INSANITY, EXCULPATION AND DISEMPowerMENT
IN BYZANTINE LAW

MARGARET TRENCHARD-SMITH

Juridical disability was the necessary consequence of mental disability in Roman and Byzantine law. Since in Roman law, legal agency could not exist in the absence of intention, the determining principle governing persons judged to be insane or mentally deficient was that they were to be exculpated and disempowered. This principle extended into the Middle Byzantine Period and is reiterated in the systematic reorganization of the legal corpus in Greek, the Basilika of the early tenth century. By that time, too, in Christian Byzantium, canon law and the civil law had come to play complementary roles in the provision of justice. The issues of concern in canons touching on the ‘mad’ or ‘possessed’ flow from a similar principle, having to do with the validity of their actions; in especial, their capacity to participate in the liturgy and sacraments.

1 'Byzantine law' is a term here assigned to Justinian’s own laws within the Codex, to his Novels, and to all later law generated within the empire. 'Byzantines' themselves would not have acknowledged a distinction between 'Roman' and 'Byzantine' law, since they were to themselves Roman and regarded their entire body of law as Roman.


3 Deepest thanks to Patrick Viscuso for sending on references to the canonical questions and responses of Timothy of Alexandria and its subsequent exegesis by
Legal Characterizations of Insanity

In ancient and medieval civil and criminal law, insanity and intellectual deficiency are most often characterized as deprivation: absence, incomprehension and impaired volition mark the insane. 4 Legal disempowerment had predictable material effects on these persons, who were debarred from making decisions or entering into transactions. 5 A madman (furiosus), it was recognized in the laws, could ‘wish,’ but his wishes had no legal force. 6 Their faculties scattered, the insane, it was deemed, lacked integritas mentis. For this reason, they might be wholly deprived of an effective legal presence. 7 In many texts, mad persons are compared to those who are ‘asleep,’ 8 no more capable of actually possessing anything than a sleeping man would be if something were placed in his hand. 9 Legally, they could not even ‘hide’ themselves, since that would require willful action, 10 and were in a sense more ‘absent’ than the absent; 11 they were notionally associated with persons in captivity. 12 They could not give tacit approval—like the dead. 13

The disempowerment of the mad in Roman and Byzantine law has parallels in the legal treatment of infants, of small children and adolescents under tutelage, of women, of slaves, of ‘prodigals’ and of the profoundly deaf and mute. What the mad putatively shared with

Theodore Balsamon and Matthew Blastares on madness and possession within marriage, to post-Byzantine canon law on the same, and to the novels of Leo VI and Nikephoros Botaneiates on spousal madness and divorce.


5 Digest 8.2.5, 19.2.14, 24.3.2.2, 29.2.9, 33.5.8.2; Para. Th. 1.10 pr; Basil. 20.1.14.
6 Digest 29.2.47; Basil. 35.14.47.
7 Digest 3.3.2.1, 3.3.3, 3.3.4, 4.8.27.5, 4.8.48, 4.8.49 pr, 50.16.246, 50.17.124.1; Basil. 2.2.237, 2.3.124, 7.2.27, 7.2.48 (49), 8.2.2.
8 Digest 3.3.2, 29.7.2.3, 41.3.31.3, 50.16.209, 50.17.124.1; Basil. 2.2.201, 8.2.2.
9 Digest 8.2.5, 41.2.1.3.
10 Digest 42.4.7.9, 47.10.17.12; Basil. 9.6.7.
11 Digest 3.3.2.1, 3.3.2, 4.8.27.5, 4.8.47-48, 4.8.49 5.1.39, 24.3.2.2; Basil. 7.2.27. 7.2.46 (47), 7.2.47 (48), 7.2.48 (49), 7.5.3, 8.2.2.
12 Digest 23.2.9.1, 23.4.8, 24.3.22.11, 37.1.12 pr, 38.16.1 pr, 40.5.36 pr, 40.5.36 pr.
13 Digest 19.2.14, 39.5.2; Basil. 22.1.14.