such as Burchell, who, having examined the similarities between Scots and South African jurisprudence, concluded, in 2009 that 'Scots law, using the Roman and South African *actio iniuriarum* as inspiration, could immediately craft a viable remedy for invasions of privacy'.[1762] With this being the case, there is no reason to suspect that Scots law could not utilise its institutional connection to the *actio iniuriarum* to develop a wider doctrine of protected personality rights, nor to presume that Scots law cannot serve to protect interests in dignity in respect of the human body, separated body parts, or human biological material.

Indeed, though the Scottish *actio iniuriarum* has been badly mistreated, it has nevertheless been noted that 'there will always be occasions when judges will seem to protect one party from being held up to hatred, contempt or ridicule by another, and that however much the actio iniuriarum may be suppressed, it is liable only to appear elsewhere in the law'.[1763] The veracity of this statement may be inferred from the fact that, absent any legal mechanism akin to the *actio iniuriarum*, English law nevertheless found itself forced to create an avenue

[1761] *McKendrick*, p.66

[1762] Burchell, *Re-Affirming Dignity*, pp.353-354; *per* the decision of Lord Bannatyne in *BC and Ors. v Chief Constable Police Service of Scotland and Ors.* [2019] CSOH 48, para.126, Scots law has now expressly developed a right to privacy – this is not expressly predicated upon the *actio iniuriarum*, but Lord Bannatyne did consider that the decision of Lord Bonomy in *Martin*, which did favourably consider a submission based on the *actio iniuriarum*, was persuasive in arriving at his ultimate conclusion.

[1763] S. C. Smith, *When the Truth Hurts*, [1998] S.L.T (News) 1, p.5

to allow for reparation in instances which would (or could) appropriately be dealt with by the action in Scotland and South Africa by enacting the Protection from Harassment Act 1997.[1764] In addition, when faced with the emergence of torts purporting to protect privacy, the English High Court[1765] ostensibly justified the development of the law, in this direction, with reference to *'iniuria*-like terms',[1766] speaking of the 'autonomy, dignity and self-esteem' of the claimant.[1767]

It is also notable that the civil aspects of this 1997 Act extend to Scotland, even in spite of the continuing presence of the nominate delict of *iniuria* within that jurisdiction.[1768] Thus, it may be submitted, the need for an action to protect dignity is so foundational to any civilised system of law that it has proven necessary to innovate and create a counterpart where no jurisprudential connection to the *actio iniuriarum* exists and that it has been deemed appropriate to functionally duplicate the action in a jurisdiction where the accessibility and importance of the action has been forgotten. Even in those jurisdictions which actively discarded the *actio iniuriarum*, the utility of a broad action to guarantee the integrity of individual interests in dignity has been implicitly recognised. In Germany, when the Civil Code threw out the *actio iniuriarum* 'by the front door', the action nevertheless 'managed to sneak in through the back window'[1769] because of the recognition of an *Allgemeines Persönlichkeitsrecht*[1770] – a general personality right.[1771] This, it is submitted, illustrates both the underlying, yet fundamental, need for the law to recognise and protect human dignity in

[1764] See Francois du Bois, *Harassment: A Wrong Without a Right,* in Descheemaeker and Scott, *Iniuria*, pp.215-240; Brown, *Revenge Porn*, p.409

[1765] In *Mosley v News Group Newspapers Ltd.* [2008] EMLR 20

[1766] David Ibbetson, *Iniuria, Roman and English* in Descheemaeker and Scott, *Iniuria*, p.47

[1767] *Mosley*, para.7

[1768] Protection from Harassment Act 1997, ss.8-10; s.14

[1769] Zimmermann, *Obligations*, p.1092

[1770] Manfred Hermann, *Der Schutz der Persönlichkeit in der Rechtslehre des 16-18 Jahrhunderts,* (Kohlhammer, 1968); Helge Walter, *Actio Iniuriarum: Der Schutz der Persönlichkeit im südafrikanischen Privatrecht,* (Duncker & Humblot: 1996)

[1771] See Blackie, *Doctrinal History*, pp.1-2

order to effect just judicial outcomes (broadly), as well as the desirability of a mechanism akin to the *actio iniuriarum* in any given legal system (specifically).

As Burchell observed, whether 'implicitly or explicitly, the core of the protection of fundamental human rights can be found in the value of individual dignity'.[1772] Taken in the sense of *existimatio* (as Burchell implicitly does, given that he lists numerous specific interests which fall under the umbrella-term 'dignity'), it is evident that the Roman *actio iniuriarum* provides a potentially effective means of protecting fundamental human rights. Such finds support in the judgment of Justices Froneman and Cameron in *Le Roux,* in which it is noted, in elaborate prose, that *'*respect for the dignity of others lies at the heart of the Constitution and the society we aspire to';[1773] at an earlier point in the judgment, it is noted that the 'common law requirements [to establish actionable *iniuria*] are in conformity with our Constitution's protection of everyone's inherent right to dignity'.[1774]

Within the European context, the European Convention on Human Rights (ECHR) has been said to serve as 'the natural legal vehicle for the idea of human dignity'.[1775] This international instrument was incorporated into domestic Scots law (and into the law of the rest of the United Kingdom) by the Human Rights Act 1998 (HRA); along with the Scotland Act 1998 the HRA is considered one of the 'essential elements of the architecture of the modern United Kingdom'.[1776] It is, thus, clear beyond doubt that the Human Rights Act and the Scotland Act brought about profound changes within Scotland,[1777] even if the introduction of these Acts did not mark as seismic a change as occurred in South Africa.[1778] Notwithstanding

[1772] Burchell, *Protecting Dignity Under Common Law*, p.250
[1773] [2011] 3 SA 274 (CC) para.202
[1774] [2011] 3 SA 274 (CC) para.176
[1775] Foster, *Human Dignity*, p.539
[1776] *Somerville v Scottish Ministers* 2008 SC (HL) 45, para.169 *per* Lord Mance.
[1777] See Reid and Visser, *Private Law*, p.5
[1778] Ackerman, *Constitutional Revolution*, *passim*.

the introduction of the ECHR rights, and the consequential protections for the 'human dignity' of individual legal subjects which arise out of those rights, in domestic law, 'in recent years, the Supreme Court [of the UK] has repeatedly emphasised the importance of relying on fundamental common law rights, as opposed to immediate resort to Convention rights'.[1779] Thus, it is submitted that there is, at present, a dual impetus for the Scottish courts to make use of the law's institutional connection to the *actio iniuriarum* and to develop a robust means of protecting individual interests in *existimatio* (*i.e.*, human dignity) at common law.

4.3 Human Rights, Scots Law and the *Actio Iniuriarum*

4.3.1 The Human Rights Act and the *Actio Iniuriarum*

Just as the concept of 'human dignity' within the South African Constitution correlates with the concept of *existimatio* within the Roman crime/delict *iniuria*, so too do many of the rights protected by the European Convention on Human Rights (ECHR) correlate with those interests which might be afforded protection by means of the *actio iniuriarum*.[1780] Indeed, following from Burchell's observation,[1781] and the fact that the *actio iniuriarum* served to safeguard *existimatio* by means of protecting lower-level dignitary interests, it may be inferred that the high-level interest which the ECHR seeks to protect, by affording protection to lower-level interests such as autonomy,[1782] privacy[1783] and bodily integrity[1784] (*inter alia*), is *existimatio*. Accordingly, it might be suggested that the use of a domestic legal action such as the *actio* is the best means of abiding with the requirements of Convention.[1785] The ECHR was

[1779] See *BC*, para.9 (substantiated with reference to *R (Osborne) v Parole Board* [2014] AC 1115, paras.57-63 and *A v BBC (Scotland)* 2014 SC (UKSC) 151, para.56).

[1780] See Moréteau, *Review*, pp.219-220

[1781] Burchell, *Protecting Dignity Under Common Law*, p.250

[1782] See e.g., *Niemietz v Germany* (Application no. 13710/88); *Pretty v UK* (Application no. 2346/02)

[1783] See, e.g., *Jaholl v Germany* (Application no. 54810/00)

[1784] See, e.g., *Janković v Croatia* (Application no. 38478/05)

[1785] Taken at the lowest possible level, the courts are under (at least) a duty to respect the standards set by the ECHR: See Wright, *Tort Law*, p.24

given effect in domestic law throughout the UK as a whole by the passing of the Human Rights Act 1998. Like the Constitution of Germany and South Africa, the introduction of the 1998 Act has been said to 'blur' the traditional[1786] divide between public law and private law;[1787] the ECHR itself exists as a supra-national legal instrument, the requirements of which the state is bound to honour,[1788] but individual legal subjects have limited recourse at this level should their rights under the Convention be infringed.[1789]

By 'bringing rights home',[1790] however, the 1998 Act rendered the provisions of the ECHR justiciable and enforceable in the domestic courts of the UK's jurisdictions and so gave rise to a 'wide variety of possible models of horizontal effect'[1791] in respect of the Convention rights by means of s.6 of the Act, which provides that 'it is unlawful for a public authority to act in a way which is incompatible with a Convention right'.[1792] 'Horizontal effect' is to be understood broadly, as the use of legal resources which form a part of the public law in private law disputes (*i.e.*, disputes between individual legal persons);[1793] in this context, horizontal effect can be said to occur when a private individual becomes subject to a duty to respect the rights of another such subject.[1794] Since courts and tribunals are 'public authorities' for the purposes of the 1998 Act,[1795] it follows that in exercising their adjudicative function, courts throughout the UK are obliged to act in accordance with the ECHR, and so safeguard the rights

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[1786] *Per* Ulpian: *'huius studii [iuris] duae sunt positiones, publicum et privatum': 'In the study of law one must be concerned with both public and private law'*, D.1.1.1.2; this demarcation was introduced into Scots law by Forbes: See Hector MacQueen, *Introduction* in Forbes, *Institutes*, p.vi

[1787] François Du Bois, *Private Law in the Age of Rights*, in Reid and Visser, *Private Law*, p.12

[1788] See *Attorney General v Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C 109, p.283 (Lord Goff).

[1789] See David Hoffman, Gavin Phillipson and Alison L. Young, *Introduction*, in Hoffman, *Private Law*, p.1

[1790] To utilise the words of the white paper that preceded the introduction of the 1998 Act: See *Bringing Rights Home: The Human Rights Bill*, [1997] CM 3782

[1791] See Alison L. Young, *Mapping Horizontal Effect*, in in Hoffman, *Private Law*, p.16

[1792] Human Rights Act 1998 s.6 (1)

[1793] This definition is necessarily simplified; defining 'private law' (and, indeed, 'public law') is *'an undertaking fraught with difficulty and cannot be done full justice here'*: See Du Bois, *The Age of Rights*, in Reid and Visser, *Private Law*, p.12

[1794] See Young, *Horizontal Effect*, p.18

[1795] Human Rights Act 1998 s.6 (3)

it seeks to uphold, in deciding cases,[1796] whether in vertical (*i.e.*, public law) disputes between citizen and state or in horizontal litigation between private (natural or artificial) 'persons'.[1797]

In debating the passing of the 1998 Act, the House of Lords expressly accepted that the courts 'have the duty of acting compatibly with the Convention not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals'.[1798] In the words of de la Mare and Gallafent, 'the Convention rights become new and fundamental sources of public policy when developing common law areas particularly affected by such considerations',[1799] explicitly highlighting tort law, and (implicitly) for Scots, the law of delict, as areas so affected.[1800]

In England and Wales, this ECHR-influenced development has occurred, to at least some extent, because 'dignity' has come to be (again) recognised as an interest which is worthy of legal protection.[1801] Due to provision in s.2(1) of the 1998 Act requiring that the courts, determining a question which has arisen in connection with a Convention right must 'take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights',[1802] the English courts are bound to (at least) mirror Strasbourg jurisprudence.[1803] As references to the term 'dignity' or 'human dignity' have been steadily increasing within the text of judgments from the European Court of Human Rights over the

[1796] Young, *Horizontal Effect*, p.16

[1797] See Sir William Wade QC, *The United Kingdom's Bill of Rights* in Jack Beatson (Ed.) *Constitutional Reform in the UK: Practice and Principles* (Oxford: Hart, 1998), p.63

[1798] Hansard, HL Committee Stage, 583 HL Official Report (5th Series), col. 783 (24 November 1997)

[1799] de la Mare and Gallafent, *Horizontal Effect*, para.27

[1800] *Ibid*.

[1801] Gavin Phillipson, *Privacy*, in Hoffman, *Private Law*, p.156

[1802] Human Rights Act 1998, s.2(1)(a)

[1803] *Ullah*, p.350

past decade,[1804] it is plain that – so long as the 1998 Act remains on the statute books[1805] – English common law must continue to develop its own jurisprudence of dignity and personality rights in line with the ECHR.

At present, though the tort of 'misuse of private information' now, as a result of the 1998 Act's influence,[1806] 'focuses upon the protection of human autonomy and dignity',[1807] it remains clear that 'the adaptation of breach of confidence to meet the requirements of Article 8 ECHR does not go far enough, as it only relates to the misuse of private information'.[1808] English law faces a number of inherent and structural difficulties in the 'age of rights',[1809] no least its longstanding and implicit distrust of 'high-level principles',[1810] as well as the general absence of such principles stemming from its history as a system founded on precedent.[1811] The law of confidence in Scotland has been said to be 'the same' as in England,[1812] however – although there exists overlap between the nominate concept of 'breach of confidence' in both jurisdictions – it remains the case that the conceptual framework in which these concepts are

[1804] See Alexander Kuteynikov and Anatoly Boyashov, *Dignity Before the European Court of Human* Rights, in Edward Sieh and Judy McGregor (Eds.) *Human Dignity: Establishing Worth and Seeking Solutions,* (Palgrave MacMillan, 2017), p.87

[1805] The Conservative government elected in 2015 made plain that it intended to repeal the 1998 Act and replace it with an undefined 'British Bill of Rights': See House of Lords: European Union Committee, *The UK, the EU and a British Bill of Rights*, 12th Report of Session 2015–16, HL Paper 139. With the loss of the Conservative majority in the 2017 general election, the plan for this appears to have fallen by the wayside, however the eventuality of the 1998 Act's repeal must be treated as a serious – and indeed likely – prospect.

[1806] F. D. J. Brand, *Privacy,* p.172

[1807] *Campbell v MGN Limited* [2004] 2 AC 457 (HL), para.51 (Lord Hoffman)

[1808] Raymond H. Youngs, *An Uneasy Relationship: The Influence of National and European Fundamental Rights in English Private Law*, in Verica Trstenjak and Petra Weinger, *The Influence of Human Rights and Basic Rights in Private Law*, (Springer Cham, 2016), p.568

[1809] Du Bois, *The Age of Rights*, p.12

[1810] See, e.g., *Kaye v Robertson* [1991] F.S.R 62; *R v Khan (Sultan)* [1997] AC 558; *Wainwright v Home Office* [2004] 2 AC 406, 419

[1811] See Youngs, *An Uneasy Relationship*, p.559

[1812] See *BC*, para.10, citing *Lord Advocate v Scotsman Publications* 1989 SC (HL) 122, pp.162-163

operating differ between jurisdictions. Scots law is not, like English law, constrained by the legacy of the forms of action.[1813]

As a mixed legal system, Scots law does not encounter the conceptual difficulties with high-level principles faced by those versed in the Common law tradition. Even Reid, who remains sceptical about the potential utility of the *actio iniuriarum* in modern Scots law, notes that 'there is little historical basis in Scots law for the kind of structural difficulties which have restricted English law to the protection of informational privacy only'.[1814] So, too, is it the case that Scots law ought not to face any structural difficulties in developing, from its common law, a schema of personality rights that seeks to regard dignity as both a governing interest (in the sense of *existimatio*) shared by all human beings and as a particular legal interest (in the sense of *dignitas*) afforded specific protection by a mechanism akin to the *actio iniuriarum*. Recognising Smith's observation that suppression of the *actio iniuriarum* would not remove the need for the *actio iniuriarum*, and that excising the mechanism would most likely lead to its re-emergence at a later stage[1815] (as occurred in Germany),[1816] it is suggested that rather than excising the action from Scots law, only to have it re-emerge in a different guise at a later stage, it would be better for the Scottish courts to make fuller use of the law's institutional connection to the *actio iniuriarum* – and the taxonomy surrounding it – which presently exists.

Per the decision of the Appellate Committee of the House of Lords in *Ullah*, the Scottish courts are not obliged to absolutely 'mirror' the jurisprudence of the European Court of Human Rights.[1817] As Lord Bingham observed in that case, 'the duty of national courts is to

[1813] Niall R. Whitty, *The Development of Medical Liability in Scotland*, in Ewoud Hondius (ed.), *The Development of Medical Liability*, (Cambridge: CUP, 2010), p.57

[1814] Elspeth C. Reid, *Protection of Personality Rights in the Modern Scots law of Delict*, in Whitty and Zimmermann, *Personality*, p.309

[1815] Smith, *Truth Hurt*, p.5

[1816] Zimmermann, *Obligations*, p.1092

[1817] See Brand, *Privacy*, p.174

keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'.[1818] Since the ECHR, and Strasbourg jurisprudence, may consequently afford a lesser degree of protection to individual interests in *existimatio* (and the lower-level interests which form a part of unimpeached *existimatio*), it follows that, before looking to the ECHR, Scots lawyers should first consider the extant common law position in any enquiry concerning the protection of individual dignitary interests.

Recalling Lord Reed's observation as to the utility of comparative law in developing the common law,[1819] it is consequently submitted that Scots common law, supplemented by comparative legal scholarship,[1820] has the potential to provide the best means of protecting individuals from exposure to actionable indignity. Recognising that 'the development of the common law can also of course be influenced by the ECHR',[1821] it is thought that the place of the ECHR – as incorporated into domestic law by the HRA – is to act only as an auxiliary to raise the standard of Scots law to the minimum prescribed by the ECHR, where domestic law should happen to fall short of this standard.[1822] Though the concept of 'dignity', as an interest worthy of legal protection, was introduced into English law only through the introduction of the HRA, due to the ancestry of the crime/delict *iniuria*, Scots law has, like other nations with a connection to the *ius commune*, evidently long recognised the analogous concept of *existimatio* and the 'lower level' concept of *dignitas*.

Even if it should be thought too late to reinvigorate the ailing Scottish *actio iniuriarum*, in spite of the curative potential of comparative scholarship,[1823] there exists not only scope for

[1818] *Ullah*, para.20

[1819] *A v BBC*, para.40

[1820] Burchell, *Re-Affirming Dignity*, pp.353-354

[1821] *A v BBC*, para.40

[1822] *Ullah*, para.20

[1823] Reid, in noting that South Africa has developed a robust jurisprudence on *iniuria*, does not seem to consider the potential utility of comparative scholarship in this regard, and instead appears to suggest that Scotland would require a native jurisprudence on *iniuria* to revitalise the action in modern law: Reid, *Personality*, para.17-12

Scots law to develop, through its common law, an effective means of protecting individual interests in 'human dignity', but also an obligation to do so. Within the taxonomy of English law, the court cannot make use of ECHR jurisprudence to 'construct a cause of action where none exists'[1824], but since the Scots law of delict is not constrained by any closed list of nominate 'torticles',[1825] the Scottish courts are not so limited.[1826] Scots law has the potential, then, to employ the ECHR as a springboard to recognise, as actionable, novel forms of wrongdoing.[1827] With that said, however, it is notable that when *Stevens v Yorkhill NHS Trust* (which turned on similar facts to *AB*) called before the Scottish courts, the pursuer did not feel it necessary to predicate their claim on a statutory basis and withdrew submissions made in respect of the HRA.[1828] Scots common law was thought (by the pursuer) and held (by the court) to be sufficient, in that case, to allow for a claim notwithstanding the difficulties faced by the English courts in similar circumstances.

On the basis of the above discussion, the potential for the courts to exploit and reinvigorate the law's institutional connection to the *actio iniuriarum* as a means of safeguarding the rights of individuals, as South Africa did in light of its emergence from apartheid, is manifestly apparent. Developing the common law is preferable to relying exclusively on the ECHR as a means of protecting individual interests in dignity, since such would leave no doubt as to the horizontal applicability of actions predicated on breaches of these interests. The HRA expressly allows for claims against public bodies, but *actiones iniuriarum* are not so limited.[1829] As such, though Scots law need not do more than Strasbourg

[1824] *A v Leeds Teaching Hospitals NHS Trust* 2004 WL 960959, para.296

[1825] See Bernard Rudden, *Torticles*, 6/7 Tul. Civ. L.F. 105 (1991-1992); F. F. Stone, *Touchstones of Tort Liability*, [1950] Stan. L. R. 259, p.272

[1826] See the discussion in Pillans, *Delict*, para.1-13

[1827] *A v BBC*, para.40

[1828] *Stevens*, para.3

[1829] Foster, *Human Dignity*, pp.539-540

requires in order to remain consistent with the requirements of the ECHR,[1830] in order to give effect to the spirit, as well as the letter, of the law, it can and must.

4.3.2 Developing *Iniuria*: Necessary, but not Sufficient?

Though there thus exists a definite impetus for the Scottish courts to develop and expand the law relating to *iniuria*, such would not be a panacea for the legal problems which arise in respect of the regulation of human body, body parts and human biological material in the Twenty-First century. For an *actio iniuriarum* to succeed, there must be some contumelious conduct on the part of the defender;[1831] the possibility of an *actio iniuriarum* would consequently not be open in cases in which a cadaver is negligently handed, or where human bodily material is damaged or destroyed through the negligent fault of another. Though *iniuria*, in the sense of 'wrongful conduct', might be said to have occurred in cases such as these, in the absence of *contumelia* (whether styled *dolus* or *animus iniuriandi*), any claim for reparation of the harm effected to the cadaver or body parts, in such instances, must be predicated on an action based on *culpa*.

Since 'personality rights' may be now vindicated by means of actions predicated on *culpa*,[1832] there is no bar to the pursuit of damages for non-pecuniary loss (misleadingly[1833] described as 'damages for *solatium* – affront, pain and suffering')[1834] in such actions. With that said, however, although modern Scots law no longer precludes actions based on *culpa* for the

[1830] *Ullah*, para.20

[1831] Whitty, *Overview*, p.221. It should be noted, however, that the fact that the action based on *culpa* can now repair damage to 'personality rights', as well as patrimonial interests, has the potential to fill some of the 'gaps' left in the law in this area. As Stewart notes (*Reparation*, at para.4.3), 'the case of transferred intent which raises difficult questions when *dole* is required does not trouble the law of modern delict because *culpa* can cover the case': thus, a claim for 'assault' – though said to be an *actio iniuriarum* in law – may nevertheless be predicated, in modern Scots law, on the occurrence of *damnum injuria datum* as well as on the interference with a person's bodily integrity alone.

[1832] Pillans, *Delict*, para.6-01

[1833] See Ch.3, *supra*.

[1834] Stewart, *Reparation*, para.18.1

reparation of injury to 'persons',[1835] as did Roman law[1836] and the law throughout early modern Continental Europe,[1837] the common law of 'personality rights' remains,[1838] a 'thing of shreds and patches'.[1839] Hence, in the case of *Holdich v Lothian Health Board*, in which a claim for damages was predicated upon the occurrence of the pursuer's 'distress, depression and loss of the chance of fatherhood', with the last of these being categorised as 'loss of autonomy',[1840] the defenders were able to plausibly contend, at debate, that 'the law does not recognise "loss of autonomy" as a compensable head of claim'.[1841]

The facts of *Holdich* are worth recounting here: The case turned on similar facts to the English case of *Yearworth v North Bristol NHS Trust*,[1842] although the legal background to the case was obviously quite different.[1843] The pursuer had deposited three sperm samples in a facility which was ostensibly owned and managed by the defenders.[1844] The sperm samples were damaged after a malfunction caused the storage vessel – in which the pursuer's three samples were stored – to increase in temperature from -190 degrees Celsius to -53 degrees Celsius. This temperature change was sufficiently grave as to significantly reduce the chance of conception and (in the now-unlikely event of successful conception) increase the risk of miscarriage, chromosomal abnormalities and birth defects. After receiving 'conflicting' advice, the pursuer made the decision to refuse to proceed with the use of the samples in a process of

[1835] Stair, for instance, 'recognised that [the living body of a freeman] was priceless, but [that 'damage' to it was] still reparable': See Stewart, *Reparation*, para.4.1; Stair, *Institutions*, 1, 9, 3

[1836] Dig.9.2.13; Strauss, *Consent*, fn.13

[1837] Blackie, *Unity in Diversity*, p.85

[1838] Notwithstanding the incentives provided by the ECHR: Reid, *Personality*, para.1-01

[1839] *Ibid*. para.1-02

[1840] *Holdich*, para.2

[1841] *Ibid*. para.3

[1842] [2010] QB 1

[1843] See, particularly, the discussion in *Holdich*, para.15

[1844] That the defenders did own and manage the facility was not spelled out in the pleadings – though it might be presumed, since the case proceeded to debate, that they did so in fact: *Holdich*, para.1

in vitro fertilisation (a decision which, he claimed, was reasonable in the circumstances).[1845] The basis of the pursuer's case was 'presented primarily as a claim for mental injury consequential on property damage in breach of contract *et separatim*, secondarily, as a claim for "pure" mental injury [in the sense of *damnum*] in delict, that is on the basis of fault [*culpa*] at common law, *et separatim*, if somewhat faintly, as a novel type of claim for damage to sperm, neither person nor property, but something *sui generis*, with consequential mental injury [still in the sense of *damnum*] again on the basis of common law fault [*culpa*]'.[1846]

The notion that there was some ongoing 'functional unity' (*eine funktionale Einheit*)[1847] between the pursuer and his sperm samples was not advanced by counsel in *Holdich*, although this idea was commented upon by Lord Stewart and it was noted that a claim based on ongoing *eine funktionale Einheit* had earlier met with success in a 1993 German decision.[1848] The claim that negligent damage to sperm amounted to a 'personal injury' had been pursued in the German case since reparation for pain and suffering was not available at that time, under German law,[1849] to one who suffered property damage[1850] and, since the plaintiff had suffered no pecuniary loss, a claim for damage to property would have necessarily failed.[1851] 'The court, therefore, had to treat certain parts of the body, separated from it, not as objects but rather as

[1845] *Ibid*., para.2

[1846] *Ibid*., para.3

[1847] The concept stems from German law, hence the inclusion of the German translation of the English concept here: See *Ibid*., para.7

[1848] BGHZ 124, 52 (VI ZR 62/93), 09/11/1993

[1849] *Per* §847 BGB

[1850] §847 BGB has since been repealed and substituted with §253 BGB, which allows for reparation of *immaterieller schaden* (intangible damage): This, it was suggested by Lord Stewart, possibly 'gives legislative effect to the 1993 decision': *Holdich*, para.9

[1851] See the comment section of *Bundesgerichtshof (Sixth Civil Senate) 9 November 1993, BGHZ 124, 52, with case note*: Translated German Cases and Materials Under the direction of Professors P. Schlechtriem, B. Markesinis and S. Lorenz, Translated by Mrs Irene Snook.

remaining parts of that body';[1852] in doing so, it was held that the general right of personality (the *Allgemeines Persönlichkeitsrecht*) legitimised this juridical development.[1853]

The notion of *eine funktionale Einheit* entails judicial recognition of an ongoing link between a person and any bodily parts, tissue or derivatives which have become corporally separated from that person. This link exists in recognition of the fact that severed body parts may now be surgically re-attached successfully, and that modern medical science allows for the removal of body parts for (*inter alia*) out-of-body treatment, transplantation or procreation. Since the objective of the law relating to 'personality rights' might be said to 'protect a person's entire area of existence and self-determination, which is materially manifested in the body',[1854] to culpably cause harm to a person's bodily matter, even if separated from them at the time of the wrongdoing, is to effect a bodily injury, provided that this person intends to 'use or reintegrate' the material at a later stage. 'For cases of final severance, the normal legal consequence applies, *i.e.*, that at the point of separation, the severed body parts lose all links to the protected entity of the "body" and become "objects" in the legal sense'.[1855]

German law, then, divides separated body parts and tissue between those which might be 'used or reintegrated' and those which are 'finally severed' on the basis of the principle of *eine funktionale Einheit*. The former remain a part of the person whence they came and so are protected by the law pertaining to 'personality rights'; the latter are recognised as merely *res* and so are subject to the ordinary rules of property law. This analysis has the potential to instruct the development of Scots law, particularly given the parallel, noted by Zimmermann, between the *Allgemeines Persönlichkeitsrecht* and the *actio iniuriarum*.[1856] Indeed, though the

[1852] *Ibid*.
[1853] BGHZ 124, 52 (VI ZR 62/93), 09/11/1993, b)
[1854] *Ibid.* a)
[1855] *Ibid.*
[1856] Zimmermann, *Obligations*, p.1092

concept of *eine funktionale Einheit* was 'rather pushed aside' by the Court of Appeal in *Yearworth*,[1857] the Scottish courts do not appear 'to have the same difficulty with the idea of "functional unity" as the Court of Appeal did' in that case.[1858] Thus, the Scottish courts remain open to the idea of categorising conduct which harms separated human biological material as actionable, whether such conduct is culpably or contumeliously effected.

Unlike in an *actio iniuriarum*, in which the ultimate classification of the dead body, or parts and derivatives of the human body, is of little practical consequence,[1859] the question of whether the body (or its parts/derivatives) are to be classified as a 'person' or as a 'thing' (or indeed, as suggested in *Holdich*, as something wholly *sui generis*) is significant in any action based on *culpa*. Since any such action is predicated on the occurrence of 'loss' (*damnum*),[1860] it is consequently necessary for the pursuer to establish what, exactly, has been 'lost' through the fault of the defender. Adopting the idea of 'functional unity' would allow for the Scottish courts to afford reparation for negligent damage to human biological material, without adopting the view that such material is 'property' as a matter of law.

Since the action for *culpa* might now serve to repair damage done to personality interests, there is no reason to consider interests which are protected by means of *actiones iniuriarum* as irreparable in cases of *culpa*. Indeed, the law already allows for the payment of damages in respect of culpable infringements of *corpus* (by means of an action for assault,

[1857] See the comments of Lord Stewart in *Holdich*, para.9

[1858] *Ibid*.

[1859] Since the affront suffered by a person who (or, indeed, society which) is connected with the entity against may serve as the basis of the action, even if there is no action in the name of the cadaver: See *supra*. As Habgood observed, however, the lack of clarity concerning the classification of the body, its parts and its derivatives can be beneficial from a practical standpoint: 'accepting the ambiguity permits both personal-type remedies and property-type remedies, as appropriate and depending on the situation, without distorting the doctrinal framework' - S Andrews (ed.), *Scottish Current Law Statutes Annotated 1990*, Vol.3, (Edinburgh: W. Green, 1990), p.37

[1860] McKenzie and Evans-Jones, *Personal Injury*, p. 279

among others)[1861] and *fama* (by means of actions for defamation, among others),[1862] though these would traditionally be treated as instances of *iniuria* (in the sense of the nominate delict). There is, consequently, nothing to say that the law of *culpa* should not now afford reparation in cases which involve a culpable infringement of *dignitas*;[1863] indeed, that the law might presently afford reparation to infringements of this interest is implied by *Holdich*, since it was found that 'the pursuer's averment of "loss of autonomy" is not *per se* irrelevant. It is as capable of forming part of a claim for *solatium* as it is of supporting a standalone claim, so that there is no reason to prevent the averment from going to proof'.[1864]

Dignitas, as an 'all-embracing interest',[1865] is intimately connected to the concept of 'autonomy' (in that term's sense of 'liberty', or 'freedom').[1866] In South African law, 'autonomy', as a personality interested protected by means of *actiones iniuriarum*, grew out of an expansion of the category of *dignitas* (as, indeed, did the concept of 'privacy' in that jurisdiction's jurisprudence). Although Scots law came to recognition of these interests by a different path,[1867] it is nevertheless submitted that the law of *culpa* in Scotland may yet be influenced by Scots and South African jurisprudence pertaining to the interests protected by the *actio iniuriarum*. Any interest which may be affronted by *contumelia* can, now, logically be harmed also by *culpa*; there is no reason to consider that a (free) individual's body might be damnified, but that his *dignitas*, autonomy or privacy may not be.

[1861] See (e.g.,) *Somerville v Harsco Infrastructure Ltd* [2015] SCEDIN 71; *Wilson v Exel UK Ltd* 2010 SLT 671; *Reid v Mitchell* (1885) 12 R. 1129 and the comments in Pillans, *Delict*, para.6-13

[1862] See, e.g., *MacKintosh v Weir* (1875) 2R 887 and the discussion in Blackie, *Defamation*, p.666

[1863] Such, it is thought, would represent a further shift away from a taxonomy of delict which seeks to condemn 'wrongs' and a further move towards a system which enjoins the protection of 'rights' – as discussed by Pillans: See Pillans, *Delict*, para.6-01

[1864] *Holdich*, para.102

[1865] Harris, *An Eternal Problem*, p.202

[1866] John Coggon and José Miola, *Autonomy, Liberty and Decision-Making*, [2011] Camb. L. J. 523, p.524; Burchell, *Protecting Dignity*, p.260

[1867] *BC*, para.126; though see fn.341 *supra*.

In any case, the success of an action in any jurisdiction which recognises 'functional unity' between a person and biological matter which has been separated from them does not turn on the recognition of *dignitas* (nor any other interest associated with it) as a protected interest. Damage done to the tissue, in such instances, may be conceptualised as an infringement of *corpus*; such is thus understood to be a 'physical injury',[1868] in the sense of 'physical damage', as described by Pillans.[1869] Receipt of the concept of 'functional unity', then, would allow Scots law to afford protection to the *existimatio*, or 'human dignity', inherent in certain types of human biological material, which have been separated from 'persons', without reifying – to say nothing of objectifying or indeed commodifying – the material in question.[1870]

It would also allow for the law to recognise the practical reality that there are occasions in which the law of property might well provide a more appropriate means of regulating the use and disposal of human bodies and, particularly, body parts and human biological material. To suggest, for example, that the administrators of a biobank such as Precious Cells International[1871] might not enjoy proprietary rights upon their assumption of control over the tissue samples stored at the firm's North Lanarkshire facility would seem strange, since such material would be undoubtedly treated as economic assets, given the nature of the firm's business.[1872] Whatever objections might be raised as a result of the 'objectification' of human tissue samples,[1873] it appears at first sight to be logical for such material to be treated as subject to the law of property than that of obligations, since the materials are wholly severed from the

[1868] BGHZ 124, 52 (VI ZR 62/93), 09/11/1993, a)

[1869] The victim, in such instances, would also be classified as a 'primary victim': Pillans, *Delict*, para.11-15

[1870] For the notion of 'reification' in law, see MacCormick, *Instititions*, p.85

[1871] Of which, see Mark Macaskill, *Precious Cells Stem Cell Firm Faces Questions Following its Collapse*, (08/04/2018, the Times)

[1872] 'For certain statutory purposes bio-matter is to be treated as a "product"': *Holdich*, para.49

[1873] See Greasley,*: Commodification*, pp.67-68

subject whence they came, with no ongoing 'functional utility', and in the sole control of the biobank (or administrators thereof) in question.[1874]

At this juncture, the significance of *iniuria* as a means of protecting individual interests in human biological material (whether such is viewed as a (part of a) 'person' or as 'property') must be re-stated. The treatment of body parts and human biological material by the Biological Resource Centre (BRC) in Phoenix, Arizona, evidently demonstrates the utility of a flexible concept of *crimen injuria* – and of the potential for a civil *actio iniuriarum* in cases of affront to cadavers – at common law. In 2014, agents of the Federal Bureau of Investigation raided a tissue bank operated by BRC and discovered, *inter alia*, 'a small woman's decapitated head which had been sewn onto a large male torso "like Frankenstein" and hung up on a wall'.[1875] To treat the occurrence of such wanton disrespect simply as a case of wrongful interference with property (which could not be done, in any case, on this analysis, since the bodies and their parts would be the assets of BRC) would be, it is submitted, remiss to the law. Even if the bodily material in the possession of BRC could be said to be their 'property', the contumelious manner in which they handled the material must clearly be held to be an affront to the surviving relatives of those deceased persons and, indeed, society as a whole. Thus, adopting the German notion of *eine funktionale Einheit* would not necessarily preclude the law from allowing a civil or criminal action for *iniuria*, even in instances in which the bodily material has been permanently removed from the 'person' in question. Such, it is submitted, highlights the need for an action for *iniuria* (whether civil, criminal or both) to continue to subsist, in law, alongside the neo-Aquilian action for *culpa*.

[1874] Nevertheless, as 'key among the problems of biobanking is the issue of consent' (see Cameron Stewart, Wendy Lipworth, Lorena Aparicio, Jennifer Fleming and Ian Kerridge, *The Problem of Biobanking and the Law of Gifts*, in Goold *et al*, *Persons, Parts and Property*, p.27), it is suggested that the *actio iniuriarum* maintains a role in cases of this kind.

[1875] Harry Cockburn, *'Like Frankenstein': Woman's head attached to man's body found lying next to bucket of human parts in lab*, (26/07/2019, the Independent)

Notwithstanding the potential utility of the concept of *eine funktionale Einheit*, counsel for the pursuer and defender in *Holdich* both agreed, 'rightly or wrongly',[1876] that Scots law was hostile to the idea that damage to stored sperm (or, indeed, other stored bodily parts or matter) could amount to 'personal injury' (in the sense of the *culpa*-based action). No submission on this point was ultimately advanced, although Lord Stewart seemingly lamented this, stating that since this submission was not made even in the alternative, 'I have to judge the case, as it is presented, on the basis that it is not a claim for bodily injury with consequential mental injury'.[1877] Though, as Lord Stewart noted in the case of *Holdich* (commenting on the English case of *Yearworth*), 'saying that six men have a "right to use" their sperm does not actually tell us whether the "right" is a property right or a personality right',[1878] the pursuer in *Holdich* elected to advance their 'primary' delictual case, as well as a contractual case, on the argument that his biological material was his 'property' as a matter of law.[1879]

In no small part due to the present 'patchy' state of the law of 'personality rights' in Scotland, it might be thought that if, in any legal action concerning negligent damage to such, a dead body or human biological material in question is deemed to be the 'property' of the pursuer, then said pursuer will find it easy to establish grounds for their claim.[1880] It is perhaps because of this perception that the argument for 'loss of autonomy', in *Holdich*, appears to have been put forth in a somewhat confused fashion.[1881] As noted, the 'primary' delictual argument

[1876] *Holdich*, para.6

[1877] *Ibid*., para.9

[1878] *Ibid*., para.47

[1879] *Ibid*., para.12

[1880] The case of destruction of, or damage to, property is straightforward: 'the *lex Aquilia* principle applies – loss wrongfully caused' is reparable in such cases, whether the loss occurs through negligence or manifest intention: See Pillans, *Delict*, para.8-22

[1881] Lord Stewart observed, at para.99, that 'the debate has left me uncertain as to the nature of the dispute around the pursuer's "loss of autonomy" claim'. As he went on to note, although the pursuer predicated his claim on a proprietary basis, 'there is a possible contradiction in the pursuer asserting on the one hand that stored sperm is property and in claiming on the other hand "loss of autonomy" in respect of the, let us assume, destruction of the sperm.': See *Holdich*, para.102

in this case was predicated upon recognition of the pursuer's sperm as his 'property', yet 'autonomy', as Lord Stewart observed in that case, 'seems to be a personality right' and 'compensation for "loss of autonomy" does not look like a proprietary remedy'.[1882] This led his Lordship to ultimately conclude that '[based] on what I have heard, the defenders' argument is the better one',[1883] although ultimately this did not prevent the case from progressing to proof.

The pursuer's contractual case also faced difficulties,[1884] but, like the delictual action, was permitted to progress to proof.[1885] In criticising the argument as it was presented, Lord Stewart suggested that the property-contract case 'could have been put on a simpler footing, namely that any "thing", not being a living person, in relation to which the possessory remedies of delivery and interdict are available, is capable of being the subject matter of a contract for safekeeping'.[1886] Accepting that counsel had conceded the 'functional unity' argument, it would follow that 'sperm in a container is such a "thing"'.[1887] In Scots law, where – as in Roman law – there remains a notable separation between *dominium* and *possessio*[1888] – recognition of the sperm as a 'thing' would not necessarily mean that the object is the 'property' of the pursuer, but such would be no bar to a pursuer's claim for contractual damages (since in such a case, the sperm would exist as an 'object' governed by the contract, rather than simply as an object of property).

Since recognition of the sperm as a 'thing' would leave the object within the realm of 'thing-law' (*i.e.*, property law), and such material is not *res extra nostrum patrimonium*,[1889] the

[1882] *Ibid*.
[1883] *Ibid*.
[1884] *Ibid*., para.5
[1885] *Ibid*., para.75
[1886] *Ibid*.
[1887] *Ibid*.
[1888] Dig. 41.2.12.1; see also para.2.4.2, *supra*.
[1889] See 1.4.2, *supra*.

question of who 'owns' the biological material, on any 'property' analysis, arises. This question gives rise to different issues from those which arise in respect of whole cadavers.[1890] Unlike that issue, when dealing with separated tissue, or derivatives, the question of who owns the material turns on the demarcation of the 'line of separation from the body';[1891] in line with the theory of *eine funktionale Einheit*, this line would not be drawn simply at the point at which the material is removed from the 'person's' principal body itself (drawing the line at the point of separation *simpliciter* is termed, for the purposes of this thesis, 'simple separation theory'). Rather it would occur at the point at which the 'person' whence the material is removed determines that the separated biological material is not to be re-attached or 'used' to effect some biological function. This could well be at the moment of separation itself, as in the case of (for example) biopsy, or it might be some considerable time after the material has been physically removed from the body (as, for example, in circumstances analogous to *Holdich*). It is for the person who shares a connection with the biological material in question to determine when, exactly, the separated tissue ceases to be a functional part of their body. Since the separated biological material, at this time, becomes a new object, wholly distinct from the 'person' from which it was removed, governed by the ordinary rules of property law, such material – it is submitted – would be said to become *res nullius* and so amenable to become *fiunt singulorum* by means of *occupatio* at the point at which functional unity ceases.

This analysis would have the consequence of vesting ownership of human biological material in whoever obtains first possession of the tissue following the cessation of functional unity. The advantages of this over an analysis which considers separation from the body *simpliciter* to be the point at which the biological material becomes an object (and so governed by the law of property) are manifest; the person retains control over their own biological

[1890] In the circumstances presently under discussion, there is no question of transfer of personality, nor of an artificial legal person such as the *hereditas jacens* obtaining either *possessio* or *dominium*.

[1891] *Holdich*, para.49

material, until such a time as they determine to lose interest in the material, where *eine funktionale Einheit* abides.[1892] Conversely, if the dividing line between (part of a) 'person' and 'object' (*i.e.*, thing in its own right) is deemed to be at the point of removal, ownership of the material in question might be said to vest in the person (or employer of that person) who first separates the object from the 'person' (provided that they do so *animo domini*, or at least with the intention of holding as 'possessor' proper).[1893] Such raises no difficulties in cases of, say, sperm – as was discussed in *Holdich*, sperm might be easily 'captured' by, and so come into the first possession of, the person who produces the material[1894] – but in cases of any medically separated biological material (including a woman's eggs), the logical consequence of this (in the absence of some legal relationship of agency)[1895] must be that the physicians who effect separation (or their employers) become the owner(s) of the tissue when the procedure is concluded, unless they have agreed, beforehand, to act as mere custodier of the separated *res nullius*.

The effect of simple separation theory would appear to correlate with the consequences of the Anglo-American 'human work or skill' rule set out in *Doodeward v Spence*.[1896] Adopting this theory in preference to that of *eine funktionale Einheit* would, consequently, expose Scots law to the same issues which persist in English law[1897] (although, perhaps, to a lesser extent due to the differences in the meaning of 'possession' and 'property' between these two

[1892] Further to this, it would not be possible for any organisation to contract out of liability for causing damage – negligent or otherwise – to separated biological material which remained functionally unified with the person whence it came, since to do such would be to cause a 'personal injury'. *Per* s.16 (1) (a) of the Unfair Contract Terms Act 1977, any contractual term which 'purports to exclude or restrict liability for breach of duty arising in the course of any business… shall be void in any case where such exclusion or restriction is in respect of death or personal injury'. Section 65 (1) of the Consumer Rights Act 2015 c.15 mirrors this rule and applies it in respect of all 'consumer contracts' (of which, see s.2 of that Act).

[1893] In other words, unless there is an implicit contract of deposit between the person from whom the tissue is separated and the physician: recall the discussion in para.2.4.2, *supra*.

[1894] *Holdich*, para.36

[1895] *Edwards*, para.91; see also the discussion in 2.3.2 *supra*.

[1896] (1908) 6 CLR 406

[1897] See 2.3.2, *supra*.

jurisdictions). To circumvent these difficulties in cases concerning the separation of tissue which the person from whom it is removed intends to make use of at a later point, it would be necessary for the law to make use of 'creative judicial reasoning'. Such could take the form – for example – of deeming that the operating physicians, in removing the material, are 'acting as the agents [of the person from whom the tissue is removed] and [those agents, in the circumstances, would consequently] not acquire any proprietary rights for their own sake'.[1898] Thus, since the wholesale adoption of the theory of *eine funktionale Einheit* would allow the Scottish courts to circumvent the issues which have faced Anglo-American jurisprudence, without requiring the courts to introduce any additional layer of abstraction, it is submitted that simple separation theory should be rejected in favour of that of *eine funktionale Einheit*.

With that said, however, as the theory of *eine funktionale Einheit* has not been expressly enjoined by the Scottish courts, it might be thought that the simple separation theory abides, at present, in Scots law. Indeed, in *Holdich*, it was established the 'case [as presented] does actually depend on the gamete‑provider "capturing" his own sperm: on this basis the particular way in which the sperm samples were produced is an essential fact'.[1899] Given that the argument presented by pursuer's counsel, though criticised, was ultimately deemed strong enough to progress to proof, it might be thoughts that the legal position espoused in *Holdich* would be adhered to in subsequent similar cases. The opportunity to develop an analogue to the theory of *eine funktionale Einheit* in Scots law may have been missed. Nevertheless, given the difficulties which the simple separation theory presents, and the fact that Lord Stewart was evidently open to being persuaded by the theory of *eine funktionale Einheit* (and his judgment certainly did not close the door to recognition of this theory in future), it is thought that scope

[1898] As was held in *Edwards*, para.91; see also the discussion in 2.3.2 *supra*.

[1899] *Holdich*, para.36

remains for Scots common law to accept the operation of this doctrine in cases concerning separated human body parts and biological material.

In any case, it is clear that the recognition of separated human biological material as 'property', rather than as a part of a 'person', would not be as problematic, in Scotland, as it may be in other jurisdictions. Unlike in Germany (at least at the time when the 1993 case was decided), there exists no bar in principle to the recovery of non-pecuniary damages, or *solatium*, arising out of damage to property in Scots law.[1900] In *Holdich*, the authority of the English case of *Attia v British Gas PLC*[1901] was found to support the pursuer's case.[1902] This case concerned a woman who sought damages for psychiatric injury after she returned home to find her house ablaze due to the negligence of contractors who were carrying out work in it. On the basis of her 'emotional attachment to the family home and treasured possessions',[1903] the plaintiff claimed that she had suffered nervous shock having witnessed the destruction of such important property. The Court of Appeal allowed her appeal and remitted the case to proof.

In doing so, the court unequivocally ruled that the culpable destruction of property might give rise to an actionable claim for psychiatric injury: Bingham LJ, for example, noted that recovery might well be possible where 'a scholar's life's work of research or composition were destroyed before his eyes as a result of a defendant's careless conduct, causing the scholar to suffer reasonably foreseeable psychiatric damage.'[1904] Both *Attia* and the example given by

[1900] Stewart, *Reparation*, para.18.43; see also the unreported case of *Richardson v Quercus Ltd.* 24 December 1998 (accessible at https://www.scotcourts.gov.uk/search-judgments/judgment?id=818d87a6-8980-69d2-b500-ff0000d74aa7); *Holdich*, para.90; *Fraser v State Hospital Board for Scotland* 2001 S.L.T. 1051; *Cross v Highlands and Islands Enterprise* 2001 SLT 1060, para.62

[1901] [1988] 1 Q.B 304

[1902] *Holdich*, para.91

[1903] The important emotional connection which might exist between a person and their home has been likewise been noted by the Scottish courts: See *Hutchison v Davidson* 1945 SC 395, wherein Lord Moncrieff expressed the truism (at p.411) that, barring some notable exceptions, 'houses are so individualised by situation, aspect, amenity, and even by mere local accidents, that as matter of sheer fact no different house is ever an interchangeably similar house'

[1904] [1988] 1 Q.B 304 p.320E

Lord Bingham turn on the 'injured' party having witnessed the property damage being caused.[1905] On this analysis, one who suffers psychiatric distress as a result of damage to their property would be likened to a 'secondary' victim of loss and so subject to the 'control mechanisms' which exist to limit liability towards such victims. If such were to follow the general rules barring recovery for damages for secondary victims in cases of physical harm to a primary victim (subject to the exception set out in *McLoughlin v O'Brien*[1906] and equating the requirement for 'close ties of love and affection' between the primary and secondary victim to a close emotional attachment between the person and their property)[1907] then recovery would be barred in tort and delict.[1908] A claimant, in the position of Thomas Carlyle (whose manuscript copy of *The French Revolution* was burned by John Stuart Mill's housemaid) would have no recourse to the courts,[1909] since he would not have witnessed the event 'with his own unaided senses'[1910] and may not have been proximate to the wrongdoing either in time or in space.[1911]

This outcome was not enjoined by the Outer House in *Holdich*. Therein, Lord Stewart noted that the divide between 'primary' and 'secondary' victims was of limited utility in cases in which where there is but one victim:

> "The primary/secondary issue should not arise not arise in sole victim cases where the allegation is of wrong done directly to the injured party's interests, where the injured party's identity… is known in advance to the wrongdoer and where the wrongdoer has

[1905] See the discussion in *Yearworth*, para.55

[1906] [1983] 1 AC 410

[1907] See *Holdich*, para.81

[1908] See *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 A.C 310 and the discussion in *Holdich*, para.87.

[1909] See the discussion in *Holdich*, para.87.

[1910] See *Hambrook v Stokes Bros* [1925] 1 KB 141, p.152

[1911] See *Alcock*

a duty of care by virtue of pre-existing legal proximity to safeguard the interest in question".[1912]

In cases of property damage which leads to psychiatric injury, then, it is not necessary that the pursuer should witness the damage occur. The person who suffers damage to their property, and consequent psychiatric injury, might be treated as a 'primary' victim of 'pure'[1913] mental harm where the property in question possesses no real economic value.[1914] The salient feature in determining liability is the existence of a relationship of 'pre-existing legal proximity' to safeguard the interest in question.[1915] Quite what constitutes this relationship in all circumstances is impossible to answer, but it is clear that such a relationship might exist between a statutory service provider and an individual,[1916] as well as between doctor and patient.[1917]

The Scottish courts, at common law, consequently have the power to afford redress where there has been non-pecuniary loss (nor, indeed, any psychiatric injury) caused by damage to property. Indeed, further to the potential reparation which might be awarded in cases of psychiatric injury, Scots law has also long recognised that individuals may attach a 'peculiar value' to certain objects of property. Although an individual who loses the ability to reproduce will undoubtedly feel that they have suffered something other than monetary loss (and, indeed, the law might ascribe no monetary value to gametes or other biological material which is separated from the human body), money is– to borrow a phrase – 'the universal solvent'.[1918] In

[1912] *Holdich*, para.88

[1913] The terminology of 'pure' psychiatric harm was criticised by Lord Stewart, though it was noted that 'it is probably too late to change the terminology'. In any case, the 'pure' mental harm which is deemed compensable in cases of this kind is, on any analysis, less than 'pure' in the true sense of that term: See *Holdich*, para.89

[1914] *Ibid*., para.88

[1915] *Ibid*., para.90

[1916] See *Farraj v King's Healthcare NHS Trust* [2006] PIQR P29

[1917] *Holdich*, para.92

[1918] *Auld v Shairp* (1874) 2 R. 191, p.199 *per* Lord Neaves.

the eyes of the law 'everything can be turned into money that is either a gain or a loss; money is asked and damages are due for reparation of every possible injury or suffering'.[1919] Thus, there exists authority to suggest that the *pretium affectionis* – the 'price of affection' attached, by the owner, to the thing – is the measure of damages payable in the event of the destruction or loss of the thing in Scots law.[1920]

This concept of *pretium affectionis* has not attracted much scholarly attention in Scotland,[1921] yet there exists authority to suggest that 'where the circumstances justify the owner in attaching a peculiar value to the subject, the Court are entitled to allow somewhat in excess of the market value, as a *pretium affectionis*'.[1922] Given the (potential) personal importance of human biological material to the subject from which it is removed, it is submitted that any legal subject from whom tissue or other biological material is removed would be entitled to attach some *pretium affectionis* to the object for as long as the material possesses some (potential) functional utility. Thus, even if the Scottish courts were to wholly disavow the theory of functional unity (*eine funktionale Einheit*), a pursuer might nevertheless be entitled to claim damages (including damages for non-pecuniary loss) in cases in which their biological material is damaged through the fault of another. The measure for determining whether or not the damage would be compensable could remain the same as under the theory of *eine funktionale Einheit*, but without the courts having to expressly rule that the material remains a part of any 'person'.

[1919] *Ibid*.

[1920] Stair, *Institutions*, I, 9, 4; *Brouster v Lees* (1707) F. 369; *Lockhart v Cunninghame* (1870) SLR 8 151 and *Fraser and Ors v J. Morton Wilson Limited* 1965 S.L.T. (Notes) 81

[1921] Indeed, it has been remarked that 'academic writers have tended to concentrate on the delictual, rather than the reparational, aspect of the subject [of damages]': Robin M. White and Michael J. Fletcher, *Delictual Damages*, (Edinburgh: Butterworths, 2000), p.4

[1922] *Lockhart*, p.152

4.3.3 Bodies and Body Parts: 'Person' or 'Thing'?

Whether the courts determine that separated human biological material should be treated as a part of a 'person' or as a 'thing' in its own right is consequently, from a practical standpoint, largely moot. As the High Court of South Africa recognised in *Chowdan v Associated Motor Holdings*:

> "Areas of law are labelled or named for purposes of systematic understanding and not necessarily on the basis of fundamental reasons for a separation. Therefore, rigid compartmentalisation should be avoided."[1923]

This observation is consistent with that Habgood, who – in commenting on the Human Fertilisation and Embryology Act 1990 – commented that 'accepting the ambiguity [of the treatment of human biological material in law] permits both personal-type remedies and property-type remedies, as appropriate and depending on the situation, without distorting the doctrinal framework'.[1924] Scots law might, then, afford reparation to an individual whose interests in their separated body parts or biological material are prejudiced, whether such parts and material are conceptualised as 'things' or as a functional part of the person's *corpus*.

Ambiguity of this kind must, however, be regarded as anathema to the principle of legal certainty and, thus, the rule of law. Fortunately, then, the theory of *eine funktionale Einheit* allows for the law to effect the end sought by Habgood, without prejudicing this central principle. By recognising that biological material might continue to form a part of the person from whom it is removed, there is no bar to personal-type remedies; similarly, in recognising that the material might come to be an 'object' once it ceases to be functionally unified with

[1923] *Chowdan v Associated Motor Holdings (PTY) Ltd.* [2018] ZAGPJHC 40, para.52

[1924] See S Andrews (ed.), Scottish Current Law Statutes Annotated 1990, Vol.3, (Edinburgh: W. Green, 1990), p.37

said person, the door is open to the recognition of property-type remedies where the situation calls for such.

Given the significance of the notion of 'dignity' in discourse concerning the human body, it is submitted that the theory of *eine funktionale Einheit* ought to be preferred above any other, as such would allow for the law to expressly protect dignitary interests in respect of separated body parts and biological material, as well (and in the same manner) as in respect of cadavers[1925] and 'whole' living persons. The dignitary interests which are afforded protection by the *actio iniuriarum* might also be afforded recognition in cases of *culpa*; if the law recognises functional unity between a person and their separated bio-matter, though, there would be no need for sophisticated argument concerning the scope of such recognised interests. Damage to biological material, in such circumstances, would amount to a 'personal injury' to *corpus* and so the harm to *existimatio* might be repaired without explicit discussion of this high-level personality interest.

The position in respect of whole cadavers and donated body parts is, however distinct: there exist good reasons for treating whole human cadavers, as well as biological material which is retained by (*inter alia*) laboratories and museums, as 'property'.[1926] Unless the continuing juridical personhood of the deceased is recognised, whether in the form of the *hereditas jacens* or in the transfer of *persona* to one who in law becomes *eadem persona cum defuncto*,[1927] there is no 'person' with whom a whole cadaver might be said to be functionally united. This is not to say that the dignitary interests of the dead cannot be protected by law in the absence of the continuing juridical personhood of the deceased. An action based on the

[1925] Provided that the reading of Dig.47.10.1.6 is accepted.

[1926] Chalmers and Leverick, *Criminal Law*, para.21.26 and para.2.4.1 *supra*.

[1927] See the discussion in para.2.4.2, *supra*.

nominate delict *iniuria* might allow for the nearest relatives of the deceased,[1928] or the state (in a jurisdiction which recognises some iteration of *crimen injuria*), to pursue a case where there has been contumelious and undignified treatment of a dead body. This action could be pursued even if the body were conceptualised as a 'thing' in law: *iniuria* may be inflicted by indirectly causing a *persona* affront through contumelious treatment of an object which is of particular importance to them.

Conceptualising the body as an object (which might be held in the possession of private persons, even if the ultimate *dominus* is unknown or unascertained) is consistent with the fact that possessory remedies might be pursued in respect of the body,[1929] as well as the fact that the body may be the object of theft.[1930] It is consequently preferable to conceptualise the whole cadaver (or parts of, and tissue removed from, a dead body) as 'property', while nevertheless recognising that parts of a living body, and biological material separated therefrom, might continue to form a part of that 'person' until the person in question deigns to renounce their ongoing interest in their bio-matter. Negligent destruction of, or damage to, a cadaver (or its parts) might then be reparable, provided that some proprietary (or at least possessory) relationship exists between a juridical person and the dead body in question. If such a relationship were deemed to exist, then there could be, as in *Holdich*, an arguable 'property-contract' case.[1931]

The measure of damages afforded in such instances might be assessed in line with the *pretium affectionis* which the person would attach to the cadaver in question.[1932] Thus, though the body might have no economic worth, a person who feels that they have been wronged as a

[1928] On the basis of the recognised common law interest in the body of one's deceased relative, confirmed by ss.65-68 of the Burial and Cremation (Scotland) Act 2016.

[1929] *Holdich*, para.49

[1930] *Dewar*, *passim*.

[1931] See Walker, *Delict*, pp.1,008-1,009

[1932] *Lockhart v Cunninghame*

result of culpable damage to a cadaver might nevertheless receive monetary reparation. On this analysis, a funeral home which mishandles a cadaver might, then, be sued by the 'nearest relatives' of this deceased, given that these relatives have possessory interests in respect of the body,[1933] but a bio-bank such as BRC would not be liable in negligence for culpable mistreatment of the bodies in their possession.[1934] For reparation to be afforded in cases in which the body (or its parts or derivatives) is conceptualised as 'property', there would need to be some intent to return the body or bio-matter to the person who believes that they were wronged, as was the case in *Stevens*. If the body was donated in perpetuity, any proprietary or possessory interest would be renounced and no *pretium affectionis* could be claimed.

4.4 Conclusion

On the basis of the above discussion, it seems then that the law ought to continue to recognise that human biological material is to be protected by the law pertaining to 'personality rights' where the material in question might be said to continue to form a functional part of a living person. Such circumstances include occasions in which the material which is removed is designated for re-integration with the person in question, or where the person plans to use the material to fulfil some particular function (such as reproduction). Where the realisation of this potential function becomes impossible, or the person in question makes known that they no longer wish to see the material re-integrated or 'used' in any other sense, said material should cease to be regarded as a functional part of that person and, instead, become a 'thing'. This 'thing', in all circumstances, would be governed by the ordinary rules of 'property law'

[1933] See para.2.4.2, *supra*. Here, there would need to be some implied contract of deposit or custody between the funeral home and the 'nearest relative(s)' for the right of action to vest in the possessor(s), though the *dominus* could sue in negligence.

[1934] They would, however, remain liable for contumelious treatment under an *actio iniuriarum*, hence why it remains necessary for the law to revitalise this action.

and so, in the Scottish context, be *res nullius* on the point of becoming a separate 'object' and so amenable to form a part of the patrimony of whoever takes 'first' possession of it.

A whole dead body, or bio-matter removed from a whole dead body, cannot be said to hold any functional unity with any 'person' and so it is logical to regard such as 'things' in law. The question of 'ownership' of separated bio-matter can be easily answered; the rules, in such instances, would be the same as regards the separation of non-functionally united bio-matter from a living person (that is to say that on separation the bio-matter would become, for the first time, a separate *res nullius*). The matter of 'ownership' of the whole cadaver is, however, altogether more difficult, although the practical issues which arise in respect of this are lessened by the recognition of possessory remedies.[1935]

Ultimately, whether or not the body, its parts and its derivatives are to be designated as 'persons', parts of 'persons' or 'things' in law, it remains the case that the relatives of deceased persons, the person from whom biological material and, indeed, society itself, retains an interest in the dignified treatment of all human bio-matter. As such, given that the nominate delict *iniuria* affords a mechanism to protect dignitary interests, it follows that Scots law should develop its institutional connection to this mechanism as a means to afford greater protection to these interests in the Twenty-First century. At present, the Human Rights Act 1998 provides an impetus for the Scottish courts to develop a robust means of protecting dignitary interests and the key interest of 'human dignity' in particular – as the courts have recognised in recent years, too, the rights which are available at common law should be strengthened and relied upon. Since Scots common law can develop with regard and reference to the approach adopted in other uncodified countries,[1936] and since South Africa has developed a 'copious' case law

[1935] See 2.4.2

[1936] *A v BBC*, para.40

concerning the *actio iniuriarum*,[1937] it is submitted that Scotland's connection to the *actio iniuriarum* ought to be reinvigorated and can be reinvigorated by means of comparative law.

The scholarship and case law concerning the delict *iniuria* in South Africa indicates that the concepts which are connected to this idea may be readily transposed to other jurisdictions. Although South Africa has developed a dual notion of civil and criminal *iniuria*, since the requirements for both are functionally interchangeable, it is clear that the civil law conception of *iniuria* in Scots law might be developed by reference to South African criminal cases. Likewise, since Scotland shared a common tradition with South Africa, the ideas discussed in this jurisdiction's jurisprudence would be, it is submitted, at home in Scotland, notwithstanding the presence, and influence, of the 'right to dignity' in the South African constitution. Though Scotland lacks a foundational document of this kind, the concept of *existimatio*, which the *actio iniuriarum* serves to protect, is readily comparable to the English language term 'human dignity'; the comparative scholarship conducted in this chapter consequently illustrates that there exists the potential for Scotland to develop a means of protecting human dignity – and thus the dignitary interests which persons might have in respect of biological material – at common law.

Conclusion

Scotland's Civil law heritage means that the regulation of the human body (and its parts and derivatives) exists, in this jurisdiction, within a framework and tradition which is fundamentally and conceptually distinct from that which prevails in the Anglo-American world. Therefore, the legal status of the body cannot be said to be 'as settled' in Scotland as it is in England, and indeed, the letter of the law in each jurisdiction is quite different. Insofar as

[1937] Reid, *Personality*, para.17-12

the matter of ‘property law’ is concerned, then, it is clear that any similarities between Scots and English law must be regarded as merely superficial, and the term ‘property’ itself must be understood in two very distinct ways depending on whether one is concerned with the Civil or the Common legal tradition.

In common with Roman law and the Continental European legal tradition, Scots law recognises *dominium* as a defined legal concept (indeed, as the ultimate relationship which might subsist between a *persona* – and a *res*) which is distinct from *possessio*. Some *res* may be *extra commercium* or *extra nostrum patrimonium* – outwith the realm of commerce or private patrimony, respectively – but this does not mean that these objects are not juridically recognised as ‘property’ (*i.e.*, ‘things’ which might be ‘possessed’, if not necessarily ‘owned’) as a Civil lawyer would understand that term.

In the Common law tradition, by contrast, the concept of ‘possession’ cannot readily be separated from that of ‘ownership’. In fact in that tradition the concept of ‘property’ is conceptualised without express regard to ‘ownership’, which is not recognised as a meaningful notion at all. Thus, when Common lawyers speak of ‘property’ in or to an object (or ‘thing’), they do not simply mean ‘ownership’ of that thing as Civilian lawyers would understand the term (although the English-language term ‘property’ is sometimes colloquially said to describe ‘ownership’). Continental European terms such as *propriété, Eigentum* and *dominium* have no perfect correlates in English law, and so it might be concluded that Common lawyers use the term ‘property’ with far less precision than their Civil law counterparts; a Common lawyer who claims that there can be ‘no property’ in an object does more than simply state that the object cannot be ‘owned’.

The concept of ‘property’ is, consequently, conceptually distinct between the two great legal traditions and, since Scots law is fundamentally rooted in a different intellectual tradition

from the law of England (particularly insofar as 'property law' is concerned), it cannot be presumed that what holds true in one jurisdiction will, or should, necessarily hold true in the other. Commonality of colloquial language should not be taken to mean commonality of legal language; the root concept of 'property' must be interpreted very differently depending on whether one is concerned with the concept as it subsists in Scotland or as it subsists in England. In Scotland, to speak of 'property in' an object is to speak of 'ownership' – in the Civilian sense of *dominium* – in, to or with the object in question. 'Property', in this sense, is distinct from the *object* of 'property' (which is better described as a *res* – a 'thing') and is also wholly distinct from 'incidents of ownership'[1938] such as 'possession', which is conceptualised as a 'distinct but lesser right' than that of 'property' (*i.e.*, 'ownership' or *dominium*).

A Scots lawyer who considers the Anglo-American 'no property in a corpse' rule might then interepret it in one of two ways: either as holding that there can be no *ownership* of a cadaver *or* as holding that the cadaver itself is not a juridical 'thing'. Due to the imprecision of the term 'property' within the Common law tradition, however, the Common law has developed to interpret the rule as holding that *both* of these interpretations are simultaneously true; the cadaver is thus, in this tradition, a legal nullity – neither 'person' nor 'thing'. This has proven problematic in practice and has led to sustained criticism of the 'no property rule'. This criticism notwithstanding, the rule firmly forms a part of modern English law, as well as the law of other notable Common law jurisdictions.

The rule that 'there can be no property in a corpse' emerged in the Common law tradition as a result of a historical accident. It has proven to be conceptually and practically problematic within the native tradition whence it developed. In part, this is because the rule developed against the background of a juridical system which split jurisdiction between

[1938] When Honoré speaks of 'incidents of ownership', the term 'ownership' serves as a synonym of 'property' in the first sense used in this paragraph: See Tony Honoré, *Ownership*, p.113

ecclesiastical and secular courts, the former being governed by Canon law (an area intellectually rooted in the Roman legal tradition), the latter by Common law. In Canon law, as in Civil and Scots property law, it is recognised that some things are sequestrated from the ordinary rules of property law and deemed *res divini iuris* (things subject to divine law). The human corpse (still less body parts and separated biological material) is not such a thing, although it (or the 'principal part', such as the head or ashes, thereof) could become part of a *res religiosa* – a species of *res divini iuris* – on its reverential interment. Insofar as the Civil law and Canon law are concerned, then, the human body is not a legal nullity, but rather exists as a corporeal thing subject to the ordinary rules of property while unburied and as a part of a greater *res religiosa* (the cadaver having acceded to the *locus religiosus*) once buried.

The Anglo-American Common law does not recognise that objects of property are *divini iuris,* or might be *extra nostrum patrimonium,* although it has historically recognised that certain matters could fall within ecclesiastical, rather than common law, jurisdiction (being thus governed by the rules of Canon, rather than Common, law). The English jurist Coke consigned the 'buriall of the cadaver' to the ecclesiastical law and later jurists – Wood and Blackstone, who each trained in the Civil, as well as Common, law – likewise regarded the interred cadaver as an object removed from the ambit of Common law 'property'. The jurists who are held out as having developed a general 'no property' rule for principled reasons, on examination, appear not to have done so, but rather to have been misunderstood and misrepresented by subsequent Common lawyers who have failed to appreciate the significance that the 'buriall' of the cadaver had in Canon and Civil law.

Although the juristic works of Coke, Wood and Blackstone did not establish any general rule that there can be 'no property in a corpse', still less that there can be 'no property' in the human body, or its parts and derivatives more generally, the Common law developed the rule in the nineteenth century through reference to, and as a result of the influence of, these

writings. Over time, the rule expanded further still and came to be applied – subject to various 'exceptions' designed to mitigate the absurdities of the expansion of the rule – to all forms of human biological material. The truth of Hume's observation that 'there is a principle of human nature, which we have frequently taken notice of, that men are mightily addicted to general rules and that we often carry our maxims beyond those reasons which first induced us to establish them'[1939] is thus manifest; the 'no property' rule does not subsist within the Common law for any principled reason, but is entrenched (and expanded beyond its original scope) only as a quirk of precedent.

The 'no property' rule is not entrenched in Scotland, in spite of the academic consensus (and certain judicial comments suggesting) that it has been received into this jurisdiction, and there is no impetus for its adoption therein. In England and Wales, the Court of Appeal has expressed its dissatisfaction with the rule, suggesting that it ought to be 're-analysed'[1940] in light of developments in medical science. Some commentators on the Common law, including judges such as Justice Edelman, regard the rule as 'almost inexplicable'[1941] and have criticised its lack of logic. As Master Sanderson expressed in the *Roche* case, 'it defies reason to not regard tissue samples as property. Such samples have a real physical presence. They exist and will continue to exist until some step is taken to effect destruction. There is no purpose to be served in ignoring physical reality'.[1942] In light of the above – and in recognition of Professor Reid's observation that 'property law is better than no law'[1943] – it might be thought that Scots law can and should conceptualise the human body and its parts and its derivatives as 'property'.

[1939] Hume, *Treatise*, 3.2.9
[1940] *Yearworth*, para.45
[1941] Edelman, *Property Rights*, p.19
[1942] *Roche*, para.23-24
[1943] Reid, *Body Parts*, p.243

This conclusion is premature, however. Although there is no doubt that Scots law has the potential to – and, indeed, in certain cases does – recognise property 'rights' in and to the body, its parts and its derivatives, it is difficult to determine, in law, who the ultimate *dominus* of a cadaver is or ought to be. The remains (including 'cremains') of a deceased human being are evidently recognised as a *res corporalis* (prior to their reverential interment)[1944] in law as it is well-established that in Scotland such things can be 'stolen',[1945] but the criminal law authorities are of little help in determining who, if anyone, the remains 'belong' to.[1946] As a result of the clear divide between 'ownership' and 'possession' known to the Scottish legal system, possessory remedies might afford redress in this jurisdiction in cases where the Common law cannot; in practice, then, the availability of such remedies could serve to mitigate the worst excesses of a rule proscribing 'ownership' of human remains and biological material. There may be no impetus for Scots law to adopt or hold to any rule that a cadaver cannot be 'owned', but it remains difficult to determine who, if anything, such a thing would or should be 'owned' by – particularly as the juridical nature of one of the canditates for the role of *dominus* – the *hereditas jacens* – remains uncertain and under-analysed in this jurisdiction.

This difficulty notwithstanding, in the case of *Evans v McIntyre*, Sheriff Scott recognised that the question of 'ownership' of the human body was not settled in Scots law, but noted that, on the authority of cases such as *Pollok v Workman* and *Hughes v Robertson*, it appeared settled that the relative of a deceased person could claim remedy in instances in which the corpse of their relative has been maltreated. This does not necessitate, or even imply, that the family of a deceased person might claim 'ownership' of the deceased's cadaver. The juridical basis of the relative's right of action, which flows from their statutorily recognised

[1944] Recall *Holy Cross Church*, para.20

[1945] Gordon, *Criminal Law*, (2nd Edition), para.14-44

[1946] See *Evans v McIntyre* A498/80, p.52

interest in the cadaver,[1947] lies in the *actio iniuriarum*[1948] – a legal mechanism which serves to protect non-patrimonial 'dignitary' interests rather than in any claim to proprietary 'right'.

The Scottish *actio iniuriarum*, in this iteration, correlates with the *actio iniuriarum* as it existed in Roman law. As in the Scottish cases of *Pollok* and *Hughes*, Roman law also recognised that 'if, by chance, a dead body [to whom I am good heir] should suffer injury, I have an action for that injury in my own name, for we observe that it affects our own *existimatio* [that is, our own 'social standing' or 'human dignity'] if any injury be done to [the corpse]'.[1949] This proposition was seemingly received into Scots law as noted by the Institutional writer Bankton, who observed that 'injury may not only be done to the living, but also in a manner to the dead… the children or next of kin may prosecute the injuries done to the remains of their parent or relation… but if there is an heir, the action is competent to him'.[1950]

The *actio iniuriarum* served in Roman law as an effective means of protecting individual's interests in 'dignity', a term which is invoked even in the Common law, where the concept is not recognised as a legally protected interest in cases concerning cadavers. Thus, the potential of the Scots law of 'personality rights' to provide a more satisfactory way of regulating the human body and its parts and derivatives is manifest. The term 'dignity', as it is employed in respect of the *actio iniuriarum*, should not be translated as 'honour', or any cognate thereof, since the Roman concept of *'dignitas'* was not essentially asymmetrical, as 'honour' is. Although the asymmetry of *dignitas* was a basic fact of life in Roman society (a patrician was inevitably able to law claim to a greater 'quantity' of *dignitas* than any plebeian), a claim to *dignitas* did not necessarily entail any claim to excel over others (as a claim about

[1947] Burial and Cremation (Scotland) Act 2016, ss.65-68

[1948] See *Stevens*, para.62

[1949] D.47.10.1.4

[1950] Bankton, *Institute*, I, 10, 29

'honour' would). The *dignitas* of any *persona* who held comparatively low social rank could be affronted, in law, by the actions of a socially 'superior' *persona*.

Whatever position prevailed in Roman law proper, the concept of 'dignity' was 'levelled-up'[1951] in the *ius commune* so as to extend, in equal measure, to all human persons in society, due in no small part to the development of a discrete 'right to dignity' spearheaded by the Sixteenth Century French Humanist and Calvinist jurist Hugues Doneau (Donellus).[1952] Donellus developed this conception of dignity by drawing on the Roman notion of *existimatio* (which, as noted, could be affronted by the contumelious maltreatment of a relative's cadaver) rather than the idea of *dignitas* itself. Though the term *existimatio* is unquestionably etymologically complex, in law it might be understood in law as the 'high-level' personality interest, under which lie (more) specific personality interests such as interests in one's *corpus, fama* and *dignitas*. *'Dignitas'*, here, might then be understood as a 'collective term for all personality interests, excluding *corpus* and *fama*, which in Roman law had not yet been clearly distinguished and independently delimited'.[1953] The list of 'personality interests' protected by the *actio iniurairum*, on this interpretation, is thus not a *numerus clausus*, and any action which affronts a specific 'personality interest' might be said to also affront the *existimatio* of the injured person.

Scotland has the potential to develop a robust law of 'personality rights' due to its connection to the *actio iniuriarum* and the notion of 'dignity' which has developed therein. Nevertheless, Scotland's institutional connection to the *actio iniuriarum* has been severely neglected. Although it is recognised as the 'ancestor' of some common Scottish legal actions,

[1951] See James Whitman, *Human Dignity in Europe and the United States*, in G. Nolte (Ed.), *Europe and U.S. Constitutionalism* (Strasbourg: Council of Europe Publishing, 2005), p.97

[1952] See Giltaij, *Existimatio*, p.235

[1953] Neethling, *Delict*, (4th Edn.), p.14

it is reasonable to wonder whether the action simply subsists as a mere 'romantic Romanism' rather than as a practical 'tool for today'.[1954]

Due to the enactment of the Human Rights Act 1998, however, Scots law may be under an obligation to develop its native tools to safeguard and protect human rights alongside the actions and remedies expressly afforded by the 1998 Act. Whether or not there exists such an obligation on the Scottish courts to develop the law relating to *iniuria*, two things are apparent. First, that such development is desirable even in the absence of any express obligation (particularly given that the 1998 Act may be repealed); and second, that no matter how desirable the development of the Scottish *actio iniuriarum* may be, this alone cannot afford adequate protection to, or to regulate disputes concerning, the human body, its parts and its derivatives in all possible cases.

Guidance on how the Scots law can effectively develop its institutional connection to the *actio iniuriarum* might be found in South African jurisprudence, which has – particularly since the end of the apartheid era, though the *actio* did find use even in this dismal chapter of South African history – cultivated a robust common law *actio iniuriarum* alongside the protections afforded to individual interests in 'dignity' under the 1996 Constitution. Though *dignitas* is protected as a specific personality right in South African law, it is also the case that the notion of 'dignity' which is safeguarded by s.10 of that Constitution correlates with the concept of *existimatio* which was protected by means of the *actio iniuriarum* at South African common law.[1955] Individual interests in one's own body, reputation and other associated personality rights are consequently safeguarded under the umbrella of 'dignity' by the *actio iniuriarum*, as well as by the Constitution.

[1954] See Norrie, *Actio Iniuriarum*, *passim*.

[1955] *Long*, p.99

Due to the introduction of the horizontal action to protect 'dignity', the South African courts need not use the Latin terminology to refer to protection afforded to *'existimatio*', however it is apparent that this interest was afforded protection (in principle, if rarely in fact) by means of the *actio iniuriarum* in this jurisdiction. Scotland may lack any analogue to s.10 of the South African Constitution, and the Human Rights Act 1998 may not provide for horizontal direct effect, but due to the traditional similarities between Scots law and the law of South Africa, it appears that Scotland may nevertheless develop its *actio iniuriarum* – and thus its law of 'personality rights' – by reference to South African case law. Developments of this kind would allow for the law to afford protection to the 'very real'[1956] interests of the family members of a deceased person in cases in which there has been maltreatment of the cadaver, or bodily material, of a loved one.

Although the development of the *actio iniuriarum* might serve to afford redress in instances concerning the maltreatment of whole human cadavers – and perhaps at times maltreatment of separated body parts and derivative human tissue – it would not, by itself, be sufficient to afford protection to the body, its parts and its derivatives in all circumstances. The *actio iniuriarum*, properly so-called, requires some *contumelia*, meaning that, if such material is not conceptualised as 'property', there can be no redress for instances of loss caused by the the defender's mere *culpa* or wrongdoing effected by negligence. That said, the Aquilian action which developed into the modern action allowing for reparation in instances of *culpa* originally barred claims in respect of 'damage' done to the bodies of free persons, yet the modern law of 'personal injury' (which, in spite of its name, does not stem from the law of 'injury' in the sense of the nominate delict) clearly regards these as compensable. Though it is hoped that

[1956] *McLean Report*, para.14

Scots law will develop to similarly allow claims in respect of 'damage' to dignity, such a claim must be bound to fail at present.

In recognition of this, it might be thought best to conceptualise the human body, its parts and its derivatives as a 'property' in the dual sense of a 'thing' 'owned' by a distinct 'person'. The law need not develop or have recourse to neglected doctrine(s) in order to afford redress to an individual who has suffered loss as a result of damage done to their property (whether such damage is effected through *culpa* or *contumelia*). Any pursuer in such a claim clearly has recourse to a legal remedy on the basis of the already-familiar principle that reparation should be made in cases of *damnum iniuria datum*. Although it might be contended that to regard the body – and its parts and its derivatives – as 'property' in this sense would be to wrongfully commodify it, or that compensation could not be properly afforded in cases of damage done to material of inestimable (indeed, potentially non-economic) value, both of these objections may be easily countered. First, Scots law can and does recognise a category of 'property' which is *extra commercium*; and second, notwithstanding that living human bodies are of inestimable value, the present law readily grants monetary rewards in cases of damage effected to them in cases of personal injury.

In addition, Scots law already recognises that persons are justified in attaching a peculiar value to certain objects of property in their patrimony. This peculiar value need not at all reflect of the economic worth of that object – indeed, the subjective value may grossly exceed the objective measure of its worth to others. Nevertheless, the law has at times recognised that this *pretium affectionis* might be regarded as the proper measure of damages to afford reparation in cases of damage, destruction or loss of the thing to which the *pretium affectionis* is attached. The concept of *pretium affectionis* has not been the subject of sustained academic discussion in Scotland, but its existence as a measure of damages – recognised by

key Institutional writers and Nineteenth and Twentieth century case law[1957] – indicates that there is no objection, in principle, to the law holding that an arbitrary sum, which is not tied to any objectively demonstrable or assessed monetary value, may be deemed payable where a person suffers the loss of a particularly (subjectively) important 'thing'.[1958]

Scots law is thus able to recognise that dead bodies and separated human biological material are 'property' without inappropriately commodifying such things. However, this fact does not overcome the objection that to taxonomically classify the body, its parts and its derivatives as 'property' is to inappropriately 'objectify' such material. While it is of course absurd to state that an entity with an actual corporeal existence is not a 'thing', it remains the case that the human body, its parts and its derivatives is more than a 'mere thing', and to treat it as such would be wrong. It is important, then, to ask when it might be acceptable to classify the body, its parts and its derivatives as 'property' and when it might be inappropriate to do so.

The 2013 case of *Holdich*, which draws on the 1993 German *Bundesgerichtshofes* case, is instructive in this regard. Where biological material (in whatever form) is separated from a person (living or dead), it is appropriate to ask whether or not there is any ongoing 'functional unity' between the separated material and the person from whom the material was separated. 'Functional unity' should here be understood teleologically; in determining whether such material should be regulated by 'property law' or the law of 'personality rights', the courts should enquire into the purpose for which the material was removed. If the material was removed with a view to its later use in some natural biological purpose (as in cases of *in vitro* fertilisation, out-of-body treatment, or indeed in cases in which a body part is severed but yet

[1957] See para.4.3.2, *supra*.

[1958] The complex question of assessment is, as Stewart underscores, 'not to do with liability'. It may be difficult to determine quantum, but the fact of actionability should not be disputed: see William J. Stewart, *How Much for a Leg? Assessing the Process of Assessment of Non-Pecuniary Personal Injury Damages in Scotland*, (Dundee: DUP, 2010), pp.6-9

may be practically and functionally re-attached) then it might be thought appropriate to regard it as a part of a 'person' and so governed by the law pertaining to personality rights. If, however, the material removed is inert or has no ongoing functional unity with the person from whom it is removed, it should be logically regarded as an object of 'property' (*i.e.*, a 'thing') which might be 'owned' by – and certainly will be 'possessed' by – a particular person.

The 'owner' of any separated body part or biological material that has ceased to exist in a state of 'functional unity' with the person from whom it has been separated can be determined by reference to the ordinary rules of property law. The cessation of 'functional unity' should be taken as the point at which the material ceases to form a part of a 'person' and becomes a 'thing' susceptible to 'ownership'. Thus, whoever obtains first possession of the 'thing' after the cessation of functional unity ought to be regarded as the owner of that 'thing'.[1959] Where a person has died and their whole cadaver has not yet been buried, it must be thought appropriate to treat the cadaver as 'property', at least in that term's second sense as an 'object of property' (as, in the absence of any robust theory as to the nature of the Scottish *hereditas jacens*, it presently remains difficult to determine who, if anyone, the *dominus* of a cadaver might be). This reflects the fact that cadavers have a corporeal existence and may be 'stolen' (and so logically may be 'spuilzied') in law. This does not preclude the possibility of an *actio iniuriarum*; in the Civil law tradition *iniuria* might be inflicted by contumeliously attacking an object of property with which a person holds a particular affinity, even if that person is not the 'owner' of said property (that is to say, the *existimatio* of the *persona* who may raise the action is affronted indirectly, by the act of violence done to the 'thing', rather than to their own 'person').

[1959] Recall that in Scotland the first person to have custody of a thing is not necessarily the first to have 'possession', in law, thereof: Anderson, *Possession*, para.1-13 and the discussion at para.2.4.2

This position, it is submitted, is preferable to blanketly regarding the body, its parts and its derivatives as either a ‘person’ or as ‘property’. There are circumstances in which it makes sense to classify human biological material as a ‘thing’ subject to the ‘ownership’ of another, and likewise there are occasions in which it is more logical to regard such material as an intrinsic part of a ‘person’. As such, it is concluded that there is no one answer to the question ‘should the human body, its parts and its derivatives be regulated by property law or by the law of personality rights?’ Rather, it is better to ask when it might be most appropriate for such material to be regulated in which way. The application of the rule of ‘functional unity’ provides a reasonable means of answering this question in respect of separated body parts and biological material; the case of the whole cadaver may be answered by reference to the protection which Scots law presently affords unburied dead bodies. A dead human body, and the ‘principal parts’ thereof, may be a ‘thing’ while uninterred in Scots law, but human remains are certainly not simply *corpus vile*.

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