Brokers of Public Trust

Nussdorfer, Laurie

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While public writing as a practice dates back to the dawn of written records, the notion of public words, scriptura publica, was a legal fiction crafted by the jurists of medieval Europe and handed down to their early modern successors. It was not their only useful fiction, but it is one of singular importance for understanding the notary’s distinctive quality as a writer, as was their idea of the public instrument, the written artifact with which notaries are so closely associated. The thinking of jurists about these topics from the time of the rediscovery of the legal texts of Roman antiquity in the early Middle Ages right through the early modern period matters to us not only because of its inherent interest but also because it powerfully affected European legal institutions.¹ University professors and lawyers teaching and writing about Roman law exercised a constitutive influence on legal developments in continental Europe to an extent unimaginable to denizens of lands where Anglo-American jurisprudence operates.² They were not the only source of law, as we shall see, but learned commentary on ancient texts of written law played a crucial role in defining the place of writing in theory and in practice. In the *ius commune*, the congeries of Roman and ecclesiastical (canon) law and medieval commentary that was their creation, the jurists constructed the legal processes and writing acts of continental society in long-lasting and culturally specific ways.

Before venturing into their preferred terrain, definitions, it is helpful to review the three major elements that came together to form this distinctive legal patrimony, the *ius commune*.³ The body of Roman writings on law collected by the emperor Justinian in the sixth century, known again by the eleventh century, was a vital element, providing the materials on which the learned professors went to work.⁴ The Justinianic corpus included several different genres of legal writing, the most...
important of which for medieval interpreters were the *Codex* or *Code*, composed of passages from imperial laws, and the *Digest*, a compilation of opinions of distinguished Roman jurists. Equally crucial, of course, were the second elements, the professors themselves, a curriculum, and an institutional site for reading and commenting on authoritative texts. By the twelfth and thirteenth centuries, the studium of Bologna, one of Europe’s earliest universities, had emerged as the preeminent place for studying Roman law.

In their classrooms, glosses, and treatises, the teachers explained Justinian’s books to students, a process that inevitably slightly changed their meaning as the jurists creatively brought ancient concepts to bear on contemporary practices and pressed their own institutions into Roman molds. So astute, sophisticated, and compelling were their readings that the principle became established, when trying actual cases on the continent, that only those sections of the *Corpus iuris civilis* that had received comment would be authoritative in court. A third major element of the ius commune therefore was the rich tradition of learned reflection on the law, which lasted for more than five hundred years. By the late sixteenth century, the concept of scriptura publica that had been developed by the wide-ranging super novae of the 1200s and 1300s, such as Accursius, Popes Innocent III and Innocent IV, and the post-glossators Bartolus of Sassoferrato and Baldus de Ubaldis, was long established. Rather than follow the concept’s development in detail through the Middle Ages, however, it is useful to focus on the stars of more limited intensity, like Giuseppe Mascardi (d. 1586), Prospero Farinacci (1544–1618), and Giovanni Battista Fenzonio (d. 1639), who illuminate its key features in early modern Rome. Convention called for each new author to review the opinions of his predecessors; thus, the tradition of citation, derided for its sterile technicalities by later reformers, in fact continually expanded the ius commune. So too did the unceasing necessity of bringing actual laws, statutes, into dialogue with the prestigious dicta of the academics.

The medieval jurists played a crucial role because Roman law did not concern itself very much with issues of evidence and proof. The commentators, whether protagonists or heirs of the profound transformation in modes of procedure around 1215 that shifted proof from physical tests like the ordeal to reasoned arguments based on data, elaborated this domain of law on their own. They usually took one of two brief but well-known sections (titles) in the *Code* or the *Digest* on “De fide instrumentorum et de amissione eorum” as their starting point. A comparison of the *Digest*’s treatment with that of the glossator Rogerius in the mid-twelfth century succinctly measures what a distance this pioneer had already traveled. Although the English translation of this section promises that it will treat documentary evidence, the first opinion quoted in the *Digest* does not even mention writing. “Instruments
include all the evidence relevant to a case. Hence, both oral evidence and witnesses are regarded as instruments.” Unfazed by this Spartan fare, Rogerius elaborated: “Instruments are a type of proof. . . . An instrument is said to be all the evidence relevant to a case, but here particularly it means written instruments of which there are two kinds, one called public and one called private.” He then went on to describe what distinguished them, to detail the various types and uses of public and private documents, and to explain how each type ought to be supported if its truthfulness was challenged. Rogerius concluded that “because contracts are often written it must be said that a contract wants writing,” making the dubious claim that Justinian’s legislation bore this out. In fact, Codex 4.21 and Digest 22.4 concern themselves more with ways to prove claims if you do not have a document than if you do. It was Rogerius—and, in succeeding generations, other jurists like him—who made the arguments for the importance of written evidence in establishing proof.

When Rogerius defined scriptura publica and scriptura privata he made distinctions as to their form as well as their uses. Formally scriptura publica came into existence in two ways, either as court records (acta) written in the presence of a judge or “as an instrumentum that a notary [tabellio] has made.” Scriptura privata by contrast is penned by quis privatus, a private individual. Rogerius did not discuss the distinction between a notary and a privatus, but we will need to do so. We have also to understand better what Rogerius and his successors meant when they termed the writing of notaries “public” and the product of their pens a “public instrument.”

While the ancient notary or tabellio mentioned in diverse passages of the Codex was an official writer of sorts, the tabellio to whom Rogerius referred in the twelfth century was different. No longer just a vaguely defined imperial scribe, the notary of the Middle Ages had acquired a tighter identification with public authority. So close was that relationship that notaries could count themselves, like magistrates, as “public persons.” As a persona publica, the notary’s hand, too, was public, manus publica, and hence the work of that hand, scriptura publica, was an authoritative public document. The medieval notary’s acquisition of publica fides, public trustworthiness, distinguished him not only from the ancient tabellio but also from official scribes often described as notaries in other legal regimes, such as that of Islam. Observed while in conversation with private clients or scribbling in courtrooms and council chambers, the notary’s writing activity might look identical to those of such scribes, but his written artifacts carried a different weight. No higher officer reviewed or attested them; they were guaranteed solely by his authority.

The records of twelfth-century Italy confirm that notarial writing had gained this special credibility. The formalities for authenticating personal transactions in writ-
ing, such as a sale or gift, changed subtly but significantly. Whereas the signatures of
the notary and witnesses traditionally validated written agreements between indi-
viduals, in the course of the eleventh and twelfth centuries the witnesses’ signatures
drop away. The signature of the notary alone was enough to render the document
worthy of trust. This new character had nothing to do with his writing abilities or
personal qualities, of course; it was the artifact of the legal fiction that he was a
“public person.”

As we have seen, Rogerius redefined the ancient instrumentum to mean a written
document, applying it to both categories that he had been the first to distinguish,
public and private. A private instrument, or scriptura privata more generally, was
simply writing “whose purpose and form are private.” It was the handiwork of
those without public authority, privati, who made a written record for their own
personal ends. All sorts of writing might qualify, though he specifically mentioned
those types, like receipts, discussed in the famous titles of Code 4.21 and Digest 22.4.
By contrast, the public instrument was particularly associated with the notary. In the
course of the twelfth century, simultaneously with their acquisition of publica fides,
notarial records increasingly came to be called instrumenta rather than the early
medieval term carta. Although the new name owed nothing to Roman documents,
it did add a suitable Justinianic dignity to words that had become more authoritative.

We can capture the jurists’ mature formulation of the public instrument from the
man with the most to say about how to make one, the prestigious Bolognese teacher
of the notarial art, Rolandino dei Passeggeri (1215/17–97). The public instrument
consists of two elements—the content of the negotiation (negocici tenor) and publica-
tion (publicationes). The content is “the contract agreed and arranged between the
contracting parties,” such as a sale, dowry, or debt. Publication, somewhat more
mysterious to Anglo-American readers, he defines as “those things that render the
instrument public and authentic.” “They are called the publicationes because they
make the instrument public and authentic and worthy of trust and because they
must be put in instruments and be written only by the hand of a public person, that
is, the notary, who is a public person whose office is devised for the benefit of the
public.” By Rolandino’s count, the six items of information that made the instru-
ment public, what later jurists would call the formalities (solemnitates), were the
year, indiction, day, place, witnesses, and name of the notary. Subjects of the pope
and emperor might add a seventh, the name and regnal year of their ruler.

Rolandino devoted many pages of his handbook to specific types of notarial
contracts, a subject powerfully influenced by the Roman contracts in the Corpus
iuris civilis. Worth emphasizing is the fact that, to be valid, their formal character
was just as important as their substance. Rogerius has already alerted us to this
equivalence when he defined the instrument by its “purpose and form.” A hundred years later, the form had a reasonably firm physiognomy because over the centuries, although the jurists were not always of the same mind on whether there were six or seven or nine requisites for publication, they did agree that the notary’s public instrument had to have certain formal features. In the opinion of some, he could be charged with the crime of falsum (forgery) if he omitted these. A witness from the end of our period, Giovanni Battista Fenzonio, former chief magistrate of Rome’s municipal tribunal, carefully enumerated the jurists’ traditional requirements (nine in this case) but pointed out that publication formalities ultimately depended on local custom. In seventeenth-century Rome, operative custom had pared these to the date and witnesses.

Rolandino’s thirteenth-century manual for notaries divided their production line into three broad categories: public instruments, wills or testaments, and judicial acts. The revolution in medieval justice epitomized by the outlawing of trial by ordeal in 1215 had put a premium on the written record of what judges saw, heard, and decided in court, and notaries armed with publica fides stepped in to provide it. Judicial acts must be in writing, the jurists taught. Rolandino codified the new expectations that made notaries a vital part of the operations of judicial institutions in both secular and ecclesiastical settings. It was now obvious that, whether its source was a judicial record or a public instrument, scriptura publica was quintessentially, if not exclusively, the creation of the notary.

Parallel to the expanded use of documentation in court proceedings was its increased use as evidence, as Rogerius had signaled when he had redefined instrumenta as written proof. While the new criminal trials that replaced the judicial ordeal had little use for writing because they required accusers and witnesses to confront the accused in person, civil disputes grew ever more dependent on it. Strongly influenced by the ritualistic features of Roman civil procedure, litigation became a highly formal series of set exchanges focused on documents. Indeed, already in the mid-twelfth century, as we have seen, Rogerius assumed that written records, public or private, would be challenged in court and gave instruction in the ways to defend them. “If the truth of an instrument is questioned,” he advised, “it can be proved by the depositions of witnesses or comparison of handwriting.” In the new culture of rational proof, most evidence had to be tested.

The abolition of the ordeal had set the stage for a massive battle over the quality of evidence, a conflict that would keep jurists entertained and judges tormented from the twelfth to the eighteenth century. The professors’ goal was to define a clear and absolute hierarchy in which the authority of all possible kinds of evidence would be determined systematically. They hoped that this system of what came to be
called “legal proof,” would guide or, better, dictate to judges, leaving them very little discretion. However, the jurists were not by nature given to concord, so the clear and absolute hierarchy was in practice many contending scales assessing the merits of a highly fetishized concept.

The jurists classified their materials as “full” proof, “half” proof, or signs (indicia), which entered the discussion chiefly as indicators that torture would be needed to get more information. By the late sixteenth century, when the experienced ecclesiastical administrator Giuseppe Mascardi completed the most thorough treatment of the topic of evidence to issue from this extended debate, the categories were somewhat more refined. In addition to seven types of full proof and four types of half proof, there were conjecture, signs, and fictio, which was “when falsehood is accepted as true in particular cases allowed by the law.” Seven, six, nine, twelve—the numbers did not really matter because the jurists did not agree. After discussing a wide range of views, Mascardi put witnesses, documents, confession, evident facts, oaths, “reasonable” presumption, and reputation (fama) in the category of full proof, omitting inscriptions, letters with episcopal seals, precedent (re iudicata), and natural reason among others. He classified as half proof the testimony of only one witness, handwriting analysis, scriptura privata, and conjecture (praesumptio non ita urgens). What he called “uncommon” types of proof, like duels, cold water, or a very odd test with an iron (purgatio ferri candentis), turned out to be mostly unacceptable to the church.

Although many medieval jurists had placed notorium, that which was transparently obvious, at the summit of the ladder of evidence and some thought confession was highest, the real battle from the twelfth century on was between witnesses and documents. Learned law both endorsed writing and allowed witnesses to prevail over it. Pronouncements for each side, sometimes from the same source, rang out for centuries. Pope Innocent III in the early thirteenth century and Baldus in the late fourteenth clearly favor witnesses and just as emphatically support written evidence. Both Holy Scripture and the Corpus iuris civilis seemed to give the edge to witnesses (two or three), but the Code included one law that contradicted this: “In the administration of justice, documentary evidence has the same force as the depositions of witnesses.” When he reviewed the long debate, Mascardi expressed some perplexity, not to say fatigue, at the difficulty of deciding securely which should be preferred, witnesses or writings. For our purposes, however, what was significant about the jurists’ vexatious attention to the question is that it forced them to say a good deal about written evidence.

Baldus, whose theoretical treatment of proof was more extensive than that of earlier jurists, contributed significantly to the debate. The power of the public
instrument, he wrote in his commentary on Code 4.21, derived from the authority of the writer, its formalities, and the fact that its content could be verified by the senses. In his discussion of Digest 22.4.6, he answered the question, “Is an instrument presumed to be true?” affirmatively, adding “if it is public, . . . but not if it is private.” Two centuries later, approaching the problem from the perspective of an expert on crime, the Roman prosecutor Farinacci too had to consider in a dispute what weight the notary carried as a writer. Citing many learned opinions, he claimed that as a rule the benefit of the doubt ought to go to the notarial record. The instrument from the hand of a notary “carries three presumptions: that it is true, formal, and that everything in it occurred. . . . it has definitive force, ready execution, is said to be proof proven, [and] makes an apparent matter manifest, very evident, transparent and obvious to all [notoriam].” Presumably the notary’s public trustworthiness transferred itself to the public instrument so that it stood very high on the scale of proof.

The word presumably flags a key feature of the way the jurists conceived written evidence, however. Despite their disagreements, they concurred in thinking that the truth of documents was conditional. Even the public instrument had credibility (fides) only until it was disproved and in that regard was no different from scriptura privata. One reason for their skepticism was the understanding of contract that they had inherited from Roman law, as an agreement between consenting parties. According to the Digest, “The point of writing is to prove the transaction more easily, but the transaction, if proved, is valid without it.” Baldus explained that writing implied an obligation, if such was clearly stated, but did not in itself constitute the obligation. The real contract was the agreement between the parties; the instrument was merely the notary’s record of that agreement.

If their legal heritage emphasized deeds over representations of deeds, the medieval jurists’ debate about the hierarchy of proof highlighted the vulnerabilities of all such representations. So a second reason for their cautious attitude toward written evidence was that they had read all the arguments about the authority of oral testimony versus that of documents, and they saw that no form of proof, except the transparently obvious, escaped unscathed. Again, Baldus put the matter succinctly: “Proof is easier to support than to establish.” The public instrument had the weight of two witnesses, but a full proof required three.

Indeed, writing always required the support of witnesses. The notary’s record usually named two witnesses, but depending on the nature of the contract, more might be needed; following Roman precedent, testaments, for example, demanded a total of seven. Scriptura privata had to have three witnesses. By the same token, the force of documents could be undermined or nullified by their witnesses, a problem
that inspired feats of legal fancy among the jurists. How credible is a public instrument denied by one witness of low status but supported by the other witness of higher standing? What if it is rejected by three witnesses, none of whom was present when it was formalized? If scriptura privata, such as a letter, receipt, or account book, is supported by the three living witnesses who signed it originally, does it have more, equal, or less force than a piece of scriptura publica whose two witnesses are dead? What if four witnesses to a will say it is false, but do not recall what was said at the signing, while three say it is valid and remember precisely the details of the setting, time, and words spoken? In his detailed treatment of proof, Mascardi tried introducing distinctions, a practical scholastic approach to the overheated question of witnesses versus written records. Some matters concerned documents, and in such cases oral testimony might be irrelevant; some made no reference to writing, and the two forms of evidence were equal. However, if witnesses said an instrument was false, it could be rehabilitated only through other witnesses.

The unintended effect of this extended discussion of the hierarchy of proof was to reduce all writing, private and public, to the same level. When pushed by the logic of their arguments, even proponents of public writing had to admit that in some cases scriptura privata might provide better evidence than a public instrument. As we shall see, scriptura publica would have to look outside the classroom, if it wanted to retain its privileges. Yet, in posing their hypothetical “what if” questions about evidence, the jurists reflected the real life of the courtroom, to whose proceedings they frequently contributed legal opinions. Moreover, their imaginative and critical interrogation of concepts had a significant, if indirect, impact on the writing practices of notaries and private individuals. Asking which document to believe led, as we shall see, to the close analysis of the written artifact produced by the notary and to the elaboration of a vocabulary for describing both the process of composition and the products of his pen. Although the actual practices of notaries provided the material, the jurists created the language for talking about public instruments, and through the statutes of cities and guilds, this language found its way into law and custom.

The notion that the notary and the testator or the contracting parties met together physically and that the notary formalized their wishes in writing operated to conflate act, the statement of wishes or the pact in the presence of witnesses, and artifact, the instrument or will that ensued. An instrument was said to be rogated, a term that scholars trace to the ritual of asking (rogare) the scribe to record the contract. The authorizing notary who put pen to parchment was the rogatario or rogatus, and a later vernacular synonym for an instrument was rogito. The language, which predated the Roman borrowings of the twelfth century, implied that some-
thing social had happened to which the technical activity was subordinate. Medieval commentators were sensitive to this nuance in a transaction that after all took place between parties in the presence of a notary and witnesses. They preserved its performative dimension when they described a notarial instrument as being “celebrated,” as if it truly were an event. As a consequence, however, how the notary wrote received little attention from the theorists before the thirteenth century. To reconstruct the process of composition, historian Giorgio Costamagna turned not to theory, therefore, but to the rich evidence of practice provided by the early notarial archives of Genoa. From these sources he discovered that the notary who validated the act of the parties drew up the written artifact in three stages. The notary followed a first draft (notula), presumably taken in the presence of the parties or very near in time to the transaction, by a more technical redaction in summary form (imbreviatura), and he climaxed the operation with an instrument “in public form” delivered to the parties. The making of a public instrument therefore entailed a sequence of steps that included an event, note taking on key details of that event (parties, witnesses, date, and place), a revision adding legal precision pertinent to the type of contract or testamentary formulas, and finally a signed version that clients took away.

While local practices varied in Italy, and the terms used in Genoa were not necessarily the same in Venice, Siena, or Rome, it is clear that notaries were writing a good many records that were not the final instruments “in public form.” In the thirteenth and fourteenth centuries, the jurists began to wonder what the status of these earlier versions was; after all, they too were in the public hand of the notary and often had the essential formalities that the handbooks required. It was not an idle question because clients sometimes lost their public instruments and in some places, like Genoa and Rome, chose not to take them at all, assuming that the notary’s second phase, the imbreviatura, was sufficient. If there were temporally distinct phases to the production of a public instrument and a variety of written artifacts issuing from each of these stages, however, the jurists had to sort out what authority these documents had. They had to develop language for talking about how to compare these versions, for deciding which was more or less valid, and for discussing future versions, or copies, which clients or heirs legitimately might request.

In the course of the fourteenth century the post-glossators, and Baldus in particular, commented in more detail on the products of the notary’s pen. They deployed a vocabulary for this purpose centered on a set of terms—matrix, protocollum, imbreviatura or abbreviatura, originale, and authenticum—that enjoyed lasting success in the continent’s legal discourse. The terms are essential to know not only because the jurists used them but also because they worked their way into statute.
The difficulty is that while they purport to denote scribal objects produced by notaries, they bear only a glancing relationship to the actual written artifacts of practitioners. This is the reason why they may have more than one meaning or may be employed in one city and not another or in the fourteenth century but not the sixteenth. The jurists’ language was fixed in the timeless and universal ether of the ius commune; notaries wrote on and with varied materials in specific places and times under diverse political and professional conditions. We explore these specificities in later chapters. For now it is our task not so much to match the professors’ categories with physical objects as to grasp their conceptual import.

In fact, the notary’s rough draft, what Baldus had termed the “earliest writing,” hastily scribbled at the time of the transaction, would have been the most difficult of all phases to recover physically, for it was routinely struck through, thrown away, or lost. The jurists thought more highly of these jottings than did the notaries, arguing that they captured the substance of the agreement between the parties (the contract) as well as those essential formalities (date, place, and witnesses) required in a public instrument. Their respect is reflected in the name matrix (Italian matrice) with which they rebaptized what the Genoese, who scratched them out, had called simply notes (notula). Always focused on hypothetical conflicts, the professors appreciated the matrix because if the veracity of the client’s document was questioned, the “earliest writing” offered a way to check it. Farinacci quoted one authority who suggested that, “when the trustworthiness of an instrument is in doubt, go to the notary’s notebook or sheet of paper on which the earliest writing of the instrument is made, as long as it is not so completely crossed out that it cannot be read.” In practice it would have been a rare notebook that survived to offer this useful evidence, but the jurists were concerned with solutions to legal problems, not practical problems, and in their defense it might have been a good thing if the notaries had saved their rough drafts more scrupulously.

As we saw earlier, the imbreviatura or abbreviatura (the terms seem to be interchangeable) was the second phase of the notarial redaction of an instrument. It involved the notary’s specification of the technicalities of the contract or will, legal formulas referred to as the customary or abbreviated clauses (clausulae consuetae or ceteratae), which he added while recopying his first notes and the requisite formalities of date, place, and witnesses into another format. When a client at a later moment wanted an instrument “in public form,” the notary put it together from the information contained in the imbreviatura of the transaction. It was abbreviated to be sure, but it had everything legally necessary to be considered scriptura publica by the hand of a notary and carry public trustworthiness.
The word *protocollum* or protocol could mean a single instrument or act but more commonly referred to a notebook or volume that contained the notary’s whole output of imbreviaturae, usually in chronological order, for a given period of time. The protocol in this latter sense came to function as a guarantee of the authenticity of the notary’s record both because it was understood as the proper place to keep it and because the temporal sequence of instruments hindered tampering (removing or adding acts) or falsification of dates. It was a key point of reference for the jurists when they talked about notaries. If it were missing, even the instrument in public form lost its fides. As the prosecutor Farinacci put it in the early seventeenth century, “Instruments without their protocols are suspected of forgery and do not prove anything.”64 His contemporary, the magistrate Fenzonio, closely followed tradition when he noted that if there was a discrepancy between a public instrument submitted by a litigant as evidence in a case and the record of the same transaction in the notary’s protocol, the one in the notary’s possession had greater credibility.65 The protocol could even reinforce a public instrument that was missing key formalities.

The last, though optional, phase was the creation of the “public form” of the public instrument. The jurists actually did not say much about the mechanics of this stage, which mattered more to consumers (and governments) than to legal scholars. The notary provided clients willing to pay the extra fee with a version of the instrument, often on parchment, that bore his signature and his identifying symbol (*signum*) or seal, which they could take home with them.66 Usually clients brought them “home” in order to present them as evidence in civil court, where they hoped the probative force promised to the public instrument could advance their suits.67

We come finally to the terms *original* and *authentic*, and we might well wonder how to apply these to the artifacts that we have just surveyed. Which version was the original—the notes that were as likely to be thrown away as saved, or the abbreviated version in the protocol, which the notary made some time after the actual transaction? Or was the original the version that the clients took with them, which they hoped would defend their rights or interests in some future contest? The notary had written all of these. Which were authentic? What was a copy, and what was its status in the hierarchy of evidence?68 Did copies carry less weight than originals? In that case, what was the point of a sacrosanct protocol, if copies made from its contents were worthless? For clients who purchased notarial services, the point was to gain access to the words of a publicly authorized writer in a form that outsiders would believe. What form should that be? The questions pressed on the notaries, because the jurists put the responsibility for retaining the products of particular stages of their writing process on their shoulders, under threat of torture and criminal penal-
ties. Which products should they be sure to keep? The concepts had real-world consequences for clients and notaries, but they mattered to the jurists, too, because they cut to the heart of public writing.

After reproving most of his predecessors for confusing these terms, Farinacci announced that he would impose semantic order by defining them according to “our common way of speaking.” By this criterion, he declared the originale, the matrix, and the imbreviatura to be identical. Because two of the three categories varied in their material forms, this statement could not have been literally true. What gave it truth, what they had in common so as to make them interchangeable, was the early character of their inscription. They were the “earliest writing,” a product of that moment that Baldus had pinpointed as critically important in his commentary on the Codex. Farinacci admitted that the imbreviatura was not as “early” as the matrix but defended his claim on the grounds that it was just an abbreviated version of those first notes. So, at least in Farinacci’s early seventeenth-century Rome, the word “original” signified the moment of origin in all its primitive roughness, a fact the lawyer emphasized by describing the physical materials that bore the matrix. They were loose sheets of paper or little booklets (liberculo) to which the notaries gave dismissive names, like broliardellum or bastardellum. As we have seen, notwithstanding its unimposing appearance, the matrix or originale contained everything necessary to qualify it as a public instrument.

If original meant what was written down first, how should we understand the word authentic in a documentary context? The instrument “in public form” that the notary gave to the contracting parties at their request was authenticum. An authenticum was a copy, but it was a powerful copy, endowed with authority by its formal signature in a public hand and by the fact that it stood, as we shall see, in close relationship to the protocol. It was this document that a litigant could take before a judge as proof of a claim; indeed, it was this copy that jurists taught ought to have the weight of two witnesses.

The fact that an originale and an authenticum, though quite different in their timing and aspect, had the same legal force ought to surprise us, but the jurists, both by what they said and by what they did not say, made it all seem quite natural. They pointed to the Janus-like protocol in the notary’s possession as the pivot. Looking backward in the process, they claimed that the imbreviature in the protocol faithfully reproduced the parties’ or testator’s wishes as expressed in the original notes. The jurists did not linger over the fact that the imbreviatura, stage two, was a quite different text than the matrix it supposedly replicated. Facing the other direction, they affirmed the principle that no copy taken from the pages of the protocol, however authentic, carried probative weight unless the same instrument in the
protocol backed it up. They did not mention that the heavily abbreviated version in the protocol (the imbreviatura) did not look at all like the authenticum, the copy “in public form.” Their silences allow the material form of the public instrument, both physical and textual, to vary. Their words, on the other hand, stress its connection to the notary. To the jurists, the public instrument, at whatever stage of composition, never entirely let go of its author.

Because the notary carried such a burden of responsibility for his writing, we might well ask what the jurists thought about him. Was he simply the hand of authority, manus publica, and that was that, or did his humanity insert itself into their reflections? The answer of course is that to some degree the notary did force himself upon their attention, if only because the professors traded in the currency of all possible conflicts. While it was not until Baldus in the fourteenth century that a major theorist wrote specifically for notaries, commentators did address a limited number of legal situations that referred to their qualities. These discussions focused on the notary’s personal status, his knowledge of the facts he recorded, his expertise in his duties, his reputation and its effects, and his mistakes and misdeeds.

In contrast to governments and professional bodies, who, as we shall see in later chapters, imposed social and educational requisites on the aspiring notary, the jurists’ demands were simple. The notary needed no more and no less than any person who qualified for a public position: he had to be a free adult male who had not been excommunicated or declared legally infamis. As a human being of this privileged status, he ought to be able to arrive at truthful knowledge using his senses—in particular, his hearing and sight. It was not the notary’s job, according to Baldus, to read the intentions of his clients as they made their wishes known at the rogation of the will or instrument. Instead, he reported what they said and did. His charge was to hear them articulate those desires on their deathbed or to watch as the parties to a contract exchanged money and then to record accurately what he heard and saw. Unlike the Roman notaries themselves, who credited divine inspiration for their capacity to tell the truth, Baldus and his followers taught that the proper basis for a notary’s knowledge of the facts was sensory. The commentators drew illuminating contrasts between the office of a notary and that of a judge. According to Fenzonio, “the notary is called the judge’s eye.” The notary represented what he saw and heard; the judge by contrast had to figure out what happened by interpreting the evidence presented. The notary was supposed to use his hand as well, of course; at least one authority held that what a judge penned was not scriptura publica because “writing is not a judge’s charge but a notary’s.”

Consistent with the epistemological resources to which they had given him access, the jurists defined the notary’s peculiar expertise narrowly. Although they
went out of their way to specify that he know how to read and to write clearly, they
did not necessarily expect him to have legal knowledge. On what we might well
regard as crucial technical know-how for a notary, the formulas of specific contracts
and legal provisions known as the abbreviated or customary clauses, the professors
said very little. They worried about when these could be added to an instrument and
whether the notary had informed the clients about them, but they left their details to
local custom. They did not define the notary’s expertise as skillful application of the
right contractual language. Quite a different matter was a public instrument
missing its formalities of date, place, witnesses, and the like, for they regarded their
inclusion as fundamental to the notary’s job. Reviewing the authorities, Farinacci
found that the vast majority believed that when a notary failed to provide them, he
was presumed to have done so on purpose and could be criminally prosecuted. If a
notary was expert in his profession, “it is not plausible that he did not know which
formalities to put into the instrument or testament and left them out.” Farinacci,
the son of a notary, was slightly more indulgent. He praised the opinion of one jurist
who thought that punishment ought to be administered only when it was a question
of omitting the usual formalities that all notaries knew, such as having more than one
witness or forgetting the year or the pope’s regnal year. After all, he quoted ap-
provingly, “a notary is not required to have the same expertise as a doctor of laws.”

The jurists’ portrait of the ideal notary, a free male listener and observer who
always remembered to include the date, place, and witnesses to a transaction, lacks
only one finishing touch: a good reputation (fama). In the Middle Ages, reputation
was so highly valued as evidence that the glossators considered it a form of proof.
Taking his cue from Baldus, Mascardi subtly demoted it as a category, but the
concept remained influential. Farinacci frequently alluded to the effects of a not-
ary’s bad or dubious reputation on the evaluation of evidence. Ill fame compro-
mised the presumption of the ius commune in favor of the notary. Even when a
notary had not been convicted of a crime, notoriety could undermine the trust-
worthiness of his public words. It had an impact on the judge’s assessment of a
disputed instrument, which lost credibility instead of gaining it from his authorship.
It also opened the notary to criminal prosecution, for example, when a judge had to
determine whether he had written or omitted something with evil intent or simply
in error. The jurists did not concern themselves with defining norms for the
profession, but they did care about how the notary’s reputation affected the proba-
tive value of his words.

This focus on the efficacy of the public instrument drove their interest in the
notary’s mistakes. As we have seen, if a notarial act was to count for something in a
court of law, it had to be formally as well as substantively correct. Notarial error in
either form or content jeopardized its validity, which in turn opened clients to legal harm and the notary himself to liability for damages. Although the presumption of the ius commune was that errors in an instrument or will were not the notary’s fault, the jurists liked to consider all possible contingencies. They were interested in how documents lost their probative force and keen to establish a means of distinguishing genuine mistakes from criminal alterations to the text, made either by the notary or by other malicious parties. Thus, they wanted to know, Was a given notarial document an actual instrument? Was it truthful? Would it prove in court?

Against the backdrop of these questions, the commentators paid close attention to the physical integrity of the instrument. Farinacci in particular weighed the meaning of all graphic interventions, whether these changes were subtractions, by crossing out or scratching through, or additions, words slipped in between the lines or in the margins. The jurists thought hard about whether and when the notary could correct an error in the instrument. Because it was legally valid in all three of its stages, he could not just throw it away and start over. Summarizing received opinion, Farinacci stated the general rule that the notary could not make a correction at all after the act had been rogated, though his dozens of elaborations and restrictions on this principle suggested otherwise. Baldus had seemed more permissive, declaring that the notary could amend a mistake as long as it did not damage his clients’ interests, but to judge from the many limitations he imposed, his pliancy was more apparent than real. Opinions were divided and often contradictory. Because the jurists were committed to the idea that the original, imbreviatura and instrument in public form were identical, it was hard to allow the notary to fix mistakes, of commission or omission, as he redacted what in reality were three distinct texts.

At most, some commentators could offer two sources of flexibility. The first was the distinction between errors that had to do with his own office as notary (solemnitates) and those that pertained to the substance of the contract (names, things, boundaries), and the second was the intervention of a judge. Even in the case of mistakes in the formalities, however, the jurists demanded a high level of scrutiny. If, for example, the notary had forgotten to include the indiction, which Baldus considered more obscure knowledge than the regnal year of the current pontiff, he could add it later, but it was quite a different matter when he omitted the date on a mortgage agreement. The second source of flexibility was even less elastic. A notary who had noticed an error could notify a judge and perhaps the contracting parties, prove that the missing or incorrect data was in fact a mistake, and with their approval make the correction. By the early modern period standards had, if anything, stiffened, with Mascardi and Fenzonio demanding that any changes be witnessed and recorded on the instrument. Although practice probably did shift over
time, it is worth noting that in 1398 the Roman notary Antonio Scambi, serenely oblivious to the jurists’ shock and horror, simply corrected his mistake on a document with an explanation.

After the doctors’ austere defense of the integrity of the instrument, it may come as something of a surprise to learn that they were quite prepared to admit half measures. A suspicious document was not necessarily worthless. It might still have some credibility, and even if it failed to provide proof, it was a far cry from false. The probative value of writing was relative, not absolute; a record disfigured by extraneous marks might still lay some claim to veracity. Nevertheless, as it slid down the scale of fides, it might well sink to the point of being judged invalid or untrue. At that point legal thinkers had to confront the question of the notary’s culpability, not mere liability for damages but dolus or criminal intent. As Farinacci archly put it, “Let us move on to the falsehoods [falsitates] committed by notaries in several ways, would that it were not so.”

Law professors in the Middle Ages had inherited from the Romans the crime of falsum, a category of misdeed applicable to a rich range of deceptive practices. Roman law’s falsum had a much broader register than the English term by which we are accustomed to translate it, forgery, embracing everything from altering documents and counterfeiting coinage to switching babies in the cradle. As capacious as it was, falsum expanded even more in medieval and early modern Europe, sweeping in fictitious pregnancies, adulterated flour, and fake textile stamps, along with nefarious things done to writings, like opening, hiding, tearing, scratching, or burning them. Obviously, any kind of document, whether in a private or public hand, might suffer malicious perusal, modification, or destruction, but falsum in Farinacci’s exhaustive account encompassed some criminal behavior pertaining especially to notarial acts and to their authors.

Contrary to what we might expect, forging public instruments was not high on the list. The great Florentine lawyer Francesco Guicciardini showed profound insight into contemporary attitudes toward notarial documents when he noted that most false instruments were originally true. It was only with time that the desire to change their provisions became irresistible, and when it did, notaries were far from the only suspects. The jurists would have admitted that notaries sometimes falsified their texts, but it was the more challenging questions that interested them, like the legal status of real instruments rogated by false or putative notaries or the liability of notaries for invalid acts that were false. In keeping with this taste for paradox, the first of the profession’s misdeeds that Farinacci took up was the real notary who denied that he was the notary or, more precisely, said he had not rogated a particular instrument for a client and refused to give it to him. A crime of this
sort threw a society that entrusted the safekeeping of its contracts and wills to notaries into disarray, but the discussion allows us to see at a deeper level the distinction drawn between the man and the office. A notary might defend himself by claiming that he had drawn up the record as a friend (amicus), not as a notary (tabellio). Mascardi explored this problem in some detail, pointing out that if a man who happened to be a notary signed his name to a document without mentioning that he was a notary, we could not assume that he had rogated it. The public signature with its affirmation of the notary’s office, however, allowed the presumption that the notary had signed as tabellio, not amicus. In his public capacity, unless he was old and forgetful, he was guilty of falsum if he did not bring forth the requested instrument.

Some notarial misdeeds were straightforward even for the jurists. They largely agreed that failing to keep the protocol (or, more controversially, the matrix), leaving out the obligatory formalities, or drawing up illegal (i.e., usurious) contracts deserved punishment. More contentious were those cases in which standard legal phrases failed to describe accurately what had taken place in a transaction. Two examples caught the special attention of the expert on crime Farinacci. Was the notary a falsario when he deployed the formulaic statement in a will that the testator had named his heir orally when in fact he had simply concurred with the notary’s suggestion? The purists defined falsehood as any alteration of the truth, and the statement was not literally true, so by one account the notary was indeed culpable. But the opinion prevailed that if the testator had nodded his agreement, the notary had done no wrong, nor should he be prosecuted unless the will as a whole had been invalidated.

A second, and thornier, problem was how notaries represented the act of paying in cash in their instruments. Was the notary guilty of falsum if he said the money was counted out (pecunia numerata) when it had been handed over but not counted, or counted but not in his presence, or counted and handed over but immediately returned? The variety of financial fictions that pass in review makes Farinacci’s forty or so elaborations on the topic a cautionary tale for readers of notarial contracts but sharpens our understanding of the notary’s own appearance in his texts. Baldus argued that the notary committed falsum if he had merely witnessed someone putting money into a purse but stated that it had been counted. He counseled notaries to register the declarations of the parties in such cases (paying close attention to verb tenses) rather than make their own assertions. If the notary wrote that Titius said that the money in the purse had been counted, the notary would be off the hook if the amount in the purse was insufficient. He would be guilty of falsum, however, if he portrayed as a fact attested by his eyes and ears what
was no more than a statement by Titius. The profession had to negotiate with some care linguistic conventions that emphasized the notary’s textual presence and juridical doctrines that confined those representations to what the notary could see and hear. Nevertheless, because proving falsum required close examination of an instrument’s language, the alert notary could avoid prosecution if he erred on the side of more precision rather than less.

Prosecution implied punishment, and here Farinacci, though never without a battery of cited authorities, may have created an original synthesis. He acknowledged that the ancient penalties for falsum, deportation and confiscation of property, had given way to a system in which punishment was left up to the judge. “For the crime of falsum, there is no specific penalty because, since the kinds of falsification differ, the types of punishment vary according to the case and the type.” When the crime was serious, harmful to the state, or repeated, “such as a notary committing multiple falsities,” culprits could face loss of a hand or the death penalty. Loss of office and legal infamy (infamis status) followed upon the main punishment, and the guilty notary would also have to pay civil damages. Farinacci admitted degrees of guilt, however, arguing that, where culpability was slight, civil proceedings were more appropriate than trials for crime. He would have relegated a dispute over the accuracy of a notary’s description of a testator as being “sound of mind,” which was legally essential for a valid will, to litigation. In any case, the broad role he assigned to judicial discretion certainly permitted a spectrum of lesser penalties, chiefly fines.

Less nuanced than the jurists, Roman city law defined falsum committed by notaries, because they bore public authority, as public crime, which entailed specific procedures and penalties. In the fourteenth century, notaries lost their office and paid fines (on pain of losing their right hand) as well as damages to the injured parties. The fifteenth-century statutes added public humiliation to these punishments; the falsario had to stand on the steps of the senator’s court on the Capitoline Hill before crowds summoned by the ringing of the town bell. In seventeenth-century Rome, a complex grid of jurisdictions and growing state surveillance meant cases of notarial crime were more likely to be heard in papal than civic courts. As far as we can tell from still incomplete evidence from these tribunals, however, charges of false wills and instruments by notaries were rare.

Both in legal doctrine and in local statute, notarial falsum embraced not only contracts and wills for private clients, what we call business acts, but also judicial acts written for litigants in civil cases or as part of a criminal proceeding. Complaints that notaries in early modern Rome had manipulated judicial records, while not frequent, were at least as common as those for business acts. Backdating an entry in
the office’s judicial log (manuale d’atti), changing details on a legal notice, and falsely transferring a case from one court to another were just some of the abuses to which notaries could lay special claim. One Capitoline notary who faced these and other charges, while still managing to hold onto his position for thirty years, was Flavio Paradisi. Paradisi unquestionably had a touch of the flamboyant about him. In 1646 he accused an acquaintance of writing a defamatory placard calling him a cuckold (becco), but the case ended ignominiously when the court discovered that he had forged it himself. The astonished defendant declared that if he had chosen to insult Paradisi he would not have called him a becco, “because I don’t know whether he is one,” but rather a falsario. “That trickster has been prosecuted in all the courts in Rome.” Of course, forgery was not the only kind of crime for which notaries might be prosecuted; extortion, cheating, and the whole normal array of misdeeds might apply just as well. However, within the domain of falsum, although executions did take place in Rome, notaries seemed to have evaded them; the few convicted professionals of whom we have been able to find trace paid fines.

Early modern jurists debated whether the penalties for falsum extended to falsification of documents by private individuals. Rome’s city law said that they did and levied the same fines on those who faked receipts and letters as it did on notaries who made false instruments. However, because of their greater probative value in the economy of evidence, forged public instruments submitted in court carried double the penalties of falsified scriptura privata.

The learned commentators had significantly shaped the image, if not the reality, of the notary as a public writer, and their success in integrating a wide range of professional misconduct into the ancient crime of falsum sharpened that image both in law and in the popular imagination. As the story of Flavio Paradisi illustrates, to the public at large a notary who did wrong was a falsario, no matter what exactly he had done. The jurists were not hostile to notaries, of course, just more interested in each other, and in their serene indifference they made a final theoretical contribution of great value to the profession. This was their treatment of the role of custom.

As we have noted, the technical details of different types of contracts were called the customary or abbreviated clauses, and no legal writer thought that notaries needed any special knowledge of these formulas. It was enough that he employ those phrases that were commonly used. Usage or custom had a respectable pedigree. In the Digest itself we read that “custom [consuetudo] is the best interpreter of statutes,” an opinion quoted approvingly by Fenzonio as he commented on those of the city of Rome. But medieval and early modern jurists chiseled this doctrine to a fine point. According to Baldus notaries should observe local custom when drawing up
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public instruments, and Farinacci also noted that contracts varied by region and city. Mascardi gave as an example of conjectures that we take for granted the notion that contracts had been written in the usual or customary manner. In the view of Baldus, even deeply suspicious circumstances like a missing protocol or a false claim that money had been counted could be excused by local usage. Such powerful theoretical support gave the notarial profession in each Italian city considerable flexibility in the conduct of its craft. In some places their practices flew in the face of the jurists’ recommendations, but even where they conformed to general principles, local notaries could determine what kind of writing materials and formats, which formularies, and what style of signature to use. Guild and city statutes restrained this freedom to be sure, and custom itself was not without constraint. Farinacci made it clear that a notary was permitted to add during the second (imbreviatura) phase in drawing up an instrument only those customary clauses most uniformly, most frequently, and most recently found in contracts. If his clients wanted to depart from common practice, the notary had to be very careful about which formulas he chose. Nevertheless, with their liberal invocation of custom, the jurists had handed to the local profession a small sphere of autonomy and a useful tool.

The jurists did not have much to say about the fact that notaries earned a living from making scriptura publica. Their job was to comment on the written law and to mediate between texts and society, not to explore every facet of the operations of the legal system. They did not discuss the price of public writing nor did they regard it as anomalous that a free profession produced and sold documents imbued with public authority. In his notarial handbook, Baldus stated tersely that a notary could not be compelled to give an instrument to the contracting parties without receiving his fee (“sine mercede”). Neither he nor the other theorists reflected on the logical or moral implications of turning evidence into a financial asset, much less on the notary’s ambiguous position at the interface between public credibility and personal gain. When, however, in the late fifteenth century the popes began to sell notarial offices in Rome, a process more or less complete by 1600, the economic dimension acquired more robust theoretical underpinnings. Venal notarial offices were a form of property, bona stabilia, just like any other office put up for sale by an early modern state. The jurists were comfortable applying the usual norms of proprietorship to the papers and title of a notary’s office; by right the owner of such property could sell, mortgage, or give away both protocols and title and could bequeath them to his heirs.

The concept of public writing owed much to the accumulation of definitions and debates by generations of legal scholars between the twelfth and the seventeenth
centuries, but quite clearly could not be left in their hands alone. They had fashioned an influential theory of evidence and a powerful new writer, the notary, from their reading of the *Corpus iuris civilis* and the needs of the medieval Italian cities. In the interests of judicial order, however, the cities themselves, and their successor states, had to transform the rich contingencies and hypotheses of the doctors into more certain and more enforceable rules. Statute, that is the laws of guild, city, and monarch, had a great deal to say about scriptura publica and the notarial profession in Rome, as we shall see in chapter 3. However, it would be a mistake to view legal doctrine and public regulations as entirely separate, for their relationship was a subtle dialectic. On the one hand, the jurists gave language to the writers of statutes, and the writers of statutes knew they could count on ius commune to cover anything they had failed to specify. On the other hand, legislators in Rome as in other Italian cities were keen to corral the often-contradictory impulses unleashed by ius commune; they wanted to pin down ambiguities and settle conflicts. The differing way the two spheres of law envisioned what should happen when parties presented documents in court illustrates the complexity of their interaction.

As we have seen, in principle the jurists regarded any kind of writing, whether scriptura publica or scriptura privata, as efficacious evidence when supported by witnesses, more witnesses in the case of scriptura privata. But how in practice was one to make evidence effective? Notwithstanding its rhetorical flourish, Farinacci’s claim that the doctors thought the public instrument “had definitive force [and] ready execution,” was wrong. In ius commune, according to the lawyer Luca Peto, who revised Rome’s city statutes for publication in 1580, the public instrument did not have “ready execution,” unless a debtor declared its contents to be true before a judge and in the presence of his creditor. Writing seventy years later, Fenzonio agreed.

The Roman statutes, which governed the conduct of all lay inhabitants regardless of what court they appeared in, broke sharply with learned law on the manner of mobilizing written evidence, whether produced by a notary or a private individual. Strongly favoring writing over its rival, witnesses, they streamlined the procedures required for obtaining judicial action on the basis of documentation. The two-step process entailed the verification (*recognitio*) of the evidence submitted to the court and the issuance of a warrant to seize the goods or person in question (*executio*). In comparison to the penitent debtor imagined by ius commune, the Capitoline tribunal practiced a rougher justice. If a plaintiff submitted a public instrument signed by two witnesses, even if they were not present at the initial transaction, and their handwriting was identified in court as authentic, the document was legally recognized. The statutes extended the same privileges to scrip-
tura privata, if it was supported by the oral testimony of three witnesses or by handwriting analysis. Once evidence was formally admitted, municipal law authorized judges to act on it (executio) with dispatch. With very few exceptions (like false, simulated, or usurious contracts), after a ten-day period magistrates could simply enforce the terms of written agreements, both notarial instruments and personal receipts (apoca), with warrants of arrest or of seizure and confiscation of property. This was as close to “ready execution” as anyone could wish—indeed, far too close for the comfort of Peto and Fenzonio.

Both Peto, author of a handbook to judicial process in the Capitoline court, and Fenzonio, who had once presided over the same tribunal, knew the Roman statutes well. In distinct ways and for varying purposes, both had been called to study them closely and to interpret their meaning for others. Fenzonio wrote with assurance about how the language of statutes should be glossed, strictly, following common usage, not the spongy dicta of the jurists. Yet both were troubled by the gap that had opened up between “our statutes” and ius commune. Before judicial action, Peto would have interrogated the witnesses to a public instrument rather than merely identify their handwriting. Fenzonio articulated the contradiction between doctrine and statute even more explicitly and was frankly amazed at the privileges granted to personal receipts. In a lengthy comment, he attempted to soften what he termed the injury done to ius commune by Roman city law. The statutes did not really mean that the adverse party could not object to the evidence submitted, he argued, and he excused their liberal attitude toward scriptura privata as an effort to stop lawsuits over small debts. The reluctance that these two prominent experts showed to give up the teachings of the learned law alerts us to its enduring power to nuance the rigor of statute as well as to fill in its silences.

Another mitigating influence on local regulators as well as a constant freshet of new juridical opinion was the Roman Rota, the highest civil appeals court in the Papal States. The twelve judges of the Rota were an exception in a general legal landscape that downplayed precedent; their decisions entered into the citation circuits of the jurists, and they were sometimes asked to make determinations about notarial documents and practices. Farinacci and Fenzonio both refer to Rota cases, and Fenzonio collected more than two hundred pages of Rota judgments regarding the city statutes, some with important consequences for Capitoline notaries. While judges normally did not have much room to decide questions of evidence, the Rota had its preferences, which may have exercised an indirect influence on the use of scriptura publica and scriptura privata. But with such considerations we are leaving the domain of theory and entering the realm of practice, the world that will occupy our attention in the chapters that follow.
We have seen how medieval and early modern jurisprudence created and elaborated the concept of public words. It is time now to meet the profession that produced, sold, and preserved scriptura publica in Rome. Notaries made a personal living from their pens, but, as we have observed, their hands were imbued with public authority. Thus, it will not come as a surprise that perhaps no other group experienced as sharply the changing structures, relations, and operations of power that transformed Rome between 1300 and 1700.