Madmens and Lawyers: The Development and Practice of the Jurisprudence of Insanity in the Middle Ages

A DISSERTATION

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The twelfth century witnessed a renaissance of the scientific study of law in Western Europe. Students flocked to the nascent universities to study the canon law of the Church as well as ancient Roman jurisprudence. These two bodies of law and the layers of commentary that built up around them formed the *ius commune*, the common legal culture and jurisprudence that thrived in Europe for centuries. Scholars have long noted the importance of the *ius commune* in discussions of political authority, ecclesiology, and rights, as well as a myriad of other legal issues, but the jurists of the *ius commune* also possessed a sophisticated reflection on the problems raised by insanity in law. As medievalists begin to examine the cultural meanings and social realities of disability and madness, it is particularly important to understand the ways in which jurists conceived of the relation between the insane and society. Using the glosses, lectures, and commentaries of the *ius commune*, this dissertation pursues the figure of the *furiosus*, the insane person, across multiple areas of jurisprudence from the twelfth to the sixteenth centuries. It examines important questions that still plague jurists today. How can one prove insanity in court? To what extent are the insane criminally responsible? What rights do the insane possess while under guardianship? Can the insane consent or possess agency in any way? By answering these questions, this dissertation will show that the medieval jurisprudence concerning insanity was sophisticated, diverse, and responsive to contemporary needs. In order
to test the ideas of the jurists against a more practically oriented source base, this dissertation also examines a number of fourteenth-century cases involving insanity found in the Archivio di Stato of Venice. Ultimately, this research shows that the insane were not a simple marginal group during the Middle Ages, but one integrated into the larger social world. It also illustrates the importance of jurisprudence for further studies of disability and marginality.
This dissertation by Brandon T. Parlopiano fulfills the dissertation requirement for the doctoral degree in Medieval and Byzantine Studies approved by Kenneth Pennington, Ph.D., as Director, and by Katherine L. Jansen, Ph.D., and Caroline R. Sherman, Ph.D. as Readers.

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Amentes pariamus charitatem
# Table of Contents

Acknowledgments ........................................................................................................... v

A Brief Note on Terminology and Names ................................................................. vii

Introduction ................................................................................................................. 1

Chapter 1: *Furor et dementia*: Concepts and Vocabulary ......................................... 31

Chapter 2: “*Est difficile probare furorem*”: The Proof of Insanity in Medieval Jurisprudence 90

Chapter 3: “*Satis ipso furore punitur*”: The “Insanity Defense” in the Middle Ages ............... 176

Chapter 4: *Commodum furiosi*: The Guardianship and Care of the Insane ....................... 249


Conclusion ....................................................................................................................... 335

Bibliography .................................................................................................................... 346
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A BRIEF NOTE ON TERMINOLOGY AND NAMES

Throughout the dissertation I use the terms insanity and madness as my standard terms for mental difference. I avoid the term mental illness because of its medical connotations. “Insanity” still retains a legal flavor; in most jurisdictions in the United States the verdict “not guilty by reason of insanity” still exists. Insanity and madness are the best English words to render the general concepts of mental incapacity employed by the jurists of the *ius commune*.

As for the jurists themselves, because Latin was the lingua franca of the medieval universities and the linguistic medium for the writings of the jurists, I have rendered their names in Latin except where common usage dictates otherwise (e.g. Gratian, Huguccio, Stephen of Tournai).
INTRODUCTION

In May, 2008, Rev. Daniel Walz, the parish priest of the Church of St. Joseph in Berth Minnesota filed a temporary restraining preventing thirteen-year old Adam Race from coming to church. Adam has a form of autism and is prone to anxiety attacks. Rev. Walz alleged that Adam’s behavior moved beyond mere distraction into the realm of physical danger, involving hitting children, knocking down the elderly, spitting, public urination. Rev. Walz contended that Adam's behavior was “destructive and dangerous... [and] increasingly difficult for his parents to manage.” Adam’s mother countered that such claims were exaggerated. “‘My son is not dangerous,’ Carol Race said. The church's action is ‘about a certain community's fears of him. Fears of danger versus actual danger.’” Adam’s family, in particular his mother Carol, fought the restraining order, first by defying it and then by challenging it in court. The restraining order was upheld, and the Races began attending a different parish.

The barring of Adam from attending Mass and subsequent legal battle prompted me as a young graduate student to go to the sources of medieval canon law, particularly Gratian’s Decretum. The striking thing was not the level of difference but the similarity. Traditional historiography has trained us to think of the Middle Ages as a foreign place when discussing mental illness, partly as the result of the history of madness being told from a medical perspective. This view emphasized the Middle Ages as a time that, at best, clung to the humoral theory of the ancients, and, at worst, was dominated by ideas of sin and possession.

2 Ibid.
Foucault offered another perspective. Whatever its problems as a history (and there are many), Foucault’s *Folie et Deraison: L’Histoire de la Folie à l’âge classique* unmoored madness from its isolation as a primarily medical topic and set it in a much wider cultural context.\(^4\) Despite his importance for any study of madness (H.C. Erik Midelfort has called it “by far the most audacious and learned challenge to the medical Whig tradition”), Foucault remains a controversial and frustrating figure, particularly from the vantage of historians.\(^5\) Midelfort, for example, has pointed out that Foucault’s arguments could still have a power even though based on questionable historical claims.\(^6\) Contemporary apologists for Foucault, such as Gary Gutting, have defended the *Histoire de la Folie* as a work of idealist history: “the operative justification of Foucault’s historical construction is its interpretive coherence rather than its correspondence with independently given external data.”\(^7\) Gutting contends that Foucault operates on the extreme end of a continuum of historical method, but he does not fairly address the problems that historians have with calling such an account history. For example, he takes Midelfort to task for criticizing Foucault’s description of the insane leading an “easy, wandering life” in the Middle Ages on the grounds that the breezy characterization of the Middle Ages is not basic to Foucault’s argument.\(^8\) Considering the extent to which Foucault’s argument portrays as drastic the shifts of the


\(^6\) Ibid.


\(^8\) Ibid., 52. “The main point is that exclusion and confinement were distinctive features of the Classical Age’s attitude toward madness. Foucault sketches an ingenious and provocative story about the medieval and Renaissance viewpoints, but no central argument depends on this account.”
Enlightenment towards incarceration of the insane, his position on the preceding period seems much more important than Gutting grants. Moreover, Foucault’s treatment of the Middle Ages is emblematic of many historians’ problem with his method. His primary example for the wandering existence of the medieval mad, in contrast to the confinement they would later undergo, is the ship of fools, the *stultifera navis*. Foucault treats this literary device as a social reality, as the prototypical reaction of medieval society to the insane.9

Despite these problems of detail, Foucault did provide historians with an important set of questions and with a framework for critiquing the traditional medically-defined narrative of the history of madness. Unfortunately, most of these historians, such as Roy Porter or Michael McDonald have occupied themselves with the era that Foucault saw as transformative.10 The Middle Ages have received less attention, perhaps as a result, as Midelfort claims, of medievalists not having to defend their period from the usual claims of barbaric treatment.11 Even in general histories of madness, such as that of George Rosen, Foucault’s characterization survived.12 In the fundamental conception of madness as a social phenomenon, a gap existed in scholarly discussions between the freedom of the Middle Ages and the morally and institutionally confined world of modernity.

However, by considering madness from a legal perspective, or more specifically from a jurisprudential perspective, a greater degree of similarity emerges. To those thinking about law in a scientific way in the Middle Ages, madness posed many of the same questions as it does

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today. How does a society recognize mental difference and deviance from norms? How does a society care for those who cannot care for themselves? To what degree can or should the mentally ill meaningfully participate in society? By reflecting on these questions, jurisprudence confronts madness as a reality. Like literature, it uses madness as a starting point for discussions of human nature and boundaries, but in a way oriented towards interactions with others.13 What are the consequences for a community if one of its members loses his mind? Records of cases can shed much light on the realities of madness in the past; recent scholars have taken this course. I am more interested in what people thought about those realities. There is a rich body of reflection on the problems posed by mental illness to society that scholars have largely overlooked.

The Ius Commune and Medieval Jurisprudence

The scientific study of law has been recognized as one of the chief intellectual endeavors of the Middle Ages since Charles Haskins’ influential The Renaissance of the Twelfth Century. Still, the jurisprudence of the ius commune, the body of legal doctrine founded on the study of Roman, canon, and feudal law, has been one of the least recognized aspects in Anglophone scholarship of that vibrant time.14 Even while criticizing the continental terms used for the ius commune (droit savant, Juristenrecht, derecho docto), Manlio Bellomo laments that Anglo-American scholarship has “no word for it at all.”15 This situation is changing. In addition to the

work of legal scholars like Kenneth Pennington and James Brundage and that of Julius Kirshner and Thomas Kuehn, who have long incorporated jurisprudence into their studies of Italian law, a number of new studies serve to introduce the *ius commune* and its largely continental body of scholarship.16

Scholars have characterized the time between the fall of the western empire and the late-eleventh century as an “age without jurists.”17 While men considered to be skilled in law existed, that skill consisted largely in the knowledge of orally transmitted custom. Reflection on the laws themselves, possession of “a mastery of the sources which can give rational guidance to legal thinking,” was not cultivated among these “*jurisperiti*.”18

The spur to change was the rediscovery of Justinian’s corpus of Roman law, particularly the Digest, without which “it is unthinkable that the science of law could have taken shape in the medieval West.”19 In the early 530’s the emperor Justinian undertook a massive compilation of law as part of an effort to rejuvenate the empire. He commissioned a team of jurists headed by the gifted Tribonian with a number of tasks. Justinian sought to update the Theodosian Code (438) with additional imperial legislation, much of it his own, with his Codex (534). He also

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issued the Institutes, an updated version of the Institutes of Gaius, to serve as an introductory textbook for law students. The crown jewel of compilation, however, was the Digest (533). Tribonian and his team sifted through the massive body of classical Roman jurisprudence in order to excerpt, edit, and rearrange its contents topically. The Digest was meant to present a unified and coherent version of Rome’s jurisprudential tradition (particularly the work of the classical jurists of the second and third centuries C.E.) that avoided repetition and solved past controversies in light of contemporary developments. Legislation issued by Justinian up to his death (565) was privately collected into the Novels, which made up the last part of what would come to be known as the *Corpus iuris civilis*. Justinian’s compilation is remarkable for a number of reasons. Without it, little of the jurisprudential heritage of Rome would survive. The story of the *Corpus iuris civilis* is, however, one of contemporary failure. Although Justinian’s subjects were linguistically and culturally Greek, his efforts to revive the glories of Rome led him to have the Codex, Digest, and Institutes drafted in Latin. Shorter Greek paraphrases and adaptations proliferated after Justinian to the detriment of his compilation. However, his efforts would prove wildly successful in the medieval West in ways that he could have hardly foreseen.

Portions of the *Corpus iuris civilis*, such as the Institutes and the first nine books of the Codex were known in the early medieval West, but received little special attention. A translation and abridgment of the Novels circulated as the *Epitome Iuliani*. The Digest, however, was unknown until the late-eleventh century. At that time, excerpts begin to appear in court records and contemporary canonical collections. Evidence suggests that the Digest reappeared in

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21 Ibid., 35-36.
piecemeal fashion. The true impact of the Digest was not felt until the early twelfth century, when a Bolognese teacher known as Irnerius began to arrange the texts of Digest and teach it. Although Irnerius and his students also turned their attention to the other pieces of the Justinianic corpus, the Digest provided a level of reflection on law previously unknown in the West. The richness of legal concepts and hermeneutics provided a serious challenge to its early students but also the promise of great reward. The Digest enshrined a rational approach to law supported by the authority of the ancient empire.

During the early twelfth century, canon law also experienced a drastic shift, though it had not experienced the decline in fortune that Roman law had in the west. Indeed, the reformers of the eleventh century turned especially to canon law and its authority both as a basis for their positions and as a means of furthering them. The shift came not from a rediscovery, but from the serious application of a critical hermeneutic. Although such ideas were present since the Ivonian prologue, a consistent application did not occur until Gratian’s *Concordantia discordantium canonum*, more commonly known as the Decretum. Sometime in the early twelfth century, Gratian, about whom little else is known than his name, began teaching canon law in Bologna. The very organization of the Decretum argues for its use as a teaching text. The first part is comprised of 101 *distinctiones* in which Gratian established basic principles and terms, such as

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22 Wolfgang P. Müller, “The Recovery of Justinian’s Digest in the Middle Ages,” *Bulletin of Medieval Canon Law* 20 (1990), 1-29. The 50 books of the Digest were broken down into the *Digestum vetus* (Dig. 1-24.2), the *Infortiatum* (Dig. 24.3-Dig. 38), which included the so-called *tres partres* (Dig. 35.2.82- Dig. 38), and the *Digestum novum* (Dig. 39-Dig. 50).


24 On canon law before Gratian, see Lotte Kery, *Canonical Collections of the Early Middle Ages (Ca. 400-1140)*, History of Medieval Canon Law (Washington, DC: Catholic University of America Press, 1999), which provides sources and bibliography for collections predating the Decretum.


26 For a survey of the sources and method of Gratian’s Decretum, see Peter Landau, “Gratian and the Decretum Gratiani,” in *History of Medieval Canon Law in the Classical Period*, 22-55.
the various kinds of law. The true innovation is shown in the second part, which is divided into 36 *causae* or hypothetical cases. Gratian used these cases to generate questions, which he proceeded to answer in a dialectical fashion using conciliar canons, papal decretals, excerpts from the Church Fathers, and Roman law. The third portion of the Decretum, the *De consecratione*, explores sacramental law through five *distinctiones*.

Despite its methodological importance, for which Gratian is regarded as the father of the study of canon law, the structure of the Decretum is notoriously “inconsistent and confusing, but beyond that the meaning and thrust of the arguments themselves often seem difficult to follow the first time through.” This confusion, as well the awareness of later additions known as *palea*, led legal historians to believe that Gratian completed the Decretum in phases. Anders Winroth has confirmed this with his discovery of four manuscripts and a fragment that represent an earlier stage of the Decretum rather than abbreviations, as previously thought. A current controversy surrounds a St. Gall manuscript that may represent an even earlier recension.

The Roman law studied in the early schools was a closed-off body of law, a dead system. Canon law, on the other hand, continued to increase rapidly, particularly in the later twelfth

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century through the flood of papal decretals pouring out of Rome.\textsuperscript{31} Early attempts to incorporate these new sources of law as appendices to the Decretum soon gave way to a number of separate collections. Around 1190, Bernardus Papiensis organized his collection of \textit{Breviarium extravagantium} (later known as the \textit{Compilatio prima}) into a five-book scheme that remained consistent throughout the Middle Ages. Despite its wide use in the schools, the Decretum did not receive official approval from the Church. Innocent III changed this relationship when he sent a collection of his decretals compiled by Petrus Beneventanus to the schools around 1210. Years later Gregory IX officially endorsed Raymond of Peñafort’s collection of decretals, decreeing that it superseded all other collections.\textsuperscript{32} The official promulgation of new volumes of canon law remained fairly consistent throughout the Middle Ages, with the promulgation of the Liber Sextus by Boniface VIII in 1298 and of the Clementines by John XXII in 1317.\textsuperscript{33}

As canonists and civilians (jurists studying Roman law) worked through their texts, a number of similar literary forms developed in both strands of legal study. The earliest signs of legal education take the form of short glosses known as \textit{allegationes}, citations to other locations within the text itself or to other legal texts. The references may support the argument of the present text or pose a contrary to it; in either case these early glosses represent only an “extremely feeble projection of a much fuller investment of both individual and collective


\textsuperscript{32} The Decretals of Gregory IX were often known in the Middle Ages as the Liber extra, because they constituted the book in addition to the Decretum that canonists studied.

\textsuperscript{33} The \textit{Extravagantes Ioannis XXII} of Guilelmus de Monte Laudano and the \textit{Extravgantes communes} of Jean Chappuis, which completed the \textit{Corpus iuris canonici} were exceptions to this. Official recognition of these compilations did not come until their inclusion of the \textit{Editio Romana} of 1582.
reflection.”34 The oral activity surrounding the *allegationes* becomes clearer as the glosses become longer. Although the particular form could vary, as in the *brocardica*, when a general principle extracted from a text is subjected to a barrage of citations arguing for or against it, or in a more general *questio*, jurists of both disciplines followed a dialectical method of *solutio contrariorum*, which involves a citation of a contrary text and a short explanation of the reason for the difference.35 The method of education could best be summed up by Odofredus, a civilian of the mid-thirteenth century, explaining his method to his students:36

First I shall give you the summaries of each title before I come to the text. Second, I shall put forth well and distinctly and in the best terms I can the purport of each law. Third, I shall read the text in order to correct it. Fourth, I shall briefly restate the meaning. Fifth, I shall solve conflicts, adding general matters (which are often called *brocardica*) and subtle and useful distinctions and questions with the solution, so far as Divine Providence shall assist me. And if any law is deserving of a review by reason of its fame or difficulty, I shall reserve it for an afternoon review session.

By the late twelfth-century, glosses became replaced by gloss apparatus, “a deliberate sequence of annotations commenting on the *libri legales.*” These culminated in the so-called ordinary glosses, the apparatus that became a standard part of the transmission of the text. Other literary forms developed that were not materially connected with the basic texts. The earliest of these were the *summae* which dealt with larger units of the text, such as a title, through continuous exposition.37 The lectures and commentaries that survive in manuscripts and early printed editions represent a blending of the two, combining the narrative flow of a *summa* with the

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34 Bellomo, *Common Legal Past*, 129.
37 Bellomo, *Common Legal Past*, 134.
specificity of an *apparatus*. These texts present layers of lectures compiled and edited by the jurists who gave them, providing opportunity to clarify or amend themselves.38

The activities of the jurists extended outside the classroom as well. They were frequently called upon to put their expertise to use in cases before secular and ecclesiastical courts. From the twelfth century, jurists drafted briefs, known as *consilia*, either at the behest of the court itself or particular parties. In the fourteenth century, though, the *consilium* explodes as a genre of legal literature.39 Oldradus de Ponte became the first jurist to edit and publish his *consilia*.40 These opinions could prove lucrative for the jurists; Baldus de Ubaldis, a prolific author of *consilia*, reportedly earned 15,000 ducats only from his *consilia* dealing with testamentary substitution.41 The *consilia* also became in the fourteenth and fifteenth centuries important sources of law. Compilations of *consilia* from a single author or multiple authors provided arguments and ways in which jurisprudence could be used. As the *ius commune* developed, the commentaries on the *libri legales*, particularly the ordinary glosses, became authoritative sources of argument. The use of *consilia* as law also followed this precedent.

Despite their importance, non-specialists have often shied away from engaging with the sources of the *ius commune* for a number of reasons. Most texts do not exist in modern critical editions. Many of the later commentaries and lectures are available only through manuscripts or incunabula and early printed editions.42 Although the *Monumenta iuris canonici* is in the process of releasing critical editions of many canonical *summae*, one of the most important, the *Summa*  

38 Ibid., 147.  
39 The literature on *consilia* is large. For an introduction see the essays in Mario Ascheri, Ingrid Baumgärtner, and Julius Kirshner, eds. *Legal Consulting in the Civil Law Tradition* (Berkeley: Robbins Collection Publications, 1999).  
42 Fortunately, libraries like the Bayerische Staatsbibliothek of Munich are making their holdings of these texts available online.
decretorum of Huguccio remains unedited.43 Further, many of the early glosses of canon and Roman law that provided the source material for the great ordinary glosses remains consultable only through the manuscripts. Even once the relevant sources have been located and accessed, scholars must confront the system of citation employed by the jurists, which has been characterized as ‘‘perplexing’ and ‘abbreviated beyond conventional understanding.’’44 The thought of the jurists is often unintelligible without the ability to follow their sources.

More important as an obstacle, however, has been historiography itself. The doctrines of the ius commune are often written off by historians of particular legal systems as mere “learned law,” an academic curiosity with little impact on daily practice. The basic conception underlying this position is of a hierarchy of laws, in which the tenets of the ius commune only become valid in situations in which appropriate royal, statutory, or even customary law is deficient.45 Manlio Belomo has argued that this is a fundamental misunderstanding or the significance of the ius commune, an argument supported by other legal scholars.46

Why would generations of young men spend sums of money on obtaining a legal education in a dead system? Many might hope for employment and advancement in the Church, where the canon law had direct application, but many more remained in the secular world.47 Training in the ius commune must have offered more than a knowledge norms that could be

45 Bellomo, Common Legal Past, 151.
47 Brundage, Medieval Origins of the Legal Profession, esp. 344-487
applied only as a last resort. Against this perplexing scenario, Bellomo argued that the *ius commune* was not “merely a ‘positive law’ deprived of all connection with ideas and all ideal roots or stripped of all theoretical, practical, and operational capacities.” Instead the *ius commune* supplies the concepts and vocabularies to discuss and reflect upon law. Bellomo uses the image of the *ius commune* as a sun: it was not itself the planet on which legal practice took place, but it did provide warmth and illumination. Particular locales adopted the norms differently, but the fundamental concepts remained universal. Across Europe, trained legal professionals could speak of local differences using the same legal language.

Recent scholars have been more accepting of this view. Although Daniel Lord Smail’s study of the use of courts in the conflicts of medieval Marseille relies on a careful examination of archival sources, he admits that the use of the courts was structured by the procedural rules of the *ius commune*. Norms concerning the admissibility of witnesses became important grounds for establishing community ties. Marie Kelleher has recently shown that Aragonese women were able to manipulate or work within the categories established by the *ius commune*. These studies show that not only was the *ius commune* a common language for professionals, there was a filtering down of that knowledge to litigants who learned how to use the legal systems as well. In this view, an understanding of madness as a social phenomenon in the Middle Ages must include jurisprudence.

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**Madness and Law**

48 Bellomo, *Common Legal Past*, 152.
49 Ibid., 192-195
Given the importance of jurisprudence in medieval history, both an intellectual endeavor and as a way of investigating how larger concepts affected daily life, it is interesting that even in the study of madness and law in the Middle Ages, jurisprudence has received little attention. The two general accounts of medieval madness, Jean-Marie Frtiz’s *Discours du fou* and Muriel Laharie’s *La Folie au Moyen Age*, use the French *coutumiers* as the basis for their treatment of legal discourse.\(^{52}\) Although they both acknowledge the basis of the treatment of the insane in the *coutumiers* on Roman law, they portray this relationship as a simple adoption, without the intermediary of juristic readings of Roman law. Laharie’s appraisal of canon law on the baptism of the insane, for example, comes through Thomas Aquinas rather than a contemporary canonist.\(^{53}\)

Also contributing to a lack of attention to the *ius commune* on madness, a good deal of study on madness and law has focused on medieval England.\(^{54}\) English legal historians have tended to view the development of the Common Law insularly and without reference to that other *ius commune*, despite the work of legal scholars like Richard Helmholz who have shown the correspondences and lines of connection, particularly through canon law.\(^{55}\) Scholars


\(^{53}\) Laharie, *Folie au Moyen Age*, 243-245.


investigating madness though the Common Law might mention Bracton and his importation of Roman law, but most frequently they rely the numerous surviving court records. True to the methodology of the Common Law itself, from these documents of practice they extract the principles that governed the interaction of the law with insanity, usually in the area of criminal responsibility. Another frequent area of English investigation concerns guardianship. By 1265, English kings assumed royal guardianship over all those struck with mental affliction. This bold extension of royal authority has resonated powerfully with English historians. For example, in a recent examination of episcopal care for insane priests, James R. King has pointed to the Prerogativa Regis as the model for the granting of coadiutores, or assistants to help ill or mentally afflicted priests carry out their duties, rather than to the numerous provisions in canon law.

The recent growth of disability studies and the use of disability as a category of analysis has led to a growth of studies of madness and law. At the forefront of this scholarly outcrop are Wendy Turner and Aleksandra Pfau. In many ways, the work of these two continues the existing trends with Turner focusing on the insane in medieval England, and Pfau treating France. Both draw primarily on documents of practice. Turner has examined the court records in order to answer a number of questions, from modes of proof and criminal responsibility to patterns of

56 See Walker, Crime and Insanity in England, 26-29; Hurnard, King’s Pardon, 159-170.
58 King, “The Treatment of Mentally Ill Clergy in Late Thirteenth-Century England,” 76: “Though the case of the rector of Bletchingdon fell under the jurisdiction of the church rather than that of the crown, it is apparent that Bishop Sutton acted much like the King- in this case and in every other case of incompetence- assigning a ‘guardian’ for the incompetent individual rather than removing him from office.”
custody. Rather than previous work that often looked at particular cases in isolation, Turner’s studies use a range of printed and archival material to draw firmer conclusions. Although not engaging directly with jurisprudential material, she has highlighted the use of Roman norms by commentators like Bracton.\textsuperscript{60} Despite a difference in source material, Turner’s work has influenced this present study by showing the need to present the law’s depiction of insanity as a whole, rather than isolating particular areas.

Pfau, on the other hand, has taken a more focused approach by basing her study of madness and law in medieval France on the royal letters of remission. These letters involve petitions to king seeking remission of punishment and a restoration of reputation for crimes committed with some extenuating circumstances. Although only a small fraction of these letters revolve around insanity, enough survive to provide interesting evidence about the perception and reality of insanity.\textsuperscript{61} Natalie Zemon Davis used these same sources to show the narrative techniques employed in a legal document.\textsuperscript{62} Pfau continues this, using the letters of remission to expose attitudes towards insanity as well the social circumstances that structured the lives of the insane. Like Fritz and Laharie, she uses the northern coutumiers as a normative source, but is clearer about the dependence of many of these records of custom on the norms of Roman law.\textsuperscript{63} Pfau has also been willing to apply questions prompted by disability studies to these norms by investigating how madness functions as a disability.

\textsuperscript{60} Turner, “Afflicted with Insanity,” 80-92.
\textsuperscript{63} Pfau, “Madness as a Disability in Late Medieval France,” 96-100
Although Turner and Pfau refer to the influence of Roman law on local norms, they do not engage seriously the jurisprudence surrounding these points of inclusion. This follows a trend in the scholarship of madness and law in the Middle Ages that only discusses the sources of the *ius commune* rather than the ways in which jurists used those sources. For example Judith Neaman provides a summary of the positions of the Digest and Decretum in her chapter on legal insanity in *Suggestion of the Devil*.

Neaman’s treatment of the Decretum in particular fails due to her lack of distinction between Gratian’s *dicta* and his source material. As in her discussion of the medical understanding of madness, Neaman provides a survey of texts available in the Middle Ages but not a an examination of how they were used. Likewise, R. Colin Pickett provided an appraisal of Roman and canonical positions in his history of madness in canon law.

Pickett was careful to discuss the importance of Roman law for the canonists, but did not draw on the canonists in his investigations. Aside from stray references to Huguccio, Rolandus, and Raymond of Peñafort, Pickett’s primary post-Gratian source was Thomas Aquinas.

Even the studies that do draw on medieval jurisprudence concerning insanity present a distorted image because of their particular points of focus. In addition to an emphasis on early modernity rather than the Middle Ages, examinations of the jurisprudence suffer from what Kenneth Pennington has termed the “Balkanization” of legal studies. Although canon and Roman law functioned together in a dialogue in the *ius commune*, many studies have emphasized the importance of one over another.

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66 Ibid., 49-70.
67 Pennington, “Learned Law.”
Stephan Kuttner dealt with the doctrine of twelfth-century canonists on insanity and culpability as part of a much larger examination of fault. Kuttner laid out Gratian's scheme for insanity and, more importantly, charted subsequent doctrine through a broad sampling of canonists. Many of Kuttner’s sources are still only accessible through consultation of the manuscripts, an indication of the specialized knowledge required to pursue this subject in the sources. Kuttner demonstrated the connections between the canonistic understanding of the “insanity defense” and other areas of liability jurisprudence, but, because insanity itself was not his primary concern, he did not pursue it into the contemporary ideas of canon law’s sister science, Roman law. As a result, he did not examine the interplay between the two that I believe is crucial to understanding the trajectory of jurisprudence.

Of the two other scholars who deal with the jurisprudence of the *ius commune* on insanity, both deal with that jurisprudence as it begins to shift in early modernity. H.C. Erik Midelfort includes a chapter on the “insanity defense” in his examination of madness in sixteenth-century Germany. He notes basic doctrines, such as the non-responsibility of the insane in the thought of Bartolus de Saxoferrato and Baldus de Ubaldis, the two luminaries of fourteenth-century jurisprudence. He also mentions the position of Angelus de Aretinus on the burden of proving madness. These are only preliminaries to set the stage for his discussion of Johann Weyer’s use of insanity jurisprudence in his defense of witches.

Marco Boari in *Qui venit contra ius* provides the most thorough examination of insanity jurisprudence, though again his study focuses on the transitions underway during the sixteenth

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70 Ibid. 187-193
century in particular. My present project is in many ways indebted to Boari's study. For example, although his subject is the *furiosus* in criminal law, almost half of the work is devoted to an examination of proof broadly understood, that is, both the signs and procedural mechanisms by which a person could establish insanity as a legal fact. Boari was perceptive of the relativity of the signs of madness and the place of these signs in the jurisprudential scheme of proof. In the area of responsibility, he emphasized the social need for punishment to balance a criminal act, and noted several jurists of the sixteenth century who began to break from the tradition of forbidding the punishment of the insane. Still, Boari's study presents a distorted view of medieval jurisprudence. By locating the fifteenth and sixteenth centuries as the era of change, he presents the jurisprudence of the preceding centuries as static. Similarly, because the era of the *utriusque iuris doctores* had already been well-established by his time, Boari does not pay attention to differences in canonistic and civilian doctrines, and the important contributions of the canonists to the trajectory of the criminal responsibility of the insane.

Boari’s study tracks juristic ideas of criminal insanity in the *ius commune* as it moves into the early modern world; my study examines how those reflections came to be.

In light of this scholarship, both of the insane and law in general and of jurisprudence in particular, the present study seeks to prove two basic points. The study of the medieval jurisprudence of insanity is crucial. The medieval jurists did not just provide a link in the chain transmitting Roman heritage to modernity, but added to and transformed it. They attempted to settle contradictions, posed new problems and solutions, and filled in lacunae. According to

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72 Ibid., 44-59, 68-69.
73 Ibid., 77-80.
74 Boari’s examination of the tradition is limited to the *glossa ordinaria* of Accursius and occasional references to jurists like Albertus Gandinus and Bartolus de Saxoferrato.
Boari, the quarto- and cinquecento saw a deepening of the jurisprudence of insanity.\textsuperscript{75} I would claim that although the source material became broader as later jurists increasingly relied on medical and literary concepts of madness, they only added to a jurisprudential base established in the Middle Ages. Second, this study examines medieval jurisprudence as a whole. Previous scholars have focused on one or two facets of jurisprudence, usually criminal law. This narrowing obscures the essential conceptual unity of insanity. A \textit{furiosus} who could not contract a marriage and the \textit{furiosus} who could not be held responsible for homicide were essentially the same.

\textbf{Disability Studies and the Middle Ages}

Although the glosses, commentaries, and \textit{consilia} of the \textit{ius commune} provide my source material, many of the larger questions I pose to that source base are influenced by disability studies. Growing out of the struggles of the 60’s and 70’s for disability rights, disability studies questions fundamental questions about the concept of disability.\textsuperscript{76} Like many of the categories of analysis, it unmoors disability from medical discourse and defines it instead as a social construct. Despite the ubiquity and questionable utility of such an approach, it can help in posing interesting questions.\textsuperscript{77} The fundamental distinction of the “social model” of disability, which has proven to be an effective tool in both activism and scholarship, centers on the difference between an impairment and a disability. In this way of thinking, an impairment is the “individual and private” condition, such as blindness or quadriplegia. Disability refers to the “structural and

\textsuperscript{75} Boari, \textit{Il furiosus nella criminalistica}, 8.


\textsuperscript{77} Ian Hacking, \textit{The Social Construction of What?} (Cambridge, MA: Harvard University Press, 1999), 36-40. Hacking criticizes the misuse and overuse of the term “social construction,” which often only means the history of a concept.
public” consequences of that impairment. In short, an impairment only becomes a disability when it impedes social or cultural participation. The solution, according to theorists, is not to “fix” the person, a view associated with a “medical model” of disability, but to “fix” society. For disability rights activists this means removing social barriers and providing greater degrees of access. For scholars, particularly historians, it means analyzing the development of social practices and institutions that transform impairment into disability.

The acceptance of disability studies into scholarship has been gradual. In 2003, Catherine Kudlick provided an overview of the state of disability scholarship and a plea for its expansion. Medievalists had already begun entering into a field that would balloon in the coming years. The first major entry into the field was Irina Metzler's *Disability in Medieval Europe*. Metzler focused on physical impairment and adopted a scheme closely based on the social model, with a strict division between impairment as a physical reality and disability as a social construction. Her primary question is whether the Middle Ages had a concept of disability as distinct from impairment. “One of the issues central to my research is the question whether we can at all refer to medieval ‘disabled’ persons, or whether we are dealing historically with medieval ‘impaired’ persons who might not share much of the ‘special needs’ status of their modern counterparts.” After searching through medical texts for references to physical impairment, through works of theology for statements on physical imperfections and the Resurrection, and through miracle stories for examples of the impaired in daily life, Metzler ends with the surprising conclusion

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80 E.g. Turner, “Afflicted with Insanity.”
82 Ibid., 2-3.
that “as far as ‘intellectual’ texts of the Middle Ages are concerned, one must conclude that although in reality there were probably as many physically impaired people, proportionately, as there were in other societies, including our own modern world, there were very few medieval disabled people.”\textsuperscript{83} Only in miracle stories did she find evidence of “disability” in the depiction of the impaired as a burden to their families or communities.\textsuperscript{84}

Despite its importance as the entry into medieval disability studies, the study is fundamentally flawed. Eyler, for example, argues that Metzler’s strict adherence to a social model of disability seems to have determined her conclusion.\textsuperscript{85} A much more serious problem, I believe, involves her use of sources. Something may be said for Metzler’s investigation of the medieval theory for an idea of disability understood as distinct from impairment, at least in giving the historian pause when encountering an impaired individual in a medieval text. He should look at the particular circumstances rather than assume the presence of the same limitations that such a person would face in a modern society. Metzler ultimately could not answer her question because she did not look to the proper source base. She explicitly cordoned off law as a purely practical field, ignoring the theoretical importance of jurisprudence.\textsuperscript{86} She asked her questions of philosophy, theology, and medicine, the areas least equipped to discuss the social ramifications of impairment. What of the irregularity of mutilated clerics? The ability of the deaf to serve as witnesses? The ability of the mute to testate? Such discussions cut to the

\textsuperscript{83} Ibid., 189.
\textsuperscript{84} Ibid., 187
\textsuperscript{85} Joshua R. Eyler, “Introduction: Breaking Boundaries, Building Bridges,” in \textit{Disability in the Middle Ages}, 7
\textsuperscript{86} Metzler, \textit{Disability in Medieval Europe}, 2: “Because physical impairment in the Middle Ages has (to the best of my knowledge) never been researched before in a monograph as a distinct and identifiable subject, it seemed that the best to initiate such a study was to focus on the theoretical framework and intellectual context of impairment in that period. This means that many other areas that could have been studied in relation to medieval impairment, the legal, economic and social situations of impaired people, and the care (or lack of it) provided for the impaired by medieval hospitals, have had to be omitted from this present research.”
heart of Metzler’s central question and would have certainly altered her conclusion that “although in reality there were probably as many physically impaired people, proportionately, as there were in other societies, including our own modern world, there were very few medieval disabled people.”  

In his critique of Metzer, Eyler states that medievalists need to find their own model of disability, and points to Edward Wheatley’s “religious model” as just such an attempt. According to Wheatley, the medieval Church controlled the discourse over disability in a way similar to modern medical control over disability. The religious model offers freedom from sin as cure and extends the hope that God will manifest his power through a miracle. In return, the Church demands doctrinal and devotional obedience, thereby limiting the agency of those hoping for such cures. The Church also maintains control through the supervision of charitable institutions. Wheatley maintains that religious discourse provided the most widely available method of transforming a physical impairment into a recognized disability. Although he asserts that a link between impairment and sin is not necessary for the functioning of the religious model, his description of it greatly relies on that very connection. Sin and madness certainly enjoyed a connection in medieval literature and polemics, as Penelope Doob, Jerome Kroll, and Bernard Bachrach have shown. Kroll and Bachrach, however, insist that sin was not the primary cause

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87 Ibid., 189.
90 This argument is convincing in the example leprosy. Carol Rawcliffe has shown that lepers did not undergo the systematic and ritualized exclusion common in medieval historiography. Instead, the Church provided the quasi-regular life of the lazarus house as an option for social integration. See Carol Rawcliffe, Leprosy in Medieval England (Woodbridge: The Boydell Press, 2006), 302-343.
91 Doob, Nebuchadnezzar’s Children, adopted a three-fold distinction based on sin for interpreting insane characters: those struck with insanity as a punishment, those struck in order to manifest the power of God, and holy men and
of insanity in the early medieval sources they surveyed. Indeed, most studies of medieval
madness have attempted to distance themselves from a view of the Middle Ages as a time
preoccupied with sin and supernatural causation for illness and impairment. My own
examination of insanity in medieval jurisprudence shows that reliance on supernatural causation
arose only for a brief period among canonists of the twelfth century. This line of thought ended
with an increased use of Roman doctrine by the canonists. I also question Wheatly’s assertion
that religious discourse provides the most widely available means of transforming an impairment
into a reality.92 As Turner, Pfau, and this present study show, law provides a discourse in which
the impaired can be disabled without reliance on sin at all, or even without recourse to
ecclesiastical institutions, but instead through familial or civic institutions.

**Madmen and Lawyers**

I am not concerned with establishing a general model of disability, but with examining
how a particular source base configures disability. Studies of madness or disability incorporating
multiple strands of thought have shown that each discourse has its own primary concerns that
shape the treatment of that disability. A model that could accommodate all would require a level
of ambiguity that would call its usefulness into question. My interest lies in madness as a social
idea. In light of the numerous studies approaching insanity through records of practice, I believe
it is crucial to determine the concepts that lay behind that practice in order to arrive at the full
picture of madness in medieval society. Disability studies has proven useful in formulating the
larger questions that underlay the present study.

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women who endure insanity as purgation. See also, Jerome Kroll and Bernard Bachrach, “Sin and Mental Illness in

First, does insanity constitute a distinct status in medieval law? Fritz characterized madness as being “drowned in a discourse of incapacity,” an assessment that Pfau has more recently accepted.93 Did the jurists of the *ius commune* consider the insane as a distinct social reality, or were they so similar to other categories of the legally incapable, such as children or the inebriated, as to obscure and differences? Marco Boari advanced a different objection to insanity as a status, pointing to the temporary nature of insanity and the presence of so-called “lucid intervals” accepted by the *ius commune*.94 According to Boari, because the effects of madness only operated during a time of insanity, and because the hope of a return to sanity was always on the horizon, insanity was not a definitive, but rather a temporary status. In many ways, this entire dissertation is an unwrapping of what insanity means as a status. From its conception to its effects, I will show how the jurists dealt with insanity as a particular and permanent marker of status.

Second, to what extent was insanity a marginalized identity? In his general history of disability, Henri-Jacques Stiker has characterized the disabled in the Middle Ages as “cared-for, integrated marginalized.”95 Pfau has adopted this characterization for the insane but still holds that “madness was defined as an inability to comprehend the law, and thus the mad could never act within it unless they recovered their sanity.”96 She maintains that the integration comes from the retention of social status but a loss of legal status.97 Pfau presents the most nuanced view of the marginalization of the insane in normative legal sources. In her assessment of the

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93 Fritz, *Discours du fou*, 153; Pfau, “Madness as a Disability in Late Medieval France,” 96.
96 Ibid. 100, 104. See Chapter 1. I question Pfau’s use of terms. The insane retain their legal status but lose the exercise of that status.
fundamental position of legal approaches to insanity, Wendy Turner admits that those with mild
mental impairment could participate actively in society. On the other hand, those with more
severe conditions, whom the jurists considered when discussing the insane, “could not participate
meaningfully as adults, and within many sources, they were referred to as if children.”98 Even
with the interpretive tools of disability studies, current scholars have continued the essentially
negative views of the past. Laharie’s discussion of law focuses on its use as an instrument of
exclusion.99 Likewise, Boari classified the treatment of madness under the heading of the
punishment and exclusion of the non-normal.100 Fritz held the most extreme view, “the madman
is defined as incapable, as a juridical non-person.”101 My examination of the jurisprudence adds a
different dimension to this general consensus. While the limitations on the legal agency of the
insane are many, the jurists seemed just as concerned with securing the rights of the insane and
examining ways in which they still might possess a sphere of agency, however limited it was.

Last, were jurisprudential discussions of madness merely academic hypotheticals, or did they have practical import? In a legal system in which consent and volition are fundamental
components of many acts, including crime, marriage, and contracts, insanity could be a useful
tool for doctors of law to educate their students. Some texts of Roman law appear to be didactic
rather than practical in their orientation.102 On the other hand, when discussing late medieval and
early modern ideas of proof, Boari has noted that the probatory system is partially based on the
general rules of the *ius commune* as well on the nature of madness itself.103 I want to push this

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102 For an example of this, see Chapter 1.
idea further by arguing that in many aspects of the jurisprudence, including but not limited to proof, the jurists sacrificed doctrinal specificity for a more vague and adaptive system suited to respond to the particular needs of a case at hand.

In order to answer these questions, I will be drawing on the *libri legales*, as well as the glosses, lectures, and commentaries of the *ius commune*, including canon and Roman law from the twelfth to the sixteenth centuries. The medieval jurisprudence of madness begins with the renaissance of legal studies in the West, particularly with Gratian’s Decretum. This study concludes with sixteenth century because, as Boari and Midelfort have shown, at this time the juristic discussion of madness begins to incorporate medical learning to an unprecedented degree. This rise of medical expertise rather than the use of social knowledge and concepts represents a small but still significant break between the Middle Ages and early modernity. The examinations of particular facets of the *ius commune* will show that the “balkanization” of legal studies presents a seriously distorted view of the development of insanity as a jurisprudential concept. I also draw on *consilia* as useful sources. Some socio-legal historians, such as Trevor Dean, have criticized the use of *consilia* as too dependent on theory and esoteric considerations of law to function as reliable witnesses of daily practice. ¹⁰⁴ This perspective misses the strength of *consilia* as a source. In the increasingly litigious culture of the Middle Ages, a time during which one had to rely on some kind of legal professional in order to hope for success in court, the arguments deployed by these professionals provide an important window into the ways law functioned.¹⁰⁵

¹⁰⁴ Dean, *Crime and Justice*, 108-109: “Consultants’ opinions were formed by strong traditions of legal analysis, in which reference to Roman law and the influence of Baldus are all too evident.”
¹⁰⁵ Bellomo, *Common Legal Past*, 155: *Consilia* are “not only an excellent mirror of practice...[but also] just as good a reflection of the theoretical potential, used in a concrete situation, of the *ius commune*.”
These arguments, which combine legal concepts with available testimony, are particularly important in the highly subjective determination of sanity.

I also supplement the usual sources of the *ius commune* with records from the Archivio di Stato of Venice. Venetian records recommend themselves for this study in a number of ways. First, most of the jurists here examined were educated or practiced in northern Italy. Venice acts as an example of this cultural milieu. Second, documents began to survive in greater numbers from the fourteenth century, when the general features of the jurisprudence had taken shape. Last, Venice had a complicated relationship with the *ius commune*. Scholars emphasizing a “hierarchy of laws” approach have argued for Venetian exceptionalism in northern Italy. Venice, they claim, rejected the oppressive, imperial norms of the *ius commune* in favor of their own judgment and norms. Padovani located this position as founded on a sense of mercantile reason and a resistance to “imperial” norms as a way of preserving Venetian liberty. Pennington has argued against Venetian exceptionalism using Bellomo’s understanding of the *ius commune* as more than another kind of positive law. The major Venetian statutes, of Jacopo Tiepolo in 1242 and of Andrea Dandolo in 1346, were modeled after the codifications of canon law, Gregory IX’s *Decretales* and Boniface VIII’s *Liber sextus*. The famous Odofredus even composed a set of glosses on the 1242 statutes. Padovani shows rhetorical similarities between the prologues of the statutes and phrases drawn from the Decretum, the Codex, and the Digest. Indeed, the first prologue to the statutes clearly mimics *Deo auctore*, the decree with which Justinian introduced and endorsed the Digest. The discussion of presumption is based on Tancred’s *Ordo*

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107 Ibid., 76.
108 Pennington, “Learned Law.”
The statutes also contain a hermeneutic of proceeding "de similibus ad similia", a hermeneutic taken from the Digest. Raineri Zeno (doge from 1253-1268), who served as podestà in Bologna in 1240, was the likely source of the commission for the glosses. The majority of the glosses often note the similarity or difference between Roman and Venetian law. According to Padovani, Zeno wanted “an accurate map of the divergence and convergence with Roman law with respect to the legislation established in the statute.” Although the Venetians preserved many of their own norms and customs, familiarity with and use of the *ius commune* were by no means foreign to the operations of Venetian law. In this study, Venice serves to provide evidence of the cases in which madness might arise, the kinds of evidence available to the jurists, and the willingness of officials to accept juristic doctrine on insanity.

This dissertation examines insanity through a study of diverse areas of medieval jurisprudence. Although major themes, such as the inclusion of the insane into society, follow throughout, and although particular jurisprudential ideas arise in multiple instances, the separation of that jurisprudence into discrete areas allows for a closer examination of the particular effects of insanity. As Jean-Marie Fritz put it, insanity in medieval law is both marginal and central: marginal because no particular title in Roman, canon, or customary law dealt with insanity, but central because its effects could be felt in almost every facet of law. The first chapter deals with the basic legal concept of insanity. I examine how key features such as the lack of understanding and the lack of volition find support throughout the source material. I also examine the particular vocabulary of insanity used by the jurists. I conclude by introducing

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110 Ibid., 78-79.
111 Ibid., 82.
112 Ibid., 88-89.
113 Fritz, *Discours du fou*, 153
the idea of insanity as status and its ramifications for the understanding of its jurisprudence. Chapter two examines the methods of proving insanity adopted by the jurists. They allowed for latitude in the social and cultural interpretation of these signs. Interestingly, I show how the jurists embraced the social apprehension of madness and tended to downplay the role of "expert" testimony. Given the nebulous nature of madness, one of the most important aspects of proof was the procedural mechanism by which one could shift the burden of proof from one party to another. The third chapter addresses criminal responsibility, the so-called "insanity defense." The interaction between Roman and canon law is critical in understanding the development of the defense. Ideas of private responsibility and public justice clash in this area of jurisprudence, and the idea of the insane as not responsible for their actions was not a sure thing. Chapter four looks at the relationship between the insane and their guardians. What obligations did the guardians have to their charges? What rights did the insane possess even while in their condition and under another's power? What role did civic institutions play? The final chapter concerns one of the most interesting areas of medieval jurisprudence of the insane, their ability to consent. Although incapacity to give consent was and is one of the defining features of the insane or legally incompetent, the medieval jurists discussed ways in which the insane could possess a fictive volition and could provide consent. A brief conclusion will readdress the major questions raised here in light of the contents of these chapters.
CHAPTER 1.

FUROR ET DEMENTIA: CONCEPTS AND VOCABULARY

The most important task at the start of any project, particularly one as difficult as the past history of a contemporary issue, is the definition of basic terms. This chapter will introduce the medieval legal idea of insanity through three related questions. First, what were the fundamental perceptions of insanity? Mental incapacity manifests itself in a wide variety of particular forms (e.g. temporary insanity, congenital mental deficiency, senility, etc.); did the jurists identify any common features connecting them all? Second, the jurists used a number of words to discuss insanity and the insane; did these terms signify varieties or grades of mental disturbance, and were these differences legally significant? Third, can the insane person be considered a distinct status in medieval law? The *paterfamilias, filiusfamilias, civis, heres*, and others are familiar figures to legal historians. Should the *furiosus* be included in their number?

This chapter provides the basis for the case studies that follow. Each study will examine the effects of insanity that flow from the basic concepts described here. More than any other, this chapter will therefore focus more on the sources of law themselves than on the jurists who employed them. The *libri legales*, the texts of Roman and canon law that acted as textbooks for generations of jurists, provided a common conceptual and terminological vocabulary that, despite the development of jurisprudence over time, united legal thought on insanity.

**Concepts of Insanity**

Roman law furnished the basic concepts of insanity in two ways. Most directly, the rediscovery and study of the Digest prompted a reinvigoration of legal science in the West. The examination of insanity entered into the schools along with other fundamental legal concepts. A second, more imprecise way involves the impact of Roman law on the idea of insanity in the
early Church. Fragments of Roman law found their way into early canonical collections, but also the Church fathers and early popes lived in a world still governed by Roman traditions and institutions, which continued long after the last Roman emperor was murdered in 476. Therefore, it is crucial to determine the nature and attributes of insanity in Roman law sources.

Roman law made frequent, albeit irregular, mentions of the insane. They often appear as hypothetical test cases, as in Dig. 41.2.18.1, where Celsus used an example of ceding possession to an insane person in order to make a distinction among the multiple intentions at work in such a transfer. From this example, we can see the general method of definition at work. The Roman jurists defined insanity negatively through mental attributes necessary for legal agency, namely awareness, understanding, and intention. They set the tone for later treatment by considering insanity only for its consequences rather than its causes.

The *Institutes* of Justinian, a reworking of the *Institutes* of the earlier jurist Gaius, served as a textbook for men beginning their study of law, and it is in the Institutes that we find the most basic statement of the legal disability of the insane. “The insane person cannot perform any transaction because he does not know what he is doing.” The insane are unaware not only of their own actions, but also of the actions of others. The identification of the insane with the unaware led some jurists, most notably Pomponius, to suggest that the insane did have legal personhood inasmuch as the unaware did. Thus they could suffer insult, though they could not

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1 Eg. C.32 c.7 c.26.  
2 Dig. 41.2.18.1: “Si furioso, quem suae mentis esse existimas, eo quod forte in conspectu inumbratae quietis fuit constitutus, rem tradideris, licet ille non erit adeptus possessionem, tu possidere desinis: sufficit quippe dimittere possessionem, etiamsi non transferas. Illud enim ridiculum est dicere, quod non aliter vult quis dimittere, quam si transferat: immo vult dimittere, quia existimat se transferre.”  
5 According to Ulpian, Dig. 47.10.3.2, the insane can suffer an insult even though they cannot afflict one because awareness of being insulted is not required for it to be an offense. “Itaque pati quis iniuriam, etiamsi non sentiat, potest, facere nemo, nisi qui scit se iniuriam facere, etiamsi nesciat cui faciat.”
commit it; insane spouses could be repudiated, they could inherit from a testament, and they could make use of certain actions.\(^6\) The analogy between the insane and the absent, which we shall examine when discussing fictive consent, derives from this inability of the insane to know or perceive what is going on around them.\(^7\)

Connected to, and even dependent on, the lack of knowledge or awareness is the lack of intention. The most explicit statement of this idea comes in Dig. 50.17.40, which declares that the insane “have no will (\textit{voluntas}).”\(^8\) The Romans did not define this absence of a will as an inability to choose, but rather as an inability to act with purpose. Thus the insane cannot, as we have seen, lose possession of their goods because they cannot form the intention to do so.\(^9\) Nor can they form the requisite intention to commit an illicit act with \textit{dolus}, or criminal intent.\(^10\) This inability to form an intention may appear side by side with the lack of knowledge, as in Dig. 29.2.9, but the jurist Paulus explicitly linked the two. He noted that the insane cannot possess something because they do not have an intention to possess, an “\textit{affectio tenendi}.”\(^11\) Later, when discussing possession through other persons, such as a slave or a \textit{filiusfamilias}, Paulus notes that “the person through whom we seek to possess must be such that they have an understanding of possession.” The insane, he continued, do not meet this requirement.\(^12\) Thus the lack of intention

\(^6\) See Dig. 47.10.3.2, Dig. 24.2.4, Dig. 28.1.16.1, Dig. 44.7.24, and Dig. 12.1.12 respectively.
\(^7\) Dig. 50.16.209: “‘Coram titio’ aliquid facere iussus non videtur prae sente eo fecisse, nisi is intellegat: itaque si furiosus aut infans sit aut dormiat, non videtur coram eo fecisse. Scire autem, non etiam velle is debet: nam et invito eo recte fit quod iussum est.”
\(^8\) Dig. 50.17.40: “Furiosi vel eius, cui bonis interdictum sit, nulla voluntas est.”
\(^9\) Dig. 41.2.27: “Si is, qui animo possessionem saltus retineret, furere coepisset, non potest, dum fureret, eius saltus possessionem amittere, quia furiosus non potest desinere animo possidere.”
\(^10\) Dig. 43.4.1.6: “Hoc edicto neque pupillum neque furiosum teneri constat, quia affectu carent. Sed pupillum eum debemus accipere, qui doli capax non est: ceterum si iam doli capax sit, contra erit dicendum. Ergo et si tutor dolo fecerit, in pupillum dabimus actionem, si modo solvendo sit tutor: sed et ipsum tutorem posse conveniri Iulianus scribit.”
\(^11\) In Roman law possession required both physical contact and the intention to possess.
\(^12\) Dig. 41.2.1.2: “Furiosus, et pupillus sine tutoris auctoritate, non potest incipere possidere, quia affectionem tenendi non habent, licet maxime corpore suo rem contingant, sicuti si quis dormienti aliquid in manu ponat. Sed pupillus tutore auctore incipiet possidere. Ofilius quidem et Nerva filius etiam sine tutoris auctoritate possidere
is at least partially founded on an unawareness of the basic idea itself. The lack of intention flows from the fundamental disconnect of the insane person from his world. As Inst. 2.12.2 notes in commenting on the frequent juxtaposition of the insane and minors, the underage lack discretion, while the insane altogether lack a mind. The connection receives further corroboration in the use of the word “sensus,” which can refer either to the perception of the world or the faculty of judgment.

The Romans viewed this lack of intent as a problem much more fundamental than a disordered will. This is clear from a comparison between the insane and the prodigi, or spendthrifts. The prodigus and the insane enjoy a connection dating to the Twelve Tables on the grounds that both conditions resulted in the granting of curators to men older than 25, the age of full legal majority. Such guardians are given for similar reasons, most notably to prevent harm to the economic well-being of the family. Like the insane, the prodigi also lack a legally valid will, though that lack is conceived in a different way. The identification as a prodigus required a judicial ruling. Any actions before this ruling are considered valid. The ruling was a barrier to any subsequent action. The legal disabilities of the insane differ in that they take effect with the


13 Inst. 2.12.1: “Praetera testamentum facere non possunt impuberes, quia nullum eorum animi iudicium est; item furiosi, quia mente carent.”
15 In Dig. 27.10.1.pr., Ulpian claimed that the guardianship of the prodigi developed along an analogy with the insane. “Lege duodecim tabularum prodigo interdicitur bonorum suorum administratio, quod moribus quidem ab initio introductum est. Sed solent hodie praetores vel praesides, si tale hominem invenerint, qui neque tempus neque finem expensarum habet, sed bona sua dilacerando et dissipando profudit, curatorem ei dare exemplo furiosi: et tamdui erant ambo in curatione, quamdui vel furiosus sanitatem vel ille sanos mores receperit: quod si evenerit, ipso iure desinunt esse in potestate curatorum.” See also Inst. 1.23.3 and Dig. 26.1.3.
16 Dig. 50.17.40: “Furiosi vel eius, cui bonis interdicitum sit, nulla voluntas est.” The legal prohibition from conducting business with one’s property amounted to a legal negation of will similar to the natural negation of will understood to occur in the insane.
inception of insanity. If an alleged *furiosus* had been proven to have been insane for a year prior to the actual determination of his insanity, each act within that year would be invalid. Insanity, unlike prodigality, could thus have a retroactive effect. The *prodigi* are defined through their disordered wills that if left unfettered would lead to a ruinous end. Given the distinction between a will negated through judicial order, and a will negated through nature, it is clear that the insane possess a disordered will of a different magnitude, one that stems from a more profound disconnect with reality. Insanity, then, it not merely a matter of poor decision-making, though as we shall see, poor decision-making could certainly be used to support an allegation of insanity.

In effect, without awareness or the ability to form an intention, the insane in Roman law cannot consent. Playing off the lexical similarity between *consentire* and *sentire*, Pomponius noted in Dig. 33.5.8.2 that consent was impossible for the insane, since they cannot perceive anything. Consent was a fundamental requirement for legal agency in Roman law. It served as the basis for a contract, which by the time of the classical jurists came to characterize every form of mutual obligation. The inability to give consent likewise made basic legal acts like

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17 Eg. Odofredus, *Lectura super Digesto novo* (Lyon 1552), fol. 119r, Dig. 45.1.6. “Or Segnori, intelligiturne interdictum bonis eo ipso, quod prodigus, licet iudex non interdicat. Et videtur quod sic, ut supra de tuto et cura. dat ab his. l. Si quis (recte ‘His qui’) [Dig. 26.5.12]. Sed contra dicimus quia furioso interdicitur a lege, sed prodigo a iudice, ut supra de cura. furio. Li et per totum titulum [Dig. 27.10.1].”
18 Dig. 26.5.12.2: “Divus Pius matris querellam de filiis prodigis admisit, ut curatorem accipiant, in haec verba: ‘Non est novum quosdam, etsi mentis suae videbuntur ex sermonibus compotes esse, tamen sic tractare bona ad se pertinentia, ut, nisi subveniantur is, deducantur in elegiam. Eligendus itaque erit, qui eos consilio regat: nam aequum est prospicere nos etiam eis, qui quod ad bona ipsorum pertinet, furiosum factum exitum.’”
19 Dig. 33.5.8.2: “Unius hominis mihi et tibi optio data est: cum ego optasssem, si non mutassem voluntatem, deinde tu eundem optaveris, utriusque nostrum servum futurum: quod si ante decessisse vel furiosus factus esse, non futurum communem, quia non videor consentire, qui sentire non possim: humanius autem erit, ut et in hoc casu quasi semel electione facta fiat communis.”
20 Adolf Berger, *Encyclopedic Dictionary of Roman Law*, Transactions of the American Philosophical Society n.s. 43.2 (Philadelphia, 1953, repr. 1991), 413, s.v. “Contractus”. In particular see, Dig. 5.1.20: “Omnem obligationem pro contractu habendam existimandum est, ut ubicumque aliquis obligetur, et contrahi videatur, quamvis non ex crediti causa debeatur.”
marriage\textsuperscript{21} or contracts for sale impossible for the insane.\textsuperscript{22} Ulpian provides an example of how total this disability was. Discussing the consent, even tacit consent, required to renew a lease, Ulpian noted that if the owner of the property were to die or go mad, a renewal would be impossible.\textsuperscript{23} Consent was so fundamental that its cessation through insanity was tantamount to death.

Insanity, in the texts of the Justinianic corpus, was an extreme phenomenon. The jurists did not admit shades or gradations but instead conceived of it as an “all or nothing” condition. This is an important point. Discrete stages within the concept of insanity, each leading to a different level of incapacity, did not enter into juristic discourse until the growth of medical jurisprudence in the sixteenth and seventeenth centuries.\textsuperscript{24} Ulpian, recalling an opinion of Vivianus, noted that “we should still regard as sane those with minor mental defects... for example that he is frivolous, superstitious, quick-tempered, obstinate, or has some other defect of the mind.”\textsuperscript{25} Defects of character or intelligence did not rise to the level of insanity; a sliding continuum of agency based on relative capacity did not exist. At times, the Roman jurists attempted to carve out realms of agency for the insane, as Pomponius did through the figure of

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\textsuperscript{21} Dig. 23.2.16.2: “Furor contrahi matrimonium non sinit, quia consensu opus est, sed recte contractum non impedit.”
\textsuperscript{22} Cod. 4.38.2: “Emptionem et venditionem consensum desiderare nec furiosi ullam esse consensum manifestum est. Intermissionis autem tempore furiosos maiores viginti quinque annis venditiones et alios quoslibet contractus posse facere non ambigitur.”
\textsuperscript{23} Dig. 19.2.14: “Qui ad certum tempus conducit, finito quoque tempore colonus est: intellegitur enim dominus, cum patitur colonum in fundo esse, ex integro locare, et huiusmodi contractus neque verba neque scripturam utique desiderant, sed nudo consensu convalescent: et ideo si interim dominus furere coeperit vel decesserit, fieri non posse marcellus ait, ut locatio redintegretur, et est hoc verum.”
\textsuperscript{24} Midelfort, \textit{A History of Madness}, 183-186 and Boari, \textit{Il furiosus nella criminalistica}, 142-143. Boari in particular pointed to the work of Benedict Carpzov and Paolo Zacchia as fundamental in this shift.
\textsuperscript{25} Dig. 21.1.1.9: “Apud Vivianum quaebeat, si servus inter fanaticos non semper caput iactaret et aliqua profatus esset, an nihilis minus sanus videretur. Et ait Vivianus nihil minus hunc sanum esse: neque enim nos, inquit, minus animi vitis aliqua sanos esse intellegere debere: alioquin, inquit, futurum, ut in infinito hac ratione multos sanos esse negaremus ut puta levem superstitiosum iracundum contumacem et si qua similia sunt animi vitia: magis enim de corporis sanitate, quam de animi vitis promitti.” See \textit{Digest of Justinian}, ed. Watson, 2.145.
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the *ignorans*, while others did so by drawing comparisons with the absent.\(^{26}\) For example, because the ability of a husband to repudiate his wife did not require her awareness, a husband could validly repudiate even an insane wife.\(^{27}\) These are exceptions, however, that prove the point; the classical jurists resisted cutting the insane off totally from legal ability, but had to work with analogous identities to accomplish that task. There was no room in the concept of the madman itself to allow any agency.

The insane did, however, enjoy full agency and personhood during the so-called lucid interval. The lucid interval is a period in which the affliction of madness seems to cease and in which the consequences of madness also cease. As Justinian decreed, during lucid intervals, the insane “can do everything that men of sound mind can.”\(^{28}\) From the use of this idea in the Justinianic corpus, the possibility of lucid intervals appears as an integral part of the general Roman legal understanding of insanity. Consider, for example, the important text of Dig. 1.18.14, a rescript of Marcus Aurelius and his son to a provincial governor dealing with matricide committed by an alleged madman. The emperors advised the governor to make a thorough investigation of the case, particularly on the question of whether the crime had been committed during a period of sanity, “as is often the case.”\(^{29}\) Dig. 5.1.39 establishes that when an insane person is named as a judge, he cannot exercise his office unless he is in his right mind. “His verdict is not diminished because he cannot judge today; the sentence he passed should be

\(^{26}\) See Chapter 4.

\(^{27}\) Dig. 24.2.24: “Iulianus libro octavo decimo digestorum quaerit, an furiosa repudium mittere vel repudiari possit. Et scribit furiosam repudiari posse, quia ignorantis loco habetur: repudiare autem non posse neque ipsum propter dementiam neque curatorem eius, patrem tamen eius nuntium mittere posse. Quod non tractaret de repudio, nisi constaret retineri matrimonium: quae sententia mihi videtur vera.”

\(^{28}\) Cod. 5.70.6: “...sed per intervalla, quae perfectissima sunt, nihil curatorem agere, sed ipsum posse furiosum, dum sapit, et hereditatem adire et omnia alia facere, quae sanis hominibus competunt.”

\(^{29}\) Dig. 1.18.14: Si vero, ut plerumque adsolet, intervallis quibusdam sensu saniore, non forte eo momento scelus admisericit nec morbo eius danda est venia, diligenter explorabitis et si quid tale commpereris, consules nos, ut aestimemus, an per immanitatatem facinoris, si, cum posset videri sentire, commiserit, supplicio adficiendus sit.”
ratified when he becomes sane.”\textsuperscript{30} Licinius referred to the temporary nature of insanity almost jokingly: the judge cannot fulfill his office “today.” It is all the more striking when considered next to Dig. 5.1.12.2, a text of Paulus also dealing with an insane judge. According to this text, custom bars some from serving as judges, such as women and slaves, nature bars others, such as “the mute, the deaf, the perpetually insane, and the under age, who lack judgment.”\textsuperscript{31} Paulus explicitly specified the insanity as perpetual, the assumption being that had he not done so, his reader would have assumed temporary insanity, since those having lucid intervals can serve as judges. This text is however, one of only two instance in the corpus where insanity is explicitly mentioned as “perpetual.” Dig. 33.2.32.6 describes the testamentary provisions that a father made for his two daughters and mentally incapacitated son. In the text, Scaevola provided an example of what such an institution might look like. The testator not only left instructions for his oldest daughter to care for her brother, but he also left her the usufruct of her brother’s portion “until he should recover and be of sound mind.”\textsuperscript{32} Such a provision would remain valid and serve as a means of caring for the son should he never recover, but there was still at least a hope that he would. This points to a key feature of Roman ideas of insanity. The basic concept was one of periodic insanity, though it could easily stretch to cover more permanent conditions.

\textsuperscript{30} Dig. 5.1.39.pr.: “Cum furiosus iudex addicitur, non ideo minus iudicium erit, quod hodie non potest iudicare: ut scilicet suae mentis effectus quod sententiae dixerit, ratum sit: neque enim in addicendo praesentia vel scientia iudicis necessaria est.”

\textsuperscript{31} Dig. 5.1.12.2: “Non autem omnes iudices dari possunt ab his qui iudicis dari ius habent: quidam enim lege impedientur ne iudices sint, quidam natura, quidam moribus. Natura, ut surdus mutus: et perpetuo furiosus et impubes, quia iudicio carent. Lege impeditur, qui senatu motus est. Moribus feminae et servi, non quia non habent iudicium, sed quia receptum est, ut civilibus officiis non fungantur.”

\textsuperscript{32} Dig. 33.2.32.6: “Duas filias et filium mente captum heredes scripsit, filii portionis mente capi datiue fructum legavit in haec verba: ‘Hoc amplius Publia Clementiana praecepti sibi quartae partis hereditatis meae, ex qua iulium iustum filium meum heredem institui: petoque a te, Publia Clementiana, uti fratem tuum iulium iustum alas tuearis dependas pro eo: pro quo tibi usum fructum portionis eius reliqui, donec mentis compos fiat et convalescat’. Quaesitum est, cum filius in eodem furore in diem mortis suae perseverans decesserit, an usus fructus interciderit. Respondit verbis quae proponenter perseverare legatum, nisi manifestissime probetur aliud testatorem sensisse.”
The presence of lucid intervals continued to be a key part of the Roman idea of insanity through the time of Justinian himself. Consider again the decree of Justinian concerning the guardianship of the insane, which the emperor began by distinguishing between those who “undergo the continuous misfortune of madness,” while for others “respite comes to them at certain times.” A clarification of the problems associated with this feature was the primary motivation for Justinian to issue this decree. The Roman idea of insanity was basically temporary in nature, though it could be expanded to include long-term or permanent mental incapacitation.

One last important feature of Roman legal insanity concerns its causes. For the most part, the Roman jurists did not concern themselves with the causes of insanity but only its consequences, which occupied them sufficiently. We have only a few scattered references to work from, though we can reach an important conclusion. Despite the idea, common in the works of the Greeks and Romans alike, that insanity was the work of the gods, the image of insanity in the Justinianic corpus is naturalistic. It was, for the most part, a disease. Those burdened with ill health or sickness had a valid excuse not to appear in court; Ulpian extended this to include the insane, “since one who is impeded madness is impeded by illness.” Similarly, Ulpian also noted that an excuse from taking up a guardianship because of sickness varies on the nature of the sickness. He used insanity as an example of such an illness: it does not remove the

33 Cod. 5.70.6.pr.: “Cum aliis quidem hominibus continuum furoris infortunium accidit, alios autem morbus non sine laxamento ingreditur, sed in quibusdam temporibus quaedam eis intermissio pervenit, et in hoc ipso multa est differentia, ut quibusdam breves indutiae, alii maiores ab huiusmodi vitio inducantur, antiquitas disputabat, utrumne in mediis furoris intervallis permanet eis curatoris intercessio, an cum furore quiescente finita iterum morbo adveniente redintegratur.”
34 George Rosen, *Madness and Society*, 73-83, and passim. Though the Hippocratic work *On sacred diseases* argued early on for a natural understanding of mental disturbance, divine or supernatural attribution remained as a powerful ideal in Greco-Roman literature and culture.
35 Dig. 2.11.2.5: “Idem est et si quis furere coeperit: nam qui fureo impeditur, valetudine impeditur.”
36 See E. Renier, “Observations sur la terminologie de l’aliénation mentale,” *Revue international des droits de l’antiquité* 5 (1950): 429-455, here 442-446. As part of his examination of the changes in terminology, Renier found that Ulpian seemed to base his use of “furor” and “dementia” on contemporary medical knowledge.
duty completely, but only for the time of its duration.\textsuperscript{37} The closest that a text in the Digest comes to ascribing a supernatural cause for insanity arises in the discussion of the Curule Aediles’ edict, which allowed a return, or \textit{redhibitio}, on damaged property, including slaves.\textsuperscript{38} Vivianus allowed an action on the purchase of a slave who indulges overmuch in Bacchanalian rituals and “responds to questions like a madman.”\textsuperscript{39} But even in this circumstance the madness is not the result of the gods, but of a defect of character in the slave. The edict in question allowed a return on the sale of a slave with physical defects; the jurists were therefore careful to distinguish between the intellectual defects that were products of physical illness, which were actionable, and those that were purely mental defects. Even in the latter case, however, there is no hint that the defect is anything but natural in origin.\textsuperscript{40}

Insanity emerged from the Justinianic corpus as a complete but temporary lack of understanding and intention arising from natural causes. This basic definition holds across a range of specific terms, as we shall see. To what extent did the jurists of the Middle Ages draw on this conceptualization?

**Concepts in the Decretum and the Twelfth-Century Decretists**

The difficulty of working with Gratian’s Decretum on the matter of the conceptual and linguistic vocabulary of madness arises from the very nature of the text. Like many twelfth-century texts using the scholastic method, the Decretum is a compendium of texts pulled from a number of previous collections. Gratian was a pioneer, especially in the area of canon law, by

\textsuperscript{37} Dig. 27.1.12: “Idem Ulpianus scribit: sed in hoc rescripto adiectum est solere vel ad tempus vel in perpetuum excusari, prout valetudo, qua adficitur. Furor autem non in totum excusat, sed efficit, ut curator interim detur.”

\textsuperscript{38} See Berger, \textit{Encyclopedic Dictionary}, 670, s.v. “Redhibitio.”

\textsuperscript{39} Dig. 21.1.1.10: “Idem Vivianus ait, quamvis aliquando quis circa fana bacchatus sit et responsa reddiderit, tamen, si nunc hoc non faciat, nullum vitium esse: neque eo nomine, quod aliquando id fecit, actio est, sicuti si aliquando febrem habuit: ceterum si nihilos minus permaneret in eo vittio, ut circa fana bacchari soleret et quasi demens responsa daret, etiamsi per luxuriam id factum est, vitium tamen esse, sed vitium animi, non corporis, ideoque redhiberi non posse, quoniam aediles de corporalibus vitii loquuntur: attamen ex empto actionem admittit.”

\textsuperscript{40} Dig. 21.1.1.10-Dig. 21.1.4.
not only including past authorities, but also attempting to resolve seemingly contrary positions. Gratian did this through the ingenious method of constructing hypothetical cases from which he derived a varying number of questions. He then arranged his sources, or *auctoritates*, in a pro-and-contra fashion before settling on an answer that in some way harmonized the opposing sides. The method is highly suggestive of a text designed specifically for teaching. In order to answer our particular questions, it is best to look at Gratian’s *dicta*, those places in the text where he inserted his own opinion in order to resolve the seeming contradictions in his sources. Alternatively, one could possibly pick through the Decretum for stray references to insanity and construct a picture in this way. This method is not so devoid of merit as it might first seem. Later canonists, searching for an expanded range of citations to bolster their own pro-and-contra method did just this. For the problem of insanity, the best example of this is C.3 q.9 c.14, a decretal of Nicholas I (d. 867). Gratian had used this text to support the idea that the absent could not be accused; in the hands of later canonists it became the main locus for determining who had the burden of proving insanity.

Nonetheless, the *dicta* provide a window into the thought of Gratian himself. Fortunately, as I have mentioned, Gratian was the first medieval jurist to give insanity a sustained treatment. C.15 q.1 presents the relation between madness and culpability, what we would recognize as a discussion of the “insanity defense.” Causa 15 tells the story of a cleric who fornicates with woman before becoming a priest. After his ordination, he goes mad and kills someone. When he recovers his sanity, he is accused before his bishop by his former lover. In order to defend himself, he asks other clerics to aid him in his case, which they will not do without being compensated. The bishop eventually tortures a confession out of the priest and subsequently sentences him without the presence of a synod. From the setup of the case, we can imagine the
questions that Gratian drew from it: can clerics exact a price for legal aid; can a woman act as a witness; can a confession be obtained by torture, etc.\textsuperscript{41} In short, this causa, which may have been among the first composed by Gratian, provided canon law students with a guide to many of the issues that might arise during a criminal trial.\textsuperscript{42} The first question that Gratian asked, however, dealt with the very basis of that proceeding: should things done while out of one’s mind be imputed to, or held against, that person? In essence, Gratian used the example of the delinquent madman to probe the nature of criminal responsibility. Stephan Kuttner has noted that Gratian, and the Decretists who taught from his texts, tended to avoid positive statements of what constituted culpability or responsibility and instead approached those topics through situations in which they might be deficient, such as accidents or the acts of the drunk, the underage, the sleeping, and the insane.\textsuperscript{43} Despite using insanity to serve a larger purpose, Gratian did not treat it as a mere prop for his narrative but seriously considered it as its own phenomenon. Since Anders Winroth confirmed and identified an earlier recension of the Decretum, scholars have

\textsuperscript{41} C.15: “Clericus quidam crimine carnis lapsus esse perhibetur ante quam sacerdotalem benedictionem consequeretur. Postquam uero sacerdotium adeptus est, in fuorem uersus quondam interfect. Recuperata uero sanitate apud episcopum accusatur ab ea, cum qua lapsus esse dicitur. Episcopus autem die dominico causam examinat. Sacerdos inificiatur crimen sibi illatum; quorundam clericorum sibi patrocinia querit; illi uero non sine precio sibi patrocinantur; tandem episcopus questionibus confessionem extorquet; demum solus et absque sinodali audientia illum sententia ferit. (Qu. I.) Queritur autem, an ea, que mente alienata fiunt, sint inputanda? (Qu. II.) Secundo, an pro inspensis patrocinis liceat clericis munera queri? (Qu. III.) Tertio, an ex mulieris confessione iste sit condempnandus? (Qu. IV.) Quarto, an die dominico eius causa sit uentilanda? (Qu. V.) Quinto, an sibi neganti purgatio sit deferenda? (Qu. VI.) Sexto, an eius confessio cruciatibus sit extorquenda? (Qu. VII.) Septimo, an absque sinodali audientia episcopus ualeat sacerdotem damnare? (Qu. VIII.) Octauo, si sponte confessus aut ab alius conuictus fuerit, quod ante ordinationem peccauerit, an suscepti ordinis officium sibi exequi liceat?”

\textsuperscript{42} Eichbauer, “St. Gall Stiftsbibliothek 673,” 118-119 and passim.

gained greater insight into the construction and flow of Gratian’s arguments. Chains of thought that often seemed tortuous at best now appeared clearer and more direct in the first recension. 

In many ways, Gratian’s concept of insanity did not change from the first recension, though a second recension addition opened the door for later canonists to present a much different vision of insanity than had been present in both Roman law and the Decretum.

Gratian must be understood in his intellectual milieu. He approached the definition of both sin and crime through insanity. In considering the former, Gratian displayed a link to Abelard not only in his methodology but also in his ideas. Gratian was thoroughly grounded in the strongly voluntaristic nature of sin advocated by Peter Abelard. Moreover, Genka has shown that Gratian in fact drew texts for his opening dictum in Causa 15 from Abelard’s *Sic et non*. From his opening statement that “Sins seem to consist in the will of the soul or a weakness of nature,” Gratian must in some way define insanity as a deficiency of the will. “Sin,” declared Gratian through Augustine, “is so voluntary a thing that if there is no will, there is no sin.” Although the idea of insanity as primarily a problem of the will is forecasted in his approach to sin, Gratian arrived at that conclusion through degrees. He first highlighted areas in which the will does not seem to be operative. Through scriptural citations such as 1 Cor. 14:38, “He who does not know will not be known”, and Rom 7:24, “Miserable man that I am! Who will

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48 C.15 q.1 d.a.c.1: “Pecata namque alia penes voluntatem animi, alia circa naturae infirmitatem uidentur consistere.”
49 Ibid., “Usque adeo peccatum voluntarium malum est, ut nullo modo sit peccatum, si non sit voluntarium.”
deliver me from this body of sin?”, Gratian referred to the idea of spiritual and bodily weaknesses as a possible source for sin. Ignorance and concupiscence, which can certainly lead to sin, number among such weakness of the spirit. Concupiscence can also be considered as a weakness of the flesh, since it is born out in the conjunction of mind and body. Among these weaknesses, Gratian distinguished between those that were sinful in themselves because they separated one from God, such as anger or hatred, and those that were simply punishments for sin and the causes of further sin, such as forgetfulness or ignorance. These so-called “pena peccati” were the fruits of the Fall, the weaknesses that attached to man as a result of his loss of Paradise, and which made man susceptible to further sin. Gratian numbered madness among the pena peccati, alongside fevers and other bodily afflictions which do not make one liable for punishment. He established a general pattern that while the spiritual infirmities tend to weaken the will, they can give rise to further sins. Bodily weakness, on the other hand, does not have so close a connection with sin; they are more a punishment or result of sin. Gratian’s thinking is a bit unclear here because of his dual use of pena peccati. On the one hand he described it as a result of sin that nurtures further sin, while on the other hand, he understood bodily infirmity to be punishment or the result of sin that does not necessarily lead to further sin. This is clear in the example of Lamech. According to a Talmudic tradition, Lamech was the man responsible for killing Cain. Though blind, Lamech hunted along with a boy, possibly his son Tubal, who acted as a guide. The boy indicated a target that he thought to be a wild animal, but which in fact was Cain. Lamech not only killed his ancestor, but stricken by grief and anger, killed the boy as well. Gratian used Lamech’s physical infirmity, blindness, to raise the objection that some

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50 The story of Cain’s death at the hands, or rather arrow, of Lamech arose out of Jewish apocryphal tradition, as the Glossa ordinaria to Genesis (Troyes, BM 54), fol. 27r noted. “Dixitque Lamech’: Aiunt Hebrei Lamech diu uiuente caliginem oculorum incurrisse et adolescentem ducem et rectorem itineris habuisse. Exercens ergo veneationem
infirmities of the body lead to sin. Gratian, however, interpreted Lamech’s blindness as essentially ignorance, a spiritual, rather than physical weakness. Even ignorance can excuse one from guilt. To illustrate this, he posed two examples that provide the final grounding for his answer to the question at hand: a blind man, who thinks he is sleeping with his wife but is actually with another woman, is not guilty of adultery, while a man hunting or exercising with a javelin where he should not be is guilty of homicide if he kills someone.\textsuperscript{51} In both cases, an unintended consequence occurs. In the first, the blind man thinks he is doing his duty, but cannot know that he is not. He could not prevent the outcome. In the second example, the javelin thrower thinks he is acting properly as well, or at least not intending to do wrong. In this case, however, he is able to and should know better. Here, corporal infirmity excuses one act but not the other, even though both were unintentional. Gratian concluded: “A mind lost through insanity, since it is not in possession of itself, does not contract guilt for those things that it allows, since it does not have the ability to deliberate.”\textsuperscript{52} As his ultimate justification for the insane not having any culpability, Gratian settled on an inability to choose a proper course of action based on a profound disconnect with reality, similar to what we encountered in Roman law. Gratian placed more emphasis on the ability to deliberate and decide, though he certainly grounded that ability in the quality of information available, as the two preceding examples show.

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\item sagitam direxerit quo adolescens indicauit, casuque chaym interfecit inter fructecta latentem, et hoc est quod dicit \textquoteleft occidi uirum in uulnus meum,
\textquoteleft id est, uulnere quod infixi non bestiam sed hominem occidi. Unde et furore accensus occidi adolescentem.
This text found its way into the canonistic tradition through Stephen of Tournai, \textit{Summa decretorum} (Troyes, BM 640), fol. 76v, C.15 q.1 d.p.c.2: \textquoteleft Sed si obicitur de Lamech\textquoteright: Aint Hebrei Lamech diu uiuendo caliginem occultorum incurrissre et adolescentem ducem et rectorem itineris habuisse. Exercens ergo venationem sagitam direxerit quo adolescens indicauit casuque, chain inter fructecta latentem interfecit. Quo audito, adolescentem quoque interfecit.
\item For the significance of these examples, see below.
\item C.15 q.1 d.p.c.2: \textquoteleft Mens uero alienata furore, cum sui compos non sit, eorum, que admittit, reatum non contrahit, quia faculatem deliberandi non habuit.\textquoteright
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It is also interesting that Gratian further solidified the lack of responsibility when he identified madness as a bodily weakness, such as a fever or any other “conturbatio humorum.” It is striking that Gratian sets insanity in a natural context. The only supernatural aspect enters through the punishment for the fall, which was the cause behind any corporal illness. Insanity just happens to people as any other disease does; it is not moralized in any way, until the second recension, that is.

Gratian’s objection in the first recension dealt with the stigma that attached to certain acts regardless of blame. As an example, he cited simony proffered by a father on behalf of his son. Because of the demands of ecclesiastical discipline, the son cannot take up an office even though he was unaware and blameless in the matter. This left Gratian’s remarks concerning insanity and the will unaltered in his solution. The second recension saw the introduction of a more troubling text, from the 867 Council of Worms.\(^{53}\) “If any insane person should kill someone, a lighter penance should be imposed if he should return to sanity.”\(^{54}\) The imposition of penance implies some sin to atone for. Gratian hesitatingly responded that, “perhaps this should be understood of one whose own fault led to insanity.” How exactly could a prior fault lead to insanity? What was the required level of connection? One could imagine a naturalistic answer to these questions, that certain illicit actions, such as sex or improper diet, could affect the humors in such a way as to lead to madness. The hypothetical of the case itself could argue for this. As later canonists examined the *questio*, however, this text and Gratian’s response opened the door to the more


\(^{54}\) C.15 q.1 c.12: “Si quis insaniens aliquem occiderit, si ad sanam mentem peruenerit, leuior ei penitencia inponenda est.”
direct influence of God, which would have enormous consequences for the development of the idea of insanity in the twelfth century.

Other texts in the Decretum corroborate the basic concepts laid out by Gratian in C.15 q.1. For example, when dealing with the ability to dissolve a marriage, Gratian included a decretal of Nicholas I to show that “if madness, insanity, or any infirmity should befall one or both of those who contracted a marriage while sane, the marriage cannot be dissolved because of this infirmity.” Here insanity is counted among other infirmities. Another decretal of Nicholas I, “Indicas Hermanum,” as we have already mentioned, became particularly important in later jurisprudence. Nicholas addressed the vague accusations of madness and unspecified crimes levied against Herman, bishop of Nevers. He held that until Herman’s accusers could provide a clearer case, “in the meanwhile, we deem that his illness pertains to a punishment for sin, rather than a sin itself, and that this should be provided for and endured, rather than punished in any way.” This text, used by Gratian to show that the absent cannot be accused, could just as easily have been included in C.15 q.1. Nicholas defined insanity as a punishment, or the result of sin, and not punishable in itself. The mad bishop could not be punished for the actions that proceeded from his infirmity. Finally, in a Pseudo-Isidorian decretal listing those marked by infamia, we find the insane mentioned in close proximity with those who “have neither mind nor intellect.”

For the most part, jurists did not deviate significantly from these basic ideas established in both foundations of the medieval ius commune. The most serious challenge to these basic

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55 C.32 q.7 c.25: “Hii, qui matrimonium sani contraxerunt, et uni ex duobus amentia, aut furor, aut aliqua infirmitas accesserit, ob hanc infirmitatem coniugia talium solui non possunt.”
56 C.3 q.9 c.14: “...quamuis nec usque adhuc qui fuerint illi excessus dixeris, nec utrum sanae mentis erat idem antistes, nec ne, cum ipsos excessus perpetrabat, euidenter ostenderis, satiusque arbitramur, quamlibet interim infirmitatem ad penam peccati, quam ad ipsum pertinere peccatum, cui magis consulendum et conpatiendum sit, quam puniendum uel etiam aliquo modo feriendum.”
57 C.6 q.1 c.17: “Hii nimirum omnes, nec serui ante legitimam libertatem, nec penitentes, nec bigami, nec illi, qui curiae deseruunt, uel non sunt integri corpore, aut sanam non habent mentem uel intellectum, aut inobedientes sanctorum decetis existunt, aut furiosi manifestantur, hi omnes, inquam, nec ad sacros gradus debent prouehi...”
ideas came from one of the earliest Decretists, Rolandus of Bologna. Scholars had long identified this canonist and theologian with Rolando Bandinelli, better known as Pope Alexander III, until John T. Noonan showed this identification to be false. Rolandus was still an important intellectual figure who composed a theological sentence collection as well as his influential commentary on the Decretum, which he continued to modify and expand throughout his teaching career in the 1150’s-60’s.

Rolandus differed markedly from Gratian in his approach to the problem posed by insanity. For one, whereas Gratian blended together the lack of knowledge and the lack of a will in his understanding of insanity, Rolandus paid more attention to insanity as a kind of ignorance. “If things done while out of one’s mind or while ignorant are not held against one, then by the same reason the sins of Lamech or Eve would not be held against them. But they were imputed to them and both were gravely punished, as Genesis clearly shows.” He also included the crucifixion. Had the Jews known, he said quoting I Cor. 2:8, they would have never crucified the King of Glory. His argument rests on the equivocation between madness and ignorance, an argument that he drove home with the powerful example of the crucifixion. Gratian had already admitted that some sins committed out of ignorance were imputable; Rolandus attempted to

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60 Die Summa Magistri Rolandi, nachmals Papstes Alexander III, ed. Friedrich Thaner (Innsbruck, 1874), 32. C.15 q.1: “Item si ea, quae mente alienate vel ignorantia fiunt, non imputantur, profecto peccatum Lamech vel Evae eadem ratione imputari non debuit; sed quam imputata graviterque fuerint punita, Genesis liber manifeste testatur: ‘In doloribus paries filios et ad virum conversio tua erit, etc.’ Reatus quoque mortis Christi Judaicus imputari non possit, si peccata ignorantiae forent utique non imputanda, de ipsis enim scriptum est: ‘Si enim cognovissent, nunquam Dominum gloriae crucifixissent.’ Item si peccata ignorantie ipsi peccanti nullatenus imputarentur, profecto multo minus peccata unius altero ignarete commissa ignoranti imputari debe rent.”
build a strong case for the crimes of the insane being imputable first through his identification of madness only as a kind of ignorance.

Rolandus bolstered this position in the second stage of his argument. One could object that insanity furnished a special case, that even though the ignorant could be guilty of their misdeeds, the insane were not, as Gratian held. Again, in order to object to Gratian, Rolandus altered the concept of madness. What had been an infirmity of the flesh, no different than a fever, was now a malady inflicted by God. “It must be noted that sometimes the loss of one’s mind happens because of the hidden judgment of God without any preceding merit, and sometimes because of preceding merit.”61 Rolandus based this idea on Gratian’s opinion in C.15 q.1 d.p.c.12, that penance may be imposed on the insane due to a preceding fault. Rolandus seems to have asked himself how this might actually function. How can a preceding fault cause insanity? In this view God is the cause of insanity, which he metes and doles according to his own secret judgment, which may or may not have reasons discernible to men. While this argument would have powerful implications for the development of the insanity defense in the twelfth century, it also introduced a supernatural strain into the concept of insanity.62 The frequent charge that the connection between madness and sin was particularly strong in the Middle Ages is for the most part absent from legal discourse, except in the thought of Rolandus.63

Why would Rolandus move the concept of insanity so far from that of Gratian? We have already seen that both the classic Roman jurists and Gratian understood the insane through a number of key faculties that they lacked: knowledge, awareness, discretion, volition, and consent.

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61 Ibid., 33. “Ad quod notandum, quod alienatio mentis aliquando est ex occulto iudicio Dei absque merito eius praeecedente, aliquando ex meritis praeecedentibus.”
62 See Chapter 3, which deals with the implications of this in more detail.
63 See Neaman, Suggestion of the Devil, 98-101. Neaman focused almost exclusively on the connection between sin and insanity in her analysis of the Decretum. See also Doob, Nebuchanezzor’s Children, 3-30. Doob finds a moral streak even within the medical discourse and uses the idea of sin to structure her entire study.
Jurists after Gratian would not substantively add to or subtract from this list. When a jurist referred to a particular attribute or attributes to the exclusion of others, it did not mean that the author was suggesting a new concept. Instead that particular aspect was most likely the most helpful in advancing a particular argument or illustrating a particular point. Rolandus is the exception that proves this rule. He differed from Gratian so fundamentally and interpreted insanity so narrowly because he was arguing against the Master’s conclusion. Huguccio would later state that Gratian was wrong in his interpretation of C.15 q.1 c.12, but Rolandus was alone among the Decretists in outright denying the non-imputability of the acts of the insane. His conception of insanity subsequently reflects this. Like others, he emphasized certain aspects of insanity over others, except that in his case his conception differs from the norm insofar as his desired conclusion does so as well.

The Nachleben of Rolandus’ reconception bears this out. A parallel approach among the early Decretists existed in the work of Rufinus. Rufinus also allowed that preceding fault might negate the impunity of the insane, though he firmly fixed such mental disturbances in the natural world. For him, insanity was “an extreme infirmity of the body, not a fault that could be held against one, but a punishment that had to be endured.” The culpa precedens approach to responsibility did not require a flight from a natural understanding of madness. Nor did the acceptance of divine causation require a rejection of Gratian’s opinion. Rolandus’ commentary to C.15 q.1 achieved wide circulation first through the Summa of Stephen of Tournai, and Johannes Faventinus, who blended Stephen and Rufinus in his own Summa. Stephen had adopted Rolandus’ conception, but toned down the language in order to bring it more in line with

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65 Rufinus, Summa Decretorum, ed. Heinrich Singer. (Paderborn, 1902), 345. C.15 q.1: “Cum itaque furoris insania sit hec extrema carnis infirmitas, non est tamquam culpa imputanda, sed tamquam pena dolenda.”
66 Pennington and Müller, “The Decretists: The Italian School,” 136-139.
Though Rolandus' hardline opinion did not achieve common currency, his identification of insanity with ignorance would captivate jurists for the coming decades, and play a role in applying the distinction between vincible and invincible ignorance to the discussion of madness.

Huguccio, the greatest of the late twelfth-century Decretists, effected a similarly important shift, albeit in the opposite direction. Huguccio rejected out of hand the *culpa precedens* argument and proved decisive in ending its juristic life. In order to achieve this, he returned to Gratian’s view of a lack of discretion grounded in a profound ignorance. Huguccio’s conception of insanity could best be described as extreme. He argued for the total lack of responsibility for acts committed while insane and did so by claiming a complete disengagement between the insane and reality. “It is asked whether things done while out of one’s mind can be held against one, and I say, without distinction, no, provided that the person is so out of his mind that he does not know, discern, or understand what he is doing.” This is an important point. Huguccio argued for a more forgiving approach to the delicts of the insane by setting a high bar for insanity itself. His initial statement implies a scale of mental deficiency; indeed the jurists had been working with such a scale through the idea of vincible or invincible ignorance, which included willed or negligent ignorance. Huguccio did not establish a scale of legal madness;

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67 See Chapter 3.
68 Huguccio had been lecturing on the Decretum through the 1180’s and finished work his *Summa* around 1188-90 before becoming the bishop of Ferrara in 1190. See Wolfgang P. Müller, *Huguccio: The Life, Works, and Thought of a Twelfth-Century Jurist*, Studies in Medieval and Early Modern Canon Law, 3 (Washington, D.C.: The Catholic University of America Press, 1994). See also Pennington and Müller, “The Decretists: The Italian School,” 142-160. In the latter, Müller states definitively that the canonist Huguccio cannot be identified with the grammarian Huguccio of Pisa, the author of the *Derivationes* who also taught in Bologna.
69 Huguccio, *Summa Decretorum* (Admont, Stiftsbibliothek 7), fol. 263r: “Hic intitulatur prima questio, scilicet utrum ea que mente alienata fiunt sint imputanda, et indistincte dico quod non, dummodo ita sit mens alienata quod hoc nesciat, non discernat, non intelligat quid agat, ut c. Aliquos [C.15 q.1 c.5], Illa [C.15 q.1 c.6], et xxvii. q. ii. Consaldus [C.17 q.2 c.1], et iii. q. viii. Indicas. [C.3 q.9 c.14].” References to Huguccio’s *Summa* have been corroborated with Lons Le Saunier, Archives Départementales 12 F.16, here fol. 251r.
rather, he only accepted as true insanity those who were profoundly deficient in their awareness, understanding, and discretion. The insane “do not understand an action in its essence... he does not know what would follow [from his deed].” The insane are not simply *ignorantes*, their lack of responsibility flows from their lack of discretion and sense. Huguccio’s position would reorient future discussions, most notably Laurentius Hispanus in the *Glossa Palatina* and Johannes Teutonicus in his ordinary gloss.

Despite the attempts of Rolandus to shift the discussion of insanity to a position better adapted to his views, by the end of the twelfth century, the main concepts of insanity had been established. Civilians did not challenge the tradition of their texts in the way that the Decretists had; as the thirteenth century witnessed greater cooperation and doctrinal dependence between canonists and civilians, the ideas of insanity common to both systems of thought reinforced each other and provided a strong foundation for the following 300 years. The jurists might disagree over the effects of insanity, but they did not fundamentally disagree over the basics.

**Vocabulary**

We now turn from the conceptual definitions to the linguistic vocabulary of insanity in medieval jurisprudence. What specific words did the jurists use to discuss insanity, and did those

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70 Ibid., fol. 264r, C.15 q.1 d.p.c.2: “...uel nescit ipsum factum in essentia, ut infans, uel dormiens, uel furiosus. Et iste nesciens non peccat uel nescit quid inde sit consequturum. Et iste similiter non peccat, sed hic optime inuenies distinctum. xxxii. q. vii. quemadmodum [C.32 q.7 c.10].”

71 Ibid., fol. 264v, C.15 q.1 c.5: “nescit’: Ex toto, id est, non cognoscit id quod, ut infans, furiosus, ebrius, dormiens. Alias quandoque nesciens peccat, ut s. e. q.i merito, et xxxii. q.vii. quemadmodum [C.32 c.7 c.10].Hinc aperte colligitur quod ea que fiunt a furiosis non imputantur, quia sensum uel discretionem non habent, ar. I. prox. [C.15 q.1 c.6], c. iii q.viii. Indicans [C.3 q.9 c.14].”

72 *Glossa Palatina* (Durham, Dean and Chapter Library C.III.8), fol. 89v, C.15 q.1: “Quod autem’: …Sed indistincte dico nunquid imputari quid in furore fit, si tunc homo non discernit nec intellegit, ar. 17 q.2 c. Gonsaldus [C.17 q.2 c.1].” See also fol. 89v-90r, C.15 q.1 d.p.c.1: “Qui non cognoscit de essential quid facit, ut dormiens, ebrius, furiosus, infans.”

73 Johannes Teutonicus, *Glossa ordinaria* (Troyes, BM 192), fol. 103v. C.15 q.1 d.a.c.1: “Quod autem’:Si quis est ita alienates mente quod nescit quid faciat, nec intellegit, nec discernit, non imputatur ei quid faciat, ait q. e. aliquos [C.15 q.1 c.5], et c. illa [C.15 q.1 c.6], et xvii. Q.ii. consaldus [C.17 q.2 c.1]. Quidam tamen distinguunt quod si sua culpa quis incidit in alienation mentis, imputatur ei, si sine culpa non, ait I. e. si quis insanies [C.15 q.1 c.12]. Quam distinctionem non admitto.”
words point to any significant distinctions within the general concept of insanity? The organization of this chapter already indicates an answer to this second question. It is possible to separate discussions of the idea of madness from the vocabulary because the diversity of terms did not represent a range of concepts. We have already seen that, especially by the end of the twelfth century, legal insanity existed as an extreme phenomenon, one that did not admit legally significant gradations. This grounds the equivalence of terms noted by other scholars such as Midelfort and Boari. Because of this basic conceptual identity, any distinction that could be made among the various terms was superficial; the core concept remained the same.

The medieval jurists had their own particular way of discussing the insane within their own network of texts that did not always align with the vocabulary encountered in the courts. A comprehensive study of the vocabulary of legal insanity would require an investigation of the differences from region to region. To balance out the jurists, I will use Venetian statutes and records as examples of non-juristic uses of vocabulary. The jurists were engaged primarily in an act of commentary. Monographic treatises did exist and indeed proliferated in the thirteenth century, and extensive, wide ranging commentaries on particular texts could at times resemble short treatises. Still, the essential intellectual activity that the jurists engaged in was the teaching of and commentary on the libri legales. It follows then that, despite some attempts to more carefully define the terminology, the single greatest determiner of the terms used was the authoritative text itself. Therefore we shall proceed by first analyzing the use of various terms in the sources of medieval jurisprudence. The presence of Christian rhetoric would complicate reference to insanity through the use of hyperbole. We shall then consider how the jurists

\[\text{\cite{Neaman's assertion that insanity in medieval canon law “became increasingly refined in its distinctions between types of insanity, or to be more precise, degrees of insanity” is completely without basis in the texts of the canonists. See Suggestion of the Devil, 91} \]
\[\text{\cite{Midelfort, History of Madness, 187-188; and Boari, II furiosus nella criminalistica, 32-34.} \]
themselves managed the variety of terms found in the sources. Finally, we shall ask whether these distinctions had any real jurisprudential significance. The consilia are particularly helpful in this regard, since the jurists were bound less by the words of their sources in these texts.

**Roman Law**

The Roman law of the Justinianic corpus was particularly formative in establishing the basic patterns of vocabulary. The classical Roman jurists discussed such figures as the *furiosus*, *demens*, *amens*, *mente captus*, *insanus*, *lunaticus*, *non comos mentis*, *non sanæ mentis*, *vecors*, *vesanus*, and *melancholicus*. The majority of references to insanity are found in the Digest. Of the 196 leges referring to insanity in the Digest, the use of the *furiosus/furor/furere* word group was overwhelming.

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<thead>
<tr>
<th>Terms</th>
<th>Number of leges</th>
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<tbody>
<tr>
<td>Furiosus/furor/furere</td>
<td>178</td>
</tr>
<tr>
<td>Demens/Dementia</td>
<td>16</td>
</tr>
<tr>
<td>(Non) sanæ mentis</td>
<td>7</td>
</tr>
<tr>
<td>Mente captus</td>
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<td>Fatuus</td>
<td>3</td>
</tr>
<tr>
<td>(Non) comos mentis</td>
<td>3</td>
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<tr>
<td>Morio</td>
<td>1</td>
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<tr>
<td>Melancholicus</td>
<td>1</td>
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<tr>
<td>Vecors</td>
<td>1</td>
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<tr>
<td>Vesanus</td>
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Remarkably, the Digest contains almost no use of these terms referring to anything except insanity. The text of Dig. 26.5.12 refers to the *prodigi* who, left to their own devices, would “come to a ruinous end.”\(^{76}\)

\(^{76}\) Dig. 26.5.12: “Divus Pius matris querellam de filiis prodigis admisit, ut curatorem accipient, in haec verba: ‘Non est novum quodam, etsi mentis suae videbuntur ex sermonibus compotes esse, tamen sic tractare bona ad se pertinencia, ut, nisi subveniat, seducuntur in egestatem. Eligendum est, qui eos consilio regat: nam aequum est prospicere nos etiam eis, qui quod ad bona ipsorum pertinet, furiosum faciunt exitum’.”
the *furiosi* and the *prodigi* in its rather unusual use of this adjective. A second example describes
the possibility of bequeathing the property of another in a testament. Including imperial property
as a legacy would be the act of a madman.\(^7^7\) Other than these two instances, the texts of the
Digest do not contain hyperbolic uses of the vocabulary of insanity.

Did the classical Roman jurists make any distinctions among these terms? This has been
a matter of some debate among scholars of classical Roman law. The main difficulty is the use of
*furiosus*. The word implies a violent or raging sort of madness that fits discussions of homicide,
such as Dig. 1.18.14, but does not seem appropriate for the range of situations in which it
appears. Dig. 41.2.18.1, for example, discusses a *furiosus* who is so peaceful as to appear sane.
Scholars put forwards a number of possible criteria to distinguish among the terms. Adrien
Audibert’s treatment of insanity mostly amounted to an attempt to differentiate between *furor*
and *dementia*, the two terms most often grouped together. Based on contemporary medical
knowledge, Audibert described *dementia* as a partial madness, a monomania, which nevertheless
resulted in the same incapacity as *furor*.\(^7^8\) Others sought for a distinction more internal to the
texts of the Digest themselves. Siro Solazzi maintained that *furor* applied to madness that
manifested itself outwardly, though we have seen that *furor* does not always connote this, nor are
there clear texts in which *dementia* refers to such non-apparent madness.\(^7^9\) The most compelling
argument was that of E. Renier. Renier examined the use of terms by particular authors and
thereby established three periods of use. The first is comprised of the earliest texts, which used a
range of terms indiscriminately. The second group of texts dates from the late-second and early-

\(^7^7\) Dig. 39.1.39.8-9: “Si vero Sallustianos hortos, qui sunt Augusti, vel fundum Albanum, qui principalibus usibus
deseruit, legaverit quis, furiosi est talia legata testamento adscribere, Item Campum Martium aut Forum Romanum
vel aedem sacram legari non posse constat.”

\(^7^8\) Adrien Audibert, *La folie et la prodigalité*, vol 1 of *Études sur l’histoire du droit Romain* (Paris: L. Larose et
Forcel, 1892), 47, 51-53.

\(^7^9\) Siro Solazzi, “Furor vel dementia,” *Mouseion* 2 (1924), 10-40; Reprinted *Scritti di diritto Romano* (Naples, 1957)
2.623-655.
third centuries. In this group, jurists such as Ulpian and Marcian, influenced by contemporary medical ideas, began to show a greater sensitivity to the total insanity represented by furor, and the secondary forms included in terms like *dementia* and *mente captus*. The final phase of texts includes the decrees of Justinian, especially texts like Cod. 5.4.25 and Cod. 5.70.6, in which Justinian explicitly set out to clarify past confusions arising from the varying use of the terms. Still, in the 41 total *leges* in the Codex referring in some way to insanity, the frequency of terms remained similar.

<table>
<thead>
<tr>
<th>Terms</th>
<th>Number of leges</th>
</tr>
</thead>
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<tr>
<td>Furiosus/furor/furere</td>
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<td>Demens/Dementia</td>
<td>6</td>
</tr>
<tr>
<td>Insanus/Insania</td>
<td>5</td>
</tr>
<tr>
<td>(Non) sanae mentis</td>
<td>4</td>
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<td>Mente captus</td>
<td>4</td>
</tr>
<tr>
<td>(Non) compos mentis</td>
<td>2</td>
</tr>
<tr>
<td>Vesanus</td>
<td>1</td>
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Despite Justinian’s desire to bring some order to the Roman jurisprudence of insanity, his own and his immediate predecessors’ use of the terminology of insanity was in some ways more complicated than the Digest. The Christian emperors referred to heretics and Jews as insane or mad in their legislation. For example, the very first *lex* in the Codex itself, a law of Gratian, Valentinian, and Theodosius ordering the adoption of Christianity throughout the empire, referred to those who did not do so as “*dementes vesanosque*.” This hyperbolic use of madness is a flourish of Christian rhetoric. If Christ is the logos, then anything perceived as opposed to Christ must somehow be irrational or mad. Such use of madness was not confined to religious matters. Cod. 1.55.6 ordered the appointment of regional *defensores* to guard against the

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81 Cod. 1.1.1: “Hanc legem sequentes christianorum catholicorum nomen iubemus amplecti, reliquis vero dementes vesanosque iudicantes haeretici dogmatis infamiam sustinere, divina primum vindicta, post etiam motus nostri, quem ex caelesti arbitrio sumpserimus, ultione plectendos.”
“madness of thieves.” The emperors Theodosius and Valentinian described the madness of a runaway slave who resists his master by seeking sanctuary in a church. In a final example, Cod. 8.4.7 condemns the “insane audacity” of someone who seizes a disputed property before the judgment of the case.

Ultimately, especially through the lens of Justinian’s attempts at clarification, the multiplicity in terms of Roman law amounted to no clear distinction. One could draw small differences from isolated texts, such as Dig. 33.2.32.6, which describes a son as “mente captus” because he was in a state of “furor.” One could point to the violent furiosus in Dig. 24.3.22.7, or the pacific furiosus in Dig. 41.2.18.1. Even in the texts of Justinian, such as Cod. 5.70.6 and Cod. 6.26.9, both furiosus and mente captus can refer to temporary or permanent insanity.

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82 Cod. 1.55.6: “Per omnes regiones, in quibus fera et periculi sui nescia latronum feruet insania, probatissimi quique et districtissimi defensores adsint disciplinae et quotidians actibus praesint, qui non sinant crimina impunita coalescere: removeautur patrocinia, quae feruorem reis et auxilium sclerosis impertiendo maturi fecerunt.”
83 Cod. 8.4.7: “Si quis in tantam furoris pervenit audaciam, ut possessionem rerum apud fiscum vel apud homines quoslibet constituturum ante eventum iudicialis arbitrii violenter invaserit, dominus quidem constitutus possessionem quam abstulit restituet possessori et dominius eiusdem rei amittat: sin vero alienarum rerum possessionem invasit, non solum eam possidentibus reperiet, verum etiam aseminationem earundem rerum restitueret compellatur.”
84 See n. 33 above.
85 Dig. 24.3.22.7 refers to a madness so ferocious that it becomes a danger to family members and others: “Sin autem tantus furor est, ita ferox, ita perniciosus, ut sanitatis nulla spes supersit, circa ministros terribilis, et forsitan altera persona vel propter saevitiam furoris vel, quia liberos non habet, procreandae subolis cupidine tenta est: licentia erit compoti mentis personae facti nuntium mittendum, ut nullius culpa videatur esse matrimonium dissolutum neque in damnum alterutrum pars incidat.”
86 See n.2 above. Celsus’ phrase “in conspectu inumbratae quietis” denotes a profound calm and lack of apparent madness. Despite the clear presence of insanity in this text, some later jurists would adopt the phrase to describe the lucid interval. See, for example, Odofredus, Lectura super prima parte Codicis, (Lyon, 1552; Reprinted Bologna: Forni, 1968) fol. 242v, Cod. 4.38.2: “Secundo dicitur, licet furiosus non possit vendere vel emere dum est in furore, tamen dum est inumbratus quiete et habet dillucida interualla, si est maior xxv annis, potest emere et vendere, et tenet emptio et venditio.”
87 See n.2 above. Justinian referred to “furor” as being either continuous or subject to intermissions.
88 The decree of Justinian allowed parents, grandparents, and great-grandparents to substitute for perpetually mentally incapacitated heirs (“mente captus vel mente capta perpetuo”), though he added that if they should regain sanity, they must be reinstated. Cod. 6.26.9: “Humanitatis intuuit parentibus indulgenus, ut, si filium vel nepotem vel proonepotes cuiuscumque sexus habeat nec alia proles descendentium eis sit, iste tamen filiius vel filia vel nepo vel nepos vel pronepos vel propeptis mente captus vel mente capta perpetuo sit, vel si duo vel plures isti fuerint, nullus vero eorum saperet, liceat isdem parentibus legitima portione ei vel eis reticra quos voluerint his substituere, ut occasione huiusmodi substitutionis ad exemplum pupillaris nulla querella contra testamentum eorum oriatur, ita tamen, ut, si postea resipuerit vel resipuerint, talis substitutionio cesse, vel si filii aut alii descendentes ex huiusmodi
These references to differences in terminology cannot obscure the general tenor of the Justinianic Corpus, in which differences in vocabulary have no consistent differentiation in fact and certainly no differentiation in law. The basic concepts examined above are equally applicable to the whole range of vocabulary. Tribonian, working on the Digest for the Emperor Justinian, seems to have wanted to simplify the terminology. Dig. 3.1.1.11- Dig. 3.1.3 provide an excellent example of this blending of terms. The texts name those who can apply to the praetor for a remedy. Dig. 3.1.1 and Dig. 3.1.3 are both extracts of Ulpian from book six of his work on the edict. The conclusion of Dig. 3.1.1 includes the *furiosus* and *furiosa* among those who cannot make an application. Tribonian inserted Dig. 3.1.2 from a work of Gaius, to include also the *fatuus* and *fatua*, since they are also the recipients of guardians. The *fatuus*, the fool, was not necessarily mentally incapable, though the insertion clearly implies an extension of incapacity to the *fatui* as well as to other categories of the mentally disabled.

As the Justinianic Corpus reached the jurists of the Middle Ages, it contained a number of words for madness without clear distinctions among them. They had the texts of the Codex in which Justinian had equivocated the major terms of *furiosus*, *demens*, and *mente captus*. Among their source texts, the jurists also had to contend with the predominance of *furiosus* and the unmet connotations they may have brought to their readings. The widespread use of *furiosus* and the essential similarity of terminology in Roman law continued to shape vocabulary after its

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89 Dig. 3.1.1.11: “Deinde adicit praetor: ‘pro alio ne postulent praeterquam pro parente, patrono patrona, liberis parentibusque patroni patronae’: de quibus personis sub titulo de in ius vocando plenius diximus. Item adicit: ‘liberisve suis, fratre soreore, uxor, sociro socru, genero nuru, vitrica noverca, privivgo privigna, pupillo pupilla, furioso furiosa’.”

90 Dig. 3.1.2: “‘Fatuo fatua’: cum istis quoque personis curator detur.”

91 Audibert, *La folie e la prodigalité*, 14, noted that *fatuus* properly described a fool, though he did not consider Dig. 3.1.2.
revival in the twelfth century. Some jurists would venture distinctions of their own, but usage in
the texts themselves proved stronger in the development of the jurisprudence.

**Canon Law**

Gratian's Decretum poses even more problems than the Codex in terms of vocabulary. The Codex drew from a relatively distinct source in terms of chronology and type of documents. The Decretum instead collected canons of Church councils, patristic letters, patristic exegesis, papal decretals, false papal decretals, penitential canons, Roman law, and Scripture together.\(^92\)

Whereas only a small percentage of references to insanity in the Codex were hyperbolic, such uses of the vocabulary of madness predominated in the Decretum. In some instances these images can be powerful, such as Augustine's depiction of the relationship between civic authority and the Donatists as that between a madman and his physician.\(^93\) For the most part, however these references are devoid of content. The best introduction to Gratian's terminology is C.15 q.1.

The striking feature of Gratian's use of vocabulary in C.15 q. 1 is his recurring use of the *furiosus* word group despite the lack of its use in the *questio*. This is even more interesting when considered in the wider context of the vocabulary used in the Decretum.

<table>
<thead>
<tr>
<th>Word Group</th>
<th>Total capitula</th>
<th>Insanity</th>
<th>Anger</th>
</tr>
</thead>
<tbody>
<tr>
<td>Furiosus</td>
<td>4</td>
<td>4/2 in dicta(^94)</td>
<td>0</td>
</tr>
<tr>
<td>Furor</td>
<td>19</td>
<td>6/5 in dicta(^95)</td>
<td>13/1 in dictum(^96)</td>
</tr>
<tr>
<td>Furere</td>
<td>4</td>
<td>3/1 in dicta(^97)</td>
<td>1</td>
</tr>
</tbody>
</table>

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\(^92\) Peter Landau, “Gratian and the *Decretum Gratiani,*” *History of Medieval Canon Law in the Classical Period,* 22-54, here 25-34.

\(^93\) C.23 q.4 c.24: “Molestus est medicus furenti frenetico, et pater indisciplinato filio: ille ligando, ille cedendo, sed ambo diligendo. Si autem illos negligent, et perire permittant, ista pocius falsa mansuetudo est crudelitas.”

\(^94\) Two of these instances occur in dicta: C.15 q.1 d.p.c.2 and C.15 q.1 d.p.c.4. The other two instances are in C.6 q.1 c.17 and C.16 q.1 c.40.

\(^95\) In C.15 q.1 d.a.c.1, C.15 q.1 d.p.c.11, C.15 q.1 d.p.c. 12, C.15 q.1 d.p.c.13; C.32 q.7 c.25; C.23 q.5 d.p.c.49. This instance is a quote from Is 10:5.

\(^96\) C.15 q.1 d.p.c.13; C.22 q.2 c.14; C.23 q.4 c.24
<table>
<thead>
<tr>
<th></th>
<th>Total capiula</th>
<th>Insanity</th>
<th>Anger</th>
</tr>
</thead>
<tbody>
<tr>
<td>Furia</td>
<td>2</td>
<td>1(^{98})</td>
<td>1</td>
</tr>
<tr>
<td>Total (26 distinct texts)</td>
<td>14/ 8 in dicta</td>
<td>15/ 1 in dictum</td>
<td></td>
</tr>
</tbody>
</table>

The Uses of Other Word Groups in the First Recension

<table>
<thead>
<tr>
<th></th>
<th>Total capiula</th>
<th>Capitula</th>
<th>Dicta</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amens/Amentia</td>
<td>2</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Demens/Dementia</td>
<td>5</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>Insanus/Insania/Insanire</td>
<td>9</td>
<td>8</td>
<td>1</td>
</tr>
<tr>
<td>(Non) Sane mentis</td>
<td>3</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Mente alienata</td>
<td>3</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Vecors/Vecordia</td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Vesanus/Vesania</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Total (18 distinct texts)</td>
<td>19</td>
<td>5</td>
<td></td>
</tr>
</tbody>
</table>

In his first recension of the Decretum, Gratian himself tended to use words from the *furiosus* word-group, the predominant word-group used in Roman law, even though words appear more frequently in his texts. Moreover, the *furiosus* word-group, particularly the noun *furor*, tended to signify anger or extreme passion rather than madness in the texts he included in the Decretum. In C.15 q.1, Gratian used descriptive phrases such as “*mente alienata,*” but the only substantive noun he used was *furiosus*. He even introduced “Aliquos scimus,” which treats violence committed by the “*dementes,*” with “Augustine writes clearly concerning the insane (‘*furiosis*’).”\(^{99}\) In the dictum preceding this text, Gratian suggestively mentioned that a *furiosus* and a *pupillus* are helped because they are not punished for those things that do result from a decision of their minds.\(^{100}\) This suggests the influence of Roman law, given the frequent

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\(^{98}\) D.33 c.2
\(^{99}\) C.15 q.1 c.5: “De furiosus autem euidentissime scribit Augustinus in lib. Questionumueteris et noui testament, ita dicens...” According to *Clavis canonum*, Gratian’s source for the text, the *Tripartita*, provides a rubric “De eodem”.
\(^{100}\) C.15 q.1 d.p.c.2: “Unde pupillo et furioso in maleficiis subuenitur, ut non eis imputentur ad penam que ex mentis deliberatione non processerunt.” The *Correctores Romani*, who edited the Rome 1582 edition of the *Corpus iuris canonici*, noted that this phrase was followed by “ff. tit. de injuriis. Illud relatum [Dig. 47.10.3]. Require supra”, in many manuscripts. The sentence, present in the first recension (Fd fol. 49rb), though without the reference to Dig. 47.10.3, seems to be an original composition of Gratian.
coincidence of *furiosus* and *pupillus* in the Digest and Gratian’s lack of concern with *pupilli* elsewhere in the *questio*. The only Roman law text in the *questio* entered into Gratian's *dictum* in the second recension.\(^{101}\) It is possible that Gratian drew the vocabulary from the *Tripartita*, which included some Roman law excerpts.\(^{102}\) For example, C.15 q.1 c.5, the *capitulum* that follows this *dictum* in the first recension, is followed in the *Tripartita* by an adaptation of Inst. 2.12.\(^{103}\) Still, *furiosus* was not the overwhelming word used in the *Tripartita*, and its use therein does not explain Gratian’s reliance on it in C.15 q.1 over other terms.

Gratian’s sources for this *questio* were patristic; he had in mind the practical impact that the musing of contemporary theologians on the nature of sin would have on criminal proceedings. Could he have also had Roman ideas of insanity and non-culpability on his mind as well? If he did, why would no text appear until the second recension? If he did not, what accounts for his use of vocabulary? These lexical peculiarities are only one indication that Gratian had Roman legal discussions of insanity in mind at least, if not in front of him, when he composed this *questio*. This may not be so farfetched. Gratian, as Kenneth Pennington has shown, was likely familiar with the work of Bulgarus, the famed Bolognese civilian.\(^{104}\) Another example from the first recension provides evidence of Gratian’s awareness of Roman law. “If someone should throw a javelin during a game, while training, or during a hunt and kill someone, he is guilty of

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\(^{101}\) Later copyists and printers designated Dig. 47.10.3 as C.15 q.1 c.2, though earlier manuscripts consistently treated the text as part of Gratian’s *dictum*. The *Correctores Romani* included a notation that in many older manuscripts, the text was not distinguished as a *capitulum*. See *Decretum* (Rome 1582) col. 1419-1420: “In aliquot vetustis exemplaribus, a capite ‘merito’ [C.15 q.1 c.1] usque ad cap. mulier [C.15 q.1 c.4], nulla est distinctio capitulorum.”

\(^{102}\) Of the six instances of “*furiosus*” in the *Tripartita*, four were drawn from Roman law: B.26.5 from the *Epitome Iuliani*, B. 26.8 and B. 29.121 from Inst. 2.12, and B.29.126 from Dig. 1.6.8.

\(^{103}\) *Collectio Tripartita*, B.26.8 (based on Bruce Brasington and Martin Brett’s working edition, available online at [http://project.knowledgeforge.net/ivo/tripartita.html.]. “Testamentum non possunt facere impubes, quia nullum eorum animi iudicium est. Item ebrii qui mente carent. Nec ad rem pertinet si impubes postea pubes factus, aut furiosus postea compos mentis factus fuerit et descesserit. Furiosi autem si per id tempus federint testamentum quo furor eorum intermissus est, iure testati esse uidentur.”

homicide since he should be far away from others." The hypothetical, which Gratian used as an example of accidental homicide that still renders one guilty, has close connections with an example used in the Digest to illustrate the *Lex Aquilia*, the Roman law concerning damages or torts:

> If [my slave] is killed by people throwing javelins as a game, the *Lex Aquilia* has a place. But if that slave had crossed the place when others were throwing javelins in the field, the *Lex Aquilia* is not active, since he should not have rashly traveled through the javelin-throwers’ field. Still, anyone who purposefully threw [a javelin] at him will be held [responsible] by the *Lex Aquilia*.

Although the wording is not exact, the peculiarity of the example, combined with the vocabulary used by Gratian in his *dicta*, argues strongly for his reliance on Roman law when constructing the *questio* in the first recension, even though an explicit citation would not enter into C.15 q.1 until its second recension. As we shall see, Gratian adhered to the idea that the insane were in no way responsible for any crimes they committed, an idea that received its strongest support in the Digest.

In the substantive discussion of insanity of C.15 q.1, canon law students would have been exposed to the prevalent use of the word *furiosus* and would have been aware of its frequent use in Roman law as well. Subsequently, it became a standard term for canonists as well as

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105 C.15 q.1 d.p.c.2: “Si autem ludo, uel exercitacione urium, uel uenatione iaculum mittens aliquem perimat, quia ab eo hoc penitus debet esse alienum, homicidii reus habetur.”
106 Dig. 9.2.9.4: “Sed si per lusum iaculantibus servus fuerit occisus, Aquiliae locus est: sed si cum alii in campo iacularentur, servus per eum locum transierit, Aquilia cessat, quia non debuit per campum iaculatorium iter intempestive facere. Qui tamen data opera in eum iaculatus est, utique Aquilia tenebitur.”
107 In his textual analysis of C15 q.1, Tatsushi Genka concluded that Dig. 47.10.3 entered into the second recension directly from the Digest, rather than through an intermediary source; Genka, “Zur Textlichen Grundlage,” 53-59.
108 See Chapter 3. Gratian’s use of the *Lex Aquilia* was not lost on later canonists. The author of the *Glossa Palatina*, for example, provided a citation to Dig. 9.2.9.4 in his explanation of C.15 q.1 d.p.c.2. See Durham, Dean and Chapter Library C.III.8, fol. 90r: “Si per casum [ms. percussum] iaculetur quis seruum alicuius interficiat, tenetur Aquilia, nisi in campo iaculabatur, ff. ad l. Aquil. Item si obstetrix, §. ult. [Dig. 9.2.9.4].” See Kuttner, *Schuldlehre*, 240-241.
109 Early *additiones*, or citations to other legal texts, placed in the margins of C.15 q.1, particularly c.5, “Aliquos scimus”, indicate that canonists were aware of the parallels with Roman law almost immediately after the *Decretum* began to circulate as a teaching text. Dig. 1.18.14 and Dig. 48.8.12 were particularly frequent citations. This is not
civilians. By the late twelfth century, papal decretals, the most vibrant source of the Church’s living law, had begun to flow into the schools. Innocent III had a collection of his decretals compiled by Petrus Beneventanus, the so-called *Compilatio tertia*, sent to the schools of Bologna (1209-1210).\footnote{Kenneth Pennington, “Decretal Collections: 1190-1234,” The History of Medieval Canon Law in the Classical Period, 1140-1234, History of Medieval Canon Law, eds. Wilifired Hartmann and Kenneth Pennington (Washington, D.C.: The Catholic University of America Press, 2008), 293-317, here 309-311. Based partially on the lack of papal endorsement for Johannes Teutonicus’ *Compilatio quarta*, Pennington has argued that Petrus sought Innocent’s approval as a means of securing the authenticity of his decretals after having compiled them. “The making of a decretal collection: The genesis of the *Compilatio tertia*.” *Proceedings of the Fifth International Congress of Medieval Canon Law, Salamanca 1976* (Vatican City: Biblioteca Apostolica Vaticana, 1980; Reprinted in Kenneth Pennington, *Popes Canonists and Texts, 1150-1550* (Ashgate: Variorum, 1993) VIII.}

In four major decretals, Innocent provided the grounds for discussions of insanity in the early thirteenth century.\footnote{Kenneth Pennington, “The Legal Education of Innocent III,” *Bulletin of Medieval Canon Law* 4 (1974), 70-77; Reprinted in Kenneth Pennington, *Popes Canonists and Texts, 1150-1550* (Ashgate: Variorum, 1993) I.} The use of vocabulary in this admittedly small sample size is eclectic. Descriptive phrases predominate, such as “*mens alienata,*” “*non compe mentis,*” or “*positus extra mentem,*” though *furiosus* is used in 3 Comp. 4.1.4 (X 4.1.24). Innocent was not consistent in his use of terminology. We might take this as an indication of his legal learning; had Innocent undergone a full and thorough legal education, we might see a more regular use of terms.\footnote{Of the three referring to sanity, one is found in the rubric of

<table>
<thead>
<tr>
<th>Terms</th>
<th>Number of capitula</th>
<th>Hyperbolic Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Non) <em>Sanae mentis</em></td>
<td>8\textsuperscript{113}</td>
<td>5\textsuperscript{114}</td>
</tr>
<tr>
<td><em>Insanus/Insania/Insanire</em></td>
<td>3\textsuperscript{115}</td>
<td>2\textsuperscript{117}</td>
</tr>
<tr>
<td><em>Furiosus/Furor/Furere</em>\textsuperscript{116}</td>
<td>0</td>
<td></td>
</tr>
</tbody>
</table>

Reaching conclusions is difficult with so few examples. The difficulty remains in the wider context of Gregory IX’s Liber extra (1234), where hyperbolic uses again predominate.

<table>
<thead>
<tr>
<th>Terms</th>
<th>Number of capitula</th>
<th>Hyperbolic Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Non) <em>Sanae mentis</em></td>
<td>8\textsuperscript{113}</td>
<td>5\textsuperscript{114}</td>
</tr>
<tr>
<td><em>Insanus/Insania/Insanire</em></td>
<td>3\textsuperscript{115}</td>
<td>2\textsuperscript{117}</td>
</tr>
<tr>
<td><em>Furiosus/Furor/Furere</em>\textsuperscript{116}</td>
<td>0</td>
<td></td>
</tr>
</tbody>
</table>

surprising, given Gratian’s apparent reliance on Roman law when constructing the *questio*. See Chapter 3 on the relation of Roman law and the insanity defense in the work of the decretists.

\footnote{X 1.4.11, X 1.6.34, X 2.1.13, X 3.5.29, X 5.31.9}

\footnote{X 1.1.2, X 3.1.12, and X 5.9.2.}
The real innovation of the thirteenth century would come through the jurists, not the pope. Noticeably absent from consideration of the vocabulary of insanity in the Decretum have been words typically indicating foolishness, such as *fatuus* or *stultus*. As used in the Decretum, these words have the connotation of foolishness or stupidity but do not rise to the level of mental incapacity. This is especially clear in the maxim of Gregory the Great recorded in D.38 c.10, “Whoever is fool in fault will grow wise in punishment.” In another instance, Jerome cited Is. 32:6, that “a fool says foolish things,” against those who claim that being a deacon is preferable to being a priest. The inclusion of these terms under the banner of madness can be traced to a specific jurist, at least in canon law.

Laurentius Hispanus was a prominent canonist and teacher in Bologna at the turn of the thirteenth century (c.1205-1214), and he afterwards went on to a long career as bishop of Oresne in his native Spain (1218-1248). During his time in Bologna, however, Laurentius was

<table>
<thead>
<tr>
<th>Terms</th>
<th>Number of <em>capitula</em></th>
<th>Hyperbolic Use</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Demens/Dementia</em></td>
<td>1^118</td>
<td>0</td>
</tr>
<tr>
<td><em>Amens/Amentia</em></td>
<td>1^119</td>
<td>0</td>
</tr>
<tr>
<td><em>Mens alienata (Alienatus)</em></td>
<td>2^120</td>
<td>0</td>
</tr>
<tr>
<td><em>(Non) Compos mentis</em></td>
<td>2^121</td>
<td>0</td>
</tr>
<tr>
<td><em>Positus extra mentem</em></td>
<td>1^122</td>
<td>0</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td>(14 distinct <em>capitula</em>)</td>
<td><strong>8</strong></td>
</tr>
</tbody>
</table>

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116 This word group is employed in seven *capitula*, of which five carry the connotation of anger.
117 “*Furiosus*” appears in the rubric of X 3.31.15 while Innocent had used a number of descriptive phrases.
118 The single instance is found in the rubric of X 3.42.3, where it is given as the condition of the “amentes.” (ed. F. col. 644): “Amentes vel dormientes baptizari, si ante dementiam vel dormitionem baptizari volebant, characterem susciptiunt, alias secus.”
119 “*Amens*” is used in both the rubric and text of X 3.42.3.
120 “Mens alienata” is used in X 3.27.3, while Innocent referred to the alleged madman in X 3.31.15 as an “alienatus.”
121 Innocent used this phrase in X 3.31.15 and X 3.27.3.
122 Innocent used this phrase in X 3.31.15.
123 D.38 c.10: “Quicumque stultus est in culpa, sapiens erit in poena.”
125 Brendan McManus, *The ecclesiology of Laurentius Hispanus (c. 1180-1248) and his contribution to the Romanization of canon law jurisprudence, with an edition of the ‘Apparatus glossarum Laurentii Hispanii in Compliationem tertiam’* (Ph.d. diss. Syracuse University, 1991), 19-30; Kenneth Pennington, “The Decretalists:
probably responsible for the composition of the *Glossa Palatina*, and definitely for apparatus on *Compilationes prima, secunda, and tertia*, though only the last is extant. He studied Roman law under the famed Azo and incorporated a great deal of Roman law into his understanding of insanity, particularly its proof. From Azo, Laurentius introduced into canon law the Roman maxim that insanity is proven through one's speech. This seemed readily applicable to the immediate subject of his commentary, 3 Comp. 3.20.1, in which a priest reportedly claimed that he wanted to become an ass. When he turned to possible analogues in the Decretum, Laurentius found none. His solution, in true rule-creating fashion, was to extract references to foolish speech from their contexts in the Decretum and hold them up as support:

Therefore he was insane, for it is understood from one’s words if he is insane. Hence Job, ‘[you speak] like one of the foolish women,’ and ‘the fool says foolish things,’ and ‘he is a fool who does not understand his own name.’

In so doing he elevated *stultus* and *fatuus* from mere foolishness to the level of mental incapacity, to the level of the *furiosus*. Laurentius’ reading passed into Johannes Teutonicus’ apparatus and to an even wider audience in his apparatus to the Decretum, which became the ordinary gloss.

Johannes added further support from the Decretum through D.22 c.4, from a letter of Gregory I


126 Alfons Stickler, “Il decretista Laurentius Hispanus,” *Studia Gratiana* 9 (1966), 461-550. Through comparison with signed glosses of Laurentius and the lack of his sigla in the *Glossa Palatina*, Stickler determined that Laurentius compiled the *Glossa Palatina*. McManus, *Ecclesiology of Laurentius Hispanus*, 34-42 confirmed Stickler’s attribution with comparison’s to the apparatus on the *Compilatio tertia*, but stated that the evidence was still not “overwhelming.”

127 The idea that insanity is proven through speech is derived from Dig. 28.7.27. The Accursian gloss on preserves an earlier gloss of Azo: [Dig. 26.5.12: Lyon, 1627, col. 152]: [ex sermonibus]: Sic ergo ex sermonibus alicuius convincitur an sit sanae mentis an non. Sic infra de condit. institu. l. quidam (Dig. 28.7.27). Azo.”


129 Laurentius, *Apparatus glossarum*, (ed. McManus), 2.496, 3 Comp. 3.20.1 s.v. “volo”: “Erat ergo furiosus, nam verbis departitudur quis furiosus esse, ff. de tut. et curat. dat. l. His [Dig. 26.5.12]. Vnde Job tamquam una ex testamentis(recte insipientibus) mulieribus, etc. xxiii. q. viii. Conuenior [C.23 q.8 c.21], et fatuus fatua loquitur, xciii. Legimus [D.93 c.24], et stultus est qui ignorant nomen suum, C. de haered. instit. l. ult. [Cod. 6.24.14] arg. contra ff. de donat. Ex hac scriptura [Dig. 39.5.16].”
concerning the papal primacy over the see of Constantinople. From the text, Johannes derived the idea that the *stultus* is one who avoids learning.\textsuperscript{130} In this example we see that *stultus* and *fatuus* did not shake off completely their association with foolishness, though the words increasingly became associated with mental incapacity.

In his revision of Johannes Teutonicus’ *Glossa ordinaria*, Bartholomeus Brixensis (d.1258) pushed the inclusion of *stultus* into the vocabulary of madness even further.\textsuperscript{131} He found support not from Roman law, but from the twelfth-century grammarian often confused with the canonist Huguccio.\textsuperscript{132}

A *stultus* is named as if from *extultus*, from *extollo*, -*lis*, since he is taken out of himself. Or a *stultus* is so-called from *statim ul tus*, from *ulciscor*, -*eris*, since a *stultus* immediately seeks revenge. Or say that he is properly speaking a *stultus* whom, because of his stupor, injury does not move. For he endures cruelty and does not seek revenge, nor is he moved by any suffering, since the heart of *stultus* is blunted.

This excerpt from the *Derivationes* of Huguccio of Pisa draws a strong connection between the *stultus* and the traditional image of the madman in Roman law through sense of disconnection with the world.\textsuperscript{133}

\textsuperscript{130} Johannes Teutonicus, *Apparatus in compilationem teriam* (ed. Pennington), 3 Comp. 3.20.1 s.v. “volo sicque”: “Ex verbis probatur furor siue stultitia, ut ff. de tutoribus et curatur. datis ab his l. Hiis [Dig. 26.5.12] et ff. de condit. instit. Quidam [Dig. 28.7.27], nam fatuus est qui fatua loquitur, ut xxiii di. Legimus [D.93 c.24], et Job dixit quasi una ex stultis locuta es, ut xxiiii q.viii. Conuenior [C.23 q.8 c.21]. Ex factis etiam probatur stulticia, nam stultus est qui ignorat nomen suum, ut C. de hered. instit. l. ult. [Cod. 6.24.14] et stulticia perpenditur ex hoc quod quis contemnmit discere, ut xxii di. De Constatinopolitana [D.22 c.4].”

\textsuperscript{131} Bartholomeus revised the *Glossa ordinaria* over a number of years (1234-1241) in order to bring it more up to date with contemporary debates as well to update the citations of the *Compilationes Antinquae* with references to the Liber extra. See Rudolf Weigand, “The Development of the *Glossa ordinaria* to Gratian’s *Decretum*,” *The History of Medieval Canon Law in the Classical Period*, 55-97, here 88-91.

\textsuperscript{132} *Decretum* (Rome 1582), col. 131, D.22 c.4, sv. “stultus”: “Stultus tantum dicitur quasi extultus, ab extollo, -*lis*, quia se extollit. Vel dicitur stultus, quasi statim ul tus, ab ulciscor, -*eris*, quia stultus statim ul tionem expetit. Vel dic quod proprae stultus est qui per stuporem non mouetur inuria, seuitiam enim perfert, nec ul tus est, nec ullo ignominiae mouetur dolore, quia stultus est hebetior corde. Unde quidam ait, ‘ego me esse stultum existimo; fatuum esse non opinor,’ id est, obtusis quidem sensibus, non tamen nullis, secundum Pap. et Hug.”

\textsuperscript{133} The text is, with negligible exceptions in the opening, drawn from Huguccio of Pisa. See Uguccione da Pisa, *Derivationes*, Edizione nazionale dei testi mediolatini, Ser. I.6, Eds. Enzo Cechini et al. (Florence: Sismel, 2004) 1.1228.
Even without explicitly citing Laurentius’ innovation or Bartholomew’s enlarged use of *stultus* and *fatuus*, canonists used these terms in conjunction with insanity freely. For example, Hostiensis, the great canonist of the mid-thirteenth century, noted that “Even if one seems to be of sound mind from his speech, he is understood to be insane from wasteful and foolish administration [of his goods].” On the other hand, Guido de Baysio (d.1313) adopted the gloss of Bartholomew into his *Rosarium*, a large commentary on the Decretum completed in 1300, and included a further text from Huguccio of Pisa not found in Bartholomew’s revision on the derivation of *fatuus*: “The *fatuus* is so-called from *for, faris*, since he displays his ignorance by speaking whatever is hidden in his mind, or by laughing in response to questions. Therefore one is called a *fatuus* from speaking, since he understands neither what he says or what others say.” Huguccio’s explanation of these two terms are remarkably similar to juristic ideas of insanity, particularly with regard to the signs of insanity, as we shall see.

The connection between fools and the insane found an increased circulation in the work of civilians in the fourteenth century (though, as we shall see below, Odofredus contrasted the *furiosi* to the *fatui*, the use of *fatuus* was relatively infrequent in the twelfth- and thirteenth-century civilian tradition.). From Guido, Albericus de Rosate (d.1360) adopted Huguccio’s derivations into his own work. Although Albericus did not hold a teaching position, he put his legal education to use through work as an advocate. He penned extensive commentaries on the

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134 Hostiensis, *In primum (...quintum) Decretalium librum Commentaria* (Venice, 1581; Reprinted Frankfurt am Main: Vico Verlag, 2006) fol. 88v, X 3.27.3: “Sed et ex administratione prodiga et fatua deprehenditur quis quasi furiosus, quamuis compos mentis in sermonibusuideatur, ff. de tu. et cu. da. ab his. l. his qui. [Dig. 26.5.12].”
Digest, the Codex, and the Liber Sextus of Boniface VIII, a *Dictionarium iuris tam ciuilis quam canonici*, as well numerous works on statutory law. In his commentaries on Roman law, Albericus frequently introduced comparisons with canon law; his career also marks him out as emblematic of the increased emphasis on practice in the jurisprudence of the fourteenth century. Commenting on Dig. 3.1.2, an insertion by the editors of the Digest linking the *furiosi* and *fatui*, Albericus combined Guido’s remarks on C.22 c.4 and D.93 c.24.137 “The *furiosus*, the *fatuus*, and the *demens* all seem to be made equal,” he noted.138 However, a strain still existed in canon law jurisprudence that regarded *stultitia* as mere foolishness.139 This was not a dead question. The maxim “qui stultus est in culpa, sapiens erit in poena” could pose a serious challenge to the idea of non-liability for the insane. “It seems,” posed Albericus,140 that one who is a *stultus* in fault should be made wise in punishment, D.38 c.10 and Dig. 43.24.4. But these refer to the *stultus* and not the *furiosus*. But the canonists seem to equivocate the *stultus* and the *furiosus*, as C.3 q.9 c.14, VI 3.5.1. And there is also Dig. 26.5.8 and Cod. 1.4.28, but I think that these are understood concerning the completely mad who incur neither *dolus* nor *culpa*.

Albericus solved the apparent confusion in terminology by noting that only those *stulti* who are “completely mad” have the same legal existence as the insane. We can see again that while the

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137 Albericus de Rosate, *Commentarii in primam Digesti veteris partem* (Venice 1595), fol. 186r.
138 Albericus de Rosate, *Commentarii in primam Infortiati partem* (Venice 1595), fol. 94v, Dig. 27.10.6: “Et furiosus, fatuus, et demens uidentur aequiparari, C. De episcopali audientia l. Tam dementis [Cod. 1.4.28], extra de baptis. c. Maiores §.Verum [X 3.42.3], et infra de priuile. credi.[sic!] l. Fatuo [Dig. 3.1.2], et supra de tuto et curato. datis ab his. l. Nec mandante. §.i [Dig. 26.5.8.1]. E tales non possunt religioni consentire, extra. de regula. c. sicu tenor [X 3.31.15], nec matrimonium contrahere. de sponsal. c. Dilectus [X 4.1.24], et supra de spons. l. Furor [Dig. 23.1.8].”
139 See, for example, Hostiensis, *Commentaria* (Venice 1581), fol. 135v, X 3.35.8: “Et qui stultus est in culpa, sapiens erit in pena, xxxviii. di. qui ea. [D.38 c.10].” Hostiensis took this phrase more directly from the ordinary gloss of Bernardus Parmensis, *Decretales Gregorii IX* (Rome 1582), col. 1301. The text on which he commented concerns the punishment of negligent abbots by episcopal *visitatores*.
140 Albericus de Rosate, *Commentarii in primam Digesti veteris partem* (Venice 1595) fol. 80v, Dig. 1.18.14: “Sed uidetur quod stultus in culpa efficci debeat sapiens in pena, 38 d. c. qui ea [D.38 c.10], et quod vi aut clam, l. seruuis [Dig. 43.24.4]. Sed ibi in stulto non in furioso. Canonistae tamen uidentur aequiparare stultum et furiosum, 3 q.9 indicas [C.3 q.9 c.14], et uide quod ibi not., et extra de cleri. egro. c.1 §.si uero [VI 3.5.1]. Et pro hoc de tuto. et cur. da. ab his. l. nec mandante. §.i [Dig. 26.5.8] et C. De episcopa. audiens. l. tam dementis [Cod. 1.4.28], sed puto intelliguntur de prorsus dementibus in quibus non cadit dolus nec culpa.” The comparison between the *stultus* and the *furiosus* is an example of *furiosus* as the primary term for insanity.
jurists may have admitted grades of mental ability, those grades only became legally significant at the extreme end, that is, when the person possessed no understanding or discretion.

While canonistic understandings of madness had begun to blend more strongly with civilian discussions by the fourteenth century, the civilians had already begun making distinctions of their own. The earliest of these dates to the middle of the twelfth century, even before many of the advances in the jurisprudence of insanity. Several Codex manuscripts bear witness to an unsigned gloss, which could appear marginally or interlinearly (or both), to Cod. 5.4.25, an edict in which Justinian clarified that laws pertaining to the *dementes* and *mente capti* also held for the *furiosi*. The text was thus a natural place to take up an explanation of the major terms. According to the gloss, *furiosus* “is contained in this name [*mente captus*]”\(^{141}\) The gloss goes back at least to the middle of the twelfth century and the time of the “Four Doctors”: Bulgarus, Martinus Gosia, Jacobus de Boragine, and Hugo de Porta Ravennate.\(^{142}\) It is found in earlier layers containing citations to the Digest marked by a struck-through “D,” rather than the later “ff.”\(^{143}\) Stuttgart, Württembergische Landesbibliothek, jur fol. 71 provides evidence of expanded teaching beyond this short gloss. In addition to the interlinear gloss,\(^{144}\) Stuttgart 71 contains a number of marginal glosses to Cod. 5.4.25 unique to the manuscript. The first makes an additional distinction that “furiosus differt a demento et mente capto.” A second gloss goes on to note that “the *furiosus* is contained in this generally accepted name.” The final gloss cites Cod.

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\(^{141}\) Città del Vaticano, BAV Vat. lat. 1427 fol. 132v, interlinear at “mente capti”: “Qui appellacione furiosus continetur.”; Tortosa, Archivio de Catedral 36, fol. 94r, interlinear at “de furioso loquitur”: “Nam et furiosus continetur hanc appellationem.” On the following line: “Qua appellacione furiosus continetur.”; Wien, ÖNB 2167, fol. 92r, interlinear at “mente capti”: “quia appellacione furiosus continetur.”.

\(^{142}\) Lange, *Römisches Recht*, 1.162-189

\(^{143}\) See Gero Dolezalek, *Repertorium manuscriptorum veterum Codicis Iustiniani*, Ius Commune, Texte und Monographien, 23 (Frankfurt am Main: Vittorio Klosterman, 1985) 1.412-414 for Tortosa 36; 1.431-434 for Città del Vaticano, BAV Vat. lat. 1427; and 1.449-450 for Wien, ÖNB 2267.

\(^{144}\) fol. 81v, interlinear at “mente capti”: “qui a appellacione furiosus continetur.”
1.4.28 and Inst. 1.10.pr, noting that this is an “argument by example.” Justinian’s text clearly supposed a difference among the various terms, but did not specify the nature or grounds of that distinction. The *allegatio* of Cod. 1.4.28 provides a further example of an implicit distinction between *furiosus* and *demen*s.\(^{146}\)

The wide circulation of this gloss shows that the assumption of the *furiosi* into the more general category of *mente capti* was a frequent feature of mid-twelfth century teaching on the Codex. It even found its way into Azo’s apparatus on the Codex.\(^{147}\) Still, the distinction, though appropriate for the particular text of Cod. 5.4.25, does not fit the Justinianic corpus as a whole. If *mente captus* were the generic term, why does *furiosus* appear in the vast majority of texts? It is not surprising then that Accursius did not include the distinction in his *Magna Glossa*. Accursius included little commentary on the diversity of terms. One of the few instances occurs at Dig. 3.1.2, where Accursius glossed “*fatuus*” as being a “*mente captus*.”\(^{148}\) Based perhaps on the context, Accursius felt the need to tie this borderline term more closely to a clearer term for insanity.

Although Accursius did not devote much attention to the vocabulary of insanity, Odofredus, his contemporary and reported rival, did.\(^{149}\) In his lively lecturae to the corpus of Roman law, Odofredus came to make a different distinction among the terms on the basis of

\(^{145}\) fol. 83v: “Nam furiosus continetur hac appellacione generaliter accepta... Simile r. t. de episcopali audienc. Tam de [Cod. 1.4.28]. Exemplo argumentum. I. inst. t. h. §.unde de [Inst. 1.10.pr].”

\(^{146}\) “Tam dementis quam furiosi liberi cuiuscumque sexus possunt legitimas contrahere nuptias, tam dote quam ante nuptias donatione a curatore eorum praestanda...”


\(^{148}\) *Digestum vetus* (Lyon, 1627), col. 296, sv. “fatuus”: “Id est, mente captus.”

degrees of violence and passivity. “The difference,” according to Odofredus, “between furor and
dementia is this. A furiosus is, properly speaking, one who would kill himself; the demens is one
who has no understanding, but rages neither against himself or another.” Odofredus then
defined insanity through the external violence implicit in the word. This was not a mere one-time
explication of a text but a recurring distinction applied elsewhere and to other terms. Considering
the seeming difference between the furiosi and the mente capti in Cod. 6.26.9, Odofredus
stated:

The difference between the furiosus and the mente captus is not a difference only
in this lex, but in another, that the furiosus is one so deprived of understanding
that he, left to himself, would rage not only against others, but even against
himself, as in Dig. 1.18.15. But the mente captus is one who is out of his mind,
but does not rage against himself or another, yet lacks all understanding of reason,
as in Cod. 1.4.28.

Again, the furiosus is distinguished by his outward violence and danger either to himself or to
others. A similar definition is found with reference to the fatui as well. “A furiosus is one who
would rage against himself and other if he were not held; a fatuus does not rage against himself
or others, but is a fool, whence he is called a fatuus, that is, mente captus, that is, demens.”

Grouping several terms together, Odofredus conceived of two types of insanity: violent and non-
vviolent. In either case, the legal effects of insanity were the same, the only difference being the
need to restrain the furiosi in some way.

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150 Odofredus, Lectura super Infortiato (Lyon 1552), fol. 61v, Dig. 27.10.6: “et est differentia inter furorem et
dementia. Furiosus est proprie qui occideret seipsum, demens est qui non intelligit verumtamen nec in se nec in
alium seuit. Supra de officio pre. l. diuus (Dig. 1.18.14) et C. de impu. et aliis sub. l. humanitatis [Cod. 6.26.9].
Odofredus.”

151 Odofredus, Lectura super secunda parte Codicis (Lyon 1552), fol. 48r: “Et nota quod inter furiosum et
mente captum non est differentia quantum ad hanc legem, sed in alio sic, quia proprie furiosus est qui ita priuat
intellectum, quod nedum in alium, sed etiam in seipsum si dimitteretur, seuiret, ut ff. de offi. pretoris. l. diuus [Dig.
1.18.14]. Mente captus uero est qui est extra mentem, sed in se vel in alium non seuiret: sed omni caret intellectum
rationis, ut supra de episc. aud. tam dementis [Cod. 1.4.28].”

152 Odofredus, Lectura super prima parte Digesti veteris (Lyon 1552,) fol. 99r, Dig. 3.1.1: “et est differentia inter
furiosum et fatuum. Nam furiosus est qui seuiret in seipsum et alios si non teneretur; fatuus est qui non seuiret in se
nec in alium, sed fatuus est unde notatur fatuus, id est, mente captus, id est, demens.”
Odofreus was not the only jurist to attempt a clarification of terms. In the fourteenth century, the famed Bartolus de Saxoferrato made similar distinctions. Bartolus treated insanity in his *Tractatus de testibus*, under the rubric of those things opposed to prudence. Already we can see that Bartolus conceived of insanity through its effects, namely the inability to govern oneself or one’s family.\(^\text{153}\) This inability can arise from two basic reasons, either from age, as with minors, especially those close to infancy, or because of chance, as with the insane, “who lack the judgment of understanding.”\(^\text{154}\) The root phenomenon, the lack of understanding, manifests itself in a number of ways. The mental incapacity of the *furiosi* was accompanied by “acts of insanity,” such as striking those around them, chasing people away, or throwing stones.\(^\text{155}\) There are others who are still insane, but do not display such signs, nor do they have sensory deficiencies, such as blindness and deafness. “We call all of these *mente capti*, although for different reasons some are called by other names, such *stultus* and *fatuus*.\(^\text{156}\) In defining the *stulti* and the *fatiui*, Bartolus drew on the canonical definitions, likely from Guido de Baysio, though he did not refer to his sources. The *fatiui* is so-called because he shows his foolishness through his speech.\(^\text{157}\) The *stulti* are those who do not react properly to things that should provoke a reaction, such as the fear of death and the loss of status, *fama*, or all one’s goods. The *stulti* either do nothing to

\(^{153}\) Bartolus, *Tractatus de testibus*, in Susanne Lepsius, *Der Richter und die Zeugen: Eine Untersuchung anhand des Tractatus testimoniorum des Bartolus von Sassoferrato* (Frankfurt am Main: Klostermann, 2003) 299: “Prudentiae quidem particulari, que ad sui ipsius regimen pertinet, opponitur imprudentia, que contingit uel ex etate uel cause. Ex etate, ut in pupillo maxime infante el infantiæ proximo, quibus, cum nec se nec familia regere sciant, datur qui persone et familia curam habeat.” Though this particular passage treats minors, the insane come under this heading because of a similar incapacity.

\(^{154}\) Ibid. “Ex casu uero contingit imprudentia in hiis, qui carent iudicio intellectus.”

\(^{155}\) Ibid. 299-300: “Quod contingit in quibusdam cum actibus furoris et dicitur furiosus, in quibusdam sine furore et hoc quandoque ex sensum defectu prcedit, ut quia surdus et mutus... Furiosus quis probatur ex actibus, ut si testis dixerit, quod uidit eum furere et actus furiosorum facere, satis exprimit. Sunt enim tales actus noti communiter. Sed si interrogetur ulterius, oportet testem exprimere actus, scilicet quia uidit percutere astantes sibi, sine causa fugere, lapides sine causa proicere et similia.”

\(^{156}\) Ibid. 300: “Quandoque stante sensum integritate contingit aliquos esse dementes, et hos omnes mente captos appellantus, licet secundum diversas causas alis etiam nominibus nuncupentur, ut stultus et fatuus.”

\(^{157}\) Ibid. 303: “Fatui uero dicuntur a fando, hoc est loquendo, quia loquendo suam fatuitatem ostendit.”
prevent such things, or fear them when there is no cause to do so. Bartolus held along with Odofredus that only violent outward signs could classify one as a *furiosus*, while other acts, or the lack thereof, led to different designations. Among all of these different terms, Bartolus was clear that the essential point was the lack of understanding or reason. The distinction among terms is an attempt to provide some order to the phenomenon that the jurists might confront when dealing with insanity. Subsequent jurists tended to follow this basic schema. For example, Bartolus’ student Baldus held that the *mente capti* are those whose minds are deficient and who do not have the appropriate mental capacity for the age, yet display no outward signs. Baldus even used this scheme to interpret Cod. 6.26.9, which only uses *mente captus*. He remarked that the text “should speak of the *furiosi* as well.” Instead, *mente captus* functions as a broad term encompassing violent and non-violent madness.

Did these distinctions even matter then? Did they influence the word-choice of the jurists? We can take Bartolus himself as an example, not only because he had digested and reformulated the key distinctions in the tradition, but even more because of the influence he had on subsequent jurists. After taking a sample of 30 texts in which Bartolus substantively discussed insanity, we can see that the text drove the use of terminology more than any abstracted definition.

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158 Ibid. “Stulti dicti sunt a stupore, quia stupenda non stupescunt. Quid enim, si alicui metus mortis uel status uel fame uel ammissionis omnium bonorum immineat et hic tamquam non cognoscens nec remedia procurat nec stupescit, sua auferri patitur a quocumque uel e conuerso? Quid, si a quolibet leui casu ut a casu mortis terretur? Proprie hic stultus est et ex istis actibus comprobatur.”

159 Baldus de Ubaldis, *Commentaria in quartem et quintum Codicis librum* (Venice 1599), fol. Cod. 5.4.25: “Mente captus est cum mens deficit et consilium anni non habet, tamen nullum furorem ostendit, sed extrinsecus in quodam habitu mentis quiete.”

160 Baldus de Ubaldis, *Commentaria in sextum codicis librum* (Venice 1599) fol. 91v, Cod. 6.25.9: “Venio ad quartum notabile, et videtur quod haec sanctio si imperfecta: loquitur enim solum de mente captum, nam et de furiosis debuit loqui, ut s. de nupt. l. si fuiosus [Cod. 5.4.25]. Solutio: mnete captus dicitur dupliciter, uno modo cum sua dementia, et quadam veluti rabiae, alio modo cum quieta dementia, ut in Auth. ut hi qui obligatas, circa medium [A 6.2.5]. Et sic ut generale urbum, hic ponitur pro omni penitus insipiente, ut patet in littera generalis, unde litera est in telligenda de mente captis large sumpto vocabulo. Et sic non obstat et hoc aperte dicitur ff. eo. l. ex facto, in prin. vers. nam et si furioso [Dig. 28.6.43.1].”
A Sample of Vocabulary used by Bartolus

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<thead>
<tr>
<th>Text</th>
<th>Words in Lex</th>
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<tbody>
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<td>Cod. 5.4.25</td>
<td>furiosus, mente captus</td>
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<td>non compos mentis</td>
<td>mente captus</td>
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<td>Dig. 1.18.13-14</td>
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<td>furiosus, demens, mente captus</td>
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<td>furiosus</td>
<td>furiosus</td>
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161 The text itself does not discuss the insane, but the right to defend oneself. Bartolus, Commentaria in prima Digesti veteris partem (Basel 1562), 10, Dig. 1.1.3: “...si licet per hanc legem propulsare injuriam, et vim, et iniuriosum factum per illum qui non habet animum, ergo sequitur quod si ab eo qui mente captus vel ab eo qui dormit, inferatur vis, non non possumus nos defendere...”
Of course, furiosus would be the frontrunner, but it is interesting to note that Bartolus only tended to include other terms when they appeared in the text. The obvious question is whether Bartolus’ main distinctions, found in the *Tractatus de testibus*, post-date his commentaries and reflect a change in thinking. The *Tractatus* was one of Bartolus' last works; it was his longest treatise but remained unfinished at his death in 1357, according to his student Baldus. The earliest dated manuscripts for his *Lectura* on the *Digestum vetus*, for example, provide a date of 1347. It is likely though that his commentaries post-date the plague of 1348; the *tractatus* might have been gestating during these years. His commentary on Cod. 6.36.5 provides some evidence. This particular text was crucial, as we shall see, for the development of proof of insanity. “This year, I have written some articles on proving that someone was insane, and I have written as I said to you on Dig. 37.3.2.” It seems likely that Bartolus was referring to the portion of his *Tractatus de testibus*, the longest discussion of proving madness in his body of work, and certainly the most important outside Dig. 37.1.2, which he referenced. Even if we only consider the use of terminology in his commentary on the Codex, in nine key texts, Bartolus

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162 Lepsius, *Der Richter und die Zeugen*, 47, 50-51.
163 Lange and Krichbaum, *Römisches Recht*, 2.724. The *tractatus* appeared in versions of different lengths, which Lepsius attributed to errors in or exasperation with copying. Kenneth Pennington has argued that the varying lengths found in the manuscript tradition provide evidence for a longer period of composition. According to Pennington, the tone and methodology of the longer versions, along with manuscripts that break off at particular sections of the text, argue for a treatise that Bartolus had begun early and returned to at intervals in his career. See Kenneth Pennington, review of *Der Richter und die Zeugen: Eine Untersuchung anhand des “Tractatus testimoniorum” des Bartolus von Sassoferrato*, by Susanne Lepsius and *Von Zweifeln zur Überzeugung: Der Zeugenbeweis im gelehrten Recht ausgehend von der Abhandlung des Bartolus von Sassoferrato*, by Susanne Lepsius, *Speculum* 80 (January 2005): 262-265.
164 Bartolus, *Commentarium super secundam partem Codicis* (Lyon 1552) fol. 44v, Cod. 6.36.5: “Et hoc anno feci articulos ad probandum aliquem esse furiosum, et feci, ut dixi vobis, supra de bon. pos. secundum tab. l. ii [Dig. 37.3.2], scilicet quod testes dicerent, quod ipse fecerit tantum semel istum actum testandi, et quod tunc non erat in recta et sana mente, sed dicebat etc. Quia postea faciliter probatur, et hoc sic feci, quia testes ut plurimum de die non recordantur, et sic non probarent, quia posset esse quod aliud testamentum fecisset.”
restricted his use of terms to those found in the texts themselves.\footnote{Cod. 5.4.25, 5.70.2, 5.70.3, 5.70.6, 5.70.7, 6.22.3, 6.22.9, 6.26.9, and 6.36.5.} The distinctions he made in the Tractatus were not likely far from Bartolus' mind in his commentaries.

Perhaps commentaries provide a skewed view of vocabulary because of their connection to a particular text; the consilia, poised as they are in both the juristic and the social worlds, might be in a better position to provide evidence on the use of terms. How did jurists handle the multiplicity of terms in these documents, and why did they have to? There are certainly degrees of concern with the issue of terminology. Franciscus Zabarella, in an interesting consilium likely written during his time at Padua, provides an example of the low end of the spectrum.\footnote{Franciscus Zabarella, Consilia (Lyon 1552) n. 56 fol. 29r-30r.} Through the text, he consistently used the terms furor and furiosus, only occasionally combining it with demens or mente captus.\footnote{Ibid., fol. 29v: “Tertio quod furor seu dementia est multiplicis specie, et ex variis causis surgere potest, ff. de edicto. edic. l. i, et duabus sequentibus [Dig. 21.1.1.11-21.1.3].” And, “Primus testis, scilicet se Mannus quondam ser Menni, dicit quod a tempore guerre, que primo fuit inter dominationem ducalem ex una parte, et Regem Ungarie ex alia parte, dictus dominus Nioclaus usque ad eius mortem fuit furiosus et mente captus, et ultra prosequitur in directo suo.” The witness likely referred to the War of Chioggia (1379-1381), in which Hungary had allied with Genoa against Venice. The use of mente captus is particularly interesting given the Venetian propensity for this term; see below.} There is no compelling evidence of a particularly violent active insanity in the case; Zabarella built his argument for sanity on the grounds of a number of instrumenta, such as previous judicial rulings and a number of contracts. Zabarella used language familiar to him; despite the innovations of Laurentius Hispanus, canonists tended to use furiosus as a standard term.

Alexander Tartagnus, a famous jurist and prolific consiliarist of the later fifteenth century, differed only slightly in a consilium arguing for the insanity of one Jacopo Castro da Reggio.\footnote{Alexander Tartagnus, Consilia (Venice 1592), fol. 147v-149v, con. 1.141. On Alexander, see Hermann Lange and Maximilliane Krichbaum, Römisches Recht im Mittelalter 2: Die Kommentatoren (Munich: C.H. Beck, 2007), 831-842, esp. 841.} Jacopo had drafted a second will which was contested on the grounds that he was not sane when...
he did so. Alexander provided a tour-de-force of proof, drawing extensively on the jurisprudence and subjecting each opposing witness to close scrutiny.\textsuperscript{169} We shall return to this consilium in the following chapter; here we are only concerned with his use of vocabulary. Alexander at times piled terms on top of one another:\textsuperscript{170}

Given that Giacopo had previously been insane (\textit{in aliquo furore}) at one time, yet was afterwards of sound mind at the time of the testament, the act will stand, because he had lucid intervals... Although if it were proven that he was mad (\textit{demens}) before the testament, it does not seem inferable that he was mentally incapacitated (\textit{mente captus}) at the time of the testament.

Still, \textit{furiosus} remained the predominant term throughout the consilium. Unlike Zabarella, Alexander established that the alleged madman in his case did have a history of violent behavior due to his condition. “[Some witnesses] depose that he threw stones and bread, which acts indicate insanity... Others testified that he was held bound in his home, which indicates insanity.”\textsuperscript{171} Still, Alexander built his case around the questionable aspects of the second will, such as the alienation of important familial property. One of these peculiarities was the drafting of the testament not in Jacopo’s home, but in that of the person who gained the most from the new testament.\textsuperscript{172} Alexander claims that he was in the grips of furor when drafting this will, but the story presented in the consilium does not bear out an interpretation of violence, save the earlier episodes.

\textsuperscript{169} This consilium was often cited in sixteenth-century \textit{additiones} to jurisprudential texts for its importance with regard to proof.

\textsuperscript{170} Alexander Tartagnus, \textit{Consilia} (Venice 1592), fol. 147v, con. 1.141: “Dato ergo quod ante fuisset Iacobus in aliquo furore; tamen postquam erat sanae mentis tempore, valebit actus ex eo, quod habuerit dilucida interualla, l. Furiosum. C. qui testa. face. pos. [Cod. 6.22.9], l.2 ff. de test. [Dig. 22.5.2], licet probatum esset quod ante conditum testamentum demens fuerit non per hoc uidetur inferri, quod hoc ipso tempore testamenti fuerit mente captus.”

\textsuperscript{171} Ibid., fol. 148r: “quia deponent quod proieciesbat lapides et panem, quia isti actus indicant furorem,. aliqui deponent quod tenebatur ligatus in domo, ut dicit Baldaasar, Io. et do. Simon, et eius frater, qui actus indicant furorem.”

\textsuperscript{172} See Chapter 2.
Other jurists were more concerned with terminology. Marianus Socinus (d.1467) handled a case of an allegedly mad guardian who was not competent during the creation of the inventory of his ward's goods. Marianus did not advance any evidence that the madman was violent in his insanity and consequently confined his descriptions of the man to the words *demens*, *fatuus*, and *mente captus*. He mentioned *furiosus* only when establishing points of the jurisprudence. Though Marianus did not explicitly draw a distinction between *furiosus* and other terms, his *consilium* bears the marks of such an idea.

Raphael Fulgosius (1367-1427) provided his own distinctions within his *consilium*. He had before him the case of Ser Ventura de Magnaio, a citizen of Feltro, who was *mente captus* because of his age. Allegedly in this state, he sold his property in Magnaio to some local villagers for half of the just price. Apparently the villagers had been friendly with Ventura since his childhood, offering him flattery, as well as food and wine in the local tavern. One main hurdle that Raphael saw before him in this case was the diversity in terminology. Ser Ventura was described as *mente captus* or *demens*, but the law speaks of *furiosi*. Based on the linkage of the terms in Cod. 6.26.9 and Cod. 5.70.1, Raphael settled that “there (Cod. 5.70.1) they are called *furiosi* who are called *dementes* or *mente capti* in Cod. 6.26.9.”

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173 Marianus Socinus, *Consilia* (Venice 1579), fol. 88r-89r, con. 1.42. The *consilia* of Marianus were collected alongside those of his son Bartholomeus. See Lange and Krichbaum, *Römisches Recht*, 2.865-866.
176 Ibid. “Super eo quod quaeritur dicendum puto, venditiones factas per dictum ser Ventura in tempore, quo demens seu mentecapetus erat, non valere. Nam quod ius in furioso statuitur, et in demente siue mentecapeto locum habet, et contra, ut colligitur C. de nup. l. Ii furiosi [Cod. 5.4.25]. Et probatur ex coniunctione leg. Humanitatis. C. de impu. et aliis substi. [Cod. 6.26.9], qua loquitur de demente et mentecapeto, et l. fi. par. i. C. de cura furio. [Cod. 55.70.7.1], qua facit mentionem de praedicta l. humanitatis, et eam confirmans. Et ibi appellat furiosum, quem ipsa l. humanitatis uocat dementem seu mentecaptem.”
A final jurist, Petrus Philippus Corneus (c.1420-1492), dealt with the problem in multiple consilia. In the first consilium, Petrus dealt with the alleged madness of a certain Ser Vannuzzi. Vannuzzi had made a testament, which was the subject of the dispute. Petrus acknowledged the distinctions made by Bartolus and Baldus, but noted that his witnesses did not seem to testify on any act of furor, but of fatuitas or dementia. Petrus resolved the apparent difficulty by returning to the core concept of insanity. The furiosi, the dementes, the fatui, the mente capti, none of these could testate. “Although these words properly differ among themselves, the laws often abuse them, as Bartolus noted.” Therefore, “those of unsound mind, whether from illness or any cause, can generally speaking be called furiosus.” Here, furiosus, the most frequent term, is the general term. In another case, Petrus held up mente captus as the seemingly more general term, perhaps on its own merits. In either case, however, Petrus used these comparisons to overcome a potentially serious problem. Witnesses in the Ius commune had to testify to the same thing in order to furnish full proof. A skilled advocate might be able to exploit the linguistic diversity to his advantage, claiming that the witnesses were testifying to different psychological phenomena, thus greatly weakening the force of their testimony. Petrus countered

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178 Petrus Philippus Corneus, Consilia (Venice 1572), fol. 29r-30r, con. 4.22, here fol. 29v: “Non deponunt testes quod aliquem actum furoris faceret, licet uideantur deponere de actibus fatuis seu dementiae.”
179 Ibid. “Ex quibus patet quod licet tex. iuris ciuilis in hac materia communiter loquantur in furioso, tamen trahuntur etiam ad quoslibet alios insanos mente qualitercunque sint a mente alienati. Et licet secundum proprietatem uerborum supradicti different inter se, tamen iura saepe abutuntur huiusmodi vocabulis, prout dicit Bar in tract. de test. opposita. circa fi.”
180 Ibid. “et quod insanus mente, siue ex morbo, siue aliunde procedat, large loquendo dici potest furiosus. Nec quisquam dubitat quominus quilibet insanus mente, siue fatuus, siue demens, siue mentecaptus, sit intestabilis, prout et supra dictum est.”
181 Petrus Philippus Corneus, Consilia (Venice 1572), fol. 239r-241r., here 239v: “Dictus Vicus uidetur probari, quod fuit et erat mentecaptus. Prout et plures deponent quod furioso seu mentecapto, qui idem sunt seu comparantur, l. 1 et 2. C. de cura fu. [Cod. 5.70.1-2] et l.2 ff. de eo ti. [Dig. 27.10.2]. Mentecaptus autem videtur nomen magis generale quam furiosus, ut probatur in l. si furiosi. C. de nup. [Cod. 5.4.25].”
this by cutting to the heart of insanity, the concept that provided the legal content for any of the varying lexical incarnations.

The *consilia* provide evidence of an active distinction among the terms of insanity in a way that the commentaries do not. The distinctions of Bartolus and the later jurists served a different purpose than those of Laurentius Hispanus. Laurentius and subsequent canonists more closely defined terms like *stultus* and *fatuus* in order to fit an idea of proof from Roman law into the canonical jurisprudence of proof. The distinctions made by Bartolus, Odofredus, and others, however, functioned less as a textual hermeneutic and more as a social hermeneutic, meant to provide a fit between jurisprudence and society. Petrus Philippus Corneus was explicit that he introduced his distinctions in order to account for the peculiarities of the testimony in the cases before him. Even Bartolus made his distinctions in the *Tractatus de testibus* as an aid to witnesses, and not to other jurists’ reading of texts.

Jurists had to address the terminological peculiarity of the *libri legales* and the subsequent commentaries. Comparing the general usage of the vocabulary of madness in *Ius commune* jurisprudence to the practice of a particular locale, in this case fourteenth-century Venice, we find a disconnect. The Venetians tended to use *mente captus* as their generic term and reserved *furiosus* for cases involving violence. The 1242 statutes of Jacopo Tiepolo and their previous redactions, attributed to either Enrico Dandolo or his son, treated insanity with regard to guardianship. Indeed, the entire second book of the 1242 statues dealt with the guardianship of minors and the insane. The only term used, besides descriptive phrases like *non sanae mentis* and

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mens alienata, was mente captus. Of the four layers of glosses to the statutes marked out by Andrea Padovani, furiosus and furor appear only in glosses explicitly signed by Odofredus. \(^{183}\)

Archival records from the fourteenth century bear out this unwillingness to use furiosus as a general term. In the 1377 case over the disputed will of Maria Gradonico, the priest and notary Conte testified that, while drafting the testament, he found her to be “of good and sound mind and intellect.” \(^{184}\) The greatest range of testimony comes from the 1442 disputed will of Antonia Solario. The avogadori di comun posed the question to the witnesses of whether Antonia was of sound mind or not. \(^{185}\) One witness, David Redu, responded that “she was without any doubt without intellect and of unsound mind; for she would say the most foolish things.” \(^{186}\) On the other hand, a number of witnesses came forward to testify that she was “of good and sound intellect.” \(^{187}\) Victor di Maestri deposed that “he never saw her act as an insane person (insanire) or do anything foolish.” \(^{188}\) The use of descriptive phrases was not confined to testimony. In 1327, the Quaranta, the Council of Forty, overturned the testament of Enrico Michieli on the grounds that he was “non sane mentis” when he made it. \(^{189}\) The testament of Giovanni Basilio was upheld in 1334, despite the allegation that he made it while he was “non

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\(^{183}\) Padovani, “La glossa di Odofredo,” 99-105. The references to the furiosi are found on 105 n.14; 115 n.25; 116 n.27; 117 n.30. (This gloss does not bear Odofredus’ siglum, though it does rely on Roman law); 117 n.33; 118 n.35.

\(^{184}\) Avogaria di Comun, Processi originali, busta 3601, II.8, fol. 3v: “Et continue a principio usque ad finem, ipse presbiter Comes inuenit eam bone et sane mentis et intellectus.”

\(^{185}\) Ibid. VII.18 fol. 3r: “Dauid Redu personaliter constitutus Coram dominis aduocatoribus comunis et Interogatus si cognouit quondam donam Antoniam vxxorem ser Antonii solario si erat sane mente uel non...”

\(^{186}\) Ibid. “Respondit quod possunt esse anni tresdecim uel circa quod ipse cognoscere cepit donam quondam Antoniam quia ibat sepissime domum suam pro emendo curamine et secum multotiens loquebatur; que quondam Antonia erat prout dubio sine ullo intellectu, et insane mentis, loquebatur enim sibi stultitias maximas.”

\(^{187}\) Ibid. fol. 3v-5v contains the statements of ten witnesses, who all use som form of “sani et boni intellectus.”

\(^{188}\) Ibid. fol. 5v: “Et suo Iudico, ipsa quondam d. antonia fuit sani Intellectus, et eam numquam vidit Insanire, nec aliquas stulticias facere.”

\(^{189}\) Avogaria di Comun, Rasp. 3641, fol. 42r.
sane mentis, et alienatus propter infirmitatem.” The Quaranta also overturned the testament of Cristina de Molino on the grounds that she was “continue mentis alienate et fatua.”

I have found only three examples in which *furiosus* was used to describe the insane, all of which dealt with homicide. In 1349, a certain “Johannes Theutonicus” killed two people while “insane mentis et furiosus.” Perhaps the language of the decision taken by the major council was influenced by Rainerius de Forlino, a “doctor legum” who composed a *consilium* for this case. Another case, in 1358, argues that for a standard use of *furiosus* in cases involving violence. The decision in another homicide case describes the perpetrator, Nicolina, as “stulta et mente alienata ac furiosa.” According to the Signori di Notte who apprehended her, it was manifestly evident that she was “amentem et furiosam.” In the final case, the Signori di Notte similarly stated that Ciclionus, the perpetrator, “was and is notoriously a *fatuus* and *furiosus*.”

This would require more local studies to completely flesh out, but it seems that the use of *furiosus* as a generic term did not extend beyond the *Ius commune*, a feature that some jurists like Bartolus tried to account for, while others, like Petrus Philippus Corneus, emphasized the equivalence of terms when confronted with the testimony of their witnesses. The legal vocabulary of insanity was then both complex and simple: complex because of the number of different words used, but simple because they came to refer to the same root concept. That concept involved a total lack of understanding and awareness. Insanity, according to the jurists, could manifest itself in a number of forms, as either temporary or permanent, as severe or so

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190 Ibid. fol. 146r.
191 Avogaria di Comun, Rasp. 3643, fol. 16r.
193 Collegio Notatorio, Reg. 1 fol. 25r-25v.
194 Ibid. fol. 42r.
195 Ibid. fol. 75r: “Et officiales de nocte, asseruerunt domino, quod officio suo plene constitit, suprascriptum Cicilionem, fuisse et esse notorium fatuum et furiosum.”
mild as to be imperceptible. A different approach seems to have been at work in England. The late-thirteenth century *Prerogativa Regis* contains a decree in which the English king assumes control over the insane, both “natural fools” and those who go mad later in life.\(^{196}\) The crown had a right to profits coming from the estates of “natural fools,” those born insane, while it had no such claim on the profits of those who later became insane. This distinction between congenital and later onset madness thus held a fundamental place in English common law. Scholars looking for a concept of intellectual disability have pointed to the distinction of the *Prerogativa Regis* as a sign of the medieval recognition of a concept of intellectual disability.\(^{197}\) Some have read this division back into Roman law, but from the preceding discussion of Roman and canon law, and the development of the concept and vocabulary in the *ius commune*, it seems that the distinction on the basis of congenital or acquired madness is particular to England.\(^{198}\)

**Status**

Across these many terms, did the core concept of insanity provide the basis for a status? What is status, and what importance did it have? According to Thomas Kuehn, status describes the person “as the bearer of rights and obligations and the conscious agent of them.”\(^{199}\) I would disagree that the subject of a status must be a conscious agent of rights. Some statuses, like that of minor, are defined through the lack of legally valid awareness or understanding, while others, like the *prodigi* or *infames*, are defined through their lack of agency. Still, the idea that certain

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196 Wendy J. Turner, “Afflicted with Insanity”, 103. See Chapter 4 for a brief look at the differences between guardianship in the *ius commune* and in the Common Law.
198 Turner, “Afflicted with Insanity”, 83-84, locates this distinction in ancient Roman law but provides no evidence for such an attribution. Berkson, “Mental Disabilities in Western Civilization,”
rights adhere to a person because of their status is an important feature. In essence, status is a simplification, a way for the law to approach the individual on his or her own ground without having to make allowance for every particularity. Status provides a legal sphere of action for recognized social roles. The fit between law and society in status is not exact, however. We cannot forget that status is a legal category, subject to legal fiction. The clearest example of this is adoption, where a person acquires the status of “son,” even though no natural relationship exists.

The key point arising from this back and forth between law and society is that status is circular. In order to operate more efficiently within a given society, the creation of a status involves abstracting a series of definitions, rules, and appropriate spheres of agency from recognized social roles. The law solidifies these abstractions as rules and then reapplies them to those defined by that status. This is apparent in the Roman, and by adoption the medieval, concept of insanity. The general appraisal of mental incapacity is distilled into rules like Dig. 50.17.40, that insane have no will. Statements like this straddle the line between definition and imposition, the hallmark of a status. Because the law deals in generalities, the attributes of the status matter much more than the specific attributes of the individual. Thus whatever the level of understanding or discretion possessed by an individual, if he is labeled as a furiosus, he has no understanding or discretion. Status is a definition that imposes attributes as much as it recognizes them. Compare Huguccio’s definition of the insane as those who do not understand what they are doing at all with the actual mechanics of proof in the following chapter. The successful proof of insanity could involve showing that, for example, a testament deviated from contemporary mores, or even that family members and neighbors thought that alleged madman was insane. Status

200 Dig. 50.17.40: “Furiosi vel eius, cui bonis interdictum sit, nulla voluntas est.”
bridges the gulf between the concept of insanity and the proof of its existence. As Marco Boari put it, insanity as a status precluded the need to prove its existence at every point.\textsuperscript{201} It allows questionable actions or behavior to be transmuted into the complete lack of awareness or volition required to nullify a testament or exculpate a homicide. As we shall see throughout this study, the juristic treatment of madness exemplifies the circular working of status.

If there is any question about insanity as a matter of status, consider the late-fourteenth century \textit{consilium} of Baldus de Ubaldis concerning a homicide by an insane person.\textsuperscript{202} Baldus took up the defense of Giannino da Vailate after he had been summarily convicted and sentenced for the homicide of Bartolino Cabini da Crema. After the initial process, an unnamed relative of Giannino came to his defense, and it is this relative who likely employed the services of Baldus. Baldus built his case first on the criminal incapacity of the insane, though this is a comparatively small part of the total \textit{consilium}. His defense of Giannino instead rested on the procedural defects in the initial procedure. Foremost among these was the judge's failure to determine Giannino's status as a \textit{furiosus} before proceeding with the case. “As soon as insanity is proposed, there must be a pronouncement on this emerging [allegation], since persons must be established in judgment before the case can proceed. If the case proceeds otherwise, it is null.”\textsuperscript{203} Insanity as a status was not only useful in thinking through the concept in the classroom, but also in the courtroom. “A case of insanity,” wrote Baldus, “is a case of status.”\textsuperscript{204}

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\item[201] Boari, \textit{Il furiosus nella criminalistica}, 25.
\item[202] Baldus de Ubaldis, \textit{Consilia} (Venice 1570), fol. 97v-98r, III.347.
\item[203] Ibid. “Et statim proposito fure ore necesse est quod super ista emergenti pronuncietur, quia fundandae sunt personae in iudicio ante quam ad eam procedatur, vt C. qui dare tutores vel curatores et qui dari possunt. l. In vniuersis. [Cod. 5.34.11], C. de auctoritate praestanda. l. Claram. [Cod. 5.59.4], ff. de iure. codicillorum. l. Quidam referunt [Dig. 29.7.14], C. de petitione hereditatis. l. Liber necne [Cod. 3.31.8], C. Ad legem Iuliam de adulteriis et stupro. l. Quoniam Alexandrum [Cod. 9.9.25]. C. de ordine iudiciorum. l. 1 [Cod. 3.8.1]. Et si aliter proceditur, processus est nullus, vt not. ff. qui satisdare cogantur vel iurato promittant vel suae promissioni committantur l. Arbitro. [Dig. 2.8.9].”
\item[204] Ibid. “Amplius causa furoris est causa status...”
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How did insanity function as a status? This entire project answers that question, showing how the idea of insanity developed and functioned in a number of circumstances. Still, we can advance some basic ideas about insanity as a status. Scholars have described insanity as an incomplete status. This may mean two things. In the first instance, Fritz and Laharie claim that the insane are only a subsection of the legally incapable, alongside minors, the drunk, and the sleeping.\textsuperscript{205} I do not find this position convincing. Fritz and Laharie base their idea on only one segment of the jurisprudence, responsibility for delicts. If one takes a larger view, incorporating ideas on guardianship, consent, and identification, insanity can more than stand on its own as a separate concept in the minds of the jurists. Moreover, even in the area of delict, jurists from the twelfth century posed questions of the pre-conditions of insanity; the effect of insanity on punishment itself considered separately from responsibility for the criminal act. They realized that insanity was a particular kind of incapacity, one certainly related to other kinds, but ultimately distinguishable. Boari argued for a more convincing description of insanity as an incomplete status. For him, insanity was incomplete because it was temporary. During a lucid interval, the limitations and legal handicaps of insanity fall away.\textsuperscript{206} These intervals were a basic part of the concept; the law recognized that recovery could always be on the horizon and provided accordingly. Although other statuses could change, such as slave to free, the insane were particularly prone to frequent oscillation between sanity and its absence.

I also view insanity as a somewhat incomplete status, though in a different way from the scholars mentioned above. Boari makes an excellent point that the full consequences of insanity are not operative during lucid intervals, but, as we shall see in the next chapter, juristic notions of proof cast some doubt on the temporal limitations of insanity. In short, the eventual \textit{communis}

\textsuperscript{205} Jean-Marie Fritz, \textit{Le discours du fou}, 157; Muriel Laharie, \textit{La folie au Moyen Age}, 247.

\textsuperscript{206} Boari, \textit{Il furiosus nella criminalistica}, 30.
opinio held that prior instances of insanity shifted the presumption away from sanity. In such a case, the person alleging sanity now had to bear the burden of proof, contrary to usual procedure. Insanity was thus easier to prove if a person had previously suffered even a single bout of madness. The lingering traces of furor could remain with one through a lucid interval, even if the full panoply of rights and restrictions did not.

A better description of insanity might be as an auxiliary status, rather than an incomplete one. By this I mean that insanity did not consume the personhood of the madman but impeded its exercise. On this important point, the sources of canon and Roman law were again in agreement. Dig. 1.5.20 states very clearly that insanity does alter one’s status. An insane father still has patriapotesitas over his children, and a judge still retains his office, even if he cannot exercise it. The Roman jurists may have had the temporal nature of insanity in mind when formulating these rules, but the Digest made clear that madness leaves the basic legal personhood of the afflicted intact. An early gloss to the Digest shows that the jurists were attentive to this feature of insanity. In BAV, Vat. lat. 2705 (fol. 8v), an allegation in the margin of Dig. 1.6.8 to the preceding law bears witness to this important feature of legal insanity. Dig. 1.6.8 holds that an insane father retains authority over his children. On the other hand, the previous lex states that if a father who is also a filiusfamilias becomes penally enslaved or otherwise loses his citizenship, he loses his status as filiusfamilias to his own son as well. The simple reference between the two leges suggests that the jurists were sensitive early on about the effects of a change in status, and noted that insanity did not involve so radical a change.

The canonists developed a similar idea. A text from Gregory the Great that made its way into the Decretum as D.34 c.2 included the insane among those who could not be ordained as priests, alongside bigamists and the mutilated. In the case of the already ordained, Gratian
himself in C.15 q.1 drew on another text of Gregory's which he included as C.7 q.1 c.14, stating that an insane bishop could not be deposed because of his condition. A *coadiutor* could be given to the ailing bishop who would perform the duties of the office and eventually succeed the bishop, but insanity itself was not grounds for deposition. The occurrence of insanity impeded further promotion, but could not affect one already promoted. The Decretist tradition was uniform in this opinion. As Honorius, a later twelfth-century Anglo-Norman canonist wrote, “if [insanity] should befall one already promoted only once, it should be tolerated, but if it happens often, he will be suspended even unwillingly.” Even in this circumstance, the insane cleric is suspended and not deposed. In C.7 q.1 c.14, Gregory had advised that if the insane bishop should return to sanity, he should be persuaded to step down. Any removal from office must be the result of a choice by the afflicted person while in a lucid interval; it is not the result of the insanity itself.

Insanity as an auxiliary status existing alongside other identities is more than the retention of whatever status was held before the onset of madness. Throughout the present study, we shall see this idea at work. For example, in the realm of proof, the expectations defined by one's social status provided the arena for judging sanity. In examples from two fifteenth-century *consilia*, witnesses judged the capacity of the rustic laborer Meo on grounds appropriate to his status, while the urban shopkeep Jacopo di Castro was judged on criteria appropriate to his station. In the area of criminal responsibility, we shall see a strain of Decretist thought that sought to use one's way of life prior to the onset of madness as the grounds for punishing acts

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207 C.15 q.1 d.p.c.13: “His ita respondetur: Non omnia, que ordinandum inpediunt, ordinatum deiciunt; non enim potest ad sacerdotium prouehi qui aliquando insaniuit. Verumtamen, si post sacerdotium furere ceperit, non ideo sacerdotio carebit, nisi forte numquam ad sanae mentis offitium illum redire contingat. Sicut de quodam episcopo Gregorius scribit in registro ad Eleuterium Episcopum: ‘Quamuis triste sit nobis etc.’ ut supra: ‘Longa inualeudine grauatus episcopus’.”
committed while insane. When jurists attempted to work around the restrictions placed on the consent of the insane, they settled on previously known intentions and social expectations to provide the content of these fictive wills.

This chapter has provided the common base for the specific examinations that follow. Despite the multiplicity of terms and the occasional distinctions made among them, the core concept of insanity remained relatively uniform and stable. The insane, most frequently called *furiosi* by jurists, lacked understanding and awareness of themselves, their surroundings, and their actions. Because of this profound disconnect with the world, they could not discern the appropriate action in any given circumstance and thus could not consent to anything. These negative attributes, particularly the lack of consent, amounted to the markers of insanity as a status. The negation of knowledge and the will were just as much consequences of a determination of insanity as they were standards to make that determination. The chapters that follow flesh out the status of the insane person as that status comes into contact with the legal and social world of the Middle Ages.
Proof is, for many reasons, the natural place to begin the case studies of the jurisprudence of insanity. To start, proof is the point of entry into the status of *furiosus*. Proving insanity involves applying the rigor of more or less commonly held definitions and norms to socially questionable or transgressive behavior. At the end of the process, the allegation of insanity moves from the realm of judgment and opinion to that of legal fact. Only after the establishment of this fact can the consequences of insanity have force. Approaching the question from another angle, disability studies advises a close attention to the modes through which disabled identity is negotiated, fixed, or destabilized. Furthermore, proof is one of the main areas of a particularly medieval innovation. The Roman jurists, or at least their writings as they survive through the highly abbreviated work of the Digest, fleshed out an elaborate discussion of the effects of insanity, but not its determination in a forensic setting. The granting and duties of guardians, civil obligations, and criminal liabilities of the insane all receive attention; proof, however, can only be glimpsed in a few fragmentary mentions on which the medieval jurists built their own system. Last, proof is one of the most contentious areas of modern insanity jurisprudence. While a majority of Americans acknowledge the basic principle of the insanity defense, there is much less concordance on how to determine whether one is truly insane or not. This is nothing new. For example, just as the medieval jurists spilled a great deal of ink over the burden of proving

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2 Gardner, *Being a Roman Citizen*, 169-172. Gardner admits that there must have been some agreed upon process, but that the state of surviving texts has largely hidden it from us.
insanity, so shifting the burden has been one of the major means of legislative intervention in response to sensational insanity cases.  

Asking the question of how to prove insanity entails asking a number of smaller, related questions. First, what evidence was relevant for the determination of insanity: that is, what are the signs of madness? Second, what procedural apparatus existed to facilitate the presentation and interpretation of this evidence? For the medieval jurists, as well as their modern counterparts, this latter question centered on the determination of who bears the burden of proof. The answers to the foregoing frame the chapter. In the following pages I will show how the jurists tackled the perennial problem of proving insanity with examples drawn from a variety of legal sources. The glosses and commentaries produced in and for the academic environment of the universities are my primary sources. In these texts we see the ongoing dialogue at work within the tradition of scientific jurisprudence from its reinvigoration in the twelfth century onward. Supplementing these commentaries are consilia, legal briefs drafted by trained advocates for particular cases and later collected and distributed, as well as a number of court cases from the Venetian Archivo di Stato. These cases are drawn from the fourteenth and early-fifteenth centuries, when the major ideas of the medieval ius commune had taken shape.

Although this chapter is divided according to the major guiding questions mentioned above, I must stress that this division is somewhat artificial. While it is possible, and even helpful, to divide the question of proof in this way, one must keep in mind that the probatory

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apparatus devised by successive generations of jurists functions as a whole. One may take apart a watch to examine the gears but must reassemble it to see it work. As we shall see, a shift in thinking about the burden of proof led some jurists, such as Bartolus of Saxoferrato, to reconsider the weight given to certain pieces of testimony.

Even deeper than this nuts-and-bolts relationship, evidence and procedure are linked through an emphasis on functionality. This is a jurisprudence meant to be used. It is surprisingly sophisticated, but its strength does not come from being an intellectual edifice of beautiful consistency. The chief virtue of the apparatus of proof was its flexibility. As Marco Boari put it, the system of proof in the *ius commune* possessed a great deal of elasticity, particularly in the variety of evidence it embraced. The *consilia*, often drafted *pro parte*, that is, to advance the case of one particular side in a dispute, provide excellent sources not only for what the thinking was, but more importantly how it was deployed. For example, we shall see instances in which a jurist writing a *consilium* deviated from his statements in a commentary in order to advance his client’s case. While the ideal in any forensic setting is to uncover the truth through the adversarial process, the modes of proof outlined here may have been used more often to craft or create a social reality than to uncover it. Whatever the case may be, knowledge of rules governing this transition to legal fact is crucial for understanding the results that follow from it. Indeed, the determination of insanity where it did not “really” exist was worry that carried over from Roman law. Even some early jurists like Placentinus (d.1192) reiterated this warning.

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5 I use the term “apparatus” purposefully. Just as a gloss apparatus was constructed from a number of different authors, sometimes resulting in an inconsistent set of interpretations, so the modes of proving insanity developed over time on the basis of what provided the surest conclusions.

6 Boari, *II furiosus nella criminalistica*, 159-160.

7 Ibid., 61, 55, et passim. According to Boari, the jurists of the *ius commune* strove to create a legal reality on the basis of a probable truth.

8 Eg. Dig. 27.10.6: “Observare praetorem oportebit, ne cui temere citra causae cognitionem plenissimum curatorem det, quoniam plerique vel fuorem vel dementiam fingunt, quo magis curatore accepto onera civilia detrectent.”
And yet despite the discussion of the legal effects of insanity that commenced with the first step of the juristic revival in the mid-twelfth century, a concern with proof is not evident until the turn of the thirteenth century as Roman and canon law became more inextricably intertwined.

‘Signa Furoris’: The Evidentiary Basis for Madness

First we must consider the signs of madness, the raw material, before examining the procedural machine through which it was fed. When canonists and civilians alike turned their attention to signs in the late-twelfth and early-thirteenth centuries, their first statements were simple, vague assertions of the basic types of signs: speech and acts. By the middle of the thirteenth century, however, the treatment of signs had received its most important intellectual grounding from two of that century’s most important jurists: one a civilian, the other a canonist. Accursius (d. c. 1263), the famed compiler of the ordinary gloss to the Justinianic corpus, expressed optimism in how signs reveal the presence of insanity. “Madness is proven by speech,” says Accursius, “and by acts, for exteriors show what is hidden in the soul.”10 This basic belief in the interpretation of the interior through the exterior underlines the whole of this area of jurisprudence. Even when the challenge of non-apparent madness is raised, it is not treated in such a way as to call the whole apparatus of signs into question, but only as a problem dealt with through procedure and legal fiction. At the same time, Sinibaldo dei Fieschi, better known as Innocent IV (d. 1254), provided further grounding for the importance of signs. According to Innocent, the proper sphere for a witness was to testify to what he could perceive with his senses. Testimony on interior facts, like drunkenness or anger (or madness, though Innocent left out this

9 Placentinus, Summa Codicis (Mainz, 1536), p. 234, Cod. 5.70.
10 Digestum infortiatum (Lyon 1627), col. 152, Dig. 26.5.12 s.v. “ex sermonibus”: “Sic ergo ex sermonibus alicuius conuniit tur an sit sanae mentis, an non. sic infra de condit. institu. l. Quidam. [Dig. 28.7.27] Azo. Et infra de quaestio. l. Minore § Tormenta. [Dig. 48.18.10.3] Item ex gestis, ut in fine eius legis, nam exteriora indicant secreta animi, etiam in aliis animalibus, ut Inst. de re di. §.Pauonum, in fi.§. [Inst. 2.1.15]” Accursius built his gloss off of an earlier gloss of Azo.
example) is to some degree impossible, since the witness cannot actually see that interior state. The witness must instead describe what he perceived that led to his judgment of that unseen condition. In this way, the witness’s testimony can be appraised in a more objective way. This placed a great deal of emphasis on the signs of madness, since these, rather than a vague statement that one was mad, became the only admissible testimony. Accursius and Innocent described two sides of the same coin. If testimony is only valid when relating phenomena perceived directly by the senses, there must be principle or basic belief in some kind of transparency that allows for an exchange between these exteriors and the interiors on which so many aspects of the law depend.

Despite the importance placed on signs, their discussion in the commentaries remained vague. The proof of insanity through speech and acts is fairly constant throughout the Middle Ages. The jurists were reluctant to give clarification, I believe, in order to allow a certain flexibility in allowable testimony. By the fifteenth century, some jurists, following the lead of Baldus de Ubaldis (d. 1400) began to explicitly mention certain signs drawn from the *libri*

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11 Innocent IV, *Apparatus in quinque libris Decretalium* (Frankfurt 1570) fol. 262v-263r, X 3.27.3: “Aliqui tamen quandoque quaerunt, an est talis dominus rei, vel an est talis iracundus vel ebriosus. Sed ad has quaestiones non tenetur respondere, quia nullo sensu corporis potest apprehendere, quod si dominus vel ebriosus vel iracundus, sed oculis mentis, scilicet ratione hoc apprehendit. Ipsa enim ratio ex his quae apprehendit sensibus corporis, bene potest iudicare eum dominum, vel ebriosum, vel iracundum, sed ipse non adducitur in iudicem, sed in testem, et ideo testimonium eius non praeiudicat, nisi causam assignet. Sed si assignat iustas causas testimonii, puta, ‘scio eum dominum quia fui praesens vbi emit lanam, de qua facit pannum,’ tunc valet testimonium, non ratione primae partis, qua dixit eum dominum, quod videre non potuit, sed iudicare, sed ratione secundae partis, qua assignavit causam iustam sui testimonii, et non est malum si testis, vel ratio bene iudicat ex his, quae sensibus corporis apprehendit, quod iudex concordat cum eo tantum nisi sufficientes causas assignet, per quas apparat eum dominum, non valet testimonium eius. Et idem videtur si dicit eum ebriosum vel iracundum, quod potius videtur iudicium rationis quam dictum testis.”

12 See Yves Mausen, *Veritatis adiutor: La procédure du témoignage dans le droit savant et la pratique française (XIIe-XIVe siècles)*, Università degli Studi di Milano, Facoltà di Giurisprudenza, Pubblicazioni dell’Istituto di Storia del Diritto Medievale e Moderno, 35 (Milan: Giuffrè, 2006), 635-637. The earliest reference to this idea found by Mausen comes from an anonymous addition to the ordinary gloss of Cod. 4.20.4. Though Mausen does not provide a manuscript source for this addition, it clearly arose after the distribution of Accursius’ gloss. This would put it roughly contemporary with the work of Innocent IV, and support Innocent as one of the early proponents of this idea.

13 Marriage, reception of the sacraments, possession of property, and criminal responsibility are only a few areas where the determination of intention has a decisive role.
legales, such as the throwing of stones.\textsuperscript{14} Indeed, a century later, Philippus Decius (d. c. 1536) could object to witnesses produced in favor of insanity on the grounds that their testimony raised suspicion by traditional signs too closely.\textsuperscript{15} Despite this attempt to bring some specificity to the discussion, for the most part we must turn to consilia and archival cases containing testimony to find actual examples of what could function as a sign of madness.

\textbf{Proof “ex sermonibus”}

Canonists and civilians (jurists of Roman law) settled on speech as the primary area of investigation for one trying to prove insanity. The formulation ‘ex sermonibus’ is drawn from Dig. 25.6.12.\textsuperscript{16} The text itself refers to spendthrifts, though the close connection between the two in Roman law made the transposition to insanity easy.\textsuperscript{17} The earliest reference to speech as proving insanity comes from around the turn of the thirteenth century. Two contemporary civilians Hugolinus (d. c. 1230) and the more famous Azo (d. c. 1230) both refer to insanity being proven or presumed “ex sermonibus.”\textsuperscript{18} The concept entered canonical jurisprudence under

\textsuperscript{14} See below for a discussion of stone-throwing as a sign of madness.
\textsuperscript{16} “His qui in ea causa sunt, ut superesse rebus suis non possint, dare curatorem proconsulem oportebit. Nec dubitabit filium quoque patri curatorem dare: quamvis enim contra sit apud Celsum et apud alios plerosque relatum, quasi indecorum sit patrem a filio regi, attamen divus Pius instio celeri, item divi fratres rescripsin filium, si sobrie vivat, patri curatorem dandum magis quam extraneum. Divus Pius matris querellam de filiis prodigis admisit, ut curatorem accipiant, in haec verba: ‘Non est novum quosdam, et si mentis suae videbuntur ex sermonibus compotes esse, tamen sic tractare bona ad se pertinentia, ut, nisi subveniat is, deducantur in egestatem. Eligendus itaque erit, qui eos consilio regat: nam aequum est spesirecere nos etiam eis, qui quod ad bona ipsorum pertinet, furiosum faciunt exitum.’” The emphasis is mine.
\textsuperscript{17} Dig. 27.10, for example provides opinions on guardians granted to spendthrifts and the insane over the age of 25, that is, beyond the age of legal minority. The text of Dig. 26.5.12 displays the fundamental connection between furiosi and prodigi: the inability to manage wealth or property, which had important consequences for familial survival.
\textsuperscript{18} \textit{Codex} (Vienna, ÖNB 2268), fol. 167r. Cod. 6.36.5 “Item ex hisermonibus eius presumitur quis furiosus. ut ff. de cond. inst. Quidam [Dig. 28.7.27]. e ff. de tut. et o. dat. ab his. His [Dig. 26.5.12] h.” The apparatus in this manuscript has been identified by Gero Dolezalek as that of Hugolinus. See Gero Dolezalek, \textit{Repertorium...
the influence of these civilian reflections, particularly through the teaching of Azo. The early Decretists, even the greatest master of the Bolognese school, Huguccio, did not turn their attention to the signs of madness, only to the burden of proof.19

For the next generation of canonists, the key text providing a nest for the discussion of insanity was a decretal of Innocent III, “Cum dilectus,” from the first year of year of his pontificate (1198).20 The case centered on a dispute between Humbert, abbot of La Bussière, and Walter, bishop of Autun, over the property of an archpriest.21 At some point in the late 1160’s, the archpriest made a profession to the monastery of La Bussière, promising all of his goods thereto, though retaining usufruct. On his deathbed, his fellow monks urged him to make a will, which he still had not done. The archpriest steadfastly refused, claiming that since he had already pledged his goods to the monastery, he had nothing to bequeath. He died intestate. After his death, the bishop of Autun claimed the property as his by right of that intestacy. The dispute escalated to the point that the bishop forcibly seized the property, an act that culminated in bringing the case before the pope. Through a series of exceptions and replications, the case ultimately came to turn on this point: the bishop’s party claimed that the archpriest was not of sound mind when he made his profession and grant, that the grant was thus invalid, and that on

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21 La Bussière and the bishop of Autun were frequently at odds over the common conflict between episcopal claims of jurisdiction and papal privileges of immunity. See Eugène Fyot, *L’Abbaye de la Bussière,* 2nd ed. (Dijon 1925).
intestacy his goods belonged to his bishop. Innocent delegated the case, ironically enough, to the bishop of Nevers to judge the allegation of insanity. Unfortunately we do not know his decision.

The decretal, included in the collection of Alanus Anglicus, found its way into the classroom more so via the *Compilatio tertia* as the sole chapter in the title concerning succession on intestacy. Among the first major commentators on the text was Laurentius Hispanus, who completed his apparatus before his election to the see of Oresne in 1215.²² Laurentius is well regarded today as an important figure in the increasing incorporation of Roman law into canon law.²³

Laurentius was the first canonist to mention speech, or even any sign of insanity. He included the reference to speech in his apparatus to the latter. Working slightly earlier than Laurentius, Alanus Anglicus adhered to a more traditional treatment of insanity in his own glosses to his collection.²⁴ This argues for Laurentius as the point of entry for this idea from Roman law. He did not just import a concept from Roman law; he also added canonical support:

“Therefore he was insane, for it is understood from one’s words if he is insane, Dig. 26.5.12. Hence Job, ‘[you speak] like one of the foolish women,’C.23 q.8 c.21 and ‘the fool says foolish things,’ D.93 c.24, and ‘he is a fool who does not understand his own name,’ Cod. 6.24.14 On the contrary, Dig. 39.5.16.”²⁵ In order to make a fit with canonical sources, he relied on an

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²² See Brendan McManus, *The ecclesiology of Laurentius Hispanus (c. 1180-1248) and his contribution to the Romanization of canon law jurisprudence, with an edition of the ‘Apparatus glossarum Laurentii Hispanii in Compliationem tertiam’* (PhD diss., Syracuse University, 1991) 46-47.

²³ Ibid., 50-58


²⁵ Laurentius Hispanus, *Apparatus glossarum*, 2.496, 3 Comp. 3.20.1 s.v. “volo”: “Erat ergo furiosus, nam verbis deprehenditur quis furiosus esse, ff. de tut. et curat. dat. l. His [Dig. 26.5.12]. Vnde Job tamquam una ex testamentis(recte insipientibus) mulieribus, etc. xxiii. q. viii. Conuenior [C.23 q.8.c.21], et fatuus fatua loquitur, xiiiin. Legimus [D.93 c.24], et stultus est qui ignorant nomen suum, C. de haered. instit. l. ult. [Cod. 6.24.14] arg. contra ff. de donat. Ex hac scriptura [Dig. 39.5.16].” The objection seems to be based perhaps on an unusual bequest that does not arouse suspicion. Regardless, it is not one that is taken up.
expanded range of vocabulary. It is also interesting to note that Laurentius used portions of
Scripture included in the Decretum, perhaps thereby giving his importation of Roman law an
even stronger anchoring in canon law. From Laurentius, the reliance on speech enters into the
apparatus of Johannes Teutonicus and Tancredus, though Teutonicus added a reference to
insanity also being proven by acts. Teutonicus also included the gloss in his apparatus to the
Decretum, which, as the Ordinary Gloss to this text, reached innumerable subsequent jurists.
Likewise, Azo’s original gloss was incorporated by Accursius into his influential Ordinary Gloss,
likewise with an additional reference to acts. Despite these additions, speech remained the
primary avenue for determining one’s sanity. Even Accursius at times neglects to mention acts as
a means of proof. Indeed, in the fourteenth century Bartolus could define questionable speech
as the proper defining act of the insane, just as stumbling along walls is the proper act for
identifying the blind.

Proof from speech clearly enjoys precedence in juristic thought. Still, these glosses and
comentaries give no indication as to what the jurists meant by proof “ex sermonibus.” Such

Pennington/edit301.htm3, Comp. 3.20.1 s.v. “volo sicque”: “Ex verbis probatur furor siue stultitia, ut ff. de tutoribus
et curator. datis ab his l. Hiis [Dig. 26.5.12] et ff. de condit. instit. Quidam [Dig. 28.7.27], nam fatuus est qui fatua
loquitur, ut xciii di. Legimus [D.93 c.24], et Job dixit quasi una ex stultis locuta es, ut xxiii q.viii. Conuenior [C.23
q.8 c.21]. Ex factis etiam probatur stulticia, nam stultus est qui ignorat nomen suum, ut C. de hered. instit. l. ult.
[Cod. 6.24.14] et stulticia perpenditur ex hoc quod quis contemnpt discere, ut xxii di. De Constantinopolitana [D.22
c.4].” Tancred cited Teutonicus as a source in his own apparatus. See BAV, Vat. lat. 1377, fol. 175r, Vat. lat. 2509,
fol. 222r and Troyes, BM 102, fol. 244v.

27 *Glossa ordinaria* (Lyon 1627), col. 152, Dig. 28.7.27, s.v. “amoveri potest”: “Ex sermonibus enim presuntur non
sanae mentis. Hoc est talis praesumit, cuius verba gerit.”

28 Bartolus, *Commentaria in primam Infortiati parte* (Basel 1562), p. 900, Dig. 37.3.2: “Videte, in furioso colligitur
ex sermonibus, an sit furiosus, i. quidam in suo sup. de cond. inst. [Dig.28.7.27] et l. Is qui. sup. de tut. et cu. da. ab
his [Dig.26.5.12]. Idem in prodigo, nam prodigus iudicatur ex actibus. d. l. His qui in fi. s. de tut. et cu. dat. ab his
[Dig. 26.5.12], et l. i. de cu. fur. [Dig. 27.10.1]. Eodem modo in muto, quia ex actibus quis iudicatur mutus, nam
dicit testis quod talis non loquebatur verba articulata, sed nutu et actibus, quia signis petebat quid volebat, arg.
praedicatarum legum. Idem dico in surdo, quia dicit testis quod talis non intelligebat ad vocem, et nihil auditu
percipiebat, sed per puncta vel aliqua signa. Idem etiam dico de caeco, quia caecitas probabiliter per visum, quia dicit
testis quod talis habebat oculos a capite evulsos, vel clausos, et similis. Sed quid si habet oculos claros, quomodo
probabitur quod non uident? Respondeo et dico quod probabiliter ex actibus, quia dicit testis, ‘udii quod ibat per loca
ardua, ut per murum,’ et similia, uel ‘ibat cum duce semper.’”
general statements allowed them enough flexibility to accommodate whatever evidence they had at hand. To see the range of speech that could serve as proof of madness we must turn to more practically oriented texts.

The first example is contained in “Cum dilectus,” the decretal on which Laurentius and Johannes both commented. The episcopal party claims: “The representative of the bishop alleged that, when the donation was made, the archpriest was not in his right mind, so that, when he was asked by the monks, ‘Do you wish to take the monastic habit?’, and he responded, ‘I do.’, they immediately asked him, ‘Do you wish to be an ass?’ he responded similarly, ‘I do.’ And thus the monks conveyed him to the monastery, which the representative offered to be proved.”29 Here the archpriest showed an inability to interact with the world in a meaningful way. Although the answer to the first question seems to be proper, the answer to second shows that it was utterly without meaning, or at least the episcopal party hoped that it did. The exchange is even suggestive that the archpriest was being taken advantage of by the monks.

Lack of appropriate response as a sign of insanity appears multiple times in the *consilia* of the Perugian jurist Petrus Philippus Corneus (c. 1409-1492). In arguing for the sanity of one testator, Petrus pointed to the testimony of a witness who recalled that “the notary asked Bartolomeo [the testator in question] some things, and he responded correctly. Certainly a sane or insane mind is discerned from speech.”30 In another case, Petrus sought to prove the insanity of a certain Ser Vanuzzi at the time he made a will. Many of the witnesses stated that Vanuzzi

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30 Petrus Philippus Corneus, *Consilia* (Venice 1572), fol. 91r, con. 2.85: “Secundus autem testis, uidelicet Franciscus Euangelista, reddit indubie idoneam causam scientiae, quia dicit quod fuit praezens, et uidit tunc sanum mente et intellectu, et quod notarius de nonnullis tunc interrogauit ipsum Bartholomaeum et recte respondebat, certe ex loquela discernitur insania et sana mens.”
did not respond to what was asked of him but that he vacillated. Like a good advocate, Petrus foresaw a counter-argument that such vacillation indicated insanity; perhaps it was part of a deeper strategy for Vannuzzi to keep his options open. Eventually through a piling up of signs, including spitting in the face of the notary, Petrus would argue that Vannuzzi was in fact insane. A final example comes from the case of a disputed land grant. A certain rustic laborer named Meo had granted property to a Donna Francesca, though he retained usufructory rights over it. Another Donna Oriente claimed that Meo was mentally handicapped and not of sound mind when he made the grant. Six of the witnesses deposing in favor of Oriente’s position claimed that Meo did not respond to what was asked of him and was thus insane. Petrus, however, could point to witnesses produced on the other side who stated that Meo was partially deaf (“surdaster”) and that “when people wished to speak with him, they had to do so in a loud voice, otherwise he would not speak with them.”

In this first concrete set of examples we can see the most important feature of the jurisprudence of signs: its relativity. No single sign existed that could objectively and in itself prove insanity. The signs are arguing points that require interpretation to have meaning. The arguing party must be convincing that insanity is the most likely explanation for a given piece of evidence. We have seen in the example above how Petrus Corneus attempted to anticipate and

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31 Petrus Philippus Corneus, *Consilia* (Venice 1572), fol. 29v, con. 4.22: “Et similiter licet quidam testes dicant, quod non respondebat ad propositum, sed uacillabat. Nihilominus non uidetur probata insania mentis, quia alio respectu potuit uacillasse et respondisse ad propositum ad aliqu a quae interrogabantur. Forte enim sibi non placebant et holebat denegare ita quod prudenter potuit id facere, et quando interrogabatur de eo quod sibi placebat forte respondebat quod sic, et ideo etiam hoc non uidetur concludenter probare mentis insaniam.”


33 Boari. *Il furiosus nella criminalistica*, 60-74. Boari emphasizes that the signs of madness are not meant to be objective. I differ from his view only in that I see the enumeration of signs, especially the throwing of stones, as a way not of making the jurisprudence of signs more objective, but of better grounding the appropriate level to which a sign should rise.
counteract possible reinterpretations of his evidence, thus ensuring that his story would be viewed as the correct one. We can see why the discussions of the burden of proof were so important; it would have been easier to force one’s opponent to craft these stories than to do so oneself.

Even in Venice, which prided itself on the straightforward nature of its laws without the complicating jargon of the ius commune, we can see this battle over interpretation at work. The 1442 disputed testament of Antonia Solario is the only case I have found in the Venetian archive that preserves testimony. From what remains of the record, Antonia seems to have drafted a testament in which she left nothing to her husband, Antonio. Some years later, near her death, she revised it and left him a third of her goods. This last testament was contested, though unfortunately the outcome of the case is not recorded. The case still provides an invaluable example of how insanity could be argued in court. The first witness produced in favor of Antonia’s madness was David Redu, who claimed that she was “without a doubt of unsound mind, since she would always say very foolish things and speak of things of the other world,” although he could not recall any particulars. The next witness, a certain Giovanni, was more specific. He claimed that, as he was cooking on the day of her son’s wedding, Antonia came into the kitchen and told him to put water in a cooking pot. He responded that the house would burn.

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34 I believe that Venetian claims of independence from the norms of the ius commune have been greatly overstated. See Pier Silverio Leicht, “Lo stato veneziano e il diritto commune,” Miscellanea in onore Roberto Cessi (Roma: Edizioni di Storia e letteratura, 1958): 203-211. If we take Manlio Bellomo’s thesis that the ius commune operated not as a rung on the hierarchy of laws, but as the spirit inspiring reflection on the laws, its influence in Venice becomes harder to deny, particularly when considering the study of law in Padua and the numerous instances of famous jurists like Franciscus Zabarella and Petrus de Ancharanno serving as counselors to the city. Even under the example of insanity, one of the homicide cases which I will later discuss has a consilium attached to it. Manlio Bellomo, Common Legal Past, 78-83.

35 Avogaria di Comun, busta 3601, VII.18, fol. 3r: “Respondit quod possunt esse anni tresdecim uel circa quod ipse cognoscerre cepti donum quondam Antoniam, quia ibat sepissime domum suam pro emendo curamine et secum multotiens loquebatur. Quod quondam Antonia erat prout dubio sine ullo intellectu, et insane mentis. Loquebatur enim sibi stultitias maximas et res de alio mundo. Interrogatus que stultitie sunt ille quia loquebatur et faciebat, respondit quod non posset recordari istas stultitias, sed quod scit quod erat insane mentis.”
down. Soon after one of her servants told her to leave and told him that he shouldn’t mind her
since she was a fool. Further, a certain Maffeo Filacamiso reported that he knew Antonia for
several years, since he had married her husband’s niece. He recalled that she would say and do
shameful things, such as lifting up her clothes to her knee and say “look and see, make my
husband a child.”

Even this seemingly convincing testimony could be countered. Two witnesses testifying
to Antonia’s sanity claimed that she was of sound mind and an intelligent woman, “except that
she indulged in wine.” Antonia’s frequent inebriation served as an explanation for her aberrant
behavior. In fact, one witness, Niccolò Matheo, stated that when she was not drunk, she was ‘’of
such good and sound intellect that she would have been able to speak with the doge As far as
otherworldly nonsense, Niccolò claimed that she always said things that were “pleasing to
God.”

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36 Ibid. “Respondit quod tempore quo Lucas Solario, filius dicte done Antonie Solario, duxit vxorem non recordatur
alter de tempore ipse testis faciebat suas futulas in domo sua, et venit tunc in coquinam dicta Antonia, quam
intellexit esse vxorem ser Antonii Solario et matrem sponsi. Et deficientie oleo in lebete in quo futulas facebat dicta
dona Antonia dixit ipsi testi quod poneret de aqua in lebete, qui inciusi sibi respondit quod non deebbit poni aqua
quia incenderet domus. Et tunc quedam sua sclaua dixit ipsi done Antonie, ‘va via mata.’ (et dixit ipsi testi quod non
attenderet ipsi quia erat stulta), et hoc est quantum scit.” The portion in parentheses was struck through in the record.

37 Ibid. fol. 3r-3v: “Respondit quod ipse cognouit ipsam donam Antoniam suprascriptam iamannis xvii uel circa,
quia ipse habuit pro uxoroe nam neptem ser Antonii solario mariti de quondam done Antonie, filiam unius sororis
sue. Et est verum quod quando ipse ibat domum dicti ser Antonii, videbat aliquando dictam donam Antoniam que
attollebat panos usque ad genua et dicebat ‘tolle varde zoch me fa uno marido le vn buzaro,’ et verba similiter
turpissa.”

38 Ibid. fol 5r: “Ser Petrus Thomasii de Iudaica Examinatus ut supra, respondit quod ipse optime cognouit quondam
predictam donam Antoniam vxorem ser Antonii um per 30 annos, et plus, et erat compatus suus, et iuit multotiens
domum suam, et ipsa etiam veniebat domum ipsius testis ad visitandum vxorem suam, et parum antequam infirmaret
etiam fuit domi ipsius testis, et asseruit cum ipsa multotiens fuisse loquitum, que habebat bonum et saluum
intellectum, et suo iudico nullum habebat aliiu contrarium ad complectus vnius mulieris sapientissime nisi quod
aliuquando se onerebat vino, et hec erat etiam vox in vicinia, verum habebat suum bonum intellectum.”

39 Ibid. 4r: “Respondit quod sunt anni xxiii, quod ipse cognouit ipsam quondam donam Antoniam quia laborauit in
apoteca ipsius ser Antonii annis sexdecim. Quam donam Antonian semper cognouit boni intellectus et sane mentis,
ita ut loqui potuisset domino duci excepto quod verum est quod vidit illam multotiens ebriam, et valde, verum dicit
fuisse etiam in hac sua ultima inimritate qua defuncta est, ad visitam ipsam que habebat suum bonum intellectum.
Nam interrogabat ipsam quomodo stabat que dicebat semper placebat deo, et bene semper ad proponitum
respondebat.” It is interesting to note that Niccolò also maintains that she responded to what was said to her..
Many of the preceding examples revolved around disputed testaments. Of the seventeen cases I have found in the Venetian Archivio di Stato in which insanity plays a role, twelve involve disputed testaments.\footnote{Avogaria di comun, Rasp. 3641 fol. 33v-34r (1327), fol. 42r (1327), fol. 146r (1334); Rasp. 3643 fol. 5v (1361), fol. 16r (1361?), fol. 21v (1361?), fol. 34v (1362), fol. 153v (1371); Rasp. 3644 fol. 121r-121v (1388), 138v (1389); Avogaria di Comun, Processi originali, busta 3601 II.8, fol. 1r-8v (1378); VII.18, 1r-8v (1442).} For reasons that will be clear when we turn to the burden of proof, later jurists seized on the testaments themselves as artifacts of speech and subjected their contents to the same analysis as the testimony of witnesses. Formulas, legal restrictions, and translation into Latin all shaped the drafting of a testament; still we must remember that the notary was, as Steven Epstein put it, “in the business of taking dictation.”\footnote{Steven A. Epstein, *Wills and Wealth in Medieval Genoa, 1150-1250* (Cambridge Mass: Harvard University Press, 1984), 16.} Thus Bartolus could claim that “one is presumed to be insane from the words placed in their testament,” or that “a condition that contains something inhuman should be rejected, and thus one is presumed to be of unsound mind from his words, unless the contrary be proven.”\footnote{Bartolus, *Commentaria in prima Infortiati partem* (Basel 1562) p. 517, Dig. 30.1.41, s.v. “constat”: “Nota quod ex sermonibus appositis in testamento quis presumatur furiosus, l. Quidam in suo, de cond. instit. [Dig. 28.7.27].” Also ibid., Dig. 28.7.27, p. 394: “Conditio quae continet inhumanitatem respuitur, et ex sermonibus presumitur quis non sanae mentis, nisi probetur contrarium. Nota quod ex qualitate sermonis quis presumitur furiosus. Simile de tu. et cu. ab his. l. His qui. §.i [Dig. 26.5.12.1]. Habuistis in l. Apud. Iul. in fine. i. de leg. i. Op. Dicitur hic quod iste qui talem conditionem apposuit praesumitur furiosus.”} His student Baldus (d. 1400) went further, arguing that sanity could be presumed not just from what was contained in the will, but also from what was omitted. A well-ordered testament should include provisions for one’s soul and for one’s children. A testament that does not include these basic, culturally necessitated items could be presumed to be the product of an unsound mind, for only a madman would not care for his eternal destiny or his progeny on earth.\footnote{Baldus de Ubaldis, *Commentaria in sextum codicis librum* (Lyon 1585) fol. 62v, Cod. 6.22.9: “Quaero, quid si not apparete quo tempore fecerit, an tempore furoris, an in dilucidis intervallis? Respondeo aut tempus testamenti erat vicinum tempore furoris, aut erat ab eo tempore multum remotum. Primo casu refert an qualitas ipsius dispositionis arguit magis ad partem sani consilii, ut quia est cuilibet sanae mentis legitima ordinatio testamenti quod etiam ex ipsius serie testamentarii luculentor apparete, ut quia continetur ibi instituto filiorum, legata pro anima, et huiusmodi, et tunc ex ipsius actus qualitate praesumitur sanae mentis. Aut contrarium, et tunc praesumitur contrarium, ut ff. de}
A consilium of Alexander Tartagnus (d. 1477) shows just how this examination of a testament could occur. The case concerns a certain Jacopo Castro de Regio, who had made two testaments before his death. The second testament contained a number of new provisions, many of which plainly or conditionally bequeathed property to persons outside the family, particularly to one Bonantonio de Bozagino, whose sinisterly portrayed relationship to Jacopo is never fully revealed. Alexander wrote his consilium on behalf of a party, most likely Jacopo’s family, contesting this second will. After reviewing the statements of witnesses in order to establish that Jacopo had a history of mental instability, Alexander turned to four new provisions in the second testament and sought to show how each one argued against the sanity of the testator. First, Jacopo bequeathed a certain storehouse to Bonantonio that his father had expressly ordered him, on pain of a certain penalty, to maintain within the family. Second, the new testament contained a provision that if his son Niccolò should die without male children, the whole inheritance would go to Bonantonio, who would provide a dowry for Niccolò’s daughters at his own discretion. In the first will, if Niccolò had no male children, the inheritance would go to the children of Bobio, presumably another son. Third, although it is customary for diligent men to make a testament in their own house or in a church, Jacopo made it in the home of another person. Whether this other person was Bonantonio, Alexander does not say. Finally, Jacopo added a clause that a priori invalidated any future will, if he could not recite therein the Salve Regina. In this way, Alexander claims, he took away from himself the free power of testating, which is against good mores.44

inoffi. test. l. Titia, in fine [Dig. 5.2.13] ff. de leg. iii. l. Patronus §. Finali [Dig. 32.1.35.3] et ff. de tu. et cur. da. ab his. l. Is qui § finali [Dig. 26.5.12.2] et de condi. inst. l. penultimo [Dig. 28.7.27] de suc. ab intest. c. finali [X 3.27.3] et iii. q.vii c. Indicans [C.3 q.7 c.4].”

44 Alexandrus Tartagnus, Consilia (Venice 1590), fol. 157r, 1.141: “Circa argumentum pro prima parte deducta dum voluit quod si est dubium, an quis furiosus sit tempore actus gesti, et probatum sit, quod habeat dilucida intevalla, debeat inspici qualitas testamenti, an sit talis quae in omnibus suis partibus conveniat dispositioni, quam quisque diligens fecisset, et prae summatur fuisse sanae mentis; secus si in aliqua parte ipsius dispositionis fuisse actus non conveniens dispositioni hominis sanae mentis, et viro diligenti, quo tunc presumitur non fuisse tunc compotem
Alexander attacked the second will on two fronts. He first showed how Jacopo acted in ways destructive to his own family. Jacopo disobeyed a command of his father and sought to alienate a property specifically designated to remain with the family. He also neglected to adequately provide for the financial security of his children by bequeathing property for dowries to someone outside of the family. Alexander went on to show that the process of making the second testament was itself suspect. Jacopo acted against social expectations of the proper way to do things by not drafting the testament in a public place and by not retaining the right to change the testament. These latter two examples also suggest strongly that Jacopo was somehow manipulated into making these changes. In both examples, Jacopo acted against the expectations of a “diligens,” a diligent or prudent man. Once again these provisions on their own do not automatically argue for insanity. Rather, Alexander crafted his case to show that Jacopo had no good reason in mind to justify these actions.

What conclusions can we reach from this examination of proof through speech? The examples above focus on the ability (or lack thereof) to interact with the world through speech. In some cases this amounts to simply showing that there is no meaningful interaction, as in allegations of not responding to what is asked. More dangerous however, are the words that do
things, to borrow J.L. Austin’s phrase. Antonia Solario’s culinary advice might have resulted in
the destruction of a house. Jacopo de Castro’s testamentary disposition might have resulted in the
financial ruin of a family. Viewed in this light, there is not a hard distinction that can be made
between words and deeds. Even further connecting the two is the common theme of relativity.
Suspect speech could imply insanity but not definitively prove it without an overarching
interpretive framework or narrative to explain why only an insane person would make a
particular utterance. The standard of what a “diligent man” would do is the hermeneutic running
through the entire jurisprudence of signs.

Proof “ex actibus”

Although speech was considered the primary sign of madness, medieval jurists noted that
more physical acts could also serve as evidence of insanity. We have seen that even early in the
thirteenth century, Johannes Teutonicus added acts to his gloss on how to prove insanity.
Accursius made a similar addition in his own apparatus. Like speech, specific examples are not
explicitly enumerated until the fourteenth century, when the jurisprudential trend favored a more
active engagement with the daily operation of law. Still, according to Bartolus, the acts of the
insane are ‘commonly known.’ But if a witness is asked for details, Bartolus advised that he
should ‘describe the act, namely that he saw [the alleged madman] strike those standing around
him, that he chased them away, that he threw stones without reason, and the like.’

As with
speech, an explanation or interpretation of why a particular act indicated insanity was necessary.

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46 Bartolus, “Tractatus de testibus,” in Susanne Lepsius, Der Richter und die Zeugen: Eine Untersuchung anhand
des Tractatus testimoniorum des Bartolus von Sassoferrato (Frankfurt am Main: Klostermann, 2003), 300:
“Furiosus quis probatur ex actibus, ut si testes dixerit, quod uidit eum furere et actus furiosorum facere, satis
exprimit. Sunt enim tales actus noti communiter. Sed si interrogetur ulterior, oportet testem exprimere actus, scilicet
quia uidit percutere astantes sibi, sine causa fugere, lapides sine causa proicere et similia.”
Because of this required interpretive leap, some felt that acts or deeds were a more secure evidentiary base. Albericus de Rosate (c.1290-1360) found speech to be misleading, noting that “although one seems to be of sound mind from his speech, still their behavior is the opposite. There are many who at first glance seem prudent and virtuous from their speech, but are the complete opposite in their deeds.”

47 Connected to this is the old anxiety of feigned insanity. Albericus seems to have thought that it would be easier to say foolish things than to have done foolish things consistently. 48 If a discrepancy should arise wherein a person seems to be sane from their words but acts in such a way as to call their sanity into question, the greater weight should be placed on one’s deeds. To support this inversion of the norm, Albericus rather skillfully drew on Mt 7:16, “from their fruits shall you know them.”

49 In using the Gospel as a source text, Albericus must have felt that he not only answered, but surpassed the citations of Hebrew Scripture advanced by Laurentius to support proof from speech.

By the end of the fourteenth century though, a peculiar spike in the specificity given to signs emerged, particularly in the work of Baldus de Ubaldis. At multiple points, Baldus noted that insanity is proven by the throwing of rocks. 50 References to throwing rocks appear in the

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47 Albericus de Rosate, *Commentarii in primam Infortiati partem* (Venice 1585), fol. 27v, Dig. 26.5.12: “Intrinseca cognoscuntur per extrinseca. Hoc. dicit. Unde verius. Intima per mores cognoscuntur exteriores, et Cato, sermo hominum mores celat, ac indicat idem. Et ad hoc bene concord. infra. de conditio. institu. l. Quaedam [Dig. 28.7.27] cum ibi nota. Et quod dicitur fatuus fatuae loquitur 93 distin. Legimus [D.93 c.24], alias legitur in Esaia. et 23 q.8 Conuenior [C.23 c.8 c.21], et ad hoc supra de aedil. edic. l.i.§. ultimo [Dig. 21.1.11], et l. Ob quae vita circa princip [Dig. 21.1.4]. Nam et alibi dicitur, loquela tua manifestum te facit, ut d. legimus [D.93 c.24] et 97 distinc. nobilissimus [D.97 c.3], et in passione dominica, et de hoc ibi in glo. Sed certe ex hoc §. Colligi videtur contrarium, quia licet ex sermonibus uideretur sanae mentis, tamen in actio erat oppositum, ut hic patet. Et tales sunt multi qui prima facie uidentur prudentes et uituis ex eorum sermonibus, sed in operibus est totum oppositum.”

48 Ibid. “Et alibi dicitur quod multa fingunt dementiam, ut onera detractent, ut infra de. cura. furiosi. l. Furiosae [Dig. 27.10.4]. ubi de hoc.”

49 Ibid. “Dic ergo quod regulariter est verum quod ex sermonibus quis iudicetur, nisi opera contrarium denegant, et hoc est quod Salvator noster in Euangelio Matt. 7, ’a fructibus eorum cognoscetis eos,’ id est, a operibus.”

50 Baldus, *Commentaria in primam et seundam Infortiati partes* (Lyon, 1585), fol. 12v, Dig. 24.3.13, s.v. “si maritus”: “In texto ibi terribilis, nota per quos actus probetur furor per istam glossam, quod picicere lapides probatur furor. In gl. que incipit nam si proicet lapides probatur furor, et est tex. C. de iud. l. ii [Cod. 4.20.2] ibi dum dicit saxis vel alio furoris genere.”; Idem, *Commentaria in septimum, octavum, nonum librum Codicis* (Lyon 1585),
work of Accursius and Bartolus, but not with the frequency that they do in that of Baldus.51

Through Baldus, this example entered the mainstream of the jurisprudence of signs.52 Why the sudden need for specificity? I believe that Baldus, who is best known as a prolific author of consilia, had a practical purpose in mind, namely, to bring greater surety to the apparatus of proving insanity. In a sea of highly interpretive signs, Baldus sought to anchor the discussion of proof that required a high threshold of evidence to show that it was not the act of an insane person. Such specificity may have also served to indicate the level to which an act should rise to be considered as proof. The question remains whether he was successful in this venture.

Why should throwing rocks emerge as the typical act of the insane? To start, it is an act connected with the insane in the sources of canon and Roman law. Cod. 1.9.3 is a decree of Constantine prohibiting attacks on Christian converts with “rocks or any other kind of madness.”53 This is one of the few instances in the Justinianic corpus in which furor does not refer to insanity, but the connection between insanity and this word grouping had become so strong by thirteenth century that Cod. 1.9.3 could function as a proof text. C.15 q.1 c.5 from

fol. 376v, Cod. 8.4.7: “De furioso dictum est supra, quod furiosi sunt qui sunt in expresso furore, proiicientes lapides, etc.”; Idem, Commentaria in primam Digesti veteris partem (Venice 1572), Dig. 1.18.14: “Quod proiicere lapides sit signum furoris, habes C. de iudaes l.2 [Cod. 1.9.2]”; Idem, Commentaria in primam et secundam Infortiati partem (Venice 1572), fol. 12v, Dig. 24.3.12: “In texto ibi ‘terribilis’, nota per quod actus probetur furor per istam glossam, quod proiiicere lapides probatur furor. In glossa quae incipiit nam ‘si proiicit lapides probatur furor’, et est textus Cod. de iud. l.2 [Cod. 1.9.2] Ibi dum dict saxis vel alio furoris genere.”

51 For Bartolus, see above. Accursius, Digestum Infortiatum (Lyon 1627), col. 31, Dig. 24.3.22.7, s.v. “ferendus”: “Nam non proiicit lapides, nec aliquid mali facit stantibus secum.”

52 See Boari, Il furiosus nella criminalistica, 60-62. Paulus de Castro, Lectura super Infortiato (Lyon 1553), fol. 20v, Dig. 24.3.22: “Ultimo nota glossam super verbum ferendus, qualiter cognoscatur fatus, scilicet, quando proiicit lapides. Sunt et alia signa de quibus habetur in l. Ob quae vitia. de edi. edi [Dig. 21.1.14]. Et nota in l. Quidam in suo. infra de condi. inde [Dig. 28.7.27].”; Angelus de Ubaldis, Lectura super Infortiato (BAV Vat. lat. 2613), fol. 129v, Dig. 24.3.22: “Et alibi dicit glossa quod qui lapides proicit furiosus est, et male agens et dicitur tune esse in furore seissimo in l. cum dote [Dig. 24.3.22].”; Alexandrus Tartagnus, Consilia (Venice 1590), fol. 156v, con. 1.141: “Et probant dicti testes actus necessarios, vel saltum praeumptione iuris concludentes furorem, quia deponuntuquod proiciebat lapides et panem, quia ist actus indicant fuorem. l.2 C. de iude. no. glossa [Cod. 1.9.2], et ibi Baldum et Angelum in l. Si cum dotem §. Si maritus. ff. soluto mat. [Dig. 24.3.22.7].”

53 Cod. 1.9.3. “Iudaes et maioribus eorum et patriarchis volumus intimari, quod, si quis post hanc legem aliquem, qui eorum feralum fugerit sectam et ad dei cultum resperxerit, saxis aut alio furoris genere, quod nunc fieri cognovimus, ausus fuerit attemptare, mox flammis dedendus est et cum omnibus suis participibus concremandus.”
Gratian’s Decretum contains a more explicit reference to the insane not only throwing stones, but also using knives and their own teeth as weapons.\textsuperscript{54} Source texts are not the only places to look for support of throwing rocks as a sign of madness; indeed they are likely not even the most important. Using the criminal records of the Venetian Signori di Notte from the late-thirteenth to the late-fourteenth centuries, I would like to examine throwing rocks a social phenomenon of violence to see what light it can shed on our understanding of the jurisprudence.\textsuperscript{55}

Throwing rocks was a frequent form of violence in the fourteenth century. What follows are a handful of cases that characterize the main features of this form of violence. The first case is the 1293 death of Crescenzo, a storekeeper, at the hands of a smith named Martino. Late one evening, Crescenzo was beating his son in front of his house when his wife attempted to stop him. Crescenzo proceeded to vent his anger on her, and when she ran from him, he began to chase her through the campo of San Samuele. As he was dragging her by the hair, one onlooker stepped into the situation. Five of the six witnesses to the act testified that Martino threw a rock and hit Crescenzo on the front of his head. In the testimony given to the Signori di Notte before his death, however, Crescenzo left out any mention of the stone being thrown. According to his testimony, Crescenzo said that he “ran after her [his wife] and seized her, and then Martino the smith of San Zulian was opposite him and struck him with a rock on the left side of his head with one blow.”\textsuperscript{56} Though Crescenzo’s statement is vague, certainly one interpretation of it would be that Martino struck him with the stone in his hand. The statement that Martino was “opposite

\textsuperscript{54} C.15 q.1 c.5, “Aliquos scimus subito dementes factos ferro, fuste, lapidibus, morsibus, multos nocuisse, quosdam et occidisse, captos autem industria et iudiciis oblato minime reos factos, eo quod non voluntate, sed inpellente un nescio qua hec gesserint nescientes. Quomodo enim reus constituitur qui nescit quod fecerit?” The text itself comes from the Pseudo-Augustinian work \textit{Liber questionumveteris et novi testamenti} of Ambrosiaster.


\textsuperscript{56} ASV, Signori di Notte Reg. 5, fol. 10r: “Ipse cucurit post eam et cepit eam per directas, et tunc Martinus faber sancti Iuliani fuit contra eum et percussit eum cum uno lapide in capite in latere sinistro, uno ictu.”
him” could imply some proximity. Why would Crescenzo tailor his testimony in this way? For one, he may have hoped to put the responsibility squarely on Martino’s shoulders, by emphasizing that he acted with purpose. Directly striking someone with a stone was a different kind of violence than throwing one: it was a more purposeful use of a weapon. In other words, if Martino threw the stone, it is possible that he did not intend to strike Crescenzo in the head; if he struck him with it in his hand, his intent is clearer.57

The accidental nature of stone-throwing is evident also from the 1363 case of Andrea, a servant boy of Bartolomeo di San Pantaleone. According to Andrea, a boatman threw a rock at him and struck him on the right side of his head. According to the witnesses, this boatman, also named Bartolomeo, had apparently been insulted by the 12 or 13 year old boy. In response he threw the rock because he wished to “give him a bath,” or knock him in the canal. The fatal blow was certainly not intended to be such.58 Likewise, Pietro, son of the late doge Giovanni Dolfino, was killed in 1367 while playing with other boys in the neighborhood of San Bernabo by throwing rocks at one another when one rock struck him in the head.59

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57 The shifting of blame is a somewhat frequent feature in the testimony of victims. Nicoleto Bevilaqua defending himself from the charge of murdering Ser Buono Enrico, specified that Enrico attacked him first “sine causa aliqua.” See ASV, Signori di Notte Reg. 6 fol. Ir. The case on fol. 97v-98r is equally illustrative. A certain Francesco described how a man, whom he characterized as a “buffus persona”, struck him with a knife “sine aliqua causa nec dicto verbo aliqua,” although the two did have a verbal altercation before the attack, according to one witness.

58 ASV, Signori di Notte Reg. 9, fol. 3r: “Andreas famulus Bartholomei S. Pantaleonis aca Iustini, Coram domino Iacobo delphino domino de nocte, prosonul. constitus. Iuratus dicere ueritatem, de contusione sue persone suo sacramento, conquerendo dixit, videlicetquod dum ipse Andreas die sabati penultimo aprilis hori none uel circa, esset super ripa sue domus que est super canale, Quidam platarius, cuius nomen ignorat, sed si ipsum uideret, cognosceret, qui ferriebat frumentum communis, pro contracta s. maragarite, volens balneare dictum Andream proiecit vnum lapidem uersus ipsum Andream, qui lapis percussit in capite dicti Andree a latere dextro vno ex contusione, cum plaga et sanguinis effusione. et fractura ossis, et prontinus ipse platarius, uidens quod percussat ipsum Andream, dixit, certe, ‘Ego volebam balneare’.”

A final example shows the emotional nature of throwing stones. In 1396 Antonio, a slave of Ser Bertuzzio Pollano, was returning a boat belonging to Ser Gerolamo Donato to his dock. The prow of the boat was decorated with the carving of a seabird. When Antonio reached the shore, Ser Gerolamo noticed that the bird’s beak was damaged. He began to berate Antonio, and a shouting match between the two ensued, ending with Gerolamo slapping Antonio for his insolence. After Gerolamo began to walk away, Antonio picked up a piece of tile on which he fell and threw it at Gerolamo, striking him in the head. Antonio then pulled out a knife and approached Gerolamo but was stopped by others who were present. In this instance, we have an argument that quickly escalated until it erupted in violence. Antonio seems to have been so angered by his treatment at the hands of Gerolamo that he hastily looked for the first weapon he could find, only afterwards producing a more recognizable weapon.

These examples display some key features of rock-throwing as a mode of violence. Rock-throwing was often emotionally fueled and its outcome was often accidental. While those mentioned in the preceding examples were held responsible for their actions, the characteristics of these attacks fit in nicely with the image of a madman, someone who is not in complete control of their actions and acts in a way he does not intend. Furthermore, of the three cases of

cilium sinistrum cum fractum ossis et plaga et sanguinis effusione, per vnum ex pueris, qui erant super fundamentum Riui.”

60 ASV, Signori di Notte Reg. 12, fol. 31r-31v: “Iacobus sclauus nobilis viri ser Francisci Barbadoico Sancti Geruasii aca propria, coram dictis dominis de nocte, testis introductus, iuratus et examinatus dicere veritatem super dicto processu et morte dicti ser Bertuzii Pollani, dixit et respondit suo sacramento quod circa tempus dimidie quadragerie nuper preterite circa vesperas et suo apparere fuit quadam die mercurie, quod ipse testis se reperit in litore Sancti nicolai, ubi erant multi. Interogatus quos erant, Anthonius sclauus nobilis viri ser Geronomi Donato Sancti Pauli, qui custodiebat insimul cum Iohane famulo dicti ser Geronomi unam barcham (ms damaged, cannot read word) intera cum proua, super quam prouam erat vnus smergum cum rostro fracto. Et ibi venit suprascriptus ser Bertuzius Pollani et tetigit dictum smergum. Et dictus Anthonius sclauus cum superbia eo dixit, de dimittus stare illum smergum (fol. 31v) et tunc dictus Bertuzius dedit vnum bufetum dicto Anthonio sclauo. Et dictus Anthonius sclauus habens unam tegolam lapidem subitus ipsam extraxit et eam proiceit contra ipsum ser Bertuzium et ipsum percussit super capiteana contusione cum sanguine. Et immediate extraxit vnum suum cultellum apane et iterum volebat percuteire ipsum ser Bertuzium, sed aliquis qui ibi erant tenuerant dictum Anthonium sclauum. Interogatus, si aliiquis alius se intermixit in dicto facto, et si alia arma uel res offensibilia ibi tracta uel producta fuerunt, dixit de non.”
homicide by the insane that I came across, two mention the murder weapon, and both are projectiles. Nicolina “stulta et mente alienata ac furiosa” struck and killed Andrea, the nephew of a priest, with a rock on 27 May, 1355. In the second case, a man known only as Ciclionus, who “was and is a notorious fool and madman,” threw a roof tile through the window of Nicoleta Zuparia, striking and killing her. At least as the example of Venice shows, the idea that throwing rocks was a typical sign of madness was not a mere textual trope, but based on direct and indirect social experience. Baldus emphasized an act that had strong textual and social connections with madness, but which still required a level of interpretation. He could not escape the need to show that the act was performed, as Bartolus said, “without cause.”

Moreover, the highly emotional nature of stone-throwing as an act of violence could be viewed as bordering on madness. In recent examinations of the proof of insanity in England and northern France, Wendy Turner and Aleksandra Pfau have both pointed to strange or explosive emotional states as common evidence of madness. Extreme emotion could operate in both directions. On the one hand it could be the source of madness, as in a 1489 case cited by Pfau in which a woman, Marguerite Bouchard, experienced extreme emotional distress when informed by her husband that the family would be leaving their home and moving to a new town. This distress precipitated an argument that ended in the husband’s murder at the hands of his wife. A letter of remission was composed for Marguerite to beg the king’s pardon on the grounds that she

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61 ASV, Collegio Notatorio, Reg. 1, fol. 42r. “Cum quidam Nicolina stulta et mente alienata ac furiosa in millo. ccc lv. die xxvii. Maii, percussisset cum uno lapidem in fronte Andream nepotem presbiteri Iohannis sanctorum apostolorum, cum contusione et fractura ossis et plaga ac sanguine. Ex qua percussione idem Andreas mortuus est.”

62 Ibid. fol. 75r, “Cum quidam, nomine, Ciclionus, die Louis elapsa, secunda presentis mensis, transiret per contractam Sancti Iohanis noui, et accepisset de terra, unam peciam cuppi, et proiecisset ipsam in domis Nicoleti Macarenie ponitam in suprascripta contracta. Et cum ipse percussisset et vulnerasset, Nicoletam Zupariam, eius vicinam, in fronte, una concussione a latere dextra, cum plaga et sanguinis effusione, de quo vulnere mortua est ipsa Nicoleta, qui cicilionus captus fuit et c., in carceribus nostris. Et officiales de nocte, assurerunt domino, quod officio suo plene constitis, suprascriptum Cicilionem, fuisse et esse notorium fatuum et furiosum.”

was out of her mind while committing the murder. On the other hand, inappropriate emotion could be a sign of madness. Turner discusses the case of a certain William de Percy of Kildale, who was investigated by representatives of the English crown on the subject of his supposed madness. In addition to giving away property to friends and neighbors, William displayed other signs rendering him suspect, such as quietly weeping during his examination. According to Turner, this sign of impotence and inability to control his emotions suggested to the investigators that William was out of his mind. Turner also points out, however, that this was only one sign among many others.

Extreme emotion was part of the image of a mentally unstable person; it did not serve as the sole basis for a determination of insanity. Take for example a 1392 case from Venice. A certain Pietro, a boy of about sixteen and the son of a tailor, and his brother Tomaso began arguing one December evening with Martino, a former slave who now worked as a fishermen. The insults flying on both sides soon became rocks. Martino hit Tomaso with a spear he was carrying, likely a tool of his trade. Pietro hurled a stone at Martino and struck him in the head. Pietro fled, and Martino later died of his wound. Although Pietro was able to escape, his brother Tomaso and a friend, Marco Marangono were captured and held in prison for the crime. About one month later, Jacobello Girardo, a notary for the Cinque alla Pace, was dining at a tavern in Mestre when Pietro approached him. Pietro stated that Marco and Tomaso were innocent of Martino’s murder and confessed to the crime himself. He stated that he had struck Martino only after his brother had been wounded. In this way, Pietro claimed to the notary that Martino’s

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64 Pfau, “Crimes of Passion,” 97-98. Jealousy also emerged as a powerful emotion leading to madness; see Ibid., 113-115.
66 ASV, Signori di Notte, Reg. 12, fol. 38v-39r.
death had been his own fault. Eventually, in May, Pietro was captured. When interrogated about the crime, Pietro denied his guilt and swore that he knew nothing about Martino’s death. When asked about the testimony of Jacobello, he claimed that “the words he spoke he only said to please others, and he had not been himself (“non erat bene in se”) when he spoke those words in Mestre.” One could imagine Pietro’s anguish at hearing the news that brother and friend were imprisoned for his crime. Weighed down by such emotion, he confessed his crime. Even if he did not turn himself in, at least Tomaso and Marco would be freed, he must have thought. Later, when he was captured, Pietro tried to downplay his confession, noting that he was not himself when he made it. His denial of the confession must not have been convincing; Pietro was blinded in his left eye for the crime. This is an example that, as Turner has shown, extreme emotional states successfully indicated madness only when corroborated by other evidence.

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67 Ibid.: “Die septimo Febr, Testificor ego Iacobellus Girardo notarius ad officium dominorum quinque de pace, videlicet quod die mercurei xxviii Januarii uel die Martis xxvii eiusdem circa vesperas, ente me in Mestre, cum omni reuerentia in hospitio tabernarii Anthonii de Cechino et faciendo collatiam cum aliquibus Christoforo de venecii massio, ad capitatum postarum et ibidem, personas domini potestatis Mestre, eo instanti superuenit quidam iuuenculus de Venecii etatis circa, ut potuit comuniter estimari, annorum xvi uel paulo plus uel minus, sine barba... Et habuit michi dicere quasi cum pudore, ‘Domine non estis uos scriba dominorum de nocte,’ cui dixi, ‘Quare?’ et ille ait per vno certo facto. Et ego respondi, ‘Non, ymo sum notarius ad quinque de pace.’ Et Item habui dicere, ‘Et quare?’. Qui ait, ‘Domine est verum quod intexeli quod quidam Marcus Marangonus de Kanaregio,’ et vnus alius, quem dictus tunc michi nominavit sed non recordor, ‘sunt presentaliter in Venecii in carceribus detenti, per dominos de nocte pro homicidio cuius Martini piscapeueradi, olim schlaui ser Nicolai fistigarii, qui Marcus et alius in rei veritate paciuntur pena, de eo quod nunquam meruerunt. Ita quod uos rogare uolo in reuerentia Dei et, etiam permittatis michi, et tangatis michi manum, quod quando exitis Venecii, compereatis, coram domini de nocte, et eisdem dicatis, quod ego fuit ille qui vulneratum dictum Martinum una nocte, circa iii horam noctis in fronte, ex quo vulnera finale obiit.’ Et tunc ego Iacobellus et qui tunc ibi erant statim multum suspensi, et inter alia uerba, habui dicere dicto iuuenculo, “Quid est nomen tuum?” et ipse dixit ‘Petrus filius ser Iohanis sartoris de kanaregio. Et habeo unum fratrem, qui nominatur Thomas, et presentalitervdetentus in careceribus.’ Bene dixit michi causam sed presentaliter, ‘Et dicatis etiam dictis dominis de nocte, quod causa propter quam percessi dictum schlaum, fuit, quia percusit fratrem meum in manu, de vno spedo, et quod dictus schlaus mortuus est, in sui maximam culpa et deffectum.’ Multa alia uerba, tunc faceret, sed non habeo menti.”

68 Ibid., fol. 39r: “Et interogatus [Petrus] dicere veritatem, de morte ipsius Martini, de qua est inculpatus, et quicquid aliuu dulcet dicere uel allegare in fauorem suum, et de mandato serenissimi domini ducis, dominorum de nocte sacramentatus, suo sacramento dixit esse verum, quod de morte ipsius Martini nichil scit, et est penitus insens et sine culpa, quia cum eo nunquam habuit uerba uelbrigam. Et uerba que dixit, ipse dixierit pro complacendo aliis, et non erat bene in se quando dixit illa uerba in Mestre.”

69 Ibid.: “Sententatus fuit dictus Petrus homicida ad erruendum eius oculum sinistrum ita quod ipso priuatur. Et dictus Marcellus protulit sententiam”
Not all acts relating to insanity necessarily revolved around violence. If we return to the case of Meo, Petrus pulled his most powerful argument in favor of Meo’s sanity from testimony about his behavior. Jacopo Luca deposed that Meo was good, pacific, and diligent in acquiring and that he did not allow his property to become rundown. Bartolomeo Luca testified that Meo was a good worker who never went home without carrying something, which indicates sanity. Ceccus Massi likewise deposed that he would go home carrying bundles of wood, that he didn’t waste time. Vitale Luca deposed that he once saw him genuflect to a priest walking by and shouted a confession at him. Furthermore, he was always digging, sowing, measuring grain, and separating hemp. Taken as a whole, Meo appears to be a diligent, hard-working, and pious laborer. In judging action then, Petrus shaped his evidence so that the judgment is based not just on what a ‘homo diligens’ would do, but on what a “laborator diligens” would do. The appraisal of the appropriateness of an act is not only relative to the situation, but more fundamentally to the particular status of the person.

Non-apparent Insanity

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71 Ibid. “Item Bartholomaeus Lucae quod dictus Meus erat bonus, loquebatur cum uolebat, bonitas autem uel prout faciunt alii homines sanae mentis et sani intellectus, et super aliis articulis, quod erat bonus et pacificus et diligens in acquirendo, et non permittebat eius bona dilapidari.”

72 Ibid. “Item Ceccus Massii de eodem castro deponit quod dictus Meus erat sudaster, et cum homines uellent ipsum loqui oportebat exclamatione alta uoce, et ipse respondebat ad interrogata, alias non fecisset aliqui uerbum, et ibat cum diligentia ad laborandum, uagandum, et ligonizandum, et faciebat crinos, nunquam amittebat tempus, piscabatur cum nassis, in clasio boues diligenter custodiebat, ne facerent damnum, et cum homines auferabant de suis possessionibus muscatellum et alios fructus exclamabat ‘lassatelo stare’. In causa scientiae, quia uidit, audiuit et praesens fuit, et quia uicinus et etiam iste testis directe probat sanam mentem et reddid idoneam causam scientiae.”

73 Ibid. “Item Vitalis Lucae deponit quod dictus Meus erat surdaster et duodecim castro deponit quod dictus Meus erat sudaster, et cum homines uellent ipsum loqui oportebat exclamatione alta uoce, et ipse respondebat ad interrogata, alias non fecisset aliqui uerbum, et ibat cum diligentia ad laborandum, uagandum, et ligonizandum, et faciebat crinos, nunquam amittebat tempus, piscabatur cum nassis, in clasio boues diligenter custodiebat, ne facerent damnum, et cum homines auferabant de suis possessionibus muscatellum et alios fructus exclamabat ‘lassatelo stare’. In causa scientiae, quia predicta uidit, audiuit et praesens fuit singula singulare referendo, quae omnia tendunt ad ostendendam sanam mentem, quod erat homo pacificus et sanae mentis, et nunquam perdebat tempus, et cum reuertebatur domum, semper portabat alicui in manibus fases ligorum et similium potius de bonis suis quam alienis.”
As we have seen, the entire juristic approach to the evidence for proving is based on the interpretation of exterior signs. But what about cases in which madness is not so readily apparent? For example, Dig. 41.2.18.1 poses the question of what happens if someone gives a piece of property to another who has the appearance of being sane (“in conspectu inumbratae quietis”), but is in fact insane. The ancient jurist Celsus solved the difficulty by stating that the donor loses possession, since he has the intention to lose possession, but that the recipient does not gain possession since he has no legally significant intention.74 This text appears to be a hypothetical example meant to isolate and examine the required states of mind in an exchange of possession; the idea of non-apparent insanity functions only to advance the story of the hypothetical. Still, this poses a problem to all of the considerations mentioned above. How can one establish insanity as a legally significant fact if there are no signs to grasp it by? Nor was this a merely academic problem. Consider, for example, a decretal of Innocent III from 1205. In it, Innocent responded to a case at the episcopal court of Vercelli. A certain knight sought to release his daughter from her marriage on the grounds that her husband was insane. Canon law was clear that insanity did not destroy the marital bond once it had formed.75 The unnamed knight had to argue that his son-in-law was insane at the time the marriage was contracted. If he were insane, then he could not have consented, and the marriage would be void. In order to make his case, the knight had to claim that he was unaware that the man his daughter was about to marry was...
insane. Innocent left the investigation of this claim to the bishop, but gave no indication as to how the investigation should proceed.\textsuperscript{76}

The jurists did not spend much time at all worrying over the threat posed by non-apparent insanity. The basic faith in their probatory apparatus derived not from the jurisprudence they had built up regarding signs, but from their teaching on the burden of proof. As I said earlier, the signs of madness, even with the effort of interpretation that they required, only supplied the raw material for proving insanity. The real work of the system was carried out by shifting the burden of proof from one party to another. In this way, insanity was never really proven or disproven; a case only ended when the judge settled on the most likely presumption. The use of presumption, as we shall see, allowed for testimony spanning a wide range of time. Even if insanity was not apparent at a given time, it could be presumed from previous actions that suggested its presence.

‘Onus Probandi: Shifting the Presumptions of Sanity’

Before moving into the juristic treatment of the burden of proof, I need to clarify where the proof for insanity fits within general conceptions of proof in the \textit{ius commune}. The various forms proof could take came to be distinguished and graded by the jurists according to their relative strength in compelling the judge to pass sentence in one’s favor.\textsuperscript{77} At the peak stood notoriety, that is, knowledge of a fact so certain that it precluded any contrary evidence; already in Gratian’s analysis of due process, a \textit{notorium factum} was sufficient to allow an abbreviated procedure.\textsuperscript{78} Included among \textit{notoria} would be \textit{res iudicata}, licit confessions, and even certain presumptions, such as the presumption of a valid marriage if sexual intercourse takes place on

\textsuperscript{76} X 4.1.24; \textit{Die Register Innocenz III}, 8.302.
\textsuperscript{77} Jean Philippe Levy, \textit{La hiérarchie des preuves dans le droit savant du Moyen Age depuis la renaissance du droit romain jusqu’ à la fin du XIV\textsuperscript{e} siècle} (Paris: Librairie du Recueil Sirey 1939), 28-30.
\textsuperscript{78} Ibid., 30-66; Francesco Migliorino, \textit{Fama e Infamia: Problemi della società medievale nel pensiero giuridico nei secoli XII e XIII} (Catania: Giannotta, 1985), 49-55.
the condition of marriage.79 At a lower level, though still strong enough to warrant a judicial sentence, are the so-called *probationes plena*, such as the testimony of at least two valid witnesses or that of valid *instrumenta*. While the *probationes plena* had a high probatory value, there was a possibility of their being challenged by opposing proofs.80 At the bottom lies the muddled category of *probationes semiplena*, which encompasses everything from the testimony of singular witnesses or documents to a variety of weaker presumptions. These proofs were also of varying strength; in general they were not sufficient grounds for a sentence, though they could be in conjunction with stronger forms of proof.81 Thus in many cases, a *probatio semiplena* had the ability to shift the burden of proof away from one, while still providing the opposing party with ample room to meet it. It is in this lowest level that we can locate the proof for insanity.82

Combining the low standing of the presumptive nature of the presence of insanity with the high degree of judgment necessary to interpret its signs, we can see a system at work in the *ius commune* in which evidence could never be truly conclusive, even when the requirements were met. The “proof” of insanity amounted to a shifting of the burden of proof to one’s adversary and a hope that he could not shift it back. The key then to understanding how insanity was proven is not just what signs were seen as significant, but more importantly the rules that governed their deployment, specifically the burden of proof. Indeed, by the fourteenth century, reflections on the burden of proof would have a profound impact on what signs the jurists preferred to use. Marco Boari has noted that proof of insanity in the *ius commune* amounted to the creation of a constructed, juridical reality.83 In this view, the understanding of the procedure

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80 Ibid., 67-84.
81 Ibid., 106-30.
83 Ibid., 51.
by which that reality was created is crucial. As we have seen, because the traditional signs of
madness were open to interpretation, the rules governing their deployment were even more
critical in the determination of insanity.84

Laying the Foundations: Decretists and Civilians in the Late Twelfth Century

Gratian was the first jurist of the twelfth-century renaissance of legal science to deal with
the problems posed by insanity in any extended discussion. C.15 q.1 provides an interesting and
sophisticated probing of insanity’s consequences for both culpability and the holding of
ecclesiastical office. Still, even given the intensely procedural focus of the causa, Gratian never
took up the issue of how exculpating insanity could or should be proven.85 As was often the case
with questions not directly addressed by the master himself, later Decretists supplied answers by
drawing on auctoritates used in the Decretum in other contexts. On this particular point, the
Decretists came to focus on C.3 q.9 c.14, a decretal of Nicholas I to Wenilo, archbishop of
Sens.86

The decretal, used by Gratian to show that the absent cannot be sentenced if they are not
contumacious, was written in response to a request drafted on Wenilo’s behalf by the famed
Lupus of Ferrières that Nicholas depose Herman, bishop of Never.87 According to Lupus,
Herman’s mental affliction was a serious impediment to his episcopal duties and required his

84 Ibid., 64-65, et passim. Boari rightly points to the highly subjective nature of the signs. On the other hand, I
believe that the rules of procedure, particularly those concerning the burden of proof, added a great deal of structure
to the determination of insanity.
85 Causa 15 walks the student through a criminal proceeding, from the commission of the act (q.1), through the
acquisition of counsel (q.2), the admissibility of witnesses (q.3), the proper time of a case (q.4), the availability of
purification as a defense (q.5), the admissibility of torture (q.6), the requirements for the validity of a sentence (q.7),
and finally the effects of a confession or conviction on clerical status (q.8).
Historica, vol. 4 Epp. 6 (Berlin: Weidmann, 1925), 611-612.29.
dated to 858. In that case, Herman’s illness had been an issue for at least five years before the appeal to the pope.
Already in 853 at the council of Soissons, Wenilo enlisted the aid of other bishops in helping Herman manage the
duties of his see. Capitularia regum Francorum, MGH Capit. 2.264.15-26.
deposition, which only the pope could accomplish. Nicholas’ response highlighted what he perceived to be a number of holes in Wenilo’s case. First, the archiepiscopal party did not specify exactly what the charges against Herman were. The only concrete allegation is that he failed to come to a synod when summoned.88 Second, and more to Gratian’s point, no one was present on Herman’s behalf to answer the charges. Finally, and most pertinent for our purposes, Nicholas noted that Wenilo’s party “did not clearly show whether the bishop was of sound mind when he committed these excesses.”89 This last point would exert a profound influence on the subsequent jurisprudence of proving insanity.

The text, however, received scant attention in the generation following Gratian. In manuscripts containing the first gloss composition, an early witness to the teaching of the Decretum dating to around 1150, the decretal receives no comment.90 It is also passed over in most early summae.91 This is not surprising given that the text’s main points, the inability to sentence the absent and the non-culpability of the insane can easily be handled without reference to it. Indeed, when Decretists do begin to discuss the text, it is often in connection with this latter point.92 Nevertheless, perhaps the procedural setting of this text began to prompt canonists by the

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88 MGH Epp. 6.612.11-15. This charge, not contained in Lupus’ letter, may have been provided in a separate letter, or may have made verbally by the party sent by Wenilo to the pope.
89 MGH Epp. 6.612.19-22. “Pro quibus, quia ex parte ipsius persona deest, nos uni parti ad alterius discrimin cedere procul dubio non possimus, quamvis nec, quique adhucilli fuerint excessus, dixertis nec, utrum sana erat mente idem antistes necne, cum ipsos excessus perpetrabat, evidenter ostenderis.”
91 Namely Pauçapalea, Rolandus, and Rufinus.
92 See for example, Köln, Dombibliothek 127, fol. 120r, which has a “nota” siglum from “evidenter ostenderis” to the end of the text, wherein Nicholas noted that the insane “should be endured rather than punished (compatiendum sit quam puniendum).” Troyes, Bibliothèque municipale 103, fol. 100r has a gloss citing C.7 q.1 c.2, which forbids the addition of further affliction to those already vexed by God, and C.15 q.1. As for the summae, cf. Johannes
last quarter of the twelfth century to read it in the light of the procedural problems of insanity. Approached in this way, Nicholas’s response seems to problematize rather than solve: why should Wenilo have carried the burden of proving Herman’s sanity? This must have seemed somewhat contrary to common sense, or at least to expectations. In responding to this text, the Decretists began to craft the jurisprudence of proving insanity.

One of the first proposed solutions that emerged, likely in transmontane circles, was based on a well-known Roman principle of equity: “in doubtful matters, the more favorable interpretation should hold.” This has clear echoes with Dig. 50.17.56, “In doubtful matters, the more favorable should be preferred.” Since the more favorable solution would have been to hold Herman insane, and thus not culpable, the burden of proof rested with the archiepiscopal party, a burden it did not meet. Another gloss, most likely by Simon of Bisignano, raised the issue of whether C.3 q.9 c.14 laid down a rule that the sanity of the accused had to be proven in every case. Simon denied that this was necessary, claiming that it only was so in this case because Herman was known to be insane. Furthermore, the gloss goes on to instruct the student

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Faventinus, Summa Decretorum (Durham, Dean and Chapter Library, C.III.7), fol. 60r, C.3 q.9 c.14, and Stephen of Tournai, Summa Decretorum (Troyes, Bibliothèque municipale 640), fol. 54v, C.3 q.9 c.14.

93 Innsbruck, Universitätssbibliothek 90, fol. 102r: “in dubiis benignius interpretandum est.” Most of C.3 q.9 c.14 is missing from the manuscript, though the end, from “(eu)identer ostenderis” to the end, is extant. This is the only surviving gloss to the capitulum. On this manuscript, see Weigand, “The Transmontane Decretists,” History of Medieval Canon Law, 179, and Glossen zum Dekret, 776-778. The gloss appears, unsigned, in a layer including the fifth composition, which Weigand believed might have been connected with a Southern French school on the basis of the many Cardinalis and Rolandus glosses. The gloss is also witnessed in Durham, Dean and Chapter Library, C.1.7, fol. 94v, where it is incorporated into material drawn from the apparatus “Ordinaturus Magister.” See, Weigand, Glossen zum Dekret, 730-731.

94 “Semper in dubiis benigniora praeferenda sunt.” See also, Dig. 1.3.18, Dig. 28.4.3, Dig. 40.4.18.1, Dig. 50.17.155.2 and Dig. 50.17.192.1.

95 Zwettl, Stiftsbibliothek 31, fol. 92v, C.3 q.9 c.14 s.v. “ostenderis”: “Per quod uidetur quemlibet accusatorem idem debere in accusatione insere, quod non est eurum de isto. Enim constabat quod esset furious et ideo exprimendum erat esse sane.” Although this particular gloss is unsigned, the manuscript contains a large number of glosses that are signed by Simon, though often different from his Summa. Compare this with Simon’s treatment of the same question in his Summa, Pier V. Aimone, ed. (Fribourg 2007), http://www.unifr. ch/edc/summa_simonis_de.php, 1.152: “Ex hoc uolunt quidam colligere a quelibet accusatore idem esse exigendum ut hoc in accusatione teneatur inserere. Quod non credimus euenire. De isto constabat uel habeatur suspicio quod esset insanuset ideo
to “take from this that if someone says that he did something unknowingly, he is not compelled to prove his ignorance, but rather his adversary is compelled to prove that he knew, as it is said here, D.82 c.2 conversely, C.1 q.1 c.108, and usefully in extra. Ubi de illis.”

Let us take a closer look at this last point. The essential argument that the knowledge rather than ignorance must be proven may be rooted in the idea that a negative cannot be proven, an idea to which we will return. But looking at the texts cited by Simon, another justification emerges. For example, C.1 q.1 c.108, a canon of the council of Piacenza (1095), held by Urban II, declares ordinations received unknowingly from simonists to be valid, which is described as being done “mercifully”.

The notions of equity and mercy received careful distinction in the works of some jurists but were still closely related concepts.

Although the gloss calling for the “more favorable” solution was explicitly Roman in its outlook, the arguments advanced in both it and Simon’s gloss for Wenilo’s need to prove sanity point to a similar underlying rationale: in questions of sanity the milder presumption should hold.

While in this particular case that presumption lies in favor of insanity, one could easily imagine a situation in which the presumption in favor of sanity would be “benignior.” This is, however, only one of the reasons put forward by Simon. The other is based on the common knowledge, or as he would also call it in his Summa, the suspicion that Herman was already insane. In addition to notions of equity or mercy, the plain facts of the case argued against the assumption of sanity.

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96 Zwettl, Stiftsbibliothek 31, fol. 92v, C.3 q.9 c.14  s.v. “sane mentis”: “Hinc collige quod si quis dicit se aliquid ignoranter fecisse, non cogitur probare ignorantiam, sed aduersarius scisse probare eum ut hic dicitur. et s. d. lxxxi.ii c.ii [D.82 c.2] contra. s. c.i Q.i si quis simoniacis [C.1 q.1 c.108]. s utile in extra. ubi de illis.” I have not been able to identify this decretal. Again, compare this unsigned gloss to Simon’s Summa, 152: “Hinc collige quod si quis asserit se aliquid ignoranter fecisse non cogetur probare ignorantiam sed aduersarius debet scientiam probare, ut supra d.lxxxii. c.ii [D.82 c.2], C.i q.i. Si quis a simoniacis [C.1 q.1 c.108], C.ix. q.i. Ordinationes [C.9 q.1 c.5].”
97 C.1 q.1 c.108: “....talium ordinationes sustinemus misericorditer.”
The set of glosses preserved in Zwettl, Stiftsbibliothek 31 have been described by Weigand as “an unusual tradition in Bologna.” They contain an unusually large number of glosses belonging to Simon of Bisignano, whose reception below the Alps was sparse at best. Still, there seems to have been some connection: the first Bolognese interpretations of C.3 q.9 c.14 with regard to the burden of proving insanity come in the Apparatus “Ordinaturus Magister” which has been connected with the school of Huguccio. Along with questions of the culpability of the insane, the first recension of “Ordinaturus Magister” (ca. 1180) also raised the problem of proof, drawing closely on the interpretation given by Simon: “This argues that the adversary should be held to prove certain knowledge against the one alleging ignorance.” The gloss remained stable in the subsequent recension of the apparatus almost a decade later. Indeed, Huguccio made this analogy between proving insanity and proving ignorance in his *Summa* However, he added an additional argument based on Roman notions of proof: “And note that since it was known that this bishop was insane, the accuser should therefore prove that he now returned to sound mind when he committed such things. For he alleged a state of sound

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102 Lillienfeld, Stiftsbibliothek 222, fol. 100v, C.3 q.9 c.14 s.v. “ostenderis”: “Ar. quod contra allegente (sic!) ignorantiam, tenetur aduersarius probare scientiam certam. C. de episcopali aud. Si legibus [Cod. 1.4.16], S. di. lxxxii. Proposuisti, Plurimos [D.82 c.2,3], S. i. q.i. Si quis a simo [C.1 q.1 c.108], I xxxiiii. Q. vlt. Inlectum [C.34 q.1 and 2 c.6], I. viiii. Q.i. Ordinations [C.9 q.1 c.5].”
103 Cf. Jena, Thüringer Universität- und Landesbibliothek El. f.56, fol. 81r; Munich, Bayerische Staatsbibliothek Clm 10244, fol. 75v; and Munich, Bayerische Staatsbibliothek Clm 27337, fol. 70v.
104 Huguccio, *Summa decretorum* Admont, Stiftsbibliothek 7), fol. 184v, C.3 q.9 c.14, s.v. “nec ostenderis”: “Et est ar. quod adversarius tenetur probare scientiam contra allegantem ignorantiam uel necessariam. qui enim pretendit ignorantiam causam probare non tenetur. ar. C. de episcopali audit. Si legibus [Cod. 1.4.16], et di. lxxxii. Proposuisti. ar. contra. i. q.i Si quis a sim [C.1 q.1 c.108] ar contra. viiii.q.i. Ordinations [C.9 q.1 c.5], ar contra. xxxiiii. q.ii. In lectum [C.34 q.1,2 c.6]. sed hic plene inuenies distincta. di. lxxxii. Proposuisti.”
mind and therefore ought to prove it, for he who alleges must prove.”  

Although Huguccio did not cite it explicitly, his concluding maxim has close resonances with Dig. 22.3.2, that “proof is incumbent on the one who says something, not the one who denies.” Instead of basing his solution on what the more merciful or equitable interpretation would be, Huguccio tied the burden of proof to the procedural position of the parties. Since Wenilo made the accusation, and since the existence of madness was common knowledge, he must be the one to prove it.

At about the same time, ca. 1180, Roman law glossators began to turn their attention to the same issue. In the corpus of Roman law, the key text for understanding the burden of proving insanity became Cod. 6.36.5, an excerpt from a rescript of Diocletian and Maximian. The case involves a son who has challenged a codicil of his father on the grounds that he was not of sound mind when he had made it. After affirming that, like testaments, the insane cannot make codicils, the rescript requires the son to “prove your assertion that he was not of sound mind.” Although, unlike the canonistic focal text, this holds that the one alleging insanity must prove it, nevertheless the wording gave rise to questions for the early jurists. Why did the son have to prove that his father was not of sound mind? Did this not amount to proving a negative? The earliest glosses are simple references to other “leges” which either highlight the problem of proving a negative or which contain situations in which a denial must be proven. An Irnerian gloss explains that “there is a difference between one who denies a right and one who denies a

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106 Dig. 22.3.2: “Ei incumbit probatio qui dicit, non qui negat.”

107 Cod. 6.36.5: “Nec codicillos quidem furentem posse facere certissimi iuris est. Si igitur scriptura velut codicillorum patris tui fuit prolata, ut aliquid ex hac peti possit, adseverationi tuae mentis eum compotem fuisse negantis fidem adesse probari convenit.”

108 Eg. Vienna, ÖNB 2267, fol. 136v; Stuttgart, Württembergische Landesbibliothek 71, fol. 117v.
deed. Here he denied the right and therefore must prove it."\(^{109}\) This is clarified a bit by a gloss of Rogerius (d. c. 1170):\(^{110}\)

You certainly confess that the codicils were made, and on this point it seems you agree with the thought of your adversary. But you contend that they [the codicils] cannot be made by an insane person, and thus deny not that they were made, but the right [to make them]. The burden of proof is incumbent on the one denying a right.

Thus the early attempts to understand this text focused a distinction of what exactly the object of the negative was rather than on the condition of the person.

Johannes Bassianus in the 1180’s approached the text differently. According to Johannes, the denial that the father was of sound mind was not truly a negative. “This negative is held as an affirmative, and there is hardly any negative that does not have an equivalent affirmative.”\(^{111}\)

Rather than making a distinction, he has sidestepped the issue completely. The son did not have to prove that his father was not of sound mind, but that he was insane. Johannes’ answer achieved a quick and wide-ranging reception. For example, Hugolinus adopted Bassianus’ solution, adding “Therefore here, since the presumption is for the other party, it is presumed that he is of sound mind unless the contrary is proven. Furthermore note that one is presumed insane from his speech.”\(^{112}\) Because the son is making an assertion, and because the presumption lies in

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\(^{109}\) Vienna, ÖNB 2267, fol. 136v, Cod. 6.36.5: “Differentiam esse inter eum qui negat ius et eum qui negat factum. Hic uero negat ius et ideo probare debet. y.”

\(^{110}\) Tortosa, Archivio de la Catedral 36, fol. 136v, Cod. 6.36.5: “Fateris nempe codicillos factos esse, quo ipso de adversarii intencione uidetur constare. Sed ipsos utpote a furioso non iure factos contendis quo circa non factos sed ius inficiaris. Neganti autem ius probationis honus incumbit.” Here the gloss is included in an apparatus of Johannes Bassianus. The text is also present in Azo’s apparatus in Melk, Stiftsbibl. 73, fol. 111v, where the signature “R.” is appended.

\(^{111}\) Tortosa, Archivio de la Catedral 36, fol. 136r, Cod. 6.36.5: “S. de probat. si script. [Cod. 4.19.11], 1. actor [Cod. 4.19.23] contra. Sed hec negatio pro affirmationem habetur, vt hic ponit. Et uix tamen est aliqua negatiau que equipollentem non habeat affirmatiuam. Secundum io.”

\(^{112}\) Vienna, ÖNB 2268, fol. 167r, Cod. 6.36.5: “ff. de probat. si script. [Dig. 22.3.2] contra. h. ff. l.ii. Sup. qui testamentum. fa. non pos. l.ii [Cod. 6.22.9], contra. S. de probat. Actor [Cod. 4.19.23]. contra. Sed hec negatio pro affirmatione. habetur. vt hic aponit et uix tamen est aliqua negatiau que equipollentem non habeat. Secundum Io. Hic ideo quia est presumptio pro aduersa parte presumitur enim esse sane mentis nisi contrarium probetur. Item ex sermonibus eius
favor of sanity, he is the one who must prove his case. With the additions concerning the presumption of sanity and the signs through which it could be proven, Hugolinus transformed Cod. 6.36.5 into a ready reference point for the proof of insanity. Although Azo only used Bassianus’s gloss in his apparatus, Hugolinus’s addition would find a wide audience through the *Magna glossa* of Accursius.¹¹³

By the end of the twelfth century, particularly in its last decades, ideas about the proof of insanity began to emerge as original jurisprudential creations. Jurists of both branches had begun to stake out the boundaries of the issues, as we have seen above concerning signs. Whereas the civilians approached the question of who had to prove insanity by carefully parsing the nature of the claim, the canonists displayed a greater sensitivity to the consequences of the determination, as well as the particular circumstances that gave rise to the allegation. In this way, the canonists assumed a more pastoral approach to the problem. In a case like that of Herman of Nevers, where *fama* held that the person was insane, the burden of proof could shift in favor of insanity. For Huguccio though, an equally important factor was the procedural position that one assumed: the one making an allegation had to prove it. At this point in the history of the *ius commune*, the flow of ideas was often one way. Roman legal concepts exerted a powerful influence over developing canonistic doctrine, without much reciprocal borrowing. By the time education in both laws became common though, canonists, particularly Johannes Teutonicus, would have constructed a more unique system of proof.

The Lasting Effects of Madness: Johannes Teutonicus and Laurentius Hispanus

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¹¹³ Melk 73, fol. 111v, Cod. 6.36.5: “S. de probat. l. actor [Cod. 4.19.23] contra. ut hic ponitur et uix tamen est alique negatiaue que equipollentem non habeat affirmationem. Secundum Io. az.”; See also Accursius (Venice 1591), fol. 961r, Cod. 6.36.5 s.v. “probari .”
By the end of the twelfth century, the relative trickle of papal decretals finding their way into glosses, *summae*, and appendices to the Decretum became a veritable flood. A new generation of canonists approached these sources of living law armed with the tools provided by a thorough grounding in the tradition that had grown around the Decretum, as well as the ever-increasing incorporation of Roman law. What changes did the thinking on the burden of proving madness undergo in this intellectual environment?

Again, the key starting point is Innocent’s 1198 decretal, “Cum dilectus” (3 Comp. 3.20.1, X 3.27.3). Even moreso than his remarks regarding signs, Laurentius did not just make reference to Roman law, as previous canonists had done, but instead thoroughly suffused his gloss with it. Laurentius began by referring to Cod. 6.36.5 as it was understood by Azo, his master in Roman law. The bishop proves a negative, since he denies what Laurentius vividly called a “factum *pregnans*, that is, one containing another affirmative within.” It is interesting to note that the analogy with the ignorant, previously so prevalent in canonistic commentary, no longer appears following Laurentius, most likely on the basis of this Roman law incorporation.

In addition to the aspect of mercy, the prohibition on requiring the ignorant to prove their ignorance could also be understood as stemming from the inability to prove a negative, which, given his procedural focus, is likely how Huguccio understood the text. Gratian himself clearly drew on the resemblance between the insane and the ignorant in C.15 q.1, a connection also present in Roman law. Borrowing a concept from Abelard, many early Decretists defined

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115 Laurentius Hispanus, *Apparatus in Compilacionem tertiam*, 2.496, 3 Comp. 3.20.1, s.v. “non fuisset”: “Probuit ergo iste episcopus negatiuam quia negabat facto pregnans, id est in se includes aliud affirmatum, arg. C. de codicil. Ne codicillos [Cod. 6.36.5].”
116 See for instance the allegation of Cod. 4.19.23 in both his commentary and “Ordinaturus Magister”.
117 E.g. Dig. 24.2.4, Dig. 28.1.16.1, and Dig. 41.2.1.
insanity as a form of “ignorantia invincibilis.” On the other hand, if ignorance could not or should not be proven, and if insanity is a form of ignorance, or at least furnishes a state of ignorance, one could make the argument that sanity should be proven in every case, which Simon and Huguccio clearly did not wish to say. The analogy with ignorance could only be pushed so far; the civilian answer, by denying the presence of a negative altogether and interpreting the proof as one of positive status, was a much tidier solution.

The case of “Cum dilectus” was much more straightforward than that of C.3 q.9 c.14. The bishop alleged insanity and thus had to prove it. The second half of Laurentius’ gloss is the next step in establishing this need. He highlighted the presumption in favor of sanity by remarking: “if something is given to one as an arra (the surety given in a sale), it is presumed that he will treat it as he would his own property and manage it as any reasonable man would.” Laurentius drew again on Roman law, basing his example of the presumption of sanity on the technical concept of the arra. Since the allegation is truly an affirmative, and since the presumption lies in favor of sanity, Laurentius concluded that the one denying sanity must prove it.

Significantly, he did not deal with the possible exception posed by C.3 q.9 c.14. The reason, I believe, is that Laurentius sought to hold firmly to the presumption of sanity and found Roman law much less ambiguous than canonical jurisprudence. If we compare his gloss on the

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118 Kuttner, Kanonistische Schuldlehre, 138-151.
119 Laurentius Hispanus, Apparatus in Compilationem tertiam, 2.496, 3 Comp. 3.20.1, s.v. “non fuisset”: “Presumitur enim quod cuilibet donatum sit arra, ut de rebus suis disponat et faciat que discretus faceret. Vnde qui hoc negat probare debet; arg. ad hoc ff. de condic. instit. quidam [Dig. 28.7.27].”
matter in 3 Comp. 3.20.1 to his remarks in the *Glossa Palatina* on C.3 q.9 c.14, we find an argument that has undergone a definite transition.\(^{120}\)

It was known that this bishop was insane, and therefore what he did should not have been imputed to him. Hence whoever said that it should be imputed was held to prove that he was of sound mind when he committed [this crime], as argues C.15 q.1 c.5 and Dig. 1.18.14. Otherwise one who says that he is insane must prove it, as in extra. *Cum dilectus* and Cod. 6.36.5… “*ostenderis*”: This argues that the adversary is held to prove certain knowledge against the one alleging ignorance.

Laurentius drew on both “*Cum dilectus*” and Cod. 6.36.5, though not on Azo’s reading of the text. Still, the *Glossa Palatina* remains the first instance I have found wherein Cod. 6.36.5 is used to support the presumption of sanity. The analogy with ignorance is also present, along with the standard set of allegations. The *Apparatus in Compilationem tertiam*, which postdated the *Glossa Palatina*, shows then a definite turn away from the canonistic approach of the previous two decades towards a Roman understanding of the problem. Laurentius embraced not only Roman law texts, but also their interpretation through contemporary civilians. This solution, though radical, had a good deal of impact on subsequent jurisprudence, as we shall see. More immediately though, Vincentius Hispanus adopted the gloss almost verbatim.\(^{121}\) The difference between the *Glossa Palatina* and Laurentius’ gloss to “*Cum dilectus*” might be evidence that Laurentius did not compile the former, or it can indicate an expansion of his thought to embrace

\(^{120}\) *Glossa Palatina* (Durham, Dean and Chapter Library, C.III.8), fol. 61r, C.3 q.9 c.14: “*Constabat ergo istum episcopum furiosum esse, et i suo non imputaretur ei quid fecerat. Unde qui dicebat imputari debere probare tenebatur quod sane mentis erat cum commiserit. ar. xv.q.i Aliquos [C.15 q.1 c.5] ff. de officio pre. Diuus [Dig. 1.18.14]. Alias qui furiosum se dicere probare debet. extra. de succ. ab int. cum dilectus [3 Comp. 3.20.1 (=X 3.27.3)]. C. de coll. Nec codicillos [Cod. 6.36.5]…ostenderis. ar. quod contra allegantem ignorantiam teneri adversarius probare scientiam certam. C. de episcopali aui. Si. legibus [Cod. 1.4.16]. S. di. lxxxii. Proposuisti [D.82 c.2]. S. i. q.i si quis a synodo [C.1 q.1 c.108]. contra. I. xxxiii. q.vlt. In lectum [C.34 q.1&2 c.6]. contra. I. ix. q.i ordinations [C.9 q.1 c.5]. contra.” Although “*Cum dilectus*” is cited with its title, this does not mean that the composition of this gloss had to follow 1210, since the text already appeared in the same title in Alanus’ collection c.1203, as 3.12.1. Eg. Vercelli, Biblioteca Capitolare LXXXIX, fol. 91v-92v.

\(^{121}\) Vincentius appends a citation to “*Cum Marthe*” [3 Comp. 3.33.5 (=X 3.41.6)]. Eg. Graz, Universitätsbibliothek 138, fol. 175r-v. This inclusion is retained in his commentary on the Liber extra: see below n. 130.
both Roman sources and contemporary reflection on those sources. Whether Laurentius penned the *Glossa Palatina* or not, he still remains a central figure in the development of the jurisprudence of proof through his incorporation of Roman law.

Another contemporary of Laurentius would also advance from the Decretist position of the late twelfth century, albeit more in a manner of degree. Johannes Teutonicus, famed for his great encyclopedic gloss to the Decretum, was also an accomplished Decretalist, notwithstanding a collection that Innocent III refused to accept. While his apparatus to the Decretum was often cobbled together from the work of his predecessors, such as Laurentius, Huguccio, and Johannes Faventinus, his apparatus to the *Compilatio tertia* stands as a truly original and inventive piece of legal scholarship. Johannes Teutonicus’ gloss to 3 Comp. 3.20.1 is more deeply rooted in the Decretist tradition than that of Laurentius, though still groundbreaking in its own way.

Johannes opened with a statement of the usual presumption of sanity: “The burden of proof is incumbent more on the one who says that someone did something during [a period of] insanity rather than sanity, Cod. 6.36.5.” Like Laurentius, he also dropped the argument from ignorance and relied instead on Roman law, though without explicitly citing the text’s jurisprudential trappings. After establishing this presumption though, Johannes moved on to the elephant in the room that Laurentius ignored: “C.3 q.9 c.14 argues the contrary. But there because the bishop [actually the archbishop] confessed that he [Herman] was ‘prius’ insane.”

His handling of this text is very close to Huguccio’s, with the conspicuous addition of the word

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122 See Chapter 1. The evidence for Laurentius’ authorship is compelling, but not definitive.
125 Johannes Teutonicus, *Apparatus in compilationem tertiam*, 3 Comp. 3.20.1 s.v. “conpotem”: “Qui ergo dicit in furore aliquem aliquid fecisse, potius illi incumbit probatio quam ei qui dicit ipsum in sanitate hoc fecisse, et C. de codicill. Nec codicillos [Cod. 6.36.5]. ff. de condit. instit. Quidam [Dig. 28.7.27].”
126 Ibid., “Arg. contra iii q.viii Indicas [C.3 q.9 c.14], set illud ideo quia episcopus fatebatur eum priusuisse furiosum. jo.”
“prius.” I have left the word untranslated for the time being because its precise meaning has important implications for change of presumption. “Prius” could mean “first” in a more specific sense, that Herman was alleged to have been insane before the trial when he had committed his misdeeds. It could also mean “previously” in a more general sense, that he was considered insane at some point in the past. This is not a trivial point but rather the difference between holding that an attested state of insanity only at the time of the alleged act is sufficient to shift the burden, or whether evidence of any prior bout is sufficient. It seems that this latter, more generous scope of evidence is what Johannes had in mind. For one, his formulation of the knowledge of Herman’s prior madness differs tellingly from those of Huguccio and Simon. Whereas the latter held that that “it was known,” Johannes imagined that “the bishop [archbishop] had confessed” it. Surely the archbishop would not have so undermined his case by claiming that Herman was insane around the time when he had committed his alleged crimes! Further support comes from his gloss to C.3 q.9 c.14. Unlike many glosses that were composed from the works of earlier Decretists, much in this gloss is original to Johannes. Remarking on the need to prove sanity he wrote: “The archbishop rightly says that he was at some time insane. But he still says that he is recently sane, and that he killed someone in his sanity, otherwise he who says that someone had sinned while insane is more bound to prove it, as in 3 Comp. 3.20.1 and Cod. 6.36.5.” The use of “quandoque” in the Glossa ordinaria resolves any doubt as to the meaning of “prius” in the

127 Johannes Teutonicus, Apparatus glossarum (Admont, Stiftsbibliothek 35), fol. 129r, C.3 q.9 c.14 s.v.
“ostenderis”: “Archiepiscopus bene fatebatur quod quandoque fuerit furiosus. Sed tamen dixit eum modo esse sanum et in sanitate occidisse hominem. Alius tenetur ille potius probare qui dicit aliquem in furore peccasse, ut extra. De suc. ab intes. Cum dilectus. R. iii [(3 Comp. 3.20.1 (=X 3.27.3)]. Et C. de codill. Non codicillos [Cod. 6.36.5].” The gloss printed in the Editio Romana of 1582 remained the same. The transformation of Herman from a bishop who could not fulfill his duties to a murderer seems to have come by reading the unspecified charges in light of Causa 15. The first work I have seen to make this connection is the Summa ‘Elegantius in iure divino’ seu Coloniensis, ed. Gérard Fransen and Stephan Kuttner, Monumenta Iuris Canonici Series A.1 (Vatican City: Biblioteca Apostolica Vaticana, 1969) 1.191.
gloss to 3 Comp. 3.20.1. The addition of the word serves a specific purpose, namely a broad use of any evidence of prior insanity as grounds for shifting the burden of proof.

What is less certain though is the relationship between Johannes Teutonicus and the earlier formulations. Does the addition of “ prius” substantially change what Simon and Huguccio had already said? Did Johannes make this addition in order to alter what had already been said, or to clarify it? These are difficult questions to answer on the basis of the texts we have. At the very least, we can discern at least one definite shift at work in the thought of Johannes Teutonicus. Huguccio especially had framed the issue in terms of procedural position: the one making the allegation had to prove it, whether it was in favor of sanity or against it. Johannes on the other hand is much more sensitive to the content of the allegation: what matters is where the presumption lies. One could imagine a circumstance in which insanity was alleged, yet on the basis of prior madness the adversary had to prove his counterclaim of sanity. It also remains to be seen how later jurists understood Johannes. Tancred, whose gloss to the Compilatio tertia would become the ordinary gloss, condensed the comments of Laurentius and Johannes Teutonicus into his own. On the one hand he cited Cod. 6.36.5 along with the interpretation of Azo, while on the other he dealt with the exception raised by C.3 q.9 c.14: 128

The bishop has therefore proven a negative since he denies a “ pregnant” fact. Here a negative included another affirmative that had to be proven by the one denying. Thus Cod. 6.36.5, Dig. 28.7.27, Dig. 22.3.8, and 2 Comp. 1.5.3. But against this is C.3 q.9 c.14. But there the bishop was bound to prove that he was of sound mind since it was known that he was previously insane.

128 Tancred, Apparatus in Compliationem tertiam (Città del Vaticano, BAV Vat. lat. 1377), 176, 3 Comp. 3.20.1, s.v. “ non fuisse”: “ Probauit ergo iste episcopus istam negatium quia negabat factum pregnans et hic negatium includebat aliam affirmatium que probari per negantem debebat. sic C. de codicillis. Nec codicillos [Cod. 6.36.5] ff. de conditionibus institutionum. Quidam [Dig. 28.7.27]. ff. de probationibus si filius [Dig. 22.3.8] supra de renunciation. Super hoc. liber ii [2Comp. 1.5.3]. sed contra supra iii Q. viii. Indicas [C.3 q.9 c.14]. Sed ibi episcopus tenebatur probare illud fuisse sane mentis quia constabat illum prius furiosum fuisse. t.”
Although Tancred molded the text along the lines of Huguccio, using “constabat” rather than “fatebatur,” he did nevertheless include “prius” which indicates some borrowing from Johannes. Through Tancred, this addition would have a wide impact. When Vincentius Hispanus later returned to the text in his commentary to the Liber extra, he added Tancred’s last sentence to his pre-existing gloss. Bernardus Parmensis would repeat Tancred verbatim in the ordinary gloss to the Liber extra, as would Hostiensis in his Lectura. Bernardus de Monte Mirato, the “Abbas Antiquus,” writing around the same time as Hostiensis, would model his remarks more closely to Johannes Teutonicus though. “Note that the one who says that someone is insane is bound to prove it, and this is true where he was previously of sound mind in public. Otherwise, if he were publicly insane, he is always presumed to be insane unless he is proven to be of sound mind, C.3 q.9 c.14.” Bernardus not only endorsed Johannes’ method of creating a presumption against sanity, but was also much more explicit about the basis for prior insanity. Although he did not name it, the insistence on the publicity of sanity or insanity shows his reliance on the idea of *fama* as a tool for creating presumption, a tool that in the next century would come under increasing scrutiny.

_Dinus and Lasting Madness_

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129 Vincentius Hispanus, _Apparatus ad Decretaes Gregorii IX_ (Paris, Bibliothèque nationale lat. 3967), fol. 139r, X 3.27.3 s.v. “non fuisse”: “Probabit ergo iste episcopus negatium quia negandi factum in se includit aliu affirmatum. ar. C. de codiciliis. Nec codicillos [Cod. 6.36.5]. Presumitur enim quod cuilibet a natura tributum sit ut de rebus suis disponit et faciat sicut discribitus faceret. Vnde qui hoc negat probare debet. ar. ad hoc ff. de condit. inst. quidam [Dig. 28.7.27] et infra de celebration missarum, Cum marthe. ver. Nouissimum [X 3.41.6] et ff. de probat. Si filius [Dig. 22.3.8] supra de renun. super hoc [X 1.9.5]. Sed contra iii. q. ix. Indicas. [C.3 q.9 c.14] sed ibi episcopus tenebatur illum fuisse sane mentis quia constabat illum prius furiosum fuisse. t et vinc.”

130 See _Liber extra_ (Rome 1582), col. 1198, X 3.27.3 s.v. “compotem”, where Bernardus Parmensis directly adopts the gloss of Tancred; cf. Hostiensis, _Apparatus super quinque libris Decretalium_ (Strassburg 1512), fol. 2.94v-95r.

131 Bernardus de Monte Mirato [Abbas Antiquus], _Lectura aurea super quinque libris Decretalium_ (Strassbourg 1510), fol. 165, X 3.27.3: “Nota quod qui dicit aliquem furiosum, hoc ipsum probare tenetur, et hoc est verum ubi ante publice fuerat sane mentis. Alias si publice fuerit furiosus, semper presumitur furiosus, nisi probetur sane mentis, iii. q. ix. Audita (recte Indicas) [C.3 q.9 c.14].”
Thus Johannes Teutonicus argued clearly that a prior history of insanity shifted the burden of proof in its favor, a way of thinking that had a wide readership through the ordinary gloss and definite reception by at least some, as evidenced by Bernardus of Monte Mirato. Not until the early fourteenth century though would his formulation receive its strongest intellectual support in a work indicative of the growing interaction between the two laws. One of the more interesting parts of Boniface VIII’s 1298 Liber Sextus is the compilation of 88 legal maxims under the title “De regulis iuris” that concludes the collection. Sometime before his death in 1303, Dinus de Mugello wrote what would stand as the authoritative commentary on these maxims, though, as Johannes Andreae would wryly remark, “it was known that he was no canonist.” Commenting on the rule “semel malus semper presumitur malus,” Dinus provided a strong theoretical foundation for the continual presence of insanity, though he never explicitly mentioned insanity. Still, this lack of focus on insanity exists only on the surface; many of the texts cited as “allegations” for crucial points in the argument were traditional citations dealing with insanity.

According to Dinus, the presumption that one is good is a presumption not only of the law, but of nature as well, a designation that the civilian jurist Odofredus had already applied to the presumption of sanity. This presumption is destroyed by a wicked act, and a new presumption is thereby crafted. He found support in Dig. 48.2.7.2, which holds that a person who brings a false charge against someone once should be heard less readily the second time. The

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132 Johannes Andreae, Novella in Sextum (Basel 1500), fol. 178r, VI 5.13.1: “Sciendum est quod Dynus non fuit canonista.” In Lange and Krichbaum, Römisches Recht, 455. The speed and skill with which Dinus composed his commentary have led some to believe that Dinus had a hand in composing the “De regulis iuris.” Lange and Krichbaum question this on the basis of his absence from the list of compilers recognized by Boniface: Lange and Krichbaum, Römisches Recht im Mittelalter, 447.

133 VI 5.17.8.

134 Odofredus, Lectura super secunda parte Codicis (Lyon 1552), fol. 63r: “Tamen si negas patem tuum sane mentis fuisse, natura contra te facit, quia a natura quilibet presumitur sane mentis.”
natural presumption is transferred by what he termed accidents of nature, which “remove the contrary effect of the presumption of nature.”\textsuperscript{135} His basic rationale for supporting this was that the function of nature is operative when there is no firmer truth to the contrary, “since anything is judged true from its present state or presumed from what is present or past.” Dinus concluded by opposing the lack of perseverance of possession with the perseverance of wickedness. Possession, though it involves a will to possess, does not inhere in the mind in the same way as a vice does; it is still somewhat dependent on outside objects. Possession can be taken away without the knowledge of the possessor, but “a vice of the mind cannot be taken away without leaving behind corruption of the mind.”\textsuperscript{136} This is the ultimate reason why the wicked are presumed to be wicked. Although Dinus did not explicitly refer to insanity, he nevertheless drew on a number of texts frequently cited to discuss insanity, a feature of the argument especially tantalizing for our purposes here. For example, to show that a vice inheres in the mind he used Dig. 21.1.1, a commentary on the Aedile’s Edict, in which a number of actionable mental defects in slaves are listed, a text that would become a frequent citation for the \textit{signa furoris}. That the state of a person’s mind must be presumed through external acts, a critical point for why one act should carry such consequences for interpreting future acts, was bolstered by Dig. 28.7.27 and Dig. 26.5.12, the two texts most frequently cited to support the role of speech in proving insanity. Indeed, Dinus’s statement closely resembles Accursius’s rationale for the \textit{signa furoris}. Without explicitly arguing for it, Dinus provided the strongest theoretical support for the idea formulated by Johannes Teutonicus.

\textsuperscript{135} Dinus de Mugello, \textit{De regulis iuris} (Venice 1495), fol. 6r, reg. 8 “Semel malus”: “Sed dic quod accidens nature contrarium remouet effectum presumptionis naturae.”

\textsuperscript{136} Ibid., fol. 6v. “Vitium autem animi auferri non potest per alium sine corruption animi delinquentis.”
If any ambiguity existed after Johannes, it did so no longer after Dinus. Paulus de Liazariis, for example, explicitly invoked this argument in his own treatment of the burden of proof.\textsuperscript{137} By the fourteenth century, the idea about the presumption of sanity given concrete form by Johannes Teutonicus came to be widely recognized. Albericus de Rosate, a student of both laws, incorporated it into his commentary on the Codex.\textsuperscript{138} Briefly stated, a single instance of insanity, if properly witnessed and supported, would be sufficient to shift the burden of proof, even if it occurred at some remove from the events that gave rise to the litigation. The ascendancy of this viewpoint would not continue unchecked however. The fourteenth century saw a heightened interest in practical jurisprudence led foremost by Bartolus of Saxoferrato.

**The Fact of Madness: Bartolus and his Discontents**

A prolific and insightful jurist, Bartolus de Saxoferrato wrote extensively on the problems posed by madness, particularly those dealing with its proof. His treatment of the issue further showcases his grounding in a practical approach to jurisprudence. Insanity, he claimed, “consists more in fact than in law.”\textsuperscript{139} With regards to the presumption of sanity or insanity, Bartolus took a highly critical approach. The understanding of the denial of sanity as containing an implicit affirmative, standard since Johannes Bassianus in Roman law and Laurentius


\textsuperscript{138} Albericus de Rosate, *Commentaria in secundam Codicis partem* (Venice 1585), fol. 68v, Cod. 6.36.5: “Et si iste aliquando fuisset furiosus, incumberet probatio ei qui diceret eum sane mentis.”

\textsuperscript{139} Bartolus de Saxoferrato, *Commentaria in primam Infortiati partem* (Basel 1562), p. 394, Dig. 28.7.27: “Quaero, quomodo potest ista sucipio submoueri et probari quod sit sanae mentis, ut ex his verbis non praesumatur furiosus? Resp. Hoc magis consistit in facto, quam in iure, quia erat iocularis, qui causa ludendi talia testamenta faciebat, uel faciebat causa humanitatis, et reductus est ad magna contritionem, et suum corpus despiciebat.” The origins of the phrase lie in the jurisprudence surrounding the nature of the interdict applied to both the insane and spendthrifts. While the latter are forbidden from conducting any business only after the imposition of a legal order, the insane are so forbidden from the onset of their condition. See Accursius to Dig. 27.10.1 s.v. *lege* (Lyon 1627), col. 368.
Hispanus in canon, Bartolus dismissed as a “trifle.”¹⁴⁰ The second and more serious object of his criticism was the ease with which the presumption was shifted in favor of insanity.

Bartolus attacked the reigning idea at its strongest point, Dinus’ explanation of “semel malus semper presumitur malus.” Recall that Dinus described the intervening quality as an accident which is presumed to be operative once present. Bartolus seized on the “accidental” nature to argue against its permanence in a commentary on proving the presence of any disability. Just because the signs of madness, blindness, or deafness are displayed once does not mean that they continue. “Although it was true that a person was once deaf, insane, or the like, does this suffice [as proof now]? Certainly not.” It might be the case, he went on to write, “that because of some accident he was blind, mute, or deaf yesterday, but not so today.”¹⁴¹ Ultimately Bartolus conceived of the shift on the basis of one prior instance to be an unacceptable legal fiction, one that was not probable enough to warrant its acceptance. This is not to say that the presumption could not be changed. For instance, Bartolus cited Dig. 28.7.27 as a possible objection. The text concerns a man who is granted a legacy from a will on the condition that he cast the testator’s remains into the sea. The question arose whether the man could still acquire the legacy without carrying out this outrageous demand. The classic Roman jurist Modestinus responded that he could, though only after an investigation of whether the testator was of sound mind or not when he made the will. The presumption seems to lie in favor of insanity in this case. Bartolus used this example to shift the focus away from consideration of prior insanity toward what can be gathered about the state of one’s mind at the time of the act in question. In this example, it would

¹⁴⁰ Bartolus de Saxoferrato, *Commentaria in secundam Codicis partem* (Basel 1562), p. 605, Cod. 6.36.6: “Ista est una truffa. Ideo non curo utrum in oratione sit negatio uel non, sed solum utrum oratio significet priuationem uel positionem.”

seem that the person was insane from the very words of the will; this is the reason for the presumption. For a previous bout of madness to be effective in moving the presumption, it had to occur “at a certain time [i.e. the time of the act in question] or for certain months.” Only a long period of insanity was sufficient to allow one to presume its continued existence. We can see this at work in the *Tractatus de testibus*, which contains Bartolus’ longest sustained reflection on the nature of insanity in law. He posed the question of whether it is sufficient for a witness hoping to prove insanity to say that he saw someone “in prison or held bound as an insane person.” He responded that it is not, unless the witness should also testify that he saw the alleged madman raving. Here is an application of the principle. Even if we were to assume that the alleged madman was bound with good reason, this instance of insanity would not be enough to create a presumption. Only with evidence of subsequent insanity could he be presumed to be insane to this day.

One important consequence of Bartolus’ criticism was, as we have seen, an increased emphasis on the quality of the act in question, a position taken up by his student Baldus de Ubaldis. Posing the question of how to determine whether a will was made by someone of sound mind or not, Baldus wrote:

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142 Ibid., “Videte, l. Quidam. sup. de cond. inst [Dig. 28.7.27] uidetur dicere quod sufficit semel quem fiuise furiosum, uel surdum, uel mutum, ut indicetur in posterum furiosus, uel similis. In contrarium facit ratio precedens, quia potuit hoc contigere propter aliquod accidens. l. Nutu, in principio s. de leg. Iii [Dig. 32.1.21]. Et hoc puto uerum. Non ob. praeallegata l. Quidam, quia sufficiebat probare fuorem temper testament, quia illo tempore fuerunt uerba illa prolata, nimirum si ibi sufficit et merito sic iudicatur. Sed in questione proposita non sufficit probare quem fiuise semel mutum, surdum, uel caecum, uel furiosum, quia debet probare aliquot certo tempore, uel mensibus sic fiuise. l. Pretia rerum, in fine. s. ad l. Falc. [Dig. 35.2.63]. Tunc enim praesumitur quod modo sic esset, nisi probetur contrarium. l.i. s. de cur. furio [Dig. 27.10.1].”

143 Lepsius, *Der Richter und Die Zeugen*, 300.

144 Baldus de Ubaldis, *Commentaria in sextum Codicis librum* (Lyon 1585), fol. 62v, Cod. 6.22.9v: “Quaero, quid si non apparat quo tempore fecerit, an tempore furoris, an in dilucidis intervallis? Respondeo aut tempus testamenti erat vicinum tempore furoris, aut erat ab eo tempore multum remotum. Primo casu refert an qualitas ipsius dispositionis arguit magis ad partem sani consilii, ut quia est cuilibet sanae mentis legitima ordinatio testamenti quod etiam ex ipsius serie testamantet luculenter apparat, ut quia continetur ibi institutio filiorum, legata pro anima, et
It matters if the quality of the disposition argues for sound counsel, in such a way that the legitimate ordination of a testament argues more for him being of sound mind, because it appears lucid even from the sequencing of the testament, as it contains the institution of sons, legacies for one’s soul, and things of this kind. Then one is to be presumed to be of sound mind from the quality of the act; or the contrary, and then the contrary is presumed.

Judging the quality of the act in question was the surest way of establishing a presumption of sanity. This is not to say that a disordered testament or one which contained provisions contrary to acceptable practice would necessarily have been judged the work of a madman. Instead it would give rise to a presumption, which would then have to be overcome by evidence arguing against it.

Nevertheless, one cannot attack a way of thinking that had reigned for decades without encountering resistance. It is not surprising that canonists in particular did not rush to incorporate Bartolus’ theory, since the previous formulation was built up by canonists using canonical texts. Franciscus Zabarella and Petrus de Ancharano, two notable canonists of the later fourteenth century, continued to advocate the idea that once one is insane, he is presumed to continue to be so. Both fashioned their arguments according to Dinus, reclaiming the argument that Bartolus had implicitly rejected.145 Beyond such restatements, other jurists responded to Bartolus with new arguments.

Baldus’ student, Paulus di Castro, offered a creative response to the problem. He acknowledged Bartolus’ point about the need for a more conclusive form of proof.146 On the
other hand, Paulus specified insanity as special kind of condition, “one that does not vary from time,” such as age, nor is it one that is easily changed, like possession. Insanity endures according to a common saying, “once one begins to be a fool, he is never freed from it.” In the most innovative part of his argument, Paulus made the connection to volition. “I say therefore that this quality, which is proved to be present once, is presumed to persevere unless the contrary is proven, just as one is presumed to persevere in the same will.” He drew on the idea of the enduring will, an idea found in both Roman and canon law, and one which had long been used as a way of granting some form of volition to the insane. Even though the will can be changed, it is still presumed to endure until the contrary is proven.

Perhaps the more serious objection to the focus of Bartolus and Baldus on the quality of the act came from Nicholas de Tudeschis, the famed Abbas Panormitanus. Devastatingly simple, his criticism did not serve to chart a way forward but to complicate matters as they stood.

furiouș? Non tamen aliquid probatur de tempore testamenti, adhuc Bartolus, in l. i vel ii infra de bo. pos. infan. vel fur. etc. [Dig. 37.2.3]. Videtur idem dicere, quod non sufficiat quia possibile est, quod tempore testamenti furor non durabit. In contrarium facit, quia ista non est qualitas que variet ex varietate temporis, eorum quo variatur etas in qua bene est verum illud, quia non sequitur semel fuit minor ergo nunc est. ut l. Spadonem §. Qui absolutus. de excu. tu. [Dig. 27.1.15.13].”

147 Ibid. “Nec est qualitasquae de facili immutetur eo modo quo immutatur possessio, quae de facili perditur. Unde non sequitur, talis semel possedit, ergo nunc possidet, iuxta no. in l. Sive possidetis. C. de prob [Cod. 4.19.16] in l. Cum ignorat C. ad exhi. per Cino [Cod. 1.18.2]. Imo solet durare, quia communiter dicitur quod qui semel incipit fatuizare, numquamliberatur, dico ergo quod dicta qualitas, quae semel probatur affuisse, presumitur perserverare, nisi probetur contrarium, sicut presumitur quis perservere in eadem voluntate, ut in l. Lucius la.i.i. de leg. ii. [Dig. 31.1.22]. Licet voluntas facilius varietur vel nisi probetur quod habebat dilucida intervalla, quia tunc testamentum praesumeretur potius factum in dilucido intervallo, quam tempore furoris, ar. supraeadem l. in adversa. C. qui test. fa. pos. l. Furiosum [Cod. 6.22.9].” Dinus used the analogies of the changes in age or possession in his commentary on “Semel malus.”

148 Ibid.

149 See, for example, X 3.42.3, wherein Innocent III allowed the baptism of the insane provided that they had expressed a previous will to be baptized before the onset of their condition. For the presumption of the enduring will in Roman law, see Dig. 22.3.22, Dig. 41.2.27, and Dig. 41.3.4.3. Dig. 1.6.8 contains a curious description of the “quasi voluntatis reliquis in furiosis manentibus” in an effort to describe the retention of patriapotestas when both parents are insane at the time of conception.

150 Nicholas de Tudeschis [Panormitanus], Commentaria super libris Decretalium (Venice 1588), fol. 248v, X 3.31.15: “Nota secundo quod furiosus non potest aliquo casu se obligare etiam Deo, cum nihil sentiat. Et sic nota quod etiam bene faciendo, non praesumitur, quod furiosus sane sit mentis. Ex quo infero, quod licet furiosus faciat testamentum tanquam quilibet mentis compos, non per hoc valebit testamentum. Idem videtur, si darem omnia bona sua pro anima, facit c. finali de success. ab inte. [X 3.27.3].”
Note that an insane person cannot obligate himself in any case, even to God, since he has no sense. And thus note that even in doing good, an insane person is not presumed to be of sound mind. From this I infer that although an insane person may make a testament as anyone of sound mind [would], the testament will not be valid because of this. It seems to be the same if he should give all of his goods for the sake of his soul. This agrees with “Cum dilectus.”

Panormitanus’ objection is almost obvious. Two of the four main decretals from the Liber extra dealing with insanity treat disputed monastic professions. What prudent man would not look to the good of his soul, a point already raised by Baldus? To return to Bartolus’ emphasis on insanity as a matter of fact, it does not matter whether the act meets with approval or not. According to Dig. 50.17.5, the insane are prohibited from conducting any business, not just mishandled business. While the quality of the act may be a good indicator, it was still seen as a not altogether reliable basis for building a presumption.

*Consilium and Conclusion*

By the fifteenth century, after almost 300 years of grappling with the problem of how to prove insanity, the jurists of the *ius commune* were no closer to solving it. Along the way, their ideas tested the boundaries of acceptable presumptions and legal fictions, allowed for the interpenetration of Roman and canonical ideas, and gave shape to a system, however flawed, that had important consequences for the identification of insanity in law. Let us close then with a brief look at a *consilium* that shows this system in action.

The *consilium* comes from the collection of Franciscus Zabarella and concerns the case of a certain Niccolò da Treviso dating from the mid-1390’s.\(^{151}\) Shortly before his death, Niccolò

\(^{151}\) Franciscus Zabarella, *Consilia* (Lycon 1552), fol. 29r-30r, con.56. In his commentary to Clem. 5.4.1, Zabarella referred to the *consilium* and his work with Petrus de Ancharano on the case; see (Venice 1497) 176v. The loan that gave rise to the suit was contracted late in 1392. Given that Petrus de Ancharano was teaching in Bologna by 1395, we can assume that Niccolò died and the suit arose sometime between these years. At the time, Zabarella was teaching in Padua, not very far away. See the entries for these jurists in the ‘Biobibliographical Guide to Medieval Canonists’ online at http://faculty.cua.edu/pennington/1298a-z.htm. We learn from the *consilium* of Petrus that the executor of Niccolò’s will was a certain Roberto Morosini, a member of one of Venice’s oldest and most powerful
contracted a loan of 2000 ducats from his mother Caterina. Upon his death, she sought repayment of the loan from the inheritance received by her grandson. Niccolò’s son, however, claimed that his father was insane when he contracted the loan and that it was thus invalid.\footnote{It seems that Niccolò’s son was also objecting to an instrument in which his father forswore an “actio non numeratae pecuniae,” an exception available to a debtor who claimed that he had never received the money in the first place.}

Writing his \textit{consilium} most likely on behalf of Caterina, Zabarella concluded that Niccolò was sane when he contracted the debt and had acknowledged that he had received the money. In arguments for Niccolò’s son a number of witnesses had come forward stating that Niccolò was continuously out of his mind for years, dating back to “a war with the King of Hungary,” most likely the War of the Chioggia (1379-1381). We can even glean from the information provided in the \textit{consilium} that at some time, Niccolò’s wife had secured payment “\textit{in alimentis},” to be granted to her, likely from her dowry. In spite of Zabarella’s ultimate conclusion, the evidence would seem to establish a clear presumption of insanity.

Zabarella argued, however, that the witnesses stated both that Niccolò was continually insane and that he had some lucid intervals. This would have been the first stage in attacking the presumption. Those witnesses deposing continual insanity may not have been present for a lucid interval. Here we see Zabarella the lawyer at work, contradicting what he would later hold in his commentary to Clem. 5.4.1. “Since his insanity was not continuous it is not presumed to last, and the gloss to X 3.27.3 that has been cited has no place. Bartolus says this explicitly.”\footnote{Franciscus Zabarella, \textit{Consilia} (Lyon, 1552), fol. 29v, con.56: “Sufficit autem ad validitatem contractus quod potuit esse tune sane mentis, quia ex quo non erat furor continuus, non presumitur durare, et locum non habet glossa praeallegata in capitulo Cum dilectus. de successione ab intestate [X 3.27.3], quod tenet Bartolus expresse in dicto capitulo, opposita prudentie [“Tractatus de testibus” n. 93, in Lepsius, \textit{Der Richter und die Zeugen}, 299-304].”}

\textit{Tractatus testibus}. In that treatise, Bartolus asked whether the insanity could be presumed to
endure. In answering the question, he advised attention to the cause of madness; if it arose from a fever or some clearly temporary cause, one could not assume the continuation of the effect.\textsuperscript{154}

We can see how much caution is needed in determining the true beliefs of jurists. Although unwilling to make mention of it in his commentary, Zabarella was more than happy to use Bartolus’ skepticism in order to deny a presumption of sanity, even when the alleged madman had at least a decade-long struggle with mental illness.

In addition to attacking the presumption of insanity, Zabarella also tried to build a presumption of sanity. He referred to four documents drafted in 1392, the very year the debt was contracted. The first was a sentence handed down by a Venetian judge on September 2, reversing the order to support Niccolò’s wife on the grounds that he was now of sound mind. The second was a joint contract for the sale of some lumber made on February 23. Another was an unspecified instrument between Niccolò and Caterina on May 2. These latter two were both soundly ordered and contained nothing that would seem to indicate an unsound mind. Finally, Zabarella put forward the debt contract itself. In it, Niccolò claimed to obligate himself freely and with full knowledge of what he was doing. Given that the previous documents argue for a presumption of sanity, and that the notary should be presumed to have done his job well, Niccolò should be presumed to have been sane when he entered into the loan.

By the fifteenth century, after years of explanation, interpretation, and disagreement, the “apparatus” of proving insanity, which rested to a large extent on the manipulation of the burden of proof, had reached its final form. Despite the different theoretical approaches to the problem, the result was not the establishment of distinct camps of thought, as one might gather from the

\textsuperscript{154} Bartolus, “Tractatus de testibus,” 300-301: “Puto ergo aduertendum, si ex alia causa furor obuenerit, puta ex febre frenetica factus uel ex potu nimio ebriosus, tunc enim continuatum f urorem nequaquam presumam, ut Ulpianus ad edictum edilium scribit [Dig. 21.1.4.1] Sed si hec cause extrinsece non appareant, uidetur quod qui semel fuit furiosus etiam hodie presumatur, nisi alii doceatur.”
commentaries alone, but rather a continuum of methods. The apparatus could more accurately be
called a toolkit; the focus on past history or the current act would be dictated by the demands of
the case, and perhaps more importantly, the demands of the client. The jurists, without clear or
consistent past examples, constructed an approach from the auctoritates of the libri legales while
maintaining a balance between the demands of what could practicably be achieved and what
seemed best to capture the truth of the circumstances.

Witnesses

When considering proof in the courts of the medieval continent, both ecclesiastical and
secular, it is crucial to remember that the evidence, arguments, and rules are all intended to
transform the allegation from a doubt to a certainty in the mind of the judge, who both
determined the facts and pronounced sentence.\footnote{Levy, La hiérarchie des preuves, 28; Massimo Vallerani, Medieval Public Justice, Studies in Medieval and Early Modern Canon Law 9, trans. Sarah Rubin Blanshei (Washington, D.C.: The Catholic University of America Press, 2012), 16. Vallerani moves away from a dogmatic view of the hierarchy of proof. From this point of view, the idea of a hierarchy of proof is authoritative, but it is an authority meant to support, rather than dictate the judge’s decision.} This sentence had great power. Although
appeals were possible and even problematic in their frequency, the res iudicata, the judgment
properly reached by the judge, had the probatory value of a determined and unassailable fact.\footnote{Levy, La hiérarchie des preuves, 39-40, 61-62. In the late twelfth and early thirteenth century, canonists in particular came to distinguish the category of “notorium iuris,” that is things that came to be notorious through the operation of the law. This category included valid confessions and judgments.} In the particular example of insanity, prior determinations of insanity for whatever reason, such
as the granting of a curator or a wife’s request for access to her dowry while her husband is
insane, would stand as firm proof of madness.\footnote{Eg. Franciscus Zabarella, Consilia (Lyon 1552), fol. 30r, n.56.} As the jurisprudence had developed by the
thirteenth century, a prior determination of this kind would have defined the burden of proof in
any subsequent case: the party alleging sanity would have to provide evidence. As Philippus
Decius noted in a consilium: “Further, it happened that a guardian was given to him as a mentally
incapacitated person, from which it is argued that he was mentally incapacitated this is presumed
from the decree of the judge."¹⁵⁸

Many jurists, aware of both the importance of reaching a determination of insanity as
well as the difficulty in doing so, cautioned judges to take particular care when the case of an
alleged madman came before them. Odofredus brought this concern to life for his students in the
characteristically dramatic retellings of the *casus* of Dig. 27.10.6¹⁵⁹ and Dig. 26.5.12.¹⁶⁰ In the
first instance, Odofredus tells the story of two men coming before the praetor, the first claiming
that the praetor should grant a guardian for an alleged madman. A second man approaches urging
caution: although the alleged madman is “not the wisest man under the sun,” still he is only
feigning insanity in order to avoid fulfilling his civic duties. Who should the praetor believe?
Odofredus responded that the judge had to make a careful inquiry of his own into the matter.¹⁶¹
In a second example, we can see the level of judicial involvement that Odofredus urged. He
posed the case of a mother coming before a judge seeking a guardian for her foolish and prodigal
son.¹⁶² The son claims that he is “wiser than anyone in the world,” but the mother, in apparent
exasperation, begs the judge, “for God’s sake, give him a guardian!” The judge calls for the son

¹⁵⁸ Philippus Decius, *Consilia* (Venice, 1570), fol. 97v, con. 76: “Et ulterius etiam accedit, quod fuerit sibi datus
curator tanquam mentecapto, ex quo arguitur illum esse mentecaptum, quia pro decreto iudicis praesumitur.”
¹⁵⁹ Dig. 27.10.6: “Observare praetorem oportebit, ne cui temere citra causae cognitionem plenissimum curatorem det,
quoniam plerique vel fuorem vel dementiam fingunt, quo magis curatore accepto onera civilia detrectent.”
¹⁶⁰ Dig. 26.5.12.2: “Divus Pius matris querellam de filiis prodigis admisit, ut curatorem accipiant, in haec verba:
‘Non est novum quosdam, et si mentis suae videbuntur ex sermonibus compotes esse, tamen sic tractare bona ad se
pertinentia, ut, nisi subveniat is, deducantur in egestatem. Eligendus itaque erit, qui eos consilio regat: nam
aequum est prospicere nos etiam eis, qui quod ad bona ipsorum pertinet, furiosum faciunt exitum.’” The text itself
speaks
¹⁶¹ Odofredus, *Lectura super Infortiato* (Lyon, 1552), fol. 61v, Dig. 27.10.6: “Veniavit quidam coram pretore,
‘Domine, talis est furiosus seu demens, detis ei curatorem.’ Alius erat presens dixit pretori, ‘Custodiatis quid facitis,
quia debitis scire quod non est sapientior homo sub sole. Sed fingit se mente captum ut fugiat ciulia munera.’
Nunquid pretor debet ei credere qui dicit eum furiosum? Non, imo solenniter inquirere. Hoc dicit. Detractet idem
econtra. Aliqui sunt fatui et tamen sapiensissima verba locuntur.”
¹⁶² Though the precise matter of this law is a *prodigus*, or spendthrift, the many similarities between the two in
Roman law permit an application of the reasoning here to the figure of the *furiosus*. For example, both here and in
his explication of Dig. 26.5.12, Odofredus referred to both the alleged madman and the alleged spendthrift using the
word “*fatuus*”. Further, the problem of seeming competent from ones words runs throughout both texts.
in order to speak with him personally, and concludes from his interview that “Solomon was not so wise.” The mother however insists that her son is a fool. Odofredus advised that the judge should not simply believe the mother or even his own words with her son but should make a full investigation. Thus even the judge himself is not completely competent to make the determination of madness; his investigation must embrace a wider range of witnesses beyond himself and any interested parties in order to uncover the truth of this difficult matter. In short, the judge must make use of fama.

Fama is a much studied phenomenon of medieval law. Historians have regarded it as an integral part in the changing procedural landscape of the thirteenth century. A concept borrowed and heavily adapted from Roman law, fama provided both a justification for the ex officio prosecution of a crime, as well as a proof of controversial strength. Fama is often translated as rumor or reputation, and jurists drew on both meaning of the term as they sought to fit the often imprecise vox publica into the established ways of thinking about proof, which placed a greater emphasis on certainty and protecting the rights of the accused. On the one hand, one could speak of fama facti, that is the common knowledge of an area that a given act had occurred. While there were many grades of this kind of fama, it can be distinguished from fama personae, which also took many forms. This latter incarnation could include the common estimation of the status of a person, such as whether they were married or free. Fama personae

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163 Odofredus, *Lectura super Infortiato* (Lyon, 1552), fol. 54v, Dig. 26.5.12: “In isto paragraphe dicitur, et casus iste sepe inuenitur verus. Mulier habebat filium fatuum vel filia fatua, sed qui audieret arengare, diceret iste est sapientior homo de mundo. Venit mulier habens filium fatuum ad iudicem invita, “Dico filius meus est fatuus et prodigus est, vel filia fatua est, monitionibus meis non acquiescunt. Pro deo detis ei tutorem, qui curet personam eius.’ Dixit iudex ‘Volo videre filium.’ Istum vocatur, incepit loqui cum isto filio, et sermonibus dixit iudex ‘Salomon non fuit ita sapiens.’ Dixit mulier, ‘Quicquid colligatis ex sermonibus eis exitus eorum fatuus est.’ Quid debet facere iudex? Non debet simpliciter credere matri nec sermonibus fatui sed diligenter inquirere veritatem et si inveniat filium fatuum, debeat decernere curatorem, alias non dabit.”

164 The foundational study remains Migliorino, *Fama e infamia*.

165 Ibid., 58.
also included the concept of *infamia*, the idea that crime, heresy, or other antisocial behavior rendered a person incapable of certain basic legal agency or rights, such as acting as a witness or bringing an accusation before a court. Complicating matters further, though one can see the community-based nature of *infamia*, that is, that certain people by their actions rendered themselves untrustworthy, it took on a more formal existence. Infamia was often the result of a judicial sentence rather than simple common estimation.

Despite the quagmire of sometimes conflicting definitions and appraisals of fama, both by medieval jurists and by modern historians, the relevance of the idea to insanity is rather straightforward. Much of the controversies over fama in the thirteenth century center on its use as a form of proof of a particular fact or crime. The use of fama to determine status was more in keeping with the Roman origins of the term and was much less problematic. It is in this sense that fama and furor meet. The broad base and quasi-common nature of fama made it an easy corrective for the narrow and possibly flawed judicial determination of sanity. In the fourteenth century, Albericus de Rosate returned to the question of the judge’s responsibilities in deciding on a case of madness. Whereas Odofredus had strongly advised further investigation, Albericus saw it as a requirement. “But if a judge should grant a curator without having made such an inquest, would it be valid? I think not ... unless it were notorious that such a one was insane or mad, for notorious things do not require proof.” The exception in notorious cases is somewhat problematic. Although the definition was not fixed, for the most part notorious acts were

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167 Albericus De Rosate, *Commentarii in primam Infortiati partem* (Venice, 1585), fol. 94v, Dig. 27.10.6: “Sed si iudex non facta tali inquisitione daret curatorem, nunquid valeret? Puto quod non, argumento supra de transac. l. Cum hi §. Si praetor [Dig. 2.15.8.17], cum similia, nisi forte esset notorium, eum furiosum vel dementem, nam notoria probatione non indigent, supra qui satis. cog. l. Si vero §. Qui pro rei qualitate [Dig. 2.8.5.1], infra de do. praeleg. l. 1 in fine [Dig. 33.4.1], et plene dixi C. de accu. l. Ea quidem [Cod. 9.2.7].”
common knowledge not through hearsay or circumstantial evidence, as with fama facti, but because the act itself had occurred publicly and entered into common knowledge through direct perception of the act.\footnote{An exception to this are the so-called violent presumptions, such as the presumption of present consent to marriage when future consent and intercourse take place. These presumption were set by law.} Because of the certainty attached to such acts, it was not possible to raise proof against them. The defining characteristic of notoria, direct perception, is impossible when discussing insanity or other intangible qualities, as Innocent IV established. The presence of insanity could only be assumed from exterior acts; counter-proof could always be admitted to question those assumptions. How then could insanity be notorious and thus not require the full investigation that Albericus had prescribed? Perhaps he wished to provide an easing of procedural demands in cases in which the judge had no doubts as to the mental state of the person before him. Perhaps Albericus was referring to a level of fama that made the kind of reinterpretations of the signs we saw above difficult or implausible. In either case, the idea that insanity could be notorious does not appear in the writings of subsequent jurists.

Albericus did, however, provide a personal example of how he found fama to be useful when he himself was acting as a judge.\footnote{Albericus De Rosate, \textit{Commentarii in primam Infortiati partem} (Venice, 1585), fol. 94v, Dig. 27.10.6: \textit{Et vere ista lex occurrit mihi de facto existenti vicario Novariae. Nam procedebam contra quendam magnatem ipsius civitatis, et cum ab eo peterem, quod responderet inquisitioni, fingebat se fatuum; unde oportuit, quia novus eram in officio, solicite inquirere a religiosis et aliis, an esset fatuus, et reperi quod non. Inquirendum est ergo diligenter, ut hic dicitur, et supra de off. praesi. l. Congruit [Dig. 1.18.13] et lege sequenti [Dig. 1.18.14] et vide Iohannes Andreae in clem. de homi. c. uno [Clem 5.4.1].}}

And [the case of] this law truly happened to me while in the vicarage of Novara. I was prosecuting a case against a certain magnate of that city, and when I sought his response to the inquisition, he pretended to be a fool. Whereupon I had to diligently inquire from religious and others, since I was new to the office, whether he was a fool, and found that he was not. Therefore one must diligently inquire.

Albericus was able to use fama, or the lack thereof, to show that the allegation of mental incapacity had no support in the eyes of the community, which, as we have seen time and again,
was the standard by which the jurists judged questions of sanity. The desire to establish a fama could lead a litigant to produce a large number of witnesses. In 1334, Caterina, daughter of Giovanni Baseio, sought to overturn her father’s last will on the grounds that he was out of his mind when he made it. Though only the decision survives in the Raspe of the Avogaria di Comun, it reports that Caterina and her husband “produced several witnesses... and there were many, many _termini_ read by which the witnesses were examined.”\(^{170}\) Despite her efforts, however, Caterina was unsuccessful in her suit. Evidently, the sheer number of witnesses was not conclusive either.

This raises the question of whether some testimony was worth more than others. Today we are accustomed to accept medical and psychiatric testimony as the most powerful source of authority; it would be inconceivable to mount a successful insanity defense, or even the more frequent declaration of non-competence, without a thorough psychiatric evaluation.\(^{171}\) But the medieval jurists focused their attention on social expectations and evaluations. In this way of thinking, could medical testimony achieve a privileged position? If not, if social evidence

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\(^{170}\) ASV, Avogaria di Comun, Rasp. 3641, fol. 146r: “Cum per nobilem mulierem dominam Chatarinam quondam filiam domini Iohanis Baseyo, nunc uxor ser Phylipi Cornario filii domini Iohanis Cornario seu dictum ser Phylipum, nomine suprascripte Chatarine uxoris sue, deponita fuerit querella coram nobilibus viris, dominis Besino Constareno, Iohane Foscareno et Raphaele Aduenturato aduocatis comunis, dicentem se uelte probare, quod dictus dominus Iohanes Baseyo, tempore quo suum condidit testamentum, non erat sane mentis, sed alienatus propter infirmitatem sicut et taliter quod testamentum per ipsum dictum Iohanem factum, nullius uigoris, seu uloris esse poterat uel debat. Dictum et ordinatum fuit per ipsos dominos aduocatos comunis, quod dicta domina Chatarina, seu vir eius ser Phylipus Cornario pro ea, produceret testes quos uellet, que domina Chatarina seu dictus eius vir nomine suo quamplures testes produxit, dati ad hoc pluribus et pluribus terminis, quibus testibus productus et inscriptis redactis ad cameram aduocatorum comunis, ipsisque testibus, per nobiles viros dominos Laurencium Mariperio, Marcum Grizo, et Raphaelem Anduenturato aduocatores comunis, visis lectis et dilligenter examinatis, omnis tres concorditer, videlicet domini Laurencii, Marcus, et Raphael determinare dixereunt testamentum factum per dictum Iohanem Baseyo valere, et in suo robore permanere debere, et omnes testes nomine dicte domine Chatarine productus cancellari, et sic de ipsorum mandato cancelati fuerunt, Mandationes etiam suam hanc determinationem ad memoriam in quaternus curie annotatur.”

\(^{171}\) Consider, for example, the so-called Durham rule, which excused any unlawful act that was “the product of mental disease or defect.” _Durham v. US._, 214 F. 2d 862, 874-875 (1954). Although the Durham rule was short lived, it was the highwater mark of medical testimony, allowing cases like that of _Douglas v. US._, 239 F.2d 52 (1956), in which a jury verdict was invalidated on the grounds that they had not sufficiently considered the expert medical testimony. See Thomas Maeder. _Crime and Madness: The Origins and Evolution of the Insanity Defense_ (New York: Harper and Row, 1985), 73-97.
provided the strongest basis for proving insanity, is the idea of a privileged witness foreign to the jurists way of thinking? In order to answer these questions, this final section will consider the roles of physicians, family members, and notaries in the determination of insanity. Although the jurists noted that each of these sources of testimony had their particular strengths, none of these groups maintained an untroubled hold on the authority to judge madness. Most of these discussions only arise in the juristic works of the fourteenth century and later. By this time, the jurists were concerned not only with advancing the theories of law, but also with providing their students with arguments that could be deployed in practice. The positions that follow vary not only because of different interpretations of the law, but also because of the need that might arise to strengthen or impugn a given witness based on the needs of a case. This is not to say that practice wholly determined the jurisprudence, but only that, as we saw above when considering signs, the jurisprudence must be placed in the context of an adversarial system of justice.

Physicians

The rebirth of the medical profession in many ways parallels that of the legal profession in the Middle Ages. Alongside theology, medicine and law were the great courses of study in the medieval universities. Like law, the medical profession structured itself according to access to knowledge: the highest level of physicians received academic training based on authoritative ancient texts which they distilled into commentaries and consultations, while less formally educated practitioners, such as surgeons and barbers, provided more mundane and inexpensive services.172 Physicians and lawyers even shared literary forms, most notably the consilium. Physicians and lawyers inhabited the same spaces and enjoyed similar professional prestige.

Moreover, their domains often intersected with one another. Hermann Kantorowicz discussed how the famed Cino de Pistoia sought the medical expertise of the equally renowned Gentile da Foligno (d. 1348) in a case of disputed paternity. Even more frequently, medical evidence often played a key role in homicide and assault cases. The use of medical expertise ran particularly deep in Venice; every case of homicide in the registers of the Signori di Notte involves the depositions of at least two surgeons confirming the death of the victim and ascertaining the number and nature of the wounds inflicted on him or her.

Reliance on medical expertise was standard practice in medieval courts. This is especially the case given the strong connection between physical sickness and mental incapacity. While sickness itself was not a sign of madness, it was a frequent enough companion. Fever or even head trauma could provide an efficient cause of madness. Consider, for example, the case of “Sicut tenor” (3 Comp. 3.24.1 [X 3.31.15]). This decretal of Innocent III involves a cleric who became gravely ill and promised to become monk on what seemed to be his deathbed. Fortunately (or perhaps unfortunately, given what follows), the cleric recovered and sought release from his vow on the grounds that he was not of sound mind at the time he made it. The abbot, unsure of how to proceed, referred the matter to Innocent, who expressed great skepticism in his response. While Innocent left the determination of sanity to abbot, he noted that the cleric

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had enough of his wits about him to fear for his soul. The instance is strongly reminiscent of a text from the Decretum, “Cosaldus” (C.17 q.2 c.1), which likewise deals with a cleric hoping to wriggle out of a presumed deathbed vow.

The connection between illness and insanity existed also in the sources of Roman law. Dig. 28.1.17 notes that a person who is mentally afflicted (mente captus) while in poor health cannot make a testament. While the two occur at the same time, the mental affliction is what closes off the ability to make a testament. This is clear in two texts from the Codex, Cod. 6.22.3 and Cod. 2.4.27, which allow those sick in body but sound in mind to make testaments and compromises, respectively. In practice, the deathbed testament was not altogether uncommon. Of the testamentary cases involving insanity in records of the Avogaria di Commun, five explicitly state that the testator sought to draft or amend the will while on his or her sickbed.

176 “Sicut tenor literarum vestrarum nobis aperuit, quum lator praesentium in sacerdotali esset officio constitutus, et tanta rerum temporalium indigentia laboraret, quod nec sibi nec suis progenitoribus seu fratribus in necessitatibus proprisi posset a quatenus providere: proprii corporis laboribus et maris periculis multis se non dubitavit exponere, ut de suo labore et acquisitione honesta suam et suorum posset indigentiam relevare. Contigit autem post haec, quod ipse, longa a vestra civitate consistens, tam gravi coepit aegritudine laborare, quod extra se positis desperaret de vita prae senti, et dum in tali esset articulo constitutus, a quodam simplici monacho indutus fuit habitu monachali, et ad monasterium deportatus. Deinde, paucis diebus elapsis, quum iam esset in principio suae convalescentiae, deposuit habitum, et licentia eiusdem loci abbatis monasterium dereliquit, et cupiens progenitorum suorum indigentiis subvenire, a vobis suppliciter postulavit, ut posset, sicut prius, in sacerdotali officio ministre et vobiscum alterius et ipsius medicis in loco consulere. Quid autem super his vobis fuerit faciendum, sacro apostolicae sedis oraculo humiliter petitionem. Nos igitur Consultationi vestrae taliter respondemus, quod, licet ista duo inter se repugnantia videantur ut quisquam scilicet sit extra se positis et de praesenti vita desperet, si tamen eo tempore, quo P. sacerdos lator praesentium positis extra mentem asseritur, indutus fuit habitu monachali, quum alienatus non sentiat, ac per hoc non valeat consentire, eum nun cunctis ab observatione monastici ordinis absolutum, nisi postquam mentis sui factus est compos, spontanea voluntate professionem mentis professionem facerit monachalem. [Dat. Laterani. 1198.]”

177 “In adversa corporis valetudine mente captus eo tempore testamentum facere non potest.”

178 “Senium quidem aetatis vel aegritudinem corporis sinceritatem mentis tenentibus testamenti factionem certum est non auferre.”

179 “Sanam mente, licet aegram corpore recte transigere manifestum est, nec postulare debueras improbo desiderio placita rescindis valitudinis corporis adversae velamento.”

180 Epstein, Wills and Wealth, 18-21.

181 ASV, Avogaria di Commun, Rasp. 3641, fol. 146r; Rasp. 3643, fol. 5v; Rasp. 3644, fol. 121r-121v; Rasp. 3644, fol. 138v; ASV, Avogaria di Commun, Processi Originali, busta 3601, II.8 fol. 1r-8v.
The relationship, however, was complicated. While mental incapacity may be the result of physical illness, the texts of the *libri legales* stress caution in assuming too close of a connection between the two. Commenting on Innocent's decretal, Laurentius Hispanus noted that even in this case of grave illness, the one alleging insanity has to provide the same sort of proof as any other alleging insanity.  

In the fourteenth century, Franciscus Zabarella consulted on a case involving a grant made by a dying bishop. Like many *consilia* included in the printed collections of the fifteenth and sixteenth centuries, many specific details were removed from this case. It seems that a certain piece of property, described as a *feudum*, had devolved to the bishop for want of a vassal to occupy it. The bishop retained control over the land for twelve years. During his final illness, indeed within two hours of his death, the bishop conferred the *feudum* on his chapter. The bishop's successor, desirous of bringing an end to what seems to have been a bone of contention with the chapter for many years, sought the advice of Zabarella on whether it is licit for him to confirm the grant. In his response, Zabarella indicated that the new bishop had assumed that his predecessor was not of sound mind simply because he was in extremis. Rather, Zabarella claimed, the contrary is true, since "it is noted that an infirmity of the body strengthens the heart... One in extreme illness is not presumed to be of unsound mind, unless as in X 3.27.3. But if it were shown that he was out of his mind, what he did would not hold."  

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182 Laurentius Hispanus, *Apparatus ad Compilationem tertiam*, 504-505, 3 Comp. 3.24.1, sv. “extra mentem”: Si autem integrum maneret eius iudicium, licet infirmitatem grauissimam pateretur, obligaretur si uoueret, arg. infra capitulo proximo, arg. infra instit. quibus non est permis fac. Preterea [Inst. 2.12.1], Tenetur autem hoc probare scilicet se extra mentem fuisse, arg. supra de success. ab intest. c. uno [3 Comp. 3.20.1]. Arg. contra supra iii. q.ix. Indicas[C.3 q.9 c.14], supra xvii. q.ii Consaldus[C.17 q.2 c.1]."  

183 Franciscus Zabarella, *Consilia* (Lyon 1552), fol. 19r, con. 33.  

184 Ibid., “Sed presupponitur quod episcopus laborat in extremis, et sic erat mente alienatus; ad hoc ff. de test. 1. In adversa [Dig. 28.1.17] de regula c. Sicut [X 3.31.15]. Contrariam est verumque, quia cum corporis egritudine compassibilis est prudential. Imo vergente deorsum et conditione corporea spiritus in sublimiora conscendit. de renunc. c.i [X 1.9.1]. Et notitur quod infirmitas coporis fortitudinem cordis augmentat, eo tit. nisi. § alia vero pro hoc. C. de trans. 1. Sanum [Cod. 2.4.27] qui test. fa pos. Senium [Cod. 6.22.3]. Et est casus ad litteram, de constituto in extremis quod non presumitur insanus mente, nisi dicatur de suc. ab intest. §fi. [X 3.27.3]. Sed si doceretur quod fuisset alienatus a mente, non teneret quid gestum est, ut in iuribus supra inductis.”
Laurentius, Zabarella claimed that no presumption of mental competence arose on the basis of a bodily illness. Indeed, Zabarella went further to claim the contrary, that often a bodily illness or impending death can firm up one's resolve. We can already see in this a preview the relationship between physicians and lawyers over the problem of insanity: though the jurists noted a correlation between illness and madness, they were reluctant to accord to it any legal force.

Still, given even this tenuous link between madness and illness, as well as identification of madness as an illness itself, we might expect some reliance on medical testimony. A jurist of the mid- to late thirteenth century, Jacobus de Arena, was the first to explicitly mention recourse to medical expertise.\textsuperscript{185} He remarked that “cognizance should be given to physicians and other prudent men who know this [i.e. insanity].”\textsuperscript{186} A fuller discussion comes in the early fourteenth century through Cinus de Pistoia (ca. 1260-1336), who as we have already seen, was no stranger to seeking medical advice.\textsuperscript{187} Commenting on Cod. 6.22.3, Cinus urged notaries (as well as witnesses) to take precaution when drafting a testament for an elderly or sick person, lest they make testaments that they should not make. He went on to note that, “in a doubt, a skilled doctor should be believed, since otherwise one is accustomed to have recourse to someone skilled in an art. But God knows who watches over this.”\textsuperscript{188} In this, one of the earliest examples of a jurist advising the seeking out of medical skill in a question of insanity, we find a number of features

\textsuperscript{185} On Jacobus, see Diego Quaglioni, “Dell Arena (D’Arena) Iacopo,” Dizionario Biografico degli Italiani, 37 (1989), 243-250, and Lange and Krichbaum, Römisches Recht, 435-441. Little is known about Jacobus; he was most likely born in Parma, though Quaglioni has shown this to be based on laterinformation. He was educated and taught in Padua in the 1260’s and 1280’s, though he cannot be located with certainty in the intervening years, though he may have spent some time in Bologna.

\textsuperscript{186} Jacobus de Arena, Super iure civili (Lyon 1541), fol. 101v, Dig. 27.10.6: “Cognitionem debet enim adhibere medicos vel alios prudentes qui sciant hoc. Jaco. de Are.”

\textsuperscript{187} See Lange and Krichbaum, Römisches Recht, 632-658.

\textsuperscript{188} Cinus de Pistoia, Lectura super Codice (Venice 1493), fol. 225r: “Nota ergo ex lege ista quod senium etatis seu corporis egritudo testandi non est impedimento si mentis sinceritas perseveret, alias secus, ut hic et insti. qui non est per. fa. te. §. preterea [Inst. 2.12.2]. Caeuant ergo tabelliones et testes ne infirmus vel senex adeo etate vel infirmitate confectus quod iam sit ab animi iudicio sequestratus. De quo in dubio perito medico est credendum, sicut alias solet ad peritum in arte sua de iure recurri. Sed deus nouti qui hoc custodiunt.”
that would characterize subsequent jurisprudence. First, consider the circumstances of the text on which Cinus was commenting. His gloss concerned a mental incapacity that arises in connection with either old age or illness, as Cinus himself made clear. A medical context for insanity existed especially when it arose in conjunction with some physical illness. Second, Cinus qualified his advice with the preface “in a doubt.” Presumably, the notary or witnesses could ascertain madness through the traditional avenues of speech and acts and would only turn to a physician if these proved inconclusive or uncertain. Third, Cinus’ final, almost colloquial, remark indicates a skepticism even for skilled physicians to identify madness in a doubtful case. In this way, even while advocating recourse to medical testimony, Cinus questioned whether it actually provided a better insight into the presence of madness.

Albericus de Rosate likewise advised that “physicians who know whether one is mad or insane should be used.” In the next breath, however, he related how in his own case of dubious insanity, he sufficiently resolved the case by relying on fama. Bartolus, a student of Cinus, also advised medical testimony in an ambiguous way: “I ask, what if there is doubt whether one is out of his mind due to illness? He touches on this in Cod. 6.22.3, and says that there should be recourse to physicians skilled in their art...This can be proven even by others, for whether one is out of his mind or not is proven through speech and acts.” Bartolus was even more explicit in stating what his master implied. He put the doubt squarely on whether alienation of the mind proceeded from an illness, and even in this case noted that there is nothing particularly special.

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189 Albericus de Rosate, *Commentarii in primam Infortiati partem* (Venice 1585), fol. 94v, 27.10.6: “Et dic, adhibendo medicos qui cognoscant, an vere fit demens vel furiosus, argum. supra de ven insp. l.2 §.1 (Dig. 25.4.2.1) Iacobus ibi.”

190 See above.

191 Bartolus, *Commentarium super secundam partem Codicis* (Venice 1487), fol. 71v, Cod. 6.22.3: “Quero quid si dubitetur, an propter infirmitatem sit alienatus mente, tangit in l. Senium. C. e. [Cod. 6.22.3] et dicit recurrencum esse ad medicos peritos in arte illa, arg. l. Si semel. C. de re simili. li. xii. [Cod. 12.35(36).6] et l.i §.i. de ve. inspi. [Dig. 25.4.1.1]. Potest etiam probari per alios. Nam ex actibus et verbis presumitur an sit mente alienatus vel non, ut l. Is qui. §. i. supra. de tu. et cu. da. ab his [Dig. 26.5.12.2] et l. Quidam. de condi. insti. [Dig. 28.7.27].”
about the information that such skilled witnesses could provide. Bartolus did not view medical testimony as wholly on par with that of laymen with regards to madness. He seems to draw on medical wisdom in the case of madness as a result of a long illness: “There is a doubt on another point, whether one is insane or mentally incapacitated because of a long illness. I have said that this should be committed to the judgment of skilled physicians, or even, if the illness should hold him for a year, it is presumed to be perpetual insofar as the brain is harmed and a cure is rendered impossible.” Even in this case, where Bartolus not only unreservedly advises the use of medical expertise but seems to make use of it himself in crafting the presumption of mind destroyed by a year-long illness, the situation is still limited to a doubt concerning madness connected with an observable, physical malady.

Bartolus’ student Baldus continued this idea of favoring medical testimony when it occurs in conjunction with an illness, though Baldus was far more willing to see its utility than his master. He noted that “very often, sickness of the body leads to the exile of the mind.... Bartolus says here that there is recourse to physicians, and that [insanity] can be taken from one’s speech, as in Dig. 28.7.27. When one who has bodily sickness has lost his ability to speak, in the text it says that he is similar to a dead man.”

One of the stronger, albeit simpler references to the skill of physicians in determining insanity comes from Angelus, Baldus’ younger brother. Angelus is fairly close to the words of Cinus, though without any of his reservations. Angelus was more concerned with undercutting

the authority of the notary (to which we shall turn later). His argument against giving precedence to the notary centered on the lack of a privileged skill, which he claimed the physician had.\textsuperscript{193}

It is clear that the jurists did see their medical counterparts as possessing a sound insight into the proof of madness, but little more than anyone else.\textsuperscript{194} They tended to limit medical involvement to cases in which the mental incapacity seemed to have its roots in a physical illness. Even then, the testimony of laymen was just as valid, since they, as Bartolus noted, heard the same words and saw the same acts as one trained in medicine. Even without the stated reservations of Cinus or Bartolus, one can see clearly from the jurists’ remarks the signs of madness that there was little room to carve out a privileged spot for specifically medical testimony. I have found the testimony of only one physician in one \textit{consilium} of Alexander Tartagnus. Alexander cited the texts of Bartolus and Baldus, mentioned above, shorn of their reservations of course, to strengthen the credibility of one of his witnesses, a certain Master Guidotto. Alexander did not specifically seek out the advice of a physician on his own. By the time he took up the case, the alleged madman, Jacopo, was already dead, making a fresh examination quite impossible. Instead, there are hints in the \textit{consilium} that Jacopo was an apothecary by trade. Guidotto may have been a long-time customer who was approached by Jacopo’s family in their efforts to void the second the testament. Alexander’s comments should thus be read in the light of a lawyer trying to shore up a witness who fell into his lap.

\textit{Family}

\textsuperscript{193} Angelus de Ubaldus, \textit{Lectura super Infortiato} (Città del Vaticano, BAV Vat. lat. 2613), fol. 129v, Dig. 28.7.27: “\textit{Caueant ergo notarii facientes testamenta ut bene comprehendant si testator freneticat et licet ipse in sua scripta dicat talis sane mentis non propterea probatur mens sana quia ad eum non pertinet nec de hoc potest rogari sed solum ad medicis, ut l. Semel. de re mili. l. xii. [Cod. 12.35(36).6].}”

\textsuperscript{194} Boari, \textit{Il furioso nella criminalistica}, 69, comes to a similar conclusion for the period before the sixteenth and seventeenth centuries.
Since the socially-based approach to proving insanity was so strong in juristic thought of the fourteenth and fifteenth centuries, was there no testimony that was privileged above the rest? Jurists of the fourteenth and fifteenth centuries considered two possible groups that could have had special insight into the proof of mental state: family members and notaries.

Family anchored the social reality of the *furiosus*. In contradistinction to his “Great Internment” of the Enlightenment, Foucault typified the life of medieval madmen as free wanderers always on the horizon. As most studies have shown, however, the insane often experienced confinement of a different sort, not through a state institution, but through their own families.195 The real need to care for members of the family who had permanently or temporarily lost their ability to function in the world had been enshrined in law from the earliest traces of Roman law in the *Twelve Tables* to the Codex of Justinian. Baldus, the first jurist I have found who accorded increased credibility to the testimony of family members on the subject of madness, made this argument precisely in the context of their role as guardians: “Note that the law commits custody to the relatives of an insane person, and that they can bind or imprison him in order to do so. Likewise note that one who is held in prison by his relatives is presumed to be insane.” Because the family has a legally sanctioned power of custody over insane members, Baldus presumed that the family would exercise this power properly, and that a witness could deduce from seeing someone detained by their family that the family was certain in its appraisal.

Baldus’ statement seems to fly in the face of a position held by Bartolus. In his *Tractatus de testibus*, Bartolus posed possible statements that a witness deposing insanity might make and asked whether they stood as valid proof or not. He considered the example of seeing one bound and imprisoned and concluded that merely seeing someone bound as a *furiosus* “was not enough

195 See Chapter 4.
[to prove], but it did help. But it would be sufficient if it were added that he saw him in chains and saying insane things while in chains.” According to Bartolus, the mere fact of imprisonment is not sufficient proof, though he does not state why. One can read this point in the light of his developing thought on insanity and time, which, as we have seen, favored perception of insanity as close to the time in question as possible. In this way, the insanity that caused the prisoner to be bound may not still govern him; the evidence of hearing him say “insane things” removes this doubt. More likely as an explanation is that merely seeing someone bound as a furiosus without any direct evidence is to take the judgment of another for one’s own. The witness who deposes simply on the fact of imprisonment does not provide the sensory evidence required by Innocent IV and Bartolus but only tells the judge that someone else had decided that the prisoner was actually insane. The direct perception that Bartolus added would solve this problem. Bartolus did not specify that a family member was responsible for this imprisonment. If Baldus were aware of this passage, which is plausible even though he did not cite it explicitly, his recasting of the presumption arising from imprisonment argues strongly for a special probatory value attached to statements and actions of the family.

This sentiment occurs more frequently in consilia as a means of supporting specific witnesses. One example comes from a consilium of Petrus Philippus Corneus regarding a certain Jacopo, whose renunciation of an inheritance was contested on the grounds of insanity. Petrus argued that Jacopo was not of sound mind but had some difficulty doing so. Although he had the testimony of many witnesses that Jacopo was insane, he lamented that “there was no witness

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who provided any reason for his knowledge."197 By this time, as we have seen, the *communis opinio* had adopted Innocent IV’s requirement for testimony involving interior judgments to be based on exterior perceptions. In fact, Petrus spent a large part of his *consilium* exploiting a loophole left by Bartolus in the *Tractatus de testibus*, in which he initially stated that a reason did not have to be rendered unless the witness were asked.198 Petrus also took another route. Since most of his witnesses were family members or neighbors, he crafted an argument in which their familiarity with Jacopo provided this reason.199

Here it is the case that relatives or neighbors prove madness and insanity, as is taken from the comments of Bartolus on Dig. 29.2.5, which is not for any other reason except that anyone’s insanity and lack of intellect are noticed by anyone who frequently sees him. Since many witnesses testify that that they had seen him and known him to be of unsound mind for many years, it seems that their testimony is sufficient.

While Petrus certainly had a reason to be innovative, given the state of the testimony he had to work with, his argument makes a good deal of sense. The rigors of testimony can be relaxed in favor of those who have frequent and extended knowledge of the alleged furiosus. His argument is based on Bartolus’ remarks concerning the ability of a mute person to interact with a notary.

According to Bartolus, a *mutus* can have a legally meaningful interaction if he is accompanied by

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197 Petrus Philippus Corneus, *Consilia* (Venice 1572), fol. 25r, con. 2.21: “Nullus autem testis est qui aliam reddat causam scientiae…”
198 Bartolus, “*Tractatus de testibus,*” 300: “Furiosus quis probatur ex actibus, ut si testes dixerit, quod uidit eum furere et actus furiosorum facere, satis exprimit. Sunt enim tales actus noti communiter. Sed si interrogetur ulterius, oportet testem exprimere actus, scilicet quia uidit percutere astantes sibi, sine causa fugere, lapides sine causa proicere et similia.”
199 Petrus Philippus Corneus, *Consilia* (Venice 1572), fol. 25v, con. 2.21: “Hinc est quod consanguinei et uicini probarent dementiam et furorem prout sumitur ex dictis Bar. in l. Mutum. ff. de acqui. haere. [Dig. 29.2.5], quid non est ex alio nisi quia furor et carentia intellectus alicuius uenit in notitiam eorum qui eum frequenter uident. Cum itaque plures testes deponunt quod multis annis uiderunt et cognoverunt eum non sanae mente, satis uidetur quod sufficienter deponant.”
family or neighbors, who, because of their familiarity, can translate the signs or gestures in order to aid the understanding of the notary.\textsuperscript{200}

Philippus Decius (d. c. 1536) also dealt with familial judgment in a \textit{consilium} for a rather messy inheritance case. In short, a certain Jacopo had two sons with one wife and three with another. One of the sons, Benedetto, had renounced his claims to an inheritance to enter a monastery, which he left after a bout of madness. A case arose between Benedetto and his surviving brothers over Benedetto’s claims to the inheritance.\textsuperscript{201} Benedetto claimed that he was out of his mind when he made the renunciation, thus invalidating it. In order to support this argument, Decius argued that Benedetto’s own father regarded him as mentally incapable. Indeed, Jacopo left nothing to Benedetto specifically because he was insane, instead leaving Benedetto’s goods and rights to his brother Giovanni with the assumption that Giovanni would use this to care for his brother. Decius did not let this assertion of the father’s opinion stand on its own, though. He also added that one can be proven insane if he is held to be so by his relatives and neighbors, or if he is commonly held to be so.\textsuperscript{202}

\textsuperscript{200} Bartolus, \textit{Lectura super prima et secunda parte Infortiati} (Venice, 1487-88), fol. 124r: “Respondeo, si quidem testes essent consanguinei vel alias domestici, sufficeret quod deponerent simpliciter se vidisse talem mutum facientem signa et actus per que et quos significabat se velle adire hereditatem. Tales enim persone presumuntur scire actus et consuetudines muti ut ipsum intelligunt, ut l. Octau. in. unde cogna [Dig. 38.8.9] et C. de in integ. rest. l. De tutela [Cod. 2.21(22).7].”

\textsuperscript{201} Ibid., fol. 97v: “Ultimo, conclusio supra formata et omnia quae supra dicta sunt maxime haberent locum et sine dubio procederent, si Benedictus tempore dicti contractus fuisset ut dicitur mente captus, quod quidem probari videtur, quia pater illius reputauit mente captum. Nam alia ratione non uidetur motus pater, nisi quod illum reputauit mente captum. Dum huic Benedicto nihil reliquit, sed omnia eius bona, et iura Johanni fratri suo assignauit cum onere quod illi praestari deberent alimenta. Furiosus et mente captus ille esse dicitur, et probatur quem pater pro furioso uel mente capto reputauit, ut no. Dicit Baldus in §item furiosi. insti. qui non est permis. facere testamentum [Inst. 2.12.1], quem refert et sequitur Alex. in consi. liii. Ad quaesitum. lib. i. Facit tex. in l. Furioso puberi. ff. de cura. furio. [Dig. 27.10.16] et eodem modo si probatur quod consanguinei et conjuncti illum habebant pro mente capto uel furioso. argu. l. Octau. ff. unde cogna. [Dig. 38.8.9] uel et si probetur quod communiter haberetur pro mente capto, ut dicunt Bal. et Ale. in locis praeallegatis. Et ista omnia in casu proposito bene concurrunt, quia a conjunctis et communiter ab omnibus uidetur reputatus mentecaptus.”
With family as a special category, we end where we began. Odofredus was unwilling to accept the simple statement of a mother that her son was a fool and thus advised judges to make a full investigation. Centuries later, while Philippus Decius argued that the statement of a father regarding his son was legally significant, he still felt the need to ground this opinion in a common estimation provided by fama. Familial opinion might hold greater sway for the reasons noted by Petrus Philippus Corneus, but it was not used unreservedly by the jurists. It is interesting that the question of bad intent on the part of the family is never raised explicitly by the jurists. In practice, however, we see that family members are often at the center of disputes involving insanity. The determination of insanity by a family member would have been too self-serving to be credible in many of these cases. Furthermore, intra-familial disputes would have created opinions of sanity or insanity on both sides. While later jurists may have expressed a slight privilege for the testimony of family members, in practice this would have been difficult to exploit.

**Notaries**

We have seen that many of the doubts concerning madness in law have centered on testaments. It is not surprising then that many jurists looked to notaries. They played a vital role in medieval life, acting, as Laurie Nussdorfer put it, as “the brokers of public trust.” They had a professional interest in drafting correct documents. As we have seen, the jurists identified illness as a cause or accompaniment of madness. Given the frequency of testaments made in the face of possible death from a serious illness or those made by the very old, notaries must have come into contact with many cases of possible mental incapacity through these cases alone. In their commentaries on Cod. 6.22.3, for example, many fourteenth- and fifteenth-century jurists

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directed at least a portion of their comments to the caution that notaries had to show in
distinguishing the effects of illness or old age from actual insanity, as Cinus did when
commenting on the role of physicians in proof.

The main question that jurists asked in relation to notaries and the insane concerned the
frequent testamentary formula “X being of sound mind, etc.” Did this actually count as proof of
sanity? To some extent, the jurists had to reject the probative value of the notary’s statement of
sanity; otherwise no testament could be challenged. The debate therefore took place on the
question of how much weight could be given to the statement. They ultimately questioned
whether it was simply a formulaic convention, or whether it actually had substantive content.

Bartolus, for example, noted that “here it arises that notaries always place in a testament,
‘Such a one of sound mind and intellect, although sick in body.’ Here it is said that the time in
which the testament is made should be examined.”\footnote{Bartolus, \textit{Commentarium super secundam partem Codicis} (Venice 1487), fol. 71r, Cod. 6.22.3: “Et hic insurgit quod notarri semper ponunt in testamentis talis sanae mente et intellectum, licet corpore languens. Op. hic dicitur inspici tempus quo testamentum sit.”} This fits with Bartolus’ concern with the
state of mind of the testator at the time the testament was made as the surest way of proving
madness. Baldus would later clarify that this amounts to an examination of the words of the
testimony. While raising the issue of the formula and then moving on to the mental state of the
testator is dismissive of the strength of the formula, Bartolus did not address its worth directly.

Baldus tackled the problem more directly. He based his response to the probative value of
notarial statements on an opinion of Jacobus de Belviso, a Bolognese jurist of the early
also taught in Naples and Siena before returning to his native city. Jacobus’ chief work was a commentary to the
Authenticae, though additions to the Accursian gloss to the Digest and Codex also survive. I have not been able to
locate this specific position with an attribution to Jacobus.} According to Jacobus, the statement of the notary does nothing
to prove insanity, only the presumption of the law. Baldus then drew on one of the basic underpinnings of the signs of madness to show this: “Sanity of mind is something invisible and not rightly perceived by sight or hearing, but by the judgment of reason.” Because of this, madness is “not proven directly by a witness, for [insanity] does not fall in directly in the sense of the witness.”206 The simple statement of the notary, then, has the same force as any generic assertion of insanity without proper reason for the determination added in support.

Bartholomeus de Saliceto followed a similar argument, building off of both Bartolus and Jacobus. The presumption of law, he noted, was that one was of sound mind unless proven otherwise. When the notary describes the testator as being “of sound mind and intellect,” he is merely stating this presumption rather than saying anything substantial. By relegating the statement of sanity to the level of a statement of presumption, Bartholomeus achieved an elegant solution to the problem. On the one hand, he noted that “proof is admitted against this presumption that can remove it.” Following the emphasis of Bartolus, he noted that even the disposition of the testament itself can be used to argue against this presumption, if it contained things that “no one of sound mind would do.” On the other hand, he did not discount the statement of the notary as a mere formula: it had some legal force, limited though it was.207

206 Baldus, Lectura super Infortiato (Venice 1494), fol.43r, Dig. 28.1.2: “Quid si notarius dicit talis sanus mente etc., utrum probetur mentis sanitas. Dicit ia. de bel. quod non probatur testimonio notarii, sed sola legis presumptione. Nam mentis sanitas est quid inuisible, et proprie non percipitur uisu uel auditu, sed magis iudicio rationis, unde ista verba tabellionis non habent vim testimonii nec probationis hominis qualitas. Sanitas mentis non probabitur per notarium sed sola verborum prolatio, quid credo verum nam nec a teste probatur directe. Nam non cadit directe in sensum testis, et facit C. de codi. i. Nec codicillos [Cod. 6.36.5]. Bald.”

207 Bartholomaeus de Saliceto, Lectura super Codice (Lyon 1485), unfoliated, Cod. 6.22.9: “Sed nunc insurgit dubium. Pone quod notaries dicit talis sanus mentis etc., an per ista verba intelligatur recessum ab omni presumpta insania. Et hoc dico quod in dubio, quaelibet praesumitur sanae mentis nisi probetur de contrario, ut sup. e. l. Furiosum [Cod. 6.22.9]. Et nota in d. l. Nec codicillos [Cod. 6.36.5] in. de cod. Unde tabellio per hec verba non iudicat sed narrat quod ius presumit eripere. Contra autem hanc presumtionem admititur probation que eam tollat. Unde, si ex verbis prolatis in testament aliud colligat ab ista presumptione receditur ostantibus verbis a tabellione prolatis. Idem dico si diposito esset talis quam nemo sanae mentis fecisset, nisi probaretur quod habuit causam sic faciendi. Nam tails ordinatio arguentis imbecillitatem consilii probat eum non sanae mentis tunc fuisse et maxime
Bartholomeus’ solution to this “pulchra questio,” as Jason del Maino would later call it, does not address the role of the notary himself, only the nature of his statement of sanity.\(^{208}\) Is it likely that a notary, bound as he was to faithfully translate the words of the testator into a legally acceptable form, would consciously draft the testament of someone whom he thought to be insane?\(^{209}\) Some jurists, Baldus included, were willing to relax the need for specific reasons for the identification of a \textit{furiosus} in the case of family; why would they not extend this to notaries, who may have had more experience dealing with people on the fringes of madness? Angelus de Ubaldis noted that simple credence could not be extended to notaries on this matter because the identification of insanity does not pertain to their office in the same way that it does for physicians.\(^{210}\) The notary then, had no special claim beyond that of a normal lay witness in the matter of madness and thus had to abide by the same requirements.

This lack of privilege, supported by a number of different reasons, had become the \textit{communis opinio} by the fifteenth century.\(^{211}\) While standard, this view was not unanimous, however. Johannes de Imola, a famed jurist of the \textit{ius commune} more than competent in canon and Roman law, advanced a possible objection to the conclusion of his colleagues. He began by admitting that the common opinion was correct in holding that insanity was something invisible, not perceivable by the senses, which “therefore cannot be proven through writing.” The testament itself can serve as proof, since it is a record of the words of the testator. In this instance,

\textit{infirmo, et augetur hec presumptio quod per prius furiosus vel non sanae mentis fuerat. Et sic ista multum resident in iudicis arbitrio. Bartholomeus.”} \(^{208}\) Jason de Maino, \textit{Commentaria in secunda parte Codicis} (Venice 1496), fol. 94v, Cod. 6.22.3.

\(^{209}\) Epstein, \textit{Wills and Wealth}, 16-25. Also consider the example of Maria Gradonigo, who commanded her notary to write, “just as she said.” (“Scribatis sicut dico vobis.”) ASV, Avogaria di Commun, Processi Originali, busta 3601, II.8 fol. 3r.

\(^{210}\) See above.

\(^{211}\) Jason de Maino, \textit{Commentaria in secunda parte Codicis}, Cod. 6.22.3 (Venice 1496) fol. 95r. Jason described this opinion as “vera et communis.”
the testament mediates the sensory perception of the alleged madman's words. So far, Johannes stayed perfectly in line with the standard ideas of proof.212

But add that perhaps it can be said that sanity is proven through such an instrument, since an official, sworn in things depending on his office, should be believed... Therefore since a notary swears to make documents properly and legally and to not make an document from a man of unsound mind, and since inquiring whether the one who seeks to make an act is of sound mind or not pertains to his office, it therefore seems that he should be believed in in a doubt.

Although Johannes offered this opinion with some hesitation, perhaps because it flew in the face of the communis opinio, the logic is powerful. He based his argument on the well-founded principle that a sworn official should be believed in things pertaining to his office.213 Angelus de Ubaldis would object that identifying madness does not fall under the office of the notary. His brother Baldus held that the notary is only responsible for creating a document as client directed him; the notary was not responsible for trying to perceive the client’s intent.214 Johannes countered these arguments by showing that the notary did have a professional obligation to not create improper documents. Under this broad heading, an inquiry into a client’s state of mind

212 Johannes de Imola, *Lectura super prima parte Infortiati* (Venice 1475), unfoliated, Dig. 28.1.2: “Item etiam tangit an sit notarius dicat talis sanus mente facet corpore languens, probetur per hoc quod testator fuerit sanae mentis. Et concludit post Dynum, quod non, quia quae essesse sanae mentis non percepitur imediata per sensum coporis sed per rationem mentis. Ideo per talem scripturam non probatur. Item probabitur sanae mentis ex iuris presumtione, de quo in l. Nec codicillos C. de codicillos [Cod. 6.36.5]. Sed tu adde quod forte potest dici quod etiam per talem instrumentum probetur sanitas mentis, quia officiali iurato in pendentiis ab officio suo est credendum in dubio ut patet ex his quae habentur in l. Divus de custo reo. [Dig. 48.3.6], et in c. Cum parati, extra de appel. [X 2.28.19], et in c. Quoniam contra falsam, extra de proba. [X 2.19.11], et per Bartolum in sua extravaganti ad reprimendam in ver. ‘per nuntium’. Ideo cum tabellio in sua creatione iuret bene et legaliter conficere instrumenta et non conficere instrumentum quod fiet ab homine non sane mentis, et sic spectat ad eius officium inquirere an ille qui rogat eum et actu sit sanae mentis, ideo videtur quod in dubio sit sibi credendum. Nam et si id non percipiat imediata per sensum coporeum, tamen potuit percipiere ex circumstantis, videlicet ex sermonibus et gestis illius, l. Si quis sup. de tuto et cu. da. ab his. [Dig. 26.5.12] et l. Quidam in suo. inf. de condi. insti. [Dig. 28.7.27]. Et hoc verum in dubio, secus si ex tenore verborum protatorum in instrumento resultaret praesumptio opposita, ut d. l. Quidam in suo [Dig. 28.7.27]."

213 See the gloss of Bernardus Parmensis in the *Liber extra* (Rome, 1582), col. 918, X 2.28.19 sv. “Suus nuncius”: “Nuncio tamen publico iurato fideliter exequenti officium suum bene creditur circa citationes, aliter non crederetur.” See also X 2.19.11 (Rome 1582), col. 695, sv. ‘Duos viros’: ‘Et sic videtur quod plus credatur scripturae tabellionis quam scripturae episcopi, vel alterius iudicis, quia scripturae iudicis non creditur nisi habeat testium subscriptione, in. de testib. Cum a nobis [X 2.20.28]. Et hoc ideo est, quia cum tabellio iuratus est, credendum est instrumentum suo, in. de praescri. Ad audientiam [X 2.26.13] et in. de praesum. Illud in fine. [X 2.23.11].”

could be considered as part of the notary’s office and thus as the grounds for special consideration under the law. Unlike Baldus or Batholomeus, who considered the weight of the statement of sanity on its own, subjecting it to the usual standards of proof, Johannes set his argument in the context of the professional integrity of the notary himself. Still, he did not push this too far. Rather than using this idea to claim that all documents that contained a statement of sanity functioned as proof thereof, which would be untenable, Johannes restricted such consideration of the notary’s office to doubtful cases, where the normal means of proof had been inconclusive.

If we take Venice as an example, Johannes de Imola’s insistence on the obligations of the notary finds a strong base in contemporary practice. Venetian notaries of the fourteenth century had a duty to ascertain the sanity of their clients when it seemed doubtful, and they faced dire consequences if they failed to do so. Venetian notaries were required in their capitularies, the contract between Venice and the prospective notary that governed professional conduct, to swear that they would not draft any documents for the insane. For example, in a capitulary dated to 1353, Andrea Bianche, a priest of Santa Maria Formosa, swore that “if someone hires me to draft any document and it seems to me that he is mentally handicapped, I will not draft that document. But if I had any doubts in the matter, I will diligently examine him, and if he was ill, I will similarly examine whether he is mentally handicapped or not.”215 This was not an empty or merely formal promise; of the eleven cases of testaments disputed due to mental illness, five involve an action against the notary, which in some cases appears to have been separate from the overturning of the testament itself. The consequences varied. Bartolomeo, a priest of San Zuane

215 ASV, Giudici del proprio, Pergamene, busta 11: “Et si quis me rogauit de aliqua carta faciendi uidebitur mihi quod sit mentecaptum ipsum cartam non faciam. Sed si dubitauero in hoc ipsum diligenter examinabo, et si infirmus fuerit similiter examinabo utrum sit mentecaptus uel non.” The individual pezzi within this busta are not numbered.
Grisostomo who made a testament for Bellella Quirini, was suspended perpetually in 1327 for
not following the dictates of the capitulary.\textsuperscript{216} In that same year, Marco Sanino was banned from
practice for five years after the testament of Enrico Michaeli was overturned.\textsuperscript{217} In 1389, Marco
di Raphanelli was only fined ten \textit{libri piccoli} after the testament of Filippo Ariano was
overturned.\textsuperscript{218} Still there was some wiggle room for the notary. In the case of the testament of
Aliuca Faliero,\textsuperscript{219} the notary, simply named Leo, escaped without penalty. An expanded session
of the Quaranta overturned the testament by a vote of 48 in favor, 20 opposed, and 25 undecided,
but absolved the notary of any wrong-doing, of “not making the examination that he should have
to determine if Aliuca were of sound mind and intellect according to his capitulary.”\textsuperscript{220} The vote
was 54-28-13.\textsuperscript{221}

It should not escape notice that the families involved in these cases tended to be
prominent. Given the importance of testaments in family strategizing, it should not be surprising
that notaries faced punishment for negligence in fulfilling their office. On the other hand, we can
see that the Quaranta, the main council that tried these cases, did not apply a consistent
punishment, which may imply perceived degrees of negligence. The case of Leo and Aliuca
Faliero is particularly significant in this regard; while the council decided that Aliuca was in fact
insane, the acquittal of Leo shows just how problematic the proof of insanity could be. Even
conducting an adequate examination of sanity, Leo did not reach the correct conclusion.\textsuperscript{222}

\textsuperscript{216} Avogaria, Rasp. 3641, fol. 33v-34r.
\textsuperscript{217} Ibid., fol. 42r.
\textsuperscript{218} Avogaria 3644, fol. 121r-121v.
\textsuperscript{219} Aluica was born into the Gradenigo family and became the second wife of Marino Falier, famous for his
attempted coup against the aristocracy.
\textsuperscript{220} Avogaria, Rasp. 3644 fol. 121r-v : “non faciendo examinationem quam facere debebat secundam formam sui
capitularis ad cognescendum si dicta domina Aluicha erat sane mentis uel intellectus.”
\textsuperscript{221} Ibid.
\textsuperscript{222} Of course, given the prominence of the Faliero family, we cannot rule out political motivations for overturning
the will but sparing the notary. It would be difficult to reach any such conclusions without the testimony produced in
What did this examination look like? We have already seen an example in the *consilium* of Petrus Philippus Corneus concerning the will made by Ser Vannuzzi. He noted that one witness arguing for sanity testified that the notary asked Vannuzzi certain questions, to which he responded appropriately. Another case from Venice provides a fuller record of such an examination. From her sickbed in December of 1378, Maria Gradonigo sent for Conte, a notary and priest of San Pantaleone in order to make a testament. This testament was later contested by Ser Beleto Gradonigo, who may have been Maria’s nephew. The Avogaria di Commun summoned Conte to defend himself and the drafting of the testament. While the full run of testimony does not survive, Conte’s deposition remains intact and provides an excellent example of how a notary could go about defending himself in a case of disputed sanity.

Maria sent Berta, wife of Ser Paolo Barbo, to Conte with the request that he come to her home. Conte arrived and found Maria sick and confined to her bed. Conte hailed her politely, and she responded, “You have come well, Conte.” Already we can see Conte structuring his case for her sanity; not only did Maria respond appropriately to his greeting, she recognized him at sight. Conte proceeded to ask, “Donna Maria, you have sent for me, what is your pleasure?” to which Maria responded that she wished to make a testament. Maria had one of the women attending to her produce a cedilla that had already been drafted. After the document was read to

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223 In Conte’s testimony, he stated that Ser Beleto’s mother was present, but that he did not know who she was. Conte, however, mentions the bequest to Ser Beleto in the same breath as the bequest to Maria’s niece, who was present, so it is possible to assume that Beleto was similarly related to Maria.

224 ASV, Avogaria, Processi Originali, busta 3601, II.8, fol. 2r: “Presbyter Comes Sancti Pantaleonis notarius Veneciarum coram dominis aduocatoribus comunis personaliter constitutus, iuratus et examinatus ad suam defensionem dicere veritatem super testamento domine Marie gradonico, de quo dicitur fuisse rogasse ipsa non ente sane mentis, sed mentis alienate, ad suam defensionem respondit...”

225 Ibid., fol. 2v: “Iuit ad domum dicte domine Marie, et inuenit, dictam dopnam Mariam in lecto, infirmam. Et iuit ad eam, et dixit ‘salu duceri, Maria, bene steteritis’. Et ipsa domina Maria respondit, ‘bene veneritis presbyterus comes’."

226 Ibid. “Et tunc dictus presbyter Comes dixit, ‘Domina Maria vos misistis per me, quid placere vobis?’ Et ipsa domina Maria respondit quod volebat facere testamentum.”
her, Maria stated that she desired Conte to write a new cedilla, “since I do not want it to stand thus.” Conte portrayed Maria as fully in charge of the situation, ordering her attendees to do the physical tasks that she was unable to perform and having full understanding of the cedilla that Conte read to her. She had a clear purpose in requesting his presence and had a specific task for him when he had arrived.

This image of acting with purpose continues throughout Conte’s deposition. When Conte questioned her on a bequest to her niece, Maria reprimanded him, telling him to “write just as I tell you.” When he had finished, Conte sought out two witnesses to finalize the document. When he had returned with the witnesses, he read the document and asked Maria if she wished to approve it. The only slight mental lapse that Conte notes is that Maria at this point wished to make an amendment. She had forgotten to leave a sum of fifty ducats to a certain Zilbertino Giustiniano. Outside of this small addition, the cedilla was acceptable. Conte testified that he “continuously, from beginning to end, found her to be of good and sound mind and intellect.” He supported this conclusion in his testimony not only by claiming that she responded appropriately to his questions, but also with the general tenor of his story, in which Maria appears as the active

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227 Ibid. “Et ipsa domina Maria respondit quod volebat facere testamentum, vocando illam dominam cum qua ipse presbyter Comes iuerat; de ca foscareno, dicendo des mihi testamentum. Et dicta domina, iuit et apportauit vnam cedilam, Et cum apportauisse, dicta domina Maria dixit, ‘Presbyter Comes accipiatis istam cedila, et legatis mihi.’ Et ita presbyter Comes accepit cedulam pro legendo ipsam, et quia erat mala litera, ipse presbyter comes male sciebat eam legis, vnde dicta domina Maria dixit dicte nepti sue de ca foscareno, ‘Legas tu ipsam,’ vnde dicta domina de ca foscareno accepit cedilam et legit eam. Et lecta cedula, dicta domina Maria dixit dicti presbitero comite, ‘Ego volo quod vos scribatis vnam cedilam, quia ego nolo quod stet sic.’ Et tunc ipse presbyter Comes posuit se ad scribendum.”

figure in charge of the situation. Conte’s testimony must have proven at least somewhat convincing; a note on the last folio of the case indicates that the Avogaria ruled in favor of the validity of Maria’s testament.229

Clearly Johannes de Imola’s argument, founded on the professional integrity of the notarial office and perhaps from personal experience of seeing notaries held responsible for instrumenta created for the insane, carried some weight despite being contrary to the communis opinio of his contemporaries. Although the commentaries and lectures of later jurists do not bear witness to a wide reception of this idea, can we find it at work in the arguments of the consilia? Consider the examples of Marianus Socinus and Petrus Philippus Corneus, two jurists who found Johannes’ argument crucial to arguing cases before them. The consilium of Marianus is difficult to penetrate because of the editing done by early modern printers. From what can be culled from the argument, the case involves a dispute over the validity of an inventory of goods made by a guardian before entering into his office.230 According to Marianus, the central issue was whether the guardian was of sound mind at the time he had made the inventory. Among other pieces of evidence, Marianus focused on the document itself, which the proposed guardian had drafted with a notary. The inventory began with the typical clause stating soundness of mind. Besides more traditional methods of proof, which focused on a canonical understanding of the nature of the presumption, Marianus seized on “a special presumption that he was of sound mind, beyond the presumption of the law.”231 This “special presumption” derives from the belief that the notary had made a correct judgment about his client’s sanity; the document was thus valid unless

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229 Ibid., fol. 8v: “Pro testamento domine Marie gradenico facto per presbyterum Contem, contrata sancti Pantaleonis.”
230 See Chapter 4 for the importance of the inventory.
231 Marianus Socinus, Consilia (Venice, 1579), fol. 88r, con. 1.142: “Secundo praemito quod ex quo de restitutione constat publicum instrumentum, quod etiam habemus specialem praesumptionem, quod fuerit sanae mentis ultra praesumptionem iuris.”
proven otherwise. Although the notary cannot perceive insanity directly and must, like everyone else, infer it from speech and acts, his judgment has greater force because he is acting in an official capacity. Marianus did not explicitly cite Johannes de Imola, but the thrust of the argument as well as the texts cited show that Johannes was his source.232

A second consilium is more explicit in its reliance on Johannes. The particular case at hand is complicated; what began as a dispute over a testament came to involve a charge of criminal conspiracy. Set in the coastal town of Fano, the case involves a certain Piergentile, who had inherited a piece of land from Vico, a relative of his, on the grounds that Vico was not of sound mind when he drafted his will. Because the will was not valid, Vico therefore died intestate and his property passed to his nearest relative, Piergentile. The heirs named in the will seem to have met in order to plan their next steps, or perhaps to even seize the land from Piergentile, who informed the local podestà that there was a gathering of more than ten men conspiring against the town of Fano, which was expressly prohibited by local statutes. Petrus had a full plate in drafting this consilium, considering everything from the application of the statute to the determination of Vico’s sanity. We are concerned with the latter. Arguing for Vico’s sanity when the will was drafted, Petrus advanced typical arguments concerning the propriety of its contents, as well as its timing: although Vico was granted a curator because of his mental condition, this took place after he had the testament created. To seal his argument, Petrus noted that:233

232 Ibid. “Nam cum tabellio in creatione iure bene et legaliter conficere instrumenta, et consequenter non scribere instrumentum eius, quod fiat ab homine non sanae mentis. Ideo in dubio sibi credendum est, et standum instrumento, ut no. in l. Divus, ff. de custodia et exhibitione rerum [Dig. 48.3.6], et in l. Cum parati, de appel. [X 2.28.19] et in capitolo Quoniam contra falsam. extra de probationibus [X 2.19.11]. et per Bartolum in extravaganti, ad reprimendum in verbo ‘pronuntiari’.” Marianus’ use of Johannes is not altogether surprising considering that Marianus studied law under him at Bologna. Lange and Krichbaum, Römisches Recht, 810.

233 Petrus Phillippus Corneus, Consilia (Venice 1490), fol. 240v, con. 3.216: “Et maxime quia notarius solet non conficere instrumentum de testamento hominis non sanae mentis. Et solent in principio instrumenti facti super
Notaries are especially unaccustomed to drafting testaments for men of unsound mind. They usually say in the beginning of a document, ‘so-and-so, being of sound mind, etc.’ Credence should be given to this assertion of the notary, as Johannes de Imola says on Dig. 28.1.2. Although this opinion of Johannes should not pass without a doubt, though his authority is great. The assertion of the notary should not deny, but rather support a conjecture. It is in agreement that, as it has been said, the testament was rightly and properly composed, and was appropriate for a person of sound mind, leaving bequests for his soul and instituting persons of merit.

Petrus acknowledged that though Johannes’ argument was novel, the great authority of this famous jurist made its use acceptable. Still, this position is not the linchpin of his argument, but is instead the cap on a longer series of points meant to prove Vico’s sanity. Taken together, the consilia of Marianus and Petrus show that Johannes de Imola’s contrary opinion enjoyed some measure of success as a means of arguing a case, even if it did not have a positive reception in the commentaries of other jurists. On the other hand, if the case required opposition to the notary’s statement of sanity, the jurists had more than ample ammunition to argue against it, as Alexander Tartagnus did in the case of Jacopo Castro.

**Conclusion**

testamento dicere talis sanus mentis, etc. Et dictae assertioni notarii creditur, dicit Imo. in l. 3 ff. de testa. [Dig. 28.1.2]. Et licet dictum Imo. non transeat sine dubio, tamen magna est eius auctoritas. Et negari nequit quin praebat magnam coniecturam dicta notarii assertio. Confert etiam quia, prout dicitur, testamentum fuit rite et recte compositum conueniens homini sanae mentis, reliquendo pro anima plura relicita, instituendo personas quorum merita erga eum praecesserant.”

234 Though Marianus clearly followed his master’s opinion, other students, such as Alexander Tartagnus and Jason de Mayno, followed the earlier communis opinio. According to Jason, Franciscus Aretinus even advanced a new argument against a notarial privilege, namely that the words of the notary have no effect in creating sanity where the natural power of the testator is lacking. Franciscus seems to have viewed Johannes’ argument as an impermissible legal fiction, that the notary’s words somehow made the testator seem sane, even if the substance of the document argues the contrary. Although Johannes only argued for a presumption, Franciscus was not willing to grant even that to the notary.

235 Alexander Tartanus, Consilia (Venice 1592), fol. 153v, con. 1.141: “Non obiicit superius dictum, quod notarius in ultimo testamento dicit Iacobus sanus mente, etc., quia illa verba nihil operantur hoc in specie, ponit Bal. in l. 2 ff. de test. [Dig. 28.1.2], ubi quaerit an si instrumento dicatur sanae mentis etc. Dicit quod lac de Bel. dicit quod quod sanitas mentis non probetur per testimonium tabellionis, sed per iuris presumptionem, quae est, pars sit sanae mentis, nisi contraium probatur, c. Cum dilectus, de fide. instr. [X 2.22.9] et ibi not. Nam secundum Baldum, mentis sanitas est quid inuisibilis, et proprie non percipitur visu vel auditu, sed magis rationis iudicio. Unde dicit, quod illa verba tabellionis non habent vim testimonii nec probationis, quia qualitas mentis non probatur per tabellionem, sed solum verborum prolacione, et idem dicit Sal. in d. l. Furiosum [Cod. 6.22.9].”
Proof was a difficult problem for the jurists of the Middle Ages. The system of proof favored direct, eyewitness testimony to create a certainty. Insanity was acknowledged as something internal and invisible, though it could be glimpsed in outward signs. These signs were not objective, but were the subject of great debate over what was considered rational in a given situation. Still, the proof of madness was inherently circumstantial; counter-proof could always be admitted. In this way, insanity was rarely thought to be proven but rather presumed. The earliest juristic reflection on the proof of insanity focused on how sanity should be presumed and who bore the burden of proving it in the case. With canonists leading the way, by the early thirteenth century the principle emerged that a previous instance of insanity had the effect of altering the traditional presumption in future cases. Although Bartolus questioned whether this idea matched reality, it continued to enjoy use by subsequent jurists. Given the shifting nature of proof, jurists in the fourteenth and fifteenth centuries began asking if the testimony of particular kinds of witnesses possessed greater strength than others. Though their answers were not entirely conclusive, their probing of the expertise of certain witnesses provided a toolkit for practice. Witnesses could be strengthened or attacked.

The whole of this area of jurisprudence is an example of Clifford Geertz’s famous dictum that “legal facts are made, not born.” Bartolus held that the signs of madness were known to all, and the jurists based their entire approach to the proof of sanity on the opinions of the community. But despite this broad-based approach, they also subjected this evidence to a rigorous evaluation. From what emerged, insanity is something that could be easily defined in public, but when it became the subject of a court dispute, it became a difficult matter indeed.

Because of the difficult and uncertain nature of insanity itself, by the sixteenth century, the system of proof had emerged as a toolkit, flexible enough to allow the lawyer to meet the needs of the case at hand. Although jurists, such as Baldus de Ubaldis, attempted to provide more certainty to the idea of proof, it remained relativistic, the product of a process rather than a given.
CHAPTER 3

‘Satis ipso furore punitur’: The “Insanity Defense” in the Middle Ages

In some form or another, the “insanity defense” has been a feature of Western civilization from its very foundations. A basic belief that an intended wrong is more serious and should be punished more harshly than an unintended or accidental wrong eventually led to an idea that those who are mentally incapable of forming such an intent or of controlling their actions should be held less blameworthy, if even at all. For the Greeks who first began reflecting on this idea in literary and theoretical writings, an excuse founded on diminished capacity was implicit in their system of justice.¹ Still, for Plato, insanity only provided a partial excuse: he explained how under Athenian law any damages caused by an insane person still required simple compensation, though without any additional penalty. A madman who committed homicide had to endure a year of exile for the crime.² The Romans, however, advocated an idea of insanity as totally exculpatory, even to the point of excusing the furiosus from punishment. Because of its importance for later jurisprudence, we shall investigate the Roman approach to insanity more carefully below.

Already though, we can see the outline of the main tension that arises between the understanding that a lack of mental capacity results in a lack of responsibility and the need for punishment. Scholars examining the exchange between these two poles have rooted it in the dialogue between the intellectual recognition of non-responsibility and the more emotional need

² Robinson, Wild Beasts and Idle Humours, 21-22.
to meet crime with retribution of some kind. This is to some extent an over-simplification, since
the desire to exculpate may have notions of pity attached to it, while there existed very good
reasons to demand some measure of punishment. Moreover, whatever the origin of the impulse,
medieval jurisprudence embraced both. Stephan Kuttner has shown the crucial role that personal
intention played in the developing thought of the twelfth-century Decretists. While the canonists
were most strongly influenced by the prevailing trends of twelfth-century thought, the Romans
had placed a similar emphasis on dolus malus, or malicious intent, as a key component of their
criminal law. On the other hand, the idea that crimes should not remain unpunished provided the
foundation for the advancement of procedure in the thirteenth century. Thus whatever the origin
of the desire to exculpate or punish, both had solid roots in the law.

We should not then see the instances in which the insane were punished as failures of the
principle. The idea of some kind of punishment meted out to the insane for their offenses ebbs
and flows over time even in the writings of the jurists; we can therefore expect a similar
phenomenon in practice. How could this wavering be palatable for the jurists? In the few
consilia dealing with homicide committed by the insane, the authors, Baldus de Ubaldis and the
less famous Rainerius de Forlivio, expressed a certain urgency in arguing against punishment.
Still, the willingness, or even need, to inflict some measure of punishment even in the face of a

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3 Michael Perlin, “‘The Borderline which Separated You from Me’: The Insanity Defense, the Authoritarian Spirit,
4 Kuttner, Kanonistische Schuldlehre.
5 Arlette Lebigre, Quelques aspects de la responsabilité pénale en droit Romain classique (Paris: Presses
Universitaires de France), 55-60; Carlo Lanza, Recerche su ‘furiosus’ in diritto Romano (Rome: La Sapienza, 1990),
133-155.
7 Boari, Il furiosus nella criminalistica, 77-80. Boari mentions a separation between the ability to punish the insane
and the determination of their responsibility. He had in mind the distinction made by Baldus, which we shall discuss
later on. Boari, however, did not consider canonistic developments and so did not appreciate the fuller history of
separating the possibility of punishment from responsibility.
lack of culpability had its roots in the membership of insane offenders in their particular communities. Punishment involves more than a community seeking vengeance or compensation for a particular act. It provides a reinforcement of socio-cultural values as well a statement of the power to enforce those values.\(^8\) Public punishment was perhaps the most forceful expression of community identity. The insane, as members of a community, were not immune from the didactic function of punishment.

The desire to punish, particularly to punish the insane, possessed an emotional as well as a rational content. This is not meant to downplay or diminish the impulse as inferior to the intellectual understanding of culpability. Humans are emotional beings. Emotion is a fundamental way of interacting with the world, and even the most cursory examination of any medieval archive will show that strong emotions lay at the center of almost any dispute ending in violence.\(^9\) Indeed, there seemed to have been a particular contempt for violence carried out dispassionately, such as poisoning or solicited homicide. Scholars who have spent many years pouring over such records have noticed the often slight insults or social breaks that snowballed into murder, and have concluded that a casual attitude towards violence often held sway, particularly in urban areas.\(^10\) Through ubiquitous scenes of violence and their often equally violent punishment, might many in the Middle Ages have become desensitized to violence? Most scholars have argued not. Several have shown that punishment could and, most often, would take

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\(^9\) E.g. Dean, *Crime and Justice in Late Medieval Italy*, 121-123, who notes the expectation of violence in reaction to a provocative insult.

a more pacific guise, such as a fine, banishment, or punitive incarceration. One, however, cannot ignore the existence and frequency of corporal punishment: not only execution, but also amputation, blinding, and, less severe, whipping or flogging. Most importantly, these forms of punishment were public. The Venetians, for example, often paraded soon-to-be executed criminals through their home neighborhood and that in which they committed their crime (if it differed), ending between the two columns on the Piazza San Marco, where the execution would take place. While it is impossible to uncover the emotional reactions of those present at such spectacles, there is little to suggest that the spectators relished these displays as a form of entertainment. Public punishment was often intended as a communal expression of horror over a violent act staged in the strongest possible way. Violence was not tolerable and had to be counteracted, even with further violence. Guido Ruggiero made the important point that the elaborate rituals of state inflicted violence set it apart from the kind that occurred in the streets; ritual provided a solemnity and purpose, as well as a message to would-be victims and perpetrators alike. As we turn to insane then, we have a legal system and social mindset that on the one hand placed a premium on intentionality, while on the other demanding a public reckoning for crimes. As Kenneth Pennington has shown particularly regarding torture, jurists constantly strove to balance the rights of defendants with the duty that society had to punish the wicked.

Current scholarship of the history of insanity and criminal responsibility in the critical period of the Middle Ages has suffered the same pitfalls as scholarship of medieval insanity in

general, namely a partial coverage of ideas. Many scholars have either neglected to examine jurisprudential sources, or do so only in particular areas. Judith Neaman was content to point to texts from the Digest or the Decretum without providing evidence of their reception or understanding. Muriel Laharie and Jean-Marie Fritz both acknowledge the presence of an insanity defense in the northern French coutumiers, but do not provide its intellectual background.

The more specific studies also contain lacunae because of their chronological orientation. Both H.C. Erik Midelfort and Marco Boari treat insanity as it emerges from the Middle Ages but give short shrift to the important developments during these years. Midelfort claimed that “when Roman law was revived in the twelfth and thirteenth centuries, the formulation of the criminal insanity defense did not at first command much attention,” and overlooked the significant twelfth-century contributions of the canonists. Even Stephan Kuttner, in his still magisterial study of blame in the thought of the twelfth- and early thirteenth-century canonists, neglected the importance of Roman jurisprudence on the thought of Huguccio in particular, who, as we shall see, changed the course of canonistic doctrine on the matter. By approaching the topic through the lenses of Roman and canonical jurisprudence, this chapter aims to build on the work of Kuttner, Boari, and Midelfort. The history of the “insanity defense” in medieval jurisprudence is the story of the tug of war between the personal considerations of responsibility and objective public need for punishment. The success of Roman jurisprudence in this area was, I would argue, due largely to its ability to incorporate these two poles.

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14 Neaman, Suggestion of the Devil.
15 Fritz, Le discours du fou, 153-157; Laharie, La folie au Moyen Age, 245-254.
16 Midelfort, History of Madness, 187-193
17 Ibid., 188.
18 Kuttner, Kanonistische Schuldlehre, 106-110.
Roman Antecedents

Any examination of the exculpatory effect of insanity must begin in Rome. Though it is difficult to determine exactly when and how they entered into the discourse, the concepts of dolus and culpa became the driving ideas behind the development of Roman criminal and tort (delict) liability.¹⁹ By the time of the jurists Roman law had moved beyond the point of the naked existence of a delictual act into the consideration of external and even internal factors.²⁰ The jurist Paulus concisely and memorably summarized the basic position: “Volition and intent separate crimes and injuries [from other non-criminal acts].”²¹ The jurists embraced a tautology in which the criminal act reflected the mindset of its perpetrator, allowing witnesses to externalize the intention underlying the crime.²² It is not surprising then that the corpus of Roman law, particularly the Digest, consistently maintained in the excerpts of a number of authors that the insane were not responsible for any crimes or damages they might commit. What is surprising, and what has proven problematic for historians of Roman law, are the different and seemingly opposed rationales given for that lack of liability.

One reason given by the classical jurists was the most obvious: the insane were not responsible because they could not form the required intention. An action against fraud, for example, had no place against the insane precisely because they lacked the capacity for dolus, that is, the intention to commit a crime.²³ Likewise they could not be the source of an insult, even

²¹ Dig. 47.2.54.pr. “Qui injuriae causa ianuam effregit, quamvis inde per alios res amotae sint, non tenetur furti: nam maleficia voluntas et propositum delinquentis distinguit.”
though they could be the object of one.\textsuperscript{24} Neither are the insane capable of going into hiding, since this requires intent.\textsuperscript{25}

This view of delictual incapacity fits in well with the general vision of insanity in Roman law. It is all the more interesting then that the classical jurists provided a second rationale. The famous rescript of Marcus Aurelius, contained in an excerpt from Ulpian, “Divus Marcus” [Dig. 1.18.14, is one of the earliest mentions of insanity outside of references to the Twelve Tables and the earliest mention of the effects of insanity on criminal responsibility.\textsuperscript{26} The text, so important for later jurisprudence, is worth quoting in full.\textsuperscript{27}

The deified Marcus and Commodus wrote a rescript to Scapula Tertullus in these words: “If it has been clearly proven to you that Aelius Priscus is in a state of madness such that he lacked all understanding because of the continuous loss of his mind, and if there is no suspicion that his mother was killed while he was feigning madness, you can dispense with any consideration of his punishment, since he is punished enough by his own insanity. Still, he should be carefully guarded and, if you think [appropriate], bound by chains, since it pertains both to punishment and to his own protection and that of his relatives. But if, as very often happens, he has intervals of greater sanity, you should carefully investigate whether he committed the crime at such a time and if any indulgence should be given to his sickness. If you find this to be the case, you should consult us so that we might determine if he should be punished because of the enormity of the crime,

\textsuperscript{24} Dig. 47.10.3.1-2. “Sane sunt quidam, qui facere non possunt, ut puta furiosus et impubes, qui doli capax non est: namque hi pati iniuriam solent, non facere. Cum enim injuria ex affectu facientis consistat, consequens erit dicere hos, sive pulsent sive convicium dicant, iniuriam fecisse non videri. Itaque pati quis iniuriam, etiamsi non sentiat, potest, facere nemo, nisi qui scit se iniuriam facere, etiamsi nesciat cui faciat.”

\textsuperscript{25} Dig. 42.4.7.9. “Adeo autem latitatio animum et affectum occultantis se desiderat, ut recte dictum sit furiosum hinc venditionem pati non posses, quia non se occultat, qui suus non est.”

\textsuperscript{26} Lanza, Recerche, 123-132.

\textsuperscript{27} Dig. 1.18.14. “Divus Marcus et Commodus Scapulae Tertullo rescripserunt in haec verba: ‘Si tibi liquido compertum est Aelium Priscum in eo furore esse, ut continua mentis alienatione omni intellectu careat, nec subest ulla suspicio matrem ab eo simulazione dementiae occissam: potes de modo poenae eius dissimulare, cum satis furore ipso punitur. Et tamen diligentius custodiendus erit ac, si putabis, etiam vinculo coercendus, quoniam tam ad poenam quam ad tutelam eius et securitatem proximorum pertinebit. Si vero, ut plerumque adsolet, intervallis quibusdam sensu saniores, non forte eo momento scelus admiserit nec morbo eius danda est venia, diligenter explorabitis et si quid tale compereris, consules nos, ut aestimemus, an per inanitatem facinoris, si, cum posset videri sentire, commiserit, suppleceris, adiiciendus sit. Cum autem ex litteris tuis cognoverimus tali eum loco atque ordine esse, ut a suis vel etiam in propria villa custodiatur: recte facturus nobis videris, si eos, a quibus illo tempore observatus esset, vocaveris et causam tanta nelegentiae excusseris et in unumquemque eorum, prout tibi levari vel onerari culpa eius videbitur, constitueris. Nam custodes furiosis non ad hoc solum adhibentur, ne quid perniciosius ipsi in se moliatur, sed ne aliiis quoque exitio sint: quod si committatur, non immerito culpae eorum adscribendum est, qui neglegentiore in officio suo fuerint.’”
if he had committed it when he could seem to be aware. Since we have learned
from your letter that he is in such a position and rank that he is watched over by
his people or even in his own home, you will seem to us to act rightly if you
summon those who watched over him at that time, examine the reason for such
negligence, and render a decision against each one of them according to their
greater or lesser fault, as it seems to you. For caretakers are given to the insane
not only to prevent them from doing something harmful to themselves, but also
from bringing harm on others. If that should happen, it should be ascribed to the
fault of those who were too negligent in their duty.

Justinian's editorial team included this text under the title *De officio praesidis*, most likely
because of the careful investigation and consultation with the emperors that Scapula had to
undertake. The most interesting aspect of the rescript for our purposes is its justification for this
decision. If Scapula were to find that Aelius killed his mother without any suspicion of faking
his madness, the governor could “dispense with any punishment, since he [Aelius] is already
punished by his own madness.”28 Crimes committed during insanity were unpunishable not
because of mental incapacity, but because the condition itself bore its own punishment. How so?
Scapula could order, if it seemed appropriate, that Aelius “should be carefully guarded and, if
you think [appropriate], bound by chains, since it pertains both to punishment and to his own
protection and that of his relatives.”29 The idea of being punished by his own insanity was not, in
the rescript, an abstract notion of pity, but a recognition that the steps needed to protect this
*furiosus* resembled punishment. The text preceding “Divus Marcus,” also an excerpt from Ulpian,
supports this interpretation. “The divine Pius wrote in a rescript: ‘The divine brothers thought
that imprisonment should be ordered for the [insane] person who had committed patricide,

28 Ibid.: “Si tibi liquido compertum est Aelium Priscum in eo furore esse, ut continua mentis alienatione omni
intellectu careat, nec subest ulla suspicio matrem ab eo simulatone dementiae occisam: potes de modo poenae eius
dissimulare, cum satis furore ipso puniatur.”
29 Ibid.: “Et tamen diligentius custodiendus erit ac, si putabis, etiam vinculo coercendus, quoniam tam ad poenam
quam ad tutelam eius et securitatem proximorum pertinebit.” Geoffrey E.M. de Ste. Croix translated this in the
Watson edition as “And yet it will be necessary for him to be all too closely guarded, and, if you think it advisable,
even bound in chains, this being a matter of not so much punishing as protecting him and the safety of his neighbors.”
There is nothing in the passage that suggests the negative with regard to punishment.
whether he had committed the crime while feigning insanity or whether he was truly out of his mind, so that if he had feigned [insanity], he would be punished, and if he were insane, he would be held in prison.”  

While addressing the problem of feigned insanity, the text of the emperor Pius similarly held that imprisonment was both punishment and a necessary consequence of raving madness. Another classical jurist, Modestinus, also recorded the idea that the insane are sufficiently punished by their own madness. Recalling the customary (and from our vantage point, cruelly bizarre) punishment inflicted on patricides, Modestinus noted that a *furiosus* who commits this crime will be unpunished, “as the divine brothers wrote in a rescript concerning one who killed his mother while insane. For it is sufficient that he be punished by his own insanity, and that he should be diligently guarded and even bound in chains.”  

Modestinus, like Pius in his rescript, clearly drew on the rescript of Marcus Aurelius and Commodus. In his commentary on the *Lex Cornelia*, the law of Sulla concerning homicide, “Young children and the insane, if they should kill someone, are not held by the *Lex Cornelia*, since innocence of intent protects the one, and the misfortune of fate the other.”

This text is remarkable for two reasons. First, the phrase “infelicitas fati” implies not the practical consequences of violent madness as in the rescript, but a more general pity for one so afflicted. Second, in providing rationale for the lack of punishment, Modestinus expressly contrasted the inability to form intent on the part of the *infans* with pity for the *furiosus*.

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30 Dig. 1.18.13.1. “Furiosis, si non possint per necessarios contineri, eo remedio per praesidem obviam eundum est: scilicet ut carcere contineantur. Et ita divus Pius rescripsit. Sane excutiendum divi fratres putaverunt in persona eius, qui parricidium admiserat, utrum simulato furiae facinus admisisset an vero re vera compos mentis non esset, ut si simulasset, plecteretur, si fureret, in carcere contineretur.”

31 Dig. 48.9.9.2. “Sane si per furorem aliquis parentem occiderit, impunius erit, ut divi fratres rescripsissent super eo, qui per furorem matrem necaverat: nam sufficere furore ipso eum puniri, diligentiusque custodiendum esse aut etiam vinculis coercendum.”

32 Dig. 48.8.12. “Infans vel furiosus si hominem occiderint, lege Cornelia non tenetur, cum alterum innocentia consilii tuetur, alterum fati infelicitas excusat.”
What do these two paths to the same place mean? In his study of the insane in the context of Roman criminal law, Lebigre noted the strand of thought prescribing pity for the insane but still felt that the inability to punish the insane rested on the general lack of legal agency.\textsuperscript{33} This does not explain why such legal disability is only mentioned with regard to other crimes, such as fraud or insult, and why pity or the sufficient punishment by madness only appears in connection with homicide. Carlo Lanza's answer to problem seems most probable. According to Lanza, the simple assertion of delictual incapacity was not enough to excuse so terrible a crime as patricide. Aimed as it was against the basic font of authority in Roman society, patricide was considered the most heinous crime, hence the rather extreme traditional punishment. The concept expanded in time to include both parents, but it did not stop there; even treason became a kind of rhetorical patricide.\textsuperscript{34}

The theory of criminal incapacity alone could not withstand the pressure of social and emotional outrage at such an act. The need to acknowledge some kind of punishment, some unpleasant consequence, even if it flowed from the practical demands preventing future violence, could mitigate these cultural pressures. The formula “\textit{satis ipso furore punitur}” therefore provided a legal fiction of punishment supplementary to the general principle of incapacity. I would add that the Roman jurists already had a workable fiction for accounting for the misdeeds of the insane. In commenting on the \textit{Lex Aquilia}, the law pertaining to torts and damages, we find Ulpian claiming that the \textit{Lex Aquilia} does not pertain to the insane, in whom there is no blame because there is no mind at all. “An action from the Lex Aquilia will cease, just as it

\textsuperscript{33} Lebigre, \textit{Responsabilité pénale}, 40: “Ainsi, le fou criminal doit être, selon Marc Aurèle et Modestin, le bénéficiaire d’une pitié qui se fonde sur son infortune. Mais à Pegasus déjà, à Ulpien surtout, revient le mérite d’avoir dégagé clairement la notion d’irresponsabilité pénale du \textit{furiosus} delinquent, en la fondant sur l’absence de comprehension de ses actes qui caractérise le malade mental.”

\textsuperscript{34} Lanza, \textit{Ricerche}, 162-165.
ceases if an animal will have caused the damage or if a roof tile should have fallen.”

The damages caused by the insane are likened to those caused by any other unthinking force. Pomponius took a similar approach: “I think that anything done because of one’s insanity should be seen as if it happened by some chance and not as if done by a person.” In this view, the deeds of the insane are just another peril in a chaotic world, “acts of God,” as modern insurance law would put it. This fiction of Roman law explains how a damage could occur without the attribution of responsibility. Had the jurists wished, they could have considered homicides like that of Dig. 1.18.14 as accidental deaths. That instead they accepted a new fiction centered on the idea of punishment is further testimony to the need for some kind of punitive reaction even if there were no fault or intention.

As we turn from Rome towards the rebirth of its jurisprudence in the Middle Ages, it is important to highlight the simultaneous approached to the punishment of the insane used by the ancient jurists. They may have argued against punishing the insane in different ways depending on the circumstance, but the ultimate effect and import of their arguments was the same. Even when punishment and precaution looked the same, the jurists distinguished theoretically between the two. While this may have been hollow succor to the furiosi themselves, it would have a lasting impact on the jurisprudence, particularly in the twelfth century. First, Gratian relied on Roman ideals in his explanation of the non-responsibility of the insane. Later, when the roots of the budding insanity defense were threatened, jurists armed with Roman law would come to its defense.

35 Dig. 9.2.5.2. “Et ideo quaerimus, si furiosus damnum dederit, an legis Aquiliae actio sit? Et Pegasus negavit: quae enim in eo culpa sit, cum suae mentis non sit? Et hoc est verissimum. Cessabit igitur Aquiliae actio, quemadmodum, si quadrupes damnum dederit, Aquilia cessat, aut si tegula ceciderit. Sed et si infans damnum dederit, idem erit dicendum. Quodsi impubes id fecerit, Labeo ait, quia furti tenetur, teneri et Aquilia eum: et hoc puto verum, si sit iam injuriae capax.”

36 Dig. 26.7.61. “Impune autem puto admittendum, quod per fuorem alicuius accidit, quo modo si casu aliquo sine facto personae id accidisset.”
As we have already seen, the first significant discussion of insanity in the legal Renaissance of the twelfth century came not from the students of Roman law, but rather canon law. Gratian’s Causa 15 posed the scenario of a cleric who had fornicated with a woman prior to becoming a priest. After his ordination, the cleric went insane and killed someone. In the first question drawn from this hypothetical Gratian focused on insanity, particularly the relationship between mental capacity and responsibility. “Can those things done while out of one's mind be held against a person?” Although I have conjectured that Roman law may have played some background role in Gratian's conception of this questio, it is clear that the primary approach to the question was theological in character. As Tatsushi Genka as shown, Gratian took his capitula, mostly patristic texts, from canonical collections, i.e. the Collection in Three Books and the Tripartita, and even possibly drew on Abelard's Sic et non for his dicta. This should not be altogether surprising. Canon law and theology in the twelfth century were still fairly indistinct from one another. Gratian's methodology, revolutionary in canon law, had enjoyed both renown and scorn as the increasingly standard pedagogy of theological learning. Influential Decretists were also prominent theologians, such as Rolandus of Bologna, who also wrote a book of sentences, and Gandulphus, who penned an abbreviation of Peter Lombard's Sentences as well as, most likely, glosses to the Decretum. The apocryphal story of Gratian and the Lombard being

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37 C.15: “Clericus quidam crimine carnis lapsus esse perhibetur ante quam sacerdotalem benedictionem consequeretur. Postquam uero sacerdotium adeptus est, in fuorem uersus quondam interfecit. Recuperata uero sanitate apud episcopum accusatur ab ea, cum qua lapsus esse dicitur. Episcopus autem die dominico causam examinat. Sacerdos inficiatur crimen sibi illatum; quorundam clericorum sibi patrocinia querit; illi uero non sine precio sibi patrocinantur; tandem episcopus questionibus confessionem extorquet; demum solus et absque sinodali audientia illum sententia ferit.”
38 Ibid.: “Queritur autem, an ea, que mente alienata fiunt, sint inputanda?”
brothers, while not helpful in writing the biography of the almost unknown father of canon law, is still informative of how contemporaries viewed the two disciplines these intellectual giants had shaped. Moreover, at the time of Gratian and the Decretists, they, rather than theologians, were at the vanguard of what would we would call moral theology.41

The exchange between the two emerging disciplines is particularly evident when considering the often fuzzy distinction between sin and crime. Abelard had already distinguished the two in his own work. Sin, properly speaking, is scorn or contempt for God. Crime, on the other hand, must be a serious sin “that can make a person criminal or infamous if people come to hear of [it].”42 Sin begins internally, and though it can manifest itself externally, it can also exist entirely within. While beginning in sin, crime must be external; it must be the subject of observation and judgment by others.43 Although it contained the conditions for the maxim that “the Church judges according to manifest and not hidden things,” the concepts exist on a continuum rather than a simple distinction.44 Crime, for Abelard, is a type of sin, a serious and public sin. The violation of laws or even norms is strikingly absent from his definition; only the internal, voluntary consent to defy God is at issue.45 The close connection between the two concepts would be of the greatest importance for Gratian and his handling of C.15 q.1.

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44 Ibid., 317.
The hypothetical centers around a homicide, and the *causa* deals overwhelmingly with questions of procedure: representation, proper form, acceptable witnesses, etc. Influenced as he was by Abelard, Gratian viewed responsibility for crime and sin as essentially the same thing, a blurring of distinctions that would later draw the ire of Huguccio.46 This freed Gratian to give greater consideration to role of volition in the sinful/criminal act.

Since the pioneering work of Anders Winroth, we have been able to peel back the layers of accreted texts to view a simpler and more direct version of the *Decretum*.47 In many ways, Gratian’s argument did not change much at all in the transition from the first to the second recension. The dicta, particularly the lengthy introductory in which Gratian established his terms and the outline of his argument, are present in the first recension, along with the key capitula: cc. 3, 5, 6, and 11. The additions in the second recension, most notably Dig. 47.10.3, support his arguments without taking them far afield. Indeed, with the exception of this Roman law text, the type of source used, patristic texts, remained consistent across recensions. The story is quite different when we turn to the second half of the questio, in which Gratian considered possible objections to his schema. He added a second substantive objection to the sole contrary text posed in the first recension. This text, and the master's brief comment on it, would shape the jurisprudence of insanity for several decades to come.

Let us turn then to Gratian's discussion of the responsibility of the insane, first in the earlier recension and then in the later. The first and most basic question drawn from the hypothetical is whether the insane are responsible for their actions, particularly in a legal or actionable way. He maintains that they are not, which he says, somewhat deceptively, “is easily

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46 Kery, “La culpabilité,” 313.
proven." Even without Genka’s textual analysis showing the borrowing of texts from the *Sic et non* itself, Gratian's starting point betrays strong connections to the highly personal and voluntaristic notion of sin championed by Abelard. Theologians of the twelfth century, reacting against the passive and automatic “tariff” approach to sin found in penitential literature, argued for a more internal notion of sin less tied to consideration of the outward act, a notion that laid the ground for a more active engagement of the penitent with his salvation. They found a wealth of support for this in the works of the fathers, particularly Augustine. Gratian took his introductory definition of sin from Augustine, claiming that sin proceeds from the will. “Sin is a voluntary evil to such a degree that it is in no way sin if it is not voluntary.” For Gratian and subsequent canonists, as for contemporary theologians, the will held an absolutely central position in matters of sin. For the most part though, as Kuttner and later scholars have observed, they dealt with the will most insightfully in cases wherein it failed or in some way proved defective. Drawing on such scriptural examples as 1 Cor. 14:38, Jn 16:2, and Rom. 7:24, Gratian acknowledged that something other than the will seemed to be at work, something that interfered with the strictly voluntary act. He termed such interferences “*infirmitates,*” weaknesses or debilities, and distinguished between weaknesses of the spirit and of the flesh. Although both had an effect on the will, the precise extent remained to be seen. Ignorance, for example, was a weakness of the spirit, though acts done in such a state could be held against

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48 C.15 q.1 d.a.c.1 “Quod autem ea, que alienata mente fiunt, non sint inputanda, facile uidetur posse probari.”
52 C.15 q.1 d.a.c.1: “Sed hoc non generaliter de omnibus peccatis intelligendum esse, idem Augustinus in 1. Libro retractionum [cap. 13.] ostendit, dicens: ‘Usque adeo peccatum voluntarium malum est, ut nullo modo sit peccatum, si non sit voluntarium’.”
one. Gratian held that none of the infirmities of the spirit, including anger and hatred, provided an excuse. Even lust, which resided in the flesh, had a mental component that made it blameworthy. Gratian numbered insanity instead among the infirmities of the flesh, such as fever. Such a weakness is also a “punishment of sin,” that is, a consequence of the Fall, but unlike infirmities of the spirit, those of the flesh did not make one liable for punishment, since they are not sinful in themselves. Gratian sidestepped even a possible objection like Lamech’s blindness by equating it with ignorance. Lamech, Cain’s apocryphal killer, was still responsible for his crime because his blindness was “similar to ignorance.” The distinction between the “infirmitates animi” and the “infirmitates carnis” is significant in Gratian’s understanding of madness. Only weaknesses of the spirit could make one liable for punishment; bodily weaknesses led to punishment only insofar as they contained or resembled those of the spirit. The distinction, however, could break down in the case of madness just as Gratian noted that it could in the case of blindness. Gratian countered this objection with a further distinction concerning the blameworthiness of the blind. A blind man who sleeps with another woman thinking her to be his wife commits no sin, while a blind man who kills someone while playing a game, exercising, or hunting does sin, since he should not be participating in such an activity.

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54 C.15 q.1 d.a.c.1: “Nullum tamen eorum in sua perfidia perseverantem hec ignorantia excusat.”
55 C.15 q.1 d.p.c.2: “Ut itaque, ex premissis appareat, siue ex uloluntate siue ex infirmitate peccata procedant, palam est illa inputari. Sed carnis infirmitas dupliciter intelligitur. Est enim languor naturae, qui carnis concupiscientia appellatur, quae uerius animae infirmitas dici potest, sed ideo carnis infirmitas dici tur, quia accidit animae ex conjunctae carnis corruptione.”
56 Ibid. “Furor autem, cum non sit peccati, ut febris et ceterae passiones, quas proprie carnis dicimus esse, quorum motus, id est ea, que illis perturbantibus fiunt, nulli inputantur ad penam.”
57 Ibid., “Sed obicitur de Lamech, qui, cum cecus esset, Cain interfecit, nec eum excusavit cecitatis infirmitas. Unde dictum est: ‘Septuplum ultio dabitur de Cain; de Lamech septuagies septies.’ Sed cecitas ignorantiae similis est.”
58 Ibid., “Cecus namque, si debitum suae uxori se credens reddere alienam pollut, non est reus adulterii. Si autem ludo, uel exercitatione uirium, uel uenatione iaculum mittens aliquem perimat, quia ab eo hoc penitus debet esse alienum, homicidii reus habetur.” The example of throwing spears while playing a game or exercising has strong connections with Ulpian’s comments of the Lex Aquilia in Dig. 9.2.9.4: “Sed si per lusum iaculantibus servus fuerit occisus, Aquiliae locus est: sed si cum alii in campo iacularentur, servus per eum locum transierit, Aquilia cessat,
Despite the physical inability, the true issue for Gratian was the mental competence to decide on a prudent course of action, a competence that the insane did not possess.

Since the insane do not have the "facultas deliberandi," they cannot commit a sin and should not be punished. Of the capitula in the first recension, one of the most powerful texts, and one most frequently singled out by later Decretists, is c.5, "Aliquos scimus," a Pseudo-Augustinian text:

We know that some, who suddenly go mad, harm many with swords, clubs, stones, biting and even kill others. When they are captured with great effort and brought to judgment, they are not held guilty at all, since they did not do these things of their own will, but by some impulse I know not what. For how is one held to be guilty who does not know what he did?

Here Gratian had not only a defense of his principle that the insane should not be punished, but even one directly related to the case at hand. Another text, of Ambrose this time, notes that "blame binds and punishment should condemn those who are voluntarily guilty, not compelled by some necessity. Neither is one who kills an innocent person while insane guilty of that death." In another text of Ambrose, the final included on the "pro" side of this questio, one who kills without willing it is called the "minister of divine vengeance." The rationale behind this text is strikingly similar to that of the Lex Aquilia. Whereas Ulpian attributed the unintended acts of the insane to chance, Ambrose (and by extension Gratian) accounted for them through the

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59 Ibid., "Mens uero alienata furore, cum sui conpos non sit, eorum, que admittit, reatum non contrahit, quia facultatem deliberandi non habuit. Unde pupillo et furioso in maleficiis subuenitur, ut non eis inputetur ad penam que ex mentis deliberatione non processerunt."

60 C.15 q.1 c.5: "Aliquos scimus subito dementes factos ferro, fuste, lapidibus, morsibus, multos nocuisse, quosdam et occidisse, captos autem industria et iudiciis oblatus minime reos factos, eo quod non voluntate, sed inpellente ui nescio qua hec gesserint nescientes. Quomodo enim reus constituitur qui nescit quod fecerit?"

61 C.15 q.1 c.6: "Ideo etiam in iudiciis istiusmodi volutarios reos, non necessitate compulos culpae constringit, pena condempnatis."

62 C.15 q.1 c.11: "Percussor autem, qui non ex dispositione, sed preter voluntatem fecerit homicidium, diuiniae minister est ultionis."
Christian replacement for chance, divine providence. Gratian again repeated this sentiment in his summation of the texts arguing against the liability of the insane. In short, because sin is voluntary, and because the insane have no will, they are not responsible and cannot be punished for their misdeeds.

In the first recension, Gratian advanced only one objection to the inability to punish the insane, one which did not assail the root principle of non-responsibility. The text, attributed to Jerome, provides two examples. A teacher who strikes pupil for the sake of discipline, not anger, and kills him, is innocent as far as grace is concerned, since sin is a matter of the will. Such a teacher would be guilty, however, according to the law, since the law looks to deeds. Likewise, if a virgin is raped, although she has committed no sin, she is no longer considered a virgin by the law, although she is in the eyes of God. Although attributed to Jerome, “Si quis iratus” is of dubious origin. The text is found in only two canonical collections: the Collection in Nine Books and the related Collection in Three Books. The first example posed in the text bears a striking similarity to an excerpt of Ulpian on the Lex Aquilia: “If a master has injured or killed a slave while disciplining him, would he be held by the Lex Aquilia as if he had done damage? Julian writes that he who had blinded a pupil of discipline is held by the Lex Aquilia, and the same will be said much more in a slaying.” The connection was not lost on even the early Decretists;

63 C.15 q.1 c.13: “Si quis non iratus, sed propter disciplinam palmam alicui dederit, et casu occiderit, sicut fieri solet, quantum ad gratiam, innocens est, quia voluntatem, non opus requirit. Quantum autem ad legem, reus est, quia opera querit. Item si in persecutione urgo fuerit obpressa, repellitur lege, quia opus inspicit, non voluntatem; in gratia autem quasi urgo suscipitur, quia non opus querit, sed voluntatem.”

64 Genka, “Zur textlichen Grundlage,” 48-51. Clavis canonum lists the Collection in Nine Books, in Città del Vaticano, BAV, Arch. S. Pietro C. 118, fol. 107r, as the only collection containing the text.

65 Dig. 9.2.5.3: “Si magister in disciplina vulneraverit servum vel occiderit, an Aquilia teneatur, quasi damnum inuria dederit? Et Iulianus scribit Aquilia teneri eum, qui elusceaverat discipulum in disciplina: multo magis igitur in occiso idem erit dicendum.”
Köln, Dombibliothek 128, a twelfth-century manuscript containing glosses connected with the first composition, contains a basic allegation to the *Lex Aquilia* in its glosses to the text.⁶⁶

Gratian added his own example to this, one drawn from a heated controversy of his own day. What if a father, without his son's knowledge, should attempt to gain a clerical office for him through simony? “The ambition of the parent is not held against the son for punishment, though he still cannot gain an ecclesiastical office.”⁶⁷ Certain effects, such as irregularity, flow from a naked act, regardless of whether it was voluntary or not. Such effects are not so much penalties as consequences. Thus the homicide committed by the insane person does not render them guilty, but irregular, that is, unable to take up orders if not already ordained, and unable to be promoted if already a cleric. Gratian specified that an already ordained cleric should not be deposed because of such a homicide, though he may be removed from his duties if there is no hope of him recovering his sanity.⁶⁸

Even though the first explicit reference to the Digest comes only in the second recension, strong evidence exists that Gratian had Roman law in mind when he originally composed C.15 q.1. As I previously noted, Gratian’s frequent use of *furiosus* in his *dicta* when the terms in his canonical source material vary is suggestive of Roman law, as is the grouping of the *furiosus* and the *pupillus*. In his dictum explaining the relevance of the story of Lamech, he also seems to have drawn on the *Lex Aquilia*. Even in his choice of texts, at least two bear a strong

⁶⁶ Köln, Dombibliothek 128, fol. 159v: “D. ad l. aquil. [Dig. 9.2]” The particular form of this *allegatio*, to the entire title rather than the specific *lex*, Dig. 9.2.5.2, is interesting. Was the source of this gloss aware of the connection but not the particular *lex*? What level of familiarity di the person have with Roman law?
⁶⁷ C.15 q.1 d.p.c.13: “Item obicitur: Sunt quedam, que, etsi non inputentur ad penam, tamen inpediunt sacramenti signaculum. Ambicio namque parentum filio non inputatur ad penam, cui tamen obest ad ecclesiae munus accipendum. Sic que mente alienata fiunt, etsi non inputentur ad penam, tamen sacri munerais executionem inpediunt.”
⁶⁸ Ibid. “His ita respondetur: Non omnia, que ordinandum inpediunt, ordinatum deiciunt; non enim potest ad sacerdotium prouehi qui aliquando insaniuit. Verumtamen, si post sacerdotium furere ceperit, non ideo sacerdotio carebit, nisi forte numquam ad sanae mentis offitium illum redire contingat.”
resemblance to positions found in Roman law, specifically again the *Lex Aquilia*. As Stephan Kuttner indicated, Gratian's use of Roman law did not stop at direct citations; at times, through the use of specialized vocabulary or concepts, certain passages bear the imprint of Roman law by the hand of one familiar with it.\(^6\)

Drawing on both Roman law, which held firmly that the insane should not be punished, and a strong Abelardian emphasis on the role of volition in sin, Gratian constructed a strong base for the non-responsibility of the insane. He only admitted an exception in the case of irregularity, which attached to someone on the basis of a fact, regardless of intent. Irregularity would be a consequence of homicide committed by the insane until the fourteenth century.

The additions of the second recension saw some bolstering of his emphasis on the will. For example, he added a text of Augustine dealing with coerced perjury. If someone threatens to kill another unless he perjures himself, and the second person, fearing for his life does so, is that perjury a sin? Augustine held that it was. Such could be called a sin of the unwilling. Although the threatened man did not wish to perjure himself, he did will the perjury in order to save his life.\(^7\) This text would be a locus for the maxim “*coacta voluntas voluntas est.*” Given its place splitting his opening dictum, Gratian was more concerned to emphasize the point that the *infirmitates* could affect the operation of the will without removing its central role. Other additions from Augustine and Ambrose dealt with drunkenness. Deeds done while drunk “are


\(^7\) C.15 q.1 c.1: “Merito queritur, que sunt peccata nolentium? utrum que a nescientibus committuntur, an etiam possit recte dici peccatum esse nolentis, quod facere compellitur? Nam et hoc contra ululantatem dici solet; sed utique uult propter quod facit; tamquam si periuare nolit, et facit cum uult uiuere, si quisquam, nisi fecerit, mortem minetur. Vult ergo facere, quia uult uiuere, et ideo non per se ipsum appetit, ut falsum iuret, sed ut falsum iurando uiuat. Quod si ita est, nescio, utrum possint ista dici peccata nolentium, qualia hic dicuntur expianda. Nam si diligenter inspiciatur, forte ipsum peccare nemo ulsit, sed propter aliud quod uult peccat.”
given leniency by wise judges.”71 Even Lot, who committed incest while intoxicated, was guilty of drunkenness and not of incest.72 The addition of these texts in particular is interesting given Gratian’s addition in the second half, as we shall see.

The most notable addition to the first half is an excerpt from the Digest concerning the inability of the insane to give insult.73 No prior collection included the text, so it is most likely that Gratian included it directly from the Digest.74 Moreover, most twelfth-century manuscripts of the Decretum treat it as a source cited within a *dictum* rather than as a separate *capitulum*. The text entered into the second recension at a relatively early stage; only one manuscript adds the text in the margin, and only two provide a non-standard placement.75 We have seen that Gratian had previously included texts that not only supported him theoretically, but that also included some particular mention of homicide committed by a madman. Why, with the numerous texts dealing with this very crime, did Gratian choose a text dealing with insult? Recall that the texts in Roman law dealing with homicide all justified non-responsibility through some form of the “*satis ipso furore punitur*” idea. Gratian instead chose a text that founded non-responsibility on mental incapacity, specifically, that insult depends on the intention of the one giving it, of which the insane are not capable. Gratian did not add this text as a flourish or an afterthought, but carefully chose it to fit his argument.

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71 C.15 q.1 c.7: “Nesciunt quid loquantur qui nimio uino indulgent, iacent sepulti, ideoque, si qua per uinum deliquerint, apud sapientes iudices uenia quidem facta donantur, sed leuitatis dampnantur auctores.”
72 C.15 q.1 c.9: “Inebriauerunt Loth filiae eius, et se nescienti miscuerunt. Quapropter culpandus est quidem, non tamen quantum ille incestus, sed quantum ebrietas illa meretur.”
73 C.15 q.1 [c.2]: “Illud relatum pereque est, eos, qui iniuriam pati possunt,: et facere posse. Sane sunt quidam, qui facere non possunt, utpuba furiosus, et inpubes, qui doli capax non est. Namque hi pati iniuriam solent, non facere. Cum enim iniuria ex affectu facientis consistat, consequens erit dicere, hos, siue pulsent siue conuicium dicant, iniuriam fecisse non uideri. Itaque pati quis iniuriam, etiamsi non sentiat, potest; facere uero nemo, nisi qui scit se iniuriam facere, etiam si nesciat cui faciat. Quare si quis per iocum percutiat, aut dum certat, iniuriarum non tenetur. Si quis liberum hominem ceciderit, dum putat seruum suum, in ea causa est, ne iniuriarum teneatur.” Dig. 47.10.3
75 Ibid., 54-56. Salzburg, Sankt Peter Abtei aXI.9, fol. 169v uses a *siglum* to add the text immediately after c.1. See also Heiligenkreuz, Stiftsbibliothek 44, fol. 154r and Köln, Dombibliothek 128, fol. 158v.
The most important, and shortest, second-recension addition came in the second half of the questio. Attributed by Gratian to the *Penitential* of Theodore, c.12 actually originated from the 868 Council of Worms.\(^{76}\) “If an insane person should kill someone and afterwards return to sanity, a lighter penance will be imposed on him.”\(^{77}\) This text proved very problematic indeed. The need for the insane offender to undergo any level of penance, however light, implied that he had committed a sin. Gratian had constructed a nuanced argument proving that the insane did not, could not sin. His conclusion flowed naturally from his basic premise that sin stems from the will; the discussion of the *infirmitates* are only possible objections to this that Gratian incorporated and explained. Indeed, by the second recension and the inclusion of “Merito” and a discussion of the coerced will, Gratian seemed even more certain, if possible, in his original conclusion, a conclusion soaked in contemporary theology. C.15 q.1 c.12 represented an earlier tradition, a tradition in which a deed demanded a consequence regardless of fault. The capitulum was not from a penitential, but it possessed all the flavor as if it were.

Faced with a challenge to not only his conclusion but the principle that supported it, Gratian, to his credit, did not dismiss the text as antiquated or somehow not applicable.\(^{78}\) He instead advanced a possible solution. “Perhaps this should be understood concerning one whose own fault has led him to insanity.”\(^{79}\) This did not represent Gratian's final word on insanity and responsibility but only a possible answer to a difficult text. The tentative explanation allowed

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\(^{76}\) MGH, Leges, Conc. 4, 265. According to *Clavis canonum*, of the 17 collections preceding Gratian that include this text in some form, only the *Collection in Three Books* attributes the text to Theodosius.

\(^{77}\) C.15 q.1 c.12: “Si quis insaniens aliquem occiderit, si ad sanam mentem peruenerit, leuior ei penitencia inponenda est.”


\(^{79}\) C.15 q.1 d.p.c.12: “Sed hoc forte de eo intelligitur, quem propria culpa ad furorem perduxit.”
Gratian to incorporate a text that fundamentally differed in its conception of sin within his volition-based scheme. If a prior fault had led one to madness, one could still be punished because original fault was voluntary. Gratian’s overall position remained one of non-responsibility. This short explanation would, however, influence Decretist understanding of the responsibility of the insane until the end of the twelfth century. Huguccio, the most vocal opponent of this interpretation, commented on the “forte” and remarked that “it is well that he tempers [his explanation], since he speaks falsely, as I believe.” Gratian provided a rather elegant solution. He maintained the primacy of the will in sin by shifting the moment of volition back. The *furiosus* was not responsible for the crimes committed while insane, but could be held responsible for any misdeeds that led to his insanity. Gratian could have found his inspiration for his explanation of “Si quis insaniens” in the example of Lot’s drunkenness. Lot was not guilty of incest because he did not possess the mental capacity to consent to the act. He did, however, consent to the drunkenness that led to his incapacitation. In this way, the lighter fault that may have gone unpunished leads to punishment because of the more serious fault it gave rise to.

**The Decretists and “Culpa precedens”**

Gratian had argued clearly that misdeeds committed during madness bore no punishment, save irregularity. Paucapalea, one of the earliest known Decretists, held firm to this argument as presented in the first recension; he did not comment on “Si quis insaniens” and what it meant for

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81 C.15 q.1 c.9: “Inebriauerunt Loth filiae eius, et se nescienti miscuerunt. Quapropter culpandus est quidem, non tamen quantum ille incestus, sed quantum ebrietas illa meretur.” See also c.7: “Sane discimus uitandum ebrietatem, per quam criminal cauere non possumus. Nam que sobrii cauemus per ebrietatem ignorantes conmittimus. Nesciunt quid loquantur qui nimio uino indulgent, incent sepulti, ideoque, si qua per uinum deliquerint, apud sapientes iudices uenia quidem factura donantur, sed leuitatis dampnatur auctores.”
Gratian’s determination of the question.\textsuperscript{82} Paucapalea was most likely aware of the text.\textsuperscript{83} Perhaps he shied away from it in his short exegesis on C.15 q.1 because of Gratian's hesitation, while the issue of irregularity raised by c.13 was more certain and supported by other texts in the Decretum.

Gratian’s attempt at integrating “Si quis insaniens” raised more questions than it answered. The idea that madness could occur by one’s own fault, or “\textit{culpa precedens},” as it would be known among later canonists, required further refinement. What was the relationship between the fault and the onset of insanity? Should a discernible connection exist, or could any preceding fault serve as the basis of later madness? How much lighter should the punishment be; should it be mitigated at all? Nearly every major canonist from Gratian until Huguccio acknowledged the validity of punishment because of a preceding fault but differed widely in how it actually functioned.\textsuperscript{84} As it developed, “\textit{culpa precedens}” thinking sat at the crossroads of a number of ideas, such as the distinction between conquerable and unconquerable ignorance or responsibility for the unintended consequences of licit or illicit activities: in short, the developing jurisprudence of criminal negligence.\textsuperscript{85} In what follows, I will highlight some of the major

\textsuperscript{82} Paucapalea, \textit{Die Summa des Paucapalea über das Decretum Gratiani}, ed. Johann Friedrich von Schulte (Giessen: Roth, 1890), 84: “Quarum prima est, ’an ea, quaem mente alienate fiunt sint imputanda?’ Quod imputanda non sint, auctoritate Augustini, Ambrosii ac Hieronymi ostenditur. Sed notandum, quia quaedam sunt, quae etsi non imputentur ad poenam, tamen impediunt sacramenti signaculum. Ambitio namque parentum filio vero non imputatur ad poenam, cui tamen obest ad ecclesiae munus suscipiendum. Sic quae mente alienate fiunt, etsi non imputentur ad poenam, tamen, ut Hieronymus ostendit, sacri muneri exsecutionem impediunt. His ‘ita respondetur, Non omnia que ordinandum impediunt, ordinatum deiciunt; non enim potest ad sacerdotium qui aliquando insaniuit. Verumtamen, si post sacerdotium furere ceperit, non ideo sacerdotio carebit, nisi forte numquam ad sanae mentis offitium illum redire contingat’.”

\textsuperscript{83} Melodie H. Eichbauer, “From the First to the Second Recension: The Progressive Evolution of the Decretum,” \textit{Bulletin of Medieval Canon Law} 29 (2011-2012): 119-167, here 137. Basing her study on the inclusion of second-recension texts in the margins and appendices of first-recension manuscripts, Eichbauer determined that “Si quis insaniens” [C.15 q.1 c.12] and its \textit{dictum} entered into the \textit{Decretum} at an intermediary stage between the first and second recensions. It was not a late addition in the process.

\textsuperscript{84} Kuttner, \textit{Kanonistische Schuldlehre}, 104-106.

\textsuperscript{85} Ibid., 110, 154, and 208. See also Palazzini, “L’imputabilità dell’atto umano,” 456; Deschamps, “L’influence du droit canonique,” 146-147.
strands of “culpa precedens” jurisprudence and show how the canonists coaxed very different conclusions from the same intellectual raw material.

The first major Decretists to deal with the implications of “Si quis insaniens” were Rolandus and Rufinus, two of the most influential Bolognese canonists. Rolandus of Bologna was the most extreme proponent of “culpa precedens” thinking. He wielded this idea to argue against Gratian’s conclusion in C.15 q.1. 86 We have already seen that he altered Gratian’s conceptualization of insanity in order to allow the imputability of crimes to the insane. Whereas Gratian counted madness among the infirmitates carnis, Rolandus reconceived it as a kind of ignorance, which Gratian maintained did not excuse from responsibility or punishment. 87 Realigning madness as a kind of ignorance was only the first part of his argument against the master. To Augustine’s definition of sin as completely voluntary Rolandus replied: 88

To which it must be noted that madness sometimes occurs because of a hidden judgment of God without any preceding fault, and sometimes because of preceding fault. Therefore we say that those things that proceed from madness not proceeding from fault are in no way held against one by God, but those things that proceed from madness to which one has come by his own fault, there is no doubt that they are held against one.

Rolandus elaborated Gratian’s explanation of “Si quis insaniens” and used it against the idea that the insane should not punished. Even in his distinction between the underlying causes of insanity, insanity without any preceding fault provided an excuse only before God, the implication being that it did not before the Church. The underlying idea was that a human judge could not discern the origins of insanity (coming as it did from a “hidden judgment of God”). Faced with this

87 See Chapter 1.
88 Ibid. 33: “Ad quod notandum, quod alienatio mentis aliquando est ex occulto iudicio Dei absque merito eius praecedente, aliquando ex meritis praecedentibus. Ea ergo, quae procedunt ex alienatione mentis non ex illius merito procedente, dicimus nullomo quoad Deum imputanda, quae vero ex alienatione mentis procedunt, ad quam propria culpa ventum est, ea siquidem imputari dubium non est.”
inability, Rolandus erred on the side of punishment. He still operated within the strictly voluntaristic framework established by Gratian but was able to shift the moment of volition to an earlier fault. God could dole out madness for many reasons, but Rolandus argued that men should act as if He had done so to punish a fault. In their study of the connection between madness and sin in the early Middle Ages, Jerome Kroll and Bernard Bachrach concluded that “God was available for the author who was discussing causation (aetiology) to use or not use as he saw fit.” This was certainly the case with Rolandus; his introduction of God as a cause of madness served his goal of eroding Gratian’s claim of non-responsibility. God provided the means through which prior fault became madness.

Rufinus on the other hand maintained Gratian’s definition of insanity, and even his uncertainty with regards to preceding fault: only one who became insane due to a “grave fault” would be responsible for his actions. Rufinus was particularly concerned to show that insanity was not a blameworthy state in itself, a point that Rolandus had called into question. Rufinus was altogether more pastoral in his approach, explaining why any punishment that the insane incurred would be desirable. Commenting on c.10, he noted that the idea that we do not deserve any punishment that comes our way is false; we should be willing to believe that we have merited any punishment we receive. This is good not only for ourselves, but also for others: “The punishment of the foolish is the education of the just, and the wise man will be made even more

90 See Kroll and Bachrach, “Sin and Mental Illness,” 508.
91 Rufinus, *Summa Decretorum* (Paderborn, 1902), 345. C.15 q.1:” Licet multa sit compugnantium disputatio, tu tamen hoc teneas quia ea, que mente alienata fiunt, non imputantur, nisi forte ille, qui a mente alienus est, sua gravi culpa mentis alienationem incurrerit. Est enim mentis alienatio talis carnis infirmitas, que non est imputabilis.”
92 Ibid., 346. C.15 q.1 c.10 sv. “derivamus”: “I.e. derivare solemus, dicentes ‘ille vel ille sic iniuste me persecuti sunt’ quasi ‘ego non merui’- quod falsum est; quicquid enim penarum nobis accidit, ut ait Ieronimus super Ezechielem [Ez 5:16], pro peccatis nostris contempte credendum est.”
when the fool perishes." Rufinus acknowledged the public nature of punishment, and its effects not only on our own internal mindset, but also that of others. Even when not strictly merited punishment did have salutary effects. Rufinus was clear that punishment did not occur in a vacuum; though personal responsibility was a critical factor, the public “education” that punishment could provide was equally important.

Stephen of Tournai would be particularly important if for nothing other than acting as the conduit for the Bolognese tradition of canonical studies to enter into the north. Even more though, he digested this tradition critically, adding his own understanding and expansion on the ideas. Stephen, for instance, transmitted Rolandus’ ideas on “culpa precedens,” though tempering it by leaving off the “quoad deum.” Stephen believed that unless preceding fault could be shown, the insane should not be punished. He found support for the idea of moving backward in a chain of acts to locate volition in Augustine, who claimed that even original sin could be called voluntary because the eating of the apple that gave rise to it was voluntary. He hinted that the connection did not have to have an intimate relationship through the example of

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93 Ibid. C.15 q.1 c.11 sv. “Christus infunditur”: “Christi gratia aliis inspiratur, quia et alii similes emendantur, et emendati peccare fortius aspernantur; nam pena impii eruditio est iusti et stulto pereunte sapiens astutior erit.”
95 Stephen of Tournai, Summa decretorum (Troyes, Bibliothèque municipal 640), fol. 77r, C.15 q.1 d.a.c.1: “Econtrario ea que mente fiunt non imputari probantur auctoribus patrum. Ad quod notandum quod mentis alienatio aliquando contingit ex occulto dei iuditio absque merito eius precedente, aliquando ex merito precedente. Ea que procedunt ex alienatione mentis non ex illius merito precedente non imputauerit. Que uero ex alienatione mentis procedunt ad quantum propria culpa uentum est, ea imputauerit.”
96 See also Ibid., fol. 54v, C.3 q.9 c.14, sv. “vir sanae mentis”: “Quia si contingat aliquem non esse sane mentis. cum excedit infirmitas illa ex qua excessus provenit, plus est habenda pro peccati pena quam pro culpa, unde et nemo talis condemnatus.”
97 Ibid., C.15 q.1 d.a.c.1. “voluntarium est malum”: Id est voluntate comissum, uel nisi voluntaria causa, id est, ex voluntate procedens illud peccatum precesserit. postquam uentum est ad illud peccatum non est peccatum. Vnde alibi dicit Augustinus, non omnino noluit qui fecit, id est non omnino non motus est uoluntate ad peccandum qui fecit peccatum. Vnde et idem Augustinus, peccatum originale dicitur voluntarium, quia voluntaria causa precesserit, id est, esus pomi.”
Lamech. According to Stephen, Lamech’s blindness was the result of his bigamy. Later, explaining the lighter penance required by “Si quis insaniens,” Stephen remarked that “perhaps he [the insane person] had been led to this blindness by a previous sin.” The use of blindness is suggestive of Lamech’s story. Thus, although Stephen held that accidental homicide could go unpunished if “all due diligence” had been shown, he seems to have been open to a more liberal interpretation of the connection between the preceding fault and later madness. He held fast to Gratian’s original position, noting that although an insane person should not be punished corporally when he returned to soundness of mind, he still should not be ordained further.

Stephen's view achieved even further spread through the work of Johannes Faventinus, who copied Stephan’s remarks into his own *Summa*. By Stephen then, the major pieces are in place, though jurists would continue to quibble over certain aspects. The northern schools in particular put this idea to use.

Many canonists followed Rolandus’ reconceptualization of madness as a kind of ignorance and came to distinguish among different grades of ignorance. Stephen, for example, distinguished between simple, affected, and unwilling ignorance. The latter had connections with insanity since “it excuses from every penalty, unless perhaps it proceeded from some fault.”

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98 Ibid., sv. “non voluntaria dici”: “Quia illud peccatum processit ex voluntate, unde in hec peccata proruit que coacte et nescienter agit. Lamech autem voluntarius commisit peccatum bigamie, unde postea merito illius peccati uenit ad occisionem chani quam[uis] nesciens et nolens incidit.”

99 Ibid., fol. 78r, C.15 q.1 c.12: “Non quia peccavit, sed ut ecclesia mentem eius cognoscat, uel quia forte priori peccato ductus hoc commisit in hanc cecitatem.”

100 Ibid., fol. 21r, D.50 c.5, sv. “Clericum qui paganum”: Si autem casu [a homicide], idem est quod in necessitate, cum maiore tamen dispensatione, ut, si casus ille accidit ex dissoluta culpa sua, deponatur, si autem cum adhibuerit quantam potuit diligentiam, incurrit casum, in ordine relinquitur.”

101 Ibid., fol. 77v, C.15 q.1 c.5: “Et nota quia quamuis cum redierunt ad sanam mentem, non debeat corporaliter puniri, non tamen deceterno debet ordinari.”

102 Ibid., fol. 77r, C.15 q.1 d.a.c.1 “Inuita quando quis ignorat et dolet se ignorare. Hec ab omni pena excusat, nisi et illa forte procedat ex precedente.”
Another distinction held that the difference was between vincible and invincible ignorance. The *Summa Parisiensis* simply noted that sometimes ignorance arose from sin, and other times simply from a disposition of the soul. Whatever the particular terminology used, the import was the same. Some ignorance was blameworthy and some was not. By linking madness to ignorance through *culpa precedens*, these canonists could bypass, to some extent, Gratian’s general prohibition on punishing the insane. The *Summa Elegantius in iure diuino* put it most succinctly: “We compare insanity to ignorance. Just as some ignorance is conquerable and unconquerable, so insanity sometimes is avoidable and sometimes unavoidable, sometimes it comes from a preceding sin, and sometimes from a disturbance of the humors.”

Though several thinkers embraced *culpa precedens* thinking, the precise connection between the preceding sin and insanity remained unclear. Practically speaking, many canonists acknowledged that the lighter penance prescribed in “Si quis insaniens” was a matter of precaution. We have already seen Stephen use the term, though he was not explicit what exactly the precaution was. According to the Anglo-Norman canonist Honorius, the penance is imposed because it is not known whether the madness arose from a fault or not. Even on a theoretical level though, there is an uncertainty about how close the connection had to be.

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103 Sicard of Cremona, *Summa decretorum* (Vienna, ÖNB 2166), fol. 43v: “Ignorantia. hic imputatur nisi sit inuincibilis.” See also the glosses to the *Decretum* in Durham, Dean and Chapter Library C.II.1, fol. 183v: “Ignorantia aut alia uincibilis alia inuincibilis alia simplex alia affectata. Inuincibilis ab omnium pena excusat. Simplex a minori. affectata a nullo.” See Kuttner, *Kanonistische Schuldlehre*, 137-145. Kuttner noted that “invincible ignorance” is a concept borrowed from Abelard (140).


Closely connected with the idea of *culpa precedens* is the idea of the will largely construed. An act could be called voluntary even if it were not willed directly. As the *Summa Omnis qui iuste iudicat* put it, “If someone wishes to kill another directly, that is the worst. But if one wished to do some evil thing and another arises from it, even though he did not intend to do it, he is still understood to will it not directly, but indirectly.”\(^{107}\) The indirect will has connections with the idea of “*re illicita versari*.” This notion of negligence developed by the canonists held that if someone were engaged in an illicit act and an unforeseen consequence came of it, he would be responsible.\(^{108}\) In this way of thinking there is at least a connection to the unintended result through the illicit act itself. The *Summa de multiplici iuris divisione* maintained a rather vague assertion of an insanity merited by past fault, an idea drawn from Rolandus’ own vague assertion.\(^{109}\) Rufinus argued that the fault had to be grave. The idea of insanity as a *pena peccati* became disengaged from the idea of original sin by some authors, such as that of the *Summa Parisiensis*, and attached to particular sins.\(^{110}\)

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\(^{107}\) Durham, Dean and Chapter Library C.II.1, fol. 184r, C.15 q.1 d.a.c.1: “Hec proprie dicuntur peccata nolentium quia nec habent principalem voluntatem nec directam ad id quod nescienter faciunt.” See also, *Summa Omnis qui iuste iudicat* siue Lipsiensis, Monumenta iuris canonici, Ser. A: Corpus glossatorum 7.1, eds. Rudolf Weigand, Peter Landau, and Waltraud Kozur (Vatican City: Biblioteca Apostolica Vaticana, 2007), 229, D.50 c.44, sv. “Si autem non voluntate”: “Ecce hic habetur quod si nulla affuerit voluntas, tamen peccatum fieri intelligitur, quod est contra illud infra xv q.i. § primo, ubi dicitur quod nullo peccatum est nisi sit voluntarium. Set dupliciter dicitur voluntarium: ut si quis directo uelit hominem occidere; hec pessima est. Item si uelit aliquod malum facere et ex eo aliud oritur malum, licet id malum facere non proponebat, tamen uelle intelligitur non directe sed indirecte. Et ita debet intelligi quod hic dicitur ‘si non voluntate’: ad id principaliter directa, tamen ad aliud malum ex quo secutum est. Si uero nulla voluntate nec ad id nec ad malum directa quicquid commissum fuerit illud non imputabile de quo ibi dicitur.”


\(^{109}\) Warren Becket Soule, *The “Summa De multiplici iuris divisione”: An introduction and critical text*, The Catholic University of America Canon Law Studies 546 (PhD diss., The Catholic University of America, 1994), 133, C.15 q.1 d.a.c.1: “Quod si mentis alienatio provenerit ex precedentis culpa merito, que ex illo proificiscuntur merito imputantur, in quo casu intelligendum est illud cap. Si quis insaniens infra e. q. [C.15 q.1 c.12].”

\(^{110}\) *Summa Parisiensis*, 173, C.15 q.1 d.a.c.1: “Quod autem superius dictum est, de eis etiam intelligitur quae sunt poena peccati. Illa autem peccata propriis dicuntur poena peccati quae propter praecedentia peccata hominibus
What has been said above [that things proceeding from ignorance are imputed before the Church and God, though only in the latter if from a preceding fault] should be understood also concerning those things that are the punishment for sin. These sins are rightly called the punishment for sin because they happen to men because of some preceding sins. So through these preceding sins are cleansed, though they are not unrightly called involuntary sins.

And again, the punishment for sin “is given to men by God because of some preceding sin, either his own or that of his parent.” The *Summa Parisiensis* also gave a concrete example that displays a closer connection. The crimes committed while insane can be held against one if they arose from a preceding fault, as when one becomes drunk willingly and afterwards kills someone while insane. There seems to be some connection on the grounds of the willing loss of mental capacity punished by a subsequent unwilling loss. On the whole, the Decretists were unwilling to specify the level of connection between the preceding fault and the subsequent onset of insanity.

Some, following Rolandus, held that the actual crimes committed while insane could be imputed on the basis of preceding fault. Honorius justified this position by claiming that because of preceding fault, the sins of the insane could be understood as voluntary in the larger sense of the word. The strongest argument against this view came from the *Summa Monacensis*. An example of the Northern French school of canon law, the *Summa* seizes on the idea of penance as a caution and notes that the Church can only impose such a cautionary
penance because it cannot know if the insanity were merited or not.\textsuperscript{115} This \textit{Summa} took Rolandus’ basic position and flipped it in order to argue for the opposite outcome. As for the actual kind of punishment to be meted out, Sicard of Cremona carefully distinguished among the types of punishment the insane could suffer. Corporal punishment could only be enjoined if there had been preceding fault, or as a caution.\textsuperscript{116} What the grounds of the cautions was, Sicard did not specify. Irregularity followed whether the insanity was merited or not, though deprivation of habit did follow either because of insanity itself or anything that followed from it.

\textbf{Huguccio, Change, and Roman Law}

By the concluding decades of the twelfth century, the idea that a fault preceding and leading to insanity could overcome the usual non-responsibility gained wide acceptance, particularly in the northern schools of canon law. We cannot forget though that the idea originated in Bologna and received its strongest support from the Bolognese master Rolandus. The \textit{Summa} of Johannes Faventinus, one of the most widespread south of the Alps, reproduced and transmitted Stephen of Tournai’s adaptation of Rolandus. \textit{Culpa precedens} thinking had permeated the canonical understanding of madness. It had also shown itself to be flexible enough to be as harsh or lenient as the particular canonists desired it to be. In short, there was little hint that Decretist doctrine would depart from this course.

But depart it did. Kuttner correctly showed that Huguccio contested this approach in no uncertain terms, and his idea made its way into the work of Laurentius Hispanus and Johannes

\textsuperscript{115} \textit{Summa Monacensis} (Munich, BSB clm. 16084), fol. 25r, C.15 q.1: “Cum ergo aliquis in furore aut quaecumque mentis alienatione delinquit relictur de iudicio qui ita eum punitur si reum ex sua culpa in insaniam ceccidisse cognoverit apud eum uero eo nomine non punitur nisi quod ad cautelam penitencia ei leuior ad sanam mentem reuero imponitur.”

\textsuperscript{116} Sicard of Cremona, \textit{Summa decretorum} (Wien, ÖNB 2166), fol. 43v: “Pene furiosorum- Carnis maceratio. hic iniungitur resipiscenti si precessit meritum. alias non nisi ad cautelam. -Habendi interdictio. hic iniungitur resipiscenti siue precessit meritum siue non, quia non post promoueri qui aliquando insanit. -Habiti priuatio. Hic non iniungitur resipiscenti pro solo furore, uel eo que ex furore sequatur.”
Teutonicus, thus achieving a more lasting influence than his predecessors.  

In this section, I will show the background of Huguccio’s break with tradition, a break based ultimately on Roman law.

The desire to break from tradition did not come out of nowhere, but seems to have been a possibility explored in Bologna. We can see the first inklings in the work of Simon of Bisignano. Simon had an interesting career. While likely educated in Bologna, he, along with Sicard of Cremona, taught in Mainz around 1180. Simon was a creative and original canonist, as well as a pioneer in the use of decretal law. It is not altogether surprising then that we find him breaking from tradition. Simon did not reject the usefulness of considering a preceding fault; he was, however, reluctant to apply such consideration to insanity. Nocturnal emission and drunkenness are examples in which such thinking was valid. For example, if a nocturnal emission proceeded from drunkenness, the fault is light, but if from some shameful thought, the fault is mortal. Likewise with the example of Lot, Simon noted that he was punished more for his drunkenness than for incest. The punishment might be more serious because of what followed from it, but the actual incest itself is unpunished. In either case, the preceding fault led directly to the offense. The application of that thought to insanity is mentioned only as a possible analogy. “Some say that it [nocturnal emission] is a sin... just as the action of an insane person whom his own fault leads to madness is punished.” Nowhere else either in his Summa or in his extensive glosses in

117 Kuttner, Kanonistische Schuldlehre, 106-110.
119 Simon of Bisignano, Summa, 1. 9, D.6 c.1: “Queritur an nocturna pollutio sit peccatum. Quod non uidetur cum tunc homo sit nesciens et peccatum nescientium nullum est ut infra C.i. q.iii. Quis locus [C.1 q.4 c.2]. Ad hoc dicunt quidam quod peccatum est, ut Gregorius uidetur hic dicere cum culpa sua homo ad hoc deuenit, sicut furiosi opus punitur quem sua culpa traxit ad furiam, ut infra C.xv. q.i. Si quis insaniens [C.15 q.1 c.12]. Alii dicunt quod non est peccatum quia nesciens non potest peccare, sed dicitur esse peccatum quia causa ex qua prouenit eo magis punitur, quia hoc inde prouenit, ut infra C. xv. q.i. Inebriauerunt [C.15 q.1 c.9].”
Zwettl, Stiftsbibliothek 31 did Simon apply this thinking to the insane.\textsuperscript{120} He did not directly comment on C15 q.1 c.12, instead concluding his commentary on the \textit{questio} with an extended discussion of negligence, of accidents arising from licit or illicit activities. If Simon meant this include insanity, we can gain some understanding of his relative silence on the matter. He seems to have understood a close rather than general relationship between the preceding fault and its effect, and would thus have been unconvinced by the vague notions surrounding the link between prior sin and madness.\textsuperscript{121}

Simon, although not a promoter of the prevailing teaching on insanity, did not reject it. Nor did he have much of an impact on thought in Bologna, where Huguccio would eventually make a clean break.\textsuperscript{122} He does however show that some canonists were becoming dissatisfied with the tradition.

Huguccio, who ended work on his unfinished \textit{Summa} around 1191 before becoming bishop of Ferrara, was the greatest of the Bolognese canonists. He combined an insightful mind and command of previous arguments with an almost fanatic devotion to legal principles. “Since the days of Johannes Teutonicus,” wrote Wolfgang Müller, Huguccio’s most recent biographer, “the ‘rigor Huguccionis,’ Huguccio’s rigor, has acquired almost proverbial status.”\textsuperscript{123}

\textsuperscript{120} On the manuscript see, Rudolf Weigand, \textit{Die Glossen zum Dekret}, 1003-1004; and Weigand, “The Development of the \textit{Glossa ordinaria},” 75.
\textsuperscript{121} Simon of Bisignano, \textit{Summa}, 1.284. “Quid autem si dum ego cooperirem domum uel huiusmodi facerem et preter voluntatem meam lapis cecidit et hominem interfecit, nunquid generabit in promotione michi impedimentum? Et quidem credimus quod si rei licite dabam operam et omnimodam diligentiam adhibui, quod michi non debeat imputari. Absit enim, dicit Augustinus, ut ea que propter bonum et licitum facimus, si aliquod malum preter nostram voluntatemueniat quod nobis debeat imputari, ut infra C.xxiii. q.v. De occidendis [C.23 q.5 c.8]. Si uero rei illicite dabam operam et diligentiam debitam non adhibui, est quod michi debeat imputari, ut supra d.l. Quantum dixit, Sepe contingit, Si duo [D.50 c.48, 50, 51].”
\textsuperscript{122} Landau, “Simon von Bisignano,” 136-137. Simon’s opinions are absent, for example, from the contemporary Bolognese apparatus \textit{Ordinaturus magister}.
\textsuperscript{123} Müller, \textit{Huguccio}, 137.
Huguccio’s firm adherence to the consequences of legal principles is evident in his handling of the responsibility of the insane in C.15 q.1. He wasted no time in warming to his task:

Here is the first question, namely whether the things done while out of one's mind can be held against one. I say, indistinctly, no, so long as the person is so out of his mind that he neither knows, nor discerns nor understands what he is doing, as in C.15 q.1 c.5, C.17 q.2 c.1, and C.3 q.9 c.14. Nor do accept the distinction of whether one went out of his mind because of his own fault or not, and if by his own fault, then the things done by him can be held against him, as in C.15 q.1 c.12. If not by his own fault, then they are not held against him, but I say without distinction that [madness] occurs with or without one's own fault, the things done at such a time of madness are not held against one.

Huguccio could not be clearer in his renunciation of the Decretist tradition of judging the responsibility of the insane. He strictly applied the principle that the insane are not responsible for their actions and refused to admit any lessening of it. In so doing, Huguccio returned to the original position advanced by Gratian.

On what grounds did Huguccio build his case though? One can detect a number of supporting arguments throughout his treatment of insanity. For one, he noted that proponents of the “culpa precedens” approach tended to identify insanity as a kind of ignorance. Huguccio attacked the notion on two grounds. First, he reminded his students that Gratian himself clearly did not describe insanity as a form of ignorance, one of the infirmitates animi, but as an infirmitas corporis, which Gratian did not allow to be held against one. Ignorare, for Huguccio as well as his predecessors, had a moral tone, which is precisely what allowed

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124 Huguccio, Summa decretorum (Admont, Stiftsbibliothek 7), fol. 263r, C.15 q.1 d.a.c.1: “Hic intitulatur prima questio, scilicet utrum ea que mente alienata fiunt sint imputanda, et indistincte dico quod non, dummodo ita sit mens alienata quod hoc nesciat, non discernat, non intelligat quid agat, ut c. aliquis [C.15 q.1 c.5], illa [C.15 q.1 c.6], et xvii. q. ii. Consaldus [C.17 q.2 c.1], et iii. q. viii. Indicas [C.3 q.9 c.14]. Nec recipio illam distinctionem, scilicet an sua culpa quis deuenerit in talem alienationem uel non, si sua culpa imputantur ei que fuit imputatur ei que fuerit ab eo, ut l. e. q. si quis. [C.15 q.1 c.12]. Si non sua culpa non imputantur ei, sed indistincte dico quod siue sua culpa siue sine culpa id ei accidit non imputantur ei que facit tempore alienationis.”

previous canonists to hold the insane responsible. Although there was a concept of unconquerable ignorance, as we have seen, the canonists tended to view ignorance as a state in which people willingly remained. Huguccio instead defined the insane as “nescientes,” a morally neutral term. The insane were those “who do not know the essence of an act. Someone unaware in this way neither sins, nor knows what would follow from his act.” Huguccio supported this with the general incapacity of the insane to contract marriage or make a vow; they could not accomplish anything that required consent, since they had no ability to consent.

Huguccio built his case on a correct understanding of Gratian’s conceptualization of madness as well as a rigid adherence to the non-responsibility of the insane. Was this enough though to combat half a century of Decretist tradition? I would suggest that equally important to Huguccio’s stand on this principle was his use of Roman law. Roman law had not been far from interpretations of C.15 q.1. Besides Gratian’s own use of Roman law, an early and incredibly widespread composition of glosses included a standard set of allegations to C.15 q.1 c.5, one the key texts arguing against punishment. This anonymous gloss included Roman law citations to “Divus Marcus,” “Infans,” and “Poena paricidii” and found inclusion in several manuscripts.

With the exception of one manuscript that I have seen, Innsbruck Universitätsbibliothek 90, this

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126 Kuttner, Kanonistische Schuldlehre, 175.
127 Huguccio, Summa decretorum (Admont, Stiftsbibl. 7), fol. 264r, C.15 q.1 d.p.c.2: “…uel nescit ipsum factum in essentia, ut infans, uel dormiens, uel furiosus. Et iste nesciens non peccat uel nescit quid inde sit consequurum.”
128 Ibid., fol. 264v, C.15 q.1 c.5, sv. “nescit”: “Ex toto, id est, non cognoscit id quod, ut infans, furiosus, ebrius, dormiens. Alias quandoque nesciens peccat, ut s. e. q.i merito [C.15 q.1 c.1], et xxxii. q.vii. quedammodum [C.32 c.7 c.10]. Hinc aperte colligitur quod ea que fiunt a furiosis non imputantur, quia sensum uel discretionem non habent, ar. i. prox. [C.15 q.1 c.6], c. iii q.viii. Indicans [C.3 q.9 c.14]. Unde tempore furoris nec matrimonium potest contrahere nec aliquem contractum qui consensum exigit celebrare, nisi tempore intermissionis, quia furiosi nullus est consensus, ut xxxii. q.vii. neque [C.32 q.7 c.26]. et C. l. iii. de contrahen. empt. [Cod. 4.38.4].”
129 The full list of allegaciones includes: a reference to the Lombard law, De damno iniuria, l. Si peccatis, C.11 q.3 c.69, Dig. 48.8.12, Dig. 48.9.9, Dig. 1.18.14, C.23 q.5 c.8, C.1 q.4 c.1. I have found the gloss in some form in Biberach an der Riss, Spitalarchiv B. 3515, fol. 180r; Bremen, Universitätsbibliothek Ms.a.142, unfoliated; Köln, Dombibliothek 127, fol. 172r; Heiligenkreuz, Stiftsbibliothek 43, fol. 178r; Heiligenkreuz, Stiftsbibliothek 44, fol. 154v; Munich, BSB clm 4505, fol. 168v; Trier, Bibliothek des Priesterseminars 8, fol. 113v; Washington, D.C., Catholic University of America Library 186, fol. 180v.
gloss did not include commentary in addition to the allegations. The first widespread example comes from the apparatus *Ordinaturus magister*, which, while not solely the product of Huguccio’s hand, is still closely connected with his teaching. Even in the first recension of this apparatus, completed around 1180, we find an important gloss to C.3 q.9 c.14. In a *brocarda* on whether the things done while out of one’s mind are imputable, we find a citation of “Aliquos scimus” [C.15 q.1 c.5] against and “Si quis insaniens” for. Below, perhaps offered as a solution, but at least the last word given, is “The insane are sufficiently punished by their own insanity.” This gloss, which remained stable into later recensions of *Ordinaturus magister*, did not explicitly endorse one view or another. At another point, the apparatus even preserved a reference to “culpa precedens” regarding the insane. Huguccio, however, was clear:

It should be said and believed that such an infirmity [insanity] is a punishment for sin and not a sin. The argument is that a punishment for sin is not a sin, which is true, although certain theologians think differently. It should be believed that the things done by some held by such an infirmity should not be held against him, unless it should appear otherwise,

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130 Innsbruck Universitätsbibliothek 90, fol. 134r. This gloss only contains *allocationes* to Dig. 1.18.14 and Dig. 48.9.9, though it does also contain “Satis enim tempore/ furore puniun/tur.”

131 The only other example I have found is Sicard of Cremona, who drew on Dig. 47.2.54 in his commentary to C.15 q.1. See Wien, ÖNB 2166, fol. 43v: “Item quia uoluntas et propositum distinguunt maleficia…”


133 Lillienfeld, Stiftsbibliothek 222, fol. 100v, C.3 q.9 c.14, sv. “‘sanae mentis’; “Ar. non imputari alicui que fiunt mente translate, Ar. I. xv. Q. i aliqous [C.15 q.1 c.5], I. xv. Q. i si quis insaniens [C.15 q.1 c.12]. contra… Sicut et furiousus satis furore ipso punitur. vt. ff. de officio pre. Diuus Marcus. [Dig. 1.18.14].”

134 Ibid., fol. 140v, C.15 q.1 c.6, sv. “furorem”: “Ad quem sua culpa non deduxit. vt infra Q. § Sed hoc [C.15 q.1 d.p.c.12].”

135 Huguccio, *Summa decretorum* (Admont, Stiftsbibliothek 7), fol. 184v, sv. “pena peccati”: “Quod dicendum et credendum quia talis infirmitate sit pena peccati, et non sit peccatum. Ar. quod pena peccati non sit peccatum, quod uerum est licet quidam teologi contra sentiant. Et est sensus credendum est quod ea que fecit detentus infirmitate tali non sint ei imputanda, nisi alius apparent.”
i.e. that he is not so afflicted. He later expanded on this: “If he were punished, affliction would
be given to the already afflicted, which should not be, as in ‘Cum percussio’... For the insane are
already punished by their own insanity, as in ‘Divus Marcus.’”\(^{136}\) Here Huguccio based the lack
of punishment on Roman norms in a way that few, if any, canonists had before. Even the maxim
drawn from “Cum percussio” [C.7 q.1 c.2] has analogues in a decree of Justinian.\(^{137}\) While
Roman law was not the only reason that Huguccio broke from tradition, it was certainly a
powerful one.

The reliance on Roman law is especially important when we consider canonical
jurisprudence after Huguccio. Laurentius Hispanus in the *Glossa Palatina* endorsed Huguccio’s
view and even added further imagery from Roman law in support.\(^{138}\) Even more staggering were
the acceptance of the Huguccio’s opinion and the explosion of Roman law citations to support it
in the French and Anglo-Norman schools, where ‘*culpa precedens*’ had dominated. The French
apparatus *Ecce vicit Leo* opposed the idea, which it attributed to “some, especially
theologians.”\(^{139}\) The rejection of considering a preceding fault is absolute:\(^{140}\)

\(^{136}\) Ibid., “Sic enim pena ei uerteretur in culpa Et afflictio afflictio addetur, quod non debet esse, ar. di. v. cum enixa.
[D.5 c.1], ad eius [D.5 c.4], et vii. q.1. cum percussio [C.7 q.1 c.2]. Satis enim ipso furore punitur furiosus, ut ff. de of.
presidis. diuus. [Dig. 1.18.14].”
\(^{137}\) See Cod. 1.4.28: “Tam dementis quam furiosi liberi cuiuscumque sexus possunt legitimas contrahere nuptias, tam
dote quam ante nuptias donatione a curator eorum praestanda: aestimatione tamen in hac quidem regia urbe
excellentissimi praefecti urbis, in provinciis autem virorum clarissimorum earum praesidum vel locorum antistitum
tam opinione personae quam moderatione dotis et ante nuptias donationis statuenda, praesentibus tam curatoribus
dementis quam furiosi nec non his, qui ex genere eorum nobiliores sunt, ita tamen, ut nulla ex hac causa oriatur vel
in hac regia urbe vel in provinciis lactura substantiae furiosi vel mente capti, sed gratis omnia procedant, ne tale
hominum infortunium etiam expensarum detrimento praegravetur.”
\(^{138}\) *Glossa Palatina* (Durham, Dean and Chapter Library C.III.8), fol. 90r, C.15 q.1 c.2, sv. “eos”: “‘eos’ infan
tem enim innocentia consilii furiosum infelicitas facti tuetur. ff. ad l. cor. de sic. Infans [Dig. 48.8.12]. Immo si quid
furiosus per modo habendum est. ac si. casu fortuitu accidat. ff. de adm. tu. l. ult. [Dig. 26.7.61]. Nisi ulontas et
propositum distinguant maleficia.”
\(^{139}\) *Ecce vicit Leo* (St. Florian, Stiftsbibliothek XI.605), fol. 68r, C.15 q.1 d.a.c.1: “Et notandum quod quidam dicunt,
et maxime theologui quod debent distinguere utrum ex culpa sua incidit, imputantur ei que facere mente alienata.”
\(^{140}\) Ibid., “Dictus quod nullomodo peccat furiosus existens in furio, quia ex quo mentis copios non est, non potest
culps committere, ut ff. ad legem aqui. sed et si. §. Igitur [Dig. 9.2.5.2] quod satis puntetur furiosus ipso furore.
vnde si matrem suam filius furiosus interciceret non punitur, ut ff. de officio presidis. diuus mar. [Dig. 1.18.14].
The insane person in his insanity in no way sins, since because of it, he is not of sound mind. He cannot commit any fault, as in the *Lex Aquilia*. It is read that he is punished by his own insanity, whereupon if he were to kill his mother, he is not punished, as in “Divus Marcus.” Therefore it should be precisely said that the insane person does not sin, unless he should return to being of sound mind and commit another wrong in that interval.

The argument was based entirely on Roman law. The reference to the particular case of “Divus Marcus,” a matricide, may have been designed to emphasize that even such a heinous crime could not be charged to the *furiosus*. The Anglo-Norman *Summa induent sancti* argued similarly, that no distinction should be made, unless it be the distinction between insanity and a lucid interval. The author of this summa likewise supported his argument almost exclusively through Roman law.

A Roman Interlude

One is struck that the primary justification offered for this break from Decretist tradition took the form of allegations and restatements of principles drawn from the texts of Roman law. Consider, as an additional example, Alanus Anglicus. Commenting on “Aliquos scimus,” that madmen are not considered guilty, Alanus noted: “The misfortune of fate excuses them, as in Dig. 48.8.12, and they are sufficiently punished by their own insanity, as in Dig. 1.18.14 and Dig. 48.9.12.” Canonists such as Huguccio and Alanus cited these phrases confidently, as rules.

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Ergo precise est dicendum quod non peccat furiosus ninis tamen ad sanam mentem rederit quando etiam in illo intervallo alieud mali commiserit.”


142 Alanus Anglicus, *Apparatus *Ius naturale*’*[ first recension, c. 1192] (Seo de Urgel, Biblioteca del Cabildo 113), fol. 111r, sv. “minime reos”: Eos enim infelicitas facti excusat, ut ff. ad l. cor di sic. Infans uel furiosus [Dig.
that did not require any further proof or explanation. Turning to contemporary Roman law, particularly Azo, who was active in the late twelfth and early thirteenth centuries, we find a remarkable similarity in method. If one were to look only at the civilians, Midelfort’s claim that the insanity defense received little attention before the fourteenth century would be correct. Azo seems to have been the first to handle culpability of the insane with any regularity, and even he tended to refer to the principle or maxim without pushing his analysis deeper. For example, commenting on “Divus Marcus,” the source of “satis ipso furore punitur,” Azo added that “affliction should not be added to the already afflicted.” At “Quod infans,” he noted “children are protected by the innocence of their council and the insane by the misfortune of fate.” The most explication he provided came when commenting on the Lex Aquilia. After providing “furiosus satis ipso furore punitur” as an explanation for the acts of insane being chalked up to chance, Azo clarified that, although the law compared the insane to animals, an action existed on damages caused by animals while no such action existed for the insane. The civilians were not loath to trust in the veracity of a prescriptive phrase, and those concerning the insane in Roman law did all seem to reinforce one another. There seemed little need to explain further, since the law was consistent, unlike in canon law. Even Accursius added little to Azo in his Magna glossa

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48.8.12], et ipso furore satis puniuntur, ut ff. de officio presidis. Divus [Dig. 1.18.14], ff. ad l. pom. de parricidiis. Pena [Dig. 48.9.12].”

143 See for example, Città del Vaticano, BAV, Vat. lat. 2512, fol. 14r, Dig. 1.18.14, sv. “cum satis furore”: “Igitur non debet addi afflictio affliction. sic. c. de episcopali. au. tam dementi. [Cod. 1.4.28] in fi. az.”; Città del Vaticano, BAV, Vat. lat. 1408, fol. 81r, Dig. 6.1.60, sv. “infans”: “Quia infantem protectat innocencia consilii, furiosum infelicitas fatti, ut l. l. cor. de sicariis. Infans [Dig. 48.8.12] et in. de amministrat. tu. l. ult. [Dig. 26.7.61] in fi. Az.”; Città del Vaticano, BAV, Vat. lat. 1408, fol. 106r, Dig. 9.2.5.2, sv. “hoc est”: “Imputatur enim casu, ut i. de amministrazione tu. l. ult. [Dig. 26.7.61] Satis enim ipso punitur fureo, ut s. de officio pre. Diuus. [Dig. 1.18.14].”

144 In addition to not finding glosses treating criminal insanity in pre-Azonian manuscripts, I have not found glosses in Azo’s apparatus bearing any signatures but his.

145 Città del Vaticano, BAV, Vat. lat. 1408, fol. 106r, Dig. 9.2.5.2, sv “quadrupes”: “Non per omnia similis est furiosus quadrupedi. actio pro quadrupede pro furioso nullo, ut supra. de rei. un. Quod infans [Dig. 6.1.60]. Az.”
besides additional *allegationes*. Thus when the canonists cited these maxims, they did so with the same confidence and authority that Azo had.

**Durham C.III.1 and “Culpa Precedens” Renewed**

“*Culpa precedens*” thinking did not, however, go quiet into that good night. Glosses from a Decretum manuscript now held in the Durham Dean and Chapter Library provide an indication as to how proponents of the prevailing Decretist tradition may have countered the sudden influx of Roman law citations. Durham, Dean and Chapter Library C.III.1 is an interesting manuscript in its own right. The initial folios contain excerpts from Burchard’s Decretum, a list of popes, and a primitive collection of decretals, the so-called *Collectio Dunmolensis*. The decretals position production of the manuscript clearly within England, and more precisely in the north, two of the unique decretals having been issued to York. The initial phase of copying these texts seems to have been completed by 1179, with three decretals from Lucius III, the last dating to 1185, copied in another phase. These decretals provide the best clues to the dating of the glosses I shall discuss.

The Decretum that occupies the bulk of the manuscript has at least three layers of glosses. The third layer, dated by Rudolf Weigand to around 1200, includes glosses from Johannes Faventinus and Gerard Pucelle, as well as many identified by Weigand as unique to the

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146 Eg. *Digestum vetus* (Lyon, 1627), col. 106, Dig. 1.18.14, sv. “cum satis”: “Not. non debet addi afflicto afflicto, ut hic, et Cod. de episcop. audiendi. l. Tam dementis [Cod. 1.4.28], et in decret. vii. q.i. c. Cum percussio [C.7 q.1 c.2], et dist. v. c. Si mulier [D.5 c.2], et C. de episco. er ele. l. Omnes. §.Praeterea [Cod. 1.3.32.2] et Cod. de poen. l. antepenult [Cod. 9.47.24], et infra ad leg. Rho. de iact. l. Nauis onusta. §. Quid ergo [Dig.14.2.4.2], et infra de vulg. sub. l. Ex facto. §. Iulianus [Dig.28.6.43.3], et infra ad leg. Pomp. de parric. l. penul. [Dig. 48.9.9], et infra. ad leg. Corn. de sic. l. Infans.[Dig. 48.8.12].”

Among these unique glosses, we find two to C.15 q.1 drawn from the *Sentences* of Peter Lombard. The use of the Lombard in canonistic works is not unheard of: Rufinus, the *Summae Coloniensis* and *Lipsiensis*, and even Huguccio all made reference to him in some way. The particular citations found in the gloss, however, I have found in no other commentary or set of glosses. These citations were likely added by someone with direct knowledge of the Lombard’s work.

*Durham, Dean and Chapter Library C.III.1 fol. 172va [C.15 q.1 d.a.c.1].*

**Peccatum est actus malus interior, scilicet mala cogitation, et exterior, scilicet mala locution et operatio. Precipue tamen in uoluntate consistit peccatum ex qua tanquam ex arbore mala procedunt opera mala tanquam mali fructus.**

*Peter Lombard, *Sententiae* II d.35 c.2.*

**Sane dici potest et libere trade debet peccatum esse actum malum interiorem et exterioorem, scilicet malum cogitationem, lucutionem, et operationem. Praecipue tamen in voluntate peccatum consistit, ex qua tanquam ex arbore mala procedunt opera mala tanquam fructus mali.**

*Durham, Dean and Chapter Library C.III.1 fol. 172vb [C.15 q.1 d.a.c.1].*

**Queritur utrum peccatum originale debeat dici uoluntarium uel necessarium, et necessarium dici potest quia uitari non potest, unde propheta “de necessitatibus meis erue me.” Et uoluntarium non incongrue apellatur, quia ex uoluntate primi hominis processit, et in paruulis etiam dicitur uoluntarium, quia factum est quodammodo hereditarium et uoluntaria causa precessit, scilicet esus pomi.**

*Peter Lombard, *Sententiae* II d.32 c.5.*

**Utrum illud peccatum sit voluntarium uel necessarium. Illud etiam non immerito quaeri potest, utrum peccatum originale debeat dici voluntarium vel necessarium… Quod voluntarium et necessarium potest dici. Et neccessarium potest dici, quia vitari non potest; unde et Propheta dicit: “De necessitatibus meis erue me.” Et voluntarium non incongrue apellatur, quia ex voluntate primi hominis processit, ut Augustinus in I libro *Retractionum* ostendit dicens “Illud quod in parvulis dicitur originale pecccatum, cum…**

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150 The “scilicet esus pomi” addition is taken from the *Summa* of Johannes Faventinus (Durham, Dean and Chapter Library C.III.7), fol. 81v, C.15 q.1 d.a.c.1 sv. “usque adeo peccatum”: “Vnde alibi dicit Augustinus, non omnino noluit qui fecit, id est, non omnino non motus est uoluntate ad parandum qui fecit peccatum. Vnde et idem Augustinus, peccatum originale dicitur voluntarium, quia voluntaria causa precessit, id est esus pomi.” Johannes copied this passage from Stephen of Tournai (see Troyes, BM 640, fol. 77r), but given the sigla of Johannes fund in this layer by Kuttner, Johannes Faventinus is the probable source of this addition.
Peter Lombard, Sententiae II d.32 c.5.

adhuc non utantur libero arbitrio voluntatis, non absurd vocatur voluntarium, quia ex prima hominis mala voluntate contractum, factum est quodam modo hereditarium.”

Are these simply examples of learned teacher of canon law showing his expertise in theology? I think not. If we accept Weigand’s date of c. 1200, or even a more conservative date of c. 1185 for the glosses, the growing Roman influences evident in the earliest versions of *Ordinaturus magister* had already been circulating. These glosses likely represent a reaction against the new interpretation of C.15 q.1, and a turn to the authority of another discipline to do so. The mention of original sin in the second gloss is suggestive of a “culpa precedens” argument: “Even in small children is [original sin] called voluntary, since the deed is in some way hereditary, and a voluntary cause preceded it, namely the eating of the apple.” The situation is analogous to that of the insane person who went mad because of a prior fault: although the sin in question is not willed in itself, the volition can be traced further back, warranting the name “voluntary.” Using the example of children is also suggestive, given the connection between the two noted even by Gratian.  

The first gloss was more innovative. “Sin is a wicked interior act, namely a wicked thought, and an exterior one, namely a wicked word or deed. Yet sin consists chiefly in the will, so that from it wicked works proceed just as bad fruit from a bad tree.” Since Gratian, the whole debate had occurred on the plane of the will. The early Decretists shifted the moment of volition back to a preceding fault, and Huguccio more strictly denied that the insane had a will. While the Lombard’s position was essentially voluntaristic, he allowed the objective act a place in his

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151 Cf. C.15 q.1 d.p.c.2: “Unde pupillo et furioso in maleficiis subuenitur, ut non eis inputentur ad penam que ex mentis deliberatione non processerunt.”
definition. Whatever the intention of the perpetrator, a wicked act had been performed and may even demand repercussions of some sort. The attendance to the act that Kuttner saw in the penitential background of “Si quis insaniens” did not disappear altogether in the twelfth century.

**Punishment of the Insane after the Decline of “Culpa precedens”**

How did this second wave of canonical jurisprudence handle “Si quis insaniens”? If the solution suggested by Gratian was false, as Huguccio in no uncertain terms declared it to be, canonists then had to explain it in another way. Their explanation harkened back to an earlier understanding, that the penance was given as a precaution (cautela). The earlier canonists meant a caution as to whether or not a fault had preceded, which was not easy to determine. Their intellectual descendants reinterpreted the caution as referring to the effect on others. Huguccio understood that the penance was enjoined even without the commission of a sin so that “ecclesiastical discipline might be preserved.” The *Summa induent sancti* interpreted the caution as referring to the possibility that the person had faked their insanity, a concern present in Roman law. Whatever the specific reason for the caution, the entire canonistic tradition was in agreement with regard to one consequence: any person who had killed another while insane, whatever their degree of guilt in the matter, was irregular.

Irregularity had been the most certain effect of homicide by an insane person in the thought of Gratian, who had advanced it as a consequence in the first recension. Even after

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152 Huguccio, *Summa decretorum* (Admont, Stiftsbibl. 7), fol. 265r, C.15 q.1 c.12: “Nunquid peccauit absit, ut s. e. q. Aliquos [C.15 q.1 c.5], illa [C.15 q.1 c.6], et iii. q.viii. Indicas [C.3 q.9 c.14]. Sed dico quod hic imponitur penitencia ad cautelam, licet non peccauit, ut d. l. presbuteros [D.50 c.32], et xxxiii. q.ii. Inlectum [C.34 q.1&2 c.6]. Et ut ecclesiastica disciplina conseruetur, ut xxiii. q.v. Excommunicatorum [C.23 q.5 c.47]. See also, Ecce vicit Leo (St. Florian, Stiftsbibliothek XI.605), fol. 68v, C.15 q.1 c.12, sv. “penitencia imponenda”: “Ex hoc dicunt quidam quod si ex culpa sua incidit quis in insania imputantur ei que facit. et hic intelligunt quando culpa sua incidit. Nos tamen credimus quod tantum ei postea imponitur penitencia ad cautelam, et hic multociens fit. ut s. l. d. Presbyteros [D.50 c.32] Nam gratianus tamen fuit in prima opinione ut patet ex sequenti paragrapho.”

153 *Summa induent sancti*, 483, C.15 q.1: “Hoc enim ad cautelam fit sepius, ut xxxiii. In lectum [C.34 q.1-2 c.6], cum suis concordiis, et hic maxime fieri debet ne quid forte humane duplicitatis admiserit, arg. xxiii. Q. v. Excommunicatum [C.23 q.5 c.47].”
Huguccio’s challenge to the idea of “culpa precedens,” canonists who held with him still held to irregularity. The French apparatus *Ecce vicit Leo* put the distinction succinctly: 154

“insofar as the law”: say, the law of promotion, since such a man who has killed another will not be promoted further, even if [he had done so] without his own fault, and we believe this well because of the horror of blood. Others say that if one killed another without fault, he will not be repelled from promotion, which we do not believe.

Although irregularity without fault was a controversial topic around the turn of the thirteenth century, even supporters of Huguccio’s position such as *Ecce vicit Leo* or Johannes Teutonicus did not dispute with Gratian’s conclusion that a homicide committed by a *furiosus* still resulted in irregularity. 155 Huguccio on the other hand, seemed somewhat conflicted. 156

For the canons impose penance on such a killer as a caution and in order to preserve ecclesiastical discipline... or insofar as the law of promotion, since such a one cannot be promoted further, not because he has sinned, but out of the horror of the fact and in order to preserve ecclesiastical discipline, but I believe that such should not be repelled from promotion, whatever is said here.

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154 *Ecce vicit Leo* (St. Florian, Stiftsbibliothek XI.605), fol. 68v, C.15 q.1 c.13, sv. “quantum etiam ad legem”: “Supple promotionis, quia non promouebitur talis de cetero ex qua hominem interfecit, quamuis sine culpa sua. Et hoc bene credimus propter horrorem sanguinis. Alii dicunt quod si interfecerit sine culpa non repellitur hic a promotione, quod non credimus.”

155 For Johannes Teutonicus, see Troyes, BM 192, fol. 25r, D.50 c.36, sv. “priuentur”: “Ad cautelam, secundum H. Clerico in nulla necessitate licitum est occidere, immo potius debet permetterse se occidi, sed nos intelligimus istud de necessitate euitabilis, quia poterat bene exiuise castrum ante aduentum Paganorum. Si enim esset ineuitabilis necessitates, non imponeretur eiusmod penitencia. Unde dicas quod si est necessitas ineuitabilis, since omni dispensatione potest celebrare in ordine habito, sed non debet promoueri ad superiores ordines.” See also *Glossa Palatina* (Durham, Dean and Chapter Library C.III.8), fol. 90v, C.15 q.1 d.p.c.13, sv. “deiciunt”: “Huic collige quod multe sunt que impedient ordinandum que non deiciunt iam promotum, ut vii. q.i. Quamuis [C.7 q.1 c.14], xxxii q.vii. Hii qui matri. [C.32 q.7 c.25].” Although Johannes did not directly reference insanity, the idea of a necessary and unavoidable murder provides an analogous situation to that of homicide by the insane. Johannes did not directly discuss the irregularity of the insane in his glosses to C.15 q.1. Neither did Laurentius, but the *Glossa Palatina* provides an example of the exalted position that promotion held in canon law.

156 Huguccio, *Summa decretorum* (Admont, Stiftsbibl. 7), fol. 265v, C.15 q.1 c.13: “Nam canones tali occisori quamuis non peccet, imponunt penitenciam ad cautelam et propter seruandum ecclesiasticam disciplinam, ut xxiii. q.v Excommunicatorum [C.23 q.5 c.47], uel quantum ad legem promotionis, quia talis de cetero non potest promoueri, non quaia peccaverit, sed propter horrorem facti et ecclesiasticam disciplinam conseruandum. Sed credo ego quod iste non debeat repelli a promotione quicquid hic dicatur, quod bene inuenies distinctum, d. l. Casu. [D.50 d.p.c.36].”
Elsewhere, Huguccio barred the possibility of promotion for any homicide, arguing, as Johannes Teutonicus put it, “with his usual rigor.” If we examine the cases mentioned by Müller, Huguccio appeared as rigid in cases where some form of volition expressed itself, i.e. self-defense and coerced oaths. In the case of completely accidental homicide, such as the insane committed, he did not advocate barring promotion. This was a bit too far for many of his followers, as we have seen. Huguccio’s rigorous promotion of the principle of non-responsibility and non-punishability would bear its fruits in the fourteenth century.

Guido de Baisio, who completed his Rosarium on the Decretum in 1300, further strengthened this point by probing possible weaknesses in two major canonists following Huguccio, Johannes Teutonicus and Laurentius Hispanus, who spread his view. After citing Huguccio’s rejection of Gratian’s explanation of “Si quis insaniens,” Guido produced an example in which Johannes and Laurentius seemed to agree with Gratian. The third part of the Decretum, the “De consecratione,” contains a text attributed to John Chrysostom concerning those who abandon themselves to sin and trust that a deathbed baptism will then offer them salvation. Chrysostom remarked that they do not receive baptism, since they pervert its

157 Müller, Huguccio, 137.
158 The text Huguccio cited, his distinctions in D.50 d.p.c.36, include the following: Admont, Stiftsbibl. 7, fol. 72r “...qui casu committit homicidium aut insistit rei illice aut licite. Si illice, siue adhibeat diligentiam siue non, imputatur ei, ut i. e. Studeat eos [D.50 c.39], Hii qui [D.50 c.49]. Generale est enim quod si quis dat operam rei illice uel licite et non adhibet diligentiam si quid mali inde prouenit ei imputatur. Si adhibet nullo modo ei imputatur, ut I. e. Sepe [D.50 c.50], Hii qui [D.50 c.52], ergo nec ad promotionem. Sic ergo talis digna potest promoueri cum in nullo peccavit, et propter homicidium nullus repellatum nisi ratione criminis, quod patet in homicida ante baptismum...Quidam dicunt tamen generaliter quod quocumque modo quis post baptismum interficit hominem, ulterius nondebet ordinari, quod non credo propter premissas rationes.”
purpose. Johannes explained this point by asking if the mere will to be baptized is sufficient. He determined that it was not; such people do not receive baptism because they do it sinfully. “They do not receive it by their own fault, and one is liable for what happens because of his own fault, as in ‘Si quis insaniens.’” While far from a ringing endorsement of “culpa precedens” thinking, the gloss does provide evidence of Johannes’ familiarity with the principle behind it.

As a second example of a possible objection, Guido drew on Laurentius’ opinion on drunkenness. Noting that Johannes did not approve of Gratian’s explanation of “Si quis insaniens,” Guido proceeded to state that “Laurentius seems to approve. If someone is unaware of the strength of wine and becomes so drunk as to overcome his mind, he will be liable for what follows from this.” This is a stronger objection. One could unwillingly become inebriated and still be responsible for his actions. In both cases though, Guido referred his students back to Johannes’ and Laurentius’ specific renunciations of the distinction between madness preceded by a fault and madness that is not.

The Fourteenth Century and the Clementines

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159 De con. D.4 c.128: “Quando quis propterea peccat, ut sanctum baptisma in nouissima sua expiratione suscipiat, fortassim non adipiscitur. Et credite michi, non terrens usos dico quod dicturus sum. Multos noui, qui hoc passi sunt, qui spe baptismatis multa peccabant, circa diem autem mortis discesserunt uacui; Deus enim propter hoc baptisma tribuit, ut soluat peccata, non addat. Si uero quis ad hoc utitur baptismo, ut ampliora delinquat, ipsum fit negligentiae causa.”

160 Decretum (Rome 1582), col. 2648, De con. D.4 c.128, sv. “discesserunt”: “Non videtur quod vacui recederent, ex quo baptizari voluerunt, ut extra de bap. Debitum [X 3.42.4]. Immo sic, quia culpa sua non perceperunt. Nam imputatur eis quod accidit culpa sua, 15 q.1 cap. penult. [C.15 q.1 c.12]. ff. loca. Si quis domum [Dig. 19.2.9].”

161 Guido de Baisio, Rosarium (Lyon 1559), fol. 244r, C.15 q.1 c.12: “In prima glossa ibi ‘approbanda’, adde: sed Laurentius videtur eam approbare. Dicit sic. Si quis vires vini ignorat et se inebriat usque ad mentis subuerionsem, huic imputandum est quod inde sequitur.”

162 Ibid.: “Sed hoc bene temperat, quia falsum dicit, ut credo. H. Sed Joh. et Lau. sentiunt cum Gratiano, ut patet in glo. de conse. di. iii. Quando quis [De con. D.4 c.128] et incipit glossa ‘non videtur’ etc. De hoc nota supra e. in sum. et supra e. aliquantos [C.15 q.1 c.5] in fi. , ubi videas. In prima glossa ibi, ‘approbanda’, adde: Laurentius videtur eam approbare. Dicit sic. Si quis vires vini ignorat et se inebriat usque ad mentis subuerionsem, huic imputandum est quod inde sequitur, ff. ad l. aquil. Qui occidit. §. ulti. [Dig. 9.2.30.4]. De hoc not. supra eo. in sum. [C.15 q.1].”
“If an insane person, young child, or sleeping person should mutilate or kill a man, he incurs no irregularity from this. We decree the same for one who, unable to avoid death, kills or mutilates an invader.”\textsuperscript{163} With this decree the last remaining consequence of homicide committed while insane lost its place in canonical doctrine. Such acts were now truly unpunished. The rigorous application of the principle of non-responsibility advocated forcefully by Gratian and Huguccio had prevailed. Even the strand of thought that allowed the granting of a light penance or the imposition of the “punishment” of irregularity had received a serious blow. “Si furiosus” resulted from the triumph of an outlook growing since the twelfth century that felt uncomfortable with punishment given to those that had not merited it. The decree is a far cry from the work of Rolandus who sought to restrict, if not eliminate, insanity as an excuse from punishment.

The actual history of the short text remains unknown, however. Despite its rubric, “Clemens V in concilio Viennensi,” the text does not number among the canons of that council.\textsuperscript{164} The transformation of the canons of Vienne (1311-1312) to the collection known as the Clementines was far from simple. Already from the closing of the council in May 1312, the post-conciliar commission charged by Clement with revising the canons for "publication" in the universities had taken almost two years to complete its task.\textsuperscript{165} Before this version could be sent to the schools, Clement died, leaving the task to his successor, John XXII, who possibly further revised the canons, not sending it to the schools until November 1317.\textsuperscript{166} We do know that at least two decrees, \textit{Pastoralis cura} and \textit{Romani principes} postdated the council by two years,

\textsuperscript{163} Clem. 5.4.1: “Si furiosus, aut infans seu dormiens hominem mutilet vel occidat: nullam ex hoc irregularitatem incurrit. Et idem de illo censemus, qui mortem non valens, suum occidit vel mutilat invasorem.”


\textsuperscript{166} Ibid. 429-430.
although their rubrics attribute them to the council. Johannes Andreae described three more decrees, *Dudum a Bonifacio*, *Quoniam ex constitutione*, and *Ex frequentibus prelatorum*, that predated the council. It is altogether likely that the simple rule set out in "Si furiosus” could have been included in one of these rounds of revision. The short, straightforward text is likely a *constitutio*, a kind of papal decree described by Stephan Kuttner as “general statements of law that were neither a judgment, mandate, judicial commission, nor a teaching response to some bishop's or prelate's inquiry.” “Si furiosus” likely originated then in the Curia sometime before 1317. The decree became the sole capitulum in the title *De homicidio voluntario vel casuale* in the *Clementines*, the collection of Clement’s decrees and decretals promulgated by his successor John XXII in 1317. Through this collection, “Si furiosus” (Clem. 5.4.1) entered into the schools and became the locus for the discussion of insanity for another generation of jurists.

The placement of “Si furiosus” under the title “De homicidio voluntario vel casuali” provides the best clues for its origin. Since the *Compilatio prima*, decretal collections included a title on voluntary and accidental homicides. The decretals in this title across the *compilationes antiquae*, many of which entered into Gregory IX's Liber extra of 1229, dealt with a wide variety of cases involving clerics. The case law of the Church provided an application of existing doctrine as well as the foundation for new developments. Daily life supplied no shortage of

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168 None of the earliest commentators on the *Clementines*, such as Guilelmus de Monte Laudano (1317), Johannes Andreae (1322), or Jesselin de Cassange (1323) make reference to any peculiarities in the transmission of this text.
170 The wording of “Si furiosus”, at least in its introduction, bears some similarity to Dig. 50.16.209, a text of Florentinus on the presence of the juridically incapable: “‘Coram titio’ aliquid facere iussus non videtur praesente eo fecisse, nisi is intellegat: itaque si furiosus aut infans sit aut dormiat, non videtur coram eo fecisse. Scire autem, non etiam velle est debet: nam et invito eo recte fit quod iussum est.” Though different enough in subject matter, the similarities are close enough to suggest a redactor of “Si furiosus” with some knowledge of Roman law, knowledge that would have been necessary at the Curia. This further shows the reliance on Roman law when considering the responsibility of the insane.
opportunities to test canonical teaching. For example, Alexander III dealt with the case of an accidental killing of a layman by a deacon while the two were engaged in a riding game. During the game, the layman jumped on the back of the deacon's horse and was stabbed by the knife that the deacon was wearing. Alexander judged that the deacon could not ascend to a higher order or even minister in his own order without the pope's permission. He did issue a dispensation that the deacon could minister as a subdeacon though. In another case involving an accident during a game, however, Alexander arrived at a different ruling. A cleric in Exeter was playing a game of some kind with another cleric, when the first, in the spirit of the game, threw the other to the ground. The second cleric unfortunately landed on his knife in such a way that he stabbed himself and later died from his wound. In this case, Alexander “freely allowed” the cleric to be promoted to holy orders. An example from 1200 and the pontificate of Innocent III concerns a chaplain whose horse went wild, threw him, and trampled a young child. Innocent ruled that since he “committed homicide neither in act or in wish, nor was involved in some illicit activity” he would not be impeded from the exercise of his office or future promotion. A final case, also from Innocent’s pontificate, dealt with a monk in the archdiocese of Besançon, who accidentally killed a boy while removing wood from the bell tower of his church. Innocent determined that the monk could be promoted in the future.

The Decretists had been firm in asserting that a homicide of any kind made one irregular. Many had acknowledged, however, that such irregularity could be overcome through papal

171 1 Comp. 5.10.9 (=X 5.12.8).
172 1 Comp. 5.10.10 (=X 5.12.9): “Ideoque mandamus, quatenus, rei veritate comperta, si ita res se habuit, et alia iusta causa non impedit, praedictum P. libere permittas ad sacros ordines promoveri.”
173 3 Comp. 5.7.1 (=X 5.12.13): “Ideoque, quia nobis non constitit de praemissis, fraternitati tuae per apostolica scripta mandamus, quatenus super his inquiras diligentius veritatem, et si est ita, quem idem capellanus nec voluntate nec actu homicidium perpetravit, nec dedit operam illicitae rei, non impedias, quo minus divina possit officia celebrire.”
174 3 Comp. 5.7.3 (=X 5.12.15).
dispensation, as seems to have been the case in the preceding rulings. The early Decretalists considered whether these popes had issued specific dispensations, or if they were establishing a new principle by which those who incurred no guilt incurred no consequence. The key factors were whether the priests had been engaged in some illicit activity and whether they had supplied all due diligence to their activity. If these conditions were met, no basis existed for holding the action against the offending cleric. Tancred noted that even though the cleric committed no sin, he could still be suspended from the exercise of his office because of the scandal that would arise. Public perception of the clerical dignity was an important concern. Elsewhere, he included an excerpt of Vincentius Hispanus, that “one is rendered irregular by act alone.” Johannes Teutonicus differed but was not entirely clear. Johannes followed the specific holdings of the decretals on homicide without always linking them together in a consistent whole. For example, if someone had committed a homicide out of an unavoidable necessity, he could remain in his own order without any dispensation but had to receive one to ascend to a higher order. If a cleric had accidentally killed someone while performing a licit act, however, he could be promoted without dispensation. This was still a limited circumstance; as Johannes acknowledged, “even the lightest fault makes one irregular.”

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175 Tancred, *Apparatus in Compilationem secundam* (Troyes BM 102), fol. 147r, 2 Comp. 5.6.2, sv. “degradare”: ...Si uero casu committitur homicidium, aut dabat operam rei licite aut illicite. Si licite et non adhibuit diligentiam quam debuit, imputatur ei ita quod nec promouetur nec uititur ordine iam suscepto. s. e. t. presbyterum. l. i [1 Comp. 5.10.8]. s. e.t. c. prox. [2 Comp. 5.6.3] Nisi dominus papa dispenset cum eo, ut di. l. Clerico [D.50 c.37]. Si uero adhibuerit omnem diligentiam quam debuit, in nullo ei imputatur, ut. l. c. prox. Scrivisti exta iii. e. t. ii, iii, et iiiiiii, [3 Comp. 5.7.4-4] s. di. l. Sepe [D.50 c.50]. Si duo fratres [D.50 c.51]. Imponitur tamen penitencia ei et suspenditur ab executione ordinis eius non peccavit propter scandalum. Si autem illicite rei operam dedit, siue adhibuit diligentiam siue non, semper imputatur ei.

176 Tancred, *Apparatus in Compilationem tertiam* (Troyes BM 102, fol. 274v, 3 Comp. 5.7.1, sv. “actum”: “... tamen seucus est quia per solum actu redditur irregularis, ut xv. q.i c.ult. [C.15 q.1 c.13] vinc.”

177 Johannes Teutonicus, *Apparatus in Compilationem tertiam*, 3 Comp. 5.7.1: “Si sit ineuctabilis sine omni dispensazione potest ministre in ordine habito, set ad superiores habendos petet dispensationem, ut supra eodem, Suggestum, lib.i. [2 Comp. 5.6.4(X ---)] et supra eodem, Qui sine, lib.i.[1 Comp. 5.10.3[X --- (C.23 q.2 c.3)] nec obstat supra eodem, Lator, [1 Comp. 5.10.10(X 5.12.9)] ubi uidetur quod ad superiores licite promoueter talis, set
By the time of Bernard Parmensis’ gloss to the Liber extra, the question was no more certain. “Even if one is said to have not directly committed homicide, he is still irregular, as I believe.” For Bernardus, the law of promotion still pertained to a deed. One may be innocent insofar as grace, which looks to the will, but not promotion. Even the idea that Alexander “freely” allowed the cleric in “Lator praesentium” [1 Comp. 5.10.10 (= X 5.12.9)] to be promoted might be understood as a dispensation. Henricus de Segusio, the famous Hostiensis, provides us with a glimpse into how canonical doctrine inched closer to Clem. 5.4.1. The text is worth quoting in full.

Some say that although one in orders should be tolerated, he still cannot ascend to higher orders. Huguccio, with his rigor, even repels such a one, saying that a homicide should in no way be promoted, since the law of promotion consists in fact, not in the mind or will. We are of the first opinion, that [the crime] should in no way be held against one... Even the Roman Curia holds this today.

Elsewhere, Hostiensis reiterated that truly accidental homicides did not impede even promotion, noting again that “Clement IV, who was otherwise inflexible on this matter, held this [opinion].” Despite this, Hostiensis still maintained that children who kill someone while...
playing a game are irregular, “even though they have no intention to kill. The law of promotion concerns facts, not volition. Still, such a homicide is suitable for dispensation.”

Although these popes and canonists did not consider homicide by the insane in their distinctions, their remarks on the related problem of involuntary homicide provide us with some clues as to the intellectual background of Clem. 5.4.1. The roots lay in the ideas of Johannes Teutonicus and others who held similar ideas about the effects of truly accidental homicide. If the act could not be foreseen or avoided in any way, Johannes felt that a dispensation was not required for promotion, effectively erasing irregularity for such clerics. Johannes made the leap from non-responsibility to a lack of any consequence. Others, such as Tancred or Bernardus Parmensis, were not so willing to forgo the tradition that defined irregularity as a matter of fact, not one of intention. Still, the seed was planted. Hostiensis referred to this as a contentious issue even in his own day, but that Clement IV and the Curia were of the less restrictive opinion. We can see now the importance of Huguccio and the subsequent canonists. They had removed any notion of fault or avoidability from the concept of insanity. In essence, homicide due to insanity resembled homicide due to a complete accident; jurists would even have recourse to the famous chapter of the Lex Aquilia that had said as much. Although Hostiensis held that children could still incur irregularity through their unintended actions, a situation much closer to insanity, his...

183 Ibid., fol. 2.304r, X 5.23.1: “Possunt tamen in irregularitatem contrahere, putaludunt lapidem vel cultellum proiciunt, et sic aliquem occiderit, ex hoc fiunt eis irregulara, etsi non habuerint animum occidendi. In lege nempre promotionisfactum attendit, non voluntas, xv. q.i c.fi. [C.15 q.1 c.13].”

184 Dig. 9.2.5.2: “Et ideo quaremus, si furiosus damnum dederit, an legis Aquiliae actio sit? Et Pegasus negavit: quae enim in eo culpa sit, cum suae mentis non sit? Et hoc est verissimum. Cessabit igitur Aquiliae actio, quemadmodum, si quadrupes damnum dederit, Aquilia cessat, aut si tegula ceciderit. Sed et si infans damnum dederit, idem erit dicendum. Quodsi impubes id fecerit, Labeo ait, quia furti tenetur, teneri et Aquilia eum: et hoc puto verum, si sit iam inuiariae capax.”
remark that it was “suitable for dispensation” provides us with a clue as to how cases involving
the insane actually proceeded. If we consider this along with the seemingly lenient attitude of the
Curia, “Si furiosus” appears as an attempt to streamline practice at the Curia. The main ideas had
already been in place and put into practice. “Si furiosus” was an official recognition and
codification of that practice.

As a codification of current practice, canonistic commentary on “Si furiosus” was
relatively homogenous and in keeping with Decretist thought after Huguccio. For example,
Johannes Andreae, who penned what became the ordinary gloss to the Clementines, cited many
of the prevailing Roman laws, such as the Lex Aquilia and the Lex Cornelia, and the maxim
“afflicto non est addenda afflicto.” Like Huguccio before him, Johannes set the non-
responsibility of the insane in the context of their more general incapacity: because they cannot
make a will, make a vow, contract marriage, or receive baptism (except under certain
circumstances), they cannot contract irregularity. Johannes also displays a reliance on Huguccio's
thought in his discussion of lucid intervals. After Huguccio restated the complete non-

185 Clementines (Rome 1582), col. 279, Clem 5.4.1, sv. “furiosus”: “Iste siue continuo furore laboret, siue per
interualla, quamdui furiit, pati potest injuriam, sed non facere, ff. de inuiri. Illud [Dig. 47.10.3], canonizata 15 q.1.
illud [C.15 q.1 c.2] et quod per eum fit. habetur perinde, ac si casu aliquo accidisset sine facto personae, ff. de
administ. tuto. l. ult. in fi. [Dig. 26.7.61]. Unde si damnum dat, non tenetur Aquil. sed est perinde ac si quadrupes
fecisset, vel tegula cecidisset. ff. ad leg. Aquil. Sed et si quaecumque. §.2 [Dig. 9.2.5.2]. Et idem ibi dicitur de
infante, et alibi dicitur quod infans vel furiosus perdidit vel corruptit, impunitum est, ff. de rei vendi. Quod infans.
[Dig. 6.1.60], et rationem reddit lex, quae de homicidio loquitur, ff. ad leg. Corne. de sicar. l. Infans [Dig. 48.8.12]
uni dicitur: infans vel furiosus si hominem oceiderit, lege Cornelia non tenetur, cum alterum innocentia consiliis,
alterum fati infelicitas excuset. Satis ergo suo furore punitur, ff. ad leg. Pomp. de paric. l. pen. in fi. [Dig. 48.9.9] ff.
de offic. praei. Diusus [Dig. 1.18.14], et afflictio non est addenda afflicto. 7 q.1 Cum percussio [C.7 q.1 c.2], de cler.
aegro. c. pen. [VI 3.5.1], C. de epi aud. tam dementis in fi. [Cod. 1.4.28]. Sicut ergo furiosus non testatur. C. qui
testa. fac. pos. Furiosum [Cod. 6.22.9], de suc. ab intest. c. fi. [X 3.27.3], nec religionem profiteetur, 17 q.1
Gonsaldus [C.17 q.2 c.1], de regula. Sicut tenor. [X 3.31.15], nec matrimonium contrahit, de spons. Dilectus [X
4.1.24], nec baptizat, de hoc 1 q.1 §.ecce. [C.1 q.1 d.p.c.42]. Quando nec baptismum recipit nisi in casu de bapt.
Maiores. [X 3.42.3]. Ita nec occidendo irregularitatem contrahit, ut hic et facit 3 q.9 c.indicas [C.3 q.9 c.14] et quis
probet, ibi not. et in praed. decre. Cum dilectus [X 3.27.3] in glo. hoc ideo. et quomodo probetur, ibi scripsi, et facit
quod not. 46 dist. cap. 1. [D.46 c.1].”
responsibility of the insane, the lucid interval took on increased importance for canonists. If preceding fault was not sufficient to punish a *furiosus*, only a cessation of insanity would permit it. Consequently, “*Si furiosus*” became a locus for discussions of proof as well as non-responsibility. In fact, discussions of the insane in this text almost entirely revolved around questions of proof. These questions were not mere add-ons; the determination that a particular act had occurred during a period of madness became very important. Rolandus, for example, did not care to discuss proof because the outcome for the *furiosus* would be the same. This was not the case for Stephanus Hugonetti, Guilelmus de Monte Laudano, Franciscus Zabarella, or any other canonist who made proof an important part of their treatment of Clem. 5.4.1.187

**Baldus and the Punishment of the Insane**

By the fourteenth century then, canonists and civilians alike endorsed the unreserved principle that an insane person, properly proven, could not be held responsible for his or her actions. After Huguccio’s criticism of *culpa precedens* jurisprudence, few jurists moved beyond Azo or Accursius in repeating the main maxims and principles.188 The next and last major development of the medieval jurisprudence of criminal insanity came from the prolific Baldus de Ubaldis towards the end of the fourteenth century. According to Baldus, not only did the insane not undergo punishment for acts committed during their madness, the insane could not be

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186 Eg. note 140. The apparatus *Ecce vicit Leo* settled on the lucid interval as the only means of punishing a *furiosus*.
187 See, for example, Franciscus Zabarella, *Lectura super Clementinis* (Venice 1497), unfoliated, Clem. 5.4.1: “Quero de quo furioso hic loquitur. Glossa ista soluit quod siue labore continuo furore siue per interualla quamdiu fuit potest parti, sed non facere iunuriam et quod per eum sit habetur ac si casu factum esset , quod sequere ut in glossa, et in ea ibi ac si quadrupes. Hoc non est omnino simile, quia in quadrupede locum habet actio de pauperie, ff. si quadru. paupe. l. i in prin. [Dig. 9.1.1], de hoc de iniuriis c. ul. [X 5.36.9]. In furioso autem nulla actio locum habet.” After establishing this basic incapacity of the insane to bear responsibility for any harm they might cause, Zabarella’s following questions relating to insanity all relate to proof: “Secundo quero quis probare debet furore... Tertio quero quomodo probatur quis furiosus.”
188 See, for example, Bartolus, *Commentaria in Digestum novum* (Basel 1562), fol. 93r, Dig. 1.18.13: “Delictum per furiosum tempore furoris commissum, puniri non debet, secus si fuisse comissum tempore sanae mentis. Ad custodiam furiosorum debet aliquis deputari, si si sit negligens, punitur...Nota quod furiosus satis punitur ipso furore, et sic non debet afflictio dari afflicto.”
corporally punished at all, even if they had committed their act while sane. “You should know that if someone commits a homicide while of sound mind and afterwards becomes insane, he cannot be condemned to death while insane, because a furiosus is considered to be absent, though he does suffer the description of his goods.”

The image of the *furiosus* as an absent person was frequent in Roman law, and served the purpose of exploring the precise legal ability or inability of the insane through an analogous category. Elsewhere, Baldus explained the basis of his argument more fully. “The process against him cannot be founded, since, because he lacks sense, he cannot contest the case.” Baldus’ fundamental argument is procedural: because an insane person does not have the capacity to fully participate in his own defense, the case cannot proceed. For Boari, the controversy highlighted the discreet effects of insanity at each stage in a procedure.

Baldus was not entirely original on this point. A text of Pomponius in the Digest stated simply that “a sentence could not be rendered on an insane person by a judge or arbiter.” Azo and Accursius both clarified this by explaining that a judgment could not be given against an insane person, but one can be given in his favor. They explained this through the common

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189 Baldus, *Lectura in sextum librum Codicis* (Venice 1577), fol. 59r, Cod. 6.22.9: “Scias tamen quod si quis tempore sane mentis commisit homicidium et postea factus est furiosus, tempore furoris non potest condemnari ad mortem, quia furiosus habetur loco absentis, sed patietur annotationem bonorum.” The *annotatio bonorum* was an inventory of one’s goods as prelude to confiscation. As such, it was not the actual execution of a penalty, but a preliminary act that publicly signaled the guilt of the now-insane person without actually inflicting a punishment.

190 See Chapter 4.

191 Baldus, *Lectura in sextum librum Codicis* (Venice 1577), fol. 88r, Cod. 6.26.9: “In contrarium facit, quia processus contra eum non potest fundari, cum non possit lit. contest., quia caret sensu, et idem in muto surdo a natiuitate.”

192 Boari, *Il furiosus nella criminalistica*, 120.

193 Dig. 42.1.9: “Furioso sententia a iudice vel ab arbitro dici non potest.”

194 For Azo, see Città del Vaticano, BAV Pal. lat. 748, fol. 52v, Dig. 42.1.9, sv. “dici non potest”: “Hoc uerum si dicatur contra eum. Secus est si dicatur pro eo, quia ex quibuscumque causis nobis ignorantibus acquiritur furioso, ut de procurat. l. Non eo minus [Dig. 3.3.38]. Secus tamen dici potest, et est in minore secus., qui minor non absens, et presens dici potest. Ceterim furiosus ad omnia regulariter est absens. Item non obstat quod contumacis dicitur, ut C. de iudic. l. Properandum [Cod. 3.1.13]. Sin autem exgestis [Cod. 3.1.13.2], quia cum contumax condemnari et solui possit et deberit. hic. non ita. az.” For Accursius, see *Digestum Novum*, (Lyon 1627), col. 524, Dig. 42.1.9, sv. “non
comparison with the absent, who can be the recipient of a judicial decision in their favor in certain circumstances. Accursius was careful to note that the insane could not be considered absent in the sense of being contumacious; there is no fault associated with their “absence.” After this mention in the ordinary gloss, the procedural ramifications of insanity did not garner much attention until Baldus. Why did he take up this position again and inject new life into it? He was certainly a brilliant jurist, but we may be able to understand his position more by looking at possible sources of inspiration. Perhaps experience with a particular case motivated Baldus. We shall later examine a *consilium* dealing with homicide by the insane (one of the few that survive) in which Baldus built his case around the procedural effects of insanity. The *consilium* is, however, difficult to date. Another possible source of inspiration might be canon law. Unlike many of his predecessors who had some knowledge of canon law, Baldus had more extensive working experience with it. He held a chair in canon law at Pavia (among other places), and wrote commentaries, albeit incomplete, on the major decretal collections. Baldus was a true jurist of the *Ius commune*. The lighter penance demanded by “Si quis insaniens” was only imposed after the recovery of sanity. This practical matter did not receive much attention from the Decretists, who were too busy wrangling over the theoretical implications of the text, but it

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potest”: “‘Non potest’: contra eum, sed pro eo, secundum quosdam, ut arg. C. de procu. l. Non eo minus [Cod. 2.12(13).14]. Nam ex quibus causis, etc. ut Inst. de here. qua ab intest. §. Sui [Inst. 3.1.2]. Alii quod etiam pro eo non valet in arbitro, ut s. de arb. l. Diem. §. Coram [Dig. 4.8.27.5], sed in iudice sic. Tu dic etiam in iudice, et etiam pro eo non valet, cum hebeatur loco absentis, ut s. de iure co. l. ii §. Furiosus [Dig. 29.7.2.3]. Sed minor loco praesentis. Nec obstat quod pro absente contumace vel contra cum sentent a datur, ut. C. de iusi. l. Properandum. §. Si autem [Cod. 3.1.13.2], quia condemnari et solui ei potest, at hic non ita. In contractibus autem adquiritur furioso eo casu quo ignoranti, ut supra si cer. pet. l. Si a furioso [12.1.12].

195 See for example, Odofredus, *Lectura super Digesto novo* (Lyon 1552), fol. 78r, Dig. 42.1.9: “Debet ergo intellegi hec lex ut dixi in casu, ut si litigo cum te sanemtis, et tu es effectus furiosus, non debet te citare iudex, sed curatorem tuum, sed contra curatorem furiosi ferre sententiam debet.” Odofredus discussed this text as relating to a non-criminal verdict. In this case, the judge could make a decision in the presence of the insane person’s guardian.

was not lost on all. Sicard of Cremona, for example, mentioned it in his *Distinctiones*. Beyond the latent idea in canon law that the insane could not be punished while in their condition, the general treatment of canon law had, up to the *Clementines*, separated the responsibility of the insane from their punishment. Whereas the civilians viewed these two as intimately connected, a view that the canonists had adopted by stages, in general, other concerns such as clerical dignity, public scandal, and ecclesiastical discipline had inserted themselves between the concepts of responsibility and punishment. In this tradition, it was easier to consider one apart from the other, which is exactly what Baldus did. I am not suggesting that Baldus pulled his idea from canon law, only that the implicit distinction between liability and punishment may have aided him in thinking about the effects of insanity at every stage of the process. Baldus did not provide many allegationes for this position, so it is difficult to follow the sources of his thought exactly. Boari, for example, believed that an underlying rationale was the cultural desire for the condemned to confess their sins before execution. Boari also suggests the right to self-defense was also a key factor in Baldus’ position. The latter seems much more plausible. Baldus constructed his argument through analogy with a legal figure, the *absens*. Furthermore, the *consilium* of Baldus dealing with the defense of a *furiosus* accused of homicide, examined below, shows a particular concern with safeguarding the procedural rights of the insane.

197 Sicard of Cremona, *Summa decretorum* (Wien, ÖNB 2166), fol. 43v: “Carnis maceratio. hic iniungitur resipiscenti si precessit meritum. alias non nisi ad cautelam.”
198 Eg. A gloss to C.15 q.1 in Biberach an der Riss, Spitalarchiv B.3515, fol. 179r, giving reasons why punishments vary: “Delicti enormitas uel detestatio; exempli cautela; communis utilitas; delinquentium contumatia; facti memoriae refricatio; coniurationum publicatio.”
199 Boari, *Il furiosus nella criminalistica*, 120.
200 Ibid. 124.
For the most part, Baldus’ position became the *communis opinio*, in part due to his great authority. Subsequent jurists tested and added to his basic idea.\(^{201}\) One of the most interesting analyses of Baldus came from Johannes de Imola (d. 1436), another jurist who taught and commented extensively on Roman and canon law alike.\(^{202}\) Indeed, Johannes first approached the problem in his *Lectura* on the Infortiatum, and then later returned to and expanded on the questions that remained in his *Lectura* on the third book of the Liber extra.\(^{203}\) Johannes began by asking whether a person who committed a homicide while of sound mind and afterwards became insane can be decapitated.\(^{204}\) We can see that Johannes structured his question slightly differently than Baldus had. Baldus had asked whether such a person could be condemned, that is, whether sentence could be passed on him. Johannes asked whether that sentence could be carried out. To answer, Johannes referred to another figure analogous to the insane: the dead. While not as frequent, in matters of tacit consent, Roman law had compared the insane to the dead.\(^{205}\) Since corporal punishment could not be inflicted upon the dead, neither could it be inflicted upon the insane, whatever their guilt.\(^{206}\) Johannes specified that if there were a chance that the condemned

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\(^{201}\) According to Jason de Maino, who would present the most consistent criticism of Baldus, only Ludovicus Romanus dissented from this opinion: Jason de Maino, *Commentaria in secundam partem Codicis* (Venice 1496) unfoliated, Cod. 6.22.9: “Ab ista sententia nemo discrepat excepto Ludovico Romano.”


\(^{203}\) Johannes de Imola, *Lectura super prima parte Infortiati* (Venice 1475), unfoliated, Dig. 28.6.43; *Commentaria in librum tertium Decretalium* (Venice 1500), fol. 283v-284r, X 2.26.16.

\(^{204}\) Johannes de Imola, *Lectura super prima parte Infortiati* (Venice 1475): “Et hec faciunt ad questionem si existens sane mentis committat homicidium an si postea incidat in furorem possit decapitari.”

\(^{205}\) Dig. 19.2.14: “Qui ad certum tempus conducit, finito quoque tempore colonus est: intellegitur enim dominus, cum patitur colonum in fundo esse, ex integro locare, et huiusmodi contractus neque verba neque scripturam utique desiderant, sed nudo consensu convalescunt: et ideo si interim dominus furere coeperit vel decesserit, fieri non posse marcellus ait, ut locatio redintegratur, et est hoc verum.” Emphasis mine.

\(^{206}\) Johannes de Imola, *Lectura super prima parte Infortiati* (Venice 1475), unfoliated: “In contrarium tamen facit d. i. Diaus [Dig. 1.18.14] in ver. ‘si vero’, ubi quo ad literam videtur posse intellegi de delicto comisso ante furorem et pro hoc etiam quia sicut non debet fieri executio in corpus mortuum iuxta id quod not. Cy. in l. ii. C. qui te. fa. poss. [Cod. 6.22.2]. Ita videtur quod non possit fieri in istum qui quodammodo videtur haberi pro mortuo ex quo caret intellectu et aliud posset dici in pena que respicit bona, ut est exheredatio.”
would regain his sanity, he could be held until that point and then executed.\textsuperscript{207} Johannes did not know how to proceed if there were no hope of recovery. On the one hand, “no crime should go unpunished.” On the other, a sense of equity seemed to urge against execution, as well as the idea that the insane is already punished by his own madness.\textsuperscript{208} In his lecture on the \textit{Infortiatum}, Johannes left the issue there. When he returned to it in his commentary on the Liber extra, he copied his earlier material exactly up to this point and then expanded on it. Johannes noted that Baldus seemed to argue against decapitation, but Baldus was more concerned with the process itself, rather than the execution of the sentence.\textsuperscript{209} What if the onset of madness had followed the sentence? Again, Johannes seemed at a loss. Based on the consultation of the emperor by the provincial governor in “Divus Marcus,” Johannes advised consulting a superior.\textsuperscript{210} Insanity arising during a process, however, interrupted it in its course. Johannes added that even if the insane person had a guardian, the case still could not proceed because of the personal nature of the punishment.\textsuperscript{211} Johannes de Imola then expanded greatly on Baldus’ original statements. He introduced a number of alternate hypothetical situations, and while his answers were not always satisfactory, they are indicative of a jurist grappling with the powerful demands of the public good and merciful humanity.

\textsuperscript{207} Ibid., “Aliud in pena que habet afficere persona ut est decapitatio et satis equum, videtur quod si speretur reduci ad sanam mentem interim custodiat et differatur executio usque ad illud tempus, ar. l. Pregnantis. i. de penis [Dig. 48.19.3].”

\textsuperscript{208} Ibid., “Si autem non sit spes de eius recuperatione sane mentis tunc est magis dubium. Nam pro una parte facit ratio, scilicet ne delictum remaneat impunitum, contra l. ita vulneratus, inf. ad le. acqui. [Dig. 9.2.51] Pro alia facit quia equitas et id quod supra dixi. Po modo aliter non determino audiui Bal. aliquid tangere in l. Furiosum. C. qui testa. fa. possunt. [Cod. 6.22.9].”

\textsuperscript{209} See above, as well as below on the \textit{consilium} 3.347.

\textsuperscript{210} Johannes de Imola, \textit{Commentaria in librum tertium Decretalium} (Venice 1500), fol. 284r: “An tunc postea poterit mitti tempore furoris videtur stare dubietas de qua predixi et poterit dici quod hoc resedebit in arbitrio superioris qui videtur super tali casu consulendus per id quod habetur in d. l. diuus [Dig. 1.18.14] in ver. ‘si vero’.”

\textsuperscript{211} Ibid., “Nec potest etiam procedi cum curatore furiosi, quia ubi ex crimen venit imponenda pena personalis non admittitur pro curator et consequenter nec curator per id quod habetur in l. Accusatore [Dig. 48.1.1] l. pe. §. Ad crimen. ff. de publ. iu. [Dig. 48.1.13.1], et in c. Accedens inf. de accru. [X 5.1.23], et sic in dicto casu quando venit imponenda pena decapitacionis non videtur posse processus fieri contra furiosum per rationes predictas.”
Not every jurist agreed with Baldus however. The first major critic was Ludovicus Romanus. Ludovicus began with the same difference in emphasis that Johannes had, namely the understanding that Baldus was discussing punishment rather than sentencing. Ludovicus’ objection centered on the perceived changing of the punishment. “A supervening quality of insanity does not remove the punishment that adheres at the time of the delict.”\(^{212}\) That the insane are held as absent did not matter; Ludovicus used the analogy of slavery as a kind of civil death. If the insane could escape punishment in this way, “then one could say that if someone who commits a delict while free is afterwards reduced to slavery, he could not be capitaly punished because he is held as a dead man.”\(^{213}\) Despite his objection and serious criticism of Baldus’ reasoning, Ludovicus still held that “although I think that he [Baldus] says this badly, his opinion should still be preserved in practice because of his great authority.”\(^{214}\) Another jurist, Petrus Philippus Corneus, acknowledged that Ludovicus had misunderstood; “Baldus and Angelus [Baldus’ brother and fellow jurist] did not wish that the punishment were changed, but that the process and condemnation be impeded through a fictive absence.”\(^{215}\)

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212 Ludovicus Pontanus, *Lectura super secunda parte Codicis* (Pavia 1496), unfoliated: “Qualitas ergo furoris superveniens post delictum non tollit penam que inerat tempore delicti, quo quis puniri poterat capitaliter quia erat sanae mentis casus est in dicta lege.”

213 Ibid., “Nec obstat quod furiosus habeatur pro absente, quia et ita posset dicere quod committens delictum tempore libertatis si postmodum redigatur in servitutem non potest capitaliter puniri eo quod seus habetur pro mortuo, ff. de reg. iur. l. Sergitutem [Dig. 50.17.209].”

214 Ibid., “Et tamen casus est in contrarium in dicta l. i. per contrarium. Unde puto quod male dicat, licet propter tantam auctoritatem opinio sua seruaretur in practica.”

215 Petrus Philippus Corneus, *Lectura in librum sextum Codicis* (Lyon 1535), fol. 48v, Cod. 6.22.9: “Tamen non videtur verum quia qualitas superveniens post delictum commissum non immutat pena, l.i ff. de pen. [Dig. 48.19.1] secundum Pontanum, ut hic latius per eum Baldum tamen et Angelum, non volunt quod mutetur pena, sed impediatur processus et condemnatio propter fictam absentim, et idem voluit ipse Baldus in d. l. Humanitatis. inf. de impu. [Cod. 6.26.9].”
A more serious and sustained objection came from Jason de Maino (d. 1519), a prolific jurist of the late-fifteenth and early-sixteenth centuries. Like Ludovicus, however, Jason focused his attention on the actual punishment rather than the process.

There is a pretty little doubt, whether someone who committed a delict for which he should be decapitated, if he goes insane, should never be decapitated, and if he could be punished in person. The common opinion is that he could not be punished in his person, since affliction should not be added to the afflicted, Dig. 1.18.14. Likewise, the insane are held in the place of the absent. But capital punishment cannot be born against the absent.

If Jason were responding directly to Baldus, it is clear that he completely misunderstood his argument. Judging by the remarks of Johannes and Ludovicus though, the tradition seems to have moved away from Baldus’ original intent rather quickly. Whatever the disconnect between him and Baldus, Jason advanced a number of different arguments against Baldus that provide important insight into the legal consideration of madness. In the first place, Jason drew on the theological and legal idea of a perduring will. As we shall see in the following chapter, the jurists invented a number of fictions to create volition for the insane. One of these fictions was the presumption that the last provable wishes of the insane before they became insane endured. Theologians adopted this idea from the jurists (who later reclaimed it) to show that if a madman died in a state of mortal sin, he would be damned. Jason used this idea against the “satis ipso furore punitur” principle to show that “if supervening madness does not free one from eternal punishment before God, it should be much further from the truth that it frees one from temporal

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216 Lange and Krichbaum, Römisches Recht, 881-892. Boari, Il furiosus nella criminalistica, 113-120, also analyzed Jason’s arguments on this point.
217 Jason de Maino, Commentaria super Infortiatum (Venice 1598), fol. 116v, Dig. 28.6.43: “Sed pulchrum dubium est, si aliquis committeret delictum propter quod debeat decapitari, si postea efficiatur furiosus, nunquid debeat decapitari? Et an potest puniri in persona? Communis opinio est, quod non possit in persona puniri, quia no debet addi afflictio afflicto, l. Diusus. ff. de off. pres. [Dig. 1.18.14]. Item, quia furiosus habetur loco absentis, l. 2. §. Furiosus. ff. de iure codicil. [Dig. 29.7.2.3].”
218 See Chapter 4.
punishment.”219 Jason's second reason comes from an interesting reading of “Divus Marcus.”

According to Jason, “no leniency should be given simply on account of illness and therefore insanity.”220 Despite the seemingly sympathetic rationale given in the text, the only reason that the matricide in “Divus Marcus” went unpunished is that the son was insane when he committed his crime. In Jason’s understanding of the case, the governor found the son insane before him; he had to determine if he had been insane when he committed the crime. Another reason why leniency should not be given to the insane concerned the enormity of the crime. Jason clearly felt that a serious crime required punishment and did not accept any excuse except one properly founded in law. Jason also opposed the image of the insane as dead man that Johannes had used; civil and natural death were not always interchangeable.221

The debate over the responsibility of the insane was settled by the thirteenth century, and by the fourteenth century the gradual expansion of this principle included also a lack of punishment. Baldus and his successors tested the limits of this expansion. While Baldus had in mind the effects of madness on the procedure of punishment, later jurists were inspired to ask whether the insane could be punished at all, regardless of their responsibility. The *communis opinio* held that the insane should not be punished, even if they merited such punishment, though

219 Jason de Maino, *Commentaria super Digestum vetus* (Venice 1598), fol. 118r, Dig. 2.9.5: “Secundo facit quod fortius tenet Bartolus in l. Nunquam §. i. per illum tex. ff. de accu. [Dig. 48.8.2.1] quod si aliquis commisit peccatum mortale, dum esset sanae mentis, deinde efficiatur furiosus, et moraitur in furore, quod apud Deum damnabitur, et ita dicit tenere Theologos. Si ergo furor superueniens non liberat a pena aeternali apud Deum, que longe immensior estaminus debet liberare a pena temporali, cum mitius agatur cum Deo, quamuis cum homine. l. Si quis reum. §.voto. ff. de pol. [Dig. 50.12.2.1].”

220 Jason de Maino, *Commentaria in secundam patrtem Codicis*, (Venice 1496), unfoliated, Cod. 6.22.9: “Et quod in illo textu [Dig. 1.18.14] puniatur quando est in furore; patet quia textus dicit ‘nec morbo eius dandum veniam,’ si morbo igitur furori.”

221 Jason de Maino, *Commentaria super Infortiatum* (Venice 1598), fol. 116v, Dig. 28.6.43: “Non obstat illud quod allegatur in contrarium, seu oppositum, quod furiosus habetur absente, et pro mortuo. Respondeo quod predicta procedunt quando quis est vere et naturaliter mortuus, ita loquitur Cynus in d. l.4. C. qui test. fa. poss. [Cod. 6.22.4] uel quando est vere absens. Sed furiosus non est vere et naturaliter absens, sed civiliter, et habeo quod mors civilis nunquam aequiparatur naturali, nisi in causibus expressis, gl. reputata singularis in c. Placuit. 16 q.3. [C16 q.3 c.8] est alia gl. in c. Susceptum de rescr. in vi. [VI 1.3.6] tex. et ibi Bar. et Doc. in l. Ex ea. §.i. ff. de ver. obl. [Dig. 45.1.121.1].”
some jurists opposed this conclusion. As Boari noted, Ludovicus and Jason based their arguments on the strict application of legal rules without considering the ethical dimension of Baldus’ assertion. Jason, with his arguments that leniency should not be given solely because of the presence of madness, especially where a serious crime was concerned, illustrates a trend against a non-punitive approach to the insane, a possible swing back after the rising tide of the contrary view in the fourteenth century. What was the source of Jason's dissatisfaction? Was it simply poor legal thinking, as he saw it? Did prevailing attitudes in practice have any impact on his dissent from the common opinion? In the final section, we shall consider documents of practice to determine how the theories discussed in this chapter impacted daily practice.

**Consilia and Practice**

To speak of daily practice and criminal insanity in the late Middle Ages is misleading. Like today, most instances of insanity that came before the courts involved civil disputes, such as testamentary cases or the granting of a guardian. Crimes committed by the insane, while much more sensational, were significantly rarer. Of the seventeen cases regarding madness I have found in Venice, only three involve homicide; the remainder are testamentary disputes. Likewise, of the twenty-six *consilia* I have used for this study, only three concern homicide. This corroborates the recent findings in other regions. Aleksandra Pfau surveyed thirty-five registers of the French royal chancery in the fourteenth and fifteenth centuries; of the 9,852 remission letters she examined, only 145 relied on madness as an excuse. Despite their relative scarcity, these cases have much to tell us about the reality of responsibility and punishment with regard to the insane.

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Let us begin with the *consilia*. Two *consilia* comes to us through collections: one of Baldus de Ubaldis and the other of Franciscus de Ramponibus, a contemporary of Baldus.\(^{225}\) Neither, unfortunately, is dated. Baldus’ *consilium* deals with a certain Giannino da Vailate, who assaulted and stabbed Bartolomeo Cabini of Crema with two blows; Bartolomeo eventually died of his wounds.\(^{226}\) Based on the towns mentioned, which were only about nine miles apart, it is possible that Baldus drafted this *consilium* while residing in Pavia during the last decade of his life.\(^{227}\) From what can be gathered from the *consilium*, Giannino was apprehended after the assault and tried before the local judge (we are unaware of the date and location of the crime and subsequent proceeding). He had even confessed to the crime before an unnamed relative arrived claiming to be Giannino’s guardian.\(^{228}\) This relative likely engaged the famous jurist in writing the *consilium*.

The case before Baldus was thus an appeal. He opened his arguments with the basic texts and maxims protecting the insane from punishment for their crimes. While Marco Boari’s praise of this *consilium* as a “*summa*” on criminal insanity might be exaggerated, Baldus certainly covered the major points of the tradition.\(^{229}\)

\(^{225}\) Baldus de Ubaldis, *Consilia* (Venice, 1570), fol. 97v-98r, 3.347; *Consilia criminalia*, ed. Johannes Baptista Ziletti (Venice, 1560), fol. 81r-81v, 2.45.


\(^{227}\) Pennington, “Baldus de Ubaldis,” 35-61.

\(^{228}\) Baldus, *Consilia*, 3.347: “Ecce ergo, coniuncta persona venit ad excusandum dictum Ioanninum allegans furorem, ut curator, et curatorio nomine dicti Ioannini.”

\(^{229}\) Boari, *Il furiosus nella criminalistica*, 85, where he refers to this *consilium* as “un’esemplare *summa* sulle questioni giuridiche riguardanti un caso anch’esso esemplare tra le varie possibilità configurabili in *criminibus* dall’azione del *furousus.*” Baldus, *Consilia*, 3.347: “Et est modo ad defensam dicti inquisiti, dicitur quod dictus inquisitus tempore dictarum percussionum, etante, et post, erat furiosus et demens. Adeo quod propter furorem non poterat dici quod committeret dolum. nam quod propter furorem fiunt, non dicuntur voluntaria: sed magis a casu, quia quidem casus non punitur pena legis Cornelie de siccariis et veneficic. quia quid fatale est, non innumeratur culpae, satisque punitur ipso furore, vt ff. de officio praesidis l. Diuus.[Dig. 1.18.14] ff. de iurisdictione. l. Si quis id, quod §. finali. [Dig. 2.1.7.2] ff. ad legem Corneliam de siccariis et veneficis. l. Infans. [Dig. 48.8.12] ff. de regulis iuris. l.
As a way of defending the accused, it is said that at the time of the assault, as well as before and after, he was insane and out of his mind. Because of his insanity he cannot be said to have committed a crime, for things done because of insanity are not called voluntary, but rather done by chance. Chance is not punished by penalty of the *Lex Cornelia*, since whatever is accidental is not numbered among faults, and one is punished by one’s own insanity… Since such a homicide is not voluntary, but accidental, the insane person should rightly be definitively and perpetually absolved. For where there is neither will nor any intention to commit a wrong, there is no authority to punish, since will and intention distinguish crimes. Where there is no guilt, there should be no punishment… These laws are very well-known. It is known by natural reason that the insane should rather be endured than acted against, for insanity is an illness of the mind and body. Nor should what happens because of a misfortune of fate be punished, since affliction should not be added to the afflicted, as in “Si furiosus”.

The bulk of the *consilium*, however, dealt with the procedural protections of insanity, a topic closely tied with ensuring the rights of the insane, and one to which Baldus paid particular attention. For him, there was a close connection between the two. The inability to punish the insane leads directly into the importance of establishing its presence. Baldus interestingly did not linger over the particulars of how to prove insanity; he assumed that Giannnino was manifestly insane. Instead, Baldus emphasized the importance of making the determination: “insanity is a matter of status, and if there is no pronouncement on an article of insanity once it is raised, then the process is ruined and does not even merit the name process, since it has proceeded...”
incorrectly.” Furthermore, the confession given by Giannino had no value, “since the insane do not know what they are saying.”

The *consilium* of Franciscus de Ramponibus bears striking similarity to Baldus’. In this case, a certain Antonio Nebe had committed a homicide, and his words and demeanor caused the bystanding witnesses to suspect his sanity. Antonio had a history of epilepsy, which had degenerated into a more severe mental illness in the preceding year. Like Giannino, Antonio had come before the local podestà during the inquisition against him and confessed to the murder. Franciscus used the presumption of continuing madness to assume that Antonio was still insane when he made this confession, likely because he had been so manifestly insane at the time of the murder itself. He counseled that the confession should be dismissed and that Antonio should be absolved of the crime. Franciscus advised the court to remand Antonio into the custody of his friends or relatives, or even imprison him in order to keep him and others safe.

231 Ibid., “Amplius causa furoris est causa status, et ideo tanquam de praetjudiciali debet ante omnia cognoscì, vt Inst. De actionibus. § Praejudiciales [Inst. 4.6.13]. See also previously in the *consilium*: “Dico igitur, et hoc est certo certius, quod si allegatur furor ad excusationem delicti, vel ad declinationem iudicii, vel ad utrunque, quod ante omnia inquirendum est, et pronuntiandum super articulo isto dementiae, vel furoris, et curae, alias processus non meretur nomen processus habere quia non est prorite procedere vel proceditur inordinata.”

232 Ibid., “Confessio enim furiosi nulla est, quia vocem suam ignorat, et quod loquitur non sentit, quia non est capax animi, neque doli, neque culpae, vt plene legitur, et nota C. Vnde vi. l. Si quis in tantam. in glossa magna. [Cod. 8.4.7, gl. “ad earundem rerum.”] Confessio igitur facta per dictum inquisitum ipso iure non tenet: quia confessio debet fieri persona legitima.”

233 Johannes Baptista Zilletus, ed. *Consilia criminalia* (Venice 1560), fol. 81v, 2.45: “Cum igitur probatum sit ipsum Antonium Nebe de terra pene Sancti Ioannis tempore dicti commissi delicti, et etiam tempore dicti commissi delicti, siue homicidii et etiam tempore, praefatum Anthonium fuisset furiosum, et in furore et insania positum etiam quia constat dictum Anthonium ante dictum commissum maleficium morbo caduco laborasse qui etiam ad insaniam vehementer patientes adducit, et illum patiens per unius anni spatium, ab huiusmodi infirmitate liber esse dici non potest.”

234 Ibid., “Sed posset dubitari cum dictus Antonius fuerit confessus coram Domino potestate omnia contenta in inquisitione uera esse, et c. Ergo confessus fuit de dictum maleficiumscenter et dolose commissa, et siue non casu, nec per furorem, sed in hoc animus et prudentia iudicantis, commissam sibi a Deo et Domino terrae ueritatem discernat, si simpliciter confessus fuerit se homicidium commisserit, et cum siue casu, nec siue etiam in furore persistere, ut iii. q.ix. c. Indicas [C.3 q.9 c.14], et not de successio. ab intesta. in c.fina [X 3.27.3].”

235 Ibid., “Concludo igitur dictum Anthonium a poena homicidii non esse affligendum, sed debere a dicta inquisitione absolu et liberari, satisque sit ipsum suo furore puniri, ff. ad l. Cor. de sicar. l. Infans [Dig. 48.8.12] et l. pen. §. fin. ff. de parrici. [Dig. 48.9.9.2] et c. i. de homi. in cle. [Clem. 5.4.1] Sed ut de caetero non ualeat in ipsum,
In both of these consilia, we find that the alleged madmen had been allowed to confess.

We get the sense from the consilium of Franciscus that the court of the podestà consulted because of this strange turn of events. In Baldus’ consultation, however, it is clear that the court had tried to proceed quickly in the face Giannino’s apparent insanity. In his argument, without the procedural safeguards of determining status, all the legal principles in the world are worth nothing.

Fourteenth-century Venice provides three examples of legal processes against the insane for homicide. Guido Ruggiero has already studied these cases, but he has seriously misinterpreted their significance. For Ruggiero, these cases are illustrative of a Venetian merchant mentality at work in law, a view he supported by clinging to the idea of Venetian legal exceptionalism. The idea that Venetian law existed independently of the ius commune is a frequent trope in historiography, but one which has come under recent criticism. The first of the three, the 1349 prosecution of the ironically named “Johannes Theutonicus,” even includes a consilium.
According to the record of the case, which preserves the decision reached by the Major Council and the *consilium* requested by the Doge and his counselors, Johannes, one of the countless immigrants from German lands in the city, had killed two men and was apprehended by the Venetian police force, the Signori di Notte. The reality of his madness was never in question. At some point, Johannes’ brother Conrad arrived in the city with other family members requesting that Johannes be given into their custody and promised to take him back to their homeland. Johannes’ case before the Major council was unusual, owing to the difficult nature of his case. The Council even requested a *consilium sapientis* from Rainerius de Forlino, a jurist in residence. Two of the Signori di Notte desired to keep Johannes in prison for the rest of his life, punitive incarceration being a common penalty in Venice at that time. The Council and the majority of the Signori decided to follow the consultation of Rainerius and remanded Johannes into the custody of his relatives.

How did Rainerius build his case? He of course noted that “the insane cannot be punished for any delict,” giving the usual citations to Roman law. Ruggiero notes Rainerius’ disconnect from Venetian practice by claiming that he opposed imprisonment on the grounds that the *Ius commune* did not allow punitive incarceration. A closer examination of the *consilium* reveals that Rainerius placed the burden of custody on Johannes’ family. Once his family returned
him to their home, the local judge could compel them to maintain custody of Johannes even if
they were unwilling to do so. Rainerius also noted that the general custom beyond Venice was
that the insane are maintained in the houses of their families, even sometimes in chains. It was
therefore not in the interest of the city to imprison Johannes when his relatives were willing to
take him, and also when they were bound to do this by law and custom. Rainerius made the point
that prison would be appropriate, not as a punishment, but as a possibility for custody if no
family could be found. He also noted that his family would be responsible for any future delicts
committed by Johannes while in their care. This latter point was mentioned in Roman law, an
idea that received some mention, but little elaboration by contemporary jurists.245

In 1355, a certain Nicolina, described as “stulta et mente alienata ac furiosa,” struck and
killed Andrea, the nephew of a priest, with a rock. She remained in prison for three years,
wherein it became apparent “from daily experience” that she was out of her mind. The Major
Council in conjunction with the Signori di Notte ordered that “she be beaten and sent outside
Venice to some place that seemed better to the Signori di Notte.” Because she lacks any
judgment or discretion, she would not be punished further for the crime.246 In 1374, a certain

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245 Bartolus, Commentaria in Digestum vetus (Basel 1562), fol. 93, Dig. 1.18.14: “Ad praesides spectat generaliter
contra latrones inquirere et homines malae conditionis et vitae, et eos punire atque eorum receptatores, et ad
praesidis officium spectat, ut furiosus in carcere detineantur, si alias commode retineri non possunt, et delictum per
furiosum tempore furoris commissum, puniri non debet, secus si fuisset commissum tempore sanae mentis, ad
custodiendum furiosorum debet aliquis deputari, qui si sit negligens punitur.”

246 Collegio Notatorio, Reg. 1, fol. 42r: “Cum quaedam Nicolina stulta et mente alienata ac furiosa in Millo. ccc Lv.
die xxvii. Maii, percussisset cum vno lapidem in fronte, Andreaem nepotem presbiteri Iohannis sanctorum
apostolorum, cum contusione et fractura ossis et plaga ac sanguine. Ex qua percussione Idem Andreas mortuus est.
Et a dicto tempore citra, Ipsa Nicolina steterit carcerate, constiteritque cotidiana experientia et eudientiis manifestis,
Cicilionus, a notorious madman, threw a piece of a cask through an open window, striking and killing Nicoleta Zuparia. Because of his known madness, he was removed from the city by the Signori di Notte and told never to return.\textsuperscript{247}

What can we tell from these cases? For one, the Venetians regarded homicides by the insane as requiring special attention; they did not follow the usual procedural paths for homicides. We can also see an institutional desire to punish even those known to be insane. Johannes’ sanity was never questioned, yet at least two of the Signori di Notte persisted through the process in their desire to incarcerate punitively. The case of Nicolina presents more of a problem. Why was she imprisoned for three years? The decision recorded is frustratingly brief, but indicates that likely had been doubts regarding her insanity. The decision notes the “daily evidence” of her, as if the true case for insanity had been built while imprisoned. If she truly were insane at the time of the crime, this argues for a summary prosecution in which her mental state was not taken into sufficient consideration, a defect remedied only after three years. Even then, when the Signori di Notte had been mostly convinced of her madness, she still received a beating before being sent from the city. Perhaps her crime, the murder of a priest's nephew, was so heinous that some public penalty was required. We should consider her fate alongside that of Ciclionus. He was also detained briefly in prison, though the Signori di Notte advised the Doge and his counselors

\textsuperscript{247} Ibid., fol. 75r: “Cum quidam, nomine, Cicilionus, die Iouis elapsa, secunda presentis mensis, transiret per contractam, Sancti Iohanis noui, Et accepisset de terra, vnam peciam cuppi, Et proiecisset ipsam in domis Nicoleti Macarenie ponitam in suprascripta contracta, Et cum ipse perussisset et vulnerasset, nicoletam zupariaim, eius vicinam, in fronte, vna concussione, a latere dextra, cum plaga et sanguinis effusione, de quo vulnere mortua est, ipsa nicoleta, Qui cicilionus captus fuit et c., in carceribus nostris; Et officiales de nocte, asseruerunt domino, quod officio suo plene constitit, suprascriptum Cicilionem, fuisse et esse notorium fatuum et furiosum. Per dominum et consiliarios Infrascriptos, et officiales de nocte Infrascriptos dictum et determinatum fuit, dictum Cicilionem, velut fatuum et furiosum, debere relaxari, Et quod officiales de nocte teneant modum, quod suprascriptus Cicilionus, conductur extra Venetias, Et non Redeat Venetiis vlo modo.”
that Ciclionesuus “was and is a notorious fool and madman.” His expulsion took place much more quickly. The Council reached their decision on 22 March; the crime occurred on 2 March. The most likely explanation for Nicolina’s treatment remains the persistence of serious doubt over her insanity.

Three cases are not enough to come to many firm conclusions. By combining these cases with the consilia though, we may be able to glimpse something of the practical reality of the insanity defense at work. The greatest hurdle to its exercise seems to have been proof. Either doubt or inadequate proof of insanity could lead to the insane being punished. Baldus’ insistence on proper procedure as a safeguard against this may take on greater importance when we consider Nicolina’s case. In Venice, the greatest concern seemed not to have been punishment per se, but the protection of its citizenry. In each case, the outcome was expulsion of the insane person from Venice. Rainerius, for example, spent more time establishing that Johannes’ family had an obligation to take custody of him, as well as liability should they fail in that duty, than actually arguing that Johannes’ insanity was exculpatory. The courts also seemed restrictive in their acceptance of insanity as proven. A larger sample would be needed to fully justify this point, but from the forgoing, we can say that courts accepted the idea that the insane should not be punished, but they would have rather erred on the side of punishment than allowing a crime remain unpunished.

**Conclusion**

The story of the “insanity defense” in the Middle Ages is that of the gradual expansion of the idea that the insane should not be punished because they could not form the intent required by both Roman law and twelfth-century theologians. Canonists led the way not only in reviving these ideas, but also in testing their limits. Where Roman jurists were content to repeat maxims
drawn from parallel examples, the canonists developed a more nuanced approach. Roman thinking would have the last laugh though. The canonists had effectively separated responsibility from punishment. In more extreme examples, like Rolandus of Bologna, the inability of fallible human judges to determine whether insanity was the result of a prior fault meant that the insane could be responsible and punishable for their crimes. While others eventually rejected the very basis of this line of thought, the idea of irregularity based solely on the criminal act remained. Only in the early fourteenth century with the promulgation of “Si furiosus” did this form of penalty cease. The high point of medieval jurisprudence for criminal insanity came when jurists interpreted Baldus’ statement that insanity brought a criminal process to a halt as a statement that the insane could not be punished even for crimes committed while sane. Jason de Maino’s rejection of this interpretation around the turn of the sixteenth century was a sign of things to come. As Boari and Midelfort have shown, the increasing penetration of medical discourse into the jurisprudence of insanity prompted a gradation of madness that had not existed during the Middle Ages.\(^\text{248}\) Armed with these new concepts, jurists and judges alike could wave off signs of apparent madness as not rising to the level true mental incapacity. This only furthered the restrictive acceptance of insanity in the courts already evident in the fourteenth century.

CHAPTER 4

COMMODUM FURIOSI: THE GUARDIANSHIP AND CARE OF THE INSANE

The *ius commune* largely defined insanity negatively, as a lack of understanding or awareness that prevented the exercise of a person’s abilities under the law. As we saw, insanity did not result in a loss of personhood or status, but merely the free exercise of that status. In this way, the insane appear to have little to no agency under the law. I return again to Thomas Kuehn’s definition of status “as the bearer of rights and obligations and the conscious agent of them.”¹ Status and its exercise are inextricably bound together. I had earlier modified this definition to include the insane and others who have been defined through their lack of agency. The previous chapter explored status through criminal law and non-liability of the insane for their actions. This chapter will examine the more positive aspects of the insane as legal persons: in what ways could they meaningfully interact with the world through law?

In order to answer this question, in the following two chapters I will focus on two aspects of jurisprudence that have received little scholarly attention: guardianship and fictive consent. Guardianship was a pervasive institution found in a myriad of forms across medieval Europe. In all its permutations, the essence of guardianship rests in the assumption that some members of society are unable or unwilling to properly care for themselves or order their affairs. The roots of this social weakness ranged from the legally enforced inferiority of women and sanctions on spendthrifts to the recognition that minors, particularly those without the benefit of a father in a male society, require special protection in managing their affairs. While the insane fit into the category of those requiring aid for a combination of both social and “natural” reasons, the bulk

of scholarship has focused on the guardianship of women, particularly widows, and children.\(^2\) This is not a mere quirk of scholarship however; the insane, while not unheard of, could not compete with widows or orphans in terms of sheer numbers. This was a feature of medieval law and jurisprudence as well. For example, when civic institutions in medieval Italy began to take an active interest in overseeing the guardianship of the insane, they did so through institutions already established to oversee the guardianship of \textit{pupilli}.\(^3\)

Roman jurisprudence is particularly important in analyzing thought about medieval guardianship. As Gigliola di Renzo Villata put it, Roman law was “una fonte inesauribile di prescrizioni” for guardianship.\(^4\) The twelfth- and thirteenth-century glossators of Roman law sought to explain the apparent contradictions in the Justinianic corpus, as well as extending its principles and positions to contemporary issues.\(^5\) Later jurists in the fourteenth and fifteenth centuries carried this extension to practice even further. Under the arch of guardianship, the jurists explored exactly how the insane interacted with the world through law and what protection they received in their disadvantaged position. The guardian, or \textit{curator}, was not the only legitimate point of contact between the insane and society.\(^6\) One of the most fascinating aspects of the medieval jurisprudence of insanity was


\(^3\) Berger, \textit{Encyclopedic Dictionary of Roman Law}, 662. \textit{Pupillus} could have a general meaning as any underage child, but more technically referred to a minor who had become \textit{sui iuris} through emancipation or the death of his father.


\(^5\) Ibid., 139

\(^6\) Berger, \textit{Encyclopedic Dictionary of Roman Law}, 420. The difference between the \textit{curator}, usually granted to the insane and those over twenty-five, and the \textit{tutor}, usually granted to \textit{pupilli}, diminished to the point of nonexistence during the history of Roman jurisprudence. The difference that mattered little in the medieval conception of guardianship of the insane, especially given the connection between \textit{pupilli} and \textit{furiosi}. 
the attempt of the jurists to craft a fictive will, or a fictive consent, for the insane. Through this
will, the insane could be understood to act in their own right without any intermediary. Through
guardianship and fictive consent, I hope to show that the insane in medieval jurisprudence were
not completely marginalized and excluded from agency because of their disability. Instead,
jurists sought to integrate them as much as possible into the legal world.

**Roman Law**

We must begin with a brief overview of guardianship of the insane as it appeared in
Roman law. The general features of ancient Roman guardianship would continue to influence the
jurisprudence throughout the Middle Ages. By far the most important feature, the aspect of
 guardianship that would define it for centuries, is its deep root within the family. The earliest
provision for the guardianship of the insane in the Twelve Tables left care to the family of the
*furiosus*, specifically to the nearest agnatic relations.7 This basic principle would remain in force,
though later Roman jurists would clarify certain relations. For example, the appointment of a son
as *curator* for his mentally ill father provided a controversial reversal of authority. A son could
not act as guardian for a dissolute father, but a rescript of the emperor Pius allowed for a son to
have guardianship over his insane father, a provision that Ulpian and Paulus approved.8 Likewise,
a son could also act as guardian for his insane mother.9 Not all relationships provided valid
grounds for guardianship, however. A husband, for example, could not act as guardian for his

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8 Dig. 27.10.1.1: “Curatio autem eius, cui bonis interdicitur, filio negabatur permittenda: sed extat divi Pii
rescriptum filio potius curationem permittendum in patre furioso, si tam probus sit.” See also Dig. 27.10.2: “Sed et
alii dabat proconsul curatores, qui rebus suis superesse non possunt, vel dari iubebit, nec dubitabit filium quoque
patri curatum dari.” The grouping of these texts suggests that Tribonian and his fellow editors wished to reinforce
the permissibility of a son’s acting as guardian for his father.
9 Dig. 27.10.4: “Furiosae matris curatio ad filium pertinet: pietas enim parentibus, etsi inaequalis est eorum potestas,
aqua debetur.”
mentally wife, according to Papinian. A text taken from Ulpian provides an example explaining this reluctance. Ulpian discussed a man who refused to divorce his wife even though she had a severe mental illness but did not provide her with care or medical aid. Instead, he took advantage of her situation to have free access to her dowry. In this situation, Ulpian allowed the woman’s curator or kin to file an action before a judge demanding that the husband use the dowry to provide for his wife. Blood relatives could be trusted more than husbands.

The Roman state became involved in granting guardians only when a family option did not exist. “Often the guardianship of an insane person or spendthrift pertains to one person through the law of the Twelve Tables, and the praetor gives it to another, because the legitimate guardian seems unsuitable to the task.” The praetor, then, possessed some oversight concerning the suitability of a particular guardian, but was still constrained by the wishes of the family. In the case of a guardian named in a will, for example, although the actual power to grant resided with the praetor, he was in some way bound to follow the wish of the testator.

The duties of the curator extended over not only “the patrimony, but also the person and health of the insane person.” Although the former received much more attention in the Digest and later the Codex, the latter was not insignificant. Care of person could involve, as the excerpt from Julian stated, a duty to provide sufficient medical aid to ensure the health and well-being of their ward. It might also imply precautions of a different sort. Consider the responsibility of the guardians in the rescript of Marcus Aurelius recorded by Ulpian in Dig. 1.18.14: there the

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10 Dig. 27.10.14: “Virum uxori mente captae curatorem dari non oportet.”
11 Dig. 27.10.13: “Saepe ad alium e lege duodecim tabularum curatio furiosi aut prodigi pertinet, alii praetor administrationem dat, scilicet cum ille legitimus inhabilis ad eam rem videatur.”
12 Dig. 27.10.16.pr.: “Si furioso puberi quamquam maiori annorum viginti quinque curatorem pater testamento dederit, eum praetor dare debet secutus patris voluntatem: manet enim ea dato curatoris apud praetorem, ut rescripto divi Marci continetur.”
13 Dig. 27.10.pr.: “Consilio et opera curatoris tueri debet non solum patrimonium, sed et corpus ac salus furiosi.”
emperor remarked that the guardians of the madman, Aelius Priscus, who killed his mother, bore some responsibility for negligence in the murder of Aelius’ mother.\textsuperscript{14}

Still, the duties of greatest interest to the classical jurists concerned the care of the patrimony and the legal abilities of the \textit{furiosus} vis-à-vis his guardian. In short, the insane had almost no authority to pursue a legal action or remedy, but the guardian did.\textsuperscript{15} A guardian might even be obligated to act in certain cases or run the risk of being accused of negligence. In this and other ways, the guardian acts as if he were the insane person for the purpose of allowing legal matter to proceed. For example, we have already seen that the comparison between the insane and the absent prohibited any judgment or award from being made in the presence of an insane person, since he could not truly be regarded as legitimately present.\textsuperscript{16} To circumvent this and allow cases to proceed in the face of the insanity of one or more parties, many jurists allowed the \textit{curator} to stand in the place of their charge. “If an insane person has or had a guardian during a pending case,” said Julian, “sentence can be passed in the presence of the guardian.”\textsuperscript{17} According to Paulus, if land is given in a testament to someone on the condition that they give a certain sum of money to an insane person, the condition is fulfilled if the \textit{curator} accepts the money.\textsuperscript{18} The guardian provided such a useful expedient to a case that the praetor

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\footnote{14 Dig. 1.18.14: “Cum autem ex litteris tuis cognoverimus tali eum loco atque ordine esse, ut a suis vel etiam in propria villa custodiatur: recte facturus nobis videris, si eos, a quibus illo tempore observatus esset, vocaveris et causam tantea neglegentiae excusseris et in unumquemque eorum, prout tibi levari vel onerari culpa eius videbitur, constitueris. Nam custodes furiosis non ad hoc solum adhibentur, ne quid perniciosius ipsi in se moliantur, sed ne alis quoque exitio sint: quod si committatur, non immerito culpae eorum adscribendum est, qui neglegentiores in officio suo fuerint.”}
\footnote{15 E.g. Dig. 3.1.1.11- Dig. 3.1.2: “Deinde adicit praetor: ‘pro alio ne postulent praeterquam pro parente, patrono patrona, liberis parentibusque patroni patronae’: de quibus personis sub titulo de in ius vocando plenius diximus. Item adicit: ‘liberisve suis, fratre sorore, uxore, socero socru, genero nuru, vitrico noverca, privigno privigna, pupillo pupilla, furioso furiosa,’ ‘Fatuo fatua’: cum istis quoque personis curator detur.”}
\footnote{16 See above, Chapter 3.}
\footnote{17 Dig. 4.8.49.pr: “Sed et interpellatur, quo minus sententiam dicat, quia nihil coram furioso fieri intellegitur. Quod si furiosus curatorem habet vel habuerit adhuc litigio pendente, potest praesente curatorе sententia dici.”}
\footnote{18 Dig. 35.1.13: “Si fundus alii legatus fuerit, si pupillo vel furioso pecuniam dedisset, videtur expelles condicionem curatorи vel tutori dando.”}
\end{footnotesize}
could grant one where none existed solely for the purposes of providing legitimate authority in a particular case. For example, if creditors seek a *missio in possessionem* to recover debts from the property of an insane person without a guardian, the praetor, after ensuring that no other suitable person exists to serve as a guardian, can appoint one of the creditors in order to validate the seizure of property.\(^{19}\)

Despite the power that *curatores* possessed over their insane wards, the jurists discussed a number of protections that the *furiosi* likewise possessed. For example, guardians had to provide sufficient security to cover possible charges of maladministration.\(^{20}\) A *curator* convicted of maladministration would be liable to repay from his own goods any damage done to the estate of the *furiosus*. Furthermore, the guiding principle of the good of the insane person, the “*utilitas furiosi*” governed every transaction made by the guardian.\(^{21}\) This applied even when an agnate acted as guardian. As an example of this principle in action, a *curator* could not liberate the slaves of an insane person because, while the deed might be laudable, it only served to diminish,

\(^{19}\) Dig. 42.4.5.1: “Non defendi pupillum constare debet liquereque praetori, ut sic permittat bonorum possessionem. Hoc autem constare debet sic: evocandi sunt ad praetorem tutores pupillii, ut defendant: si autem non habet tutores, requirendi cognati vel adfines et si qui alii forte sunt, quos verisimile est defensionem pupillii pupillae non omissuros vel propter necessitudinem vel propter caritatem vel qua alia ratione: liberti etiam si qui sunt idonei, evocandi exquiendaque defensio. Si aut negent se defendere aut non negent, sed taceant, tunc praetor possessionem habebit, tantum scilicet, quod non defendatur: si defendi coeperit pupillus vel pupilla, desinet possidere. Idem est et in furioso.” See also, Dig. 42.4.7.9-11: “Adeo autem latitatio animum et affectum occultantis se desiderat, ut recte dictum sit furiosum hinc venditionem pati non posse, quia non se occultat, qui suus non est. Plane si non defendatur furiosus, curatorem ei dandum, aut bona eius ut possideantur, nominatim permittendum est. Labeo autem scribit, si non inveniatur curator vel defensor furiosi, sed et si curator datus eum non defendat, tunc removendum eum et oportere praetorem dare curatorem aliquid ex creditoribus, ut non amplius, quam necesse est, ex bonis furiosi venare: eaque servanda Labeo ait, quae solent servari, cum venter in possessionem mittitur. Plane interdum bona eius causa cognita vendenda erunt, si urget aeternum et dilatio damnun sit allatura creditoribus, ita autem vendenda, ut quod superstit, furioso detur, quia dominis eius status et habitus a pupilli condicione non multum abhorret: quod quidem non est sine ratione.” Both texts were drawn from Ulpian.

\(^{20}\) Dig. 27.10.7.1: “Curator dementi datus decreto interposito, uti satisdaret, non cavite et tamen quasdam res de bonis eius legitimo modo alienavit. Si heredes dementis easdem res vindicent, quas curator alienavit, et exceptio opponet ‘si non curator vendiderit’, replicatio dari debet ‘aut si satisfactione interposita secundum decretem vendiderit.’ Quod si pretio accepto curator creditores furiosi dimisit, triplicatio doli tutores possessores praestabit.”

\(^{21}\) Dig. 27.10.11: “Pignus a curatore furiosi datum valet, si utilitate furiosi exigeante id fecit.” See also, Dig. 27.10.12: “Ab adgnato vel alio curatore furiosi rem furiosi dedicari non posse constat: adgnato enim furiosi non usquequaque competit rerum eius alienatio, sed quatenus negotiorum exigit administratio.”
rather than preserve or grow, the estate under his care.\textsuperscript{22} In order to ensure that guardians put this principle into practice, the jurists recommended juridical oversight of any sale or acquisition of the insane person’s property.\textsuperscript{23} “If one should wish to divide the estate of someone under 25,” stated Ulpian, “the governor of the province must permit it after investigating the case. The same should be followed if the guardians of the insane, spendthrifts, or others, wish to divide their estates.”\textsuperscript{24} Despite these safeguards, if maladministration should take place, guardians could be prosecuted through an actio negotiorum gestorum.\textsuperscript{25} This action, first created to protect one’s property which has been managed while the owner is unaware, such if he were absent for some reason, differed from the standard action against guardians of minors. The actio negotiorum gestorum allowed suit while the guardianship was still ongoing, while an actio tutela was only valid after the guardianship ceased. While there was a known end to legal minority, insanity might persist until the death of the furiosus. This actio allowed for a more immediate and pointed response to maladministration.\textsuperscript{26}

Codex

Most of Justinian’s own legislation pertaining to insanity involved the institution of guardianship. Two major laws promulgated in 530 involved the clarification of the appointment

\begin{itemize}
  \item \textsuperscript{22} Dig. 27.10.17: “Curator furiosi nullo modo libertatem praestare potest, quod ea res ex administratione non est: nam in tradendo ita res furiosi alienat, si id ad administrationem negotiorum pertineat: et ideo si donandi causa alienet, neque traditio quicquam valebit, nisi ex magna utilitate furiosi hoc cognitione judicis faciat.” See also, Dig. 40.1.13: “Servus furiosi ab adgnato curatore manumitti non potest, quia in administratione patrimonii manumissio non est. Si autem ex fideicommissi causa deberet libertatem furiosus, dubitationis tollendae causa ab adgnato tradendum servum, ut ab eo cui traditus esset manumittatur, Octavenus ait;” and Dig. 40.9.22: “Curator furiosi servum eius manumittere non potest.”
  \item \textsuperscript{23} See Dig. 27.10.17.
  \item \textsuperscript{24} Dig. 27.9.11: “Si praedia minoris viginti quinque annis distrahi desiderentur, causa cognita praeses provinciae debet id permittere. Idem servari oportet et si furiosi vel prodigi vel ciuscunque alterius praedia curatores velint distrahere.”
  \item \textsuperscript{25} Dig. 27.3.4.3: “Cum furiosi curatore non tutelae, sed negotiorum gestorum actio est: quae competit etiam dum negotia gerit, quia non idem in hac actione, quod in tutelae actione, dum impubes est is cuius tutela geritur, constitutum est.”
  \item \textsuperscript{26} On the actio negotiorum gestorum, see Reinhard Zimmerman, The Law of Obligations: Roman Foundations of the Civilian System (Cape Town: Juta, 1990), 433-450.
\end{itemize}
of guardians. Each subsequently found inclusion in the Codex under the title *De curatore furiosi vel prodigi*. The first handled the problems posed by the often periodic nature of insanity. If a *furiosus* suffered periods of madness and lucidity, was a new appointment of a *curator* necessary with each relapse? Justinian decided that it was not; the initial appointment held for the lifetime of the *furiosus* (or the *curator*). When the insane person experienced a lucid interval, the authority of his guardian ceased, and he regained the full ability to manage his affairs. During a period of madness, the *curator* would reassume his duties. In this way, Justinian hoped to avoid the “constant and almost ridiculous” reappointment of guardians.\(^27\)

The second enactment was longer and much more thorough in the requirements and formalities concerned with the appointment of *curatores*. To begin, Justinian dispensed with the need for a guardian when an insane person had a father to care for him and manage his affairs. “For what other affection can be found that can conquer that of a father?” Justinian asked.\(^28\) He then moved onto the case of an insane person without surviving parents. A *furiosus* who found himself *sui iuris* could inherit from his parents when he was the *suus heres*, or automatic heir.\(^29\) In the event of an inheritance left to a *furiosus* in which he was not a necessary heir, the *curator* could seek possession of it, provided that he considered it to be in the best interest of his ward.

According to Justinian, a *curator* named in a testament had to promise to manage the property entrusted to him well and to undertake an inventory of the estate. Such a guardian would also have to pledge his property against any charges of maladministration. Any property that passed to the *furiosus* after the completion of the initial inventory would be added to it. The

\(^{27}\) Cod. 5.70.6.1: “...ne crebra vel quasi ludibiosa fiat curatoris creatio et frequenter tam nascatur quam desinere videatur.”

\(^{28}\) Cod. 5.70.7.1: “Quis enim talis affectus extraneus inveniat, ut vincat paternum?”

\(^{29}\) Berger, *Encyclopedic Dictionary of Roman Law*, 487. The *heres suus et necessarius* had no power to refuse the inheritance. See Kuehn, *Heirs, Kin, and Creditors*, 22-25. Even under Roman law, the praetorian privilege of the *beneficium abstinendi*, the ability of the heir to refrain from taking up the inheritance, had largely erased the distinction.
failure to complete an inventory resulted in infamia. If a guardian is not named in the father’s testament, the duty passed to the nearest agnatic relation. Lacking any suitable relative, a judge could name a guardian on his own authority. Justinian then established a clear line of preference in appointing guardians, moving from paternal wishes outward, and only abandoning family care in the last resort.  

Besides the procedure of appointment, Justinian set out a number of obligations and spheres of action possessed by the curatores furiosorum. For example, guardians had a wide authority over the agreements and partnerships contracted by the insane before the onset of their condition, even to the extent of dissolving partnerships. This had some precedent in the thought of Gaius, who held that agnates or guardians could restructure agreements and obligations reached by the insane. They could also sell produce or fruits of property, provided they added the proceeds of such sales to the substance of their wards. Justinian required guardians to

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30 Cod. 5.70.7.6: “Sin autem testamentum quidem parens non confecerit, lex autem curatorem utpote agnatum vocaverit, vel eo cessante aut non idoneo forsitam existente ex iudiciali electione curatorem ei dare necesse fuerit, tunc secundum praefatam divisionem in hac quidem florentissima civitate apud gloriosissimam urbicarium praefecturum creatio procedat: sed si quidem nobilis sit furiosi persona, etiam florentissimo senatu convocando, ut ex inquisitione curator optimae atque integrae opinionis nominetur. Sin vero non talis persona sit, etiam solo viro gloriosissimo praefecto urbis praesidente hoc procedat. Et si quidem curator substantiam idoneam possidet et sufficientem ad fidem gubernationis, et sine aliqua satisdatione nominationem eius procedere: sin autem non talis eius census inveniatur, tunc et fideiussio in quantum possibile est ab eo exploretur.

31 Cod. 4.37.7: “Sancimus veterum dubitatione semota licentiam habere furiosi curatorem dissolvere, si maluerit, societatem furiosi, et sociis licere ei renuntiare. Et quemadmodum in omnibus alius contractibus legitimam auctoritatem ei dedimus, ita et in hac parte eum permittimus competenter commodis furiosi providere.”

32 Dig. 46.2.34.1: “Adgnatum furiosi aut prodigi curatorem novandi ius habere minime dubitandum est, si hoc furioso vel prodigo expeditat.”

33 Cod. 5.37.28.5: “Hisque adicimus nullam neque in hoc capitulo ambiguitatem relinquentes tutoribus et omnibus curatoribus licere fructus, sive qui ex reditibus praediorum colliguntur sive ex substantia personarum quarum gubernationem habent inventi fuerint, id est vinum et oleum et frumentum vel cuiuscumque speciei sunt, sine decreto distrahere iusto pretio, quod in his locis, in quibus venditio celebratur, tunc temporis noscitur obtinere, et quae ex venditione corundem fructuum colliguntur pecuniae, cum alia pupillorum vel adulorum aliarumque personarum substantia administruntur.”
undertake the defense and legal aid in every way required by law. Failure to do so constituted grounds for removal.\textsuperscript{34}

In short, Roman law provided a rich inheritance for later jurists. The emphasis on family as the center of care and authority continued into the Middle Ages, even as, for example, communal governments in Northern Italy began regulate the appointment and oversight of guardians. This stood in marked contrast to England, where from the early fourteenth century the king had official guardianship over all insane persons.\textsuperscript{35} Particular safeguards, such as the need to create an inventory and judicial enforcement of the principle that all transactions must be in the interests of the \textit{furiosus} also enjoyed a strong second life in medieval jurisprudence. The latter would in fact come to pose problems for inheritance by the insane that Justinian had seemingly solved. As we turn to guardianship in the Middle Ages, however, we must pause to consider the institution in canon law, which took a different form from the secular institution described by the civilians.

\textit{Canon Law and Coadiutores}

The Decretum contains little about guardianship of the insane specifically. Fearful of the avarice it might awaken, canon law had, stretching back to Justinian at least, been skeptical of allowing clerics to “immerse themselves in secular affairs.”\textsuperscript{36} Exceptions were made for

\textsuperscript{34} Cod. 5.37.28.2: “Personis etiam, quae periculo proprio vel suae substantiae tutores vel curatores petierunt, sive matres forte fuerint vel quidam alii, compellendis eos, quos ordinaverint tutores vel curatores, praeparare talem subire defensionem. Vel si illi noluerint hoc facere et propter huiusmodi defensionis recusationem tutela vel curatione removeantur, sic necesstatem imponimus memoratis personis alios tutores vel curatores ordinare in ipsis gestis, in quibus tutores vel curatores creantur, ex sua confessione declarantes talem subire defensionem.”


\textsuperscript{36} See, for example, Jacobus de Arena, \textit{Commentarii in universum ius civile}, Cod. 5.32.1, fol. 37r: “Scire debes quod nec inuitus nec volens potest clericus se subicere iurisdictioni seculari, extra de fo. competen. 1. Si diligenti [X 2.2.12], et in aut. de sanc. episco. §. Economos [A. 9.15.23= N. 123], cum ergo non possit dari nisi ei qui est de iurisdictione dantis, infra qui dare tuto. poss. Liiii [Cod. 5.34.4]. Merito videtur quod non possit dare per secularem. Item non subest clericus iurisdictioni seculari ratione rei, quia res clericorum fruitur eodem privilegio cum persona,
traditionally disadvantaged members of society, those whom Stephen of Tournai would call
“miserabiles personae;” borrowing the Roman law term. The locus for the protection of the
“miserabiles personae” in the Decretum is D.86-88. Nowhere in this block of texts is there a
reference to the insane. This is especially significant when considering D.87, which was not part
of the first recension of the Decretum. D.86 c.26, which dissuades clerics entering into secular
matters except in the case of guarding “widows, orphans, and other persons who require
ecclesiastical aid out of fear of God,” is completed by D.88 c.1, a text holding similar position
with the rubric “De eodem.” D.87 was inserted as a way of clarifying just who these “other
persons” were. They included widows, orphans, those who flee to churches for refuge, and freed
slaves. The insane do not have a place here. The guiding principle in D.87 is one of protecting
those who have nowhere else to turn. The insane might have come under ecclesiastical protection
if they fell into this category. There was an assumption that family care would be sufficient and
that insanity, although defined as a misfortune in the same way as poverty, did not ipso facto

imo iudex ecclesiasticus debet dare tutorem vel curatorem non obstante l. Necquicquam [Dig. 1.16.9], que dicit quod
nihil est in prouincia quod non per ipsum expediatur, et tamen causa fiscalis, non expediatur per ipsum.”
37 Stephen of Tournai, Summa decretorum (Troyes BM 640), fol. 32r, D.87, sv. “viduas”: “Ad curas etiam episcopi
pertinere dicit viduas et orphanos, quod et de ceteris miserabilibus personis intelligendum est.” Stephen was the first
canonist I have found to use the term, which he borrowed from Cod. 3.14.1. On “miserabiles personae”, see
Brundage, “Widows as Disadvantaged Persons”; and Thomas Duve, Sonderrecht in der Frühen Neuzeit. Das
frühneuezeitliche ius singularum, untersucht anhand der privilegia miserabilium personarum, senum und indorum in
Alter und Neuer Welt, Studien zur europäischen Rechtsgeschichte, 231, (Frankfurt am Main: Klostermann, 2008).
38 D.86 c.26: “Decreuit igitur sancta et magna sinodus, neminem horum deinceps, hoc est episcopum, siue clericum,
aut monachum, conducere possessiones, aut misceri secularibus procurationibus posse, nisi forte, qui legibus ad
minorum etatum tutelas siue curationes inexcusabiles attrahuntur, aut cui ipsius ciuitatis episcopus ecclesiasticarum
rerum commiserit gubernacula, et orphanorum atque uiduarum, que indefensae sunt, aut earum personarum, que
maxime ecclesiastico indigent ammuniculo propter timorem Dei. Si quis uero transgressus fuerit hec precepta,
eclesiasticae correctioni subiaceat.” D.88 c.1: “Decreuit sancta sinodus, nullum deinceps clericum aut possessiones
conducere, aut negociis secularibus se/miscere, nisi propter curam aut pupillorum aut orphanorum aut uiduarum, aut
si forte episcopus ciuitatis ecclesiasticarum rerum sollicitudinem eum habere precipiat. Ubi patet, quia alia sunt
negocia secularia, alia ecclesiastica.”
bring one under the sheltering arm of the Church. This is particularly clear in a twelfth-century

*questio* disputed in the early classrooms of Bologna:

A certain mentally handicapped woman went to a certain monastery because her
relatives (cognates and agnates) would not take care of her. The abbot and monks,
moved by pity, provided her with the necessities. It is asked what the Church can
claim against the agnates for the goods which they possessed. Ugo responded that
the Church would succeed [in its claims]. A *petitio hereditatis* is proposed,
although the Church did not inform the relatives, since they were absent and
unaware. But others who were present and knowledgeable ought to offer
themselves to procure the petition.

In this solution, the Church only provided for the insane woman when her family no longer did,
and even in this case it is suggested that the monks have a claim on her portion of the inheritance
to cover their expenses in doing so.

The closest circumstance in which canon law provided for any kind of regular
guardianship for the insane came in the person of the *coadiutor*. As in Roman law, insanity in
canon law did not constitute grounds for stripping an official of his status. Thus a cleric who
became ill, either physically or mentally, retained his rank, though the mentally ill would find
themselves barred from further promotion without a dispensation. Still, in the case of a
mentally-ill bishop, Gratian relied on a text from Gregory I. According to Gregory, a bishop who

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39 Giovanni Palmerio, ed., *Quaestiones dominorum Bononiensium: Collectio Gratianopolitana*, in *Scripta anecdota
glossatorum* (Turin: Bottega d’Erasmo, 1962), 498: “Quedam mulier mentecapta, cum agnati et cognati eius cura, de
ea non haberent, ivit ad quoddam monasterium. Abbas et monachi, misericordia ducti, exhibuerunt ei necessaria.
Modo queritur quid Ecclesia dicitur possit adversus agnatos de bonis eius que possident. Ugo respondit ecclesiam
obtinere. Proponitur petitio hereditatis, licet non fuit eis ab Ecclesia, quia absentibus et ignorantibus, denuntiatum.
Alii vero scientes et presentes ultro debent se deferre ad eam procurandum.”

40 See above, Chapter 1.

41 Insanity itself constituted a form of irregularity. Gratian is very clear at the end of C.15 q.1, that the bar from
promotion arose not from the act of the murder, but from the onset of madness. Elsewhere in D.33 c.2, we find that
insanity is included in a list of impediments to ordination. As Gratian says, some things that impede ordination do
not cause the deposition of the already ordained, in an argument similar to one that would be applied to marriage. In
all of the controversy surrounding the irregularity attached to a violent act in the leadup to Clem. 5.4.1, the mere fact
of insanity seems to have fallen by the wayside. Indeed, not one of the Decretalists dealing with the Clementines
addressed this, even the historically minded Johannes Andreae. Given the papal proclivity to dispense with such
barriers, e.g. illegitimate birth, we can safely assume that insanity would have been handled similarly, although the
canonists themselves provide no evidence.
found himself unable to discharge his duties because of mental incapacity cannot be deposed because of his condition. Instead he should be given a *coadiutor*, whom Gregory understood to be the eventual successor of the ailing bishop. Even priests were given *coadiutores* in the event of physical or mental inability.\(^42\)

The jurisprudence concerning *coadiutores* breaks down into two main phases. The first phase, from the Decretum to the Liber sextus of 1298, dealt with the rationale for the office of *coadiutor*. The second, after the Liber sextus, focused more on the logistics of the office, on what the *coadiutor* could or could not do. The basic rationale for the *coadiutor*, already present in Gregory’s decretal, is that the mere fact of illness, whether physical or mental, was not sufficient to depose someone from an office.\(^43\) While a serious debility, such as insanity or epilepsy, might impede the exercise of an office, it could not remove one from it. Even an impairment that might bar one from ordination in the first place did not result in deposition, as Gratian himself clarified even in the first recension of the Decretum.\(^44\) Barring the commission of a crime, a bishop could not be deposed unless he had voluntarily renounced the office himself. Thus, as Gregory stated, an insane bishop could step down in a lucid interval, but while in the grips of madness he was not competent to make this decision, even if it were in the best interest of his see.\(^45\) Huguccio, for

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\(^{42}\) See King, “Treatment of Mentally Ill,” 57-80. King, however, locates the impetus for providing *coadiutores* in the assumption of guardianship by the English crown rather than in the rich heritage of the office in canon law.

\(^{43}\) C.7 q.1 c.14: “Et ideo, quia uiuentem episcopum ab offitio suo necessitas infirmitatis, non crimen abducit, alium loco eius ( nisi recusante eo) nulla sinit ratio ordinari; sed si interualla egritudinis habere est solitus, ipse data petitione non se ulterius ad hoc ministerium subuertente infirmitate posse fateatur assurgere, et alium loco suo expetat ordinandum.”

\(^{44}\) C.15 q.1 d.p.c.13: “Non omnia, que ordinandum inpediunt, ordinatum deiciunt; non enim potest ad sacerdotium proprehii qui aliquando insaniuit. Verumtamen, si post sacerdotium furere ceperit, non ideo sacerdotio carebit, nisi forte numquam ad sanae mentis offfitium illum redire contingat. Sicut de quodam episcope Gregorius scribit in registro ad Eleuterium Episcopum: ‘Quamuis triste sit nobis etc.’ ut supra: ‘Longa inualetudine grauatus episcopus.’ [C.7 q.1 c.14].”

\(^{45}\) C.7 q.1 c.14: “Quo facto omnium solemnriter eleccione alter, qui dignus fuerit, episcopus ordinetur, sic tamen, ut quosque eundem episcopum in hoc seculo uita tenuerit, sumptus ei debiti de eadem ecclesiae ministrentur. Enimuo si nullo tempore ad sanae mentis redit offitium, persona fidelis ac utiae probabilis est eligenda, que ad regimen ecclesiae idonea possit existere, atque de animarum utilitate cogitare, inquietos sub disciplinae uinculo constringere,
example, rejected any distinction between curable and incurable illnesses; that is, even when no hope of recovery existed, there existed no grounds either in canon law or in Scripture to allow deposition.\footnote{Huguccio, \textit{Summa decretorum} (Lons le Saunier, Archives Départementales MS. Jura 12 F.16), fol. 187v. C.7 q.1 c.2, sv. “negelcta”: “Quod esse si coadiutor ei non daretur ex capitulo, hoc aperte colligitur contra io, quod pro egritudine non est qui remouendus uel cogendus ut abrenunciet. Nec admitto illam distinctionem, scilicet an egritudo si incurabilis an curabilis, quod enim canon non distinguuit nec tibi distinguere licet, nisi de auctoritate scripture id conprobes, ar. di. lv. Si euangelica [D.55 c.13] et ii. q.v. Consuluisti [C.2 q.5 c.20], et xxxi. q.i. Quod si [C.31 q.1 c.13].”} “I say therefore that there is no sickness, whether leprosy, epilepsy, insanity, for any other illness, for which one should be deprived of the episcopacy or be forced to renounce it.”\footnote{Ibid., “Dico ergo quod nulla egritudo est, siue sit lepra, siue epilepsis, siue furor, siue alia quecumque infirmitas pro qua debeat quis priuari episcopatio uel cogi abrenunciandum, ar. hic. et e. Pontifices [C.7 q.1 c.4] et ecce Qualiter Quamuis [C.7 q.1 cc.13-14]. Item beneficium canonice habitum sine culpa auferri non debet, et xvi. q.vii. Inuentum [C.16 q.7 c.38].”} Huguccio’s interpretation even banned compulsion during a lucid interval; the decision to renounce must be entirely voluntary. Instead, as the \textit{Glossa Palatina} would state, “a \textit{coadiutor} will be granted who can supply any insufficiency.”\footnote{Glossa Palatina (Durham, Dean and Chapter Library, C.III.8), unfoliated, C.7 q.1 c.14, sv. “egritudinis”: “In furore enim renunciatio constituti interualla, xvii. q.ii. Consaldus [C.17 q.2 c.1], C. de testamento. Discretis [Cod. 6.22.10], xxxii. q.vii, Neque furiosus [C.32 q.7 c.26], quia sunt interualla patitur licito tempore quod sanus est. Si alteriui ordinari petierit et abrenunciauerit, tunc alter ordindus, alter non, sed ei coadiutor dabitur quia eius insufficiencia, repleat.”}

Huguccio’s view would impact subsequent jurisprudence. For example, when confronted with the problem of an epileptic priest, the Anglo-Norman canonists Honorius allowed for perpetual suspension (but not deposition), if his condition manifested itself frequently. If rarely, he could be given a \textit{coadiutor}.

Johannes Teutonicus later held a similar position in his gloss, though with somewhat softer language by omitting reference to a perpetual suspension.\footnote{Magister Honorius, \textit{Summa}, 138, C.7 q.2: “Circa quos distinguere: Si frequenter cadant, perpetuo sunt suspendi, ut infra c.i [C.7 q.2 c.1]. Si raro, et certum sit quod non emittant spumam et uoces confusas, ministare possunt adiuncto coadiuatore, ut supra di. xxxiiii. Communiti [D.33 c.3] supra e. Q.ii Illud [C.7 q.1 c.15]. Si de hoc ubietur, probabtur episcopus, ut infra c. prox. in fine [C.7 q.2 c.2], Presbiter, ut di. xxxiii. Communiti [D.33 c.3].”} For ecclesiasticarum rerum curam gerere, et maturum atque efficacem in omnibus se exhibere, qui etiam episcopo, qui nunc egrat, superstes, loco eius debeat consecrari.”\footnote{Decretum (Rome 1582), col. 218, D.33 c.3: “Qui ita vexantur, distinguendum est: nam si frequenter cadunt, non debent ministrare, ut infra 7 q.2 c.1 [C.7 q.2 c.1]. Si vero raro, et emittunt voces confusas, similiter non debent ministrare, ut infra 7 q.2 c.2 [C.7 q.2 c.2]. Si autem raro nec emittunt voces confusas, possunt, sed habere debent coadiutores, ut 7 q.1 Illud [C.7 q.1 c.15].”}
lower orders as well as for bishops, the *coadiutor* provided the means of allowing a continual exercise of an ecclesiastical office without requiring the undeserved and unwilling deposition of the current occupant. On the question of churches in danger due to scandal or mismanagement, Hostiensis clearly summed up the elegance of this solution:

The public good should be preferred to the private. The possible objection of the insane and infirm who are not removed does not stand. It seems that the private good is preferred to the public for these. This is not true. Rather, both are preserved, the private good in that the afflicted person is not removed, and the public in that a *coadiutor* is given to him.

Through the *coadiutor*, canonists and churchmen struck a fine balance between the quotidian needs of particular sees or churches governed by physically or mentally disabled clergy and the larger legal principles urging retention of status.

Notably absent from many discussions of *coadiutores* in the late-twelfth and thirteenth centuries were a description of a *coadiutor*’s power, and a statement of the role of papal power in the appointment of such an important official, save in scattered references. The *Glossa Palatina*, for example, asserted that the *coadiutor* possessed “full and general administration” in the see.

As for papal authority, the *Summa induent sancti* noted that a bishop who renounced his see

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51 Hostiensis, *Apparatus super quinque libris Decretalium* (Strassburg 1512), fol. 2.33v, X 3.5.6, sv. “coadiutor”: *Sic remanet archidiaconus in statu suo, sed non habet exercitium. Et hoc teneas incunctanter, quod numquam est prelatus remouendus a beneficio suo propter morbum superueientem. Sed si non potest suum officium exercere, dandum est ei coadiutor, ut hic et in concor. signa. supra e. e. prox. [X 3.5.5].”

52 Hostiensis, *Apparatus super quinque libris Decretalium* (Strassburg 1512), fol. 1.94v, X 1.9.10: “Ubi tamen periculum destructionis ecclesie vel magni periculi et scandali in spiritualibus et temporalibus imminet, potest cogita tamen quod bonum concambium alterius prelature siue dignitatis ei assinetus, ar. infra eo. c. §. Pro graui [X 1.9.10.]. Nam publica utilitas prefertus priuate, infra de regularibus. Licet. §. Ila [X 3.31.18], ad hec vii. q.i Mutationes et c. Scias et c. sequenti [C.7 q.1 cc.34-36]. Et sic etiam potest intelligi infra de rerum permu. Quesitum. §. fin. [X 3.19.5] Nec obstat quod posse opponi de furiosis et infirmis, qui non remouentur. Et sic videtur in eis priuata utilitas publice preratatur, vii. q.i c.i et c. quamuis triste et c. qualiter, et c. cum percussio[C.7 q.1 cc. 1, 14]. Hoc enim non est uerum. Immo ibi seruatus utraque utilitas priuata, scilicet in eo quod infirmus non remouetur; publica vero in eo quod ei coadiutor datur.”

53 Durham, Dean and Chapter Library C.III.8, C.7 q.1 c.1, sv. “curam omnem agere”: “Ar. quod coadiutor siue visitator generalem et liberam habet administrationem, ar. et e Quamuis esse in de elec. [C.7 q.1 c.14] tamen olim licet et ar. contra secus autem in procuratore.”
because of illness should do so with papal consent as well. The lack of reflection on the papal role in granting coadiutores fits the idea of a relationship between pope and bishops only beginning to come into focus at the time. While canonists did not perpetuate Gregory’s assumption that the coadiutor chosen by the chapter would succeed to the see, neither did they reflect on the role of the pope in choosing the de facto chief administrator of the diocese. A more precise clarification of both of these pressing issues did not come until the 1296 decree of Boniface VIII, “Cum pastoralis.”

Included in the Liber sextus as the sole chapter under the title “De clericco egrotante vel debilitato, “Cum pastoralis” provided Boniface’s answer to two important questions that had largely gone unasked by preceding canonists. In the first place, Boniface included the granting of episcopal coadiutores among the causae maiiores, those cases in which the pope alone had competence. Immediately after this strong statement of papal authority, Boniface acknowledged that practical demands could not always be bent so easily to such an ideal.
But lest any churches, especially in remote places, suffer loss by this pretext, we, wishing to take precaution that there be no harm done in this, decree by a general constitution that a bishop, elderly, beset with a bodily ailment, or even otherwise perpetually impeded so that he cannot exercise his office, can of his own counsel and with the assent of his chapter, or the greater part of it, can accept with apostolic authority one or two coadiutores in order to fulfill their office. But if the bishop should be insane and does not know or cannot express what he wishes or does not wish, then his chapter or two parts of it can with apostolic authority select one or two coadiutores, who can fulfill the office.

Boniface ceded the exercise of papal authority to the chapters in order to foster the smooth continuation of episcopal administration, even in the event of a severely disabled bishop, without requiring a potentially lengthy trip to Rome.

Boniface also set out more clearly the scope the coadiutores’ authority. They should act temperately, abstain from alienating any property either of the see or the prelate himself, and must render a full account of their administration both to the chapter and to the bishop, if he is of sound mind. Boniface, like Gregory before him, allowed for the possibility that the coadiutor might be the eventual successor of the infirm bishop, noting that these requirements were binding on him as well.\(^\text{58}\)

Canonists of the fourteenth century investigated the precise powers of the coadiutor even more fully. One question in particular was whether the episcopal coadiutor possessed the authority to confer benefices. According to Guido de Baysio (d. 1313), because the power to confer benefices was not contained in the general commission given to episcopal vicars, unless made explicit, neither was it contained in the authority given to coadiutores.\(^\text{59}\) Another early

\(^{58}\) Ibid. “Praesenti quoque adiicimus sanctioni, ut coadiutores huiusmodi de proventibus praelatorum in quorum assumentur auxilia, sumptus recipient moderatos, ab alienatione qualibet de bonis ecclesiasticis praelatorum ipsorum vel ecclesiarum silarum quomodolibet facienda penitus abstinentes, rationem non solum in districto examine, sed et praelatis eisdem, si sanae mentis exsitterint, ac capitulis eorumdem, seu etiam ipsisr um praelatorum successoribus, si hoc antea non fecerint, plenariam redditi.”

\(^{59}\) Guido de Baysio, Apparatus Libri sexti (Milan 1490), fol. 85v, VI 3.5.1, sv. “abstinentes”: “Hic quod beneficia conferire non possunt tales coadiutores. Ad hoc factu quia in generali sermone non continetur beneficiorum collatio, supra e. li. de of. vica. Cum in generali [VI 1.13.3]. Ergo standum est regule nisi contrarium ostendatur, ut xv. q.iii.
fourteenth-century jurist, Oldradus de Ponte (d. c. 1337), carefully crafted an opposing argument based on practical demand rather than the application of a general principle. Included among his consilia is a short examination of the abilities of the episcopal coadiutor. Oldradus began by making a simple but important distinction. Sometimes a coadiutor is given to a bishop who is of sound mind but cannot maintain his diocese; in other instances, the bishop is unable to discharge his duties because of mental illness or senility. In the latter case, the coadiutor had, to echo the phrasing of the Glossa Palatina, “free and general power in spiritual and temporal matters.” Borrowing an idea from Innocent IV, Oldradus held that the acts of the coadiutor were done not in his name or that of the bishop, but in the name of the church itself. This resolves the problem of whose name the benefice is given in, but not the actual authority by which it is granted. Oldradus restated Guido de Baysio’s rationale and then offered his rebuttal, which centered on his distinction between the two basic reasons for the original grant of the

§. Cum autem, ver. Nec quisquam [C.15 q.3 d.p.e.4]. ff. de reg. iur. l. i [Dig. 50.17.1]. Facit ad hoc, infra ne. se. va. Ilia [VI 3.8.1]. Sed ar. contra, supra e. li. de elec. Is cui [VI 1.6.42]. Dic quod non loquitur in coadiutorem, sed in visitatorem quibus liberamet generalem administrati, ut e. t. Cum. in fine [VI 1.6.34]. De hoc supra e. li. de sup. ne pre. Ecclesie [VI 1.8.4].”

60 Oldradus de Ponte was a jurist at the court of the popes of Avignon. He was most famous for his collection of consilia, which was the first to be widely circulated. See Zacour, Jews and Saracens, 6-10.

61 This text is not a consilium in the sense of being drafted in response to a particular case, but rather an examination of a particular topic, perhaps in response to question posed to Oldradus in the Curia. See Zacour, Jews and Saracens, 5.

62 Oldradus de Ponte, Consilia (Venice 1499), unfoliated, con. 44: “Ad hoc videtur dicendum quod aut datur coadiutor alicui sane mentis existente, puta propter certam causam, ut timorem dilapidationis, et tunc exercitum illius causae propter quam datus est coadiutor non erit sine consilio et assensu coadiutoris, ut extra de ofi et potesta. iudi. dele. c. venerabili. [X 1.29.37] . Si autem propter mentis alienationem et nimiam senectutem vel infirmitatem datur coadiutor, videtur habere in spiritualibus et temporalibus generalem et liberam potestatem, ut vi[t], q.i c.i et ibi not. et c. Quamuis triste, c. Petisti, et c. Quia frater [C.7 q.1 cc. 1, 14, 17, and 18], et extra de sup. ne prela. c. Grandi. li. vi. [VI 1.8.2 ].

63 Ibid., “Et quod faciet non faciet nomine episcopi vel constituentium eum, sed nomine ecclesia, ut not. Innoc. extra de procu. consulti ad fin. ult. gl. [X 1.38.15 ].” Innocent’s argument in this text is based on the problems posed by administrators acting in the place of those who cannot be validly represented, such as excommunicates. Innocent IV, Apparatus in quinque libros decretalium (Frankfurt am Main 1570), fol. 172v. “Item alius est in temporalibus officiis, qui agunt nomine constituentium, ut syndici; alius in aliis temporalibus, qui nomine constituentium non agunt, ut visistor uel coadiutor, qui non nomine dantium agunt, sed nomine ecclesiae, cuius est visistor uel coadiutor. Huissi modi enim officialibus non nocet, si is cuuisadiutor est sit excommunicatus, cum ab eo non fuerit constitutus nec nomine eius agat, sed nomine ecclesiae, et idem dico etiam si constituens esset excommunicatus.”
For one, the *coadiutor* would not have “free and general power” if he could not make such grants. “Moreover, if we pose that a *coadiutor* was given to a bishop suffering from the continuous loss of his mind, if the *coadiutor* could not make such a provision, churches would be vacant for long period, since it is not known when [the bishop] will recover or die. Therefore in this case, [the granting of benefices] seems licit.” Oldradus’ argument has some parallels with that of Boniface in “Cum pastoralis.” Principle had to give way and make some reasonable provision for the daily operation of the see and its churches. Oldradus did not argue that the *coadiutor* had this important authority in every case, but only in those in which the temporal and spiritual good of the church was in jeopardy. For this reason, Oldradus’ opinion gained more support than Guido’s.
The coadiutor filled the role of the guardian in ecclesiastical matters. Albericus de Rosate, a student of Oldradus, drew an explicit connection between the two in his treatment of guardians of the insane: “Coadiutores, since they are given to bishops and other prelates because of old age or sickness are similar to these guardians.” Given the general prohibition on clergy serving as guardians for laymen, as well the particular needs of a mentally disabled cleric, the coadiutor developed in canon law as separate but parallel to the more common office of guardian in the secular world.

**Guardianship in the Ius Commune**

Glossing the words “alienare res,” Accursius noted that guardians “could do all things as if he were the master.” Gigliola di Renzo Villata has shown that the early glossators tended restrict this latitude, a sentiment we have already seen at work in the body of Roman jurisprudence itself. The task of the jurists was to strike a balance between the rights of the insane and the rights of those who had some legal relationship with the insane, and to do so while mindful of the possibilities for abuse. Guardians continued to have a wide range of possible legal action: “inheritance, legacies, ownership, possessions, legal actions.” Beyond these, Odofredus would add, “lest the insane person perish, you have what pertains to the office

videtur, arg. supra. de admi. tut. l. Inter bonorum.” Last, see Johannes Andreae, *Novella super quinque libris Decretalium* (Venice 1489), unfoliated, X 3.6.6: “Tu die quod si coadiutor datur ad aliquid certum, puta ad administrationem temporalium tantum, non confert beneficia, quia illa confert prelatus ut prius. Si vero datur cura spiritualia, prelatus confert de consensu coadiutoris. Si vero datus esset dementi vel huic similis, siue per papam siue per alium auctoritate pape, ut in c. decre. predicte, siue per ordinarium, ut dixi supra in quinto membro, coadiutor ille beneficia confert.”

67 Albericus de Rosate, *Commentaria super Infortiato* (Venice 1595), fol. 94r, Dig. 27.10.rub: “Quia coadiutores, quia dantur episcopos et aliis prelatis propter senium uel morbum, sunt similes istis curatoribus...”

68 *Digestum vetus* (Lyon 1569), col. 384, Dig. 12.2.17.2, sv. “alienare res”: “Ut C. de admini. tut. l. Non omni [Cod. 5.37.16], et omnia facere possunt ut domini, ut infra de admi. tu. l. Tutor qui [Dig. 26.7.7] et infra pro.empt. l. Qui fundum. §. Si tutor [Dig. 41.4.7.3].”

69 *Digestum infortiatum* (Lyon 1551), col. 454, Dig. 29.2.62, sv. “ei potest”: “Hereditas, legatum, dominium, possessio, actio, ut et infra de usur. l. Si servu [Dig. 41.3.28] et de acti. et obliga. l. Si a furioso [Dig. 44.7.24].”
of guardian: not only administration, but also the protection of his life.”

Guardianship was an encompassing office ideally geared towards furthering the good of the insane in a way that they could not do for themselves. In many ways, inability and vulnerability defined the insane. Even in the fifteenth century, Paulus de Castro found truth in the basic argument from the old rules of Roman law that the insane can do nothing on their own, but are limited to acting entirely through their guardians. Guardians must certainly have seemed at times to have acted as if they were the masters, the “domini,” of their wards’ property. This section will examine the scope of a guardian’s power and the agency of the insane as mediated through the guardian.

In what follows, many of the texts will discuss the much more common guardianship of minors. Based on a similarity of legal condition, though not an identity, jurists extended many of the same features of guardianship of minors to that of the insane. Very often the jurists treated them side by side, as in the twelfth-century *Summa Trecensis*: “Now it should be said that the alienation or supposition of estates or any other goods without a decree is prohibited not only for minors, but also for the insane.” The equivocation between the two continued through the Middle Ages.

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70 Odofredus, *Lectura super Infortiato* (Lyon 1552), fol. 61v, Dig. 27.10.7: “Ne furiosus pereat et ita habetis quid pertinet ad officium curatoris furiosi non solum administrare imo vitam eius defendere et ad istud accedit quia officium tutoris in perona pupilli tuenda et patrimonio eius, supra de tu. et cu. da. l. Scire [Dig. 26.5.21] et Inst. qui dari. tu. pos. §. Certe [Inst. 1.14.4].”

71 Paulus de Castro, *Lectura super prima Digesti noui parte* (Venice 1490), unfoliated, Dig. 41.2.1: “In glossa que incipit ‘vel curatoris’ ibi, ‘l. Negotiis [Dig. 50.17.5]’, dic plenius quam glossa quod aut loquimur in furioso, et ille nullum negotium potest gerere etiam cum curatoris authoritate, sed debet gerere etiam per curatorem, ut in d. l. Negotiis [Dig. 50.17.5].”


73 A good example is Rolandinus de Passageriis, *Summa artis notarie* (Lyon 1559), p. 90, I. §. “Tutor quae seruare debet in venditione rei pupillaris”: “Item nota quod si contigerit curatorem surdi, et muti, vel furiosi, vel mentecapti rem huiusmodi personarum vendere, cum hoc sit quod talis curator habeat facere inuentarium et rationem administrationis suae reddere ad boni pretoris solertiam et cautelam spectabit, quod haec dictae solennitates in ipsa venditione seruentur, sicut in praecedenti instrumento rei pupillaris, et quod etiam faciat emptor pro maiori sui
I emphasized above that the ancient Roman jurisprudence of guardianship revolved around the family as the center of power and authority. The same is true of medieval jurisprudence.74 Both through individual members, such as the father, the seat of family authority, or even more generally as a whole, familial oversight was the basic pattern and rationale of guardianship. Pattern, because even when communal magistracies and offices began to take a more active and systematic interest in guardianship, they tended to serve as supports to or extensions of family power, rather than acting in competition with it. Family also provided the rationale for guardianship, since one of the main reasons for prohibiting the insane from conducting business on their own was the preservation and safekeeping of the patrimony.75

Medieval jurists embraced with open arms the preference given to family members acting as guardians found in Roman law. Azo could repeat without any addition that “where one who is insane is in the power of his father he undoubtedly cannot have a curator.”76 Even when spendthrifts or the insane who are sui iuris receive guardians, Azo understood this to be the appointment of agnatic relatives.77 In the fourteenth century, Baldus de Ubaldis still held to this

securitate hoc fieri a procuratore. Verum quia huiusmodi venditiones de raro contingunt, huius instrumen tum per ordinem series omittitur. Et si contigerit, poteritis illud eligere mutatis personis satis leuiter ex praedicto.” Insanity was rare enough and similar enough for many of the forms and ideas relating to minority to be applied to insanity as well.


75 This is one of the main reasons why in Roman law as well as in medieval jurisprudence, furiosi and prodigi are often mentioned in the same breath.

76 Azo, Summa Codicis (Lyon, 1540), fol. 143v, Cod. 5.70: “Ubi autem ille qui furiosus est, est in potestate sui patris, indubitare curatorem habere non potest, quia sufficit ei ad gubernationem omnium rerum paterna verecundia. Quis enim talis effectus extraneus inueniatur ut vincat paternam, vel cui ali credendum est liberorum res gubernandas parentibus de relictis proprisi, ut infra e. l. ult. [Cod. 5.70.7]. Illi ergo furioso et prodigo debet dari curator qui sui iuris est. Scendium est tamen lex ipsa furiosis et prodigis designat quosdam curatores, scilicet agnatos eorum, ut inst. de cur. §. Furiosi [Inst. 1.23.3].”

77 Ibid. See also, Summa Trecensis, 158, Cod. 5.19: “Agnati quidem ad curam furiosi et prodigi ex lege uocantur. His deficientibus a iudice dandi sunt curatores, qui data satisfactione prestare sacramentum debent se omnia cum utilitate furiosi acturos et neque utilia pretermissuros neque inutilia admissuros: quod nunc constitutione noua in omni curatore uerum est. Non tamen ideo a ratiocinii excusantur, et insuper inuentarium cum omni subtilitate conscribere debent et ita res cum omni diligentia aministrare, dum predia sine decreto non alienent.”
Even when not formally constituted as guardians, family members had special claims to assist their mentally ill members. From the cautionary tale of the insane wife and the abusive husband, Baldus extracted the idea that relatives can seek aid for an insane family member and did not have to guarantee that the insane person would ratify it upon regaining sanity. The latitude given to family members is evident in a *consilium* of Baldus dealing with homicide. A relative of Giannino, the accused *furiosus*, arrived to defend his kin in the process against him. Baldus did not specify the degree of relation, but did state that the relative had undertaken none of the formalities that would have distinguished him as Giannino's guardian. Still, according to the argument, familial connection sufficed in itself to compel the court to admit the relative to Giannino's defense. So long as suitable relations existed, Paulus de Castro held that “an insane person is immediately (that is, without the need for judicial confirmation) in the care of his nearest agnates, and that it is clear that this guardianship is legitimate, although guardianship is usually granted.” In practice, extreme informality in naming guardians would have been unwieldy. There were, as we shall see, benefits to having a judicially confirmed guardian, even if he were a close relative. Jacobus de Arena, for example, noted that even where a guardian was named in a father's testament, the highest rung of Justinian’s hierarchy of preference in naming guardians, he “does not immediately become a guardian, but should be

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78 Baldus de Ubaldis, *Commentaria in quartum et quintum Codicis librum* (Lyon 1585), fol. 242v, Cod. 5.70.7: “Furiosus constitutus in patria potestate non habet curatorem, sed pater est legitimus administrator. h.d.”

79 See the previous chapter.

80 Baldus de Ubaldis, *Consilia* (Venice, 1570), fol. 98r, 3.347: “Certe nec de hoc est dubitandum, quoniam conjuncta persona, etiam si curam non suscipiat veri curatoris, nec inuentarium faciat, tamen ad plenam defensionem admitterit, quia iure naturae permissum est sanguinem suum defendere, vt. Cod. de appellationibus et consulationibus. l. Additos [Cod. 7.62.29]. ff. de justitia et iure. l. Vt vim [Dig. 1.1.3].”

81 Paulus de Castro, *Lectura super secunda Digesti noui parte* (Venice, 1485), unfoliated, Dig. 45.1.6: “Item tertio collige ex glossa quod furiosus statim et prodigus post interdictionem factam per iudicem sunt in cura proximi agnati, et sic patet quod eorum cura est legitima, licet regulariter omnis cura sit datia, ut no.in d. l. De creationibus. de episco. audi. [Cod. 1.4.27] et Inst. de curat. §. Furiosi [Inst. 1.23.3]. Tutela vero regulariter reperitur legitima, ut in titulo de legiti tuto. [Inst. 1.15].”
confirmed by a judge."82 Although separated by nearly two centuries and a slight difference in the kind of guardianship discussed, Jacobus and Paulus expressed the flexibility in the jurisprudence of guardianship. Although a preference may have existed for judicial confirmation, in cases like that of Giannino, the acceptance of a less formal guardian had benefits as well.

The most frequent reasons for a judicial grant involved some breakdown of proper familial authority. Albericus de Rosate noted, for example, that a son-in-power could be given a guardian even during the lifetime of his father, contrary to “Cum furiosus,” if his father were absent or captured by enemies.83 Usually, according to Baldus, the nearest agnate functions as a guardian for an insane person of any age. If a judge, after making an investigation, should find no suitable agnate, he could appoint a guardian.84 Two points stand out: Baldus insisted on the need for an investigation into the presence of an agnate. If the judge had not made such an investigation, one could imagine a relative advancing a claim against the guardianship of the appointed curator. Second, Baldus noted that agnates could serve as guardians for the insane “of any age.” This allowed the possibility of a son serving as a guardian for an insane father, a situation allowed under Roman law. Bartholomaeus de Saliceto would add that even a son in power could serve as a guardian for his insane father.85 Still, the reversal of authority that

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82 Jacobus de Arena, Commentarii in universum ius civile (s.l. 1541), fol. 95r, Dig. 26.3.3: “Sed forte contrarium est verum tali argumento: curator datu a patre in testamento filio furioso non statim est curator, sed debeat a iudice confirmari, infra de cura. furio. l. penul. [Dig. 27.10.16], et tamen iste prefertur legitimis, C. de episc. audien. l. De creationibus [Cod. 1.4.27].”
83 Albericus de Rosate, Commentaria in primam Codicis partem (Venice 1585), fol. 280r, Cod. 5.70.7: “Patre viuente non datur alius curator filio furioso, h.d. Ibi ‘non potest,’ ut infra de sententiam pas. l. fi. [Dig. 48.23.4]. Sed si pater esset absens vel captus ab hostibus, tunc dareetur curator, ut ff. de tutelis l. Muto. §. fi. [Dig. 26.1.6.4] et ibi notatur.
84 Baldus de Ubaldis, Lectura super Institutionibus (Milan 1493), fol. 17r, Inst. 1.23: “Furiosi et prodigi cuiscunque acetatis curator proximior agnatus existit, quibus si agnatus non superest ex inquisitione curator per iudicem constitutur, per quem etiam mutis et surdis ac caecis, ac mentecaptis, et alios morbo perpetuo impeditis curator simuliter decernitur, h.d. usque ad §. Interdum [Inst. 1.23.5].”
85 Bartholomeus de Saliceto, Lectura super Codice (Lyon 1485) 5. unfoliataed, Cod. 5.70.3: “Nota quod filius petit curatorem dari patri, sed et proprie filius potest dari curator patri, ut ff. e. l.i. in fine et l. ii. [Dig. 27.10.1.1 and 2], et matri, ut l.Furiose, infra eodem ti. [Dig. 27.10.4]. Ibi videtur probari quod hoc procedat etiam si filius sit in potestate
disturbed the Romans continued to give the medieval jurists pause. Odofredus, for example, asked whether such a guardianship would be unseemly. Supported by the *libri legales*, he responded that it would not, adding that such an arrangement would be preferable to an outsider or stranger acting as a guardian. The basic assumption, present in Justinian’s legislation, that a family member would be more diligent in his duties than a stranger remained in force, though it now served to justify a different arrangement than originally intended. Albericus de Rosate raised an interesting question from his personal experience.

But I ask a question that was asked of me in the Roman Curia. Some insane person has a father and a son; who would his guardian be, the father or the son? It seems that the son is preferred, just as he is preferred in the succession. Regularly, where there is an inheritance, there also is guardianship, and also since the care of the insane is deferred to legitimate [guardians]. On the contrary, the father should be preferred, since there is no love that surpasses that of a father, as in “*Cum furiosus*.” If one pays careful attention, when it says that a son, rather than a stranger, should be given as a guardian to the father, it sufficiently indicates that if there is another relative like a father, that he is preferred to the son in this guardianship. It would be more fitting and appropriate that the father should be
the guardian rather than the son, since the unsuitability that you have here, namely that the father is ruled by the son, ceases. After being asked this question, I responded in this way, that the father is preferred, and the many advocates of the Curia who were asked this question concurred.

Although permissible, and even preferable to some circumstances, the guardianship of a father by a son still struck many as an unseemly inversion.

Families were not the only interested parties in the appointment of a guardian for the insane: friends, associates, creditors, and debtors also had a stake in the physical and, more important for many, financial care of the insane. Building from these private interests, the governments of the northern Italian communes began taking a more systematic approach to the appointment and supervision of guardians. Di Renzo Villata remarked,

In the area of guardianship, the greatest interest of the communal ordinances identified itself with the protection, in the most effective way possible, of orphans, as well as widows and other miserabiles personae... the sources bear witness, in the oath of the podestà, that frequently at the moment of assuming responsibility, explicit mention is made of the obligation of the supreme civil authority to defend orphans, as well as others mentioned earlier, as requiring particular assistance on the part of public power.

The exercise of public power seemed, most directly, to secure the public good through the protection of patrimonies during periods in which they might be jeopardized. Less tangibly, the use of public power to protect the weakest members of society served to legitimize the exercise of that power. The protection of widows, orphans, and other miserabiles personae was a

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See Smail, *Consumption of Justice*, 133-159, esp. 133-139. Smail particularly highlights the social and emotional links created by lines of credit and the often powerful ruptures created by debt litigation.

Di Renzo Villata, “Note per la storia della tutela,” 62: “...per il campo tutelare il superiore interesse degli ordinamenti comunali o principeschi si identificava con l’esigenza di proteggere nel modo più efficace possibile gli orfani, al pari delle vedove e delle altre miserabiles personae: non per nulla, come le fonti testimoniano, nel giuramento del podestà, al momento dell’assunzione della carica, si faceva, di frequente, precisa menzione dell’obbligo della suprema autorità cittadina di difendere gli orfani, come pure quegli altri soggetti prima indicati, ritenuti bisogni di una particolare assistenza da parte del pubblico potere.”
scriptural precept, and one that found fertile growth in canon law.\textsuperscript{90} The extension of public power over the insane had the potential to benefit all concerned parties.

The thirteenth through the fifteenth centuries witnessed an explosion of magistracies across the cities of Italy: Venice, Florence, Siena, Pisa, Modena, Parma, Bologna, Piacenza, Vercelli, Padua, and Milan all expanded existing offices to oversee the guardianship of vulnerable persons. Smaller cities such as Verona, Chioggia, Trent, and Udine created entirely new offices.\textsuperscript{91} As we have through the course of this study, let us take a closer look at Venice. The 1242 statutes of Jacopo Tiepolo included a number of provisions for the appointment of guardians for orphans and the insane first promulgated in the 1195 statutes of Enrico Dandalo. “Therefore, we wish that a guardian should be given to those under twelve whose fathers have died intestate in this way; they should come with their relatives on behalf of the father and mother before the presence of the lord Doge and his judges, seek a guardian from them, and explain the reason for the petition.”\textsuperscript{92} The law following this extended this procedure to the insane as well. Even the Doge's court was limited in the scope of its ability to grant a guardian. Glossing the word “\textit{intestatis},” Marco Canziani, a late thirteenth-century priest and notary who penned numerous glosses to the 1242 statutes, explained that “the opposite [holds] if the parents of the \textit{pupilli} had died with wills, since such \textit{pupilli} are not given [guardians] because they have

\textsuperscript{90} Eg. Ex 22:22; Dt 10: 18, 14:29, 24: 17-21, 27: 12-3, 19; 2Rg 14: 4-7; Ps 67: 6, 145: 9; Sir 35: 17; Is 1: 17, 23; Jr 7:6; Bar 6:37; Zach 7:10; Mal 3:5; 2Mcc 3:10; Lk 18: 1-8; Acts 6:1; 1Tim 5:3-16; Jac 1:27. In the Decretum, see D.87, C.23 q.3 c.26.

\textsuperscript{91} Di Renzo Villata, “Note per la storia della tutela, 64.

\textsuperscript{92} Cessi, ed., \textit{Statuti veneziani}, 103, II.2: “Ideoque volumus quod minoribus XII annorum relictis a patribus mortuis intestatis tutor debeat creari taliter, ut veniant de propinquis ex parte patris et matris ante presentiam domini Ducis et iudicium et debant ab eis petere tutorem et assignare causam, quare petant.”
the testament."  
Canziani, who was close to the practice in Venice, expounded on the respect shown to the family to govern its own affairs.

An addition made to the 1242 statutes not found in the preceding redaction involved the use of the Procuratori di San Marco as a depository for documents relating to guardianship, particularly the inventories of the wards’ property. The role of the Procuratoria would quickly grow from there. The first evidence of the existence of the Procuratoria comes from the twelfth century, where it appears as an office designed to maintain the church of San Marco. The office soon developed into a kind of archive for personal deposits and trusts, and eventually it grew into a massive office managing perpetual trusts, guardianships, and the execution of testaments. A key stage in the transformation came soon after the promulgation of the 1242 statutes in a 1267 decree of the Major Council. Lorenzo Tiepolo later amplified this: “We decree that henceforth, the Procuratori di San Marco are and should be guardians of pupilli and the mentally incapable according to the form of the statute and law.” Lorenzo outlined that the Doge and the Giudici del Proprio would still have a role in determining cases of guardianship.

93 “Secus ergo, si mortui sint testati parentes pupillorum, nam talibus pupillis non dantur tutores pro eo quod habent testamentum. Marcus S. Canciani.” On Canziani, see Padovani, “La Glossa di Odofredo,” 100-101. Canziani’s gloss belongs to a layer that Padovani places in the last decades of the thirteenth century and the first years of the fourteenth. The glosses belong to a number of court officials and notaries, including Jacobus de Bertaldo.
The fullest source for the new procedure and expanded competence of the Procuratoria comes from Jacobus de Bertaldo in his *Splendor Venetorum civitatis consuetudinum*, left unfinished at his death in 1314. According to Jacobus, upon intestacy, family members could take the orphan or insane person before the Doge and Giudici del Proprio, who would examine the merits of the case and advance it to the Procuratoria. Even in cases where a will existed, but which contained insufficient provision for the orphan or *furiosus*, the Procuratoria would take up guardianship, but name a suitable relative as a co-guardian who would have direct administration over the goods of the estate. The Procuratoria then, although it saw a great increase in its power in the thirteenth century, remained an institution geared towards augmenting rather than clashing with family authority.

Ideas concerning guardianship of the insane in Northern Italy differed markedly from England. Whereas Italian institutions and the jurisprudence of the *ius commune* regarded the family as the primary source of guardianship on a theoretical and practical level, by the mid-thirteenth century the English crown had taken guardianship among the insane of the kingdom. Written in the later thirteenth century, the *Prerogativa Regis* records a change in guardianship

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97 Jacobus de Bertaldo was a Venetian priest and notary who eventually served both as bishop of Krk (modern day Croatia) and as the chancellor of the doge. He died in 1314. On Jacobus, see Pasquale Smiraglia, “Bertalo, Iacopo,” *Dizionario biografico degli Italiani* 9 (1967), http://www.treccani.it/enciclopedia/iacopo-beraldo_(Dizionario-Biografico)/.

98 Mueller, “The Procurators of San Marco,” 139-140. Jacobus de Bertaldo, *Splendor Venetorum civitatis consuetudinum*, ed. Francisco Schupfer, in *Scripta anecdota glossatorum* (Bologna, 1901), 3.99-158, here 3.142-143: “Et frequenter contingit quod pupillis necesse est creari tutores, non generaliter quia non remanserunt a patre mortuo ab intestato, sed specialiter ad certum quid tractandum, inquirendum et recuperandum, deffendendum et faciendum et conservandum... Item que bailia et potestas dari debeat tutori mentecapti... Item si (mentecaptus) redierit ad mentis compositionem, reddet ad ipsum administraclio commissaricin in eo quod administratum non fuerit.”

99 Similarly in Florence, public authority often acted in the service of family power with regard to guardianships. A judge could grant a guardian at a father’s request. See Graziella Magherini and Vittorio Biotti, *L’Isola delle Stinche e in percorsi della follia a Firenze nei secoli XIV-XVIII* (Florence: Ponte alle Grazie, 1992), 63-66, where they describe the 1369 of a certain Giovanni, whose father brought him before a judge claiming that he mismanaged his goods. The judge declared Giovanni incompetent, granted him a guardian, and ordered a *banditore* to publicly proclaim his incapacity.

that had been made earlier in the century.\textsuperscript{101} Chapter 11 of the \textit{Prerogativa} declares first that “the king shall have custody of the lands of natural fools, taking the profits from [the lands] without waste or destruction, and after the death of these idiots, he shall return [the property] to the rightful heirs, so that these idiots shall not sell off [the lands] and their heirs not be disinherited.”\textsuperscript{102} Chapter 12 maintained similarly for those “who once had memory and intellect, but who became \textit{non compos mentis}, [and] there are many [like this] with lucid intervals.”\textsuperscript{103} One difference between the so-called natural fools and those who later became insane was that the latter retained rights over residual profits of his property, while the former did not. The delegated the actual care of the insane to others. Often he named family members, provided that they were not direct heirs, but the king named his own favorites to guardianships, from which they could extract payment. Whatever the form of insanity, guardians could take some form of payment for their services from the estate, provided that it was not excessive. In this way, the appointment of guardians functioned as a means of payment without the need to empty the royal coffers.\textsuperscript{104}

Despite these risks of royal abuse, the late-thirteenth century English legal commentary known as the \textit{Fleta} specifically named exploitation by heirs as one of the main reasons why the crown assumed guardianship to begin with.\textsuperscript{105} Here we see the basic difference between the extension of central authority in English guardianship and in Italian guardianship. Whereas Northern Italian institutions bolstered the authority of the family and acted as an extension of it, English policy made families an extension of the crown.

\textsuperscript{101} Wendy J. Turner, “\textit{Afflicted with Insanity}”, 96-101.
\textsuperscript{102} Ibid., 103.
\textsuperscript{103} Ibid.
\textsuperscript{104} Turner, “\textit{Town and Country},” 18, 25-26.
\textsuperscript{105} Ibid., 21.
Returning to Italy, alongside magistracies overseeing the granting and supervision of guardians, which tended to concern themselves with care of property, other civic institutions occupied themselves with care of person in the most extreme circumstances. Just as courts augmented and stabilized family control over guardianship when possible, so prisons could often act as extensions of family power over the insane when the families themselves became unable to care for or contain members who experienced particularly violent bouts of insanity. Although certainly not all insane people were violent, the jurists retained a notion that the *furiosi* were those who were violent against themselves and others. Even if the jurists did not consistently apply that definition in their use of the term, violence remained an attribute associated with the insane.\(^{106}\) As a precaution against such violent outbursts, the insane could be confined if necessary. In the case of Jacopo di Castro, Alexander Tartagnus used as evidence of his insanity the testimony of three men that Jacopo “was held bound in his home.”\(^{107}\) In 1347 Rainerius de Forlino advised the Doge and the Signori di Notte that it was preferable for the insane to be “not kept in prisons, but by their relatives in their houses, bound by iron chains.”\(^{108}\) When other jurists discussed the imprisonment of the insane, it was usually in the context of familial, rather than outside, initiative. According to Bartolus, for example, an official could detain the insane in prison “if they could otherwise be properly kept.”\(^{109}\) Baldus held that “the law commits the

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\(^{106}\) See Chapter 3. An early example of attribution of violence is the *Summa Coloniensis* and its treatment of “Indicas Hermanum” [C.3 q.9 c.14]. Although the text never specified the crimes that Herman was accused of (which seem to have been, from other sources, failure to appear when summoned to a synod and possibly dereliction of his episcopal duties), the author of the Summa describes that Herman had committed homicide.


\(^{108}\) ASV, Collegio Notatorio, Reg. 1, fol. 25v: “Nam uidetis, quod furiosi, non custodiuntur in carceribus, sed a suis coniunctis in suis hospicis, fereis unculis alligati. Illud igitur sequi debemus quia illa L. diuus [Dig. 1.18.14], per generalem consuetudinem, sic extiterit declarata, a qua recedere non debemus, quia consuetudo est optima legum interpres ut ff. de c. et se consuli. l. Minime [Dig. 1.3.23] et. l. Si de interprecatione [Dig. 1.3.37].”

\(^{109}\) Bartolus, *Commentaria in primam Digesti veteris partem* (Venice 1570), fol. 40r, Dig. 1.18.13: “Ad praesides spectat generaliter contra latrones inquirere et homines male conditionis et vite, et eos punire atque eorum
custody of the insane to relatives, and that they can bind or imprison them in order to guard over them.” The physical custody of the insane was the responsibility of their usual guardians, their relatives. This could be no inconsequential task; if the *furiosus* were truly prone to violent expressions of madness, the relatives who had custody of him could be liable for any damages he caused or crimes he committed. For example, the Doge’s counselors and the Signori di Notte, under the advisement of Rainerius, released a *furiosus* who had committed homicide into the care of his relatives under the condition that they would be liable for any future attacks. Families then had both the ability and an interest in providing custody for insane.

If, however, a family proved unable to care for or control an insane member, they could remand him into the custody of a prison. Magherini and Biotti have shown in their study of Le Stinche that the 1322-25 Florentine Statutes allowed for a licenza d'incarcerazione, a judicial order for imprisonment from either public magistrates for the commission of crimes, or even from parental denunciation. This latter feature of the licenza had a strong connection with notions of *patria potestas*, a use of judicial intervention “to effect punishment and private
They provide the example of a certain Raniero, whose father denounced him in 1347 as a disobedient and violent thief. Raniero stole grain and oil, mistreated his father's workers, and refused to work himself. After his father’s denunciation, the Podestà agreed to imprison Raniero “until he returned to an obedient lifestyle.” The wider power of a family, particularly the head of the family, to use public institutions in this way extended also to the insane. Magherini and Biotti report the 1368 case of a certain Giunta, whose brother went before the Podestà claiming that Giunta was “insane and a fool” and that he should be incarcerated, preferably in a private place, lest he become a danger to his family members or others. The family took seriously the threat posed by Giunta’s madness, both for their own safety, and the liability they might incur for the safety of others. This did not necessarily amount to an abandonment of Giunta. The request for a private place could indicate a willingness to pay extra for the provisions he would receive. Nor were the prisons of the medieval Italian cities removed and isolated from the cities. Rather, as Guy Geltner has shown, they were centrally located and integrated into civic rituals and imagery. People on the outside could often interact with prisoners if they so wished. Imprisonment might have been a reality for many insane people, either due to their placement therein by their families, or because they committed crimes and had no family members to take custody. In this case, however, as evidence from Venice shows, expulsion from the city might have been more common than non-punitive incarceration for the insane who lived outside the care of their families.

Rights of the Insane

114 Ibid., 34: “Gli interventi del giudice intendono spesso realizzare una punizione e ‘correzione’ privata...”
115 Ibid., 38.
116 Ibid., 34-35.
117 See Geltner, Medieval Prison, 20. A prisoner or family of the prisoner could pay a fee, an agevolatura, to secure better living conditions inside Le Stinche.
118 Ibid., 100-109.
119 See the previous chapter.
What rights did the insane under guardianship possess? What protection did they have from the maladministration of their guardians? What actions could they perform in their own right without the intervention of their guardians? The jurists drew on the many regulations pertaining to guardianship in Roman law in order to answer these pressing questions. The first among these was the ability to manage one's own affairs during a lucid interval, during which a person recovered his full legal abilities. Among Justinian’s reforms, you will recall, was the rule that a *curator furiosi* retained his appointment but not his authority during a lucid interval. The basic rule held throughout the Middle Ages, though some jurists elaborated on it.\(^{120}\) Baldus, for example, asked whether a curator could be granted during a lucid interval. Likely wishing to protect the autonomy of the *furiosus* while sane, he responded that a curator could only be given during a period of insanity.\(^{121}\) In order to formalize the transfer of authority, the Venetian statutes required the insane person to go before the Giudici del Proprio and provide sufficient evidence of his sanity, at which point the court would suspend the guardian's authority.\(^{122}\) As an example of this, in his attempt to prove the sanity of Nicolò da Treviso, Franciscus Zabarella could point to the court order of the Giudici di petizion granting Nicolò’s wife access to her dowry to support the family during her husband’s madness, and the subsequent order rescinding the first when he

\(^{120}\) Bartholomeus de Saliceto, *Lectura super Codice* (Lyon 1485), 5. unfoliated, Cod. 5.70.6: “Uel breuius: curator furiosi cessat ab administracione tempore dilucidi interualli, et eam reasumiy reuertente tutore. h.d.”

\(^{121}\) Baldus de Ubaldis, *Commentaria in sextum Codicis librum* (Lyon 1585), fol. 62v, Cod. 6.22.9: “Quaero, unquid furioso habenti dilucida interualla possit dari curator, et dic quod sic, tempore morbi non tempore sanitatis. Tamen si furov vadit et reuertitur, datus tempore morbi remanet curator, et habet inter capedinem temporis curator, sicut ipse furo, ut not. supra de cur. fur. l. Cum aliis. [Cod. 5.70.]”

\(^{122}\) Cessi, ed., *Statuti Veneziani*, 118, II.13: “Si autem mente alienatus fuerit ad mentis compositionem reversus et tutor ipse nondon dictam factam habuerit rationem, ipsi rationem ipsam faciat ad plenum ex hiis, que de suo habuerit sive reeperit. In ratione autem continebuntur accepta nomine fatui et data nomine eius vel descendentium ab eo, pro quibus dare permittitur. Item, et soluta, si aliquid solvit nomine illius fatui. Item, omnia bona sua debeat in eum venire, et etiam commissaria, si quam, prius quam esset fatuus, habebat, ad eum reddedat de hiis, que non sunt completa in commissaria. Et ideo volumus quod de universis bonis mentecapti carta inventarii fieri debeat, ut dictum est in minoribus, et ponatur in custodia Procuratorum Sancti Marci.”
returned to sanity.\footnote{Franciscus Zabarella, \textit{Consilia} (Lyons 1552), fol. 30r, con. 56: “Probat hoc instrumentum sententie late Venetiis per dominos iudices petitionum, qui reuocarunt quamdam sententiam latam super prestandis alimientis domine Theodo. coniugi dicti Nico. moti per rationem quia idem domi. Nicol. erat factus sane mentis de quo cum tunc fuerit plene cognitum, verum est dicere quod et in hoc iudicio fidem facit, ex quo deductur ad eundem effectum.”} To proceed less formally invited skepticism on the validity of actions performed by the supposedly sane \textit{furiosus}. The Perugian jurist Petrus Philippus Corneus was consulted in a rather complicated property case. A certain Giovanni Lazari had been insane and under the care of a guardian. He supposedly returned to sanity and made a donation of a house to his niece. At the time, the only evidence of his sanity was his refusal to act through a guardian (which would have presented problems, as we shall see) and the testimony of the notary and witnesses to the act that he appeared sane. After the property had passed through inheritance and sale to someone outside the family, a later guardian of Giovanni sought recovery of the property on the grounds that upon the intestate death of his niece, the house should have returned to Giovanni, rather than passing to the cousin who sold it. Petrus held that sufficient evidence did not exist to show that Giovanni was competent to make the grant in the first place. The property belonged to him because he could not, as an insane person, alienate property on his own authority.\footnote{Petrus Philippus Corneus, \textit{Consilia} (Venice 1572), fol. 79r-81v, con. 1.69.} The party in possession of the house at the time of the case had possessed it for twelve years, and the original donation likely occurred several years before their acquisition. Failure to adhere to a recognized transition of authority between a guardian and his charge could have far-reaching consequences.

The ability to inherit was an interesting right of the insane that, for many jurists, highlighted the interaction of the authority of the guardian and the power still retained by an insane person. Inheritance was the most basic way of perpetuating a family’s wealth, providing a link through generations that many statutory enactments and jurisprudential devices sought to
preserve. Thomas Kuehn has recently shown that the acceptance of an inheritance, once thought to a simple formality, was anything but. In his investigation of the renunciation of inheritance in Florence, Kuehn demonstrated the prevalence of and rationale behind family members, even in many cases sons, refusing or delaying the acceptance of an inheritance. The basic reason for refusal was that an estate laden with debts could result in costing more than the beneficiary would gain. Even in the event of statutory protection of the beneficiary's own property from obligation for the debts of the testator, acceptance of such a “*hereditas incommodis*” provided little benefit to the *heres*. On the other hand, creditors of the estate required someone to accept it in order to recover the debts owed to them. Legislators and jurists had to balance the often opposed interests of multiple parties. Kuehn did not, however, examine the insane and their ability to accept or reject an inheritance. The legal effects of insanity provided a fresh set of problems. On the one hand, an inheritance would likely be the only means of support for an insane person whose parents had died. On the other hand, given the potentially harmful effects of accepting a debt-ridden inheritance, could an insane person be compelled to accept an inheritance that did not benefit them?

The most basic operative distinction in whether the insane can take up an inheritance is their status as heir. Commenting on whether the insane can act as heirs, Accursius noted that they could if they were “*sui heredes*”, “otherwise they cannot, unless through a guardian.” Under Roman law, a *suus heres* was one who automatically took possession of an inheritance upon the death of the testator, without an ability to refuse. The most common example of a *suus heres* was a son for his father. As it developed, however, Roman jurisprudence gradually eroded this

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126 *Institutiones* (Lyon 1571) p. 333, Inst. 3.1.3, sv. “haeredes”: “Scilicet, sui, alias non, nisi per curatorem, secundum quosdam, ut C. de cur. fur. l. fi. §. Tali itaque [Cod. 5.70.7].”
distinction. With the benefit of a privilege introduced by the praetor, the “beneficium abstinendi,” a *suus heres* could abstain from accepting the inheritance, which he made known by not taking any part of the inheritance. The later *ius commune* had to grapple with the sometimes conflicting source material over this key issue. The problem was especially important for the insane. Their “*inmixtio*” (or lack thereof) in a paternal inheritance could not be understood as legally significant, but neither would an acceptance or rejection made by the curator be valid. Medieval jurists continued to understand the acceptance of an inheritance as a matter of personal choice, an area of law pertaining strictly to the intent of the heir, even in the face of compelling public interest, such as the payment of outstanding debts.

The general rule adopted by jurists in cases of an insane heir derived from the decree “*Cum furiosus.*” Justinian determined that although a guardian could accept an inheritance for an insane person, but that the insane person retained the right of refusal upon regaining his sanity. If the *furiosus* were to die before accepting or rejecting the inheritance, it would pass by rules of substitution or intestacy as if the *furiosus* had not existed. The estate was left in a kind of limbo, something recognized by the jurists of the *ius commune*. As Odofredus explained,

> [an insane person] can accept or repudiate an inheritance, I respond that this is true for those over the age of twenty-five who are of sound mind, since they acquire through themselves. The contrary holds for the insane who lack

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127 Kuehn, *Heirs, Kin and Creditors*, 24
128 See the following chapter on the difference between fictive consent among the canonists and civilians. The personal nature of the acceptance or rejection of an inheritance is, for the civilians, the exception that proves the rule. Even if the assumption of an inheritance pertained to the benefit of a furiosus, it remained a decision that he himself had to make while of sound mind.
129 Cod. 5.70.7.8-9: “Sin autem in furore diem suum obierit vel in suam sanitatem perveniens eam repudiaverit, si quidem successio est, ad eos referatur, volentes tamen, id est vel substitutum vel ab intestato heredes vel ad nostrum aearium: eo scilicet observando, ut hi veniant ad successionem, qui mortis tempore furiosi propinquiores existant ei ad cuius bona vocabantur, si non in medio erat furiosus, omni satisdatione vel cautione, quam per inextricablem circuitum veteris iuris auctores induxerunt, radicitus excisa. Legatis autem procul dubio vel fideicommissis ceterisque adquisitionibus furioso adquirendis et substantiae eius adregandis: sin autem ipse resipuerit et noluerit ea admittere et aperte haec resserit vel heres eius hoc fecerit, a substantia eius ilico separandis, quasi nec fuerant ab initio ad eum devoluta, et legitimum tramitem ambulantibus, substantiam furiosi neque praegravantibus neque adiuivantibus.”
understanding. Although a guardian can acquire for them, they do not seek it themselves. Afterwards, if they recover, they are said to be put in the same position they would have been in had they been of sound mind, namely that they can accept or repudiate. If they repudiate, the law pretends that they had never acquired the inheritance for themselves.\textsuperscript{130}

The inheritance is neither accepted nor rejected until the \textit{furiosus} performs the action himself.\textsuperscript{131}

Jacobus de Arena highlighted the ambiguous nature of such an inheritance by asking whether the guardian of a \textit{pupillus} (similar in many ways to the legal position of a \textit{furiosus}) had to make an inventory of an inheritance left to him.\textsuperscript{132}

If you say yes [that he should make an inventory], what should he put in the inventory since the pupillus has nothing before the acceptance of the inheritance? If you say that first the guardian should accept the inheritance and then make an inventory, this is not possible, since the pupillus must by necessity accept with the authority of his guardian. But the guardian cannot authorize unless the inventory has already been made. You should say that first he must make an inventory in which he says that among the goods of the pupillus, he found that the pupillus has the right to acquire or repudiate this inheritance and that he found nothing else.

\textsuperscript{130} Odofredus, \textit{Lectura in prima parte Codicis} (Lyon 1552), fol. 306v, Cod. 5.70.7.7: “Non obstat si querit sucessionem que est iuris, quod potest postea si resipuerit, eam admittere vel repudiare, quia respondeo quod illud verum est in hominibus maioribus xxv annis sane mentis, quia ipse querunt per semetipsum. Sed secus in furiosis qui carent intellectu. Licet curator eis acquirat, non tamen querunt per se. Si postea resipiscant, dicuntur poni in eo statu in quo essent si fuissent sane mentis, scilicet, ut possint admittere vel repudiare. Et si repudiant, fingitur retro non quesita per semtisplos.”

\textsuperscript{131} Eg. Baldus de Ubaldis, \textit{Commentaria in sextum Codicis librum} (Lyon 1585), fol. 105v, Cod. 6.30.5: “Nota quod hereditas furioso delata potest per curatorem agnosci, tamen furiosus ad sanam mentem perueniens poterit eam retinere ul respuere, prout volet, sed si in furore decesserit, ad haeredes furiosi non transit hereditas extraneorum. Sed legata et fideicommissa acquiruntur furioso, et transmituntur in eius haeredes ab ipso. Apparet ergo quod per agnitionem haereditatis quam facit curator furiosi hereditas acquiritur ei interim, sed non habet per petuam causam acquisitionis, sed pendet ex futuro euentum, quod est speciale in furioso.”

\textsuperscript{132} Jacobus de Arena, \textit{Commentarii in universum ius civile} (s.l. 1541), fol. 96v, Dig. 26.7.5.10: “Sed an debet tutor confiscere inuentarium antequam pupillus adeat hereditatem? Si dicas sic, quid ergo ponit in inuentario cum pupillus ante aditam hereditatem adhuc nihil habeat? Si dicas quod primo debet adire et postea facere inuentarium, hoc esse non potest, quia pupillus necesse habet adire cum autoritate tutoris. Tutor autem non potest autozizare nisi confecto inuentario, ut hac lege. Dicas quod primo debet facere inuentarium in quo dicat quo modo ipse in bonis pupillii inuenit ipsum pupillum habere ius adeundi et repudiandi talem hereditatem, et nihil aliud dict se inuenisse. Sed si quando aliqua bona fuerint filio acquisita ipse iurat ponere in inuentario et cum postea pupillus autoritate adibit hereditatem, tunc illa bona ponet oin inuentario. Vel potest dici quod detur alter tutor specialiter ad adeundam hereditatem, ut not. in glossa, ff. de testa. tutel. 1. Si nemo [Dig. 26.2.19]. Hoc habet locum in pupillo extraneo, sed si esset suus potest dici quod existentia sui heredis habetur pro additione, ut ff. de fideicom. l. Generaliter. §. fi. [Dig. 40.5.24.21], et sic statim posset confiscere inuentarium. Iac. de Are.”
For Jacobus, the actual possession of the *pupillus*, or the *furiosus*, was the right to the inheritance, no more or less.

Baldus de Ubaldis accepted the description of an inheritance left to an insane person as a right to be included among other corporeal and incorporeal possessions of theirs. “A guardian of an insane person... can accept bonorum possessio left to the insane person, and is bound to add to the inventory all goods that have resulted from this acceptance, save the right of the insane person to accept or reject them if he should recover.”¹³³ In the meantime, however, whether the insane person recovered and made a decision on the inheritance or whether he died in the grips of madness, he still possessed the ability to enjoy the fruits of that inheritance as a means of support.¹³⁴ Such use did not constitute an acceptance of the inheritance. Recall that even a *suus heres* could refuse an inheritance, provided that he had not made use of it in any way. Baldus followed Accursius in holding that the administration of a paternal inheritance by a guardian did not constitute such an “inmixtio.”¹³⁵ The guardian could use any fruits or profits of the inheritance to support the furiosus, while the furiosus retained his right to accept or reject it.

¹³³ Baldus de Ubaldis, *Commentaria in quartum et quintum Codicis librum* (Lyon 1585), fol. 243r, Cod. 5.70.7.7: “Curator furiosi postquam iurauit et satisdedit et promisit promitenda, et recepit administrationem per decretum, potest agnoscere bonorum possessionem delata furioso, et bona ea occasione peruenta tenetur in inuentario addere, salvo iure repudiandi at acceptandi furioso si respuerit.

¹³⁴ Baldus de Ubaldis, *Commentaria in sextum Codicis librum* (Lyon 1585), fol. 92r Cod. 6.26.9: “Quinto op. Ista institutio nihil operatur infurioso, ergo frustra exigitur fieri, nam institutio furiosi habet tacitam conditionem in se, si ad sanam mentem reuertatur, l. fi. De cur. fur. [Dig. 27.10.17]. Et est ratio, quia institutio debet afferre consolationem et gaudium, ut in auth. de her. et fal. §. Si vero absunt, ver. si enim omnino [N.1= A.1.1.2.1]. Sed mente captus gaudere non potest, nec est spes quod gaudeat unquam. So. ideo debet instituti, ut si ad sanam mentem reuertatur, gaudeat et prouidentiam parentis perpendat. Caeterum si in furore decedat, nihil sibi prodest, vel dic. quod etiam interim prodest ad alimenta et fructus plenos quos consequitur.”

¹³⁵ Baldus, *Commentaria in quartum et quintum Codicis librum* (Lyon 1585), fol. 243r, Cod. 5.70.7.7: “Quid ergo operatur illa existentia? Dicit glossa quod curator poterit administrare sine inmixture, nec habebit nessesse petere bonorum possessionem nomine furiosi.” See *Digestum infortiatum* (Lyon 1551), p. 1223, Dig. 37.3.1, sv. “Accipere possessionem potest”: “Contra infra de succes. edi. l. i par. Furiosi [Dig. 38.9.1.5]. Sed quantum ad commodum delata est furioso, et ei potest peti, scilicet ut habeat fructus, non quantum ad ius ut habeat dominium, ut ibi, et C. de cura. furio. l. fi. par. Tali. [Cod. 5.70.7.7].”
The difference between an insane person who was a *suus heres* and one who was not only arose meaningfully in the event that the insane person died without accepting or rejecting the inheritance. In this situation, a number of distinctions came into play in order to determine the recipient of the inheritance. First, the jurists considered the difference between an inheritance and another kind of bequest, such as a *legatum*, a payment or grant made from the inheritance to one who was not an heir. Odofredus noted that the difference between an inheritance and a legacy lies in that “an inheritance contains in itself profitable and unprofitable things, wherefore one should not be acquired unless the will of the heir intervenes.” An inheritance could prove harmful to the recipient, but a legacy could only add to the substance of the legatee. A legacy could not, for example, have debts attached to it that could rebound onto the legatee. For this reason, volition was not necessary to receive a legacy, which, according to Albericus de Rosate, “is obtained by the unaware and transmitted by the *ius commune*.” Since volition or even awareness, were not requirements to receive a legacy, the insane could do so in their own right and transmit such goods to their heirs, whether by testament or intestate succession.

When a *hereditas* is involved, the distinction centers on whether the inheritance came from a parent or from outside the family. An external inheritance would not pass on to the heirs

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137 Odofredus, *Lectura in prima parte Codicis* (Lyon 1552), fol. 306v, Cod. 5.70.7.7: “Sed que est ratio, diuersitatis inter heredem et legatarium. Respondeo, ratio est illa, quia hereditas habet in se commoda et incommoda. Unde non debet acquiri nisi interueniat heredis voluntas.”
138 Albericus de Rosate, *Commentarii in primam codicis partem* (Venice 1585), fol. 280v, Cod. 5.70.7: “‘Respurit’, id est repudiauerit, vel heres eius scilicet furiosi. Videtur ergo quod furiosus resipiscens, et ante antequam amplectatur vel repudiet decdens, transmittat, cuius contrarium modo notai. Sed hic loquitur in legato, quod ignorant quiterit et transmittitur iure communi, ff. de leg. 2 l. Cum pater. §. Surdo [Dig. 31.(1).77.3]. Supra vero de haereditate, quae ignorant non quiterit, non transmittitur, ut infra de iure deliberan. l. Quoniam sororem. [Cod. 6.30.7] Ol.” Albericus repeated a position held by his teacher Oldradus de Ponte.
139 See also Baldus de Ubaldis, *Commentaria in quartum et quintum Codicis librum* (Lyon 1585), fol. 243r, Cod. 5.70.7.7: “Curator furiosi postquam iurauit et satisdedit et promisit promitenda, et recipit administrationem per decretum, potest agnosere bonorum possessionem delata furioso, et bona ea occasione peruenta tenetur in inuentario addere, salvo iure repudiandi at acceptendi furioso si respuerit. Sed in furore decedit, ex acceptatione curatoris non sit transmissio bonorum possessiois. Legatum autem bene transmitteretur ad heredem furiosi.”
of the furiosi. According to Bartolus, “if [an insane person] were to die while insane, it is as if the bonorum possessio had never been, and it does not transfer to an heir.”\textsuperscript{140} The circumstances are different, according to Bartolus, when a paternal inheritance is involved. In this case, “the inheritance of a father does not so much devolve to the son as it does continue.”\textsuperscript{141} Bartolus walked a line between preserving the autonomy of a son, even an infant or an insane son, to refuse a paternal inheritance while still supporting the continuous link of the patrimony. In short, Bartolus held that the rule of the \textit{ius commune} posited a continuation in patrimony from father to son, and that the privilege of abstaining from acceptance does not prevent the transmission of an inheritance, but travels along with it.\textsuperscript{142}

In any event, the rule of transmission described by Bartolus would only have a place in intestate succession. Roman law, and the \textit{ius commune} after it, developed the device of substitution, by which even a furiosus who died without ever possessing a moment of sanity could still die testate. Roman law contained many forms of substitution that allowed a testator great freedom in providing for a number of possible circumstances that would otherwise jeopardize the will or the patrimony. One of the basic forms was pupillary substitution. Through this, if a father had a young son, he could name a substitute heir for that son in the event that he died before reaching the age of legal majority. In effect, such substitution amounted to the father

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\item \textsuperscript{140} Bartolus, \textit{Commentaria in secundam Infortiati partem} (Lyon 1555), fol. 182r, Dig. 37.3.1: “Tamen siue dicamus facti siue iuris, semper est idem iuris, quia donec est furore est bono. possessio. Sed si in furore decedit, finitur bo. pos. non fuisse, et ad haeredem non transmittit.” See also Baldus in note 134 above.
\item \textsuperscript{141} Bartolus, \textit{Commentaria in secundam Codicis partem} (Lyon 1555), fol. 34v, Cod. 6.9.3: “Nam haereditas patris non dicitur deuolu ad filium, sed magis continuari, ut l. Nihil. infra pro here. [Cod. 7.29.2]. Item ex eo dicit agnitas, nam in hereditate patris non requiritur agnito de iure ciuili, loquitur ergo de hereditate extraneorum.”
\item \textsuperscript{142} See, for example, Jason de Maino, \textit{Commentaria in secundam Codicis partem} (Venice 1579), fol. 8v, Cod. 6.9.3: “Ratio est quia esset hereditas patris delata infantilui anniculo, non procederet iste textus, qui dicit agnita bonorum pos. et sic requiritur quod agnito sit facta, nec in ea esset tunc differentia inter infantem et furiosum, quia quiilibet eorum ex potentia suitatis transmittet ad heredes. Textus est in l. fi. §. Sin autem perpetuus. C. de cur. fu. [Cod. 5.70.7.7], quia hereditas patris absque aliqua aditione ipso iure perfecte acquiritur cuique filio, et infanti, furioso, et transmittitur ad omnes, ut determinat Baldus, reprobata gloss.”
\end{itemize}
testating on behalf of his son during a period in which the son could not legally craft a will of his own. The substitution ceased to be valid when the son reached majority. Similarly, the insane were covered under exemplary substitution, a later development so named because of its introduction according to the example of pupillary substitution. As with pupillary substitution, a father could substitute an heir for an insane son or daughter if that person died without regaining sanity and thus the ability to draft a will of his own.\footnote{Johannes de Imola, \textit{Commentaria in librum tertium decretalium} (Venice 1500), unfoliated, X 3.26.16: “Et inter cetera dicit quod conuenit in hoc cum pupillari cum per pupillarem pater testatur filio qui sibi non potest testari propter etatem pupillaris, ita per exemplariam testatur furioso et dementi qui propter defectum mentis non potest sibi testari.”}

In the case of a mentally ill minor, either a pupillary or an exemplary substitution would be available. The jurists held that in such a case, a pupillary substitution had precedence. Johannes Andreae argued for this on a more theoretical level, that the natural cause for a substitution (minority) should have precedence over an accidental cause (insanity).\footnote{Johannes Andreae, \textit{Novella super quinque libris Decretalium} (Venice 1489), unfoliated, X 3.26.16: “Si vero esset filius inpubes et furiosus, pupillariter, non exemplarie, sibi substitui debet considerata naturali causa non accidentalis, ff. de tutelis, Qui habet [Dig. 26.1.3].” See also, Johannes de Imola, \textit{Commentaria in librum tertium decretalium} (Venice 1500), unfoliated, X 3.26.16: “Tangit etiam do. an. quid si concurrat pupillaris etas et furiositas vel dementia, an dedebit fieri exemplaris substitutio an vero pupillaris, et concludit doc. tenere quod fieri debet pupillaris et non exemplaria, quia ubi concurrerit causa naturalis et accidentalis, inspici debet potius causa naturalis, l. Qui habet. §. i. ff. de tutel. [Dig. 26.1.3.1].”} On a more practical level, as we shall see, a pupillary substitution allowed for greater flexibility in who could be substituted.

The key feature of exemplary substitution, as many jurists saw it, was the basis of its introduction in a sense of humanity, a sentiment taken from Justinian’s decree on the subject, \textit{“Humanitatis.”}\footnote{Cod. 6.26.9: “Humanitatis intuitu parentibus indulgemos, ut, si filium vel nepotem vel pronepotem cuiuscumque sexus habeant nec alia proles descendentium eis sit, iste tamen filius vel filia vel nepos vel nepotis vel pronepotis mente captus vel mente capta perpetuo sit, vel si duo vel plures isti fuerint, nullus vero eorum saperet, liceat isdem parentibus legitima portione ei vel eis relicta quos voluerint his substituere, ut occasione huiusmodi substitutionis ad exemplum pupillaris nulla querella contra testamentum eorum oriatur, ita tamen, ut, si postea resipuerit vel resipuerint, talis substitutio cesset, vel si filii aut alii descendentes ex huiusmodi mente capta persona

\textit{“Humanitatis.”}} They contrasted this to pupillary substitution, which was introduced
“according to the rigor of law.” The jurists used this sense of humanity or mercy to argue for strict limitations on the practice of exemplary substitution, though in some cases it also served to expand it.

The greatest restriction on the use of exemplary substitution concerned who could be named as substitutes. Following “Humanitatis,” the jurists held that sons or brothers of the insane person had to be substituted before an “extraneus” could be, whereas pupillary substitution allowed the father to substitute whomever he wished. One point at which the jurists diverged from “Humanitatis” concerned the number of sons or brothers who had to be substituted. The text indicates that “one or many” could be substituted, which raised the issue of disinheritance. If only one son or brother were named, would this not amount to a possibly unjust disinheritance, resulting in a suit against the testament? Odofredus held that, even though the decree itself did not specify this, any children or brothers passed over in the substitution had to be “disinherited by name, otherwise the testament would not be valid.” Bartolus allowed for one son to be substituted, provided that others were provided with a clear institution in the will or were justly disinherited. The guiding principle for him in an exemplary substitution was “if a person is insane, he ought to do what he would do if her were of sound mind.” This obligation of the insane to follow social norms even while technically unable to do so because of their condition

sapientes sint, non liceat parenti qui vel quae testatur alios quam ex eo descendentes unum vel certos vel omnes substituere.”

146 Bartolus, Commentaria in secundam Codicis partem (Lyon 1555), fol. 26v, Cod. 6.26.9: “Ratio est secundum do. Guil., quia substitutio exemplaris est introducta ex quadam humanitate ut hic dicit textus. Sed pupillaris est introducta secundum iuris rigorem.”

147 Eg. Odofredus, Lectura super secunda Codicis parte (Lyon 1552), fol. 48r, Cod. 6.26.9: “Item nota in alio differentiam: in pupillari substitutione potest substitui quilibet extraneus, sed in ista exemplaria non. Si furiosus vel mentecaptus habeat liberos vel frатres, alias sic, ut in hac lege dicitur.”

148 Ibid. “Quare dicetis ut dixi in litera in casu, quia ceteros debet nominatim exheredare, alias non valeret testamentum, ut insti. de exh. lib. §. Posthumorum [Inst. 2.13.2].”

149 Bartolus, Commentaria in primam Infortiati partem (Lyon 1555), fol. 165v, Dig. 28.6.43: “Nam quod dicit lex, unum ex filiis debet substituere, concedo tamen alios instituere ex re certa vel exhaeredare ex iusta causa debet. Nam si furiosus est debet facere id quod faceret si esset sanae mentis.”
was a feature of the civilian discourse on insanity, especially when discussing fictive consent. The main fiction underpinning exemplary substitution is that it stands in for the testation of the insane person since he cannot testate himself, which is clear in a hypothetical put forward by Guilelmus de Cuneo. Guilelmus posed the case of a person who had committed a crime that resulted in a stripping of his testamentary capacity and afterwards became insane. “Can I make an exemplary [substitution] for him?” Guilelmus advanced an argument that such a substitution was possible, since the advent of madness seemed to erase the previous fault. “But I say otherwise, that it cannot be done, since this constitution has been introduced at the prompting of humanity, that this substitution can be made for those who cannot testate for themselves because of madness or insanity.”

For Guilelmus, as well as later jurists who held this position, substitution was a means for the insane, otherwise unable to testate, to do so; it did not extend to those who were prohibited for other reasons.

Similarly, substitution could not be used to take the libertas testandi away from someone. Again, Guilelmus posed an important question. “But say that I have an emancipated son, that he has made his own testament, and that he has instituted Titius as an heir before becoming insane. Can I substitute for him after his insanity? It seems that I can through these laws. I say no, since a testament should not be broken because of insanity arising afterwards.”

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150 Guilelmus de Cuneo, Lectura super Codice (Lyon 1513), fol. 59v, Cod. 6.26.8: “Sed pone quod ante furorem erat impeditus filius tetari ob aliam causam, ut quia damnatus criminerepetundarum vel alio crimine, ff. de test. Is cui bonis. §.i [Dig. 28.1.18.1]. Postea factus est furiosus. Nuncqquid possum facere ei exemplarem? Videtur quod sic per iura station allegata, ut totum vitium sit translatum in furorem. Dico contra quod non potest fieri, quia hec consitutio inducta est humanitatis intuitu, ut eis qui non possunt sibi testari propter dementiam vel furorem, quod fiat hec substitutio.”

151 Ibid. fol. 58v: “Sed iuxta hoc quero; nos habemus quod substitutio potest hic fieri furioso, sed pone: habeo filium emancipatam. Facit suum testamentum, titium heredem instituit antequam esset furiosus. Nuncquid ei possum substituere post furorem. Videtur quod sic per hec iura. Dico contra, cum testamentum propter furorem post venientem non rumpatur, ff. de iniu. rupt. et irri. test. l. fi. [Dig. 28.3.20], supra qui tes. fa. pos. l. Furiosus [Cod. 6.22.9].”
testate. If a prior testament exists, the intention enshrined within it cannot be overridden by subsequent madness. Only if the testament were somehow invalid could substitution occur, as Guilelmus posed in a follow-up scenario. “But if the testament is in any way deficient, as when an heir is dead or some other reason, then I believe that a substitution can be made, for the testament cannot be invalidated from which no inheritance can come.”

This brought up the problem of a lucid interval. Originally, Justinian conceived of an exemplary substitution ending with the recovery of sanity just as a pupillary substitution ended with majority. This posed a problem for many jurists. What if the *furiosus* had a lucid interval and then relapsed into madness before he was able to make a testament? Did this void the substitution? Guilelmus de Cuneo made a distinction based on the time of the lucid interval: if the relapse occurred in the life of the testating father, the substitution held, likely because the son would not be able to testate on his own because he remained under his father's power. If however the interval and relapse occurred after the death of the father, then the substitution would be void and the *furiosus* might die intestate. Earlier, Hostiensis had taken a different view. What mattered most was whether the *furiosus* had made a testament during this lucid interval or not. If had made a testament, then the substitution clearly had no place, “lest he have as an heir one whom he did not wish to have.” On the other hand, if the *furiosus* experienced a lucid interval and did not make a will, the substitution would still hold, even if he could be blamed for not

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152 Ibid.: “Si autem aliquo modo deficit testamentum, quia heres institutus mortuus vel alias, tunc credo quod possit fieri substitutio, nec enim rumpitur testamentum ex quo non aditur hereditas.”
153 Cod. 6.26.9: “...si postea resipuerit vel resipuerint, talis substitutio cesset...”
154 Guilelmus de Cuneo, *Lectura super Codice* (Lyon 1513), fol. 58v, Cod. 6.26.8: “Sed pone: feci hanc substitutionem filio furioso, statim resipuit, sed post redit in furorem. Nunquid rumpit testamentum? Videtur quod non quia non videtur resipuisse, cum non duravit. ff. loc. l. Martius [Dig. 19.2.59], ff. de in rem verso, Si pro patre. §§. Versum [Dig. 15.3.10.6], ar. supra de cur. fur. Cum aliiis [Cod. 5.70.6]. Sed dic aut istud euenit in vita patris, et tunc substitutio valet; si post mortem, non. Et est ratio: quia cum in vita patris contingit quamuis postea veniat in infirmatatem sufficit quod furiosus sit tempore testamenti et mortis, ar. ff. de vul. et pu. l. Coheredi. §§. Cum filie [Dig. 28.6.41.2].”
making a will, “since the thought very often can escape us.” Bartolus held a middle way, that a testament and not a lucid interval voided an exemplary substitution, though not for the merciful reason advanced by the canonist. Instead, Bartolus based his rationale on a close reading of “Humanitatis.” After summarizing Guilemus’ argument, he commented that “this does not seem true in the text of ‘Humanitatis,’ where it seems that the substitution ceases when insanity ceases. Note that it says ‘ceases’; it does not say ‘is extinguished’.” Bartolus based his distinction on the difference between a lucid interval and an end to madness. “I say therefore that exemplary substitution ceases when madness ceases, but it is not extinguished. Upon a return of madness [the substitution] will regain its force, since it had never been extinguished.” While not stating the possibility explicitly, Bartolus seems to have left the door open for the furiosus to die intestate, if he recovered his sanity and died while sane, that is while the substitution remained in a period of cessation.

155 Hostiensis, Summa aurea (Venice 1578), col. 1053, X 3.26: “Cessat hec exemplaris et expiret furore cessante, ut in eadem l. Humanitatis [Cod. 6.26.9], Inst. de pup. subst. §. Qua ratione [Inst. 2.16.1], ff. de vulg. sub. l. Ex facto [Dig. 28.6.43]. Sed quid si habet dilucida interualla? Potest dici quod si habet tanta quod testamentum facere possit, secundum leges C. qui test. fac. poss. Furiosum [Cod. 6.22.9], euanescit substitutio. Et si non fecerit, et imputet sibi, non euanescit, quod saepeius cogitatio potuit euitare, arg. ff. ad Velle. senatuscon. Si mulier [Dig. 16.1.11], ff. de reg. iur. Quod quisque ex culpa sua damnum patitur [Dig. 50.17.203], vel dic si fecerit testamentum euanescit, ne habeat haredem, quem habere nollet, ut liber testandi sit stilius, C. de sacrosan. eccl. l. i [Cod. 1.2.1], quod si non fecit nec potuit, durat substitutio, arg. expressum C. de curs. fur. Cum illis [Cod. 5.70.6], C. de legi. Quod fauore [Cod. 1.14.6], ff. de lib. et posthu. Cum quidam [Dig. 28.2.19], nec obstat superioribus legibus quia intelligi possunt de illo furioso qui coninue laborabat, et est plenius liberatus. In illo autem qui habet dilucida interualla est eadem ratio, quae non supra e. vera ratio non, Si intestatus decedat vendicat sibi locum, hoc videtur de mente quicquid innuant verba, mens autem sequenda est, ff. de excu. tu. in l. Graeca scire oportet. §. Aliud postmodum [Dig. 27.1.13.2].”

156 Bartolus, Commentaria in primam Infortiati partem (Lyon 1555), fol. 166v, Dig. 28.6.43: “Item distinctio quam ipsi faciunt, aut furore est reuersus in vita est testantis etc. non videtur vera, nam l. Posthumus. de iniusto testam. [Dig. 28.3.12] et l. ii. C. de posth. haere. insti. [Cod. 6.29.2], quae factum distinctionem, an posthumus moriatur in vita testatoris, an post mortem loquntur in testamento quo quis si hii ipsi facit, sed in testamento, quod quis fecit alteri ut filio pupillo, vel furioso, non attenditur utrum impedimentum cessauerit in vita eius cui facta est substitutio, ut in vita pupilli vel furiosi. Ita not. in l. Si arrogator, in principio, supra de adoptionibus in principio primae glossae magnae [Dig. 1.7.22]. Dico ergo quod cessante furore exemplare substitutio exemplaria, et non exinguat et furore reuertere incipit habere vires cum numquam fuerit extinta. Fator tamen quod si in illo medio tempore quo erat in dilucido interualllo, furiosus sibi testamentum fecisset, tabulea pupillares essent omnino extinctae, per tex. huius legis. Non enim debet auferri testamenti faccio homini sanae mentis. Et ex hoc dicere aliud quod si filius furiosus fecisset testamentum ante furem eo effecto furioso non potest substituiri a patre vel a matre, et similibus.”
The notion of humanity or mercy that served as the basis of exemplary substitution could also enable a jurist to expand the traditional limitations imposed on its use, as it did for Johannes de Imola. Bartolus had argued that the “humane” nature of this law permitted both fathers and mothers to make substitutions for their mentally incapable children. Engaging in a common trope that transcended the law, Bartolus denied that mothers who remarried after the deaths of their spouses could substitute for children of the first marriage. Angelus de Ubaldis seconded this opinion, noting that the second marriage rendered the mother suspect. Johannes de Imola challenged this stereotype. He first remarked that a father could substitute for a mentally handicapped son before undertaking a second vow, but he saved the fire of his argument for a second point. The naming of an heir through substitution, Johannes claimed, pertains more to the good of the son than to the good of the mother. Moreover, “Humanitatis” made no distinction between a mother who remarried and one who did not. He acknowledged that mothers who remarried were forbidden from administering the property of underage children from the first marriage, but he maintained that the reason behind this ban did not hold in substitution. The interdict from administration served as a protection against the maladministration of this property.

157 Ibid. fol. 165r: “Quaero utrum mater quae transiuit ad secundam votam possit filio exemplariter substituere. Dico quod non, quia substitutio est introducta causa humanitatis, quae humanitatis cessat in matre, ut l. Quae tutores. C. de admi. tu. [Cod. 5.37.22]. Hoc patet etiam quia pupillus non debet educari apud eam, quare ad secunda vota transit, ut l. i. C. ubi pup. edu. deb. [Cod. 5.49.1]. Praeterea isti matri non concedit tutela, ut in aut. Sacramenta. C. quando mu. tu. offic. fun. po. [Cod. 5.35.2 (=N.94.2)]. Si ergo in vita non conceditur, multo minuis in morte.”

158 Angelus de Ubaldis, *Lectura super Infortiato* (Città del Vaticano, BAV Vat. lat. 2613), fol. 124r.

159 Johannes de Imola, *Commentaria in librum tertium decretalium* (Venice 1500), unfoliated, X 3.26.16: “Nam tunc non priuatur successione filii ut patet in dictis iuribus et sic multominus debet priuari potestate substituendi exemplarie cum illa potestats sit potius ad commodum filii ut habeat heredem quam ad commodum matris, ar, eius quod dicitur de pupillari, insti. de pup. subst. in prin. [Inst. 2.16.1] et l. Iulianus. ff. de acquir. her. [Dig. 29.2.42], in l. Ex tribus. C. de inoffi. test. [Cod. 3.28.26]. Et sic si non priuatur commodo sucessionis quod est proprie commodo matris, multo minus potest priuari potestate substituendi, qui est potius ad commodo filii.”
in the mother’s interest rather than that of her children. Through substitution, the mother made no claim to the goods of a mentally ill child but merely provided him with an heir.\textsuperscript{160}

Although Johannes based his argument partially on a separation of the interdict from administering property from the interdict on instituting an heir, such a distinction was harder to draw in the case of a father who was a “\textit{vilis persona}.” Bartolus held that “just as administration was denied to such a father in life, so should the ability to dispose his goods after his death be denied to him.”\textsuperscript{161} Here we can see the basic difference between the two. The mother marrying a second time could not administer the goods of her children but could administer her own. The act of substitution was as much an act of testation on the part of the one making the substitution as the one for whom it was made. Johannes de Imola agreed with Bartolus, clarifying that simply being a “\textit{vilis persona}” was not enough; the father had to be under a formal judicial interdict.\textsuperscript{162}

**Protection under Guardianship**

As we saw in the case of substitution, the jurists tended to agree that a father with a poor reputation could not testate on behalf of his insane son or daughter. The insane received other

\textsuperscript{160} Ibid.: “Et pro predictis etiam faciat quia licet etiam pater dicatur infere inuiriem non priuatur potestate substituendii, l. i. §. i. ff. de vul. et pup. [Dig. 28.6.1.1]. Ergo eodem modo videtur quod licet mater aliqualem inuiriem dicatur infere filio matrimoni transeundo ad secunda vota, ut habetur in §. Gregoriana, in ver Prosperimus in aut, de non eligendo se. nubentes col. i [N.2= A.1.2], et in aut. de nup. §. Si autem tutelam coll. iiiii. [N.1= A.1.1.40]. Non debet tamen per hoc priuari potestate substituendi, ex quo hoc non est iure cautum, sed potius oppositum d. l. Humanitatis [Cod. 6.26.9], quae indistincte loquitur. Nec obstat quod interdiceret administratio bonarum propter transitum ad secunda vota, quia istud concernit vel saltim concernere possit commodum ipsius matris si non interdiceret administratio, quia posset bona pupillii usurpare que ratio cessat in potestate substituendi per qua principaliter prouidetur filio, ut habeat heredem, et ista pars satis videtur de iure posses defensari per predicta.”

\textsuperscript{161} Bartolus, \textit{Commentaria in primam Infortiati partem} (Lyon 1555), fol. 166r, Dig. 28.6.43: “Primo in eo quod praesupponunt quod si pater erat vilis persona potest substituere filio, credo hoc non esse verum. Sicutenum tali patri denegetur administrationem in vita, ut l. final. C. de senten. pas. [Cod. 9.51.13] et l. Si cum dotem. §. Eo autem tempore, supra sol. matr. [Dig. 24.3.22.5], cum simi. Ita debet ei denegari facultas disponendi post mortem de bonis suis eadem ratione. Illi enim cui est interdictum bonis propter prodigalitatem, est interdictum in vita et in morte, ut l. Is cui bonis, supra de testa. [Dig. 28.1.18].”

\textsuperscript{162} Johannes de Imola, \textit{Commentaria in librum tertium decretalium} (Venice 1500), unfoliated, X 3.26.16: “Tu potes concordare opi., quia aut pater adeo est turpis vite quod sibi est interdica administratio bonorum per iudicem, et tunc cum non possit per se testari, l. Is cui bonis. ff. de testa. [Dig. 28.1.18], non poterit etiam pro filio suo, et ita intelligatur opinio Bartoli. Secus si nulla sit facta interdictio per iudicem, quia tunc sicut potest testari pro se, ut patet ex his que habentur in d. l. Is cui [Dig. 28.1.18], ita videtur quod possit etiam pro filio suo per dicta iura que indistincte loquantur.”
forms of protection during guardianship, all of which were aimed at restricting the authority of the guardian and bolstering accountability. From the earliest reception of Roman law, the glossators weakened the sentiment found in their texts that cast the guardian “in loco domini” in favor of other texts describing a more restrictive sphere of ability.163 The Romans themselves had undergone a similar shift in progressively limiting the ability of the tutor.164 Unable to manage their own affairs or self-advocate in any legally significant way while in the grips of their condition, the insane were in a vulnerable position. Guardians could abuse their authority in a number of ways. Accursius listed several: the guardian could deny support to their ward, not make an inventory, or ignore judicial orders to dispose of property or monetary assets properly.165 Either before or after the acquisition of an inheritance, a guardian would have an opportunity to fraudulently remove an item for himself.166 Accursius noted that “from the moment the case of a suspected tutor begins, he is under an interdict from administration.”167

One of the main forms of protection for the insane person was the inventory. The inventory should contain, according to “Tutores” [Cod. 5.37.24], “all things and instruments.”168

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163 Di Renzo Villata, *La Tutela*, 246
164 Ibid., 272-273
165 *Digestum infortiatum* (Lyon 1551), p. 162, Dig. 26.10.1, sv. “atrociora”: “Puta quia presens alimenta denegauit et probatum est eius mendacium, vel si data pecunia tutelam redemerit, vel si inuentarium non fecit, vel si pecuniam deponere vel in emptionem praediorum conuertere noluit iussus a iudice, vel euidenti fraude bona pupillorum alienauerit. Item si liberatus fraudulenter gessit tutelam filiorum patroni, ut Institut. eo. §. sed si quis et §. liberatus [Inst. 1.26.10-11], et supra de offic praefecte. urb. i. §. item [Dig. 1.12.1], et supra de tut. l. In eos [Dig. 26.1.9], et supra de admini. tut. l. Tutor qui. §. Item solent [Dig. 26.7.27], et infra l. iii. §. Tutor qui et §. Tutores [Dig. 26.7.3.], et infra l. proxi [Dig. 26.7.4] et C. de adm. tut. l. Nisi [Cod. 5.37.4].”
166 Ibid. p. 164, Dig. 26.10.3.5, sv. “crimine”: “Cum subractit res haereditarias ante aditam haereditatem, vel post aditam hereditatem, sed ante apprehensam possessionem. Et quod subiicit, si minus, id est cum subractit post aditam haereditatem et apprehensam possessionem, scilicet ad haerede pupillo, tunc enim conueniri potest furt, quia rei hereditariae non sit furtae nisi in casibus, ut infra de fur. l. Rei hereditariae, et l. seq. [Dig. 47.2.69-70] et infra de cri. expl. haere. l. ii et l. fi. [Dig. 47.192, 6]. Vel dic si minus, id est, si non potest accusari crimine expilatae hereditatis, quia non habet locum, quod est ut dixi. Innuit ergo hic, quod pro ante gestis non potest accusari ut suspectus, et sic est contra Institut. eo §. Sed et antequam [Inst. 1.26.5]. Solu. ut ibi.”
167 Ibid. p. 169, Dig. 26.10.10, sv. “non timet”: “Quia ab eo tempore quo cepit causa suspecti moueri, interdicitur ei administratio, ut Institut. eo. §. si quis autem. [Inst. 1.26.7].”
168 Cod. 5.37.24: “Tutores vel curatores, mox quam fuerint ordinati, sub praesentia publicarum personarum inventarium sollemniter rerum omnium et instrumentorum facere curabant.”
Bartolus understood this to mean all corporal items and incorporeal rights possessed by the insane person. The guardian is not, however, bound to make an inventory of items or instruments that he does not find among the estate of the minor or insane person, such as debts owed to the insane for which instruments are not found among the documents of the ward.\(^{169}\) In short, Bartolus held that a guardian could not be expected to go to unreasonable lengths to completely catalogue the estate they were about to take administration of. As we saw in Accursius’ list, the mere omission of creating an inventory was enough to render a guardian suspect. The act was so essential to the office of guardian that, according to Odofredus, “there is a legitimate exception against [a tutor or curator] that he cannot do anything unless he has made an inventory, that is, unless he show that he had made an inventory.”\(^{170}\) Given this necessity, the jurists discussed an acceptable timeframe in which an inventory could be made. Odofredus referred to a number of texts that could be interpreted to provide a limit of three or four months from the granting of a curator, but he preferred that the instrument should be made “as soon as one is constituted, which we understand [to mean] as soon as is conveniently possible.”\(^{171}\)

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\(^{169}\) Bartolus, *Commentaria in primam Infortiati partem* (Lyon 1555), fol. 63r, Dig. 26.7.7: “Quaero quae res debent poni in inuentario. Textus in l. Tutores [Cod. 5.37.24] dicit quod debeat fieri inuentarium omnium rerum et instrumentorum. Quod intellige verum, scilicet omnium corporalium. Et quod dicit, instrumentorum, intellige, id est, iurium incorporalium, de quibus apparent instrumenta, seu probationes in bonis pupilli. Ex hoc concludo duo. Primo quod debita a pupillo aliiis tutor non tenet ponere in inuentario, quia illorum ius non est res pupilli, sed est res creditoris ipsius. Pro hoc textum in lege ultima. C. de alimen. pupil. praestandis [Cod. 5.50.2], non tamen nego quin possit ponere, si uult. Secundo concludo quod si sunt debita aliqua ipsi pupillo, de quibus in bonis suis non reperiatur instrumentum, quod tutor non tenetur ponere in inuentario antequam exigat. Quod probo: inuentarium dicitur quia repertur et inuenta in bonis pupilli ibi describuntur, ut hic not. in prima glossa. Sed inueniri dicitur illud proprie quod manibus apprehenditur, ut Inst. de re. diui. §. Item lapilli [Inst. 2.1.18], C. de fideius. l. Si barsatorem [Cod. 8.41.13] et not. per doctores in l. Licet. de acqui. pos. [Dig. 41.2.45]. Sed talia debita non inueniuntur, nec capi possint manibus, ergo non possunt scribi in inuentario. Postquam vero illa debita erunt exacta, poterunt in inuentario poni, sicut de nouo obuenientes, ut l. fi. §. tali. C. de cura. fur. [Cod. 5.70.7.7].”

\(^{170}\) Odofredus, *Lectura super Infortiato* (Lyon 1552), fol. 38r, Dig. 26.7.7: “Or, circa materiam istam, collegitis unam practicam ubicumque experitur quis ut tutor vel curator ista est legitima exceptio contra eum non potest gerere nisi fecerit inuentarium unde nisi ostendat se fecisse inuentarium, repellitur.”

\(^{171}\) Ibid.: “Infra quod tempus tenetur facere inuentarium, dicunt quidam tres menses, si res sunt presto, alias infra annum, ut C. de iur. delib. l. Sancimus. §. Si autem [Cod. 6.30.18.4]. Alii dicunt infra iiiis menses, ad instar clerici qui legitimam tutelam potest suscipere, infra iiiis menses, ut C. De episco. et cle. Autem presbyteros [Cod. 1.3.6]."
a presumption of *dolus*, that is, of fraud or ill-intent, on behalf of the guardian. Bartolus clarified that this was true only when the guardian had begun conducting business with the property of his ward.\(^{172}\)

But I say that if a guardian performed no administration, although he was slow in making an inventory and slow in discharging his duty, nothing can be objected by anyone. But if he began his administration before making an inventory, nothing can be objected from the inventory, since he is a guardian and must make one, but he can be accused as suspect.

The Venetian statutes of 1242 hoped to avoid delays or failure to make an inventory entirely. The court, either the Giudici del Proprio or the Procuratori di San Marco, would not release the instrument confirming the guardian's authority to act in that capacity until he had presented the court with a completed inventory.\(^{173}\) Because the guardian would have to render an account of his administration when his ward returned to sanity, the inventory made it more difficult for a deceitful guardian to hide maladministration or graft.

A further protection possessed by the insane concerned the authority the guardian had to alienate property. We have already seen that the perceived best interests of the insane had a role in their ability to acquire inheritances. The same held as the guiding principle of the guardian’s ability to alienate. Furthermore, the jurists also continued a Roman position holding that a judge must confirm significant alienations of property in order to make certain that it was in the best

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\(^{172}\) Bartolus, *Commentaria in primam Infortiati partem* (Lyon 1555), fol. 63r, Dig. 26.7.7: “Dico ergo quod si tutor nil administrauit, licet tardius venerit ad conficiendum inuentarium, et tardius venerit ad gerendum, nihil potest ei obici a quocunque, sed si si administravit antequam faceret inuentarium, nil potest obici inuentario, quia tutor est et facere debet, sed posset accusari ut suspexit, ut dictis legibus.”

\(^{173}\) Cessi, ed., *Statuti veneziani*, 104, II.2: “Et volumus quod tutori non detur instrumentum tutele, sed penes iudices retenatur, donec ipsi tutores cartam fecerint, in qua scripta sint omnia mobilia et immobilia et instrumenta de debitis per singula, que intromittunt de bonis minoris, et iudices sint presentes ad videndum et extimandum bona, que debent in carta denotari, et carta ista detur in manibus Procuratorum Sancti Marci.”
interest of the ward. The most common reasons for such alienations would be the payment of debts or the provision of a dowry. Other jurists, such as Guido de Suzzarra and Jacobus de Arena allowed for the provision of clothing or expenses to maintain one’s status, the so-called neccesitas famae, as valid reasons for alienation as well, though other jurists would hold to a more restrictive position. The “legitimate way” in which a guardian can make a sale, according to Accursius, involved “a just price, a need for the good of the madman, and the imposition of a [judicial] decree.” Odofredus seconded that, because a guardian can only do things pertaining to the best interest of their wards, a guardian cannot make donations without cause. In the case of a donation without reciprocal benefit to the insane person, such as the price that would come to the insane from a sale, would have made such arrangements less likely to be understood as benefiting the insane person. Rolandinus de Passageriis (fl. late twelfth century) provided a concise summation of this principle:

Concerning what must be considered in the sale of the property of a pupillus, one must note and pay attention that the property of the pupillus must be sold because of a debt or the clear benefit of the pupillus. Also that if there are not movable goods in the inheritance that can be sold, that legitimate property can be publicly sold, that is publicly announced in the communal palace or in the contada where the property is located, or in the contada where the pupillus lives, that more may be given. Also that the creditor, who will receive the price, be present, if the sale

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175 Di Renzo Villata, La Tutela, 286-287, 292.
176 Digestum Infortiatum (Lyon 1627), col. 370, Dig. 27.10.11, sv. “legitmo modo”: “id est iusto pretio et dementis utilitate exigente, et decreto etiam interposito, cum alienatio idipsum exigeret, quia sterilis erat. Acc.”
177 Odofredus, Lectura super Infortiato (Lyon 1552), fol. 41r, Dig. 26.7.22: “Tutor potest peragere ea que pertinent ad utilitatem pupilli, et ideo tutor ad utilitatem publicam potest nouare, rem in iudicium deducere, sed non potest ponare et donationes facere a tutore sine causa, non valent. Hoc dicit.”
178 Rolandinus de Passageriis, Summa artis notariae (Lyon 1559), p. 88, I. “Tutor quae seruare debet in venditione rei pupillaris”: “Quia haec circa rei pupillaris venditionem consideranda sunt, notandum et attendendum est diligenter, quod res pupilli vendi debent ob aes alienum, aut ob eudiantem utilitatem pupilli, causa cognita quod ita sit. Et quod non sint res mobiles in haereditate commode vendendae, et quod subhastentur res legitime, id est, publice praeconizetur, in palatio communi, aut in contrata, ubi sita est res, siue in contrata ubi habitat pupillus, ut plus offerenti detur, et quod presens sit creditor, qui recepturus est pecuniam pretii, si venditur ob aes alienum, aut quod causa quare venditur assignetur, et quod ipsa venditio fiat coram potestate, vel iudice, decretum et authoritatem interponente.”
is made because of a debt... and that the sale be made in the presence of the podestà or judge, and occur with their authority and decree.

Rolandinus stressed the “clear benefit” of the insane in the sale in cases where a debt did not require payment. As a means of both interpreting and enforcing this principle, Rolandinus stressed the intervention of public authority. In Venice, for example, particularly after the rise of the Procuratori, the actual administrators of the guardianship worked in conjunction with the official guardians, the Procuratori, who could exercise oversight in matters of alienation. Beyond public authority, Rolandinus stressed public presence as a further means of interpretation and enforcement. A guardian would have much more difficulty in executing a questionable transaction if required to do so in the public eye and be subjected to considerations of reputation and common knowledge that such publicity would entail.

If the inventory and judicial oversight failed to deter or prevent misadministration, a guardian could be accused by a wide range of persons. If, for example, multiple guardians attended to one insane person, any one of the guardians could accuse another of malfeasance even during the term of guardianship. According to Jacobus de Ravanis, generally, an action existed only after the completion of one's guardianship. The Romans had altered this for guardians of the insane. Since the end of insanity was not as certain as the end of legal minority, ancient Roman jurists allowed for actions against the curator through the device of the *actio negotiorum gestorum*, the action available when one conducted the business of another who was

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180 Jacobus de Ravanis, *Lectura super Codice* (Paris 1519), fol. 243v, Cod. 5.37.2: “Duo sunt curatores; unus non potest conueniri alium durante cura. Hoc dicit. Ad legem istam opponitur, immo lex dicit quod curator potest conueniri durante cura, unde opponitur de lege, ff. rem. pu. sal. fo. l. Nisi [recte ‘Non quasi’]. §. Cura [Dig. 46.6.4.7]. Dicit glossa ibi loquitur de curatore furioso, hic de curatore adolescenti. Dico quod immo idem est in utroque. Sed opponitur ad legem istam de l. ff. de tutelis et ra. distr. l. Si cum adhuc [Dig. 27.3.16] et ff. de contrari. tute. act. l. i. §. finito \[?\]. Dico quod durante cura curator potest conueniri, quod verum est quantum ad hoc ut reddatur ratio unius administrationis unius actus vel ut soluatur debitum. Sed generali negotio gesto non potest conueniri nisi finito officio ut hic.”
absent, unaware, or who had otherwise not given authorization. Jacobus broadened this ability to be more immediately responsive to particular transactions. “I say that a guardian can be sued during his guardianship, which is true insofar as an accounting should be rendered for the administration of a single act, or in order for a debt to be paid. But generally, one cannot be sued for conducting business unless the office is completed.”

Beyond suit by a colleague, guardians could be accused by anyone, including women. Azo noted that the accusation or postulation of a suspect guardian is almost public. Anyone, even women, could make an accusation, though Azo limited this to women who were “moved by affection” such as a mother, sister, or nurse. Furthermore, a guardian could not be accused before he had taken up administration, but if he had ceased to do so, he could be accused as suspect because of negligence. In this way, the public perception of both maladministration and the lack of administration could result in an investigation of the guardian. Although the furiosus was often the object of such protections, he could also be liable in certain circumstances for the dishonest actions of his guardian on his behalf. Jacobus de Arena put the case simply: “If [a guardian] should be delinquent, then say that the pupillus has either been made wealthier [by

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181 Ibid.
182 Azo, *Summa Codicis* (Lyon 1540), fol. 138v, Cod. 5.43: “Est autem hec accusatio seu postulatio suspecti tutoris quasi publica. Hoc est omnibus partibus quinimmo et mulieres admittuntur, sed he sole que pietate necessitudinis ducte ad hoc procedunt, ut puta mater, nutrix quoque, et auia, et soror. Sed et si qua alia fuerit mulier cuius pretor perpensam pietatem intellexerit, non sexus vercundiam egredientis, sed pietate productam non continere iniuriam pupillorum admitteret eam ad accusationem.” See also Bartolus, *Commentaria in primam Infortiati partem* (Lyon 1555), fol. 76r-76v, Dig. 26.10.1: “Quilibet admittitur ad acusandum tutorem de suspecto, etiam mulier, si ex pietate moeetur. Hoc dicit. Nota quod publicum est illud, quod omnibus patet, quod facit ad multa. Opponitur quod mulieres non admittantur, ut infra de accusationibus l. Qui accusare [Dig. 48.2.8]. So. Speciale est hic.”

183 Azo, *Summa Codicis* (Lyon 1540), fol. 138v, Cod. 5.43: “Qui autem nihil gesserunt non possunt accusari suspecti, sed tamen possunt remoueri ut suspecti si dolo vel ignauia vel negligentia cessauerint, ut ff. e. Haec autem. §. Qui nihil [Dig. 26.10.4.4], et Inst. e. §. Sed et antequam [Inst. 1.26.5]. Vel iudex compelleit eos gerere, ut infra e. l. Preses [Cod. 5.43.3]. Vel dic quod antequam gerat ex dolo tamen accusatus suspexit, ut infra e. l. iii [Cod. 5.43.3] et quod dicitur in lege illa He. §. Qui [Dig. 26.10.4.4]. Si ob ignauiam vel negligentiam fecerit, id est, administrauerit postquam vero cepit gerere et propter dolum vel propter culpam, potest accusari suspexit.”
it] or he has not. In the first case, he will be bound. [for it].”¹⁸⁴ When a guardian would most likely have been a family member, this rule prevented a family from dishonestly increasing its substance by hiding behind the incapacity and impunity of a minor or insane member.

The numerous protections possessed by the insane with regard to their property in the *ius commune* illustrate another difference with English common law. Although the English crown certainly sought to protect the property of the insane from abuse, it did acknowledge that guardians had some rights to payment from the substance of their wards. In the area of guardianship, the king had to look to the interest of the insane person as well as himself. The jurists of the *ius commune* concerned themselves more closely with the rights of the insane and the inviolability of their property. Certainly, abuses occurred; more archival data is necessary to determine the extent and variety of exploitation of the insane even under guardianship. Still, the *ius commune* held more restrictive positions on the rights of the family to act as guardians and on the ability of guardians to dispose of the goods of their charges than English Common Law seems to have done.

¹⁸⁴ Jacobus de Arena, *Commentarii in universum ius civile* (s.l. 1541), fol. 245v, Cod. 5.39: “Si autem delinquat [the tutor or curator], tunc dic quod pupillus est ex hoc locupletior factus, aut non est. Primo casu tenetur, ut. ff. quan. ex fac. tuto. l. iii [Dig. 26.9.3] et concor.” See also *Digestum vetus* (Lyon 1569), col. 179, Dig. 2.2.3.1, sv. “coerceretur”: “Sed hoc priuilegium proficiet pupillo et ad tutorem poena spectabit, quod est iniquum. Dic ergo et pupillum teneri quatenus utitur, ut infra de dol. l. Sed si ex dolo [Dig. 4.3.15]. Vel dic ipse, scilicet pupillus, nam aut in totum debet probare, aut in totum reprobare, ut infra de admini. tut. l. Cum queritur [Dig. 26.7.16]. Prima placet et sibi imputet.” See also, Bartolus, *Commentaria in primam Digesti veteris parte* (Venice 1570), fol. 53v, Dig. 2.2.3.1: “Quero, quid si in impetratione tutoris, peruenit commodum ad pupillum? Respondeo: eatenus tenebitur pupillus, quatenus ad eum peruenit de commodo, ut in glo.et bene.” Baldus took a slightly different position, based on the special mandate held by procurators and the general mandate held by guardians. Any punishment would be suffered by the guardian, because he had conducted the fraudulent transaction on his own, without a specific mandate to do so. Baldus is against this: *Commentaria in primam Digesti veteris partem* (Lyon 1585), fol. 88v, Dig. 2.2.3.1: “In ea gl. ibi ut in tutore vel dic quod simile in tutore et procuratore, quia impetraatio procuratoris dependet essentialiter ab ipso principio a speciali mandato, vel ratificatione, nec alter valet. Sed in tutore, non dependet ab hoc, quia tutor habet officium suum liberum a lege, ut infra de admi. tu. l. Inter bonum [Dig. 26.7.48]. Unde valet quod tutor impetrauit et quia pena non potest cadere in dominum, cadit in ipsum impetranent.” Baldus, however, discussed punishment, while Jacobus and Bartolus referred to the profit that accrued to the pupillus (or furiosus) as a result of the fraud.
The insane then received a great deal of protection, at least theoretically, while under guardianship and still possessed certain rights due to them as members of a family or citizens of substance. Although care of the patrimony could often appear to be the primary concern, care of person also received a fair amount of attention by the jurists. In both cases, family care was the rule of the day; public authority frequently served to secure or augment the power of the family, particularly of the father. Perhaps most importantly, juristic discussions of guardianship focused on limiting the power of guardians, especially in the matter of inheritances, where the insane retained personal rights that no guardian could remove.
CHAPTER 5

FINGITUR CONSENTIRE: CONSENT, VOLITION, AND THE LEGAL AGENCY OF THE INSANE

The preceding chapter began the investigation of the interaction of the insane with the legal world of the Middle Ages through the intermediary figure of the guardian. The guardian possessed the ability to manage the daily affairs of the insane person either until death or the recovery of sanity. The question remains, though, whether the insane person him- or herself retained the legitimate ability to conduct any legally meaningful act. In short, did limited circumstances exist in which the insane could consent?

On the surface, the question seems laughable. Consent, in Roman and subsequently in canon law as well, provided the fuel for nearly every significant act; mutual understanding and agreement validated legal action. Almost every discussion of the insane in jurisprudential sources made reference in some way to their inability to give consent, an inability that largely defined insanity as a status. Huguccio, and jurists after him, argued for the criminal incapacity of the insane by showing how they could not consent to marriage, orders, vows, or baptism.\(^1\) The lack of consent was a mainstay of Roman law also: the insane could not contract marriages or enter into contracts of any kind.\(^2\) The plainest and most extreme statement of this principle in Roman law appeared early in the list of ancient \textit{regulae iuris}: “the insane can contract no business whatsoever, while the underage can do so with the authority of his guardian.”\(^3\) The implications of the rule are profound for the ability allowed to the insane. Even though the

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\(^1\) See Chapter 3.
\(^2\) Dig. 23.2.16.2: “Furor contrahi matrimonium non sinit, quia consensu opus est, sed recte contractum non impedit.”; Cod. 4.38.2: “Emptionem et venditionem consensum desiderare nec furiosi ullum esse consensum manifestum est. Intermissionis autem tempore furiosos maiores viginti quinque annis venditiones et alios quoslibet contractus posse facere non ambiquitur.”
\(^3\) Dig. 50.17.5: “In negotiis contrahendis alia causa habita est furiosorum, alia eorum qui fari possunt, quamvis actum rei non intellegent: nam furiosus nullum negoition contrahere potest, pupillus omnia tutore auctore agere potest.”
ancient Roman jurists considered the underage similar to the insane in that neither were capable of fully understanding a situation, the actions of someone underage still had legal force, provided that his guardian approve. The implication of this, that the actions of a furiosus would be invalid even if approved by the guardian, indicates a fundamental lack of legal agency by the insane that concurrent approval or post-factum ratification could not overcome. If a guardian acted as supervisor to ensure the soundness of the transaction at hand, the furiosus was so legally incapable as to close off even this possibility, one which was open to the similarly incapable minor.

Lacking the basic ability of legal agency, the insane seemed to be cut off from their world, from both the inter-personal and sacramental relationships that structured life in a community. Scholars have picked up on this as the fundamental aspect of the exclusion of the insane from society, and more generally, as the defining feature of insanity.4 Guardians could in some ways mediate this disconnection between the madman and society through the management of certain transactions and care for goods and family. For example, Justinian decreed that children of the insane could marry, with the dowry being furnished by the curator. But the jurists did not stop there. One of the more interesting and least commented on aspects of insanity jurisprudence is the way in which canonists and civilians probed the limits of consent by suggesting ways in which the insane could be said to consent.

This is a contemporary problem as well. The participation of the mentally ill in medical tests, trials, and treatments that could be helpful or potentially harmful raises the issue of informed consent. A common way of dealing with the problem today involves distinguishing

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4 Neaman, Suggestion of the Devil, 74, mentions that Roman law considered the madman as “a non-person.” Laharie, La folie au Moyen Age, 241-247, likewise only discusses the limitations, under both canon and secular law, enforced on the insane. For Fritz, Le discours du fou, 154, insanity is just one part of the general legal discourse on incapacity.
degrees of capacity, something that, as we have seen, was not a main feature of medieval jurisprudence.\(^5\) The problems posed by the requirements of informed consent have an impact not only in straightforward medical ethical situations, but also in criminal law. Can a court order medication in order to make a mentally ill defendant competent to stand trial? When such individuals “choose” to undergo medication, courts tend to regard this as a freely chosen action, even when the sanity of the individual is in question. As Erin Talati keenly observes, “only competent persons are free to make decisions that are not in their best interests.”\(^6\) Even today, with notions freedom of choice much more geared towards the individual than in much of medieval Europe, we still have an idea of what is generally socially acceptable as “filling in the gaps” for those who may not be able to make decisions for themselves.

The attention paid to the consent of the insane themselves shows an interest in integrating the insane as much as possible, or at least a rejection of the absolute exclusion contained in “In negotiis.”\(^7\) The differing opinions taken, particularly by in the thirteenth century, show an interesting split between an approach to law dependent on a strict interpretation of the texts, and one that was more practically oriented.

**Roman Law**

A solid foundation in ancient Roman jurisprudence is especially important when considering medieval approaches to the agency of the insane. Medieval jurists were heirs not only to the particular arguments advanced by the classical jurists, but also to their aims. Roman jurisprudence contained a number of metaphors or analogous images to explain the precise

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\(^7\) Dig. 50.17.5. See note 3 above.
abilities and inabilities of the insane and situate them within legal society. Most frequently, ancient jurists considered the insane as holding the position of the absent, the sleeping, or the dead. For example, according to Julianus, an insane person cannot perform any legal act because he is “in all things and in all ways held as one asleep or absent.”\(^8\) Ulpian posed a situation in which a tenant continues to farm the land he rents after the end of his lease without an express agreement between himself and the landlord. In normal circumstances, Ulpian understood that the lease continued through some kind of “bare consent,” that is, consent without expression through a verbal or written contract. On the other hand, if the landlord had died or gone mad, the lease could not be renewed in this way. For Ulpian, the insane had the same ability to consent as the dead.\(^9\) A final example, from Pomponius concerns a testamentary bequest that leaves to two men the choice of a slave from the estate of the deceased. If both men choose the same slave, he will be held jointly. If, however, one should die or go mad, he will no longer be a joint slave since that owner ceases to consent to such an arrangement.\(^10\) In each instance, the images of absence, sleep, and death provide a more tangible insight into the legal position of the insane as put forward in Dig. 50.17.5.

An opposite strain of thought existed, however, that used the same basic strategy of arguing through analogous identities. This alternate way of thinking held that the insane possessed some, albeit limited, legal agency. Why did this inconsistency emerge within the

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\(^8\) Dig. 29.7.2.3: “Furiosus non intellegitur codicillos facere, quia nec aliud quicquam agere intellegitur, cum per omnia et in omnibus absentis vel quiescentis loco habetur.”

\(^9\) Dig. 19.2.14: “Qui ad certum tempus conducit, finito quoque tempore colonus est: intellegitur enim dominus, cum patitur colonum in fundo esse, ex integro locare, et huiusmodi contractus neque verba neque scripturam utique desiderant, sed nudo consensu convalescunt: et ideo si interim dominus furere coeperit vel decesserit, fieri non posse marcellus ait, ut locatio redintegretur, et est hoc verum.”

\(^10\) Dig. 33.5.8.2: “Unius hominis mihi et tibi optio data est: cum ego optassem, si non mutassem voluntatem, deinde tu eundem optaveris, utriusque nostrum servum futurum: quod si ante decessissent vel furiosus factus essem, non futurum communem, quia non videor consentire, qui sentire non possim: humanius autem erit, ut et in hoc casu quasi semel electione facta fiat communis.”
Roman tradition? Two related reasons exist. Roman law acknowledged that the insane were not a thoroughly marginalized group, as we have seen. Insanity could strike at any level of society, and the jurists adamantly held that insanity did not serve as grounds for losing one’s status or place in society. The insane, even when they could not exercise their duties, were still at least conceptually part of society and retained their offices. With this essential integration in mind, the Roman jurists perceived a gap between the implications of their theories and the demands of practice. The second reason flows from this. If the insane did not exist entirely on the margins of society, then the inflexible exclusion following from “In negotiis” required a release of some kind. The obvious means of integration might have been merely the reliance on the curator, the guardian granted to the insane person. The curator could, for example, manage contracts, conduct cases, and even provide dowries for the children of their wards. Curatores were a viable link between the insane and society. It is interesting then that the classical jurists imagined ways in which the insane retained agency of their own. In this regard, they might have stopped at the concept of the lucid interval, since the insane regained full legal agency during such an interval. The jurists, however, went even further, imagining valid actions available to the insane in the grips of their madness.

For example, a husband could repudiate his insane wife. As the jurist Julianus explained, a woman could be repudiated even if she were not aware of it. Insanity posed no further problem

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11 Cod. 4.37.7: “Sancimus veterum dubitatione semota licentiam habere furiosi curatorem dissolvere, si maluerit, societatem furiosi, et sociis licere ei renuntiare. Et quemadmodum in omnibus aliis contractibus legitimam auctoritatem ei dedimus, ita et in hac parte eum permittimus competenter commodis furiosi providere.” See also Cod. 5.37.28.pr.: “Sancimus neminem tutorum vel curatorum pupilli vel adulti vel furiosi alienumque personarum, quibus tam ex veteribus quam ex nostris constitutionibus curatores creantur, defensionem quam pro lite susceperunt recusare, sed ab initio liitis modis omnibus memoratas personas defendere et litem praeparatam secundum leges instruire scientes, quod et hoc munus necessarium est tam tutelae quam curationi.”; and Cod. 5.4.25.3: “His itaque dubitatis tales ambiguitates decidentes sancimus hoc repleri, quod divi Marci constitutioni deesse videtur, ut non solum dementis, sed etiam furiosi liberi cuiuscumque sexus possint legitimas contrahere nuptias, tam dote quam ante nuptias donatione a curatore eorum praestanda.”
than any other kind of lack of awareness. Marcellus held that the insane enjoyed some testamentary rights and could receive legacies, just as someone unaware of the grant could.  

A final example regards the *peculium*, an institution of Roman law in which a piece of property or some of money would be granted to a son or slave, though the father or master still retained ownership. The father or master incurred liability for any contracts conducted through the *peculium*, and he enjoyed rights to any profits, according to the specific granting of the *peculium*. If the father or master had gone mad, he could still acquire through a previously-granted *peculium* because awareness was not required. Paulus adduced another reason, however. Even an insane or underage heir to the original grantor could acquire through the initial consent given in granting the *peculium*.  

This last moves beyond the analogy to the unaware and into the realm of creating a kind of consent for the insane. From the previous example of the *peculium*, certain voluntary acts create a presumption of continuation, a legal fiction that we shall see at work particularly in canon law. For example, Ulpian used just such an idea in explaining how an insane father retained *patriapotestas* even if the child were conceived during a bout of insanity. “But if both the husband and wife are insane and then conceive, the offspring is born into the power of the father, as if some remains of volition continue in the insane.”

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12 Dig. 28.1.16.1: “Marcellus notat: furiosus quoque testamenti factionem habet, licet testamentum facere non potest: ideo autem habet testamenti factionem, quia potest sibi adquirere legatum vel fideicommissum: nam etiam compotibus mentis personales actiones etiam ignorantibus adquiruntur.” The text itself was excerpted from Pomponius.  
14 Dig. 41.2.1.5: “Item adquirimus possessionem per servum aut filium, qui in potestate est, et quidem earum rerum, quas peculiariter tenent, etiam ignorantes, sicut Sabino et Cassio et Iuliano placuit, quia nostra voluntate intellegantur possidere, qui eis peculium habere permisserimus. Igitur ex causa peculiari et infans et furiosus adquirunt possessionem et usuapiunt, et heres, si hereditarius servus emat.”  
15 Dig. 1.6.8: “Sed et si ambo in furore agant et uxor et maritus et tunc concipiat, partus in potestate patris nascetur, quasi voluntatis reliquiis in furiosis manentibus: nam cum consistat matrimonium altero furente, consistet et utroque.”
mad, he does not lose his property, since his intention to possess does not change. Likewise, an insane person can still take possession through usucaption, provided that his occupancy had begun before the onset of madness. We have already seen, however, that a strong counter-argument to this way of thinking existed in texts such as “Qui ad certum” that equated insanity with a kind of death. Roman attitudes towards any kind of fictive intent were often ambiguous.

This ambiguity is especially clear when considering the major images used to explain the abilities and inabilities of the insane: absence and sleep. The jurists employed these analogous conditions for different purposes, and did not always agree on the validity of such identifications. “Where presence is required, but not verbal [consent], a mute or deaf man can consent if he has understanding. An insane person however, is in the position of someone absent.” Absence was the most frequent and problematic image. In many cases, the identification between insanity and absence served the purpose of limiting participation in legal proceedings, or even putting a stop to them entirely. For example, a person who is the subject of a case is not considered to be present if he is insane. An award by an arbiter is not binding unless made in the presence of

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16 Dig. 41.2.27: “Si is, qui animo possessionem saltus retineret, furere coepisset, non potest, dum fureret, eius saltus possessionem amittere, quia furiosus non potest desinere animo possidere.”
17 Dig. 41.3.4.3: “Furiosus quod ante furorem possidere coepit, usucapit. Sed haec persona ita demum usucapere potest, si ex ea causa possideat, ex qua usucapio sequitur.”
18 Dig. 19.2.14. See n. 9.
19 Dig. 19.2.14. See n. 9.
20 Dig. 50.16.246: “Apud Labeonem pithanon ita scriptum est: exhibet, qui praestat eius de quo agitur praesentiam. Nam etiam qui sistit, praestat eius de quo agitur praesentiam, nec tamen eum exhibet: et qui mutum aut furiosum aut infatatem exhibet, non potest videri eius praestare praesentiam: nemo enim ex eo genere praesens satis apte appellari potest.”
both parties; such an award could not be made if one of the parties were insane.\textsuperscript{21} Indeed, any act required to be done in one’s presence demanded his awareness.\textsuperscript{22}

On the other hand, absence might allow a case to proceed. For example, if a son under his father’s power were insulted in his father’s presence, only the father had a right to the action. If however the father could not advance the case “because of insanity or some other mental defect,” the action on the insult resided with the son, “because the father is like one who is not present.”\textsuperscript{23}

Even when activity occurred through the \textit{curator}, the analogy with the absent allowed flexibility of action. A \textit{curator} could not release his ward from a prior stipulation, the basic form of the Roman contract. The \textit{curator} could, however, substitute new terms for the stipulation and then obtain a release under these new terms. According to Ulpian, this device was introduced from a common practice dealing with the absent.\textsuperscript{24}

The connection with absence could function for fundamentally different reasons then, depending on the particular context. Context drove some jurists to reject the comparison outright. For example, an absent person could be appointed as a \textit{procurator}, provided that he be informed and give his consent. The comparison breaks down specifically because of the requirement for some kind of consent. Paulus, in the short excerpt, did not address the possibility of the insane

\textsuperscript{21} Dig. 4.8.27.5: “Coram autem dicere sententiam videtur, qui sapientibus dictit: ceterum coram furioso vel demente non videtur dicit: item coram pupillo non videri sententiam dictam, nisi tutor praesens fuit: et ita de his omnibus\textsuperscript{22} Iulianus libro quarto digestorum scribit.”

\textsuperscript{22} Dig. 50.16.209: “‘Coram Titio’ aliquid facere iussus non videtur praesente eo fecisse, nisi is intellegat: itaque si furiosus aut infans sit aut dormiat, non videtur coram eo fecisse. Scire autem, non etiam velle is debet: nam et invito eo recte fit quod iussum est.”

\textsuperscript{23} Dig. 47.10.17.11: “Filio familias iniuriam passo, si praesens sit pater, agere tamen non possit propter furorem vel quem alium casum dementiae, puto competere iniuriarum actionem: nam et hic pater eius absentis loco est.”

\textsuperscript{24} Dig. 46.4.13.10: “Tutor, curator furiosi acceptum ferre non potuit, nec procurator quidem potest facere acceptum: sed hi omnes debent novare (possunt enim) et sic acepto facere. Ne his quidem accepto fieri potest, sed novatione facta potuerunt liberari per acceptationem. Nam et in absentium persona hoc remedio uti solemus: stipulamur ab aliquo id novandi causa, quod nobis absentis debet, et ita accepto liberamus, a quo stipulati sumus: ita fiet, ut absens novatione, praesens acceptatione liberetur.”
ratifying the appointment in a lucid interval. Another, and much more problematic example, arises in connection with the action for recovery of a dowry. Upon the dissolution of a marriage, the wife retained control over her dowry. Her father did have an action for its recovery, but it required her consent. In the paragraph “Voluntatem,” Ulpian considered the two special cases of absence and insanity in light of this requirement. If the daughter were insane, she should be understood as consenting on the grounds that “a daughter seems to consent to her father unless she clearly opposes him.” The insane daughter’s inability to oppose functions as consent in this situation. Consideration of an absent daughter throws this inability into stark relief. “But if the daughter is absent, her father will not act with her consent, and he will have to furnish surety that she will ratify it.” A sane daughter must be aware in order to oppose. Frustratingly, Ulpian did not provide a reason why a sane daughter needed to be aware, but an insane daughter did not. The insane and the absent did not occupy the same position in this instance, though the insane here appear to possess a kind of consent.

These reflections in Roman law would exercise an important influence on subsequent jurisprudence first by providing a number of images and rules for the agency of the insane. The foremost among these was a connection between the insane and the unaware, sometimes mediated through the figures of the sleeping or the absent. In cases wherein the unaware could be the author or subject of an action, the insane could be as well. Some jurists went even further

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25 Dig. 3.3.1.3-3.3.2: “Dari autem procurator et absens potest, Dummodo certus sit qui datus intellegetur et is ratum habuerit. Furiosus non est habendus absentis loco, quia in eo animus deest, ut ratum habere non possit.” The point is made through a blending of Ulpian in Dig. 3.3.1 and Paulus in Dig. 3.3.2.

26 Dig. 24.3.2.2: “Voluntatem autem filiae, cum pater agit de dote, utrum sic accipimus, ut consentiat an vero ne contradicat filia? Et est ab imperatore Antonino rescriptum filiam, nisi evidenter contradicat, videri consentire patri. Et Iulianus libro quadragesimo octavo digestorum scriptit quasi ex voluntate filiae videri experiri patrem, si furiosam filiam habeat: nam ubi non potest per dementiam contradicere, consentire quis eam merito credet. Sed si absens filia sit, dicendum erit non ex voluntate eius id factum cavendumque ratam rem filiam habituram a patre: ubi enim sapit, scire eam exigimus, ut videatur non contradicere.”

27 Watson, ed. Digest, 2.259.
than this, and ascribed a fictive, limited variety of consent to the insane, as in “Voluntatem” (Dig. 24.3.2.2) or “Patre furioso” (Dig. 1.6.8), for example. This leads to the second great legacy of Roman jurisprudence: the extent to which the jurists were willing to go in order to preserve the integration of the insane into society. Of course, in the ancient Roman Empire, as well as in other times and places, the poor and lower classes who fell into insanity likely faced a greater degree of exclusion and neglect than their wealthier counterparts. The mere fact of insanity was not, however, the reason for this gap in treatment. Poorer families were likely less able to maintain members who went mad. However marginalized these unfortunates might have been, insanity was not the main cause of their exclusion. Whether through the retention of status or office or the particular allowances made for limited spheres of legal action, Roman jurists attempted to integrate the insane into their socio-legal world as much as possible without outright contradicting their fundamental principles.

If we turn to the Codex, particularly to Justinian’s own legislation, we find a much different focus. Guardianship of the insane, although an institution of Roman law from the Twelve Tables, received a revival and revision from Justinian. The abilities of the insane to interact with the legal world through their curators mentioned above all derived from Justinian’s legislation. Of the sixteen Justinianic leges dealing with madness in a substantial way, thirteen center on the abilities, duties, or appointments of guardians. The emphasis on guardianship has important ramifications for the role of the insane in the later Roman legal landscape. The classical jurists embraced guardianship as well a careful analysis of the particular disabilities of the insane as a way of defining their precise level of legal agency. This is the kind of

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28 Those involving guardianship in some way: Cod. 1.4.27, Cod. 1.4.28, Cod. 1.4.31, Cod. 4.37.7, Cod. 5.4.25, Cod. 5.37.28, Cod. 5.68.1, Cod. 5.70.6, Cod. 5.70.7, Cod. 6.49.7, Cod. 9.51.13, and Cod. 7.40.2. The decrees of Justinian not involving guardianship: Cod. 3.33.12, Cod. 6.22.9, and Cod. 6.26.9.
sophisticated analysis we might expect of the so-called “priests of the law,” those who devoted
themselves to the science of law at its highest levels. The imagery employed by the jurists is
remarkably absent from the Codex. Justinian’s decrees instead appear as a more practical
response. In many of his texts, Justinian expressly set out to clarify controversies of the past, and
guardianship figured into many of his solutions. Take for example the question of whether the
children of the insane could marry. Justinian noted that the jurists had allowed this on the
grounds that such children could marry because “they thought it sufficient that the father not
oppose [the marriage].”29 Rather than expanding on the technical distinction between consent
and non-opposition, Justinian quickly proceeded to a more practical solution to the logistical
problem of dowry provision: the guardians of an insane father could negotiate and furnish the
dowry under the supervision of the local governor or bishop.30

The Roman legacy would be particularly important for the jurisprudence to come. It
provided medieval jurists with the tools for thinking about insanity as an integrated feature of the
socio-legal landscape. This next wave of European jurists was not bound to take up this way of
thinking. Justinian, for example, who was closer to the body of ancient jurisprudence than any
later canonist or civilian could claim to be, did not actively engage a line of thinking that
attributed agency to the insane themselves, but instead focused on the office of guardian as a link
between the furiosus and the world. Medieval jurists could have adopted a similar emphasis.

29 Cod. 5.4.25: “Et filiam quidem furiosi marito posse copulari omnes paene iuris antiqui conditores admiserunt:
sufficere enim putaverunt, si pater non contradictat.”
30 Ibid. “His itaque dubitatis tales ambiguitates decidentes sancimus hoc repleri, quod divi Marci constitutioni deesse
videtur, ut non solum dementis, sed etiam furiosi liberi cuiuscumque sexus possint legitimas contrahere nuptias, tam
dote quam ante nuptias donatione a curator eorum praestanda. Aestimatione tamen in hac quidem regia urbe
excellentissimi praefecti urbis, in provinciis autem virorum clarissimorum earum praesidium vel locorum antistitum
tam opinione personae quam moderatione dotis et ante nuptias donationis constituenda, praesentibus tam curatoribus
dementis vel furiosi quam his, qui ex genere eorum nobiliores sunt. Ita tamen, ut nulla ex hac causa oriatur vel in
hac regia urbe vel in provinciis iactura substantiae furiosi vel mente capti, sed gratis omnia procedant, ne tale
hominum infortunium etiam expensarum incremento praegravetur.”
Instead, the civilians in particular clarified and built upon the Roman inheritance and ultimately devised a new way of ascribing consent to the insane. Canonists, on the other hand, tended to treat the consent of insane more reservedly. I will show that this was not so much a slavish adherence to the doctrines of their source texts, but rather a fundamentally different appreciation of the role of the individual. Still, civilians and canonists alike settled on the figure of the *furiosus* as an ideal test case for the limits of consent.

**Canon Law and the Enduring Will**

Consent is an important concept in canon law. As we saw, by the later twelfth century, Huguccio and his followers broke the main image of the insane away from the ignorant and instead defined them through their lack of consent to the criminal act. The four main decretals in the Liber extra, all of Innocent III, dealing with insanity also involve the idea of consent in some way. “Cum dilectus” (X 3.27.3) and “Sicut tenor” (X 3.31.15) both center on the inability of the insane to make monastic vows. “Dilectus filius” (X 4.1.24) handles the incapacity to consent to marriage. Each of these three examples turned on the proof; if insanity could be proven, consent ipso facto could not have been present. Only the fourth decretal, “Maiores” (X 3.42.3), which dealt with the consent necessary for baptism, allowed for some measure of consent on the part of the insane.

“Maiores” is a response of Innocent III to Imbert d'Aiguières, Archbishop of Arles, in 1201. In a region of France beset by heresy, Imbert was a rare rock of support for Innocent

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31 E.g. Huguccio, *Summa decretorum* (Admont, Stiftsbibl. 7), fol. 264v, C.15 q.1 c.5, sv. “nescit”: “Ex toto, id est, non cognoscit id quod, ut infans, furiosus, ebrius, dormiens. Alias quandoque nesciens peccat, ut supra eodem q.i. Merito [C.15 q.1 c.1], et xxxii. q.vii. Quemadmodum [C.32 c.7 c.10].Hinc aperte colligitur quod ea que fiunt a furiosis non imputantur, quia sensum uel discretionem non habent, arg. infra. proximo. [C.15 q.1 c.6], C. iii. q.viii. Indicans [C.3 q.9 c.14]. Unde tempore furoris nec matimonium potest contrahere nec aliquem contractum qui consensum exigat celebrare, nisi tempore intermissionis, quia furiosi nullus est consensus, ut xxxii. q.vii. Neque [C.32 q.7 c.26], et C. l. iii. de contrahen. empt. [Cod. 4.38.4].” Huguccio reinforced the non-responsibility of the insane for criminal acts by linking it to their general incapacity to give consent.
among the local bishops. He posed a number of doctrinal questions that the Cathars had raised in Arles, chiefly the validity of infant baptism. From Innocent’s response, we can roughly reconstruct the main objection raised by the heretics, namely that infants could not understand and consent to baptism, and that the sacrament therefore had no salutary effect for them. As a response or possibly a preemption, the heretics added that baptism could then be validly conferred on sleeping or insane adults, who, they must have added, possessed the same awareness and degree of consent as infants.

Among his answers to these questions, Innocent responded that because original sin is contracted without consent, baptism can remit it without consent. Likewise, actual sin, which one can only contract voluntarily, can only be remitted voluntarily. Because infants are incapable of voluntarily sinning, they have no need for a voluntary baptism. This sets up Innocent for his response to the counter-argument based on the insane. He continued by addressing why then, baptism does not remove even original sin for the insane. Innocent based his answer on the eternal effects of original and actual sin: “The punishment of original sin is lacking the vision of God, but the punishment for actual sin is the perpetual torment of hell. Therefore, if the first is

32 Hélène Tillmann, *Innocent III*, Europe in the Middle Ages, Selected Studies v. 12, Trans. Walter Sax (Amsterdam: 1980), 245-246. The bishops of Toulouse, Béziers, Uzès, Auch, Valence, and Rodez had been deposed or compelled to resign around this time because of the influence of heresy in their dioceses.

33 X 3.42.3: “Quibusdam igitur quaestionibus, quas contra catholicos haereticij moverant, nos postulas respondere. Asserunt enim, parvulis inutiliter baptismis conferri, quod nituntur tam ratione quam auctoritate probare, illud primo et praecipue inducentes, quod, quum secundum verbum Iacobi Apostoli, dicentis in epistola sua: ‘Caritas operit multitudinem peccatorum,’ et iuxta illud testimonium veritatis in evangelio de peccatrice, quae ipsius pedes laverat, perhibentis: ‘Dimissa sunt ei peccata multa, quoniam dixit multum:’ non nisi per caritatem et in caritate crimina dimittuntur, parvulis, qui nec sentiunt, nec consentiunt, et caritatem non habent, quae sentientibus et consentientibus tantum infunditur, peccatum non dimittitur in baptismo. Et sic eis baptismis non conferit, quia non est talibus conferendum. In evangelio quoque legitur: ‘Qui crediderit et baptizatus fuerit, salvus erit, qui autem non crediderit, condemnatur; unde parvuli, sive fuerint sive non fuerint baptizati, condemnatione, utpote non credentes’.”

34 Ibid.: “Verum quidam ex hac solutione invenisse se credunt viam ad alias quaestiones, argumentantes ex eo, quod dicimus, parvulis in baptismate peccatum originale dimitti, quod et adultis dormientibus vel amensibus peccatum, si baptizentur, ratione simili dimittatur. Quum enim neutri sentiant tunc vel consentiant, dicunt, idem in consimilibus iudicandum. Hic vero dicimus distinguendum, quod peccatum est duplex, originale scilicet et actual; originale, quod absque consensu contrahitur, et actual, quod committitur cum consensu. Originale igitur, quod sine consensu contrahitur, sine consensu per vim remittitur sacramenti; actual vero, quod cum consensu contrahitur, sine consensu minime relaxatur.”
remitted to someone, but not the second, he would be punished in hell for the guilt of an actual crime. These are incompatible.” According to Innocent then, infants and the insane are not absolutely similar, because the insane, provided that they had not been so from birth, would have sinned voluntarily before the onset of their madness. The key idea underlying Innocent’s treatment of the baptism of the insane is the importance of voluntary consent by the individual in his salvation. As he noted, “That anyone who is unwilling and opposed to receiving and maintaining Christianity should be compelled to do so is contrary to the Christian religion.”

Although Innocent allowed for some amount of compulsion according to the maxim “coacta voluntas, voluntas est,” the utter lack of volition on the part of the insane created a situation of absolute compulsion which was, as he stated, contrary to the precepts of Christianity. As adults capable of consent, “if the insane or asleep persisted in their opposition [to baptism] before they incurred insanity or fell asleep, do not receive the character of baptism if they are immersed because the intention to oppose it is understood to continue in them.” Although the insane are incapable of forming a will, Innocent embraced the legal fiction that presumed the continuation of a previous intention during a period of madness. This concept functioned in Roman law, for example, in the realm of usucaption. If a furiosus had begun to usucapt before the onset of madness, the jurists assumed that the intention to do so continued afterwards. Innocent then

35 Ibid.: “Sed adhuc quaeritur, quare non saltem originale peccatum amentibus, et dormientibus in baptismo sicut parvulis dimittatur. Ad hoc est taliter respondendum, quod Dominus, qui totum hominem salvum fecit in sabbato, opus imperfectionis non novit, et ob hoc peccata non ex parte, sed ex toto dimittit. Praeterea poena originalis peccati est carentia visionis Dei; actualis vero poena peccati est gehennae perpetuae cruciatus. Unde, si dimitteretur alicui primum, altrum non dimisse, talis non careret visione Dei propter originale dimissum, et cruciaretur in gehenna perpetuo propter reatum criminis actualis; sed haec tanquam incompossibilitia sese minime patiuntur, immo sibi mutuo adversantur.”

36 Ibid.: “Verum id est religione Christianae contrarium, ut semper invitus et penitus contradicens ad recipiendam et servandam Christianitatem aliquis compellatur.”

37 The locus for this maxim is C.15 q.1 c.1.

38 X 3.42.3: “Dormientes autem et amentes, si, priusquam amentiam incurrerent aut dormirent, in contradictione persistèrent, quia in eis intelligitur contradictionis propositum perdurare, etsi fuerint sic immersi, characterem non suscipiunt sacramenti.”
turned to reverse side of the argument. “But the opposite holds if they had first been catechumens and had possessed an intention to be baptized; the Church is accustomed to baptize such people at the point of death. Then the deed imprints a sacramental character because one does not find the barrier of an opposed will.”\(^39\) The presumption of a continuing intention can work either way. It is important to note that while this is a presumption or a fiction, as later jurists, especially civilians would be keen to indicate, Innocent treated this presumed continuation as true volition.

Innocent, as he remarked himself, did not pioneer a new concept of canon law in this decretal. As early as the Third Council of Carthage in 397, we find a provision for baptism of the sick that “if the sick cannot respond for themselves, if others should give testimony of their intention, they will be baptized. The same should be done for penitents.”\(^40\) Two further texts from the Decretum, both from early councils, support this basic point. “Qui recedunt” (C.26 q.6 c.7), from the 452 council of Arles, decreed that “One who suddenly becomes mute can be baptized or accept penance, if he has testimony of previous consent in the words of others... All things pertaining to piety should be conferred on the insane.”\(^41\) The following text in the Decretum, from the fourth Council of Carthage, also allowed the Eucharist to be given as viaticum to the dying provided that there is evidence of a previous intention to receive it.\(^42\) Thus

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\(^39\) Ibid.: “Secus autem, si prius catechumeni exstitissent, et habuissent propositum baptizandi; unde tales in necessitatis articulo consuevit ecclesia baptizare. Tunc ergo characterem sacramentalis imprimit operatio, quum obicem voluntatis contrariae non invenit obstentem.”

\(^40\) De con. D.4 c.75: “Egrotantes, si pro se respondere non possunt, cum voluntatis eorum testimonium sui dixerint, baptizentur. Similiter et de penitentibus agendum est.” See Pickett, Mental Affliction and Church Law, 30.

\(^41\) C.26 q.6 c.7: “Similiter subito obmutescens (prout statutum est) baptizari, aut penitenciam accipere potest, si voluntatis preteritae testimonium aliorum uerbis habet, aut presentis in suo nutu. Amentibus etiam quecumque pietatis sunt sunt conferenda.”

\(^42\) C.26 q.6 c.8: “Is qui penitenciam in infirmitate petit, si casu, dum ad eum sacerdos inuitatus uenit, oppressus infirmitate obmutuerit uel in frenesim contrauerit fuerit, dent testimonium qui eum audierunt, et accipiat penitenciam, et, si continuo creditur moriturus, reconcilietur per manus impositionem, et infundatur or eius eucharistia. Si superuixerit, admoveatur a supradictis testibus peticioni suae satisfactum, et subdatur statutis penitenciae legibus
the particular mechanics of observing a presumed enduring intention had deep roots within the canonical tradition. As a result, later canonists accepted the idea of an enduring will without much criticism or even addition. The only modification involved a lowering of the evidentiary threshold required to prove a prior intention. Innocent seemed to limit post-madness baptism to catechumens, thereby setting a high bar for proving the presence of a pre-existing will. The Glossa Palatina, which cited “Maiores” as a source, noted that “if a Jew or Saracen is insane, one should not baptize him unless it was known that he had the will [to be baptized] before his insanity and could not [act on it].” For Goffredus de Trano the reference to catechumens served as an example of a valid prior intent, but not that such status was necessary. The essential point, that a prior intention is presumed to continue, remained stable through the entirety of the period under examination. The enduring will came to operate as a presumption; the last known express intention was presumed to continue.
The enduring will of the insane had a life in the wider world of the *ius commune*. Already in the early thirteenth century Laurentius Hispanus had indicated the similarity between Roman and canon law on this point.⁴⁷ For Albericus de Rosate, among others, the enduring will provided a rationale for why the insane retain their status during a bout of madness.⁴⁸ Interestingly, many citations of this principle, even by those commenting on Roman law texts, refer to a circumstance that is overtly theological nature. In the fifteenth century, Paulus de Castro referred to an implication of the enduring will that had become commonplace by his time.⁴⁹

Thus even an insane person is presumed to continue in that intention in which he had been before he fell into madness, as is held in “Maiores.” If he had been in mortal sin and been impenitent, he should be thought to have died in that sin, and thus he should be denied ecclesiastical burial.

The damnation of those who were prevented by insanity from confessing, the dark obverse of a doctrine that allowed baptism of the insane if its conditions were fulfilled, seems to have arisen among theologians in the late thirteenth or early fourteenth centuries. Bartolus, for example, attributed the idea to theologians in a general way.⁵⁰ A contemporary, Rainerius de Forlivio, was

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⁴⁷ Laurentius Hispanus, *Apparatus glossarum in Compilationem tertiam*, 528, 3 Comp. 3.34.1, sv. “propositum perdurare”: “ff. de probat. Eum qui [Dig. 22.3.22].”

⁴⁸ Albericus de Rosate, *Commentaria in Digestum vetus* (Venice 1585), Dig. 1.5.20: “Furiosus retinet statum et dignitatem sine administratione sicut rei suae dominium, h.d.” Albericus provided the rationale for this more clearly in his commentary to Dig. 1.6.8, fol. 53r: “Sed quae reliquiae possit remanere, cum furiosus nec habeat voluntatem nec consensum? Die quod supersunt reliquiae prioris uluntatis, quam habebat quando furere ceptit, et in illa videtur perseruare, ut dixi supra ti. l. Qui furere [Dig. 1.5.20].” Petrus de Ancharano made a similar point; see note 46 above.


⁵⁰ Bartolus, *Commentaria in primam Digesti noui partem* (Lyon 1555), fol. 119r, Dig. 41.3.31.4: “Per istum textum potest determinari quaestio, quam Theologi determinant. Si aliquid habet peccatum mortale et efficitur furiosus, et
more specific: “St. Thomas Aquinas cites this law, that if someone in a state of mortal insane goes insane and dies in that state, he is damned.” I have been unable to locate this sentiment among the works of Aquinas or any other major contemporary theologian. Aquinas did comment on the enduring will, but only in the case of baptism of the insane, where he followed the precepts of “Maiores.”

**Civilians and the Causa contradicendi**

The enduring will was the particular form of fictive consent used by canonists. Although, as we have seen, the concept achieved circulation throughout the *ius commune*, many jurists concentrating on Roman law and the *iura propria* developed a different form that did attract a strong following among canonists. Early jurists in the Roman tradition tended to focus on the disabilities of the insane rather than their abilities, particularly with regard to consent. Placentinus allowed the insane to consent during lucid intervals, but the lucid interval, despite the growing presumption of the continuation of madness, remained a period in which insanity,

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51 Rainerius de Forlieve, *Lectura super Digesto Novo* (Lyon 1523), fol. 43v, Dig. 41.3.31.4: “Ibi, “possessionis iuste”: Sanctus Thomas de Aquino allegat hanc legem, quod si aliquis constitutus in mortali peccato incipiat furere et decedat in furore, quod sit damnatus.”

52 See Thomas Aquinas, *Summa Theologica*, III. q.68 art.12.

properly speaking, ceased. The first civilian to discuss the ability of the insane themselves to consent was Azo.

Azo reconfigured the prohibition of Dig. 50.17.5 in his commentary, distinguishing between express and tacit consent in order to do so. “An insane person is sometimes held in the place of one consenting. He is so held in those cases in which an express will is not necessary, as in ‘Voluntatem.’ In cases in which express consent is required, the insane person is held in the place of one dissenting, as in ‘Invitum autem.’” Azo seemed to allow some form of tacit consent for the insane, a position born out in his commentary on Dig. 50.17.40. In comparing a criminal under an interdict from alienating his goods to an insane person, Azo noted that an insane person cannot alienate or acquire [goods] because he cannot consent. But in an instance in which not opposing someone would be sufficient, the tacit will of the insane person is believed to intervene, as in “Voluntatem.” One can make a case for him as for any unaware person, as in “Sui autem.” But where an express will is necessary, the insane person is said to be unwilling, as in “Invitum autem.”

From this gloss, we see that Azo considered this tacit will to operate in cases in which non-opposition sufficed as consent. Nowhere in his glosses on the volition of the insane, however,

54 De diversis regulis iuris, 7, Dig. 50.17.5: “Vendere tamen in dilucidis interuallis potest furiosus et contrahere et testamentum facere.”
55 Azo, Apparatus in Digestum novum (Wien, ÖNB 2268), fol. 479r, Dig. 50.17.5: “Furiosus in quibusdam loco consentientis habetur. Habetur in quibus expressa voluntas non est neccessaria, ut ff. solut. matrimonio. I.ii § ult. [Dig. 24.3.2.2]. In quibus etiam voluntas expressa est necessaria, loco dissentientis habetur, ut ff. de seruit. Inuitus [Dig. 8.2.5].”
56 Ibid. Dig. 50.17.40: “Item comparatur furioso, quia et furiosus alienare non potest nec etiam acquirire cum consentire non possit. Porro in quo casu sufficerit aliqui non contradicendo in eodem casu voluntas tacita furiosi interuenire creditur, ut.sup. soluto matrimonio. I.ii. §.Volunt. Nam et ei queritur ut ali ignarant. ut. Inst. de hi. que ab inte. def. §. Sui autem et ignorantes [Inst. 3.1.3]. Sed ubi expressa uoluntas est necessaria, furiosus inuitus dicitur, ut sup. de seruit. ur. pre. Inuitum [Dig. 8.2.5].”
57 See, for further example, Azo, Apparatus in Digestum vetus (Città del Vaticano, BAV Vat. lat. 1408), fol. 254r, Dig. 23.1.8: “Qui non contradicat intelligitur consentire, C. de contrhen. empt. I.ii [Cod. 4.38.2], inf. de ritu nupt. Oratione. §. ult. [Dig. 23.2.16.2], inf. soluto matrimonio I.ii. §. Voluntatem [Dig. 24.3.2.2] az., sup. de his qui sui uel alien. iur. Patre. [Dig. 1.6.8] az.” With the exception of Dig. 23.2.16.2, all of these were key texts for the consent of the insane.
did he consider the implications of “Qui ad certum,” in which the insane are denied even a tacit will.  

Azo left an opening for the insane to have a tacit will, at least a will in those instances where non-opposition sufficed for consent. What were these instances? Besides the restitution of the dowry, a frequently cited instance of tacit consent in Roman law involved the consent implied by a father’s presence when his son was named to a magistracy. In this case, the father’s non-opposition had the force of consent. A similar example from the Novellae that was canonized into the Decretum involved a master who “knowingly and without opposition” allowed a slave to receive clerical ordination. In these situations, according to Azo at least, the insane could be understood as consenting.

Azo’s successor Accursius strongly disagreed with his former master and placed a greater emphasis on “Qui ad certum,” which disallowed a continuation of a lease if the lessor had died or gone mad, as an authority to deny tacit consent to the insane. The most concise statement of his views comes in his gloss to “In negotiis,” the most extreme statement of incapacity in Roman law.

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58 Azo neither addressed the text in his comments on the issue nor provided a gloss on the text itself. See for example, Dig. 19.2.14 in Città del Vaticano, BAV Vat. lat. 1408, fol. 216r. The only glosses to the text are interlinear.

59 Dig. 50.1.2.pr.: “Quotiens filius familias voluntate patris decurio creatur, universis muneribus, quae decurioni filio inunguntur, obstrictus est pater quasi fideiussor pro filio. Consensisse autem pater decurionatui filii videtur, si praesens nominationi non contradixit. Proinde quidquid in re publica filius gessit, pater ut fideiussor praestabit.”

60 Nov. 123 c.17: “Si servus sciente et non contradicente domino in clero ordinatus fuerit, ex hoc ipso quod constitutus est liber et ingenuus erit. Si vero ignorante domino ordinatio fiat, licet domino intra spatium unius anni et servilem fortunam probare et suum servum accipere. Si vero servus sciente domino sive nesciente sicuti diximus eo, quod in clero constitutus est, liber factus ecclesiasticum ministerium reliquerit et ad saecularem transierit vitam, suo domino ad servitium contradatur.” See D.54 c.20.

61 Digestum novum (Lyon 1627), col. 1870, Dig. 50.17.5: “Quaedam sunt negocia quae exigunt expressam voluntatem, ut supra de proc. l. Filius. §. Invitus [Dig. 3.3.8.3], et supra de scr. ur. pradi. l. Inuitum [Dig. 8.2.5], et in his obitinet haec lex, ut supra de iure co. li. l. ii. §.pe. [Dig. 29.7.2.3], scilicet ut habeatur loco dissentientis. Item aliquando sufficit tacitus consensus, et in his idem, ut supra lo. et condu. l. Qui ad certum [Dig. 19.2.14] nisi in casu ut supra solu. ma. l. ii. §. fin. [Dig. 24.3.2.2], ubi est speciale propter patrem. Sed Azo dicebat in tacito consensus videri semper consentire furiosum per illam solu. ma. [Dig. 24.3.2.2], quod non placet per legem illam qui ad certum
There are some matters that require express consent, such as in “Invitus procurator” and “Invitum autem.” In these “Furiosus” holds, namely that the insane person is in the position of one dissenting. Where tacit consent is sufficient, the same holds, as in “Qui ad certum,” unless in a particular case, such as “Voluntatem,” which is special because of the father. But Azo claimed that the insane person always seems to consent tacitly because of “Voluntatem,” which is incorrect because of “Qui ad certum.” At times, even tacit consent is not necessary but merely that the prohibition ceases. In these instances the insane person is held in the place of one consenting.

Accursius dealt a powerful blow against Azo’s argument. For Accursius, the insane could not consent in any active way, even when that activity seemed passive. He was more careful to clarify the distinction between true tacit consent and the cessation of opposition by using the example of the *actio negotiorum gestorum*. This action held when one managed the affairs of another without a mandate, though also without express prohibition. For example, one person may be absent and because of some pressing need, another person may conduct business for the absent person. So long as the absent person had not expressly prohibited the other from conducting his affairs, an obligation between the two could arise even though no consent, express or tacit, had been given. As his contemporary Odofredus put it, true tacit consent requires knowledge and awareness, and the insane do not possess these.

In a way, later jurists seized on an inherently dual meaning of the inability to oppose. On the one hand, the insane daughter could not legally oppose because of her lack of mental capacity. This had rung unsatisfactorily in the ears of many, like Accursius, who cast the text in light of a paternal privilege, and Odofredus who likewise referred to a special circumstance in

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[Dig. 19.2.14]. Aliquando etiam nec tacitus consensus est necessarius, sed sufficit si cesset prohibitio, ut supra de neg. gest. 1. Si ex duobus [Dig. 3.5.7.3].”


63 Odofredus, *Lectura super Digesto novo* (Lyon 1552), fol. 185v, Dig. 50.17.5: “Or, vidistis quod furiosus ideo quod caret intellectum, nullum negotium potest peragere, id est, non ea in quibus requiritur expressus consensus, vel tacitus, quia loco absentis habetur, ut supra de cu. fu. l. ii. §. pe. [Dig. 27.10.2].”
favor of the dowry. Still, the absent daughter similarly could not oppose because of her particular circumstance, though her inability was not held as consent. This was particularly problematic given the noted convergence between the categories of insanity and absence. One of the main uses of the equivocation between madness and absence, as a way of explaining the inability to give consent, served to explain why the presence of the insane could not be interpreted as consent. Later jurists, as we shall soon see, settled on a different understanding of the daughter’s inability to oppose, one suggested, but not pursued by Accursius. Glossing the word “contradicat” in the key text “Voluntatem,” Accursius noted, “that is, have a reason to oppose.”

In another gloss to this lex, he remarks that the daughter “is not able to oppose, even if she understands, unless she has a reason for opposing.” Accursius’ main explanation remained a special paternal privilege, as we can see from his references to “Voluntatem” and elsewhere.

By the fifteenth century however, the idea of requiring the daughter to have a reasoned opposition had evolved into legally mandated consent in certain cases. This shift in explaining the text would have important consequences for the range of legal action open to the insane.

Accursius and Odofredus both held firmly that the insane could not consent in any way. The potentially problematic “Voluntatem,” in which an insane daughter consented to her father seeking restitution of the dowry, posed a difficulty for this position. Azo interpreted the text as allowing the insane to consent tacitly, a solution that Accursius and Odofredus utterly rejected.

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64 Ibid.: “In casu speciale est fauore dotis, ubi tacite uidetur consensus, ut supra l. ii. §. Voluntate [Dig. 24.3.2.2].”

65 Digestum infortiatum (Lyon 1552), col. 6, Dig. 24.3.2.2, sv. “contradicat”: “Id est, contradicendi causam habeat, ut infra eod. l. Dotem [Dig. 24.3.37] et l. Si cum dotem. §. Eo autem tempore [Dig. 24.3.22.5]. Sed contra infra eod. l. Titia [Dig. 23.3.62], ubi pater debet probare eam consentire. Sed dic quod proba, eo ipso quod non dissentit.”

66 See note 61 above. See also, Digestum novum (Lyon 1552), col. 1885, Dig. 50.17.40: “Sed quod dixi, secundum Azo furiosum videri tacite consentire, ubi tacita sufficit voluntas. Dici potest contra regulariter, ut supra loca. l. Qui ad certum [Dig. 19.2.14]. Nec obstat §. Voluntatem [Dig. 24.3.2.2], quia speciale propter patrem cui videtur consentire, et facit C. de in integ. rest. mi. l. Si curatorem [Cod. 2.21(22).3].” Digestum vetus, (Lyon 1552), col. 1828, Dig. 19.2.14, sv. “non posse”: “Imo videtur in tacito consensu furiosus consentire, ut infra solu. ma. l. ii. §.pen. [Dig. 24.3.2.2]. Sol. Ibi speciale propter patrem.”
They understood “Voluntatem” as referring to a special privilege given to the father. This explanation seemed to ring unsatisfactorily in the ears of many subsequent jurists, who did not continue this explanation in their own explanations of the ability of the insane to consent. Angelus de Ubaldis, for example, was one of the few jurists to even reference this position of Accursius, and then did so only to comment on its falseness.67

Later jurists seized on this requirement to give reasoned opposition as a better explanation of a text than a paternal privilege. Jacobus de Arena (d. c. 1300), for example, noted that “she should clearly oppose and have a reason for opposing.”68 The insane, according to Jacobus, “are not regularly held as consenting, though this fails in the case of this paragraph ['Voluntatem'].”69 Jacobus noted the need for a reasoned opposition, and the peculiar nature of “Voluntatem” in allowing for the insane to consent, but did not explicitly link them. The express connection between the two and incorporation into a scheme of volition came with Dinus de Mugello. Commenting on “Voluntatem,” Dinus sought to clarify the connection between the insane and the absent as well as the situations in which the insane could consent:70

But where presence and express consent are required, the insane are held as absent. Where tacit consent is required, whether one is present or absent, then [the insane] are held in the place of the dissenting. But if even one of sound mind would not be able to oppose, then [the insane] are held as present and consenting, as here.

67 Angelus de Ubaldis, Lectura super Digesto novo (Città del Vaticano, BAV Vat. lat. 2614), fol. 371r, Dig. 50.17.5: “Ubi est speciale propter patrem. Hic non est uerum, unde solue quod ubi furiosus, si comos mentis existeret, non posset contradicere ibi loco non contradicentis habetur, non dico quod habeatur loco consentientis, et ita loquitur l. ii. §. Voluntatem. sup. so. ma. [Dig. 24.3.2.2]. Sed ubi existens sane mentis haberet contradicendi materiam, tunc habetur loco non consentientis, non dico loco contradictionis, ex quo semper intelligitur quiescens et absens ut dicta l. ii. §. fin. de iure codi. [Dig. 29.7.2.3].”
68 Jacobus de Arena Super iure civile (s.l. 1541), fol. 89r, Dig. 24.3.2.2: “Euidenter contradicat et causam contradicendi habeat, infra eodem, Dotem [Dig. 24.3.22].”
69 Ibid.: “Si furiosi, regulariter non habeatur pro consentu, sup. loca. Qui ad certum [Dig. 19.2.14]...”
70 Dinus de Mugello, Apostille super Infortiato et Digesto novo (Lyon 1513), unfoliated, Dig. 24.3.2.2: “Sed ubi requiritur presentis et consensus expressus, tunc habetur pro absente. l. ii. par. fi. de iure codici. [Dig. 29.7.2.3]. Et ubi sufficat tacitus siue sit presens siue absens, dissentientis loco habetur, ut l. Qui ad certum [Dig. 19.2.14] et l. Certe [Dig. 43.26.6]. Sed si sane mentis existens contradicere non posset, pro presente et pro consentiente habetur ut hic. Dy.”
In this way, the insane appear to consent, even if they do not truly do so. Dinus was, after all, clear that the insane consent neither tacitly or expressly.

Dinus’ solution found a wide reception among subsequent jurists. Bartolus provides an interesting example of its later interpretation. Although he relied on Dinus’ breakdown of the consent available to the insane, Bartolus also stressed that legal fictions had limits. “I come to the last part of this law [Dig. 19.2.14], from which note that a fiction of law extends itself to that which the law of nature extends. For the since the insane and the dead cannot naturally consent, they cannot be imagined to consent by the law.”

The insistence that legal fictions cannot extend beyond the limits set by nature did not prevent other fourteenth- and fifteenth-century jurists from allowing the insane to consent in situations in which even those of sound mind would be forced to consent unless they could provide reasoned opposition. Bartolus clarified that this was not a true form of consent, but others were less careful in their terminology. Albericus de Rosate, Baldus, de Ubaldis, Angelus de Ubaldis, and Johannes de Imola all, for example, expressed some form of this idea as the basis for the fictive consent of the insane.

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71 Bartolus, *Commentaria in secundam Digesti veteris partem* (Venice 1570), fol. 132r, Dig. 19.2.13: “Venio ad ultimo par. legis, ex quo not. quod ad id se porrigit legis fictio, ad quod se porrigit lex naturae. Nam furiosus et mortuus cum non possint naturaliter consentire, non finguntur consentire a iure.” See also, Bartolus, *Commentaria in primam Infortiati partem* (Lyon 1555), fol. 6v-7r, Dig. 24.3.2.2: “Furiosus non videtur consentire quando requiritur consensus verus, tacitus vel expressus, ut l. contraria [Dig. 19.2.12]. Sed hic nullus consensus requiritur, sed non contradicere pro voluntate habetur. Facit ad hoc quod no. in l. In negotiis, de reg. iu. [Dig. 50.17.5]. Opp. ad tertium dictum, nam furiosus equiparatur absenti, ut l. ii. §. Furiosus, supra de proc. [Dig. 3.3.2.1], et infra de iure cod. l. ii. §. Furiosus [Dig. 29.2.7.3]. Ergo idem debet esse in absente quod supra dixi in furioso. gl. inuoluit se. Dynus dicit optime. Quandoque requiritur consensus absentis, et tunc furiosus habetur pro absent, ut l. Sed et si unus. §. Filio. infra de inuir. [Dig. 47.10.17.11]. Quandoque requiritur consensus absentis, et tunc furiosus non habetur pro absent, ut l. ii. §. supra de procur. [Dig. 3.3.2.1]. Quandoque requiritur praesentia et consensus expressus, et tunc habetur pro absent, ut l. ii. §. Furiosus, infra de iure codicil. [Dig. 29.7.2.3]. Quandoque requiritur consensus, nec curatur utrum si praesens, vel absens, et tunc aut sanae mentis contradicere potest, et tunc habetur loco dissociatis, ut l. Qui ad certum, supra locati [Dig. 19.2.14] Aut non posset contradicere, et habetur pro consentiente, ut hic. Verutamen istud non est proprie consentire, sed magis non dissentire, ut supra dixi.”

72 Ibid.

73 Albericus de Rosate, *Commentariorum in primam Infortiati partem* (Venice 1585), fol. 7v, Dig. 24.3.2: “Sed dic quod ibi non ex consensu, sed ex re obligatur, id est, ex contractu, qui perficitur re, scilicet gerendo negotia eius, in quo etiam si non consensu perficitur, in quo quis licet non habeat animum, habere videtur, cum si sanae mentis esset.
Paulus de Castro (d.1441) went even further in his ascription of fictive consent to the insane:  

But it is opposed that the insane fictively consent in those things that do not prejudice them, but instead in those things that pertain to their benefit. The gloss there [Dig. 24.3.2.2] says “when express consent is not required,” but here express consent is required. This does not seem to have been well said, since, except in a contract of stipulation, other contracts seem to be completed through tacit consent. Because of this, you should say other than the gloss does, that then the insane fictively consent in those things that pertain to their good, when a contract would not result from such consent, nor is [the insane person] held as contracting. Otherwise they cannot fictively consent in order to be held as contracting, since they are not able to truly contract.

Paulus moved beyond the compulsion to consent to a more active notion. The insane could consent to anything that would benefit them, provided that an actual contract would not be made thereby.

The idea of compelled consent was not merely an academic exercise. Paulus de Castro provides an important example of the doctrine in action in a consilium concerning the restitution

dissentire non posset, nisi iustam causam contradicendi haberet, ut dixi.” Baldus de Ubaldis, Commentaria in primam et secundam Infortiati partes (Lyon 1585), fol. 5r, Dig. 24.3.2.2: “Tertio, nota quod furiosus fingitur consentire in his in quibus, si esset compos mentis, haberet necesse consentire.” Angelus de Ubaldis, Lectura super Infortiati (Città del Vaticano, BAV Vat. lat. 2613, fol. 3v), Dig. 24.3.2.2: “Filia patris et sane mentis patri in cuius potestate consistit agenti de dote consentire debet, id est, intelligitur consentire si non contradicit nec causam contradicendi habet, et ideo furiosa intelligitur consentire sin autem filia et bene causere debet se pater rem ratam filiam habituram... In texto ibi eundem contradicat et causam contradicendi non habeat, ut glossa hic dicitur et bene alias intelligitur contradicere propter prejudicium quod sibi peratur, ut infra e. Si cum dotem. §. Eo autem tempore. [Dig. 24.3.22.5]. Ibi merito quod quis credit hoc intellige ut supra dixi cum causam contradicendi non haberet si esset sanae mentis et sic non ob. s. lo. l. Qui ad certum [Dig. 19.2.14].” Johannes de Imola, Lectura super prima parte Infortiati (Venice 1475), unfoliated, Dig. 24.3.2.2: “Item nota quod furiosus habetur pro consentiente in actu in quo non posset contradicere si esset sane mentis, de quo hic latius per doct. ... In glossa ‘credit’, in fine: Nota bene hanc concordiam gl. quod si furiosa haberet causam contradicendi si esset sane mentis non haberetur pro consentiente quod est no. pro limitatione huius litterae.”

74 Paulus de Castro, Lectura super prima et secunda Digesti veteris parte (Venice 1495), fol. 176r, Dig. 12.1.12: “Sed opponitur quod etiam in primo (the first example posed in the text) idem sic, quia furiosus fingitur consentire in quae non tendunt in sui praejudicium, sed potius in utilitatem, ut l. ii. §. Voluntate. sol. [Dig. 24.3.2.2]. Magna glossa dicit quod obi, quando non requiritur expressus consensus, sed hic requiritur expressus. Istud non videntur bene dictum, quia excepto contractu stipulationis, caeteri contractus videntur posse perfici ex tacito consensus sic expresso, ut l. Item quia, supra de pac. [Dig. 2.14.4]. Propret hoc, dic aliter quam glossam, quod tunc furiosus fingitur consentire in quae tendunt in sui utilitatem, quando ex tali consensus non resultat contractus, nec haberetur pro contrahente. Alius non fingitur consentire, ut habeatur pro contrahente, cum vere contrahere non possit, ut l. In neg. de reg iur. [Dig. 50.17.5], et est casus in d. l. Qui ad certum [Dig. 19.2.14].”
of a dowry. Although I have only been able to locate the *consilium* in one of his printed collections, it can be authenticated as coming from the hand of Paulus. In his commentary on the *Infortiatum*, Paulus referenced having consulted in the case.\(^{75}\) The *consilium* is short and worth quoting in full.\(^{76}\)

It is proposed in fact that a certain Francesco had a father by the name of Guido, who was mentally incapacitated and utterly without understanding, and that Francesco took a wife and confessed that he had received a certain amount from her as a dowry. While his father was still alive, [Francesco] died. Afterwards, Guido his father also died. It is asked whether the property of Guido, father of Francesco, can be obligated for restitution of the dowry. It seems that they cannot, since Guido did not receive the dowry and did not obligate himself or his goods for it. Only Francesco and his goods are obligated; Guido is not unless up to the

\(^{75}\) Paulus de Castro, *Lectura super Infortiato* (Venice 1494), fol. 18v, Dig. 24.3.22.12: “Ego autem habui talem casum de facto quod filius cuiusdam mente capti receptit dotem et pater non potuit se et bona sua obligare postea fefellit. Mulier volebat ire contra possessores honorum patris. Dicebatur quod non poterat quia non recepit nec se uel bona sua obligauerat. Ego dicebam contrarium, quod si fuisse sane mentis, poterat compelli ad se et bona sua obligandum si non est factum. Hoc contingit quia fuit et sine usuque ad vires peculii, si Francisco peculium concesserat. ff. sol. matr. l. Si cum dotem. §. Transgrediamur [Dig. 24.3.22.12], cum iib not. Quae actio de peculio est personalis, l. Summa in ff. de pec. [Dig. 15.1.21] et plene not. in l. Frater a fratre. ff. de condi indebit. [Dig. 12.6.38] per Bartolum. Contrarium videtur verius per not. in dicto par. Transgrediamur [Dig. 24.3.22.12] per Bartolum, ubi determinat quod pater cogitur obligare se et bona sua pro restitutione dotis receptae a filio suo et eo ipso, quod consentit filio contrahenti matrimonium et recipiens dotem videtur se et bona sua obligare per l. Si filius. ff. de tut. [Dig 27.3.6, 7, or 11] et l. Si inter. tres. §. Imperator. ff. de excusat. tutor. [Dig. 27.1.15.17]. Sed qui proprie furorem consentire non potest habetur pro consentiente si non suberat aliqua causa contradicendi, et sit casus in quo, si esset sanae mentis, cogerotur consentire, ut habetur eodem tit. sol. matri. l. 2. §. Voluntatem [Dig. 24.3.2.2]. Igitur, etc. Nam pater naturali ratione sicut tenetur dotare filiam ne propter defectum dotis matrimonium imediatur, et pro filio dare donationem ante nuptias, l. Qui liberis. ff. de rite nupt. [Dig. 23.2.19], et ubi non est consuetudo talis faciendi donationem ante nuptias, debeb et tenetur obligare et se et secundum Bart. in d. par. Transgrediamur [Dig. 24.3.22.12]. Posito ergo quod se non obligavit, nec consenserit, quia tamen hoc contingit ex causa necessitatis propter defectum consensus eius, ne publica nuptiarum utilitas et matrimonium mediatur, lex exigit, ut habeatur perinde acsi consessisset, ff. de capt. l. In bello. §. Medio [Dig. 49.15.12.3], ubi est textus optimus. Ad propositionem facit quod habetur in l. Si finita. §. Eleganter. ff. de dam. infec. [Dig. 39.2.15.28], ubi cautio, quae erat fienda necessario pro facta habetur, ff. usufr. ea er. quae usu commun. l. Hoc senatus. §. i [Dig. 7.5.5.1], de leg. 3. l. fin. §. Filia [Dig. 31.(1).77.19 (79)], et de euctio. l. 2 [Dig. 21.2.2], de adopt. l. His verbis [Dig. 1.7.19]. Nec obstat quod primo loco allegavi in contrarium, quia procedit ubi pater potuisse consentire et filius vel eius uxor fuisse negligentem in faciendo cum consentire vel notificando sibi, quod hic non est ad quae facit, quia in dubio pro dote determinandum est, ut in reg. iu. cum similib. [Dig. 24.3.1]. Item filius vivente patre fuit quasi dominus in l. Suis. ff. de liber. et posthu. [Dig. 28.2.15]. Laus Deo, ego Paulus de Castro.”
value of the *peculium*, if he had granted a *peculium* to Francesco. The contrary seems truer, because of what Bartolus says when he determined that a father is compelled to obligate himself and his goods for the restitution of a dowry accepted by his son, and that because he consented to his son contracting the marriage and receiving the dowry, he seems to obligate himself and his goods. But he who cannot consent because of insanity is held as consenting if no reason for opposing exists and the case is one in which, if he were of sound mind, he would be compelled to consent. For a father is bound by natural reason to endower his daughter lest the marriage be impeded because of a defect of the dowry. For the son he is bound to provide a *donatio ante nuptias*, and where this is not the custom, he has an obligation and is bound to obligate himself and his goods, according to Bartolus. I pose that he did not obligate himself or consent, but that it nevertheless occurred from necessity because of the defect of his consent, lest the public good of marriages be impeded. Nor does what I alleged in the first place oppose this, since that holds when the father would have been able to consent and the son or his wife had been negligent in marrying with his consent or in notifying him, which is not the situation here, since in a doubt, the determination should be in favor of the dowry. Also, the son was like the master while his father was alive.

The key item of importance is not just that Paulus used the idea of fictive consent, but how he used it. Paulus stated that a father is held “by natural reason” to dower his daughters or provide a *donatio ante nuptias*, and to obligate himself for both, “lest a marriage be impeded because of a defect of the dowry.” Paulus acknowledged that Guido had not truly consented or obligated himself, but that “lest the public good of nuptials and marriage be impeded, the law requires that he be held as if consenting.” Paulus took the concept of marriage, rooted in natural law, and worked down from a precept of natural law to the particular measures required to enforce that precept. The reasonable and natural good of promoting marriages required consent in this instance. Guido could still be compelled to grant his consent even when naturally barred by insanity.

The fictive consent of the insane, though endorsed by numerous jurists, did not find unqualified acceptance among all jurists. Alexander Tartagnus, for example, took issue with Paulus’ decision in his *consilium*. “He has greatly erred, since although someone is mentally
incapacitated, a father is not obligated unless by giving a dowry to his daughter, or if a daughter seeks a curator to be given to her mentally ill father-in-law, who can obligate himself for the dowry.”

For Alexander, the intellectual gymnastics made by Paulus could have been more easily solved with recourse to a guardian. Jason de Maino, on the other hand, approached the principle more directly. The fictive consent of the insane in cases in which even a sane person would not have a reason for opposing seems contrary not only to Roman sources barring the insane from consenting in any way, as well as the principle described by Bartolus forbidding fictions of the law from extending beyond what is naturally permissible. Jason solved the incompatibility by noting that the insane do not have a fictive consent or volition, since this is impossible, but rather “they fictively do not oppose, which places nothing in being.”

Jason objected to the name of “consent” being granted to this phenomenon and urged a more careful attention to terms. By calling it consent, one could ascribe a positive content to it, as Paulus de Castro did. Strictly speaking, the insane could not consent, but their non-opposition could be legally meaningful, still, though, only through the operation of a legal fiction.

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77 Alexander Tartagnus, *In primam et secundam Infortiati partem commentaria* (Venice 1595), fol. 37v, Dig. 24.3.22.12: “Iuxta predicta dicebat hic Paulus de Castro quod in casibus in quibus pater tenetur se obligare pro dote restituienda, si est mente captus, perinde est ac si se obligasset, arg. l. Si. finita. §. Eleganter. infra de dam et infec. [Dig. 39.2.15.28] et l. 2 supra de euic. [Dig. 21.2.2]. Sed cum supportatione, plurimum errauit quia licet sit mente captus, non tamen obligatur nisi pater dans dotem pro filia, vel ipsa filia petat dari curatorem socero mente capto, qui se obliget pro dote, per l. i et l. Admone C. qui pet. tut. [Cod. 5.31.1 et 7], que ratio cessat in dicto par. eleganter [Dig. 39.2.15.28], nec aliquid facit in d. 1.2 [Dig. 21.2.2] secundum verum intellectum.”

78 Jason de Maino, *In primam Infortiati partem commentaria* (Venice 1579) fol. 12r, Dig. 24.3.22.12: “Septimo nota ex secunda parte principali textus et sic ex uer. ‘Et Iulianus’ quod furiosus habetur pro consentiente eo casu, quod si fuisset sanae mentis, non habuisset causam contradicendi, alias secus et pondera tex. qui ponit duas imagines, uidelicet dictionem quasi et dictionem uideri, ut supra dixi et sic uidetur quod ista lex fingat consensus in furioso, sed hoc uidetur contrarium l. Qui ad certam ff. loc. [Dig. 19.2.14] all. in glossa. Item uidetur contra regulam que habet quod fictio non magis debet habere locum in caso ficto quam ueritas in uero, nec in genere, nec in specie, l. Si pater, de adop. [Dig. 1.7.29]. Declarat Bartolus in l. Si qui est pro emptore [Dig. 41.3.15], in l. Qui patri. ff. de usuc. [Dig. 29.2.59] et Baldus in d. l. Qui ad certam [Dig. 19.2.14], ubi allelguat Cy. in l. Si non singuli. C. si cer. pe. [Cod. 4.2.5]. Sed impossible est reperire hoc in furioso in genere, et in specie, ergo etc. Sed responde alter quam glossa et aliter quam doc. quod in hoc tex. in furioso non fingitur consensus aut voluntas, quia istud est impossible, sed bene fingitur non contradictio que nihil ponit in esse, l. Ex facto ff. de her. inst. [Dig. 28.5.19].”
From here we can better appreciate the difference between the canonical and civilian traditions with respect to the fictive consent of the insane. Canon law allowed for a fictive continuation of a previously known intention, while Roman law allowed for the requirements of law to provide the content for a compelled consent. Much of canon law, particularly where the insane were concerned, tended towards private goods, especially personal salvation. An insane person could not consent to baptism, a monastic vow, or marriage. Especially with regard to baptism, one could not enjoy the effects of the sacrament without voluntarily accepting it. The canonists were particularly adamant in agreeing with Innocent that “no one should be dragged to the Christian faith unwillingly” (though of course the maxim coacta voluntas voluntas est still held). The marital and monastic vows, between which canonists had drawn comparisons, were also based personal expressions of consent and volition. In effect, canon law discussed consent of the insane in the context of things that one could or should do, but which they were not obligated to do. For example, jurists were clear that an insane person the insane could not testate even pious bequests. The suitability or desirability of a given action could not overcome, as Baldus put it, the “universal impediment” that was insanity. The fictive consent of the insane through the enduring will provided a way to respect the personal wishes of the individual and extend them into a period where such wishes were absent.

Civilians, on the other hand, dealt with public, rather than private, goods. The consent of the insane in this way of thinking pertained more to allowing cases or common legal relationships to move forward. Paulus de Castro, for example, considered even marriage from the point of view of the public good. The law provided acts that, for reasons of the public good, one had to consent to unless one had compelling reasons to the contrary. The two bodies of law
approached the same problem, the need to mitigate the absolute bar on the insane from personal legal agency, in two very different ways depending on the particular outlooks of each system.

As Alexander Tartagnus noted, guardianship might provide a more acceptable and less complicated way of providing legal agency to the insane. Through their guardians they could participate in most legal transactions, such as sales, the acquisition of inheritances and bequests, suits to defend their interests. Jurists remarked on a number of protections that the insane possessed against possible abuse by their guardians, granting the insane some measure of safety from the mismanagement of their proxies. But even in the institution of guardianship, a place still existed for the agency of the insane themselves, as we saw in the example of the acceptance of inheritances. Despite the limited circumstances in which the insane could be understood to consent through a legal fiction, the pursuit of this idea by the jurists speaks volumes about their appreciation of the insane as legal persons. The insane were in most ways limited by their actions and shut off from normal avenues of legal activity. Despite this “natural” disability, the jurists searched for acceptable ways to enable participation; they sought to integrate the insane into the legal world as much as possible. By stopping at the Roman or canonical source material without an investigation of the jurisprudential interpretation of these texts, many historians have presented a distorted vision of the legal agency as well as the general understanding of the insane in medieval legal thought. The insane were not a thoroughly marginalized identity.
CONCLUSION

Despite the essential continuity of many features of the jurisprudence concerning insanity into the sixteenth century, one can observe significant changes, the most important of which is an increased willingness to meaningfully incorporate other modes of discourse. Jean-Marie Fritz rightly characterized medieval jurisprudence as “an impermeable discourse” with regard to insanity. For example, in the area of proof, jurists allowed for expert medical testimony, particularly in doubtful cases, but for the most part used social evidence available from non-specialized witnesses. Likewise, canonists rejecting culpa preceded arguments in the late twelfth and early thirteenth centuries often characterized that position as endorsed by theologians. Among the humanist jurists of the sixteenth century, these barriers begin to breakdown, with interesting results. For example, drawing mostly on the work of ancient philosophers and poets, many jurists began to discuss the madness of love, a frequent literary trope, using the concepts of jurisprudence. Andreas Tiraquellus (1488-1558) used lines of Catullus, Virgil, and Ovid to conclude that “the poets often call love madness, and lovers they call raving, raging, or insane.” Tiraquellus proceeded from this identification to argue that those who committed a wrong under the influence of love should be treated more leniently. This extended beyond criminal law into contractual obligations. According to Octavius Simoncellus (d. 1620), just as guardians of the

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1 Fritz, Le discours du fou, 193.
4 Ibid., p. 16: “Propter apertam cupiditatem non temere (ut reor) contenderim, um leuis esse puniendum, ne dicam inpunitum relinquendum, qui praemium ardentiorque amore quicquam deliciere, veluti non ex animi sententia, sed furem concitatus id ipsum admiserit.”
insane required a judicial decree for certain property transactions to be valid, so those who lose their wits because of love need a judicial decree to enter into valid contracts.⁵

A more significant use of an outside discourse came with the increased medicalization of the jurisprudence of madness, especially through the work of Paulus Zacchia (1584-1659).⁶ In his treatment of madness in the *Quaestiones medico-legales*, Zacchia concerned himself with distinguishing among the various terms pertaining to loss of reason according medical and literary sources. Whereas the jurisprudential tradition of the *ius commune* did not make legally significant distinctions among terms like *furor*, *dementia*, and *fatuitas*, Zacchia brought a level of precision and a new conceptual tool: the gradation of insanity. The jurists of the medieval *ius commune* treated insanity as an all-or-nothing category. As Marco Boari noted, the integration of medical learning in particular allowed for a recognition of different levels of insanity and consequently different levels of agency.⁷ Key to the medicalization of the jurisprudence of madness was the increased attention paid to melancholy, a term mentioned only once in the Digest and, according to Zacchia, “used rarely by the jurists.”⁸ Melancholy, was however, a firm fixture in medieval medical literature. Deriving its name from an excess of black bile, melancholy could take many forms, producing a range of symptoms from extreme emotions such

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⁵ Octavius Simoncellus, *Tractatus de decretis caeterisque solemnitatibus* (Venice 1619), fol. 13r: “Intelligi debet secundum eum, cum contractus cum ea, vel eo celebratur cuius amore quis exardescit, quam tamen reprobationem ipse non admitterem ita de facili, sed credere indistincte, quod, quotiensque celebratur venditio, seu aliquis alius contractus ab eo qui maximo sit amore captus, cuius causa appareat manifesto ipsum non integri animi iudicium habere, quod facile liquere poterit ex actibus ab eo inutiliter, paruque cum eis existimatione gestis, dictos contractus esse ipso iure nullos absque decreti intueruntur, et id siue cum eo, vel ea, celebratur contractus cuius amore quis exardescit, siue cum alio, cum amans equiparetur furioso.”


⁸ Paulus Zacchia, *Quaestiones Medico-Legales* (Nuremberg 1726), 1.132: “Porro melancholici nomen apud jurisconsultos in usu minime est, nisi de raro Budaes tantum in l. 2 ff. de aedil. edict. [Dig. 21.2.2].”
as fear and sadness to hallucinations and paranoia.\textsuperscript{9} For Zacchia, the problem emerges precisely over the limited nature of \textit{melancholici}, who are only “insane” with respect to a particular idea or fixation, but who can otherwise function normally.\textsuperscript{10} Should those mentally afflicted in this way be denied agency in the same way as those totally lacking the use of reason? Zacchia answered first by pointing out that common practice allowed the \textit{melancholici} to testate and enter into contracts, so long as their delusion did not interfere. He also wryly added that no man could be found who did not have his own peculiar beliefs: everyone could be numbered among the insane.\textsuperscript{11}

The introduction of a distinction between the \textit{furiosi} and the \textit{melancholici} would have important effects of criminal law as well. Benedictus Carpzov (1595-1666), the famed seventeenth-century Saxon jurist, used that distinction to formulate two general rules on the punishment of the insane for their crimes.\textsuperscript{12} First, “the insane are neither obligated by a crime nor bound by any punishment.”\textsuperscript{13} On the other hand, according to the second rule, “although one guilty of a crime committed due to melancholy should in no way go unpunished, still the


\textsuperscript{10} Paulus Zacchia, \textit{Quaestiones Medico-Legales} (Nuremberg 1726), 1.132: “Sed circa melancholicos maximum, ac multae speculationibus debium pro juristis occurrit. Nam ut alias hic dictum est sunt ex melancholicis plures, qui circa unam tantummodo rem insanuus, circa quam firmam habent, et falsam opinionem, existimantes illam esse, si non sit, vel econtra, vel alio modo uqm vere sit, quam falsam opinionem exceptam, in caeteris optime et apposites, et discurrent, et operantur, ac negota sua cum omni circumscpectione, et prudentia gerunt, vitia fugere, bona sequi satis cognoscunt, et in summa, si eam peculiaris illius opinionis falsitatatem excipias, nihil omnino ab homine sanae mentis differunt.”

\textsuperscript{11} Ibid., 1.132-133: “In huiusmodi autem melancholicis, de quibus ad praesens dubitamus, ea prudentia minime desideratur, quia si permittantur testari, contrahere, et alia id genus agere, omnia recte, et ut deceret, disponent, quia supponimus, in his rationem non nisi circaparticularia quoddam errare. Quibus etiam illud addam (quod mirum videri legentibus poterit, cum tamen fortasse res non aliter se habeat) quod si ob errorem peculiaris alicuius opinionis, hi pro mente captis judicandi, et idcirco, ut tales a multis civilibus actibus prohibendi, timeo, ne pene omnes homines ob eandem causam inter dementes comprehendi debeant. Nam quis hominum est, qui non habeat suas haereses, a quibus eum avellare ne caeterorum quidem universorum hominum conatus sufficeret?”

\textsuperscript{12} On Carpzov’s positions on insanity, see Boari, \textit{Il furiosus nella criminalistica}, 143-153.

\textsuperscript{13} Benedictus Carpzov, \textit{Practica nova imperialis saxonica} (Wittenberg 1670), 3.368: “Prima regula haec sit: Furiosus ex delicto suo nec obligatur, nec poena aliqua tenetur.”
ordinary punishment can be remitted and a lighter one imposed.” Judicial discretion was crucial in enforcing this distinction. By incorporating a category rarely used by jurists but frequently by physicians, jurist of the sixteenth century were able to carve out grades of insanity and agency while admitting the presence of traditional signs of madness. The importation of other discourses into jurisprudence altered such fundamental aspects of the jurisprudence but did not represent a complete break with the past tradition. For example, Paulus Zacchia could still point to speech as a primary sign of insanity and allege in support that “a fool says foolish things.” Still, the increased use of medical terminology and testimony in cases of insanity led to the inclusion of insanity as an area of forensic medicine, rather than as a social phenomenon as many jurists of the Middle Ages had conceived it.

**Answers and Questions**

After examining the range of the areas in which insanity appears, we can return to the questions posed in the introduction and arrive at some conclusions about insanity in medieval jurisprudence.

I first asked whether insanity posed a permanent, distinct status under law or whether, as others have held, it was temporary or “drowned in a sea of incapacity.” This study has shown that the jurists of the medieval *ius commune* considered insanity carefully as a legal problem in

14 Ibid., 3.371: “Altera regula de melancholicis haec notanda est: Quod licet reus ob delictum ex melancholia comissum, impunitus nequaquam remanere debeat, poena tamen ordinaria ipsi propterea remitti, aliaque mitior tuto irrogari quaeat.”

15 Ibid., 3. 372: “Quare licet melancholici delinquentes prorsus impuniti haud dimittantur, in hoc tamen ipsis succurrendum est, ut ordinarium delicti supplicium mitigetur, substitutam mitiorem quamdam poenam extrordinariam, quam judex prudens pro qualitate facti, et ratione melancholie, affectionis, mentisque perturbatae crimi aequalem existimaverit.”

its own right. Certainly similarities existed; the jurists adopted protections designed for minors under guardianship wholesale for application to the insane. Still, in many important aspects, such as proof or criminal responsibility, concepts peculiar to insanity, such as the lucid interval, became important parts of the larger jurisprudential reflection. As for the temporary nature of insanity as a status, the jurisprudence of proof in particular problematizes this view. According to the *communis opinio*, a prior history of madness could follow one for the rest of his or her life. From the court cases and *consilia*, we see that testimony concerning madness could often stretch back years before the case at hand. While the particular effects of insanity, such as loss of certain aspects of agency, became operative at times of demonstrable insanity, the specter of insanity seemed to hang over every lucid interval. The *furiosi* were governed by a sense of hyper-rationality. For example, during a period of madness, the jurists permitted guardians, acting on behalf of the insane, to perform only acts in the interests of their ward. This served to both protect the insane person and allow a normal and community-approved continuation of business. Similarly, the civilians allowed the public good to stand in for the will of the insane, substituting the rationality of such actions for the defective will of the insane. The imposition of a communally recognized rationality on the insane carried over into lucid intervals. Although a onetime *furiosus* might have reasons for choosing one inheritance strategy over another in his will, his actions were subject to greater scrutiny. What would have been an odd choice for one person would become proof of insanity for a onetime *furiosus*. Such scrutiny was a primary means of proof, and the slightest deviance from the norm could raise the question of insanity for one who had a history of mental disturbance. Even during a lucid interval, the identity of insane was difficult to shed. Horacio Faberga defined a stigma as “when an individual takes on a new degraded identity that produces mortification, and when such an identity comes to affect his
location in social and physical space."^{17} The constant suspicion of a return to madness extended the identity of the *furiosus* even into periods of lucidity.

I admit insanity as a partial status only in that it did not consume other statuses. An insane father who had authority over his children did not lose that authority as a result of his madness, but only the exercise of that authority. This extended from fathers up to bishops and kings. Insanity did not destroy legal personhood, but limited it. This is an important point in a time where philosophers distinguished man from other animals based on his possession of reason, and where literature often relegated the insane to the wilderness, only able to rejoin society when regaining sanity. The jurists portrayed the insane as an integrated marginal group: marginal because they lost a great deal of legal agency, but integrated because they still possessed certain basic rights and abilities. Not only did the insane retain status, but they could be expected to act in socially mandated ways through fictive consent. Even their intentions prior to the onset of madness retained significance and served as a link of continuity between periods of sanity and insanity.

This brings us to the second major question: to what extent did the *ius commune* define insanity as a marginal status? Although recent scholars like Wendy Turner and Aleksandra Pfau have characterized the insane, to use Stiker's phrase, as a cared-for, integrated marginality, ideas of exclusion have dominated the discussion of the norms related to insanity. Certainly the insane existed on the fringes of legal activity and had severe restrictions imposed on their agency. The insane could not marry, testate, form a contract, or incur punishment for any wrongs they might commit. The general tenor of the jurisprudence, however, seeks to work around these limitations and integrate the insane into society as much as possible. The retention of status was not just a

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matter of social status but legal, involving the possession, if not use, of certain rights.\textsuperscript{18} For example, the use of \textit{coadiutores} in the Church rests on the idea that a bishop or priest cannot lose his rights merely due to madness. Insanity does not mean an end to legal personhood, as Fritz would have it, but a limitation on it.\textsuperscript{19} The jurists were eager to build upon the protections extended by Roman law to the insane under guardianship. Judicial and social oversight were only some ways of safeguarding the rights of the insane. The ascription of fictive consent to the insane is also indicative of not only a degree of social integration, but more importantly the desire on the part of the jurists to limit the restrictions placed on the insane as much as possible. Most areas of medieval jurisprudence not only encouraged but relied on integration in order to function. The jurists embraced the often ambiguous and particular evidence for madness coming from neighbors and family rather than from expert witnesses. The socially or culturally relative signs that served as the basis for proof required an examination of the insane in the context of their interactions with a particular community and its norms. In terms of care, the jurists acknowledged the primary role of the family. Instances in which civic institutions stepped in, such as the use of prisons or the oversight of guardianship, served to augment rather than detract from the integration of the \textit{furiosus} in his family. This is an important point for future histories of insanity and society in the Middle Ages. The integration mentioned by Pfau and Turner, both of whom have focused on documents closely tied with the practice of law, was not a practical response to the limitations imposed by normative law. The idea of integration within acceptable limits suffused the concept of insanity; it was part of reflection on the law as well as its practice.

\textsuperscript{18} Pfau, “Madness as a Disability in Late Medieval France, 100: “Although mad people did not have a legal status, the \textit{Livre de jostice} noted ‘if someone is mad, he does not lose his dignity [social status] because of it’.”

\textsuperscript{19} Fritz, \textit{Le discours du four}, 160: “Le fou se définit alors comme incapable, comme non-personne juridique.”
Third, I asked whether insanity interested the jurists of the *ius commune* as a merely theoretical curiosity or as a social problem requiring a careful response. From the previous points, it is clear that the jurisprudence of insanity had a close relationship with practice. The vagueness of the signs of madness and the attention shown to procedural mechanisms show that the jurists were willing to accept whatever evidence might be available and instead focused on its use during a case rather than its contents. The attribution of fictive consent shows the jurists working around the strict limits seemingly imposed by the very concept of insanity in response to practical concerns, such as dowry rights. Even reflections on the liability and punishment of the insane show a level of discomfort with the theoretical idea that the insane should in no way be punished. The popularity of *culpa precedens* in the twelfth century was at least partially rooted in the uneasiness of the canonists with a crime that had no consequences. Later, although Jason de Maino built his arguments against the inability to execute the insane on a strict reading of the texts of Roman law, the social need for punishment was an important underlying factor.

Although the jurisprudence of insanity was meant to be used, insanity as a useful status was ambiguous. The jurists frequently raised concerns over madness feigned in order to escape punishment or certain obligations, fears that remain prevalent in modern discussion of legal insanity. Albericus de Rosate, for example, prided himself on uncovering the fake madness of magnate involved in a case. Alleging insanity, however, was a risky long-term strategy. Although it might prove useful in a particular case, such as voiding an unprofitable contract, the long-term stigma associated with madness would have acted as a deterrent. While categories
such as minority and widowhood might act in some cases as “useful marginalities,” insanity was much more uncertain in this regard.\textsuperscript{20}

This study also bears on other aspects of the history of madness and law. For one, I have shown that one must view canon and Roman law together when discussing insanity. This is most clearly the case in discussions of responsibility. Canonists were the first to put ideas of responsibility to the test, much more than contemporary civilians. On the other hand, Roman texts were key in framing the discussion. After Gratian framed C.15 q.1 with Roman law, canonists during the twelfth took another path relying on \textit{culpa precedens} thinking. When Huguccio argued for a return to Gratian’s original position, he did so on the basis of a more explicit use of Roman legal principles. Similarly in proof, developments in the canonical understanding of the burden of proof came to influence civilians as well. Many later jurists understood the role of the episcopal \textit{coadiutor} in terms of a \textit{curator}.

The one area where the jurisprudence diverged was over the level of fictive consent. Canon law only allowed fictive consent through the continuation of a previous will, while civilians allowed the requirements of the law to stand in for the will of the insane. The division on this issue arose, I argued, from a fundamentally different orientation. Canon law looked at the consent of individuals in their own salvation, while the civilians viewed it through the public good. Despite this difference, both sought ways around the absolute negation of the legal personhood of the \textit{furiosus}.

Finally, working from a source-base primarily focused on Italy and the Mediterranean, I have shown that some important differences existed between the \textit{ius commune} and northern European ideas of madness. For one, English and northern French sources made repeated

\textsuperscript{20} See Brundage, “Widows as Disadvantaged Persons,” 193-206, where he discusses the privileges that widows enjoyed by virtue of their recognition as a disempowered group.
reference to a distinction between congenital mental illness (the so-called natural idiot) and later-onset insanity. This distinction had increased importance because of the thirteenth-century Prerogativa Regis, whereby the English king took permanent guardianship over the congenitally mentally deficient and temporary guardianship over those who went mad later in life. The jurists of the *ius commune* based their distinction instead on the severity of symptoms. Congenital madness only proved legally significant in discussions of baptism; otherwise it was a category unused by the jurists. Studies of England and France have also emphasized the importance of royal power in the governing of the insane. Whereas guardianship remained essentially a familial institution, even when augmented by civic authority, in the south, in England in particular the extension of royal guardianship created a greater concern for the government to identify the insane. It also opened the door for greater exploitation of the insane as the king bestowed guardianships on favorites as a means of payment. Still, similarities existed with regard to crimes, particularly homicides, committed by the insane. Royal pardon was a frequent means of dealing with such crimes in England and northern France. Even in Venice though, murders committed by the insane departed from normal procedure and received a ruling from the Doge and his councilors. More careful studies of the archives of southern Europe will be required to make an accurate comparison and discover if the differences in the legal treatment of madness can be pushed further.

I hope for this study of the medieval jurisprudence of insanity to be a useful tool moving forward, both in the history of madness and in the history of disability. The jurists of the Middle Ages reflected on the rights and abilities of the insane as well as their limitations. It was not a

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22 See Hurnard, *King’s Pardon*, 159-170.
23 Ruggiero, “*Excusable Murder,*” 111.
discourse of repression or exclusion, but an attempt to come to grips with a difficult social problem. The question of how to balance rights, protection, and the needs of society continues to raise itself today. Even if the jurisprudence of the Middle Ages offers us few solutions to apply in our own time, at least we can look at our predecessors across the gulf of years and find a common purpose.
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