

# What did *occidere iniuria* in the *lex Aquilia* Actually Mean?

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Abstract — The first chapter of the *lex Aquilia* imposed liability for *occidere iniuria*. The prevailing view is that “iniuria” was originally understood objectively (“unlawfully”), though some argue that it conveyed a subjective notion of fault or a will to offend. We can in fact detect a subjective notion in *iniuria* from the very beginning when we recognize that the term borrows from the earlier delict of *iniuria*, which entailed *dolus*. An *iniuria* against a slave by wounding was a *contumelia* against his master. This logic was carried over to the *lex Aquilia*: the *occidere iniuria* of a slave was a *contumelia* to the master and indeed took from the master’s patrimony. The requirement of intentional fault (*dolus*) came with the borrowing: *occidere iniuria* meant “to kill willfully.” The later introduction of a third chapter to the *lex Aquilia* and the development of fault based on negligence (*culpa*) was not, on this view, a newly found subjective basis for fault, but the extension of an existing subjective basis to a wider number of cases.

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## I.

In the past few years, articles have appeared dealing with the meaning of the term *iniuria* in the *lex Aquilia*: Alan Rodger has asked “What did *damnum iniuria* actually mean?”<sup>1</sup> and more recently Paschalis Paschalidis has asked “What did *iniuria* in the

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<sup>1</sup> A. Rodger, “What did *Damnum Iniuria* Actually Mean?,” in A. Burrows and A. Rodger, eds., *Mapping the Law: Essays in Memory of Peter Birks* (Oxford 2006), 421–38.

*lex Aquilia* actually mean?”<sup>2</sup> Following these, I would like to draw attention to the meaning of the expression *occidere iniuria* in the first chapter of the *lex Aquilia*.

Alan Rodger has focused on the relationship between *damnum* and *iniuria* and has concluded by saying that the phrase *damnum iniuria* is an asyndeton in which both nouns are in the nominative case. They are used to describe the loss and unlawful injury (or harm or detriment) for which the *lex Aquilia* granted remedies. This conclusion comes from an analysis of texts where *iniuria* means injury, harm, prejudice and not only fault — as Ulpian explains in D.47.10.1 pr. and D.9.2.5.1:<sup>3</sup>

D.47.10.1 pr. (Ulpian 56 *ad ed.*). Iniuria ex eo dicta est, quod non iure fiat: omne enim, quod non iure fit, iniuria fieri dicitur. Hoc generaliter. Specialiter autem iniuria dicitur contumelia. Interdum iniuriae appellatione *damnum culpa* datum significatur, ut in lege Aquilia dicere solemus: interdum iniquitatem iniuriam dicimus, nam cum quis inique vel iniuste sententiam dixit, iniuriam ex eo dictam, quod iure et iustitia caret, quasi non iuriam, contumeliam autem a contemnendo.

Wrong is so called from that which happens not rightly; for everything which does not come about rightly is said to occur wrongfully. This in general. But, specifically, “wrong” is the designation for contumely. Sometimes again, by the term “wrong” there is indicated damage occasioned by fault, as we say in respect of the *lex Aquilia*; then, too, we sometimes call unfairness wrong; for when someone delivers judgment unfairly or unjustly, it is called wrong; for it lacks lawfulness and justice, as not being rightful; but contumely derives from despising or deriding. (Trans. Watson Digest.)

D.9.2.5.1 (Ulpian 18 *ad ed.*). Iniuriam autem hic accipere nos oportet non quemadmodum circa iniuriarum actionem contumeliam quamdam, sed quod non iure factum est, hoc est contra ius, id est si culpa quis occiderit: et ideo interdum utraque actio concurrat et legis Aquiliae et iniuriarum, sed duae erunt aestimationes, alia damni, alia contumeliae. Igitur iniuriam hic *damnum accipiemus culpa datum etiam ab*

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<sup>2</sup> P. Paschalidis, “What did *iniuria* in the *lex Aquilia* Actually Mean?,” *RIDA* (3rd), 60 (2008), 321–63.

<sup>3</sup> See M. F. Cursi, *Iniuria cum damno. Antigiuridicità e colpevolezza nella storia del danno aquiliano* (Milan 2002), 93–94.

eo, qui nocere noluit.

We must here, of course, not take *iniuria* as meaning some sort of insult, as it indicates in the action for insult, but as indicating something done illegally, that is, contrary to the law — as, for example, if one kills wrongfully. Thus, although from time to time the action under the *lex Aquilia* and the action for insult concur, there will in such a case be two assessed heads of damages, one for wrongful harm and one for insult. Therefore, we interpret *iniuria* for present purposes as including damage caused in a blameworthy fashion, even by one who did not intend to harm. (Trans. Watson Digest.)

These texts were in fact the result of a development that took place over the best part of 500 years, from the vote of the *lex Aquilia*. However — as Rodger says — to clear up the original relationship between *damnum* and *iniuria*, the course of that development needs to be explored.

To address this issue and basing his analysis on the assumption that Rodger's reading of *damnum iniuria* is correct, Paschalidis Paschalidis seeks to explore the original meaning of *iniuria*. He examines the approaches of modern legal scholars about the meaning of *iniuria* and distinguishes two views.

a) The prevailing one suggests that *iniuria* was initially defined on a purely objective basis (“unlawful”) and that only later, in classical times, the jurists started to think of *iniuria* in terms of *dolus* and *culpa*, as an attempt to overcome the purely objective elements of the delict.

b) The alternative view treats of *iniuria* as a subjective test: for some *iniuria* has always been understood as fault; for others it cannot be interpreted as mere unlawfulness since it indicates the will to offend the owner of the damaged object.

Paschalidis highlights that the scholars who have followed the objective approach to *iniuria* seem to focus more on the result of the act, whereas the scholars of the opposite approach appear to concentrate on the act itself. In his opinion, however, there are convincing arguments on both sides: he thinks that the Roman jurists based the notion of *iniuria* on the Aristotelian notion of injustice (ἀδικία) as explained in the *Nicomachean Ethics*,<sup>4</sup> which embraces both the idea of the “act” giving rise to the damage and

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<sup>4</sup> Arist. *Eth. Nic.* 1136a 27–29.

the “result” of the act, i.e. the damage itself. In other words, *damnum iniuria* should be understood as “loss caused by injustice and injustice caused by loss.”<sup>5</sup>

## II.

To take ἀδικία as the criterion for the interpretation of *iniuria* is a very interesting proposal. It highlights the “subjective” value of *iniuria* which, in my opinion, was original and not acquired later by identification with *culpa*: according to Aristotle, ἀδικία is in fact a voluntary crime, the blame being conceived not as a mere result of the (objective) actions, but depending also on the mental state of the author of the actions.<sup>6</sup> However, Paschalidis does not positively prove the influence of the Aristotelian theory on the building of the notion of *iniuria* in the *lex Aquilia*.

In the first place, the late-republican influence of Greek philosophy on Roman culture cannot explain the original meaning of *iniuria* in the *lex Aquilia*, which was probably passed between the fourth and third centuries BC. But the influence of the Aristotelian ideas on the Roman concept of *iniuria* cannot be supposed even on the later identification of *iniuria* with *culpa*. Paschalidis himself recalls that David Daube<sup>7</sup> has persuasively argued against the sometimes claimed<sup>8</sup> borrowing of the Roman standards of liability (*dolus*, *culpa*, *casus*) from the Aristotelian<sup>9</sup> ideas of ἀδίκημα, ἀμάρτημα, ἀτύχημα. Daube highlights that Aristotle in the *Rhetoric*, while explaining ἀμάρτημα, makes no reference to negligence or lack of care (i.e. in a meaning corresponding to *culpa*), but rather to ignorance, lack of knowledge, lack of information, so that — even if he admits a generically “Greek” influence as highly probable<sup>10</sup> — the thesis of a direct borrowing must be considered “an exaggeration.”<sup>11</sup>

In my opinion, the subjective value of *iniuria* can be detected in *damnum iniuria datum* from the beginning, because it was a

<sup>5</sup> Paschalidis (note 2), 363.

<sup>6</sup> See also D. Ibbetson, “How the Romans did for Us: Ancient Roots of the Tort of Negligence,” *U. New South Wales L.J.*, 26 (2003), 475.

<sup>7</sup> D. Daube, *Roman Law: Linguistic, Social and Philosophical Aspects* (Edinburgh 1969), 131–56.

<sup>8</sup> Cf. B. Kübler, “Der Einfluss der griechischen Philosophie auf die Entwicklung der Lehre von den Verschuldensgraden im römischen Recht,” in Karl Larenz, et al., eds., *Rechtsidee und Staatsgedanke. Festgabe für Julius Binder* (1900), 63–67, esp. 66–67.

<sup>9</sup> See Arist. *Rh.* 1374b 1–10; *Eth. Nic.* 1135a 15–21; 1135b 10–21.

<sup>10</sup> Daube (note 7), 151.

<sup>11</sup> *Id.*, 131.

borrowing from the earlier delict of *iniuria* and it corresponded to *dolus*.<sup>12</sup> And, in the absence of clear proof, there is no need to assume a Greek influence on Roman thought, when the connection between *iniuria* and *dolus* can be explained within the logic of the Roman delicts. The only evidence of *iniuria* as Aristotelian injustice can be detected well beyond the Roman age, being proposed in the seventeenth century by the Second Scholastics,<sup>13</sup> one of the sources of the modern construction of Natural Law, which has led to a projection of the modern distinction between unlawfulness and culpability onto Roman sources.

### III.

This distinction was not shared by the Roman jurists. They could not conceive of unlawful conduct (*iniuria*) without an intrinsic subjective value (*dolusculpa*) or, on the other hand, a subjectively reprehensible act that was not unlawful — except those cases when the existence of a cause of justification excluded the *iniuria*.

This state of things was reflected in the provisions of the *lex Aquilia*:<sup>14</sup>

D.9.2.2 pr. (Gaius 7 *ad ed. prov.*). Lege Aquilia capite primo cavetur: “ut qui servum servamve alienum alienamve quadrupedem vel pecudem iniuria occiderit, quanti id in eo anno

<sup>12</sup> Cursi (note 3), *passim*.

<sup>13</sup> See, for the interpretation of *iniuria* as injustice, Dominicus Soto [Domingo de Soto], *De iustitia et iure* (Venice 1573), 101v–102r (IV.6.5); Leonardus Lessius [Lenaert Leys], *De iustitia et iure caeterisque virtutibus cardinalibus libri IV* (Louvain 1605), 65–66 (II.7); Didacus Covarrubias [Diego de Covarrubias], *Regulae, Peccatum [de regulis iuris, lib. sexto]*, in *Opera Omnia*, 1 (Frankfurt am Main 1583), 226r (II.2). Cf. H. Thieme, “Natürliches Privatrecht und Spätscholastik,” in *ZSS* (GA), 70 (1953), 230–70 [= *Ideengeschichte und Rechtsgeschichte: Gesammelte Schriften*, 2 (Cologne/Vienna 1986), 871–908]; id., “Qu’est ce-que nous les juristes devons à la Seconde Scolastique espagnole?,” in P. Grossi, ed., *La seconda Scolastica nella formazione del diritto privato moderno* (Milan 1973), 7–21; F. Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*, 1, 2nd ed. (Göttingen 1967) [= *Storia del diritto privato moderno*, 1 (Milan 1980), 455–56]; B. Kupisch, “La responsabilità da atto illecito nel diritto naturale,” in L. Vacca ed., *La responsabilità civile da atto illecito nella prospettiva storico-comparatistica* (Turin 1995), 135. See also M. F. Cursi, *Danno e responsabilità extracontrattuale nella storia del diritto privato* (Naples 2010), 135–36, 142–43 (for the influence of the Second Scholastics on Grotius), 147–54 (on *Usus modernus Pandectarum* and Natural Law).

<sup>14</sup> These three texts (two by Gaius, the last by Ulpian) are the closest to the original version of the three chapters of the *lex Aquilia*. See Cursi (note 3), 167–219.

plurimi fuit, tantum aes dare domino damnas esto.”

The first chapter of the *lex Aquilia* provides as follows: “If anyone kills unlawfully a slave or servant-girl belonging to someone else or a four-footed beast of the class of cattle, let him be condemned to pay the owner the highest value that the property had attained in the preceding year.” (Trans. Watson Digest.)

G.3.215. Capite secundo <adversus> adstipulatorem, qui pecuniam in fraudem stipulatoris acceptam fecerit, quanti ea res est, tanti actio constituitur.

The second section of the Act provides an action against an additional stipulator who grants a verbal release of a debt in fraud of the stipulator, and it gives an action for the value in money of what is involved. (Trans. Gordon and Robinson.)

D.9.2.27.5 (Ulpian 18 *ad ed.*). Tertio autem capite ait eadem *lex Aquilia*: “Ceterarum rerum praeter hominem et pecudem occisos si quis alteri damnum faxit, quod usserit fregerit ruperit iniuria, quanti ea res erit in diebus triginta proximis, tantum aes domino dare damnas esto.”

In its third chapter the *lex Aquilia* says: “In the case of all other things apart from slaves or cattle that have been killed, if anyone does damage to another by wrongfully burning, breaking, or spoiling his property, let him be condemned to pay to the owner whatever the damage shall prove to be worth in the next thirty days.” (Trans. Watson Digest.)

It is highly probable that the first two *capita* were the more ancient parts of the law, and that the original version of chapter one only dealt with the killing of a slave.<sup>15</sup> We also know that the case of the wounding of the slave would be developed only later by the *prudentes* through the interpretation of the third *caput* of the *lex*.<sup>16</sup> So, at the time the law was passed, injury against a slave had a different regulation depending on the nature of the offense: when he was killed, the case fell under the *lex Aquilia*; when he was wounded, it was a matter of *iniuria*.

However, the *iniuria* against a *servus* was not only conceived as an offense to the slave, but above all as a *contumelia* against the *dominus*: what the Romans called *iniuria per alias personas*.

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<sup>15</sup> See *id.*, 208–212.

<sup>16</sup> See *id.*, 197–208.

This last form of *iniuria* was introduced by a praetorian revision of the original system of the XII Tables, which probably took place before the advent of the *lex Aquilia*.<sup>17</sup> This was a radical innovation, in which some of the features of the ancient delict presumably survived unchanged, features that are firmly attested in a later period, but which most probably were already present under the regime of the XII Tables. That was because the *dominus* had *potestas* over the slave, who was *alieni iuris*, so that every event of legal significance affected the master, and not the slave.

It is difficult to believe that the rule set out by the *lex Aquilia* followed a different logic: on the contrary, I think that the killing of the slave — just like his wounding — amounted not only to a prejudice against the patrimony of the *dominus*, but also to an *iniuria-contumelia* against the owner of the *potestas*, the power of life and death of the master over his slaves, because in killing the slave the offender usurped a *potestas* which was not his to wield, depriving the legitimate possessor of that power. In other words, I think that the expression *occidere iniuria* in the first chapter of the Aquilian law reproduced the same legal mechanism of the delict of *iniuria-contumelia*. This may seem like an obvious point, but the interesting fact is that the Romans in both cases (and in a way that is completely novel compared with the system of damages prevailing before the *lex Aquilia*) defined this offense as *iniuria*.

It is clear, however, that the decision to borrow the notion of *iniuria* from the delict of the same name could only lead to its “comprehensive” adoption. The legislator of the *lex Aquilia* could not omit an essential element of that delict (and one that was especially prominent in its new praetorian form), namely the requirement of intentional fault (*dolus*). Abandoning this requirement would have resulted, not in the acceptance of the concept of *iniuria*, but in its complete perversion.

We find, therefore, that the two delicts of *iniuria* and *damnum iniuria datum* were at the beginning perfectly complementary: the first being concerned with physical offenses against the slave and moral offenses against his *dominus*, other than killing; and the second being concerned with the killing of the slave and moral offenses against his *dominus*.

It is interesting to note that, while these conclusions may seem quite “heretical” to a continental lawyer, they are close to the views expressed by many British scholars. Even if they do not identify the common denominator of *iniuria-contumelia* and

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<sup>17</sup> See *id.*, 221–68.

chapter one of the *lex Aquilia* in the offense to the *dominus*, they highlight the link between the two delicts, speaking of “two delicts” (Peter Birks),<sup>18</sup> or describing the third chapter of the *lex* as “an off-shoot of the delict *iniuria*” to which the original criterion of liability of *iniuria* — i.e. *dolus* — has been extended (David Pugsley).<sup>19</sup> In my opinion, it is highly significant that the connection between the delicts has been seen by scholars who were not educated in the continental distinction between unlawfulness and culpability, but it is not impossible that this position is itself a projection of modern — though different — categories onto the Roman sources. In the English theory of torts, in fact, already Henry de Bracton<sup>20</sup> linked *iniuria* with *damnum*, seeing damage in each case of *iniuria* and so clearing the way for the traditional overlap of injury and damage<sup>21</sup> on which the theory of private wrongs introduced by William Blackstone is built.<sup>22</sup>

#### IV.

The later evolution of *damnum iniuria datum* is not totally independent of *iniuria*, although the two delicts drift more and more apart.

It seems that the text itself of the Aquilian law was changed, since a third chapter was added to grant protection for all damage to inanimate objects. This provision caused a significant change in the *ratio* of the law: just as it happened with the delict of *iniuria*, it is probable that the injury to the slave was still conceived as damage to a *persona* and not to a *res* — slavery was not so widespread a phenomenon as to modify the domestic dimension

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<sup>18</sup> P. Birks, “The Early History of *Iniuria*,” in *TRG*, 37 (1969), 195. See also id., “A Point of Aquilian Pleading,” in *IURA*, 36 (1985), 101–102, and later id., “Ulpian 18 *ad edictum*: Introducing *damnum iniuria*,” in R. Feenstra, ed., *Collatio Iuris Romani: Études dédiées à Hans Ankum*, 1 (Amsterdam 1995), 17–27.

<sup>19</sup> D. Pugsley, “The Origins of the *Lex Aquilia*,” *LQR*, 85 (1969), 54–58, esp. 58. See also A. Watson, “Personal Injuries in the XII Tables,” *TRG*, 43 (1975), 214–22, on the use of the same verbs in the norms of the XII Tables about *iniuria* and in the third chapter of the *lex Aquilia*.

<sup>20</sup> Henry de Bracton, *De legibus et consuetudinibus Angliae*, 2, ed. G. E. Woodbine and S. E. Thorne (Cambridge, MA 1968), 140 (*si ille cui datum est rem datam ulterius dare possit*), 289 (*item oriuntur obligationes ex delicto vel quasi*), 437 (*de minoribus et levioribus criminibus quae civiliter intentantur*).

<sup>21</sup> Id., 140 (*si ille cui datum est rem datam ulterius dare possit*): . . . *quia non omne damnum inducit iniuriam, sed e contrario iniuria damnum*.

<sup>22</sup> William Blackstone, *Commentaries on the Laws of England*, 3, 9th ed. (London 1783), 115.



of archaic *servitus*. In the third chapter there is instead an explicit reference to *damnum*, i.e. to damage to property. Within this new perspective, the text of the first chapter was also modified, being widened to include *pecus quadrupes* — even if the link with *iniuria* here was probably too strong to insert the term *damnum*.<sup>23</sup>

Another reason for the separation of the two delicts was the rise of the notion of *culpa* in *damnum iniuria datum*. It is generally accepted that the notion of *culpa* emerged from the context of juristic interpretation of the *lex Aquilia*, specifically in cases where the causes of justification did not work properly: resort to self-defense in a manner deemed excessive;<sup>24</sup> abuse of an instructor's disciplinary authority that results in permanent physical damage to a student;<sup>25</sup> injury to passers-by inflicted by careless tree-trimmers;<sup>26</sup> and the intentional infliction of harm upon an animal grazing illegally on one's property.<sup>27</sup> In all these cases, one could not speak of *dolus*, yet the jurists saw fault, negligence on the part of the perpetrator of the act. To solve these problems, a new standard of liability — that of *culpa* — was introduced.

However, according to the currently dominant view, this process coincided with a change from an objective standard of liability — *iniuria*, in the sense of unlawful conduct — to a subjective one — *culpa*. Sandro Schipani, for example, observes that *culpa* is “associated with a subjective reprimand, and this is the case not only where the state of mind is intentional, but also where there is a loss of control — measured against a standard — over one's state of mind.”<sup>28</sup> According to this view, it was only the Severan jurists who, towards the end of the classical period, accomplished the definitive equivalence of the two notions, stating that *iniuria* consists in *quod non iure fit . . . id est si culpa quis occiderit* (“what does not occur lawfully . . . that is, if someone should slay with fault”).<sup>29</sup>

<sup>23</sup> See Cursi (note 3), 278–79.

<sup>24</sup> See D.9.2.4 (Gaius 7 *ad ed. prov.*) and D.9.2.5 pr. (Ulpian 18 *ad ed.*).

<sup>25</sup> D.9.2.5.3 (Ulpian 18 *ad ed.*) and D.9.2.5.7 pr. (Ulpian 8 *ad ed.*) [= D.19.2.13.4 (Ulpian 32 *ad ed.*)].

<sup>26</sup> D.9.2.31. (Paul 10 *ad Sab.*).

<sup>27</sup> D.9.2.39 pr. (Pomp. 17 *ad Q. Muc.*).

<sup>28</sup> S. Schipani, *Responsabilità ex lege Aquilia: criteri di imputazione e problema della culpa* (Turin 1969), 131: “. . . connessa a un rimprovero soggettivo, anche se questo non colpisce soltanto gli atteggiamenti intenzionali, ma altresì il mancato controllo — in rapporto ad un modello — dei propri atteggiamenti.”

<sup>29</sup> D.9.2.5.1 (Ulpian 18 *ad ed.*).

On the contrary — as we have seen — this was not in my opinion the first introduction of a subjective standard of liability, but rather a widening of the original notion of *iniuria-dolus* to cases of negligence. There must have been a time when the two notions of *dolus* and *culpa* worked side by side, until *culpa* — the wider standard — gradually absorbed *dolus*, becoming fully identified with *iniuria*.

In any case, the rise of *culpa* resulted in extending the application of the *lex Aquilia* to a larger number of cases. If the delict of *iniuria* covered the willful wounding of a slave, the introduction of the third chapter of the *lex Aquilia* and the concurrent development of the notion of *culpa* had the effect of also protecting, by the *actio legis Aquiliae*, cases of negligent wounding of slaves (and four-footed animals).<sup>30</sup>

## V.

All this obviously changed the relationship between *iniuria* and *damnum iniuria datum*. In the beginning, there was a perfect complementarity between the two delicts: *iniuria* dealt with the physical offenses against the slave other than killing, whereas *damnum iniuria datum* concerned the killing of the slave. But with the application of the third chapter of the *lex Aquilia* to the wounding of the slave and the simultaneous absorption of *dolus* inside the larger notion of *culpa*, an overlap was possible in all cases of a willful wounding of a slave. This led to a concurrence of the *actio legis Aquiliae* with the *actio iniuriarum* that was solved by the Roman jurists through the rule that the choice of the one action would prevent the use of the other:

D.44.7.34 pr. (Paul *lib. sing. de concurrent. act.*). Qui servum alienum iniuriose verberat, ex uno facto incidit et in Aquiliam et in actionem iniuriarum: iniuria enim ex affectu fit, damnum ex culpa et ideo possunt utraeque competere. Sed quidam altera electa alteram consumi. Alii per legis Aquiliae actionem iniuriarum consumi, quoniam desiit bonum et aequum esse condemnari eum, qui aestimationem praestitit: sed si ante iniuriarum actum esset, teneri eum ex lege Aquilia. Sed et haec sententia per praetorem inhibenda est, nisi in id, quod amplius ex lege Aquilia competit, agatur. Rationabilius itaque est eam admitti sententiam, ut liceat ei

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<sup>30</sup> See M. F. Cursi, "Roman Delicts and the Construction of Fault," in T. McGinn, ed., *The Roman Law of Obligations: Past, Present, and Future* (Ann Arbor) (forthcoming).

quam voluerit actionem prius exercere, quod autem amplius in altera est, etiam hoc exsequi.

A person who beats another's slave contumeliously by this one act falls foul of both the Aquilian action and the action for insult; for the *iniuria* is done with intent, while the damage is done with fault, and, consequently, both actions are competent. However, if the one action has been elected, some say the other is extinguished. Others say that the action for insult is extinguished by the Aquilian action, since it ceases to be just and equitable that one who has paid the assessed amount be condemned; but if the action for insult has been brought first, he is liable under the *lex Aquilia*. But even such a judgment ought to be prevented by the praetor, except to the extent that the action is for the excess amount competent under the *lex Aquilia*. Therefore, it is more reasonable to accept the view that he is allowed to bring that action first which he prefers, but also to recover the excess inherent in the other action. (Trans. Watson Digest.)

This alternativity means, of course, that the two actions shared the same procedural *res* and the same notion of *iniuria*, coherently with the original link between *iniuria* and *damnum iniuria datum*.<sup>31</sup> The discovery of this link explains some of the seeming anomalies in the sources.

The first is in Ulpian, who writes that *damnum iniuria datum* causes *iniuria cum damno*: *iniuria* together with damage.

D.9.2.49.1 (Ulpian 9 *disp.*). Quod dicitur damnum iniuria datum Aquilia persequi, sic erit accipiendum, ut videatur damnum iniuria datum, quod cum damno iniuriam attulerit . . . .

What is said about suing under the *lex Aquilia* for damage done wrongfully must be taken as meaning that damage is done wrongfully when it inflicts wrong together with the damage . . . . (Trans. Watson Digest.)

It is apparent that in this sentence *iniuria* cannot mean *culpa*: he could not write that the delict causes “negligence with damage”; *iniuria* must indicate some “effect” of the act, and the only notion of *iniuria* that can be consistently used in this connection is *contumelia*. Ulpian says, in other words, that the *damnum iniuria datum* causes both a patrimonial damage and an offense

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<sup>31</sup> See Cursi (note 3), 100–131.

to the dignity of the *pater familias*, the head of the patriarchal family.<sup>32</sup>

Moreover, in many sources we find the words *actio damni iniuriae*, with *iniuria* in the genitive case instead of the ablative. While Buckland<sup>33</sup> condemns the expression as “meaningless,” Pugsley<sup>34</sup> thinks that *actio damni iniuriae* comes from the expression *damni iniuria* instead of *damnum iniuriae*, and Kelly<sup>35</sup> and Rodger<sup>36</sup> read it as an asyndeton and link the *damnum iniuria datum* with the delict of *iniuria*. For Kelly, the *damnum iniuria datum* is a “pecuniary loss associated with acts of *iniuria*, of wrongfulness”; for Rodger, the two nouns are both genitives depending on *actio*, meaning “action of loss and unlawful injury.” In any case, the genitive form of *iniuriae* instead of the ablative shows that it is impossible to read the word as meaning “negligence”: “action of damage and negligence” or “action of damage of negligence” make no sense. Once again, the term must indicate, like *damnum*, an effect of the conduct, and once again the only value of *iniuria* that is coherent with this use is *contumelia*.<sup>37</sup>

## VI.

The reconstruction that I am proposing here is of course only one possible path. But I think it is the logical consequence of two requirements that seem to me essential for a correct methodological approach.

First, the need to free the Roman categories from conceptual models that have emerged only later, in the Civil and Common law tradition.

Second, the need to study the Aquilian delict within the whole Roman system of delicts and its historical development.

However, after my reconstruction was published in 2002, the continental scholars, formed in the Civil law tradition, that have explored the original meaning of *iniuria*, still follow the traditional doctrine in reading *iniuria* in objective terms, i.e. in the sense of unlawfulness, without discussing the problem of the

<sup>32</sup> See *id.*, 131–39.

<sup>33</sup> W. W. Buckland, “Actio damni iniuriae,” in *RHDFE*, 6 (1927), 120–21.

<sup>34</sup> D. Pugsley, “Damni injuria,” in *TRG*, 36 (1968), 374; *id.*, “The Origins of the Lex Aquilia” (note 19), 58.

<sup>35</sup> J. M. Kelly, “The Meaning of the lex Aquilia,” in *LQR*, 80 (1964), 80–81.

<sup>36</sup> Rodger (note 1), 423.

<sup>37</sup> See *Cursi* (note 3), 139–42.

projection of modern models onto the interpretation of the notion of *iniuria* in the *lex Aquilia*.<sup>38</sup>

Only recently, A. Corbino<sup>39</sup> has tried to detect a subjective meaning of *iniuria* at the time when the *lex Aquilia* was passed, connecting *iniuria* with *culpa*. But the author has not criticized the traditional objective notion of *iniuria* or my reconstruction which links *iniuria* with *dolus* — a reconstruction that Corbino has called “very speculative and questionable,” but not actually discussed<sup>40</sup> — neither has he proved his own theory, whose weakness lies in the fact that the first evidence by late-republican jurists for the interpretation of *iniuria* as *culpa* is too late in comparison with the probable time the law was passed.

More recently, however, the same author,<sup>41</sup> sharing the *pars destruens* of my reconstruction, but still without embracing the *pars construens* of the original link between the *iniuria* delict and the *iniuria* in the *lex Aquilia*, admits a subjective meaning of *iniuria* in the *lex Aquilia* different — it seems — from *culpa*. In his opinion, before the vote of the *lex Aquilia*, a specific technical meaning for the verbs *occidere*, *rumpere*, *frangere*, *urere* had emerged, referring not only to the objective unlawfulness of the conduct, but also to its subjective aspects. This subjective meaning would have been expressed by the term *iniuria*, thought of as the link between the *iniuria* delict and the *damnum iniuria datum*, particularly in the case of *rumpere* and *frangere* — which are verbs common to both delicts.<sup>42</sup> One could ask, however, if not *dolus* — as in my reconstruction — what could be the subjective criterion different from *culpa* originally coinciding with *iniuria*? To this question — even if it would be useful to emphasize the originality of the author’s proposal — the work gives no answer.<sup>43</sup>

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<sup>38</sup> Cf. G. Valditara, “Dalla iniuria alla culpa. Su una dibattuta questione,” *SDHI*, 75 (2009), 131.

<sup>39</sup> A. Corbino, *Il danno qualificato e la lex Aquilia. Corso di diritto romano*, 2nd ed. (Padua 2008), 159–76.

<sup>40</sup> A. Corbino, “L’oggetto della aestimatio damni nella previsione del primo e del terzo capitolo del plebiscito aquiliano,” in *Studi in onore di Remo Martini*, 1 (Milan 2008), 699 n.2.

<sup>41</sup> A. Corbino, “Antigiuridicità e colpevolezza nella previsione del plebiscito aquiliano,” *SDHI*, 75 (2009), 77–111.

<sup>42</sup> Cf. XII Tab. 8.2; Coll. 2.5.5 (Paul. *lib. sing. et tit. de iniuriis*) [= XII Tab. 8.3]; and the third chapter of the *lex Aquilia* in D.9.2.27.5 (Ulpian 18 *ad ed.*).

<sup>43</sup> Cf. also Cursi, *Danno e responsabilità* (note 13), 44–50.

## VII.

In conclusion, I think I can confirm my hypothesis of reading *occidere iniuria* in the first chapter of the *lex Aquilia* as “to kill willfully.” Both delicts of *iniuria* and *damnum iniuria datum* must be understood within the archaic structure of the Roman patriarchal family: every act directed against a *persona alieni iuris* or a *res* under the *potestas* of the *pater* caused not only damage to the property, but also an offense to the dignity of the master of the house.

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