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BETWEEN CREATIVITY AND CONSTRAINTS

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## INTRODUCTION

Declamation in ancient Rome was a rhetorical exercise through which young men gained facility at public speaking. It was a fundamentally creative activity, but at the same time subject to constraints that channeled this creativity in particular directions. This dissertation studies how the *themata* (“themes,” or fictional legal scenarios) of Roman declamations invited different types of responses – argumentative, narrative, emotional, character-driven, utilitarian, and so forth – from the speaker. The combination of creativity and constraints provided training in moral reasoning and social valuation in addition to practical skills for courtroom advocacy. Many puzzling features of the genre make sense when compared with other Roman discursive practices, such as the use of historical *exempla* (“examples”) in ethical decision making, the assertion of control in literary translations of Greek texts, and the use of legal fictions in jurisprudence.

Students began declaiming during the final phase of the education process, which consisted of study with a rhetorician.<sup>1</sup> The previous two stages were led by a *praeceptor* or *magister*, who taught basic reading and arithmetic, and a *grammaticus*, who covered poetry and simple composition exercises known as *progymnasmata*. The vast majority of non-elite children in the Roman world never

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<sup>1</sup> Comprehensive accounts of the ancient education system are Stanley F. Bonner, *Education in Ancient Rome: From the Elder Cato to the Younger Pliny* (Berkeley, 1977) and Raffaella Cribiore, *Gymnastics of the Mind: Greek Education in Hellenistic and Roman Egypt* (Princeton, 2001). Also valuable is F. H. Colson, ed., *M. Fabii Quintiliani Institutionis Oratoriae Liber I* (Cambridge, 1924) for its detailed commentary on Quintilian’s discussion of Roman education.

advanced to the rhetorical stage. For those students who did reach it, beginning around age 12 or 15, activity centered on the declaiming of two types of exercises.<sup>2</sup> In the first, known as a *suasoria*, the student gave advice to a historical or mythological character faced with some choice. The second, known as a *controversia* – the focus of this dissertation – was considered more advanced: the student was presented with a fictional legal controversy and had to make a court speech on behalf of either the prosecution/plaintiff or the defense. Observers since antiquity have been struck by the improbable and fantastic nature of these *controversia* themes. Here are two typical examples, each beginning with a fictional law or laws, and then stating a series of events leading to a legal conflict:

LIBERI PARENTES ALANT AUT VINCIANTUR. Quidam alterum fratrem tyrannum occidit, alterum in adulterio deprehensum deprecante patre interfecit. A piratis captus scripsit patri de redemptione. Pater piratis epistulam scripsit: si praecidissent manus, duplam se daturum. Piratae illum dimiserunt. Patrem egentem non alit (Sen. *Con.* 1.7).<sup>3</sup>

QUO QUIS LOCO FULMINE ICTUS FUERIT, EODEM SEPELIATUR. TYRANNI CORPUS EXTRA FINES ABICIATUR. Tyrannus in foro fulminatus est. Quaeritur an eodem loco sepeliatur ([Quint.] 274).<sup>4</sup>

Students were expected to compose their speeches in writing, applying standard principles of rhetorical theory. They then memorized and rehearsed them, and finally presented them before the entire class and the rhetorician. It appears that many or all the students declaimed the same themes, though not necessarily on the same occasion. The atmosphere was often raucous and competitive. The rhetorician would critique the students' performances and sometimes deliver model speeches of

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<sup>2</sup> A good general account of declamation is Stanley F. Bonner, *Roman Declamation in the Late Republic and Early Empire* (Berkeley, 1949).

<sup>3</sup> "CHILDREN MUST SUPPORT THEIR PARENTS OR BE IMPRISONED. A man killed one of his brothers, a tyrant; he caught the other in adultery and killed him in spite of their father's pleas. He was captured by pirates and wrote to his father requesting a ransom. The father wrote back to the pirates and said he would pay double if they cut off his hands. The pirates released him. Now the father is destitute and the son is not supporting him." (Translations in this dissertation are my own except where otherwise noted.)

<sup>4</sup> "IN WHATEVER PLACE A PERSON IS STRUCK BY LIGHTNING, IN THE SAME HE MUST BE BURIED. THE BODY OF A TYRANT MUST BE CAST AWAY OUTSIDE THE BOUNDARIES. A tyrant was struck by lightning in the forum. It is inquired whether he must be buried in the same place."

his own.<sup>5</sup> Ancient critics claimed that the atmosphere of the rhetoric classroom encouraged empty bombast, a striving after applause and effect rather than substance.<sup>6</sup> It is certain that throughout this time period, there was an increasing appetite for *sententiae*: pointed phrases that contained ironic juxtapositions or striking collocations of words or ideas. Not only are the themes themselves sensational, but in the resulting speeches, we see the most vivid possible descriptions of these unbelievable scenes: tyranny, torture, dismemberment, pirates, storms at sea, evil stepmothers, and raped virgins. Perhaps most disturbingly for modern popular conceptions of the Romans, declamation continued to be practiced by adult elites, and performances were even held in the court of the emperor Augustus.<sup>7</sup>

## I. What declamation accomplished

In view of its sensational nature, it would be tempting to dismiss declamation as a marginal aberration or a sign of decline in Roman culture, and much of the scholarship during the 19<sup>th</sup> and 20<sup>th</sup> centuries did take that approach. Nevertheless, over the past few decades, there has been a growing realization that in spite of the unreality of its subject matter, declamation played a serious and important role in Roman society. What follows is a summary of recent findings about what declamation accomplished, in relation to a variety of spheres.

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<sup>5</sup> Henceforth, I generally use the term “rhetorician” when I mean the rhetorician as teacher and composer of themes. I use “declaimer” to indicate the speaker on any given declamation. For the participants and settings of extant declamations, see below, Section II: Texts and evidence.

<sup>6</sup> For instance, Quint. *Inst.* 2.2.9-13; Petr. 1-4.

<sup>7</sup> Sen. *Con.* 2.4.12-4.

## *Declamation and the Roman legal system*

The stated rationale of declamation was to train students to be advocates in the courtroom.<sup>8</sup> So a natural area of inquiry is to investigate how effective it was in meeting that goal. At the outset, it is important to recognize that the functions of the modern lawyer were divided between two distinct professions at Rome: jurists (*iurisconsulti, iurisprudentes*), who specialized in the law, and advocates (*oratores, patroni*), who spoke on behalf of clients in court. The relationship between the two professions was complementary, though subject to contestation and renegotiation over the course of Roman history.<sup>9</sup> From the perspective of training, however, it was clear that advocates did not need instruction in the details of the law or in the fine points of procedure, as jurists could be consulted for those questions; the primary task of the advocate was to speak effectively and persuasively on behalf of his client.

In evaluating declamation as training for advocacy, much scholarship has focused on the laws contained in its themes, evaluating their realism and searching for parallels with real Greek or Roman laws; the implication was that declamation was valuable only insofar as its laws reflected real Roman laws. Earlier studies, following ancient critics, emphasized the fictional or fictionalized nature of the laws, and hence disparaged the genre as a whole. In the mid-20<sup>th</sup> century, Lanfranchi, Parks, and Bonner endeavored to show that some of the laws did have real parallels, and that the cases sometimes employ correct legal language.<sup>10</sup> But the most sensible view is that of Crook: he

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<sup>8</sup> Stated, for instance, by Quintilian: ... *declamatio, in quantum maxime potest, imitetur eas actiones in quarum exercitationem reperta est* ("... declamation should imitate as much as possible those courtroom actions for which it was designed as practice," *Inst.* 2.10.4). But note that neither Quintilian nor other ancient practitioners say that this was its *only* purpose; that was a presupposition made by critics.

<sup>9</sup> In general see Fritz Schulz, *History of Roman Legal Science* (Oxford, 1946), 43-45; George A. Kennedy, "The Rhetoric of Advocacy in Greece and Rome," *American Journal of Philology* 89:4 (1968): 419-36; Bruce W. Frier, *The Rise of the Roman Jurists: Studies in Cicero's pro Caecina* (Princeton, 1985); most recently Jill Harries, *Cicero and the Jurists: From Citizens' Law to the Lawful State* (London: Duckworth, 2006).

<sup>10</sup> F. Lanfranchi, *Il diritto nei retori Romani: contributo alla storia dello sviluppo del diritto romano* (Milan, 1938); E. P. Parks, *The Roman Rhetorical Schools as Preparation for the Courts Under the Early Empire* (Johns Hopkins University Press, 1945); Bonner, *Roman Declamation*.

argues that the parallels identified by Lanfranchi and the others are “mostly marginal items,” functioning in a context that is quite alien to the overall system of Roman law; but that the search for value in declamation along these lines is misguided anyway.<sup>11</sup> In Crook’s view, the value of declamation lay in the fact that it taught legal reasoning, and for this purpose, fictional laws and scenarios could be just as valuable as real ones. Even far-fetched themes “provided the instrument for discovering all the topics of argument inherent in a particular situation.”<sup>12</sup> Besides the content of arguments, declamation contains sufficient “signs that the teacher was interested in teaching his pupils to argue in a lawyerlike way, i.e. to play an effective part in the procedural part of the law.”<sup>13</sup> Chapter 4 will talk further about how declamation invited discussions not just about the application of law, but about interpreting its meaning, and in this way shared in some of the reasoning processes of the jurists.

The court system envisioned in declamation is not identical to the real Roman system, but it is easy to identify points of equivalence, particularly to private-law procedure.<sup>14</sup> A suit began when the two parties brought their dispute before the praetor; the plaintiff sought legal remedy based on

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<sup>11</sup> J. A. Crook, “Once again the *controversiae* and Roman law” (*Prudentia Suppl.* 1993), 70-1.

<sup>12</sup> J. A. Crook, *Legal Advocacy in the Roman World* (Ithaca: Cornell University Press, 1995), 165, here quoting with approval the earlier study by Martin L. Clarke, *Rhetoric at Rome: A Historical Survey* (Routledge, 1953), 68. Similar sentiments are expressed by Emanuele Berti, *Scholasticorum Studia: Seneca il Vecchio e la cultura retorica e letteraria della prima età imperial* (Giardini editori e stampatori in Pisa, 2007), 79-80.

<sup>13</sup> Crook, *Legal Advocacy in the Roman World*, 167. Similarly Emanuele Berti, “Law in Declamation: The *status legales* in Senecan *controversiae*,” in *Law and Ethics in Greek and Roman Declamation*, ed. Eugenio Amato, Francesco Citti, and Bart Huelsenbeck (De Gruyter, 2015) describes how ancient *status* theory taught step-by-step methods of argumentation that could be used both on fictional and on real cases. (See also Bé Breij, “The Law in the *Major Declamations* Ascribed to Quintilian,” in the same volume.) On the other hand, critics since ancient times could argue that while this was fine in principle, declamation as actually practiced was not good training for advocacy. For instance, Votienus Montanus (Sen. *Con. 9 praef.*) lists numerous ways in which rhetoric students were often unprepared when they reached the forum.

<sup>14</sup> Roman private law included many offenses known as “delicts” that today are considered criminal, such as *furtum* “theft,” *iniuria* “assault,” and *damnum iniuria datum* “damage done wrongfully.” Standing courts to try public offenses (“criminal” offenses, in modern terminology) were instituted beginning in the mid 2<sup>nd</sup> century BCE. These courts also required a prosecutor to go before the praetor in order to initiate proceedings; both sides regularly employed advocates. So the similarities between declamation and private suits apply to criminal cases as well, to greater or lesser degrees depending on the circumstances of the case. See Jill Harries, *Law and Crime in the Roman World* (Cambridge, 2007) for detailed exposition of public law in relation to delicts; for a helpful summary, see Andrew Riggsby, *Roman Law and the Legal World of the Romans* (Cambridge, 2010), 187-204.

the list of actions that the praetor published annually, known as the Edict. In this initial stage of the proceedings, known as *in iure* (“at law”), the praetor took the agreed-upon facts and the disputed issue and condensed them into a formula, which he then handed over to a lay judge (*index*). A praetor’s formula could be something like the following:

Let Gaius be judge. If it appears that the slave which is at issue belongs to Aulus Agerius at civil law, and it has not in the opinion of the judge been restored to Aulus Agerius, whatever its value shall be let the judge condemn Numerius Negidius to pay that to Aulus Agerius; if it does not so appear, let him absolve.<sup>15</sup>

In the second phase of the case, the parties presented their evidence and arguments *apud iudicem* (“before the judge”), commonly employing advocates to speak on their behalf. This is the role to which the declaimer corresponded: he was presented with a set of facts, to be taken as “given” or agreed upon by the parties, and a legal question to be decided. His task was to make a speech in advocacy for one or the other party. It is also important to note the position occupied by the theme writer or rhetorician, in comparison to a real court case: his role corresponded largely to that of the praetor who framed the legal conflict; the rhetorician decided what facts had been agreed upon by the two parties, and who was seeking what from whom based on what laws. Since the theme writer was working entirely with fictional information, he had complete latitude to frame the case – consciously or unconsciously – in such a way as to require any type of legal or ethical discussion.

### ***Declamation and acculturation***

On a wider scale, rhetorical education played an important role in acculturation: training its participants to take on adult roles in Roman society. Since this training was exclusively for males, this necessarily meant construction of masculinity. Bloomer discusses how declamation required the student actually to adopt the persona of roles he would need to play later in life, either in opposing

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<sup>15</sup> David Johnston, *Roman Law in Context* (Cambridge, 1999), 114, synthesized from Gaius *Inst.* 4.39-52. The names are placeholders, like our “John/Jane Doe.”

disreputable practices in society, or playing the role of a *patronus* who defended those not eligible to speak in court.<sup>16</sup> Beard suggests that declamation could be considered a form of “cultural myth-making,” insofar as its texts “construct a fictional world of ‘traditional tales’ for negotiating, and re-negotiating, the fundamental rules of Roman society . . . [T]hey offer an arena for learning, practising and recollecting what it is *to be and think Roman*.”<sup>17</sup> Other studies have explained why this purpose of declamation became increasingly important in the time of Augustus and the early Principate: with the expansion of the empire, there were new advancement opportunities for municipal and provincial elites. These new members needed to be integrated into the existing elite social structures and imbued with elite values, and rhetorical education was a key component of this. Imber sees a connection with Augustus’ patronage of rhetoricians: he “knew that the sons of the municipal aristocracy who studied with such teachers could claim a *Romanitas* as certain as that of Cato and the old Romans. Time would make old Romans of the new elite soon enough. Declamation would make them Romans immediately.”<sup>18</sup> Sinclair notes that rhetorical education was particularly useful for this purpose because of its concept of a “decline of eloquence” from an earlier ideal:

Instead of putting an ambitious young man through a battery of aptitude tests and civil service exams, the Romans [of the Principate] used a less visible method to permeate the psyche of the individual and bind him to the institution. They were masters of actually *exerting* “the anxiety of influence.” They established an unattainable ideal in the form of a vision of past perfection that everyone must strive after in order to be accepted and succeed.

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<sup>16</sup> W. Martin Bloomer, “A Preface to the History of Declamation: Whose Speech? Whose History?” in *The Roman Cultural Revolution*, eds. T. Habinek and A. Schiesaro (Cambridge, 1997), 199-215, and “Schooling in Persona: Imagination and Subordination in Roman Education,” *Classical Antiquity* 16 (1997): 57-78. Cf. Anthony Corbeil, “Rhetorical Education and Social Reproduction in the Republic and Early Empire,” in *A Companion to Roman Rhetoric*, ed. William Dominik and Jon Hall (Blackwell, 2007), 69-82.

<sup>17</sup> Mary Beard, “Looking (Harder) for Roman Myth: Dumézil, Declamation and the Problems of Definition,” in *Mythos in mythenloser Gesellschaft: Das Paradigma Roms*, ed. F. Graf. (Stuttgart, 1993), 56 (emphasis original).

<sup>18</sup> Margaret Imber, “Practiced Speech: Oral and Written Conventions in Roman Declamation,” in *Speaking Volumes: Orality and Literacy in the Greek and Roman World*, ed. J. Watson (Leiden, 2001), 212, based on Suet. *Gram.* 17.

As long as a man took his bearings from the canonized models, all avenues of advancement were open to him.<sup>19</sup>

Declamation thus held up models for students to emulate, and provided constant criticism of their success or failure at imitating the ideal. Through this feedback, students came to share the sensibilities and value systems of the elite society that they aspired to join.<sup>20</sup>

### ***Declamation and moral reasoning***

A specific component of the acculturation process was training in moral or ethical reasoning. This was inherent in the structure of declamation, as it staged debates about ethical conflicts. From one standpoint, the training it provided was highly conventional. Kaster points out that in contrast to the unreality of the subject matter, “the arguments that are developed and the sentiments that are expressed to meet these eccentric facts are themselves *utterly* conventional, containing virtually nothing that the most respectable Roman gentleman would consider untoward or contrarian.” In Kaster’s view, the sensational nature of the themes actually worked to reinforce confidence in the sufficiency of custom and tradition: it conveyed the impression that even “the most startling, novel, or extravagant circumstances” could be dealt with by applying the traditional wisdom of the *mos maiorum*.<sup>21</sup> Along with Kaster’s observations, it should be emphasized that Roman declamation typically does not exhibit the type of cleverness associated with the Greek tradition – sophistry,

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<sup>19</sup> Patrick Sinclair, “Political Declensions in Latin Grammar and Oratory, 55 BCE-CE 39,” *Ramus* 23 (1994): 104-5 (emphasis original).

<sup>20</sup> In the process, rhetoric schools influenced the formation of a new ideal. Thomas N. Habinek, *The World of Roman Song: From Ritualized Speech to Social Order* (Johns Hopkins University Press, 2005), 113, argues that “the authority of oratorical practice in the forum derives from the school, and not the other way around. It is school that makes the ability to speak, dress, gesture – in short, perform in a certain way – the mark of a ‘good,’ (i.e. successful), high-status orator.” Cf. also Eric Gunderson, *Staging Masculinity: The Rhetoric of Performance in the Roman World* (Ann Arbor: University of Michigan Press, 2000).

<sup>21</sup> Robert Kaster, “Controlling Reason: Declamation in Rhetorical Education at Rome,” in *Education in Greek and Roman Antiquity*, ed. Y. L. Too (Leiden: Brill, 2001), 325.

paradoxical argumentation, attempts to overturn conventional viewpoints.<sup>22</sup> Declaimers did not speak on both sides of a case on the same occasion, or place opposing arguments in close juxtaposition in order to accentuate their reversibility. Our sources are of course too limited to allow claims that something never occurred. But based on Seneca's censures and the model speeches presented by [Quint.], it is clear that conventional morality was the norm in declamation. (Chapter 2 talks further about Seneca's disapproval of Greek tendencies in declamation.)

Nevertheless, Roman *controversiae* required careful thinking and ethical consideration in other ways. Most *controversiae* were not questions of fact (i.e. "Did he commit the crime or not?"), nor did they present straightforward situations where one simply had to apply the relevant traditional value. Usually there were two values at stake, or two possible classifications of a given action, and speakers had to choose which to apply at the expense of the other in that particular situation. For instance, a theme involving Popillius, who had (fictionally) been a client of Cicero and later murdered him on Antony's orders, "puts the duty owed to one's patron (a ground for prosecuting Popillius) up against the duty to obey one's commander (a ground for defending him)," as Roller observes.<sup>23</sup> One common conflict in declamation was between *ius* ("law") and *aequitas* ("fairness" or "equity"); other values included *utilitas* ("usefulness"), *honestum* ("honor"), and *pietas* ("respect," as between fathers and sons). But as Roller argues, declamation tended to focus attention on the moral component of evaluation: "In declamation, a moral understanding of events is the primary mode of understanding;

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<sup>22</sup> Kennedy, "The Rhetoric of Advocacy in Greece and Rome," 426, notes a general difference of emphasis in Greek and Roman persuasive techniques: even in fragments of early Roman oratory, "the moral and emotional factor is much fuller, and the logical element correspondingly less. Indeed, a Roman audience would have found naked logic, i.e. sophistry, as offensive as the Greeks found it attractive." Cf. further discussion by Anthony Corbeil, "Rhetorical Education in Cicero's Youth," in *Brill's Companion to Cicero: Oratory and Rhetoric*, ed. James M. May (Leiden: Brill, 2002), 23-48.

<sup>23</sup> Matthew B. Roller, "Color-Blindness: Cicero's Death, Declamation, and the Production of History," *Classical Philology* 92 (1997): 112, discussing Sen. *Con.* 7.2. For more on this case, see Chapters 2 and 3.

ethical appeals are more authoritative and persuasive than appeals on any other grounds.”<sup>24</sup>

Declamation required its practitioners to engage in moral reasoning as they weighed these conflicts and thought about how to persuade the audience to accept their evaluation.

Two recent studies have emphasized the importance of these moral discussions to Roman society as a whole. Bernstein highlights the fact that declamation brings no resolution to the fictional conflicts; instead “the declaimer’s plea directs the audience to assess ethical claims. Through the mimesis of legal conflict, declaimers explore tensions and contradictions within the Roman cultural code.”<sup>25</sup> Lentano argues that while declamation is on the surface about *leges* (“laws”), its real interest is *mores* – unwritten “customs” that lie outside the sphere of law but were understood as socially binding. Declamation presented those *mores* fictionally in the form of *leges*, and thus through a “juridicization of ethics” (*giuridicizzazione dell’etica*) provided a venue to debate their applicability to new situations.<sup>26</sup>

### ***Declamation and exemplary literature***

Less well explored has been the relationship between declamation and exemplary literature. In the narrow sense of rhetorical theory, an *exemplum* was an “example” that could be cited in a speech; Quintilian defined it as *rei gestae aut ut gestae utilis ad persuadendum id quod intenderis commemoratio* (“the mention of a deed done or supposed to have been done that is useful for persuading an audience to accept what you are asserting,” *Inst.* 5.11.6). Used with this meaning, *exempla* were like

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<sup>24</sup> Roller, “Color-Blindness,” 113. Cf. the slightly different but related observation of Imber, “Practiced Speech,” 208: “... the overwhelming majority of *controversiae* center on a conflict of allegiance between two social roles inhabited by one character.” Put yet another way, the scenarios of declamation tend to be “axiologically complex,” in the words of Joshua Landy, *How to Do Things With Fictions* (Oxford, 2012), 38: “If [a work of narrative art] is to spur us to serious reflection on our attitudes, then it must challenge us by placing at least two of our values into conflict, allowing each to assert its claim on us, rather than simply reinforcing one of them (in imagination) and making us feel, like Diderot, how astonishingly good and just we are.”

<sup>25</sup> Neil Bernstein, *Ethics, Identity, and Community in Later Roman Declamation* (Oxford, 2013), 5.

<sup>26</sup> Mario Lentano, “‘Un nome più grande di qualsiasi legge’: Declamazione latine e *patria potestas*,” *Bollettino de Studi Latini* 35:2 (2005): 566.

historical precedents that could provide justification in a current controversy. In Cicero's famous first speech against Catiline, he lists one *exemplum* after another to illustrate the senate's quickness to use force in earlier times:

An vero vir amplissimus, P. Scipio, pontifex maximus, Ti. Gracchum mediocriter labefactantem statum rei publicae privatus interfecit; Catilinam orbem terrae caede atque incendiis vastare cupientem nos consules perferemus? Nam illa nimis antiqua praetereo, quod C. Servilius Ahala Sp. Maelium novis rebus studentem manu sua occidit.... Decrevit quondam senatus ut L. Opimius consul videret ne quid res publica detrimenti caperet; nox nulla intercessit; interfectus est propter quasdam seditionum suspiciones C. Gracchus, clarissimo patre, avo, maioribus, occisus est cum liberis M. Fulvius consularis.<sup>27</sup>

The simplest and most obvious connection with declamation is that a declaimer could likewise insert historical *exempla* into his speech. There are relatively few actual instances of these in the surviving collections, because Seneca rarely included them in his quotations and [Quint.]'s speeches tend to be bare outlines, but their use must have been widespread (discussed further in Chapter 3).<sup>28</sup> During the Tiberian period, Valerius Maximus made a collection of nearly a thousand such *exempla*, organized under the character quality or ethical value that they illustrate, positively or negatively; one of his goals was probably for the collection to serve as a resource for declaimers.<sup>29</sup>

But *exempla* played a much larger role in Roman culture and had more significant connections to declamation. Recent scholarship has emphasized that the *exemplum* lay at the center of an entire discourse by which Roman social values were established and reproduced; the past was

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<sup>27</sup> "Did not that most illustrious man, Publius Scipio, the pontifex maximus, acting as a private citizen, kill Tiberius Gracchus, who was only slightly weakening the state? Then shall we as consuls put up with Catiline, who desires to lay waste the entire land with fire and slaughter? For I pass over those more ancient instances, such as how Caius Servilius Ahala with his own hand slew Spurius Maelius when he was plotting a revolution.... The senate once decreed that Lucius Opimius, the consul, should make sure that the republic suffered no harm. Not one night elapsed; Gaius Gracchus was killed simply for the suspicion of treason, though he was from a most illustrious father, grandfather, and lineage; Marcus Fulvius was killed, a man of consular rank, along with his children," Cic. *Cat.* 1.3-4.

<sup>28</sup> Marc Van der Poel, "The Use of *Exempla* in Roman Declamation," *Rhetorica* 27:3 (2009) provides a list of citations. My Chapter 3 expresses some disagreement with his interpretation of the data. See also more recently David Urban, "The Use of *Exempla* from Cicero to Pliny the Younger" (Dissertation, University of Pennsylvania, 2011).

<sup>29</sup> On the *exemplum* in rhetorical theory: Karl Alewell, *Über das rhetorische Paradeigma: Theorie, Beispielsammlung, Verwendung in der römischen Literatur der Kaiserzeit* (Leipzig: Hoffman, 1913). For more on Valerius Maximus, see below.

evaluated and memorialized in order to guide present and future conduct. Roller identifies four components of this discourse: first, someone performs a deed that is held to be significant for the Roman community; secondly, eyewitnesses observe the deed and place it in an ethical category, such as *virtus* (“military valor”), *pietas* (“loyalty”), or *gratia* (“gratitude/influence”); thirdly, the deed and its ethical evaluation are commemorated through some monument, which could include statues, narratives, place names, rituals, and many other things; fourthly, later audience strives to imitate or surpass the original deed by performing ethically valued actions for the Roman community.<sup>30</sup> The importance of exemplary discourse is seen, for instance, in Livy’s preface: he intends for his work to form a monument to the great deeds of the past, so that readers may contemplate them and know which to imitate and which to avoid.<sup>31</sup> Not only so, but as Chaplin points out, Livy throughout the work illustrates *how* to make use of past *exempla*: he regularly presents scenes of characters citing *exempla* in their reasoning processes, some using them profitably to successful outcomes, others misusing and misunderstanding them.<sup>32</sup> Even Valerius Maximus may have been providing something more than mere raw material for declamation; Bloomer describes how the *exempla* in Valerius’ collection would have had educational value for rising social classes, training them in the values and moral reasoning processes of the traditional elites.<sup>33</sup>

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<sup>30</sup> Matthew B. Roller, “Exemplarity in Roman Culture: The Cases of Horatius Cocles and Cloelia,” *Classical Philology* 99.1 (2004): 4-5.

<sup>31</sup> *Hoc illud est praecipue in cognitione rerum salubre ac frugiferum, omnis te exempli documenta in industri posita monumento intueri; inde tibi tuaeque rei publicae quod imitere capias, inde foedum inceptu foedum exitu quod vitas* (“For in the study of history it is especially improving and beneficial to contemplate examples of every kind of behavior, which are set out on a clear monument. From it you can extract for yourself and your commonwealth both what is worthy of imitation and what you should avoid because it is rotten from start to finish,” Livy *praef.* 10 – transl. Chaplin).

<sup>32</sup> J. D. Chaplin, *Livy’s Exemplary History* (Oxford, 2000).

<sup>33</sup> W. Martin Bloomer, *Valerius Maximus and the Rhetoric of the New Nobility* (Chapel Hill: University of North Carolina Press, 1992). See also D. Wardle, *Valerius Maximus: Memorable Deeds and Sayings, Book I. Translated with Introduction and Commentary* (Oxford, 1998), esp. 14-5. Clive Skidmore, *Practical Ethics for Roman Gentlemen: The Work of Valerius Maximus* (Exeter, 1996) argues for a serious moral purpose in Valerius, but creates a false dichotomy between this and use in declamation. See also most recently Ute Lucarelli, *Exemplarische Vergangenheit: Valerius Maximus und die Konstruktion des sozialen Raumes in der frühen Kaiserzeit* (Vandenhoeck & Ruprecht, 2007).

Langlands presents a clear account of how *exempla* were used in moral reasoning: she emphasizes that the context in which an action occurred was a key component to its ethical evaluation, in a process she terms “situation ethics.”<sup>34</sup> One could not simply imitate the actions of every famous person in Roman history; instead, each individual had to compare his or her own character and social role with that of the person in the story, and also consider the circumstances in which the action took place. For instance, in a section about *libertas* (“freedom of speech,” 6.2), Valerius describes how Cato the Younger publicly resisted Pompey in a court case: Cato was serving on the jury, and Pompey wrote letters of commendation for the defendant, a senator who was obviously guilty but a friend of Pompey’s. Cato ordered the letters to be rejected from the court, citing Pompey’s own law that forbade the admission of such support for those of senatorial rank. Valerius goes on to comment that this would have been an astonishing act of *audacia* – a negative quality – if anyone else had performed it; but in evaluating the deed, we must consider Cato’s character: *Huic facto persona admirationem adimit: nam quae in alio audacia videretur, in Catone fiducia cognoscitur* (“The individual concerned removes any amazement from this act, for what would have seemed in another man audacity, in Cato is recognized as confidence,” 6.2.5, Langlands’ translation).<sup>35</sup> Langlands argues that this emphasis on the situation and the character of the person performing the action brought a certain flexibility to exemplary discourse; it averted the danger that *exempla* would remain fixed in the past, unattainable and thus irrelevant for the moral guidance of people in the present.<sup>36</sup>

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<sup>34</sup> Rebecca Langlands, “Roman *Exempla* and Situation Ethics: Valerius Maximus and Cicero *de Officiis*,” *Journal of Roman Studies* 101 (2011): 100-122.

<sup>35</sup> Connections with Stoic philosophy are apparent, as Langlands notes; see Brad Inwood, “Rules and reasoning in Stoic Ethics,” in *Reading Seneca: Stoic Philosophy at Rome*, ed. Brad Inwood (2005): 95-131, and Teresa Morgan, *Popular Morality in the Early Roman Empire* (Cambridge, 2007), 179-90.

<sup>36</sup> Langlands, “Roman *Exempla* and Situation Ethics,” 102-3. Most recently on exemplarity, see Michèle Lowrie and Susanne Lüdemann, eds., *Exemplarity and Singularity: Thinking through Particulars in Philosophy, Literature, and Law* (London: Routledge, 2015).

Set against this backdrop, declamation can be seen to have a deeper connection to exemplary discourse than merely slotting *exempla* into a speech. Both discourses lay at the intersection of ethics and narrativity. An exemplary text such as Valerius' started with an ethical category and then provided narratives that illustrated it; new situations that arose could be evaluated based on their similarity to or difference from these well-accepted *exempla*. Declamation, by contrast, started with a narrative of events whose evaluation is open to dispute; the speaker had the chance to employ both argumentative and narrative strategies in order to place the events into the desired ethical category – sometimes even adding events to the narrative, bringing it into conformity with an *exemplum*. (For more on this, see Chapter 1.) Both discourses also had a connection with Roman history: in exemplary discourse, events were evaluated by the Roman community and then passed on through memorialization. Declamation often employed fictionalized vignettes from Roman history, with key details changed, in order to test their evaluation in this new form through situation ethics. (See Chapter 3.)

## II. Texts and evidence

Most of our direct knowledge of Roman declamation comes from three collections that survive to varying extents: one by the elder Seneca, one ascribed to Quintilian, and one by Calpurnius Flaccus consisting only of excerpts. Seneca's collection is the earliest, dating to sometime towards the end of his life (ca. 39 CE). It originally consisted of 10 books of *controversiae* and at least one of *suasoriae*; half of these books have survived in entirety, and the rest are preserved in excerpts. Seneca's collection is unique in that he only quotes portions of declamations, based on recollections from earlier in his life; these are interspersed with anecdotes, commentary, and evaluation of the speakers and their performances. The collection ascribed to Quintilian has two parts: 145 "lesser" declamations (*Declamationes Minores*) remaining out of an original 388, and 19 "greater" (*Declamationes*

*Maiores*). The *Declamationes Minores* are generally more like sketches or outlines for speeches, not fully fleshed out with *communes loci* and perorations; many of them contain introductory comments from a rhetoric teacher, advising the students on how to handle the case. Current thinking is that this teacher was not Quintilian himself, but may have been someone associated with his school. The *Declamationes Maiores*, by contrast, differ markedly from Quintilian's precepts, and are thought to date from several centuries later – perhaps widely differing centuries. (Henceforth, the *Declamationes Minores* are referred to as [Quint.]; the *Declamationes Maiores* receive their full title when cited.) Calpurnius Flaccus is thought to date from the second century CE; despite its extremely fragmentary nature, his collection has value for comparing declamatory themes and the statements that were made on both sides of the case.

This study will focus primarily on Seneca's *Controversiae* and [Quint.]'s *Declamationes Minores*, as they are the most extensive and well-preserved, and also the closest in time to the classical period. It is important always to keep in mind what a small sample these two texts represent; the vast majority of actual declamations that were delivered are lost without a trace, because they were never written down except as speakers' notes or teachers' corrections. Furthermore, Seneca and [Quint.] show us quite different windows on a very large phenomenon: Seneca's declaimers, for the most part, were teachers of rhetoric performing for each other in elite social gatherings, or giving large public auditions. [Quint.] reveals more of the daily activities of the rhetoric classroom; there are no speeches by students, but the collection gives a good idea of what students were expected to produce. In spite of these differences, as this study will show, there are important commonalities between the two corpora both in the themes they include and in the ways that the speakers handle them.

Besides the declamatory texts that are preserved directly, another source of information is the ancient discourse about declamation. Although the term was not yet used with that specific

sense in Cicero's day, his works contain valuable descriptions of the rhetorical education process. The most extensive account of declamation is that of Quintilian, whose *Institutio Oratoria* makes frequent references to declamation and provides recommendations for how it should be done. Declamation is satirized by Juvenal and Petronius and criticized by Tacitus in his *Dialogus de Oratoribus*.

### III. The argument of this dissertation

The interplay between creativity and constraints is the central theme of this dissertation. It is built around close reading of the themes and the responses that declaimers make to particular kinds of themes. While rhetoricians (i.e., teachers) did not necessarily have a single purpose in mind for each theme they devised, it is clear that planning and thought went into their creation: Quintilian gives advice on what types of subject matter they should contain;<sup>37</sup> Porcius Latro recognizes that certain cases are devised (*fingi quasdam controversias*) in order to raise particular ethical questions.<sup>38</sup> Themes remained in use nearly unchanged for long periods of time, as a comparison between Seneca and [Quint.]'s collection reveals; thus, rhetoricians must have felt they were useful for accomplishing some purpose.<sup>39</sup> Rhetorical education can also be thought of as a system operating outside the control of any individual or particular group of teachers. In any case, whether the themes

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<sup>37</sup> Quint. *Inst.* 2.4.26-40 on the general subject matter that should be presented to students for practice; 2.10 on how the themes should be as realistic as possible.

<sup>38</sup> *Aiebat enim manifestum esse e lege et de officio patris quaeri et fingi quasdam controversias in quibus pater furiosus probari non possit, <nec> absolvi tamen propter impietatem nimiam, libidinem foedam* ("He said it was clear from the law that the question was also about the duties of a father; certain *controversiae* are designed such that the father cannot be proved [literally] mad, but <neither> can he be absolved of his lack of dutiful affection or his disgraceful passions," Sen. *Con.* 2.3.12). This is discussed further in Chapter 4.

<sup>39</sup> Antonio Stramaglia, "Temi 'sommersi' nella declamazione antica," forthcoming (2015) discusses factors that caused some declamation themes to fall into disuse, while others were preserved. See also Imber, "Practiced Speech," 208 for a comparison to oral traditions: details may be lost over time, but structured patterns with cultural significance tend to be preserved. Hence, the declamation themes that remained in use were those that touched on culturally significant issues. On the historical basis for some themes, Mario Lentano, "*Concessum est rhetoribus ementiri*. Quattro esempi di come nasce un tema declamatorio," *Annali online di Lettere – Ferrara* 1-2 (2011): 133-152.

were the product of specific intentions or the impersonal productions of a traditional system, there is great value in looking at what they *accomplished*, in the speeches that are preserved. Certain types of themes elicited certain types of responses from speakers, and this dissertation looks for connections between those responses and other features in Roman society.

The purposes and effects of some themes are obvious. For example, Sen. *Con.* 7.4 presents a father who is being held captive by pirates, and a mother who is blind and unable to provide for herself; the son must choose whether to go and ransom his father or stay and care for his mother.<sup>40</sup> The case requires weighing the duties owed to a father against the duties to a mother. (Speakers accept the unstated premise that helping both is not an option – declamation is not an exercise in problem-solving.) [Quint.] 298 consists of an extremely simple scenario: *Rusticus parasitum filium abdicat* (“A farmer disowns his parasite son”). The case calls for *ethopoia* (character portrayal), as the speaker adopts the persona of a rustic farmer with wholesome morals; it also invites commonplaces against the corruptions of city life. On nearly all cases, verbal creativity is encouraged to a high degree; this is one of the most striking features of the genre, and has already received a great deal of attention from critics ancient and modern.<sup>41</sup>

Ancient rhetorical theory provides a detailed schematic system for classifying court cases; it was designed to assist the student in recognizing the key point at issue and devising the appropriate

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<sup>40</sup> LIBERI PARENTES ALANT AUT VINCLANTUR. *Quidam, cum haberet uxorem et ex ea filium, peregre profectus est. A piratis captus scripsit de redemptione epistulas uxori et filio. Uxor flendo oculos perdidit. Filium euntem ad redemptionem patris alumenta poscit; non remanentem alligari volt* (“CHILDREN MUST SUPPORT THEIR PARENTS OR BE IMPRISONED. A man who had a wife and a son by her went abroad. Captured by pirates, he wrote to his wife and son asking to be ransomed. The wife went blind from crying. As the son was about to go ransom his father, she asks for sustenance from him; when he refuses to stay, she seeks to have him imprisoned”).

<sup>41</sup> For instance, Petr. 1-4. Bonner, *Roman Declamation*, analyzes stylistic features of the genre and traces its (negative) influence on other Latin literature. George A. Kennedy, *Quintilian* (New York: Twayne, 1969), 53 gives a positive recognition of declamation as a creative endeavor.

response to it.<sup>42</sup> Knowledge of ancient classification has value – it is good to know what students were explicitly being told to do – and numerous modern studies adhere to it closely.<sup>43</sup> The danger, however, is that if analysis remains confined to the traditional framework, then it is difficult to see anything new. Slapping a label like *legum comparatio* (“comparison of laws”) on a case creates the impression that this is all there is to say about it. Other modern studies, conversely, tend toward the other extreme and apply social, cultural, or even philosophical analysis to declamation, but vary in their degree of connection to the actual texts. This study seeks to follow a middle course: focusing closely on the texts and their wording, but grouping them in new ways in order to reveal different patterns in the responses that they elicit. These are discussed further in the chapter summaries immediately below.

As for constraints on declamation, some of these came from the themes themselves: speakers had to debate the legal question that the theme writer presented to them; they could not choose which characters would prosecute which others, and for what reasons. Other constraints came from the rules of the game: teachers gave instructions to students and graded their performances, and adult declaimers had to follow the same generally accepted guidelines. But an important and easily neglected source of constraints was the audience: fellow students, or (in Seneca) other adult declaimers and members of the public who attended declamation performances. Speakers had to develop a sensitivity to the values and expectations of the audience, and think carefully about what arguments or characterization would be likely to persuade them. Observing the responses of declaimers to the themes reveals something about how those declaimers understood

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<sup>42</sup> This classification scheme pervades the rhetorical handbooks *Rhetorica ad Herennium* and Cicero’s *De Inventione*, and also Quintilian’s treatise *Institutio Oratoria*. For some key terms, see the Excursus at the end of this Introduction.

<sup>43</sup> For instance, Bonner, *Education in Ancient Rome*, 288-308. Most recently, the valuable chapter by Emanuele Berti, “Law in Declamation,” elucidates how Seneca’s declaimers employed *status* theory in their legal arguments.

their audience, and Roman culture more generally; it also reveals how participating in declamation shaped those speakers, what it taught them, what skills it imparted for use elsewhere in society.

**Chapter One** is about the imbalanced nature of most *controversia* themes. One might have thought that the scenarios would be designed to be equal, in order to give students the chance to argue both sides: inviting rhetorical cleverness like Antiphon or the *Dissoi Logoi*. But most of the surviving Roman declamations are not like those earlier Greek examples. The legal questions, to be sure, are usually designed to be insoluble, and thus the cases are equally balanced in that respect. (More on this in Chapter 4.) But in terms of the reputability of characters or the perceived fairness of their actions, the themes are usually skewed toward one side or the other: there is one side that the audience is much more likely to sympathize with at the outset.

The chapter shows how the imbalanced themes provided the opportunity for two different types of speeches. For the stronger side, usually adopted by the majority of Seneca's declaimers, there was the chance to reinforce the conventional moral interpretation of events; these speakers often employ moralizing invective, taking on the persona of a stern, traditional Roman man (*vir gravis*). For the other side, it provided the chance to contest that interpretation by revising the narrative, using innovations known as *colores* ("colors"). Inserting these details between the given facts of the theme was a way of challenging the dominant perception of events without straying beyond the conventional ethical stance of the community. The strategy of reshaping the narrative shows an important similarity with the Roman discourse on *exempla* and situation ethics. As mentioned above, ethical thinking was encoded in the form of *exempla* – stories about the deeds of famous ancestors, which were retold, praised, and monumentalized, as a way of stirring people in the present to imitate or surpass them. In order to apply *exempla*, it was necessary to compare the personal character and circumstances of the actor in the story with one's own character and circumstances; the ethical evaluation of the same action could change if the situation changed.

Declaimers handling the morally questionable sides in *controversiae* employed a reasoning process similar to situation ethics, but in reverse: inserting key facts into the narrative could change the context or circumstances, and thus allow a different ethical evaluation, parallel to the evaluation of characters in exemplary literature.

The topic of *patria potestas* – a father’s traditional authority of life and death over his sons – arises in this chapter and in several subsequent ones. A number of studies have argued that declamation tended to reinforce the right of fathers to kill their sons.<sup>44</sup> Here it is argued that this is true only of the theoretical right: declamation speakers genuflect before a father’s *potestas* in theory, but hesitate about applying it in actual situations. This becomes apparent through the concept of audience sympathy: speakers argue as though they expect the audience to have doubts about harsh behavior on the part of fathers.

**Chapter Two** turns to the question of how far speakers were permitted to go with these *colores*, or revisions to the narrative. Allowing too much leeway could have resulted in chaos, undermining the pedagogical validity of the exercise. We will look closely at the rules that are commonly thought to have governed *colores*, and show that many of them were frequently ignored or were enforced only selectively. While a number of sources indicate that speakers were required to stick within the literal wording of the theme, not changing any of its basic facts, the evidence shows that there was a lot of leeway here in practice. On the other hand, speakers could be severely censured for *colores* that were “banal” – that is, they adhered scrupulously to the facts of the theme, but evaded the central moral conflict it was designed to address. The relative degree of emphasis placed on these rules helps demonstrate their underlying purpose, and indeed the purpose of declamation as a whole. The rules were designed to channel the speaker into effective self-

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<sup>44</sup> For example, Bé Breij, “*Vitae Necisque Potestas* in Roman Declamation,” *Advances in the History of Rhetoric* 9 (2006): 71: “Looking at the declamations discussed above, we can only conclude that they consolidate the position of the Roman father and his *patria potestas*, including the *vitae necisque potestas*.”

presentation as a strong, traditional Roman, in control of circumstances and of himself; not shying away from the ethical conflict of the case. Seneca, in his collection, regularly invokes the Greeks as a short-hand for what can go wrong in declamation; he cites them either a source of error which the Romans are seduced into imitating, or a standard of vice by which Roman faults are measured.

**Chapter Three** looks at the fictionality of the declamatory world, and explores its implications for the moral reasoning that is conducted there. Declamation expects its practitioners to suspend disbelief about the unreal and unlikely nature of its world; at the same time, it expects them to take it seriously on a moral level, applying real ethical standards from the Roman world. Speakers typically do manage this split-level suspension of disbelief; occasionally, however, they import their real-life standards of normality, basing arguments on the implausibility of events in the theme itself and attributing them to, for instance, collusion between characters.

This becomes more significant when we consider how declaimers applied supposedly real Roman historical *exempla* to the fictional world of declamation. In some instances declaimers seem uncomfortable with the moral implications of an *exemplum* – for instance, the stern fathers of Early Rome who killed their sons – and we see them appealing to the implausibility of the theme in order to escape from applying it. (E.g. the father who ordered one son to kill the other obviously did not *actually* intend for him to do it; by entrusting the task to a brother, he was likely indicating that he wanted him spared.) The chapter also shows that declamation does not stage debates directly about the received versions of *exempla*: for instance, speakers do not get to debate whether it was right for the *pontifex* Metellus to enter the temple of Vesta (forbidden for men) in order to rescue the Palladium from a fire. Instead, Sen. *Con.* 4.2 presents a version of the story in which Metellus is blinded in the process; students have to consider whether this additional circumstance changes the ethical evaluation of the deed. In a sense, rhetoricians were treating Roman history as more stable than the historians were. For the historians, historical events were still malleable, contestable, subject

to change in the retelling. But the rhetoricians, by creating self-consciously fictionalized versions of the canonical stories, were tacitly accepting that there was a “correct” version of the story and an evaluation which could not be touched. They invited students to debate only the fictionalized variations, as practice in situation ethics.

Lastly, **Chapter Four** is about the ways that declamation thematized the interpretation of law. Declamation focused on those aspects of interpretation that were useful to the advocate, particularly, its ethics and utility as opposed to its legal correctness; however, it did show parallels to the real thought processes of jurists. All *controversiae* require interpretation of law to some extent. While Chapter 1 showed that most themes are imbalanced in terms of audience sympathy, and that these provided practice at different ways of arguing, here we see that the themes tended to be equally balanced in terms of the law. On cases with family conflicts – disinheritance of sons, madness suits against fathers – the legal question is insoluble because the grounds for these suits are undefined. Speakers may discuss them, and ask e.g., “Is it permissible to disown a son for X reason?” But there is not much to say on the subject, so the discussion is quickly channeled to ethics: declaimers overtly acknowledged that the purpose of these cases was to discuss the moral duties of fathers and sons.

More puzzling initially are the numerous cases that presuppose a vague or poorly coordinated system of laws, where conflicts arise between laws, there are questions about the intent of the lawgiver, or the law applies to the given scenario only by analogy. The paradox is that these cases required arguments that were not permitted in the real courtroom: an advocate could not go before the judge and ask him to rule based on the supposed intent of the lawgiver. The judge was limited to the formula that the praetor had delivered to him. Nevertheless, the chapter argues that these cases did mirror interpretive discussions that went on in other phases of the legal process, and that these were not without value to the advocate. In particular, the legal fiction: when jurists or

praetors saw that a law led to unjust or undesirable outcomes, they usually could not or did not change it; instead, they instituted workarounds, stating that certain analogous but not identical situations would henceforth be covered under the law on a counterfactual basis, “just as if” they were identical to what the law envisioned. In a similar way, declaimers were regularly invited to think not just about what the laws covered, but about what the legal system *ought* to be like.

Through all these chapters, a recurring theme is that declamation dealt with ethics in the realm of the concrete. Speakers rarely engaged in abstract philosophical speculation, and Seneca’s references to those who did so are not favorable. Declamation set values in conflict by placing them in specific, though fictional, scenarios, where speakers had to consider their implications. Character qualities as well – virtues and vices, but especially virtues – were explored by making declaimers actually portray characters who possessed those qualities; imitating them, narrating actions and thought processes that would be characteristic of them. Portrayal of a character was even thought to reflect on the ethical qualities of the speaker himself.

## Excursus: The terminology of declamation

Declamation drew upon a considerable amount of specialized terminology. For reference purposes, it may be helpful to summarize it all in one place at the beginning of the dissertation.

As noted above, declamation consisted of two types of exercise. In the *suasoria*, the student gave advice to a historical or mythological character who was facing some choice, real or fictitious. For example, *Deliberat Alexander an Oceanum naviget* (“Alexander deliberates whether to sail the Ocean,” Sen. *Suas.* 1.1); *Deliberat Cicero an scripta sua comburat, promittente Antonio incolumitatem si fecisset* (“Cicero deliberates whether to burn his writings, as Antony is promising to spare him if he does so,” Sen. *Suas.* 1.7). The other type is the *controversia*, the subject of this dissertation; in it, the student had to argue one side of a fictional legal case, such as Sen. *Con.* 1.6:

Captus a piratis scripsit patri de redemptione; non redimebatur. Archipiratae filia iurare eum coegit ut duceret se uxorem si dimissus esset; iuravit. Relicto patre secuta est adulescentem. Redit ad patrem, duxit illam. Orba incidit. Pater imperat ut archipiratae filiam dimittat et orbam ducat. Nolentem abdicat.<sup>45</sup>

This fictional scenario introducing a declamation was known as the *thema* (“theme,” i.e. “given information,” from Greek θέμα). For a *controversia*, it usually included a fictional law that would be relevant for the case (unless the law was understood, as above – disinheritance).

Ancient rhetorical theory classified court cases – real and fictitious – into a number of categories and subcategories. The clearest system is introduced in *Rhetorica ad Herennium* 1.18-25. The top-level division was into *coniecturalis* (“conjectural,” i.e. question of fact), *legitimus* (“legal,” i.e. concerning the law itself), and *iuridicalis* (“juridical,” i.e. evaluation of an action admitted to have taken place). The *causa legitima* was divided into *scriptum et sententia* (or *voluntas*) (“letter vs.

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<sup>45</sup> “A young man who had been captured by pirates wrote to his father for a ransom. He was not being ransomed. The pirate captain’s daughter forced him to swear that he would marry her if he was released; he swore. She left her father and followed the young man. He returned to his father and married her. An orphan girl came along. The father ordered his son to divorce the pirate captain’s daughter and marry the orphan. When he refuses, the father disinherits him.”

intent”), *contrariae leges* (“conflicting laws”), *ambiguum* (“ambiguity”), *definitio* (“definition”), *translatio* (“transference,” i.e. procedural), and *ratiocinatio* (“reasoning by analogy”). The *causa iuridicalis* likewise could be *absoluta* (“absolute”), in which the action is claimed to be right in itself, or *adsumptiva* (“assumptive”), in which defense was based on additional factors: *concessio* (“acknowledgement,” i.e. admission of guilt and plea for pardon) or *purgatio* (“exculpation,” i.e. a denial of having acted intentionally).

This system of categorization was known as *status* or *stasis* theory. Many of the terms turn up in declamation, but it has been argued that the *colores* used by Seneca’s declaimers (see below) come from an alternate system.<sup>46</sup> As *status* theory has been discussed and applied in numerous other studies, it is not the main framework for analysis in this dissertation.<sup>47</sup>

The full manuscript title of Seneca’s work is *Oratorum et rhetorum sententiae, divisiones, colores*, based on the structure of the text. After the theme of each case, Seneca lists the *sententiae* – pithy sayings – by speakers on one side, then those on the other side (labelled *pars altera*). (The speeches were not made all on one occasion; Seneca draws upon years of recollections of what different speakers said on the same theme.) Then are the *divisiones* – how each speaker “divided” his argument, along with some discussions about how the case should be handled (sometimes in Seneca’s voice, sometimes quoting other declaimers). The *divisiones* were a hierarchy of *quaestiones* – “questions” about legal points, i.e. dealing with *ius* (“law”). Besides *quaestiones* there was *tractatio* – the “handling” of the case, which was concerned more with obligations, duties, or fairness (*aequitas*). Thus, for Seneca the *divisiones* often fell into a two-part structure of *ius* and *aequitas*, “law”

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<sup>46</sup> Thorsten Burkard, “Zu den Begriffen *divisio* und *color* bei Seneca maior,” in *Présence de la déclamation antique. Suasives et controverses grecques et latines*, ed. Rémy Poignault and Catherine Schneider (forthcoming).

<sup>47</sup> See Malcolm Heath, “The Substructure of *Stasis*-Theory from Hermagoras to Hermogenes,” *Classical Quarterly* 44 (1994): 114-29; J. Kastely, “The Recalcitrance of Aggression: An Aporetic Moment in Cicero’s *De inventione*,” *Rhetorica* 20 (2002): 235-262; Berti, “Law in Declamation”; Janet Fairweather, *The Elder Seneca* (Cambridge, 1981).

and “fairness,” which was handled respectively in *quaestiones* and *tractatio*. After the *divisio* of a case, Seneca lists the *colores* (“colors”) – details or revisions inserted into the narrative in order to change its evaluation. At the beginning of each book is a preface usually showcasing a particular declaimer, complete with biographical details, anecdotes, and critical assessment.

In [Quint.], after the theme, there is usually a *sermo* (“discussion”) containing advice from the rhetoric teacher about how to handle the case. Then follows the *declamatio* (“declamation”), which is a model or sample speech composed by the teacher. The speeches in [Quint.] are often quite compressed, little more than outlines, though some are expanded with great detail. Sometimes the *sermo* contains the whole outline for the speech and no *declamatio* follows.

## CHAPTER 1

### IMBALANCED *CONTROVERSIA* THEMES AND MORAL REASONING

Roman declamation provided opportunities to practice moral reasoning. In keeping with this purpose, one might have expected the themes to present a wide range of evenly balanced cases, for which a good argument could be made for either side. But this is not what we find in the surviving declamatory collections. Instead, most *controversia* themes are imbalanced in such a way that the audience is likely to sympathize with one side or the other at the outset.<sup>1</sup> Sometimes the imbalance is based on the legal facts presented in the theme; more often, one side seems to be stronger based on the reputability of the character or actions, or the perceived fairness of his or her position. The *controversiae* recorded by Seneca are also imbalanced in another way: often the two sides were not equally popular with the declaimers who spoke on the theme; instead, usually one was more frequently chosen than the other. Previous studies have noted the conventional nature of declamation,<sup>2</sup> and that is seen even in the choice of sides: on any given *controversia* in Seneca's collection, the majority of declaimers almost always spoke on the side that was perceived as stronger

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<sup>1</sup> Noted by H. Bornecque, *Les Déclamations et les Déclamateurs d'après Sénèque le Père* (Lille, 1902) in one of the earliest comprehensive modern studies of the elder Seneca: "Or, si les matières des Controverses sont conçues de telle façon que l'on peut soutenir les deux faces de la cause, il n'en est pas moins vrai que l'une est plus difficile à défendre que l'autre ..." ("However, if the themes of the *Controversiae* are designed in such a way that one can argue for both sides of the case, it is nonetheless true that one side is more difficult to defend than the other ...," 90).

<sup>2</sup> Cited previously in Introduction: Kaster, "Controlling Reason"; Bloomer, "A Preface to the History of Declamation"; Corbeill, "Rhetorical Education and Social Reproduction."

in reputability or fairness.<sup>3</sup> This chapter will look at how Seneca's declaimers responded to the expectations created by imbalanced themes: for the stronger side, the themes provided the chance to reinforce the conventional moral interpretation as forcefully as possible; for the other side, these themes invited argumentation through narratives, as an alternative to (or key supplement to) abstract philosophical speculation. Revising the narrative was a way of contesting the dominant perception of events without straying beyond the conventional ethical stance of the declamatory community. On some cases, speakers betray uncertainty about what the viewpoint of the implied audience actually should be; this may provide a clue to where Roman thinking itself was conflicted.

## I. The nature of the imbalances: law, fairness, and audience sympathy

Ancient commentators on declamation sometimes referred to one side or the other as stronger and easier to argue, or weaker and more difficult. On the first case in his collection, Seneca cites *Latro's* observation: *Colorem ex altera parte, quae durior est, Latro aiebat hunc sequendum ...* ("As a *color* for the other side, which is more difficult, *Latro* said that the following should be adopted ...," 1.1.21).<sup>4</sup> On 7.5, a case of mutual accusations, Seneca discusses how the "weaker side" can downplay incriminating details by avoiding close juxtaposition with the opponent: *Utique ei qui inbecillio rem partem habet non est utile comminus congrredi; facilius latent quae non comparantur* ("Particularly for the one who has the weaker side, it is not beneficial to fight at close quarters; details that are not compared are more easily hidden," 7.5.7). In [Quint.], the *sermones* or "discussions" on the case sometimes mention one side as being harder or easier than another. The *sermo* of 254 states: *Totam autem existimo*

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<sup>3</sup> Fairweather, *The Elder Seneca*, 151: "Some *controversia* themes were so devised that it was possible to make out a fair case both for and against the defendant, but usually one side's case was very much easier to justify than the other's, and few declaimers chose to defend the more obviously villainous characters in the themes ...." She quotes Sen. *Con.* 10.4.15, discussed further below.

<sup>4</sup> It is possible that *durior* here mean "harsher," which suits the point equally well: in context, that side is more difficult *because* the character's actions seem harsher. On the meaning and significance of *colores*, see below and Introduction.

*commodiorem esse partem diversam; suadeo iis qui dicturi sunt in illam potius incumbant* (“I believe that the whole case for the other side is easier; I encourage those who are preparing to speak to direct their efforts there instead,” 23). In 326 the *sermo* calls one side’s task “very difficult”: *Fere commendatio per haec petenda erit, quae illi difficillima erit* (“He must seek commendation roughly in this way, although it will be very difficult for him to obtain it,” 3). Quintilian and Seneca even mention cases that are so imbalanced that nothing can be said on behalf of the other side. Seneca declares, *Nibil est autem turpius quam aut eam controversiam declamare in qua nihil ab altera parte responderi possit, aut non refellere, si responderi potest* (“However, nothing is more disgraceful than to declaim a *controversia* in which nothing can be answered by the other side, or to fail to address the other side’s response if one can be made,” 10.5.12).<sup>5</sup> The frequent imbalance in sides has been noted by numerous modern commentators, starting with Bornecque, and more recently Gunderson;<sup>6</sup> however, the role that the imbalances play in moral reasoning deserves further analysis.

As a first step, it is necessary to look more closely at the ways in which cases can be imbalanced. Ancient theorists taught that a case could have a component of both *ius* and *aequitas*: *ius* meant the legal facts of the case, and *aequitas* meant roughly “fairness” – i.e. the side that was right on moral grounds, even if not in legal technicalities. Seneca and the declaimers relied quite heavily on these concepts as seen in the *divisio* sections of the cases, where issues of *ius* were evaluated through *quaestiones*, the “legal questions” around which a speaker structured his argument. For each case Seneca usually lists the *quaestiones* of several declaimers – almost always Porcius Latro, and then

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<sup>5</sup> It is unclear if Seneca thought this particular case, or any in his own collection, belonged in that category; it will be discussed further in Section III below. Quintilian says extreme imbalance was the rule in his day: while talking about a tendency of speakers in court to ignore arguments from the other side and focus only on their own, he adds: *Et scilicet multo magis in scholis, in quibus non solum contradictiones omittuntur, verum etiam materiae ipsae sic plerumque finguntur, ut nihil dici pro parte altera possit* (“Naturally this happens much more often in school declamations, where not only are objections ignored, but in fact the themes themselves are usually devised such that nothing can be said in favor of the other side,” *Inst.* 5.13.36).

<sup>6</sup> Erik Gunderson, *Declamation, Paternity, and Roman Identity: Authority and the Rhetorical Self* (Cambridge, 2003), 132. He often makes the imbalance in sides central to his analysis of declaimers’ attitudes toward fathers and sons.

a few others who diverged in ways that he considered noteworthy. Issues of *aequitas* were not considered *quaestiones* but belonged instead to *tractatio* – roughly, a way of “handling” or “presenting” the case, conceptually distinct from legal argumentation. (They could, however, be phrased as questions, such as *An debeat* [e.g. *abdicari*]? – “Is it right [for him to be disinherited]?”), and the various components of the discussion could be widely dispersed throughout an actual speech.)<sup>7</sup> Roller’s observation that moral considerations are paramount in declamation, noted in the Introduction,<sup>8</sup> might lead one to conclude that *aequitas* is the more important factor to look at in assessing a declaimer’s response; this would not be wide of the mark, but in fact the situation is more complicated: it is the intersection of the two categories of *ius* and *aequitas* that yields the most interesting results.

It is not always easy to apply these concepts on any given case. In evaluating *ius*, there is the problem that the laws are usually fictional, and so real Roman legal practice (when it is known) is not a sure guide. Sometimes a clear viewpoint is expressed by Seneca’s declaimers in their discussions of the case, such as 1.6.8, *In hac controversia nihil litium fuit: fere omnes consentiunt* ... (“In this *controversia* there was no disagreement: practically all agreed ...”). In [Quint.] 326, an envoy is charged with harming the state because he reported incomplete information about an oracular response to a plague; the *sermo* states that his side is harder specifically because of the legal facts: *Tractum esse pestilentiae malum hoc nuntio manifestum est* (“It is obvious that the horror of the plague was prolonged by his report,” 3). But more often the legal facts are uncertain, indecisive, or disputed; in the very tentative classification of this study, roughly 27 of the 35 cases preserved complete in Seneca do not

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<sup>7</sup> For more on *ius*, *aequitas*, and other terminology in this section, see Introduction; also the extensive discussion in Fairweather, *The Elder Seneca*, 155-65. Less comprehensive than Fairweather is Lewis A. Sussman, *The Elder Seneca*. Mnemosyne Supplementum 51 (Leiden: Brill, 1987).

<sup>8</sup> Roller, “Color-Blindness,” 113: “In declamation, a moral understanding of events is the primary mode of understanding; ethical appeals are more authoritative and persuasive than appeals on any other grounds.”

show a clear consensus or preponderance of opinion among declaimers, nor can our assessment of the legal principles at issue arrive at anything definitive.<sup>9</sup> This characteristic of the themes seems to have been intentional: as Chapter 4 goes on to argue, most themes were probably designed to be legally insoluble. True, they required students to practice legal argumentation; ancient *status* theory provided the step-by-step framework for discovering the key issues of a case, even when there was no single correct answer to arrive at.<sup>10</sup> But this was only one of the themes' purposes; along with the legal conflict, they were also designed to set up a conflict of moral values. Whether legally clear or legally uncertain, most cases show a very clear *moral* imbalance, with one side holding a significant advantage based on the criterion of fairness or reputability. It is this intersection of legal facts and moral imbalance that forms the topic of this chapter.

In assessing the moral balance of a case, it becomes helpful to turn to something broader than the *aequitas* of the ancient rhetoricians. At the conceptual level at least, there must be one side which, based on the initial statement of facts in the theme, the audience feels a stronger impulse to sympathize with. This may be due to the reputability of the character or actions, or the perceived fairness of his or her position. In a *causa coniecturalis*, where the question is not about the fairness or legality of an action, but about which version of events really happened, the stronger side in terms of audience perception is the one which they are more likely to accept, with the least persuasive effort. We can occasionally find guidance for assessing this category in explicit statements by Seneca and [Quint.]: for instance, Seneca refers to the defendant of 10.4 as *inquinatum et infamem* ("tainted and disgraced," 18); the fact that he mentions it in passing, without discussion or justification, indicates that it is an audience judgment about the character which he himself shares. The term *invidia* ("ill

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<sup>9</sup> For more on this see Chapter 4 and Appendix A.

<sup>10</sup> See Emanuele Berti, "Law in Declamation," for a discussion of how *status* theory underlies the legal arguments of Seneca's declaimers.

will, disfavor, disrepute”) can also include moral disapproval of a character: *invidia relictī patris* (“her disrepute for abandoning her father,” Sen. *Con.* 1.6.10) is used by Latro in a discussion of strategy.

The clearest passage is [Quint.] 270.1, which makes explicit the relationship between *ius*, *aequitas*, and audience sympathy. Regarding a father who brought about the death of his daughter’s rapist by legally questionable means, the *sermo* says: *Facilis et in promptu ratio est huic seni quod pertinet ad adfectum [paenitentiae], quod pertinet ad aequitatem. Nisi tamen etiam iure defenditur, verendum erit ne illum flentes iudices damnent. Diligenter ergo pugnare circa legem debebimus* (“The argument is clear for this old man as far as sympathy, as far as fairness. However, unless he is also defended legally, there is a danger that the jury may convict him with tears in their eyes. Therefore, we will have to argue forcefully concerning the law.”<sup>11</sup> Here, *adfectus* and *aequitas* are mentioned as two distinct things, which are nevertheless united by forming one side of the opposition to *ius*. The audience of this case is expected to feel an emotional sympathy with the father because his actions are perceived as *aequiora* – fairer, more just – regardless of what direction the legal facts may point.<sup>12</sup> As we will see later in the chapter, the concept of exemplarity helps in defining more clearly what audience sympathy is and where its basis lies.

It remains to ask how *aequitas* and audience sympathy correlate with the declaimers’ choice of sides. Seneca almost always presents more material for the side he lists first; his editorial statements, where they occur, usually indicate that this is the side that most declaimers took.<sup>13</sup>

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<sup>11</sup> “... convict him with tears in their eyes”: wording from D. R. Shackleton Bailey, transl., [Quintilian]. *The Lesser Declamations*, 2 vols. Loeb Classical Library (Harvard University Press: Cambridge, Mass., 2006).

<sup>12</sup> [Quint.] 313.1 *sermo* makes a similar distinction in recommending when to speak in the persona of an advocate instead of as the character himself: *Et quotiens causa plus iuris habet quam pudoris, ad eum transferenda est qui non erubescit* (“And whenever a side has more legal right than reputability in its favor, the speech should be transferred to one who will not blush”).

<sup>13</sup> Stated preference for the first side, with more material: *Pro illo qui debilitabat expositos pauci admodum dixerunt* (“Very few spoke in favor of the man who crippled exposed children,” 10.4.15); *Hanc controversiam magna pars declamatorum sic dixit velut <non> controversiam divideret sed accusationem* (“The greater part of the speakers declaimed this case as though they were not declaiming a *controversia* but a prosecution,” 10.5.12). Both of these cases are discussed in more detail later

Moreover, the types of arguments that they make imply a certain direction of sympathy on the part of the audience: the first side usually appeals to an audience that already agrees with them on moral evaluation, indicating that this is likely the dominant interpretation of events. The second side demonstrates a way of contesting the majority view, of revising an initial impression. The focus of this chapter is not on counting the quantity of material or assessing the number of speakers – although this occasionally becomes relevant – but on how both sides employ the exemplary mode of moral reasoning, in different ways, depending on the type of imbalance in the case. We will look at how the majority handled the conventional side, and what means could be used for arguing the more difficult side, against popular perception; what happened when the legal facts and audience sympathy pointed in opposite directions; and lastly, how to interpret those cases where the declaimers themselves seemed unsure of where to situate their side.<sup>14</sup>

## II. For and against public perception: narratives of the *sacerdos prostituta*

Sen. *Con.* 1.2 *Sacerdos prostituta* (“the prostitute priestess”) is a case where legal facts and public perception point in the same direction:

SACERDOS CASTA E CASTIS, PURA E PURIS SIT. Quaedam virgo a piratis capta venit. Empta a lenone et prostituta est. Venientes ad se exorabat stipem. Militem qui ad se venerat, cum exorare non posset, colluctantem et vim inferentem occidit. Accusata et absoluta remissa ad suos est. Petit sacerdotium.<sup>15</sup>

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in this chapter. Other statements, not proving a majority choice of side, but a widespread preference for a particular approach: *Omnes infamaverunt raptae patrem quasi cum raptore concludentem* (“They all defamed the *rapta*’s father as having colluded with the *raptor*,” 2.3.17); *Omnes infamaverunt adolescentem, quasi illius criminationibus factum sit ut frater abdicaretur* (“They all defamed the young man, on the grounds that through his accusations the brother was being disinherited,” 2.4.7); *Omnes invecti sunt in libertum* (“They all inveighed against the freedman,” 4.8 *excerpta*).

<sup>14</sup> For more details on how the cases might be classified, see Appendix A.

<sup>15</sup> “A PRIESTESS MUST BE CHASTE FROM AMONG THE CHASTE, PURE FROM AMONG THE PURE. A virgin was captured by pirates and sold. She was bought by a pimp and made a prostitute. She persuaded the clients who came to her to give her alms. When she was unable to persuade a soldier who had come to her, as he was struggling and applying force she killed him. She was accused and acquitted, and then sent back to her family. She seeks a priesthood.”

All the *sententiae* quoted by Seneca are on the first side, against the girl's candidacy; they come from fourteen speakers and run to over 1,300 words of Latin text. The other side's response is not mentioned until the *colores* section, where Seneca summarizes the approaches taken by eight speakers.<sup>16</sup> It seems likely that this imbalance in quantity of material reflects a real disparity in the number of speakers who chose each side. But more important for analysis is the nature of each side's response. One of the key components of the first side's case is the employment of moralizing invective, discussed immediately below. As the next section will show, those declaimers who take the girl's side do so by bringing revisions into the narrative that change the assessment of her character.

The general tenor of speeches against the girl could be summarized as, "Of course she should not be a priestess – why are we even discussing this?" Speakers on this side do not seem overly concerned about stressing the legal arguments, although they do present them. They can make a strong case based on the definition of *casta*, even without venturing into the conjectural question of whether or not the girl is technically a virgin. Latro asks, *Utrum castitas tantum ad virginitatem referatur an ad omnium turpium et obscenarum rerum abstinentiam?* ("Does chastity refer only to virginity or to separation from everything shameful and obscene?"). From here, the rest is easy: *Putam enim virginem quidem esse te, sed contrectatam osculis omnium; etiamsi citra stuprum, cum viris tamen volutata es* ("Suppose you really are a virgin, but handled by the kisses of everyone; even if this falls short of sex, you have still rolled around with men," 13). This legal framework formed the jumping off point for extensive passages of moral outrage and invective, set frequently in the form of clever *sententiae*. The approach for this side needed hardly any analysis from Seneca; he says, *nihil habet difficultatis* ("it presents no difficulty,"); and *dicendum est in puellam vehementer, non sordide nec obscene* ("one must speak

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<sup>16</sup> About 460 words, although *sententiae* vs. *colores* is not a comparison of like with like.

against the girl forcefully, but not basely or obscenely,” 21). The tone of indignation that pervades these speeches seems to have been at least as important to the total effect as were the *quaestiones* and close legal reasoning. All serve to reinforce the assertion that she is *incesta*, and to explore every possible inference of what being *incesta* entails.<sup>17</sup>

The ways in which the two sides handle the narrative require more extensive explanation and analysis. As mentioned in the Introduction, classical rhetorical theory called for every speech to contain a *narratio*, a “narration” or “statement of facts,” in which the speaker set forth his own version of what happened. In analyzing *controversia* speeches, however, we are interested not just in the *narratio* proper – of which Seneca rarely preserves more than a few lines explicitly labeled as such – but in how the entire sequence of events from the theme is represented throughout a speech given in response to it. One must remember that a *controversia* theme is usually only the barest kernel of a narrative: it introduces characters and states that events happened, but nothing more.<sup>18</sup> The underlying causes, connections, and motivations are usually unexpressed, and are available to be filled in by the minds of the speaker and the audience. A speaker’s understanding of what goes into the gaps in a theme may be reflected many places throughout the speech; the ways in which he fills them in may hold the key to the moral interpretation of events.

Literary theories of the past few decades provide an explanation of why this is so. According to reader response criticism, declamatory themes are not unique in containing gaps; every text, indeed every sentence, contains indeterminacies, and filling them in is a necessary component of the

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<sup>17</sup> On the issues of rape and sexual crimes in declamation, see Graziana Brescia, *La donna violata. Casi di stuprum e raptus nella declamazione latina* (Lecce: Grifo, 2012).

<sup>18</sup> On declamation themes as “narrative microtexts,” see Lucia Pasetti, “Cases of poisoning in Greek and Roman declamation,” in *Law and Ethics in Greek and Roman Declamation*, 162-4. She follows the terminology of Emilio Pianezzola, “Spunti per un’analisi del racconto nel thema delle *Controversiae* di Seneca il Vecchio,” in *Percorsi di studio: dalla filologia alla storia* (Amsterdam: Hakkert, 2007), 251-263; and Luciano Nosarti, *Forme brevi della letteratura latina* (Bologna: Pàtron, 2010).

process of reading. In order to illustrate this, Terry Eagleton analyses the opening two sentences of a John Updike novel (*Couples*):

“What did you make of the new couple?” The Hanemas, Piet and Angela, were undressing.

Eagleton points out that there is no explicit connection between the two sentences; based on a knowledge of literary conventions, the reader concludes that the first is a line of dialogue, and the names in the second sentence refer to characters, one of whom speaks the line. Cultural knowledge tells us that Piet and Angela are probably a couple, and probably alone, perhaps in a bedroom, because people do not customarily undress in public places or in large groups. But many other interpretations are technically possible, because they are unstated in the text: “The phrase, ‘The Hanemas,’ we imagine, is probably in grammatical apposition to the phrase ‘Piet and Angela,’ to indicate that this is their surname . . . . But we cannot rule out the possibility that there is some group of people called the Hanemas in addition to Piet and Angela, perhaps a whole tribe of them, and that they are all undressing together in some immense hall.”<sup>19</sup> Eagleton emphasizes that this interpretation process is ongoing, working backwards and forwards as a reader progresses through a text. “The reader makes implicit connections, fills in gaps, draws inferences and tests out hunches; and to do this means drawing on tacit knowledge of the world in general and of literary conventions in particular. The text itself is really no more than a series of ‘cues’ to the reader, invitations to construct a piece of language into meaning.”<sup>20</sup> This construction of meaning is possible as both author and reader share an understanding of the “schemata” by which texts operate: “the reader will

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<sup>19</sup> Terry Eagleton, *Literary Theory*, 2<sup>nd</sup> ed. (University of Minnesota Press, 1996), 65.

<sup>20</sup> *Ibid.*, 66.

bring to the work certain ‘pre-understandings,’ a dim context of beliefs and expectations within which the work’s various features will be assessed.”<sup>21</sup>

Considered in this way, the gaps in a *controversia* theme like 1.2 are extensive. The statement that the girl was captured and sold by pirates seems straightforward, but upon further reflection, it says nothing about her previous life, family background, or character. It implies that she was traveling somewhere by sea, but it does not specify whether or not she was accompanied by a family member or guardian.<sup>22</sup> Declamatory pirates customarily send word to the family requesting a ransom; this theme does not specify whether the pirates did so or not, and if they did, whether the family refused to ransom her or tried and failed. *Prostituta est* is in the perfect tense, indicating that she entered the state of working as a prostitute; *venientes ad se exorabat stipem* is progressive aspect, indicating repeated or habitual occurrences; but still, it contains no definitive statement about the length of time. It does imply that she persuaded the customers to give her alms instead of having sexual relations with her, but it does not actually state that she remained a virgin.<sup>23</sup> Likewise, *Militem qui ad se venerat, cum exorare non posset, colluctantem et vim inferentem occidit* does not state whether this particular customer, the soldier, succeeded in performing any sexual acts before she killed him, nor does it describe the other circumstances or the means by which she did it. After killing the soldier, the girl was *accusata*, but we do not know by whom; she was *absoluta* in the subsequent trial, but the content of her successful line of defense is unstated. Now, in the present day, the girl is seeking a priesthood, which necessarily includes a claim to be *casta* in some sense; what sense is open for interpretation.

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<sup>21</sup> Eagleton, *Literary Theory*, 67, explaining the theory of Roman Ingarden.

<sup>22</sup> Graziana Brescia, “Ambiguous silence: *stuprum* and *pudicitia* in Latin declamation,” in *Law and Ethics in Roman Declamation*, 84, discusses the responsibility that was placed on virgins to safeguard their *pudicitia*.

<sup>23</sup> Parks, *The Roman Rhetorical Schools*, 73, translates, “Of those who came to her she demanded the price, but begged off being compelled to earn it.” This is a logical expansion of the thought apparently underlying “she asked for alms.”

In the terminology of reader response criticism, every reader of this text interprets it based on his or her pre-understandings. The speakers against the girl start with a negative ethical evaluation of her; their invective fills in the narrative gaps, based on negative presuppositions, with things that would be in keeping with a person of that assumed character. In short, they give her almost every other conceivable disgraceful attribute besides *incesta*. For instance, Cestius Pius insinuates about the girl's family: *Ita domi custodita est ut rapi posset; ita cara fuit suis ut non redimeretur* ("She was guarded at home in such a way that she was able to be raped; she was so precious to her family that they didn't ransom her," 7). Publius Asprenas implies a low-class background by referring to her as someone whom *nemo civium suorum norat antequam prostitit* ("none of her fellow citizens knew before she became a prostitute"); later on, while arguing that the girl must have become unchaste during her captivity, he asks, *An melius pirata servavit quam pater?* ("Or did a pirate protect her better than her father?" 9). The declaimers take delight in describing all the scenes in which the girl must have been touched and handled, often simply restating what was in the theme but using more emotionally or morally charged language. Once again, Publius Asprenas: *Iacuisti in piratico myoparone; contrectata es alicuius manu, alicuius osculo, alicuius amplexu* ("You lay in the pirate ship, you were felt by one man's hand, another man's kiss, another man's embrace," 9). Publius Vinicius, describing the slave market: *Nuda in litore stetit ad fastidium emptoris; omnes partes corporis et inspectae et contrectatae sunt* ("She stood on the shore naked in order to be sneered at by customers. All the parts of her body were inspected and handled," 3).

Seemingly confident that the audience shares their negative evaluation of the girl, speakers against her present negative details as self-evident, not needing any argumentation. For instance, most of them assume that she must have given the customers at least a kiss in exchange for not having full sexual relations with them. Cestius Pius: *Cum deprecaberis intrantis amplexus, ut alia omnia impetraris, osculum erogasti* ("As you begged off the embraces of the customers, you paid with a kiss in

order to gain all the other things,” 7). Junius Gallio: *Haesisti in complexu, osculo pacta es* (“You clung in their embrace, you made the deal with a kiss,” 12). Some declaimers imply that even in the act of defending herself from the soldier, she must have been polluted; in an amusing statement censured by Seneca for its obscenity, Murredius speculated, *Fortasse dum repellit libidinem, manibus excepit* (“Perhaps while she was repelling his desire, she seized it in her hands,” 23). Romanus Hispo asks, *Numquid hoc negas, conluctatam te tamen cum viro, quem in illa volutatione necesse est prius super te fuisse?* (“Surely you don’t deny that you did struggle with a man, and that during that rolling around he must have been on top of you?” 6).

They are able to make these unsupported assertions because the girl’s conduct already aligns with negative *exempla* seen elsewhere in Latin literature, and surely known (at least in general terms) to the audience. For the speakers on this side, moral reasoning requires nothing more than mentioning facts or behavior that also occur in the exemplary story, and the audience is able to make the connection, consciously or unconsciously. One such story is Valerius Maximus 6.1.4, in a chapter on *pudicitia*, where Publius Maenius shows himself to be a strict guardian of *pudicitia*: upon discovering that one of his favorite freedmen had kissed his daughter, even though it had been an accident and not out of lust, Maenius still put the man to death. Valerius adds that by this harsh *exemplum* Maenius taught his daughter *ut non solum virginitatem inlibatam, sed etiam oscula ad virum sincera perferret* (“to preserve not only untainted virginity, but also pure kisses for her husband”). In the same section Valerius relates several stories, drawn from Livy, in which the only honorable outcome for girls whose chastity has been violated is death: Lucretia, raped by king Tarquin, took her own life (6.1.1); Verginia, who had merely been solicited persistently by the decemvir Appius Claudius, was killed by her own father (6.1.2). In denouncing the prostitute who would be a priestess, the declaimer Publius Vinicius makes a clear allusion to these exemplary stories: *Eo deducta es ubi tu aliud nihil honestius facere potuisti quam mori* (“You were taken to such a place where the only honorable thing

you could do was die,” 3). Vinicius and the other speakers for this side are situating themselves in the tradition of stern Roman men protecting the state as well as the family from the encroachments of immorality.

### ***Creating another side to the story***

Narrative, and specifically exemplary narrative, is even more important for understanding the approach of the other side, which had to work in the face of public perception. One of the ways declaimers responded when the initial impression was against their side was by revising the narrative. These innovations in the narrative are a structural clue that declaimers believe the audience will be against them at least on some point in the case.<sup>24</sup>

Quintilian recommended that in a real court case, if the agreed-upon facts were prejudicial to our side, we should still relate those same facts in our narration, *sed non eodem modo: alias causas, aliam mentem, aliam rationem dabo* (“but not in the same way: we will provide different causes, a different motive, a different rationale,” *Inst.* 4.2.76). There was a technical term – *color* – which could cover all these types of alternate interpretations: it could include the attribution of motives to a character, as well as the invention of background events that made the supposed motives more plausible.<sup>25</sup> In a real case, great care was needed not to assert things that could be refuted by the other side; in a *controversia*, the constraint was that the invented material must not contradict the facts of the theme.<sup>26</sup> Roller notes that these *colores* in declamation were the primary way that the ethical interpretation of

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<sup>24</sup> Rare examples of an otherwise more popular side revising the narrative: 7.6.14, where Albus needed to innovate in order to shore up a weak spot on his side; also 1.2, the *incesta de saxo*, discussed later in this section.

<sup>25</sup> Recent work on the origins of the term *color* is Burkard, “Zu den Begriffen *divisio* und *color* bei Seneca maior”; he argues that it meant the “coloring in” of the bare outline of the narrative.

<sup>26</sup> Quintilian’s full discussion of *colores* and *falsae expositiones* is at 4.2.88-100. For more about the constraint on violating the facts of the theme, see Chapter 2.

events was asserted and contested.<sup>27</sup> At the same time, however, the term *color* encompassed a range of other things besides additions to the narrative; in Seneca, it could even include the tone or approach, such as invective, which we have seen is characteristic of the *stronger* side.<sup>28</sup> Therefore, it is necessary to maintain focus on information that is invented beyond the given facts of the case, and how this works to change the narrative.

The previous section showed that the speakers who denounced the girl also introduced details that were not stated in the theme. In order to see how this side does it differently, we must return to reader response criticism, with its schemata or pre-understandings. Now the focus is not on the reader, however, but on how a speaker or writer makes use of these schemata when producing a text in the first place. The historian Hayden White has argued that the writing of narrative history necessitates the imposition of pre-existing plot structures onto events. Simpler forms of historical writing such as the annal provide a bare list of events in temporal sequence; the slightly more complex chronicle retains the temporal sequence and directs attention to particular characters or places; but a true narrative requires a story structure and an interpretation of events as grouped into a beginning, middle, and end. “In historical discourse, the narrative serves to transform a list of historical events that would otherwise be only a chronicle into a story. In order to effect this transformation, the events, agents, and agencies represented in the chronicle must be encoded as ‘story-elements,’ that is to say, characterized as the kinds of events, agents, and agencies that can be apprehended as elements of specific ‘story-types.’” The author of the text draws upon a repertoire of

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<sup>27</sup> Roller, “Color-Blindness,” 113-4.

<sup>28</sup> *Alterius partis color nihil habet difficultatis: adparet <ex sententiis> quas praeposui. Dicendum est in puellam vehementer, non sordide nec obscene* (“The *color* for the other side presents no difficulty: it is clear from the *sententiae* I have quoted. One must speak against the girl forcefully, but not basely or obscenely,” 1.2.21) – thus, speaking forcefully against the girl is a *color*. *De colore inter maximos et oratores et declamatores disputatum est, utrumne aliquid deberet dici in novercam an nihil... Fuerunt et qui in novercam inveherentur ...* (“There was debate among the greatest orators and declaimers about whether something should be said against the stepmother or not.... There were also those who inveighed against her,” 20) – thus, attacking the stepmother is a *color*. An extensive discussion of *colores*, including the evolution of the term, is found in Fairweather, *The Elder Seneca*, 166-78, but without a specific focus on narrative revisions and what they could accomplish.

“plot-structures” known to the culture in which he is writing. The plot-structures are not determined by the events themselves, “because any given set of real events can be emplotted in a number of ways, can bear the weight of being told as any number of different kinds of stories. Since no set or sequence of real events is *intrinsically* ‘tragic,’ ‘comic,’ or ‘farcical,’ but can be constructed as such only by the imposition of the structure of a given story-type on the events, it is the choice of the story-type and its imposition on the events which endow them with meaning.”<sup>29</sup>

Even more fundamental to the emplotment of events into a narrative is the fact that they must first be selected, out of the infinite number of things that occur, and that this selection is always done according to some purpose. “For in fact every narrative, however seemingly ‘full,’ is constructed on the basis of a set of events which *might have been included but were left out*; and this is as true of imaginary as it is of realistic narratives.”<sup>30</sup> The medieval *Annals of St. Gall* report the Battle of Poitiers with the following words: “Charles fought against the Saracens at Poitiers on Saturday.”<sup>31</sup> The development beyond annals and chronicles to narrative history depends on an organizing principle of selection; besides stating that the battle took place on a Saturday, narrative history requires the awareness of a social system to which the events have relevance. Narrative shares a close connection with morality because it implies a comparison with what might have or ought to have happened; characters could have made different choices, and the reader is invited to evaluate what actually happened by weighing it against a more desirable, ideal outcome.<sup>32</sup> White continues,

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<sup>29</sup> Hayden White, “The Question of Narrative in Contemporary Historical Theory,” *History and Theory* 23.1 (Feb. 1984), 20. Emphasis original.

<sup>30</sup> Hayden White, “The Value of Narrative in the Representation of Reality,” *Critical Inquiry* 7.1 (Autumn 1980), 14. Emphasis original.

<sup>31</sup> *Ibid.*, 11-2, 15.

<sup>32</sup> S. W. Quackenbush, “Remythologizing Culture: Narrativity, Justification, and the Politics of Personalization,” *Journal of Clinical Psychology* 61 (2005), 73. He adds, “As implicit references to ideal states, stories necessarily encapsulate events and actions within a moral framework.... A coherent narrative is thus inconceivable prior to the emergence of the cultural justification systems that illuminate the moral significance of each of our acts. Indeed, narrativity can appropriately be considered as the *very language* of justification.” Emphasis original.

“All this suggests that narrativity, certainly in factual storytelling and probably in fictional storytelling as well, is intimately related to, if not a function of, the impulse to moralize reality, that is, to identify it with the social system that is the source of any morality that we can imagine.”<sup>33</sup> Narratives are told for the purpose of justification when the meaning of events is under dispute; again, this is in contrast to the simpler presentation of annals: “For the annalist, there is no need to claim the authority to narrate events since there is nothing problematical about their status as manifestations of a reality that is being contested. Since there is no ‘contest,’ there is nothing to narrativize ....”<sup>34</sup>

If the narration of real historical events is subject to authorial choice of emplotment, with the choice of plot entailing a specific moral interpretation of events, declamation, in a related way, offers the chance to play around with the fictional events of the theme and try to impose a different plot and a different moral evaluation.<sup>35</sup> In these terms, we can restate what it means for the themes to be imbalanced: many themes, as written, suggest a particular plot structure to the Roman audience at the outset, and that plot structure carries with it its own moral evaluation. Declamation invites the speaker to explore the question, “What other events or circumstances, if present, would change the plot and the moral evaluation of these facts?” This brings us back to the *exemplum*, which completes the picture with its component of situation ethics. As described in the Introduction, Langlands has shown that in order to use *exempla* in decision making, Romans were expected to take into consideration the circumstances of the action and the *persona* of the one performing it.<sup>36</sup> What would

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<sup>33</sup> White, “The Value of Narrative,” 18.

<sup>34</sup> Ibid., 23. Other studies in the field of psychology have made similar claims in recent decades. James A. Holstein and Jaber F. Gubrium, *The Self We Live By: Narrative Identity in a Postmodern World* (Oxford, 2000) summarize current thinking on the role of narrative in the construction of the self.

<sup>35</sup> For narratives that change moral evaluation, cf. several recent retellings of the *Wizard of Oz* with a new backstory that makes the wicked witch into a sympathetic protagonist; or the hit television series *Breaking Bad*, which led millions of viewers to sympathize with a murderous drug dealer because they knew his earlier life history.

<sup>36</sup> Langlands, “Roman *Exempla* and Situation Ethics,” 100-122.

have counted as *audacia* in an ordinary person was *fiducia* for Cato, because of who Cato was and his previous deeds in life. Thus ethics depended to a large extent on context, not on particular facts.<sup>37</sup>

Declaimers defend the *sacerdos prostituta* by imposing a different plot structure on the story, creating a different context and allowing a different evaluation of actions. While both sides necessarily fill in gaps in the narrative, the speakers for the girl do so in a way that is qualitatively different from the other side, discussed above. Their main strategy consists of the insertion of divine agency into the series of events; it includes the invention of key details to assist in changing the plot. Seneca summarizes the strategy as it was utilized by Fuscus Arellius: *Fuscus pro puella colorem hunc introduxit: voluerunt di immortales in hac puella vires suas ostendere, ut appareret quam nulla vis humana divina resisteret maiestati: putaverunt posse miraculo esse in captiva libertatem, in prostituta pudicitiam, in accusata innocentiam* (“Fuscus introduced the following *color* for the girl: the immortal gods wanted to display their strength through this girl, so it might be clear that no human force could resist the divine majesty. They thought it would count as a miracle for there to be in a captive, freedom; in a prostitute, chastity; in a defendant, innocence,” 17). Albuicius asserts that it was the gods who brought the soldier, and they did so for a specific purpose: *Nescio quis feri et violenti animi venit, ipsis credo dis illum impellentibus, ut futurae sacerdotis non violaret castitatem <sed ostenderet>* (“Some man came with a fierce and violent disposition; I believe the gods themselves were pushing him on, so that rather than violating the chastity of the future priest, he might show it forth,” 18). He also sees the gods at work in her subsequent trial: *Hoc factum eius ne lateret eisdem dis immortalibus fuit curae: accusator inventus est qui pudicitiae eius in foro testimonium redderet* (“The same gods saw to it that this deed of hers should not remain secret: an accuser was found, in order that he might bear witness to her chastity in court,” 18). Thus, he reinterprets the theme’s “she was accused [by someone]” with “an accuser

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<sup>37</sup> Cf. also Urban, “The Use of Exempla from Cicero to Pliny the Younger,” 32-73, who describes how the exemplary stories themselves could be changed by the narrative framing to suit different argumentative contexts.

was found [by the gods],” again with divine intention expressed in the following relative clause of purpose (*qui ... testimonium redderet*).

Some speakers go beyond divine agency (i.e. causation of the given events) to actual divine intervention, in the sense of visible appearance and action. Here is Triarius, imagining the girl’s description of events as related by her advocate in the previous trial: *Negabat se puella fecisse, negabat illum suis cecidisse manibus: “altior” inquit “humana visa est circa me species eminere et puellares lacertos supra virile robur attollere”* (“The girl said that she didn’t do it, that he didn’t die by her hands. She said, ‘An apparition, larger than human, was seen looming up around me and raising these girlish arms to more-than-manly strength.’”). Triarius goes on to invent the girl’s motivation for seeking the priesthood, grounding it in this specific divine intervention: *Quicumque estis, dii immortales, qui pudicitiam ex illo infami loco cum miraculo voluistis emergere, non ingratae puellae opem tulistis: vobis pudicitiam dedicat, quibus debet* (“Whoever you are, immortal gods, who wished for chastity to shine forth from that disgraceful place by means of a miracle – you have brought help to a not-ungrateful girl. She dedicates her chastity to you, for she owes it to you,” 21). The theme had not made any mention of her thankfulness to the gods or motivation for seeking the priesthood, but this is easily slotted into the gap if one is following the plot structure of a virtuous girl chosen by the gods.<sup>38</sup>

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<sup>38</sup> Other details invented by declaimers for this side, which assist in changing the plot: Albucius adds specific words spoken by the girl during her struggle with the soldier: *Praedixit illi abstinere a sacro corpore manum: “non est quod audeas laedere pudicitiam, quam homines servant, dii expectant.” Et in perniciem ruenti suam “en” inquit “arma, quae nescis te tenere pro pudicitia”, et raptum gladium in pectus piratae sui torsit* (“She warned him to keep his hand off of her sacred body: ‘You must not dare to harm this chastity, which men preserve and the gods await.’ And as he rushed toward his own destruction, she said, ‘Behold the weapons which you bear unknowingly in service of chastity!’ And she snatched the sword and drove it into the chest of its pirate,” 18). Argentarius makes up a line of argument that had been used against the girl in the previous trial, but would work to her advantage in the present case: *Accusator in hoc maxime premebat ream: aiebat occisum esse intra verba, antequam vim adferret* (“This is what the prosecutor stressed as the chief point against her: he said the soldier had been killed in the midst of words, before applying force,” 19). Albucius also imagines that the girl’s defense in the previous trial had used the same claim of divine agency, and that this was decisive for her acquittal: *Nemo credebatur occisum virum a femina, iuvenem a puella, armatum ab inermi: maior res videbatur quam ut posset credi sine deorum immortalium adiutorio gesta* (“No one believed that a man had been killed by a woman, a youth by a girl, an armed person by an unarmed: the deed seemed greater than one could believe done without the help of the immortal gods,” 18).

Understandably, the part of the story that these declaimers did not dwell on was the earlier portion, from her capture by pirates to her work in the brothel. Seneca says that *Cestius timuit se in narrationem demittere; sic illam transcucurrit: ...* (“Cestius was afraid to let himself down into narration; this is how he danced past it: ...”) and there follows a piece of argumentation highlighting how the given events (in briefest outline) demonstrate the girl’s *pudicitiam, innocentiam, felicitatem* (“chastity, innocence, good fortune”); it is capped by the *sententia: Inter tot pericula non servassent illam dii nisi sibi* (“In the midst of so many dangers, the gods would not have preserved her except for their own benefit,”<sup>19</sup>). In reference to the earlier parts of the narrative, *Marullus cum descripsisset dignationem puellae magnam fuisse, altius quiddam superbiusque vultu ipso praeferente, hanc adiecit sententiam ...: narrate sane omnes tamquam ad prostitutam venisse, dum tamquam a sacerdote discesserint* (“Marullus described how how the girl’s dignity was great, with her very face displaying something quite lofty and proud, and he added this *sententia*: ‘Go ahead and tell how all came to her as to a prostitute, as long as they all go away as from a priestess,’” 17). These strategies show that the declaimers did not need to contest the entire narrative; they did not need to insert innovations at every point where one was possible. It was only necessary to bring in divine agency or outright intervention at certain key points, and the entire remainder of the plot structure could thus be shifted. This shift could be reinforced by argumentation and made memorable through *sententiae*.

Both sides recognize that the key question of the theme is not whether the girl is a virgin but whether she is *casta*. As seen above, the speakers against the girl argue that she fails at this definition because she was touched and handled and associated with disreputable people. For the girl’s side, the requirement that she be *casta* effectively precludes defenses based on an appeal for pity. (This possibility is brought up by the other side in order to ridicule and reject it – 1.2.3.<sup>39</sup>) No one argues

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<sup>39</sup> Spoken by Publius Vinicius: “*Fortuna*” inquit “*haec me coegit pati; miserere debent omnes mei.*” Et ego misereor tui, puella. Sed non facimus miserandas sacerdotes; non est apud nos maximus honor ultimorum malorum solacium (“She says, ‘Fortune compelled

that she remained *casta* because the prostitution happened against her will; apparently that stretched the definition beyond what Roman society would be willing to accept. So a defense based on narrative is the option that remains, and the narrative they settle on is divine agency. Those on the girl's side apparently do want her still to be a virgin, but they place the greatest stress on how she is *casta* and *pudica* in spite of what happened to her. This strategy works because of the situation ethics described by Langlands: the declaimers are using the *persona* concept from exemplary literature, but in reverse. For an ordinary person, the sequence of being captured by pirates, sold as a prostitute, and committing homicide would have made one *incesta* and *impudica*; but for a person favoured by the gods, these same events and actions showed bravery, innocence, chastity, good fortune. Therefore, the speakers changed the surrounding story to portray her as the latter sort of person, favored by the gods and chosen as their priestess.<sup>40</sup>

They were assisted by pre-existing plot structures that are seen elsewhere in Roman exemplary literature. Partially parallel is a story of divine intervention to vindicate a priestess of wrongdoing. In Valerius 1.1.6 (in the section *De religione*), a Vestal Virgin was flogged because one night she was insufficiently diligent in keeping the eternal flame alight.<sup>41</sup> But the next *exemplum* (1.1.7) shows how a different result might come about: *Maximae vero virginis Aemiliae discipulam exstincto igne tutam ab omni reprehensione Vestae numen praestitit. Qua adorante, cum carbasum, quem optimum habebat, foculo imposuisset, subito ignis emicuit* (“On the other hand, when a pupil of the chief virgin, Aemilia, allowed

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me to suffer these things. Everyone should pity me.’ I do pity you, girl. But we do not appoint pitiable priestesses; in our state, the highest honor is not a consolation for extreme misfortunes,” 3).

<sup>40</sup> Imber, *Practiced Speech*, 211 makes a similar observation, but expresses it in relation to stock characters and narrative archetypes: “The job of the student declaimer was to assimilate the conduct of the stock characters described in the *controversiae* to the behavioral characteristics associated with the archetypal figure.”

<sup>41</sup> *Adiciendum his quod P. Licinio pontifici maximo virgo Vestalis, quia quadam nocte parum diligens ignis aeterni custos fuisset, digna visa est quae flagro admoneretur* (“To these cases we must add the following story. The chief pontiff, Publius Licinius, decided to have a vestal virgin flogged to punish her for being careless in watching over the eternal fire one night”). Translation by Henry John Walker, *Valerius Maximus: Memorable Deeds and Sayings: One Thousand Tales from Ancient Rome* (Indianapolis: Hackett, 2004).

the fire to go out, the goddess Vesta kept the young woman safe from all criticism. Pleading with the goddess, the young woman placed the best linen garment she possessed on the hearth, and the fire suddenly came back to life” – translation by Walker). The persuasive power of divine intervention is also seen in another case in Seneca’s collection (1.3), where it is not an invention of declaimers but rather is strongly suggested in the theme itself: *INCESTA SAXO DEICIATUR. Incesti damnata, antequam deiceretur de saxo, invocavit Vestam. Deiecta vixit. Repetitur ad poenam.*<sup>42</sup> The case then hinges on the correct interpretation of this strange event: was it caused by the gods? If so, which side did it support? The great majority of declaimers are hostile to the woman – after all, she has already been condemned as unchaste – but they are troubled by the possibility that she truly was aided by a divine intervention. Many of their speeches contain additions to the narrative that serve to explain away the supernatural element or change its meaning: her executioners were too modest to remove her dress, and so it billowed out like a parachute (12); she had prepared herself for possible punishment by taking lessons in how to fall (11); the bystanders at the execution had cried out to the gods that her punishment would be too swift, and so they brought her back to face additional suffering (10). Seneca and his colleagues mocked some of these *colores*, but the fact that numerous declaimers felt the need for them shows that a narrative of divine intervention was not something that could be lightly dismissed.<sup>43</sup>

In his chapter on *pudicitia* (6.1.ext.2), Valerius praises a woman as chaste because she killed her rapist *after* the fact. The story comes originally from Livy 38.24: during the war against the Galatians in 189 BCE, a Roman centurion raped one of the prisoners, the wife of a Galatian chief.

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<sup>42</sup> “LET AN UNCHASTE WOMAN BE THROWN DOWN FROM THE ROCK. A woman convicted of unchastity appealed to Vesta before being thrown down. She was thrown down and survived. She is sought for punishment again.”

<sup>43</sup> On divine intervention in declamation, cf. also [Quint.] 323 *Alexander templum dedicans*, where the *sermo* recommends playing up religious feeling: *Quam maxima religione iudicum implendus animus est* (“The judges’ minds must be filled with religious awe as much as possible”). In exemplary literature, cf. discussion by Bloomer, *Valerius Maximus*, 215-6: Divine portents accompany the deaths of both Pompey and Caesar; for Pompey, Valerius portrays the portents as a sign of divine displeasure, while for Caesar he makes them indicative of his being added to the number of the gods.

The centurion agreed to free the woman in exchange for a ransom, but when it was being handed over, the woman gave a signal to her kinsmen and they killed the centurion. She took the head to her husband and told him the full story of the crime and her revenge. Valerius caps his account with the following evaluative statement: *Huius feminae quid aliud quisquam quam corpus in potestatem hostium venisse dicat? Nam neque animus vinci neque pudicitia capi potuit* (“Could anybody say that anything apart from the body of this woman had fallen into the power of the enemy? Her spirit could not be defeated nor her chastity overcome” – translation by Walker).<sup>44</sup>

If this woman was chaste, then *a fortiori* the declamatory girl could be considered chaste because her act of violence actually prevented the assault. If Vesta could display her approval of a priestess who was manifestly guilty of negligence, then the gods could just as well intervene to indicate whom they were choosing as priestess. All these stories were available for use in the moral discussion process. Declaimers merely had to activate them, add agency, events, and motivation where needed, and show the audience, “This is the story we are in.” The desired ethical evaluation followed naturally.

### III. Conflicting sympathy and legal facts: *an laesa sit res publica?*

In the *controversia* of the *sacerdos prostituta*, public perception and legal facts coincide. A similar pattern of responses is seen, to varying degrees, on all cases where the audience’s sympathy is clearly for one side, and the legal facts either favor the same side, or are uncertain and not much in focus. (For details of classification, see Appendix A.) In these cases, the main emphasis is not on the legal argument, although it is present, but rather on the moralizing invective for the more popular side and narrative revisions for the weaker side. But now we must consider another type, where audience

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<sup>44</sup> Livy also ends his account with a positive evaluation: ... *sanctitate et gravitate vitae huius matronalis facinoris decus ad ultimum conservavit* (“... by the sanctity and seriousness of her life, she preserved the glory of this matronly deed until the end,” 38.24).

sympathy is on one side and legal facts are on the other. By a tentative count, there are six cases like that out of the 35 complete cases in Seneca's collection. I will focus on three which are united by the thematic concern of laws about *laesa res publica* (harming the state) or *laesa maiestas* (harming state majesty – both are often translated by the modern legal term *lèse-majesté*); these three also contain illuminating editorial comments from Seneca about how the declaimers handled the case. They are 9.2 *Flamininus in cena reum puniens*, 10.4 *Mendici debilitati*, and 10.5 *Parrhasius et Prometheus*.<sup>45</sup> Close inspection shows that both sides employ the same exemplary reasoning process order to navigate the intersection of moral and legal conflicts in declamation.

What these three cases have in common is that the theme posits an action for harming the state; a character then does something extremely reprehensible and is charged under this law. In all three cases, judging by quantity of material and by Seneca's explicit comments, the majority of declaimers take the prosecution side, but they seem to spend relatively little effort on strengthening the weak legal claims of their side. The focus of their case is moralizing invective against the character in question. The defense is the side that focuses on legal argumentation, and their case seems like it ought to be decisive; but significantly, they still feel the need to bolster their case by revising the narrative. This reinforces the impression that narrative revisions are an important strategy for declaimers whenever it is necessary to counter the dominant moral interpretation of events.<sup>46</sup>

This pattern is well illustrated by Sen. *Con.* 10.4, the *mendici debilitati* ("crippled beggars"):

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<sup>45</sup> The other three are 7.2 *Popillius Ciceronis intersector*, 9.4 *A filio in arce pulsatus*, and 10.1 *Lugens divitem sequens filius pauperis*.

<sup>46</sup> In some of the other cases, the mismatch runs in the opposite direction: these are analogous to [Quint.] 270, mentioned in Section I above, where the audience sympathizes with the defendant but the legal facts are against him. Cases like this in Seneca are 9.4 *A filio in arce pulsatus* and 10.1 *Lugens divitem sequens filius pauperis*. The two sides handle these cases in roughly the same way as those analyzed in this section, but with the roles of prosecution and defense reversed.

REI PUBLICAE LAESAE SIT ACTIO. Quidam expositos debilitabat et debilitatos mendicare cogebat ac mercedem exigebat ab eis. Rei publicae laesae accusatur.<sup>47</sup>

The legal facts of this case seem to tip in favor of the defendant. Seneca lists two *divisiones*, both by declaimers who took the defense side; the one by Latro is the most detailed. Since the law under which the man is charged is the *actio rei publicae laesae*, Latro argues that, first, the state has not been harmed; second, even if the state was harmed, it was not harmed by the defendant, but by the parents who exposed the children; thirdly, no one can be charged with harming the state if his actions were legal; and last, even if his actions were illegal, they were illegal under a different law: anyone who was injured should prosecute him under the law of *iniuria* (11-3). Gallio adds the point that the state could not be harmed by anything done to exposed children, because they were not part of the state: *Non potest, inquit, res publica laedi [possit] <nisi> in aliqua sui parte; haec nulla rei publicae pars est; non in censu illos invenies, non in testamentis* (“The state cannot be harmed except in respect to some part of itself. This is no part of the state: you will not find them in the census, you will not find them in wills,” 14).

In spite of these seemingly clear legal considerations, there is no doubt that the sympathy of the declaimers is on the other side. Seneca lists the prosecution’s side first, with many *sententiae* from all the major declaimers (fifteen speakers in all). Only one *sententia* is listed for the defense, although five defense speakers including Latro and Gallio are cited in the *divisio* and *colores* sections. But apart from counting the material, this is one of the cases where we are guided by explicit comments from Seneca. At the beginning of the *color* section he tells us: *Pro illo qui debilitabat expositos pauci admodum dixerunt* (“Very few spoke in favor of the man who crippled exposed children,” 15). This imbalance is typically a sign that the audience views one side as more reputable or stronger in *aequitas*, and

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<sup>47</sup> “LET THERE BE AN ACTION FOR HARMING THE STATE. A certain man crippled exposed children and forced them to beg and demanded the income from them. He is accused of harming the state.”

indeed, Seneca later refers to the defendant as an *inquinatum et infamem reum* (“tainted and disgraced,” 18).

The prosecution does very little to prove explicitly that the state has been harmed by this man’s actions. The most specific evidence is adduced by *Latro* (presumably on a different occasion, when he also argued this side); he rather feebly brings up the awkwardness caused to parents:

*Aestimate quale sit scelus istius, in quo laesi patres, ne liberos suos aut agnoscant aut recipiant, etiam confessas iniurias tacent .... Effecit scelestus iste ut novo more nihil esset miserius expositis quam tolli, parentibus quam agnoscere* (“Consider the nature of this man’s crime: because of it, injured fathers keep silent about even confessed wrongs in order to avoid recognizing and taking back their own children .... That wicked man has brought it about that by a novel custom, nothing is more wretched for exposed children than to be taken in, nothing more wretched for parents than to recognize them,” 1). Instead of focusing on evidence, the prosecution presents their case as self-evidently right and incites the audience’s sympathy further through moralizing invective. Their speeches are full of eloquent denunciations of the defendant’s crimes, graphic descriptions of torture and wounds, paradoxical juxtapositions, and emotional appeals for pity. For example, *Cassius Severus* (2) is particularly vivid:

Hinc caeci innitentes baculis vagantur, hinc trunca bracchia circumferunt, huic convulsi pedum articuli sunt et extorti tali, huic elisa crura, illius inviolatis pedibus cruribusque femina contudit: aliter in quemque saeviens ossifragus iste alterius bracchia amputat, alterius enervat, alium distorquet, alium delumbat, alterius diminutas scapulas in deforme tuber extundit et risum e crudelitate captat.<sup>48</sup>

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<sup>48</sup> “On one side they wander blind, leaning on staffs; on another, they carry around trunks and arms; this one has had the joints of his feet torn, his ankles twisted; this one has had his legs broken; he has crushed the thighs of that one, leaving feet and knees intact. That bone-breaker rages differently against each one: he cuts off the arms of one, tears out the tendons of another; he twists another, castrates yet another; he pounds back the shoulder blades of another into an ugly hump, and draws a smile from his cruelty.”

Most of the other prosecution *sententiae* are of this nature.<sup>49</sup> In fact, the eloquence exhibited on this side seems to have become almost an end in itself, an arena of competition between declaimers. Seneca tells us in passing, when he has already moved on to the defense side: *Labienuus tam diserte declamavit partem eius qui debilitabat expositos quam nemo alteram partem, cum illam omnes disertissimi viri velut ad experimentum suarum virium dixerint* (“Labienuus declaimed the side of the man who crippled exposed children more eloquently than anyone did the other side, even though all the most eloquent men chose that one as a sort of test of their strength,” 17). Puzzlingly, this passage seems to have been misunderstood by Bornecque, in his otherwise excellent early study of declamation: “It is a difficult task to excuse the man who collected exposed children, mutilated them, forced them to beg, and lived on the alms given to them (X 4). Nevertheless, these are the themes that one chooses as the environment to test one’s strength (*ib.* 17).”<sup>50</sup> But a more careful reading of Seneca’s text reveals the opposite: the *experimentum virium* consists of verbal forcefulness and creativity in denouncing a disreputable character, not the argumentative ingenuity that would be required to defend him.

The prosecution comes around to the question of harm to the state in a more subtle way: they bolster their invective with some of the few actual *exempla* (as opposed to an exemplary mode of reasoning) that we see in the surviving declamations. The obvious parallel to cite on this theme is that of Romulus and Remus, who were exposed alongside the Tiber and raised by the she-wolf; and in fact, no less than four of Seneca’s declaimers make some reference to this story. It serves to

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<sup>49</sup> Typically striking paradoxes are by Vibius Gallus: *Tot membra franguntur ut unum ventrem impleant, et – o novom monstrum! – integer alitur, debiles alunt* (“So many limbs are broken to fill one belly, and – what a shocking prodigy! – a healthy one is fed, cripples do the feeding,” 3); by Mento: *Errant miseri circa parentum suorum domos, et fortasse aliquis a patre alimenta non impetrat* (“The pitiful children wander around to their parents’ homes, and perhaps one is turned away by his own father,” 7).

<sup>50</sup> Bornecque, *Les Déclamations et les Déclamateurs*, 90: “... c’est un rôle pénible que ... de disculper l’homme qui recueille les enfants exposés, les mutilés, les fait mendier et vit des aumônes qu’on leur donne (X 4). Cependant ce sont ces thèmes que l’on choisit, comme à l’envi, pour essayer ses forces (*ib.* 17).” In a later study Bonner, *Roman Declamation*, 51 in turn cites Bornecque and this passage in support of his statement that “it was a sign of ability to adopt the more difficult side.” This is definitely wrong, unless Bonner means that the prosecution side is somehow more difficult (which is unlikely given what Bornecque had said).

illustrate, first, an attitude of compassion toward exposed children; and more importantly, the possibility that an exposed child might turn out to be someone valuable to the state. Fulvius Sparsus tells part of the story and its application: *Oblita feritatis, placida velut fetibus suis ubera praeuisse fertur. Sic lupa venit ad infantes; expectemus hominem? Gratulor tibi, Roma, quod conditores tuos homo non incidit* (“They say that, forgetting her wildness, she gently offered her teats to them as though to her own young. This is how the wolf came to the infants; should we wait for a man? I am glad for you, Rome, that this man did not stumble upon your founders,” 9). More specifically on the value to the state, Albius Silus asks: *Quid si aliquis ex istis futurus est vir fortis? quid si tyrannicida? quid si sacerdos? Nec, puto, incredibilia in hac turba loquor; certe ex hac fortuna origo Romanae gentis apparuit* (“What if one of them was going to be a war hero? Or a tyrannicide? Or a priest? And I don’t think I’m saying something unbelievable even in the case of this group: for in fact, the Roman nation arose from such an unfortunate position,” 3).<sup>51</sup> The exemplary narrative works in an indirect way to illustrate the applicability of the *laesae rei publicae* law to the present situation.

As far as we can see from Seneca, Gallio’s assertions go unanswered: in the face of his claim that exposed children are not part of the state and thus no concern of this law, none of the declaimers argue explicitly for a broader conception of the state, or “society,” as something that might be undermined by oppression at its periphery. There are no philosophizing statements along the lines of, “Injustice anywhere is a threat to justice everywhere.”<sup>52</sup> No one in Rome believed that, and Gallio’s is in fact the true Roman position; if the issue was framed in the way he presented it, no

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<sup>51</sup> The other two references: Triarius states somewhat obliquely: *Expositos aluerunt etiam ferae, satis futurae mites si praeterissent* (“Even wild beasts have taken care of exposed children, though they would have been kind enough merely to leave them alone,” 4). Cornelius Hispanus says: *Ergo, si illis temporibus iste carnifex apparuisset, conditorem suum Roma non haberet* (“Therefore, if this butcher had showed in those times, Rome would not have her founder,” 5).

<sup>52</sup> Dr. Martin Luther King, Jr., *Letter from Birmingham Jail*, April 16, 1963.

one could refute it.<sup>53</sup> Furthermore, the practice of exposing children was legal and accepted, as the defense could also point out; the prosecution had to be careful that their arguments against this particular defendant did not overshoot the mark and question the whole social order.<sup>54</sup> But this case shows how exemplary narrative takes the place of more abstract, and potentially dangerous, lines of inquiry. Declaimers for the prosecution focus on the things where the audience already agrees with them – by inciting their instinctive revulsion at cruelty, by activating the association with myths of early Rome – and they do not need to argue directly for the applicability of the law.

But the picture of this case is still not complete, because the defense side also recognizes that public perception must be taken seriously. They are not content to spell out their apparently sound legal reasonings; they still feel a need to revise the story in their own direction. Compassion is an important audience value, so they find a way to make the man compassionate. Pompeius Silo, as summarized by Seneca, says: *Misericordem hunc fuisse, voluisse vitam dare, sed non potuisse alere; itaque eo compulsus ut unusquisque aliquam partem corporis pro toto dependeret* (“The man was compassionate, he wanted to give life, but he could not support them. So he was compelled to make each one contribute a portion of his body in exchange for the whole,” 17). Even Gallio provides an alternate story for anyone not wholly convinced by his laissez-faire argument: *Egentem hominem et qui ne se quidem alere nedum alios posset sustulisse eos qui iam relictis sine spe vix spiritum traherent, quibus non iniuria fieret si aliquid detraberetur, sed beneficium daretur si vita servaretur* (“The man was destitute, not even able to feed himself, let alone others. He had brought up children who were abandoned, without hope, and

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<sup>53</sup> Gallio was the adoptive father of Seneca’s son Novatus, who employed a similar hands-off philosophy in the real world: while serving as procurator of Achaia in the 50s C. E., he famously refused to intervene in a violent dispute between Jews and Christians (*Acts of the Apostles* 18:12-7).

<sup>54</sup> For the defense: *Turrinus Clodius hoc colore usus est: multos patres exponere solitos inutiles partus* (“Turrinus Clodius used this *color*: Many fathers customarily exposed their useless offspring,” 16). Cf. Brent D. Shaw, “Raising and Killing Children: Two Roman Myths,” *Mnemosyne*, Fourth Series 54.1 (2001), 31: “No sensible historian of antiquity has ever sought to deny the pervasive reality of infanticide or, more commonly, the exposure or setting out of unwanted newborns.”

scarcely even breathing. It would be no injury for them if something was removed, but a benefit if their life was preserved,” 15). These changes to the story retain the value of compassion that is seen in the Romulus and Remus *exemplum*, but they show how compassion must be worked out differently in different circumstances. Once again, the *exemplum* turns out to be subject to situation ethics; declaimers can introduce small changes into the situation and thus change the moral evaluation of actions.

A similar conflict between legal facts and audience perception is seen in the very next case in the collection: *Con.* 10.5, about the painter Parrhasius:

LAESAE REI PUBLICAE SIT ACTIO. Parrhasius, pictor Atheniensis, cum Philippus captivos Olynthios venderet, emit unum ex iis senem. Perduxit Athenas, torsit et ad exemplar eius pinxit Promethea. Olynthius in tormentis perit. Ille tabulam in templo Minervae posuit. Accusatur rei publicae laesae.<sup>55</sup>

Seneca lists many *sententiae* for the prosecution, of the type that we have noted is characteristic of the side that is stronger in public perception: moral denunciations, lurid embellishments of details. He lists no *sententiae* for the defense, but instead makes the following observation, quoted partially in Section I of this chapter:

Hanc controversiam magna pars declamatorum sic dixit, velut <non> controversiam divideret sed accusationem, quomodo solent ordinare actionem suam in foro qui primo loco accusant. In scholastica, quia non duobus dicitur locis, semper non dicendum tantum sed respondendum est. Obiciunt quod hominem torserit, quod Olynthium, quod deorum supplicia imitatus sit, quod tabulam in templo Minervae posuerit. Si Parrhasius responsurus non est, satis bene dividunt. Nihil est autem turpius quam aut eam controversiam declamare in qua nihil ab altera parte responderi possit, aut non refellere, si responderi potest.<sup>56</sup>

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<sup>55</sup> “LET THERE BE AN ACTION FOR HARMING THE STATE. When Philip was selling Olynthian prisoners, Parrhasius the Athenian painter bought one of them, an old man. He brought him to Athens, tortured him, and painted Prometheus with him as model. The Olynthian died during the torture. Parrhasius set up the painting in the temple of Minerva. He is accused of harming the state.”

<sup>56</sup> “The greater part of the speakers declaimed this case as though they were not declaiming a *controversia* but a prosecution, in the way that those who speak first in court, the prosecutors, customarily structure their argument. In a school declamation, since speakers do not argue on both sides, it is always necessary not only to present one’s case, but also to respond. They cite against him the fact that he tortured a man, that he tortured an Olynthian, that he imitated divine punishment, that he set up the painting in the temple of Minerva. If Parrhasius is not going to respond, they are

Customarily, declaimers were expected at least to consider the possible arguments that could be made for the other side. This was necessary if the correspondence between *controversiae* and real court cases was to be maintained; in a real case, the prosecution would speak first, then the defense, and then each side would rebut the other's arguments in a second speech. Since declaimers only spoke once, their speech would normally include a section answering counter arguments that their fictional opponents might make.<sup>57</sup> The type of moral reasoning envisioned for declamation needed to include at least that much of an adversarial component, even though the cases might be imbalanced, sometimes drastically so. But in *Con.* 10.5, it seems that the majority of declaimers honestly thought there was no need to answer objections for the other side; they seem to have treated that position as untenable, or at the very least, to have thought their audience would view it as untenable.<sup>58</sup>

Seneca knew that it was in fact possible to defend Parrhasius; in the *divisio* section, he lists a number of compelling legal arguments that were made for his side.<sup>59</sup> These are mostly along the same lines as the defense of the man who crippled exposed children (10.4, just above): Gallio asks, *An laesa sit res publica? Quid perdidit? inquit; nihil* ("Has the state been harmed?" he asked. "What has it lost? Nothing," 13), and then proceeds to demonstrate one by one how Parrhasius' actions had not been harmful to the state or subject to the law on *laesa res publica*. Despite this potentially decisive legal point, the other declaimers who defend Parrhasius (Latro, Albucius, Pompeius Silo, Arellius Fuscus, Romanus Hispo) still feel the need to employ *colores* to turn the circumstances more in

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structuring their argument well enough. However, nothing is more disgraceful than to declaim a *controversia* in which nothing can be answered by the other side, or to fail to address the other side's response if one can be made," 12.

<sup>57</sup> Cic. *Inv.* 1.78; *Rhet. Her.* 1.4, 18; Quint. *Inst.* 7.1.38; 5.13.53-5.

<sup>58</sup> Seneca adds that the Greek declaimers were even more insistent in this regard: *Graeci nefas putaverunt pro Parrhasio dicere; omnes eum accusaverunt, in eosdem sensus incurrerunt* ("The Greeks thought it was morally wicked to speak on the side of Parrhasius; they all prosecuted him, they all rushed into the same ideas," 19). Chapter 2 questions whether the claim of *nefas putaverunt* should be taken literally, in light of Seneca's overall portrayal of the Greeks.

<sup>59</sup> This fact seems to indicate that Seneca was not including the present case among those on which nothing could be said for the other side, *pace* Bernstein, *Ethics, Identity, and Community*, 168.

Parrhasius' favor. The theme had said that the man was old, but in Latro's version, *Emptum esse a Parrhasio senem inutilem, expiraturum; si verum, inquit, vultis, non occidit illum, sed deficientis et alioqui expiraturi morte usus est* ("Parrhasius had bought an old man who was useless, near the point of death. If you want to know the truth, he did not kill him, but he made use of the death of someone who was failing and about to die anyway," 17).<sup>60</sup> In a slightly different tack, *Hispo Romanus ignorantia illum excusavit: pictor, inquit, intra officinam suam clausus, qui haec tantum vulgaria iura noverat, in servum nihil non domino licere, pictori nihil non pingere, mancipium suum operi suo impendit* ("Hispo Romanus excused him on grounds of ignorance: 'He was a painter, shut up in his studio. He knew only these common, popular rules, that nothing was impermissible for a master in respect to his slave, nothing was impermissible for a painter to paint; and so he expended his own slave<sup>61</sup> for his own work,'" 19). This comes under the rhetorical category of *purgatio* "exculpation," a type of defense that could include a plea of *imprudencia* ("ignorance").<sup>62</sup> But employing it in this context entails changing the backstory with a different character portrayal of Parrhasius. In the terms of Langlands and situation ethics: for a simple painter shut up in his studio, what would be outrageous cruelty for someone else becomes a not quite commendable, but at least excusable, act of disregard for social conventions.

The last case in this section, 9.2, shows the same pattern of moralizing invective and narrative innovations seen in the previous two, but also contains some guidelines from Seneca about the right and wrong way of using them on each side. The theme presents some fictionalized actions of the otherwise historical proconsul Flamininus:

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<sup>60</sup> Likewise Albius: *Calamitosum fuisse, orbem, palam mortem optantem: nec aliter illum Philippum vendidisset nisi putasset illi poenam esse vivere* ("He was destitute and childless, openly desiring death; Philip would not have sold him if he had not thought it would be a punishment for him to live," 17).

<sup>61</sup> Here the two senses of *mancipium* as "property" (in general) and "a slave" (in particular) both seem to be in view.

<sup>62</sup> *Rhet. Her.* 1.24.

MAIESTATIS LAESAE SIT ACTIO. Flamininus proconsul inter cenam a meretrice rogatus, quae aiebat se numquam vidisse hominem decollari, unum ex damnatis occidit. Accusatur maiestatis.<sup>63</sup>

Seneca applauds many of the *sententiae* employed by the prosecution in their invective, but adds the following critique: *Ecce et illud genus cacozeliae est, quod amaritudinem verborum quasi adgravaturam res petit* (“There is also a variety of bad taste that looks for bitter words in order to make the facts appear worse,” 28 – translation by Winterbottom). The example that Seneca singles out is spoken by Licinius Nepos: *Reus damnatus est legi, perit fornicii* (“The criminal was condemned for the sake of the law and killed for the sake of the brothel,” 28). It is hard for modern readers to see what exactly is so problematic about this example, compared with all the other sensational things that declaimers say in the course of their invective. If the focus is on the bitterness of the words (*amaritudinem verborum*), this speaker seems to be following standard rhetorical precepts; Quintilian has a section on *augendo* (“increasing”) or *amplificando* (“amplifying”) the force of an utterance by choosing stronger or more emotionally loaded words.<sup>64</sup> Nevertheless, Seneca’s statement shows that if a declaimer intended to take this approach, he still had to do it well; the community’s standards of taste may have been subtle, but the slightest transgression of them brought censure and ridicule.

Seneca also has some key advice for the defense side:

De colore [inquit] quaeritur, quo uti debeat is qui pro Flaminino dicit. Quaedam controversiae sunt in quibus factum defendi potest, excusari non potest; ex quibus est et haec. Non possumus efficere ut <reus> propter hoc non sit reprehendendus; non speramus ut illum iudex probet sed ut dimittat. Itaque sic agere debemus tamquam pro facto non emendato, non scelerato tamen.<sup>65</sup>

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<sup>63</sup> “LET THERE BE AN ACTION FOR HARMING STATE MAJESTY. Flamininus the proconsul, at the request of a prostitute at a dinner party who said she had never seen a man beheaded, executed one of the condemned men. He is accused of harming state majesty.” Sources on the historical kernel of this episode are Livy 39.42-3, Cic. *Sen.* 42, V. Max. 2.9.3. On fictionalization of historical themes, see also Chapter 3.

<sup>64</sup> *Inst.* 8.3.89, 8.4.1 ff.

<sup>65</sup> “They debated what *color* should be employed on behalf of Flamininus. There are certain *controversiae* in which a deed can be defended but not excused, and this is one of them. We cannot prevent the defendant from deserving

Thus, instead of arguing through *colores* or narrative revisions, Seneca thinks the case could best be defended on straight legal grounds,<sup>66</sup> using the definitional defense seen several times previously: that the proconsul's actions did not constitute *maiestas laesa*. Some speakers did not heed this advice and devised *colores* anyway – or perhaps, to put it more accurately, Seneca gives the advice because he observed the results that came from these *colores*. Fuscus Arellius said: *Ebrium fuisse nec scisse quid fecerit* (“He was drunk and did not know what he was doing,” 20). This seems unlikely to carry much weight in improving the evaluation of Flamininus, but Seneca does not condemn it specifically. He does, however, censure as *ineptum* the following bit of imagined dialogue by Triarius:

Sermo erat, inquit, in convivio contemni nimiam praetoris lenitatem: alios fuisse proconsules qui cotidie animadverterent; huius anno nullum esse occisum. Dixit aliquis ex convivis: “ego numquam [iratus] <vidi hominem occidi>.”<sup>67</sup> Dixit et mulier: “et ego numquam.” Iratus quod clementia sua contemptui esset, “curabo” inquit “sciant non deesse mihi <severitatem.>” Adducitur<sup>68</sup> sceleratus, quem videre lucem ultra non oportet.<sup>69</sup>

Although this met with Seneca's censure, and in spite of the textual uncertainties, it should be clear what Triarius was attempting to do. His additions to the narrative create a completely different

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censure for his deed; we do not hope for the judge to approve of him but rather to acquit him. And so we must argue as though defending a deed that is not blameless, but not criminal either,” 18.

<sup>66</sup> Similar advice is given on *Con.* 7.6, about a man who gave his daughter in marriage to a slave as a reward for his having protected her at a time when a tyrant permitted slaves to rape their mistresses: *A parte patris magis defensione opus esse dicebat Latro quam colore* (“On the side of the father, Latro said there was more need for a defense than a *color*,” 17). That is, the action was so disgraceful that there was no chance of shifting it into a positive light through *colores*; the only hope was to argue that in spite of the disgrace it still did not fit the definition of *dementia*, as the man's son was alleging. Nevertheless, other speakers on that side do employ *colores*. Quintilian also says: *Ne illud quidem ignorare oportet, quaedam esse quae colorem non recipiant sed tantum defendenda sint, qualis est ille dives qui statuam pauperis inimici flagellis cecidit et reus est iniuriarum: nam factum eius modestum esse nemo dixerit, fortasse ut sit tutum optinebit* (“One must also be unaware that certain cases do not admit a *color* but can only be defended, like the rich man who flogged a statue of a poor man and was charged with *iniuria*; no one would say that his action was reasonable, but one could perhaps be convinced that it was legal,” 4.2.100).

<sup>67</sup> Emended by Bursian.

<sup>68</sup> Added by Madvig. Other editors' *adducatur* would work equally well, making the last sentence part of the quotation of Flamininus.

<sup>69</sup> “He said: There was a conversation at the banquet ridiculing the praetor's excessive softness: they pointed out that other proconsuls had executed prisoners every day, but during this proconsul's year, not one had been killed. One of the guests said, ‘I have never seen a man killed.’ A woman also said, ‘Neither have I.’ Angered that his clemency was a cause of ridicule, he said, ‘I will make sure they know that I do not lack strictness.’ A criminal was brought in, who did not deserve to see the light any longer.”

context for Flamininus' action, where it can receive a different ethical evaluation. The theme creates the impression – without stating it explicitly – that Flamininus was enthralled by the *meretrix* and executed the prisoner in order to entertain her. In Triarius' story, the impulse originated from other guests at the banquet; it was only incidental that a woman took part in the conversation and may have provided the final push. Triarius calls her a *mulier* to deemphasize, although not contradict, the given fact that she was a *meretrix*. More importantly, the topic of conversation is now a matter of state concern: the frequency of executions and the proconsul's *lenitas* or *severitas*. Triarius accordingly avoids the key verb *decollari* ("beheaded") in the theme – which had made the prostitute seem interested in the method of killing – and maintains the focus on the fact and frequency of state executions (specified in *animadverterent*). In the new context, Flamininus was struggling to establish the right balance between harshness and clemency. He saw that observers were interpreting his clemency as too lenient, and so he took action to correct that impression on the spot. In this version, far from harming state majesty, Flamininus was actually helping it by protecting the reputation of its representative.<sup>70</sup>

Other speakers on this case delved into quite complicated and interesting constitutional questions, such as: was it possible for a magistrate to harm the state by conduct in his private life, or only by things done *qua* magistrate?<sup>71</sup> Silo Pompeius argues that things that would have been permissible for a private citizen are impermissible for a magistrate, on situational grounds: *Quaedam quae licent tempore et loco mutato non licent* ("Some things that are permitted are not permitted if the time

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<sup>70</sup> Chapter 2 talks further about *colores*, including this one, that were judged ineffective because they sidestepped the central ethical conflict of the theme.

<sup>71</sup> From the *quaestiones* of Montanus: *An quidquid in magistratu peccavit proconsul vindicari possit maiestatis lege* ("Can all wrongs that a proconsul commits during his magistracy be punished under the law of *laesa maiestas*?," 13); *Si non omne non recte factum hac lege vindicari potest, an id quod sub auctoritate publica geritur. Nam cum adulterium committit, cum veneficium, tamquam civis peccat; cum animadvertit, auctoritate publica utitur* ("If not every wrong can be punished under this law, can that which is done under public authority? For when he commits adultery or poisoning, he acts as a private citizen; when he carries out an execution, he uses public authority," 14).

and place change,” 17). The imbalanced themes on *laesa maiestas* provided declaimers with opportunities to reason and debate about what exactly it meant to harm the state, and who might do it, and under what circumstances. Some declaimers took advantage of these opportunities. By comparison, Triarius’ narrative approach seems much less sophisticated; but it is no less interesting for its simplicity. It eschews all the more abstract questions and says, “Don’t assume too much from the narrative. What if it was not like that at all? What if he did it in a different context?” The exemplary, narrative mode of moral reasoning was deeply ingrained in the mindset of declaimers; sometimes they employed it with great thoughtfulness and effectiveness, while other times they resorted to it ineptly, as Triarius did, when another approach would have brought better results.<sup>72</sup>

#### IV. Confused speakers, confused audience: the father’s *vitae necisque potestas*

The preceding cases have shown how Seneca’s declaimers employ moralizing invective or narrative revisions to suit the legal facts and the audience’s perception of their side. But in the next case, Sen. *Con.* 7.1 *Ab archipirata filio dimissus* (“The man who was released by his son, the pirate captain”), the implementation of these strategies betrays great confusion: the declaimers seem uncertain where their side should be situated in relation to both categories. The scenario is as follows:

Mortua quidam uxore, ex qua duos filios habebat, duxit aliam. Alterum ex adolescentibus domi paricidii damnavit; tradidit fratri puniendum. Ille exarmato navigio imposuit. Delatus

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<sup>72</sup> This case contains another of the relatively rare instances where actual historical *exempla* are cited: *Ipse Montanus illum locum pulcherrime tractavit, quam multa populus Romanus in suis imperatoribus tulerit: in Gurgite luxuriam, in Manlio impotentiam, cui non nocuit et filium et victorem occidere, in Sulla crudelitatem, in Lucullo luxuriam, in multis avaritiam* (“Montanus handled that passage very nicely about how many wrongs the Roman people has tolerated in its commanders: in Gurges luxury, in Manlius lack of self control – he was not punished for killing his son, a victor – in Sulla it tolerated cruelty, in Lucullus luxury, in many, greed,” 19). These are the opposite of Cicero’s *exempla* cited in the Introduction: they show what types of character the *maiores* did *not* punish harshly.

adulescens ad piratas archipirata factus est. Postea pater peregre profectus captus est ab eo et remissus in patriam. Abdicat filium.<sup>73</sup>

The legal facts of this case are complex, first, because the grounds for disinheritance in declamation are in general not defined (see Chapter 4), but more importantly, because the case hits upon a shifting area of Roman legal thinking and practice: the question of whether or not a father still has the traditional *vitae necisque potestas* (“power of life and death”) over his sons. Since the theme does not begin with a law, the declaimers had to appeal to something else – either real Roman law, or popular perceptions of and attitudes toward the law.

According to tradition, Roman fathers had always held absolute power over their children, including the right to put them to death as adults. But the question of what this right really entailed, and how long it remained in force, has been much discussed. Recent scholarship is clear about two main points: first, that the right did technically exist, although was not encoded in statute at any time; secondly, that there are almost no clear instances of the right ever being exercised. Modern analyses have tended to emphasize the one side (that the right existed)<sup>74</sup> or the other (that it was practically never used),<sup>75</sup> but in fact there is broad agreement. On the first point, the custom seems to have come down from earlier tradition, and may have been included in the Twelve Tables.<sup>76</sup> On the second point, many of the accounts of paternal severity found for instance in Valerius are not applicable, because the father was acting in the capacity of magistrate, not exercising paternal

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<sup>73</sup> “A man had lost his wife, from whom he had two sons, and married another. He condemned one of the young men at home for parricide; he entrusted him for punishment to his brother, who placed him on a boat stripped of all equipment. The young man was carried to some pirates and became a pirate chief. Later the father, while traveling abroad, was captured by him and released back to his country. He disowns his [other] son.”

<sup>74</sup> e.g. Breij, “*Vitae Necisque Potestas* in Roman Declamation.”

<sup>75</sup> e.g. Richard Saller, *Patriarchy, Property and Death in the Roman Family* (Cambridge, 1996), 117: “In sum, there is no clear evidence for the successful invocation in the classical era of a father’s *vitae necisque potestas* against a grown offspring except in defense of the *patria*.”

<sup>76</sup> Bruce W. Frier and Timothy A. J. McGinn, *A Casebook on Roman Family Law* (Oxford, 2004), 191.

authority.<sup>77</sup> Shaw notes that imperial-era accounts often confuse the traditional *patria potestas* with the *ius occidendi* found in the Augustan law against adultery; that law permitted fathers to kill their daughters if they caught them in the act of committing adultery. Writers in the Digest treat those killings as if they were done by the father's *vitae necisque potestas*, but in reality they were justified by a more specific law.<sup>78</sup> Other ancient accounts highlight the fact that paternal power was subject to severe constraints; for instance, the father was expected to hold a *consilium domesticum*, or trial at home, before putting a son to death (V. Max. 5.9.1, Sen. *Cl.* 1.15.1-6). By the second century C. E., the constraints became formalized in imperial rescripts: *Divus Hadrianus fertur, cum in venatione filium suum quidam necaverat, qui novercam adulterabat, in insulam eum deportasse, quod latronis magis quam patris iure eum interfecit* ("While hunting, a man had killed his son, who was committing adultery with his stepmother. The deified Hadrian is said to have exiled him to an island, because in killing him he had used more a brigand's right than a father's," Marcianus *dig.* 48.9.4 – translation by Frier and McGinn). Frier and McGinn conclude that while the father's power was "perhaps never formally rescinded in classical Roman law," it "is apparently treated as void in A.D. 318/319 by the Christian emperor Constantine .... However, by that date the right to kill one's children was, as it seems, long since obsolete."<sup>79</sup>

What also seems clear, and more interesting, is that Roman references to *vitae necisque potestas* often served an ideological purpose. This power was investigated by antiquarians who viewed it as a symbol of the simplicity and austerity that had marked Roman society in earlier times.<sup>80</sup> Bernstein notes that in the era when the senatorial aristocracy saw their authority diminished by Augustus even

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<sup>77</sup> William V. Harris, "The Roman Father's Power of Life and Death" In *Studies in Roman Law in Memory of A. Arthur Schiller*, ed. Roger S. Bagnall and William V. Harris (Leiden: Brill, 1986), 82-4.

<sup>78</sup> Shaw, "Raising and Killing Children," 63.

<sup>79</sup> Frier and McGinn, *A Casebook on Roman Family Law*, 191. Extensive discussion 191-209.

<sup>80</sup> Shaw, "Raising and Killing Children," 58-9.

within their own families – by the marriage legislation, by restrictions on manumission of slaves, by his own assumption of the title of *Pater Patriae* – one of their responses was to reemphasize the authority that they believed they had once held.<sup>81</sup> “Late republican and early imperial literature offers an idealizing retrospective on *patria potestas*, presenting a nostalgic narrative in which the *paterfamilias* traditionally possessed supreme authority over his children that became eroded in later ages.” These “nostalgic fictions ... express the desire for an era in which political power was shared among a group of aristocratic families (rather than monopolized by the imperial regime ...).”<sup>82</sup> In a way, during this time period, the mere fact that the Romans believed in the father’s power of life and death is more important than any actual details of what that power entailed.

In this context, what do Sen. *Con.* 7.1 and the responses to it reveal? First, the theme does not set up a straightforward conflict about the father’s right to punish his son: that punishment is mediated through another son, whom he orders to carry out his sentence. The son does not refuse to carry it out; he comes close to using the traditional punishment for a parricide – sewing him into a sack and tossing it into a river or the sea<sup>83</sup> – but he changes it in a way that leaves his intentions unclear. This detail in the theme introduces the possibility that the son is conflicted about the legitimacy of the father’s intended punishment. The theme plants additional doubts by bringing in the stepmother, who otherwise seems quite extraneous to the story. Her introduction encourages speculation that the father’s action was not just or rational, but rather the result of the stepmother’s pernicious influence.

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<sup>81</sup> Neil Bernstein, *In the Image of the Ancestors: Narratives of Kinship in Flavian Epic* (Toronto, 2008), 17-8.

<sup>82</sup> *Ibid.*, 21.

<sup>83</sup> Cic. *Inv.* 2.149; *Rhet. Her.* 1.23. Other details, such as the inclusion of animals in the sack, are found in later accounts: Sen. *Cl.* 1.15.7; Modestinus *dig.* 48.9.9.

In response, the great majority of declaimers champion the son's side,<sup>84</sup> an imbalance which normally aligns with the side perceived as stronger in *aequitas* or morality. They also seem to believe that the son needs a vigorous legal defense, as though he is in danger of being convicted for not respecting his father's *vitae necisque potestas*. Nevertheless, in the legal arguments that Seneca records, none of them tells the father outright, "You don't have this power anymore." Instead, they attack more through insinuation, particularly by undermining the validity of a trial held at home. For example, Latro asks in his *divisio*: *An licuerit illi quod iubebat pater facere. Non licet, inquit, fratrem necare; <nec iure> ille damnatus erat: non enim iudicio publico ceciderat* ("Was it permissible for him to do what his father ordered? It was not permissible to kill his brother; he had not been convicted legally, because he had not been defeated in a public trial," 16). Geminus dramatizes a conversation between the two brothers:

Interrogavi fratrem: Apud quem praetorem causam dixisti? "Apud nullum," inquit. Quis accusator fuit? "Nemo." Quis testis? Immo qui testes? Uni enim etiam de minore scelere non creditur. "Nemo" inquit. Quis de te pronuntiavit? "Nemo. Quid porro?" inquit. "Ego si reus fuissem, ad te non misissem?"<sup>85</sup>

Asinius Pollio says the son thought long and hard about what he should do: *Si tantum, inquam, nefas commissum est, nullae meae partes sunt: ad expiandum scelus triumviris opus est, comitio, carnifex. Tanti sceleris non magis privatum potest esse supplicium quam iudicium* ("I said, if such a great crime has been committed, then this has nothing to do with me: punishing a crime requires triumvirs, a jury, an executioner. For

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<sup>84</sup> Fourteen speakers in the *sententiae* section for the son, three for the father. Three more (different speakers) are listed for the father under *colores*. Seneca's discussion of the *divisio* lists several schools of thought on how to defend the son: *Hac divisione usi sunt quibus placuit damnati causam non defendere sed tantum suam agere; alia usi sunt quibus placuit et illius causam defendere* ... ("This was the *divisio* of those who chose not to defend the cause of the condemned brother, but only their own; those who wanted to defend his cause as well used different one ...," 18); *De colore inter maximos et oratores et declamatores disputatum est, utrumne aliquid deberet dici in novercam an nihil* ("There was debate among the greatest orators and declaimers about whether something should be said against the stepmother or not," 20). But there is no mention of any debate about the father's side, let alone one by the "greatest orators and declaimers."

<sup>85</sup> "I asked my brother: Before what praetor did you plead your case? He said, 'None.' Who was the prosecutor? 'No one.' Who was the witness – or rather, who were the witnesses? For one witness is not believed even on a trivial matter. He said, 'No one.' Who sentenced you? 'No one. What can I say? If I had been on trial, would I not have sent for you?'" 23.

such a great crime there can no more be a private execution than a private trial,” 22).<sup>86</sup> Other declaimers link these legal doubts with the son’s unusual choice of punishment. Haterius, after rehearsing them, has the son conclude, *Invenioque poenam simillimam rei: mersam, non tamen ex toto perditam ratem, quae vel punire fratrem posset vel absolvere* (“And so I invented a punishment similar to the situation: a raft that had been sunk but not completely destroyed, which could either punish my brother or acquit him,” 24).

At the same time, however, these declaimers act as if the son’s side is weaker in public sympathy, as if the audience is going to side with the father and his *potestas*. This is unusual, because in most cases the majority of speakers are seen arguing *with* public sympathy. Here, *pietas* prevents outright invective against a father; but still, instead of expressing moral outrage – the typical sign that they believe the audience shares their moral outlook – the majority of declaimers employ narrative revisions, the strategy for changing the audience’s evaluation of events. Thus, it is not enough for them to say that the son knew he had no right to kill his brother. Instead, they come up with mitigating circumstances to excuse his partial disobedience. Albucius takes the angle that the son was so stunned by the order to punish his brother that he was barely able to consider his own actions (1). He goes on to invent a speech by the brother, accepting the death that their father has ordered, but imploring the defendant not to kill him with his own hands and thus become a parricide (3). Cestius Pius brings in a divine intervention – similar to what was seen previously with *Con.* 1.2 the *sacerdos prostituta*; here he says: *Ecce navem divinitas armat: subito visa sunt vela, subito navis coepit erigere se et attollere. Magnum praesidium in periculis innocentia* (“Behold, divine power equipped the boat: suddenly sails were seen, suddenly the ship began to right itself and ride higher. Innocence is such a great guardian in dangers!” 10).

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<sup>86</sup> Also Geminus, who presents the son as arguing for his brother’s innocence; in answer to the imagined objection of why he did not defend him earlier, he replies, *Non potui citius: hodie primum res in forum delata est* (“I could not do so sooner: today is the first time the case has come into court,” 19).

Another type of innovation provides an alternative motivation for the son in punishing his brother, and in choosing the method. Arellius Fuscus the elder says the son thought he himself was being tested: *Cum traditus est mihi frater imperatumque ut sumerem supplicium, si qua est fides, temptari me putavi an possem parricidium facere* (“When my brother was handed over to me and I was ordered to execute him – if you can believe me, I thought that I was being tested, to see if I could commit parricide,” 7). Several others say he thought it was the father’s intention that he *not* kill his brother. Passienus’ *color* is: *Non putavi patrem velle utique occidi filium. Videbatur mihi omnia misericordiae praeparasae: quod domi cognoverat, quod inter suos. Fratri, inquam, tradidit: age, si parcere voluisset, cui tradidisset?* (“I did not think my father wanted me to kill his son at all. It looked to me like he had made all the preparations for mercy: he had tried him at home, in the midst of his family. I said, ‘He handed him over to his brother. Come, if he wanted him spared, who else would he have given him to?’” 22). Many declaimers also avail themselves of a line of defense that was already latent in the theme: the son suspected that the stepmother had stirred up the charges and that his brother was innocent.<sup>87</sup> There is a sense in which the theme requires these ambivalent defenses of the son; as noted above, it presents him as a character who may be conflicted about his father’s authority. So the declaimers defend him by undermining the father’s authority on the one hand, but at the same time working to gain audience sympathy.

Confusion is seen on the father’s side as well. Perhaps paradoxically, those who take this side, as far as Seneca reports, do not actually make the argument that the father has *vitae necisque potestas*. Instead, they try to incite pity – as if they, too, feel that the audience’s sympathy is against them, and they need to get it back. The *colores* for the father center on the scene where his pirate son releases him: Varius Geminus has the father say, *In hoc me dimisit, non quia me volebat salvum esse, sed ad*

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<sup>87</sup> The declaimers discuss the advantages and disadvantages of this strategy in 7.1.20; their various choices are seen *passim*.

*patrocinium suum, ut, quia non nunc occiderat, videretur nec ante voluisse* (“He let me go not because he wanted me to be safe, but to help his defense in court: so that, since he didn’t kill me now, it would seem like he hadn’t wanted to previously,” 26). Latro says, *Quis porro me uno miserior est, qui vitam parricidae debeo?* (“Who is more wretched than I, alone, who owe my life to a parricide!” 26). Likewise the *sententia* of Gavius Sabinus: *Facinus indignum! Damnatus parricida post poenam potuit dicere patri suo: “Morere!”* (“What a shameful deed! A convicted parricide, after his punishment, was in the position to tell his father, ‘Die!’” 16). This is far from asserting that he had the absolute right to punish his son however he wished, and furthermore, far from displaying confidence that the audience already sympathizes with him in his exercise of power.<sup>88</sup>

Thus, neither side of the case acts as if audience sympathy is in its favor. Why would this be? A possible explanation is that those on the son’s side are playing along with the declamatory fiction that they are in a world where *vitae necisque potestas* still applies and that the audience supports it. This imagined audience is inclined to side with the father, but is still susceptible to questions about the private trial and the possible influence of the stepmother; nevertheless, they need revisions to the narrative for them to side fully with the son and endorse his disobedience. Those arguing for the father’s side, on the other hand, know where the real audience’s sympathy lies, and it is this that shapes their approach. They know that the Roman public of their day was not sympathetic to acts of paternal cruelty; as the younger Seneca would later report, *Trichonem equitem Romanum memoria nostra,*

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<sup>88</sup> The same hesitation about the exercise of *patria potestas* is seen in Sen. *Con.* 1.7, where a father promised some pirates a double ransom if they would cut off his son’s hands. The declaimers for the father’s side come up with various narrative innovations to excuse his actions (he did not really intend for them to do it, he was struck mad with grief at the son’s previous crimes); but no one recorded by Seneca argues that the father had the right to inflict that kind of punishment on his son. In [Quint.] 372.11 a foster father does argue that he possesses *vitae necisque potestas*: *Pater tuus eram, iure praesentis condicionis. Abdicare itaque potui, occidere potui, omnem potestatem tamquam in filio exercere* (“I was your father, by law of the present condition. Thus I could disown you, I could kill you, I could exercise all my power over you as over a son”). But in context, this is a hypothetical, *a fortiori* claim, not a reference to real actions; what the foster father had actually done was to cut off the son’s hands, a right explicitly granted to fathers in the theme (*Qui patrem pulsaverit, manus ei incidantur*, “Whoever strikes his father shall have his hands cut off”). It is on the basis of this law that he makes his actual defense.

*quia filium suum flagellis occiderat, populus graphiis in foro confodit; vix illum Augusti Caesaris auctoritas infestis tam patrum quam filiorum manibus eripuit* (“I can remember when the people in the Forum used pens to stab an equestrian named Tricho because he had flogged his son to death; the authority of Caesar Augustus barely rescued him from the hostile hands no less of fathers than of sons,” *Cl.* 1.15.1 – translation by Frier and McGinn). This gap between true sentiments on paternal authority and ideologically motivated recitations thereof may serve to explain why two different implied audiences seem to be constructed by the two sides.<sup>89</sup>

## V. Conclusion

Most *controversia* themes afforded practice at both legal and moral reasoning. The imbalanced themes were particularly well suited to teach moral reasoning because they provided not just two different sides to argue, but two different ways of arguing. The more sympathetic side allowed declaimers to rehearse the conventional ethical stance, to practice their skills at moral outrage and invective – in short, to take on the persona of a *vir gravis*, a defender of traditional Roman *mores*. The other side invited them to speculate about moral situations through narrative, by asking, “What other events or circumstances, if present, would change the evaluation of these given facts?” But these revisions to the narrative still turn out to be appeals to a conventional values and *exempla*. The revisions that help the seemingly scandalous *sacerdos prostituta* center almost exclusively on religion; they would fit in nicely with the climate of increased public piety under Augustus. Neither those for nor against the man who crippled exposed children question the widespread practice of infanticide

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<sup>89</sup> In concluding this, I am in agreement with Lentano, “Un nome più grande di qualsiasi legge,” 577-84, who argues that no matter how absolute the father’s authority seems to be in principle, the structure of declamation means that it is always set in conflict with some other law or norm. Declamatory fathers can assert their powers: *Pater iussi. Hoc nomen omni lege maius est* (“I have commanded it as a father. This name is greater than every law,” *Decl. Maior.* 6.14). But those powers are negated by the fact that the fathers have to justify them through persuasion in the fictional courtroom. In practice, the fathers actually turn out to have only those powers which are explicitly granted to them by the declamatory law. See also Chapter 3 below for additional discussion of how the declaimers handled the topic of paternal harshness or cruelty.

or argue that marginal members of society deserve rights. Speakers against the particular father in 7.1 still showed respect for the institution of *patria potestas*; they cast doubt on his legal power of life and death, but only because contemporary Roman society already doubted it anyway. These cases explore how actions could be evaluated differently in different situations, but all participants in the debate agree to remain part of the same ethical system, guided by the same *exempla*.

In this sense, it can be said that declamation formed an alternative to abstract philosophical reasoning about ethics. There were Romans who wrote philosophical treatises: Cicero and the younger Seneca are the most famous. But given the almost universal prevalence of declamation among educated classes, far more Romans must have encountered ethical debates in the declamation hall than in any context that could be labeled philosophical. The Romans' traditional skepticism toward Greek philosophy is well known; even within Seneca's collection of declamations, Albius is criticized because he gave abstract questions undue prominence, treating them *tamquam problemata philosophumena* ("as though they were philosophical puzzles," 1.3.8). For the largest portions of Roman society, philosophy was not a place where one would turn for moral guidance. Teresa Morgan has marshalled evidence of how Roman "popular morality" was propagated through proverbs, fables, *gnomai*, and *exempla*; these provided guidance in the difficult task of figuring out where one fit in the social hierarchy and ethical system.<sup>90</sup> Langlands adds that "to decide how to act in the Roman world you need a very fine moral and social sensibility, accurate self-knowledge and a knowledge of the moral scale against which you must measure yourself . . ."<sup>91</sup> Along with proverbs,

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<sup>90</sup> Morgan, *Popular Morality in the Early Roman Empire*, 185.

<sup>91</sup> Langlands, "Roman *Exempla* and Situation Ethics," 115. See also Rebecca Langlands, "Roman Exemplarity: Mediating Between General and Particular," in *Exemplarity and Singularity: Thinking through Particulars in Philosophy, Literature, and Law*, ed. Michèle Lowrie and Susanne Lüdemann (London: Routledge, 2015), 68. She quotes Quint. *Inst.* 12.2.30 on the importance of exemplary figures in moral education: *An fortitudinem, iustitiam, fidem, continentiam, frugalitatem, contemptum doloris ac mortis melius alii docebunt quam Fabricii, curii, Reguli, Decii, Mucii aliique innumerabiles?* ("Will anyone teach courage, justice, frugality, loyalty, continence, contempt for pain and death better than the Fabricii, the Curii, the Reguli, the Decii, the Mucii and innumerable others?") and comments, "These historical Roman figures and their historic feats

fables, and *exempla*, declamation can be added to the list of things that offered practice at that. The intensity of the invective it exhibits and the scornfulness of the criticisms traded by Seneca's declaimers attest to the seriousness of declamation and the clarity of feedback it provided for its participants.

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... were the real and concrete examples of virtue that enabled the Romans to learn about the abstract concepts of courage and justice and so on.”

## CHAPTER 2

### CONSTRAINING AND DIRECTING CREATIVITY

As a competitive activity with pedagogical goals, declamation needed to be governed by a number of rules. The basic instructional or procedural rules are clear enough: essentially, “Given these fictional laws and events, make a court speech in the persona of one of the litigants or of an advocate.” More difficult to identify are rules or limits placed on *colores* – the background details or revisions to the narrative that speakers were allowed to introduce in order to strengthen their side’s position (Chapter 1). This chapter will look closely at the rules that are commonly thought to have governed *colores*, and show that many of them were frequently ignored or were enforced only selectively. The relative degree of emphasis placed on these rules helps demonstrate their underlying purpose, and indeed the purpose of declamation as a whole: the rules were designed to channel the speaker into effective self-presentation as a strong, traditional Roman, in control of circumstances and of himself, not shying away from the ethical conflict of the case.

Allowing declaimers to invent details could in principle have opened up the door to chaos. Based on three main sources, we know that there were rules to rein in the potential disorder. One source is the occasional direct statements from rhetoric teachers, primarily Quintilian (*Inst.*) and [Quint.] in the *Declamationes Minores*, who typically provides instructional comments (*sermones*) on each case. Another source is the conversations between declaimers that Seneca reports, as they discuss

whether or not a given *color* is permissible. A third consists of comments and critiques that Seneca delivers in his own authorial voice. These second and third sources are sometimes difficult to distinguish, because Seneca may quote a criticism without indicating whether he approves of it or not. But Seneca in his own voice is often harshly critical. All of these sources, taken at face value, create the impression that the rules were rather strict.

One well-known rule or constraint is that declaimers were not free to change the given facts of the theme.<sup>1</sup> Quintilian, in a discussion of legal narratives, mentions that in both real court cases and in declamations it is possible to introduce fictional information, but there are constraints in both situations: first, the fictions must be internally consistent, and secondly, *Curandum est ... ne iis quae vera esse constabit adversa sint; in schola etiam ne color extra themata quaeratur* (“One must make sure that the fiction does not contradict the facts that are known to be true; also, in a school declamation, a *color* must not be sought in contradiction to<sup>2</sup> the facts of theme,” Quint. *Inst.* 4.2.90).<sup>3</sup>

A second rule is that declaimers could not appeal to the testimony of invented witnesses.<sup>4</sup> This is not stated explicitly anywhere, but is apparent from the fact that no one does it in the extant declamations. The pedagogical reason are not mysterious: first, in a fictional speech, fictional witnesses would carry no more weight than assertions made in the speaker’s own voice; secondly,

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<sup>1</sup> A good discussion is Fairweather, *The Elder Seneca*, 174-6. Cf. also Kaster, “Controlling Reason,” 320; Roller, “Color-Blindness,” 114, among others.

<sup>2</sup> For the Latin terminology: *extra* must have the sense of OLD sv. 10 “not in accordance with” (cf. Cic. *Inv.* 2.134: *causam extra scriptum accipi non oportere*). Otherwise it could be argued that every *color* is “outside” the theme, in the sense that the details it introduces are external to those that the theme posits. For *praeter* in the next note, cf. OLD sv. 3 “out of line with, contrary to.”

<sup>3</sup> Elsewhere in the same chapter on narratives, Quintilian mentions the *scholarum consuetudo in quibus certa quaedam ponuntur (quae themata dicimus) praeter quae nihil est diluendum* (“the custom of the declamation schools in which certain established facts are presented, called ‘themes,’ which our defense must not contradict,” 4.2.28). [Quint.] also mentions the general principle as something that is well known: *Quotiens hoc genus materiae dividam, necesse habeo id dicere quod iam saepe dixi, me nullam voluntatem cuiusquam contra themata intellegere* (“Every time I divide this type of case, I find it necessary to repeat what I always say: that I do not interpret any character’s motivation in a way that conflicts with the theme,” 337.1).

<sup>4</sup> Fairweather, *The Elder Seneca*, 114 contrasts this feature of Roman declamation with Antiphon’s *Tetralogies*, where speakers could offer their slaves to provide testimony under torture.

most themes did not anyway center on questions of fact (the *causa coniecturalis*, “Did he/she do it?”), for which witness testimony would be essential.<sup>5</sup> Fairweather argues for an additional corollary: that speakers were not allowed to invent material that could not be substantiated without witnesses. This seems like a reasonable constraint; however, Section II will show that it likely did not exist, and furthermore, it was pedagogically beneficial for it not to exist.

Several other constraints might better be labeled “guidelines for effectiveness” than rules per se; nevertheless, they could draw harsh censures from Seneca and are therefore important for shaping a complete picture of the goals of declamation. A seemingly obvious constraint was that a *color* needed to be plausible. But as this chapter will show, plausibility was a much more complicated concept than it seems at first sight; it was closely tied in with social expectations, and also with Seneca’s subjective personal assessment of a speaker. Those who neglected this guideline risked being labeled *stulti* (“stupid”) or *inepti* (“inept”). Seneca employs similar terminology to censure *colores* that were “banal” – that is, they adhered scrupulously to the facts of the theme, but evaded the central moral conflict it was designed to address. The last constraint discussed in this chapter is the requirement that declaimers maintain control – of the dignity of the characters they portray, and also of themselves while composing and delivering the speech. While these constraints seem to concern more than just *colores*, in Seneca’s criticism they are, interestingly, often linked.<sup>6</sup>

As we will see, the rules and constraints of declamation were enforced selectively or with varying degrees of rigor: adhering to the facts of the theme was less important than one might

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<sup>5</sup> In those cases that are conjectural, witness testimony is sometimes introduced as part of the theme. For instance, the theme of Sen. *Con.* 7.5, a case of mutual accusation, includes this key detail: *Placuit propinquis quaeri a filio quinquenni, qui una dormierat, quem percussorem cognosceret; ille procuratorem digito denotavit* (“The relatives decided to ask the five-year-old son, who had been sleeping in the same room, whom he recognized as the attacker. He pointed to the procurator”). The declaimer’s task is then to interpret the testimony and argue for or against its validity.

<sup>6</sup> Thus, while this chapter largely omits other types of rules, e.g. about how to devise arguments, how to structure the speech, what diction and delivery to use, how to preface one’s remarks, etc. – all these things are impossible to separate entirely from *colores*.

expect; addressing the central moral conflict and demonstrating control were very important. The chapter goes on to look at the implications of this selective enforcement of the rules, and asks what precisely a declamation student was being trained to do or to be. The relative value of the rules in declamation becomes clearer in comparison with several other Roman discourses or fields of study. On the one hand, it is necessary to consider the role of the *grammaticus*, or grammarian, in childhood education: at this level, mechanical observance of rigid rules *was* very much in focus. A contrast with basic grammatical education helps to elucidate what rhetoric students were expected to do differently. On the other hand, there are similarities between declamation and Roman literary translations of Greek texts. Roman writers typically avoided close analysis and word-for-word rendering of the source text, viewing this as characteristic of lower class scribes or interpreters. For Roman elites, it was more desirable to exert control over the Greek text, sometimes dismembering and reworking it entirely, in such a way that their own identity and authorial voice shone through. This is what Roman poets and translators did with Greek myths, histories, and even technical treatises; it bears close parallels to what Roman declaimers did with the scenarios they were given.

The theme of contrast between Romans and Greeks is important. Seneca makes this a basic organizational feature of his collection, discussing the Romans first and in great detail on each case, and then addressing the Greeks separately and more briefly at the end. There is no obvious reason why the subject matter requires this particular division: Seneca could have divided his material between older and younger declaimers, or Italians and provincials – to name two other contrasts that he does occasionally reference.<sup>7</sup> Instead, he relentlessly and pervasively compares the Greeks and the Romans in his criticism: the Greeks are either a source of error which the Romans are seduced into imitating, or a standard of vice by which Roman faults are measured. Everything is portrayed as a

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<sup>7</sup> On *novi declamatores*: 1.1.14; 1.4.7; 1.8.11. On Spaniards or other provincials: 1.*praef.*16; 2.4.8; 10.*praef.*16; cf. Sinclair, “Political Declensions in Latin Grammar and Oratory,” 97; also Miriam Griffin, “The Elder Seneca and Spain,” *The Journal of Roman Studies* 62 (1972): 1-19.

contest between Romans and Greeks – even when it is an antiheroic contest to reach the greatest depths of ineptitude. This chapter will show that this comparison makes sense in light of declamation’s goal of training speakers to be Romans: for Seneca, the Greeks are a convenient short-hand to indicate failures to achieve the standards of Romanness.

## I. Grammatical study and its social significance

The starting point for any declaimer was to read and understand the theme. Chapter 1 discussed how every text contains gaps to be filled in by the reader; *colores* can be described as details that declaimers inserted into the gaps in the theme in order to change its moral evaluation. But in order to do this, they first had to be sure of what the theme said: what did it imply by the use of cases, tenses, and moods, the choice of words, and the order of clauses? What gaps were there to be filled? Ancient rhetorical theory recognized that *amphibolia* or *ambignitas* (“ambiguity”) was present in some sentences. Quintilian gave tips for avoiding it in speaking, such as, by rewording *Lachatem audivi percussisse Demean* (“I heard that Lachates struck Demeas / Demeas struck Lachates” – ambiguity of subject and object accusative) with a passive clause: *a Lachate percussum Demean* (“... that Demeas was struck by Lachates,” *Inst.* 7.9.10). There were standard arguments for addressing ambiguity in laws or wills, taught through examples like *Heres meus uxori meae vasorum argenteorum pondocentum, quae volet, dato* (“My heir shall give my wife a hundred-weight of silver vessels that will be chosen,” *Cic. Inv.* 2.116 – unspecified subject of *volet*). Some declamation themes were set up to deal with ambiguous or conflicting laws (see Chapter 4). But reading and interpretive skills lay at a foundational level, and were needed more broadly than just on the cases that specifically called for them. Declaimers had to figure out the exact meaning of the whole theme, every theme, in order to understand how to handle the case.

A good example is the case of the *sacerdos prostituta* (Sen. *Con.* 1.2, discussed in Chapter 1): the theme presents the problem of whether a girl who underwent all those misfortunes is qualified for the priesthood, given the requirement that a priestess be *casta* (“chaste”).<sup>8</sup> Latro begins by asking whether *castitas* refers only to virginity, or to “separation from everything shameful and obscene” – a definition on which the girl would surely fail.<sup>9</sup> But then he takes a step back to the more basic question of whether the theme even says that she remained a virgin: *Etiam si ad virginitatem tantum refertur castitas, an haec virgo sit. Aiebat Apollodoreis quidem placere fixa esse themata et tuta, sed hic non repugnare controversiam huic suspicioni; non enim ponit ut adhuc virginem, et multa sunt propter quae credibile sit non esse.* (“Even if chastity refers only to virginity, is she a virgin? He said that while the Apollodoreans liked for the themes to be fixed and safe, here the *controversia* was not at odds with that suspicion: for the theme does not stipulate that she is still a virgin, and there are many reasons why it is plausible for her not to be,” 1.2.13-4).<sup>10</sup> Latro is recognizing that, while the theme introduces the girl as *quaedam virgo*, it does not use the term again, and does not specify what happened to her in the custody of the pirates or in the brothel. Awareness of this makes the case against the girl even easier: declaimers are not limited to the definitional argument, that the girl is not *casta* even if she did remain a virgin. They can make the stronger claim that she is unlikely even to be a virgin. Thus, reading the theme – not just pronouncing the words, but employing skills of lexical, grammatical, and syntactic interpretation

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<sup>8</sup> *SACERDOS CASTA E CASTIS, PURA E PURIS SIT. Quaedam virgo a piratis capta venit. Empta a lenone et prostituta est. Venientes ad se exorabat stipem. Militem qui ad se venerat, cum exorare non posset, colluctantem et vim inferentem occidit. Accusata et absoluta remissa ad suos est. Petit sacerdotium* (“A PRIESTESS MUST BE CHASTE FROM AMONG THE CHASTE, PURE FROM AMONG THE PURE. A virgin was captured by pirates and sold. She was bought by a pimp and made a prostitute. She persuaded the clients who came to her to give her alms. When she was unable to persuade a soldier who had come to her, as he was struggling and applying force she killed him. She was accused and acquitted, and then sent back to her family. She seeks a priesthood”).

<sup>9</sup> *Utrum castitas tantum ad virginitatem referatur an ad omnium turpium et obscenarum rerum abinentiam?* (1.2.13).

<sup>10</sup> Very little information remains about the Greek rhetorical theorist Apollodorus of Pergamum, or his rival Theodorus of Gadara. Fairweather, *The Elder Seneca*, 80-1 provides a summary. She assumes that *fixa esse themata et tuta* refers to precision or lack of ambiguity in the composition of the themes; however, Latro seems to be talking more about fidelity to the themes on the part of the declaimers. It is difficult to draw any conclusions from this one brief reference.

– shows a declaimer where to direct his efforts, and governs which claims are and are not permissible.

Despite the foundational importance of reading and correct interpretation, the next section will argue that it was assigned less emphasis than might be expected; speakers could be surprisingly loose in their construal of the wording of the theme. So before moving on to look at that evidence, we must examine another relevant factor: the significance of grammatical study in the educational and social hierarchy. Reading and interpretive skills were taught to Roman children by a *grammaticus*, during the second stage in the educational process.<sup>11</sup> The first stage, primary education, was carried out by a *praeceptor* or *magister* who taught the alphabet and arithmetic to young children. Next came the *grammaticus*, who taught students of varying ages, followed by the rhetorician, who typically received students starting around age fourteen or fifteen.<sup>12</sup> The rhetorical stage was more advanced both in content and in social exclusivity. As for the content of grammatical instruction, part of it focused on spelling and grammar, recognizing parts of speech, cases, tenses, and moods, and identifying grammatically incorrect usages. These skills were also applied actively through reading: analysis of grammar and syntax was inherent in the reading process, as students had to understand the structure of a text correctly in order to read aloud with expression and pause in the right places. The *grammaticus* assisted them through a process known as *praelectio*, in which he read the difficult passages ahead of them, modeling the pauses and emphasis. Resolution of grammatical ambiguities was done mainly through paraphrasing – restating the meaning of the sentence in a different, clearer

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<sup>11</sup> On Greek and Roman education in general, a standard work is Bonner, *Education in Ancient Rome*. More recent, and based on a wider range of source material, is Criore, *Gymnastics of the Mind*. See also Charles McNelis, “Grammarians and Rhetoricians,” in *A Companion to Roman Rhetoric*, ed. William Dominik and Jon Hall (Blackwell, 2007), 285-96.

<sup>12</sup> Criore, *Gymnastics of the Mind*, 56.

way – rather than through a metalanguage of grammatical terminology such as that used in modern Latin and Greek classrooms.<sup>13</sup>

Students at the rhetorical level applied these things to more advanced tasks. Even when declaimers do not make explicit references to cases, tenses, or moods, we will see that they do engage in the interpretive process, discussing and paraphrasing what the text should be understood to mean. All of these skills were part of the repertoire that was taught by the *grammaticus* during the second phase of the educational system. Indeed, in terms of content, there was not a complete break between the grammarian and the rhetorician. Some subjects overlapped. At the rhetorical level, students were expected to take the basic grammatical concepts and apply them in a more sophisticated way: composing complete speeches, descriptions, character portrayal, argumentation, filling out commonplaces, implementing the most effective tone of voice and delivery.

At least as important as the difference in content and application was the difference in social position – and the fact that students of rhetoric, especially as seen in Seneca, were aspiring to improve their position in society. We should note first that out of the whole population, comparatively few people reached the grammatical stage of education; at the same time, it was considered to have low prestige in comparison with the higher, third stage, rhetorical education. *Grammatici* were often slaves or freedmen, and not well paid for their services.<sup>14</sup> Kaster undertakes the task of surveying all available evidence about the social position of grammarians; most of it is from the fourth and fifth centuries, slightly later than our period, but no less useful for that reason: it shows the direction in which Roman society was developing, and if anything, grammarians from

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<sup>13</sup> E.g. Quintilian, while warning against the potential ambiguities of the ablative case, uses paraphrases to identify the two possible meanings: *Sed ablativo ipsi . . . inest naturalis amphibolia. “Caelo decurrit aperto” utrum “per apertum caelum” an “cum apertum esset”* (“But the ablative case itself contains an inherent ambiguity, for instance, as to whether *caelo decurrit aperto* means ‘through open heaven’ or ‘when heaven had been opened,’” *Inst.* 7.9.10). Contrast the terminology of the modern classroom: “ablative of location” (or “position in space adjunct”) vs. “ablative absolute clause.”

<sup>14</sup> Bonner, *Education in Ancient Rome*, 58-60.

the earlier Principate would have had even less prestige. Focusing on fourth-century Bordeaux, on which we have the detailed testimony of Ausonius, Kaster argues that *grammatici* were respectable, but were distinctly in the middle of the social spectrum: “The position held some opportunity for professional, social, and geographic mobility, but without direct access to the highest prizes mobility could bring. In this respect, the grammarians were overshadowed by the men at the next level of the professional hierarchy, the rhetoricians.”<sup>15</sup> Throughout the Roman world, grammarians had difficulty in improving their station because they could rarely afford “the public expenditures that traditionally established and reinforced claims to social preeminence.”<sup>16</sup> Cribiore warns against overstating the case: literary representations of the extremely low status of primary teachers, and uses of the term as an insult, should be taken with a measure of skepticism. There is ample evidence that teachers could be well respected – in small communities.<sup>17</sup> Nevertheless, for comparison with declamation, the attitudes of elites and sub-elites are precisely the point.

Seneca portrays a world of vigorous social climbing: men from the provinces (with Seneca’s native Spain particularly in focus) came to Rome, and saw rhetoric as a venue for improving their status, gaining positions within the new imperial system. For these declaimers, *grammatici* would have been one of the groups immediately below them, which they were striving to rise above; there was every incentive to distinguish themselves from this lower group and associate as much as possible with the values of the elite group they were trying to join. In relation to this fierce competition for social status, Seneca presents himself as a *munerarius* or organizer of games, bringing the various declaimers on stage to compete with each other as in a gladiatorial contest. He also plays the role of

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<sup>15</sup> Robert A. Kaster, *Guardians of Language: The Grammarian and Society in Late Antiquity* (Berkeley: University of California Press, 1997), 106, accessed Oct. 15, 2014, <http://ark.cdlib.org/ark:/13030/ft8v19p2nc>.

<sup>16</sup> *Ibid.*, 113.

<sup>17</sup> Cribiore, *Gymnastics of the Mind*, 59.

an umpire or judge who presides over the combat, stigmatizing declaimers for their failures to meet the declamatory ideal. Sinclair describes this process admirably:

[I]n Seneca's hands, the code of behaviour of the declamation schools was negatively circumscribed: it became most explicit only when someone fell short of it. The penalty for infractions of this social code was derision. A *faux pas* – whether a minor breach of taste or a significant political indiscretion – brings ridicule and mockery on the bumbling speaker; he risks being brushed off as *stultus* (“foolish”), losing all claim to public regard in the social rankings and, ultimately, sinking into oblivion.... Seneca did not survey the field with detachment. He entirely “bought into,” or (if you prefer) “sold out to,” the dominant ethos.

Sinclair notes that Seneca expresses his criticisms “like a sort of hyper-declamer, in a style more Roman than the Romans.”<sup>18</sup> Other times, the criticisms are not delivered in Seneca's own voice: he quotes censures that one declaimer leveled against another, in a sort of give and take of gladiatorial combat that surrounded the performance of the speech itself. This can make it difficult to discern Seneca's own opinion; on the other hand, it provides a broader window on the principles by which declaimers and their speeches could be evaluated.<sup>19</sup>

The criticisms reported by Seneca contain clues to the pedagogical purposes of declamation, and also its social significance. Speakers who made mistakes in reading and interpreting the theme – that is, who failed to implement the skills of the *grammaticus* – opened themselves up to criticism from the community; however, as we will see, the principles that governed this criticism were quite different from those in a grammar school. In fact, the evidence will show that Seneca tends to quote

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<sup>18</sup> Sinclair, “Political Declensions in Latin Grammar and Oratory,” 99. Cf. also Gunderson, *Declamation, Paternity, and Roman Identity*, 140: “Seneca keeps a close and constant watch on the propriety of declamation. He is harsh and cruel. Seneca draws the lines, and he banishes those who step outside of them. Even as these speakers may think their phrases clever, Seneca reveals their madness: they are not part of our family of rhetoric. Here again, the idiom may be that of sanity, health, or soundness, but the practice is wholly one where the truth of taste has been made indisputable. The indecorous has no place among this community of good men experienced at speaking, and Seneca will bring seemingly unrelated charges of mental competence in order to secure a conviction on this account. Once again, the critique of declamation is itself declamatory.” Cf. also Gunderson, *Staging Masculinity*, 83-4.

<sup>19</sup> Cf. Fairweather, *The Elder Seneca*, 54: “Seneca's willingness to stand back, as it were, and let other critics air their views, is a sign that he has given us a remarkably objective survey of the literary circles in which he moved.” She makes this optimistic assessment from the standpoint of source criticism, attempting to figure out which viewpoints are Seneca's and which belong to other declaimers. By contrast, Gunderson, *Declamation, Paternity, and Roman Identity*, especially p. 229, emphasizes the overarching power of Seneca's editorial voice in shaping the collection.

*grammaticus*-type censures only against speakers who failed conspicuously in other areas. The following sections will look more closely at the rules of the declamatory game: things that speakers were censured for, things they got away with, and the higher principles involved in a successful declamation performance.

## II. Some rules were made to be broken

If one were to list all the constraints and censures in ancient accounts of declamation – especially in Seneca, but also Quintilian – it would be easy to form the impression that the rules were very strict. However, if one investigates how often declaimers get away with “violating” the rules, the picture changes in small but significant ways. It gradually becomes clear that there was a higher principle in play: it was more important for the declaimer to appear strong, Roman, and in control of the material. Training in Roman values was obviously part of the educational process from the beginning; however, as numerous studies have pointed out, rhetorical education was the level that trained elites to assert their role in society.<sup>20</sup> In Kaster’s words: “Control, finally, is what the schools of rhetoric were about. Through their lessons, the young elite males who frequented the schools learned to control their own speech so that they might one day control the opinions of others, in the law courts, in their correspondence, or in conversation.”<sup>21</sup> This section will look at how the larger purpose of declamation intersected with its need to operate according to fixed rules and procedures.

### *Violating the theme*

We should start with the rule that declaimers were not permitted to change the basic facts of the theme. Declamation themes portray a fictional world in which the facts are already established

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<sup>20</sup> For instance, Bloomer, “A Preface to the History of Declamation” and “Schooling in Persona”; Corbeil, “Rhetorical Education and Social Reproduction.”

<sup>21</sup> Kaster, “Controlling Reason,” 334.

(that is the definition of *thema*) at the outset of the court case. Seneca records a number of passages in which declaimers discuss interpretive issues, attempting to determine what exactly the theme states, and whether a given innovation is in keeping with it; they criticize each other for invalid interpretive methods. For example, in Sen. *Con.* 9.5:

DE VI SIT ACTIO. Quidam duos filios sub noverca amisit: dubia cruditatis et veneni signa insecuta sunt. Tertium filium eius maternus avus rapuit, qui ad visendos aegros non fuerat admissus. Quaerenti patri per praeconem dixit apud se esse. Accusatur de vi.<sup>22</sup>

Speakers for the prosecution, against the grandfather, need to explain why he was suspiciously refused entry. It is in this area that Silo Pompeius goes too far, in the estimation of Latro:

Silonis Pompei color fuit, ut Latroni videbatur, qui controversiae repugnaret; dixit enim venisse avum ad inbecillum puerum. Ad aegros non semper admitti, utique ad eos qui graviter aegrotant; saepe et patrem non admissum; sic avo quoque intempestive venienti dictum: “nunc non potes”; statim cum convicio abisse. In altero idem fecisse. Latro aiebat hunc colorem optimum esse si res ita esset, sed recipi non posse, quia ponatur: “non est admissus”; sub hoc themate intellegere nos non hoc illi dictum: “nunc non potes,” sed ex toto “non potes.”<sup>23</sup>

This employs an interpretive skill that a *grammaticus* would have taught: recognizing that *non est admissus*, in context, should mean the man was told *ex toto* “non potes” instead of “nunc non potes.”<sup>24</sup>

Latro’s own *color* was to claim that there had always been hostility between the father and grandfather (i.e. his father-in-law), even while the first wife was alive; when the sons were sick, the

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<sup>22</sup> “LET THERE BE AN ACTION FOR VIOLENCE. A certain man lost two sons under the care of a stepmother; they were accompanied by ambiguous signs of indigestion or poisoning. The third son was snatched away by his maternal grandfather, who had not been allowed in to visit the sick children. When the father inquired, he told him through a messenger that the boy was with him. The grandfather is charged with committing violence.”

<sup>23</sup> “Silo Pompeius used a *color* which flouted the theme, according to Latro. He said the grandfather had come when the boy was very weak. People are not always allowed in to visit sick people, especially not those who are seriously ill; even the boy’s father had often been turned away. In the same way when the grandfather came at an unsuitable time, he was told, ‘You cannot come in right now.’ He immediately went away shouting abuse. He did the same thing in the case of the second son. Latro said this *color* would be excellent if matters stood that way; but that it could not be accepted, because the theme states ‘he was not allowed in.’ We cannot take this wording to mean, ‘You cannot come in right now’; it must be ‘You cannot come in,’ at all, 10.

<sup>24</sup> Modern Latin grammars agree that the perfective tenses are preferred for categorical statements that something did not occur. E. g. Harm Pinkster, *Oxford Latin Syntax: Volume I: The Simple Clause* (Oxford, 2015), 444.

grandfather came and was abusive, and this was why he was not allowed to see them.<sup>25</sup> Another declaimer, Gallio, combined Latro's *color* with Silo's, in a way that Seneca thought was skillful, but still shared Silo's fault of going against the theme:

Gallio utrumque miscuit et hoc colore, qui videri potest alioqui thema evertere, <paratius><sup>26</sup> usus est: dictum est, inquit, illi: "Quiescit puer, paulum commorare; medici vetuerunt quemquam admitti. Scitis solere illos dicere: nec si pater venerit." Protinus iste clamare coepit: "Testor me non admitti" et tantum non tabellis signatis denuntiare. Avum distuleram; accusatorem exclusi. Iterum, inquit, venit cum convicio: "Tam unum occidistis, alterum occiditis." Nihil est miserius quam ubi aliquoi ex miseria sua invidia quaeritur.<sup>27</sup>

We know from elsewhere that Gallio was one of Seneca's favorite declaimers: in the preface to Book 10 he ranks him as one of the four best he had ever heard; he was also the adoptive father of Seneca's eldest son, Novatus. So it is noteworthy how Seneca tones down any criticism of Gallio in this passage: instead of saying that his innovation *thema evertit* "violates the theme," Seneca says that it *videri potest alioqui thema evertere* "in other respects might be thought to violate the theme"; in spite of this, he employed it *paratius* "more skillfully" than Silo. Gallio actually earns some admiration from Seneca for his treatment of this *color*, even though it rested on a faulty interpretation of what *non fuerat admissus* could be understood to mean. Already a pattern emerges: Seneca is more forgiving of violations by people that he rates highly for other reasons.

Other instances can be cited where declaimers openly discuss the basic principles of interpretation. Sen. *Con.* 7.1 was analyzed in detail in the previous chapter: a father condemned one

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<sup>25</sup> ... *ne viva quidem uxore bene sibi cum socero convenisse, mortua vero professas inimicitias illum gessisse secum. Languente puero venisse illum cum convicio, cum vociferatione, nefaria et dicentem et auspicantem: amicos auctores fuisse ne admitteret hominem non ad officium nepotum sed ad invidiam et contumeliam generi venientem ...* (9.5.9).

<sup>26</sup> MS reads *paratius*; Müller emends to *paratius*, followed by Winterbottom.

<sup>27</sup> "Gallio mixed them both, and used this *color*, which in other respects might be thought to contradict the theme, more skillfully: 'They told him, "The boy is resting, wait a little while. The doctors have forbidden anyone to be allowed in. You know what they always say: 'Not even if his father comes..."' Right away the grandfather began to shout, "I call for witnesses that I am not being allowed in," and practically brought legal charges. I had held him off, as a grandfather; I shut him out as my accuser. He came once more and shouted insults: "You already killed one, now you are killing the other." There is nothing sadder than when a man's misfortune is turned into a cause of hatred against him," 11.

son for parricide in a trial held at home, then ordered the other son to put him to death. Declaimers differed on whether it was more advantageous to argue that the first son was also innocent, or to concede his guilt and defend only the second son. Geminus Varius was with the party who wanted him to be innocent, and noted that the theme does permit this (*patitur autem materia*, 18).<sup>28</sup> Thus, fidelity to the theme was at least a notional goal.<sup>29</sup> In Sen. *Con.* 9.6, declaimers are roundly criticized for an impossible interpretation: the theme posits a law where a *venefica* (“[female] poisoner”) must be tortured until she reveals her accomplices; a woman who had been convicted of poisoning her stepson, while being tortured named her own daughter as an accomplice; the father defends the daughter.<sup>30</sup> In speaking for the defense, many speakers tried to heighten the pathos by making the girl as young as possible, even a mere child: Cestius pictured a scene where the stepmother ordered her daughter, *Da fratri venenum* (“Give your brother poison”) and the daughter responded, *Mater, quid est venenum?* (“Mother, what is poison?” 10, 12). Vibius Rufus used the line, *Nutrix, ream tolle* (“Nurse, pick up the accused,” 13). Murredius and other declaimers tried to outdo each other in cleverness at this point.<sup>31</sup> But Montanus Votienus pointed out that it was impossible and ridiculous for the girl to be this young: *Itaque elegantissime deridebat Montanus Votienus in hac controversia ineptias rhetorum, quod sic*

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<sup>28</sup> *Hac divisione usi sunt quibus placuit damnati causam non defendere et tantum suam agere; alia usi sunt quibus placuit et illius causam defendere, inter quos et Geminus Varius fuit, qui aiebat adulescentem optimam causam habere si non occidit fratrem etiam nocentem, meliorem tamen, si non occidit innocentem; patitur autem materia.*

<sup>29</sup> Cf. also Sen. *Con.* 2.3, where the theme states that the *raptor* had not won pardon from his father. *Latro* hints that the father secretly intends to show him mercy at the last minute; he criticizes *Fuscus* for making the father’s intention overt, in violation of the theme: *Non probabat Fuscum, qui paulo apertius agebat. Est, <inquit, contra> controversiam promittere. Potest nihilominus et bonus agi pater et non exoratus* (“He did not approve of *Fuscus*, who made this assertion rather more openly. He said, ‘It is against the theme for the father to promise. Still, he may be portrayed as a good father who has not been won over,’” 11).

<sup>30</sup> *VENEFICA TORQUEATUR DONEC CONSCIOS INDICET. Quidam mortua uxore ex qua filium habebat, duxit alteram et ex ea filiam sustulit. Decessit adulescens. Accusavit maritus novercam venefici. Damnata, cum torqueretur, dixit consciam sibi filiam esse. Petitur puella ad supplicium. Pater defendit.*

<sup>31</sup> Murredius, imitating Cestius, has the father address his daughter before the court: *Compone te in periclitantium habitum, profunde lacrimas, manus ad genua demitte: rea es* (“Get yourself ready to look like one in danger: shed tears, drop your hands to your knees – you are a defendant”); he has the daughter respond, *Pater, quid est rea?* (“Father, what is a defendant?” 12). Cf. also the parallel case in [Quint.] 381.1: *Proferte a sinu nutricis ream* (“Bring the defendant from her nurse’s lap”).

*declamarent tamquam haec quae nominata est infans esset, nec intellexerent si talis esset ne futuram quidem ream* (“In this case, Montanus Votienus elegantly mocked the stupidity of the rhetors, who declaimed as though the accused girl were an infant; they did not understand that if she were that young, she could not even be put on trial,” 10). The constraint comes from the wording of the text combined with a knowledge of the legal system: a girl that young could not be put on trial regardless of what allegations were made against her. Here, the personalities of the declaimers may once again be important: Cestius was a Greek who declaimed in Latin, frequently criticized by Seneca; Murredius is blasted for his stupidity roughly a dozen times.<sup>32</sup> So, the rules of interpretation are clearly on the books, but we can also see that even when their application is legitimate, it is not necessarily impartial.

This much is clear; but it is equally illuminating to look at the places where declaimers commit egregious violations of the theme *without* being censured for them. Sometimes [Quint.] the rhetorician actually employs such violations in his model speeches, as Shackleton Bailey notes very conscientiously in his footnotes. In reading through his Loeb edition of the *Declamationes Minores*, it is striking how many times the footnotes contain comments such as, “*Extra*, indeed *contra thema*” (366 note 2) or “Neither statement is in the theme” (368 note 6). An easy response would be to say, “This must be the work of a sloppy rhetoric teacher” or “Clearly, he was no Quintilian.” But it is also possible that we have been misled by Quintilian’s prescriptive statements in *Instituto Oratoria*, and the censures in Seneca; perhaps by looking at what good declaimers and rhetoric teachers actually *do*, we can arrive at more interesting conclusions.

A *color* that seems to flout the theme and is not censured is seen on Sen. *Con.* 7.6: a tyrant permitted slaves to kill their masters and rape their mistresses; the leading men of the state (*principes*

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<sup>32</sup> Sen. *Con.* 1.2.21, 23 (*obscene*); 1.4.12 (*sententiam ... stultissimam*); 7.2.14 (*stuporis sui*); 7.3.8 (*suo stupor*); 7.5.10 (*res ineptas*), 15 (*fatuam sententiam*); 9.2.27 (*tumidissime*); 9.4.22 (*colorem stultissimum*); 9.6.12 (discussed above); 10.1.12 (*ineptissime*); 10.4.22 (*insanierunt*); 10.5.28.

*civitatis*) fled; one slave protected the daughter of his master; when the master returned, he gave his daughter in marriage to the slave and was accused of *dementia* by his son.<sup>33</sup> The father's side is regarded by declaimers as quite difficult to defend: marrying one's daughter to a slave was nearly beyond the pale of justifiable behavior. Nevertheless, in 18-19 several declaimers (Pompeius Silo and Gavius Sabinus) attempt to defend the father by saying he was poor and could not afford the dowry for a better husband. Gunderson observes, "Obviously these two have to fight awkwardly against – if not outright ignore – the notion in the premise of the case that the father was one of the state's 'leading citizens' (*principes*)."<sup>34</sup> It is true that Roman senators could become impoverished, but Gunderson is probably right that this *color* loses sight of the initial facts.

As another example, consider how the verb *amare* is used in the theme of [Quint.] 356:

Quidam luxurioso filio, amanti meretricem, dedit pecuniam ut sibi emeret eam meretricem quam ipse pater amabat. Ille eam redemit quam ipse adulescens amabat. Abdicatur.<sup>35</sup>

The theme states factually, using the indicative mood, that the father did love the prostitute.<sup>36</sup> It could have used a subjunctive form (*amaret*), which would make the action merely part of the father's implied statement; it also could have said *videbatur amare*, as does the theme of [Quint.] 385, where a character's feelings are left open to doubt: *videbatur amare ancilla adulescentem* ("the slave girl seemed to love the young man"). The wording of this theme, as it stands, makes the father extremely disreputable and weakens his grounds for disinheriting the son. So it is surprising to see what

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<sup>33</sup> *Tyrannus permisit servis dominis interemptis dominas suas rapere. Profugerunt principes civitatis; inter eos qui filium et filiam habebat profectus est peregre. Cum omnes servi dominas suas vitiasent, servus eius virginem servavit. Occiso tyranno reversi sunt principes; in crucem servos sustulerunt. Ille manu misit et filiam conlocavit. Accusatur a filio dementiae.*

<sup>34</sup> Gunderson, *Declamation, Paternity, and Roman Identity*, 137.

<sup>35</sup> "A certain man had a debauched son who loved a prostitute. He gave the son money to buy for him the prostitute that he, the father, loved. The son bought the prostitute that he, the son, loved. He is disinherited."

<sup>36</sup> The nearly identical theme of Calp. *Decl.* 37 likewise uses the indicative: *Diversas meretrices amabant pater et filius. Pater filio pecuniam dedit ut amatam patris redimeret. Ille suam redemit. Abdicatur* ("A father and son each loved a different prostitute. The father gave the son money to free the one that he, the father, loved. The son freed his own prostitute. He is disinherited").

response [Quint.] recommends in his *sermo*: the father should argue that he was only pretending to be in love with the prostitute as part of a strategy for reforming his son (2-3).<sup>37</sup> The fact that [Quint.] can ignore the theme's wording to such a degree is evidence of the guiding principle of declamation: while *grammaticus*-level skills in interpreting tenses and moods were important up to a point, declaimers were being trained to go beyond them. [Quint.]'s innovation rescues the father's reputation and portrays him as a stronger, more decisive Roman *paterfamilias*; this fulfills the goal of declamation on a more meaningful level than distinguishing the implications of *amabat* and *amaret*.

In another case in [Quint.], 321, two brothers had a falling out and then reconciled; one of them (call him brother A) named his friend, a doctor, as his heir. This brother, after having dinner with brother B, returned home and said he suspected he had been poisoned; the doctor said he would give him a potion to drink as an antidote; the man drank it and died; the remaining brother and the doctor accuse each other of poisoning.<sup>38</sup> In [Quint.]'s model speech, brother B disputes the claim that brother A suspected he had been poisoned; instead, he suggests that the doctor planted these suspicions in his mind (25-6). As Shackleton Bailey (notes 22 and 24 ad loc.) observes, the theme clearly states that he did suspect. So this line of argument breaks the rules of the game, in the sense of not accepting the given facts as truly established; and thus, it provides further insight on how declaimers were expected to view interpretive issues, and how much it was possible to get away with. A *grammaticus* could probably be found to argue that this innovation does not *completely* flout the theme: the brother could have come home and said, "I don't feel well." The doctor could have

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<sup>37</sup> Shackleton Bailey *ad loc* points out the conflict with the theme, if the father was only pretending to love the prostitute.

<sup>38</sup> *Fratres consortes inimici esse coeperunt. Diviserunt. Alter ex his medicum instituit heredem. Postea redierunt in gratiam. Is qui medicum amicum habebat, cum cenasset apud fratrem et domum redisset, dixit suspicari se venenum sibi datum. Respondit medicus potionem se daturum remedii, et dedit; qua epota ille discessit. Invicem se reos deferunt veneficii frater et medicus* ("Two brothers who were co-heirs had a falling out. They divided the property. One of them named a doctor as his own heir. Afterwards the brothers reconciled. The one with the doctor as a friend dined at the other brother's house, then returned home; he said he suspected he had been poisoned. The doctor answered that he would give him a potion as antidote, and gave it; the man drank it and died. The surviving brother and the doctor accuse each other of poisoning.")

replied: “Hmm, you know these could be signs of poison.” Brother: “Then, I think I was poisoned!” Doctor: “Let me give you an antidote.” The last two lines of dialogue represent what the theme states; the first two can be inserted into the gap.<sup>39</sup> Another *grammaticus* might agree with Shackleton Bailey that this goes too far. But in fact, these (hypothetical) opposing arguments about the words of the theme would miss the point about what constituted a successful *color*. This *color*, recommended by [Quint.], conforms to the larger goals of declamation: for a Roman man casting suspicion on a lower-class, possibly Greek, *medicus*, the approach would be perfectly legitimate and even commendable. By arguing in this fashion, the student learns to portray a character who is strong and in control of the “facts.”

In contrast to disputes about the interpretation of the theme, it is worth noting in conclusion that disputes about the meaning of the law are much more frequent. They are seen in all *controversiae* that hinge on definitions, such as the *sacerdos prostituta* (Sen. *Con.* 1.2) discussed earlier: speakers can argue about what is included in the definition of *casta*. Seneca notes that rhetoric students are taught to make an issue about every word of the law,<sup>40</sup> and one declaimer follows this advice exactly: Silo Pompeius notes the words *casta e castis* (“chaste from the chaste”), and argues, *Lex, inquit, cum dicit, hoc non tantum ad parentes refert sed ad omnes quibus conversata est virgo; non enim adicit “e castis parentibus,” sed “e castis” cum dicit, vult illos a quibus venit virgo castos esse* (“When the law says this, it refers not only to parents but to everyone with whom the girl has associated. It does not add the word ‘parents’: when it says ‘chaste from the chaste,’ it intends for all those from whom the girl comes to be chaste,” 1.2.15). In other cases, declaimers ask whether *Incesta saxo deiciatur* (“Let an unchaste woman be cast

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<sup>39</sup> Cf. Triarius’ *color* in Sen. *Con.* 9.2.20, discussed in Chapter 1. A later section of this chapter will argue that even though Triarius conforms to the facts of the theme, his *color* is censured because it is banal and evades the central ethical conflict of the case.

<sup>40</sup> *Silo Pompeius, dum praeceptum sequitur quo iubemur ut, quotiens possumus, de omnibus legis verbis controversiam faciamus, illam quaestionem movit: “casta e castis”* (“Silo Pompeius followed the precept by which we are told to make an issue out of every word of the law; he raised a question about ‘chaste from the chaste’”).

down from the rock”) meant that the woman had to die, or merely be cast down (which would leave her free of further punishment when she survived the fall, 1.3.8); more generally, what constituted a *beneficium* (“service”) incurring a debt of gratitude, or what fell under the definition of *laesa maiestas* (“harming state majesty”), *vis* (“force, violence”), *iniuria* (“injury”), or *dementia* (“madness”). All these types of questions drew upon the analytical skills taught by the *grammaticus* and applied them at a higher level. Their frequent occurrence is understandable when we recall that declamation was training for advocacy, a profession which defined itself in a sort of triangular relationship with grammarians (*grammatici*) in one direction and jurists (*iurisconsulti*, *iurisprudentes*) in another.<sup>41</sup> Declaimers, just like full-fledged legal scholars, did need the tools of the grammarian for the purpose of engaging in a certain amount of legal analysis; as Seneca mentions, an advocate needed the ability to raise disputes about every possible point of the law.<sup>42</sup> The difference was that, unlike jurists, declaimers needed only enough legal knowledge and analysis to present their case in the most persuasive light possible. (For more on this, see Chapter 4.) And in contrast to grammarians, declaimers were not expected to exegete the theme as if it were a stanza of poetry. In order for declamation to be useful as a practice activity, there needed to be some constraints on changing the facts of the theme, at least in theory. But even from the tiny pool of evidence that Seneca and [Quint.] present us, we can see that accomplished declaimers and rhetoricians often violated these constraints when their performances aligned with the larger goals of declamation.

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<sup>41</sup> See Schulz, *History of Roman Legal Science*, 43-45, for more on the relationship between advocates and jurists. Also Parks, *The Roman Rhetorical Schools*, 92.

<sup>42</sup> Extant rhetorical handbooks provide guidance here: Cic. *De Inv.* 2.116-121 covers how to analyze ambiguously worded laws; Cic. *De Inv.* 2.144, 147 and *Rhet. Her.* 1.20 deal with conflicting laws.

## *Witnesses and evidence*

The introduction to this chapter noted that declaimers could not appeal directly to the testimony of witnesses. In a fictional genre, such imaginary testimony would have carried no more weight than assertions made in the speaker's own voice; permitting it would have brought little additional pedagogical value. Even so, declaimers could introduce external facts in the form of *colores*, which consisted of events, motivations, or thought processes that were extraneous to the theme. So the question arises: did these narrative innovations have to be at least in principle verifiable? What were the rules of evidence in the fictional declamatory world?

There is one passage where Seneca seems to quote a criticism on the grounds that the *color* could not be substantiated without witnesses. It would be tempting to generalize this and treat it as one of the standard rules of the game for declamation, as Fairweather does.<sup>43</sup> However, a closer look at the evidence casts doubt on this interpretation; in fact, there are good reasons for believing that this was *not* a constraint, and that a certain amount of flexibility in this area was pedagogically advantageous. The case in question is Sen. *Con.* 7.2, a semi-historical *controversia* involving Popillius, the killer of Cicero, who was (fictionally) charged with "misconduct" (*de moribus*), on the grounds that Cicero had previously (and fictionally) defended him from a parricide charge. One declaimer defends Popillius as follows:

Fuscus Arellius hoc colore usus est: Antoni se partem secutum ut, si quid posset, Ciceroni prodesset; facta proscriptione ad genua se Antoni procidisse, deprecatum esse pro Cicerone; offensum Antonium dixisse: "eo magis occide quem mori non vis." Hic color displicebat Passieno, quia †ad testem ducit†; nam si hoc fecit Popillius, non tantum quod defendat non habet sed habet quod gloriatur.<sup>44</sup>

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<sup>43</sup> Fairweather, *The Elder Seneca*, 175-6: "It was also not thought allowable to make any claim about the facts of the case which could not be substantiated without a witness." Similar but more restrained is Bloomer, "Schooling in Persona", 65: while noting that most *controversiae* hinge on evaluation or definition, he adds, "The fact is seldom denied, for this would require witnesses...."

<sup>44</sup> "Fuscus Arellius used this *color*: he had joined Antony's side in order to help Cicero, if in any way he could. When the proscription was announced, he flung himself at Antony's knees and begged him to spare Cicero. Antony was

The first problem here is the textual uncertainty. Fairweather believes that, despite the text's doubtful reading, Passienus' criticism must have had something to do with witnesses. Possible emendations that she cites are *testem adducit* (A. Augustinus), *ad tes<imonium r>em ducit* (J. B. Hall), and *ad testem ducit <controversiam>* (her own). However, none of these conjectures seems to square with the following explanatory *nam* clause: it is hard to see how the statement "it leads toward witnesses" could be explained or justified on the grounds that "this makes Popillius' action not only permissible but praiseworthy." The latter clause explains why Passienus disapproved of the *color* (apparently, that it is too powerful and makes the case too easy), but a reference to witnesses would have a strange grammatical fit with the rest of the sentence. Perhaps for this reason, Winterbottom simply obelizes the passage (as above), and adds in the apparatus, "No convincing emendation of these words has been suggested."<sup>45</sup> The next section of this chapter ("Implausibility and banality") looks in detail at another basis for criticism that seems more applicable to this *color*: that it attempts to turn an unjustifiable action into a positive good through trivial or gratuitous alterations of the circumstances, thereby evading the central ethical conflict of the case. This seems a better fit for the clear wording of Seneca's text (*non tantum quod defendat non habet sed habet quod gloriatur*).<sup>46</sup>

Even if Passienus did make some mention of witnesses, the fact remains that other speakers did use *colores* that would have required witnesses, and there is no other recorded censure for it. An example was seen in the previous section, on Sen. *Con.* 9.5, where Seneca approvingly quotes a *color* by Latro: that there had always been hostility between the father and grandfather (i.e. his father-in-law), even while the first wife was alive; when the sons were sick, the grandfather came and was

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outraged and said, 'Kill him all the more, since you don't want him to die.' This *color* displeased Passienus, because †it leads to a witness‡; for if Popillius did all this, not only does he have nothing to defend, but he actually has something to be proud of," 12.

<sup>45</sup> Winterbottom, *Seneca the Elder*, ad loc.

<sup>46</sup> The other example cited by Fairweather as "open to a similar objection" (Sen. *Con.* 10.5.18) is also addressed in that section.

abusive, and this was why he was not allowed to see them. It is hard to see how Passienus' criticism would apply any less to this *color* than to that of Fuscus. One more example is worth quoting (others are in Appendix B): in [Quint.] 358, the *color* specifically invents other characters who could have served as witnesses, but without whose testimony, the assertion would be insubstantial. The law in this theme states that anyone who beats his father shall have his hands cut off: an exposed child was raised by a foster father; he later beat that father, had his hands cut off, and charges that father under the law of *talio* (retribution in kind). The main question of the case is whether or not a foster father is included in the definition of "father." [Quint.]'s *sermo* notes that the young man's position is legally weak on these grounds: most will agree that a foster father should be included. And so he offers the following advice for the son's side:

Dicat tamen educatorem fuisse hunc ab initio crudelem, et hinc suspicatum iuvenem non esse illum verum patrem. Saepe amicis questum, quibusdam etiam mandasse ut inquirirent qui aliquando infantes exposuissent. Hac re validius offensum senem. Itaque dedisse operam ut se pulsandum praeberet; deceptum etiam tempore ipso iuvenem incidisse in eum quem minime provocatum iniuria vellet.<sup>47</sup>

All these assertions would need to be established by the friends and the people with whom they made inquiries, but these people exist only within the fiction created by the *color*. So here even [Quint.], the rhetoric teacher, is recommending a *color* that could not be substantiated without witnesses. If there really was a constraint against inventing this type of material, it seems that declaimers and rhetoric teachers regularly ignored it – even more often than they flouted the facts of the theme.

While the constraint on flouting the theme did exist in principle, it seems more likely that the constraint regarding witnesses did not exist at all. Flexibility in this area would be in keeping with

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<sup>47</sup> "He should say that the man who raised him was cruel from the beginning, and for this reason the young man suspected that he was not his real father. He often complained to his friends, and even sent some to make inquiries about who had exposed infants around that time. But the old man was even more enraged by this. And so he made an effort to get the son to beat him. Deceived by the time [i.e. night], the young man stumbled upon the one whom he would least have wanted to provoke by injury."

real Roman law of the time, which did not have clearly established guidelines regarding witnesses and evidence. Borkowski and du Plessis argue that under the formulary system (late republic and early empire), “rules of evidence still hardly existed, although it was recognized that any assertion should be proved by the person making it. Witnesses were not yet generally compellable. Oral evidence was still preferred, but written evidence was being increasingly used.”<sup>48</sup> Even later, under the *cognitio* system of trials before a magistrate, the use of evidence and witnesses was completely subject to the magistrate’s discretion.<sup>49</sup> Witnesses were important, but they could be impugned and discredited by skillful advocates,<sup>50</sup> and other factors might play a more decisive role. Johnston notes that Roman judges frequently considered the relative “worthiness” or social position of the parties, as much as any evidence they might present: for example, in *Noctes Atticae* 14.2, Aulus Gellius relates how he himself once refused to acquit a defendant with disreputable character, even though the plaintiff had failed to present sufficient evidence against him. Johnston further argues, “It is clear from the literary sources that ‘evidence’ was often produced to make an emotional impact, or because of the favourable light it cast upon a party in general terms, rather than because it was germane to the point at issue.”<sup>51</sup> Alexander observes that this focus on character portrayal can create

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<sup>48</sup> Andrew Borkowski and Paul du Plessis, *Textbook on Roman Law* (3<sup>rd</sup> ed. Oxford, 2005), 77. On witnesses and documents in the late Republic, see also Frier, *The Rise of the Roman Jurists*, 207.

<sup>49</sup> Borkowski and Du Plessis, *Textbook on Roman Law*, 81.

<sup>50</sup> Michael C. Alexander, *The Case for the Prosecution in the Ciceronian Era* (University of Michigan, 2002), 84-7 discusses how easily Cicero discredited the prosecution witnesses in his speech *Pro Flacco*.

<sup>51</sup> Johnston, *Roman Law in Context*, 128-9. Cf. Valerius Maximus 8.5.1, where a defendant was acquitted precisely *because* the witnesses against him were so distinguished and their testimony was so convincing; the jury did not want to seem like it had been unduly influenced: *Cn. et Q. Serviliis Caepionibus isdem parentibus natis et per omnes honorum gradus ad summam amplitudinem provectis, item fratribus Metellis Quinto et Lucio consularibus et censoriis, altero etiam triumphali, in Q. Pompeium A. f. repetundarum reum acerrime dicentibus testimonium non abrogata fides absoluto Pompeio, sed ne potentia inimicum oppressisse viderentur occursum est* (“Cn. and Q. Servilius Caepio, born of the same parents and advanced to the highest eminence by progress through all stages of official rank, likewise the brothers Metelli, Quintus and Lucius, ex-Consuls and ex-Censors, one of them a triumphator, spoke very strongly in evidence against Q. Pompeius, son of Aulus, accused of extortion. Pompeius was acquitted, not because they were disbelieved but to counter the impression that they had crushed an enemy by their influence,” – transl. by Shackleton Bailey). Indeed, Valerius’ other five *exempla* under the rubric “witnesses” are more concerned with the status or reputation of the witnesses, prosecutor, or defendant, and how this pertained to the outcome; they have nothing at all to do with evidence or testimony per se.

an impression that “Roman trials had little or nothing to do with Roman law”: arguments that the crime was perfectly in keeping with the defendant’s character, or (for the defense) inconceivable based on his honorable manner of life, “can easily mislead us into thinking that the whole trial was just a test of personalities. But if one accepts the idea that character is a constant, arguments from character can be seen in a different light.”<sup>52</sup> The legal system reflected these broader Roman values and moral outlook.

The same values and outlook are seen in declamation: it was more important to devise *colores* that would convincingly contribute to a portrait of character than to be strictly concerned with technicalities such as witnesses.<sup>53</sup> The prominent role of character portrayal (*ethopoiia*) in declamation has been well analyzed.<sup>54</sup> Character is important even in the choice of sides on a case: in Sen. *Con.* 7.5, a man is murdered under complex circumstances, and his son and the *procurator* (household agent) bring mutual accusations against each other.<sup>55</sup> Both sides have mostly circumstantial evidence in their favor; the only witness against the *procurator* was a five-year-old child. There was no prima

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<sup>52</sup> Alexander, *The Case for the Prosecution*, 34. Cf. also Clifford Ando, *Law, Language, and Empire in the Roman Tradition* (Philadelphia: University of Pennsylvania Press, 2011), x: “On the basis of currently available evidence, the Romans did not write treatises on legal argument or, for that matter, rules of evidence or precedence or procedure *stricto sensu*.”

<sup>53</sup> Quintilian discusses how to handle witnesses in real court cases – preparing one’s own, cross-examining the adversary’s – and specifically criticizes rhetoric schools for not teaching these things: *Eius rei sine dubio neque disciplina una in scholis neque exercitatio traditur, et naturali magis acumine aut usu contingit haec virtus* (“Without a doubt, the schools provide neither theory nor training in this area, and competence is acquired either by natural talent or by practice on the job,” 5.7.28).

<sup>54</sup> E.g. Fairweather, *The Elder Seneca*, 176-8; Bloomer, “Schooling in Persona”; Imber, “Practiced Speech.”

<sup>55</sup> *Mortua quidam uxore, ex qua filium habebat, duxit aliam, sustulit ex ea filium. habebat procuratorem in domo speciosum. cum frequenter essent iurgia novercae et privigno, iussit eum semigrare; ille trans parietem habitationem conduxit. rumor erat de adulterio procuratoris et matris familiae. quodam tempore pater familiae in cubiculo occisus inventus est, uxor volnerata, communis paries perfossus. placuit propinquis quaeri a filio quinquenni, qui una dormierat, quem percussorem cognosceret; ille procuratorem digito denotavit. accusat filius procuratorem caedis, ille filium parricidi* (“A man lost his wife, by whom he had a son, remarried and raised a son by his second wife. He had a good-looking agent in his household. The step-mother and step-son quarrelled frequently, and he ordered his son to move; he rented a house next door. There was a rumor of adultery between the agent and the mother. One day the father was found killed in his bedroom, his wife injured and the party-wall dug through. The relations decided to ask the five-year-old son who had slept in the same room whom he recognized as the assassin; he identified the agent by pointing at him. The (elder) son accuses the agent of murder, while the agent accuses the son of parricide” – transl. by Winterbottom).

facie reason to favor either side – the testimony of a five-year-old should have been easy to discredit – but in fact, every single declaimer mentioned by Seneca takes the son’s side. It may be that, like Gellius, they observed the *procurator*’s social position and his associated character-type, and simply did not consider him to be an available protagonist – like the pirates and pimps who fill *controversia* themes, but never actually have a voice in court.<sup>56</sup>

So, declamation reflects real emphases of the Roman legal system; moreover, allowing such *colores* in fictional cases would have been pedagogically useful for other reasons. They would train students to ask, “What kinds of facts, if I could establish them, would be most helpful to my case?” This must be recognized as the whole point of *colores* – the reason why declaimers were allowed to innovate at all. In real cases, they could then seek out the evidence necessary to establish such facts, or if evidence was lacking, they would already have practice at making it up persuasively. For instance, the case of the young man who beat his foster father ([Quint.] 358) illustrates the type of defense that a good advocate would *want* to make. If he encountered an analogous situation in the forum, the advocate could look for the kind of witnesses that he had needed to invent previously, and more importantly, paint a convincing portrait of the character of the parties involved.<sup>57</sup>

### ***Implausibility and banality***

In a broad sense, there was a requirement that the innovations be plausible, or believable. This could be expressed by the Latin words *credibilis* or *verisimilis*.<sup>58</sup> While it might seem obvious that plausibility would be desired, it also had a more specific connection with the Roman legal system. The praetor’s formula to lay judges did not instruct them to reach a verdict based on what is true,

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<sup>56</sup> On these peripheral characters, see Danielle van Mal-Maeder, *La fiction des déclamations*. Mnemosyne Supplementum 290 (Leiden/Boston: Brill, 2007), 10; she notes that they served mainly to set up the conflicts in which the more central characters found themselves involved.

<sup>57</sup> Cf. Aristotle, *Rhet.* 2.12-7 on portrayal of character.

<sup>58</sup> *Credibilis/incredibilis*: Sen. *Con.* 2.6.8; 9.4.22; 9.6.10. *Verisimilis*: Sen. *Con.* 4.6 *excerpta*.

but on what “appears” to be so: thus, the standard term for “to be convicted” in a criminal case is *fecisse videtur*, literally “he seems to have done it,” while *non fecisse videtur* is “to be acquitted.” There was no requirement to prove guilt beyond reasonable doubt.<sup>59</sup> The Contrebia tablet of 87 B.C.E. instructs judges to decide a dispute between two municipalities based on the alternatives *sei parret* (“if it appears”) and *sei non parret* (“if it does not appear”).<sup>60</sup> Declamation shares this focus on appearances and likelihood: neither side had to prove its argument beyond reasonable doubt (nor, indeed, was it possible to do so); a *color* simply needed to present a version of events that was more plausible than the other side’s version. The concept of plausibility or likelihood is related to the portrayal of character discussed in the previous section. Hoffman has demonstrated that the word *eikos* in Greek and Roman rhetorical theory (translated variously as “likely, probable, plausible, reasonable”) has at its core the idea of similarity or verisimilitude; when used to evaluate narratives of events, “an account has the quality of verisimilitude when it *resembles* or is *similar* to what is known to be true.”<sup>61</sup> This meant that judgements of plausibility were closely related to societal stereotypes, both about events and about characters: “Social expectations, because they have nearly the force of truth, have a large role to play in judgments of verisimilitude. They often define a ‘profile’ against which accounts are compared. If the characters and events of a courtroom account seem typical in that they describe events that the audience would expect under the circumstances, then the narrative is *eikos*, and apparently true. It ‘fits the profile.’”<sup>62</sup> When declaimers criticize each other’s *colores* on

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<sup>59</sup> Alexander, *The Case for the Prosecution*, 35.

<sup>60</sup> Archaic spellings for *si parret* and *si non parret*. Discussed by Clifford Ando, “Fact, Fiction, and Social Reality in Roman Law,” in *Legal Fictions in Theory and Practice*, ed. Maksymilian Del Mar and William Twining (Springer, 2015), 302.

<sup>61</sup> David C. Hoffman, “Concerning *Eikos*: Social Expectation and Verisimilitude in Early Attic Rhetoric,” *Rhetorica* 26:1 (2008), 3.

<sup>62</sup> *Ibid.*, 21. Cf. also Christopher W. Tindale, *Reason’s Dark Champions: Constructive Strategies of Sophistic Argument* (Columbia: University of South Carolina Press, 2010), 82: *Eikos* arguments “tap into [the audience’s] general fund of knowledge concerning the customs of their society, their community, and how they know people to generally behave.” A judge in Canada recently employed something like ancient *eikos* reasoning in conducting a trial, and as a result, her ruling was overturned on appeal. The case involved an assault charge against a beer-league hockey player for actions taken

grounds of plausibility, the judgments are inherently subjective, up to a point; they can also be revealing about cultural values and expectations. Sometimes it is difficult to distinguish censures for implausibility from other types of criticism that Seneca records: problems of style, obscenity, or “taste” in a very broad sense.<sup>63</sup> All these judgments are in some sense connected, and many of them will become relevant later on in the chapter. Still, this section will specifically investigate constraints on implausible innovations to the narrative. We will look for common denominators in things that are recorded as being censured, and also in things that were repeatedly said *without* being censured.<sup>64</sup>

One thing that was apparently not considered inherently implausible was divine intervention, as discussed in Chapter 1: speakers could attribute divine agency to the experiences of the *sacerdos prostituta* (“prostitute priestess,” Sen. *Con.* 1.2) or the *incesta de saxo* (“unchaste woman thrown down from the rock,” Sen. *Con.* 1.3).<sup>65</sup> Many themes themselves presuppose a world in which the gods are involved in human affairs; for instance, oracular *responsa* play a key role in the scenarios of [Quint.] 329 and 384, to name a few; other themes mention priesthods, Vestal Virgins, and other offices of Roman state religion (or offices that are analogous to real Roman ones).<sup>66</sup> On the other hand,

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during a game. Judge Diane Lahaie discounted the testimony of several witnesses on grounds like, “It was not logical that three Tiger-Cats defencemen would be on the ice in the last minute of the game when the Tiger-Cats were down by two goals.” Since this is a mere supposition based on what usually happens in hockey games, the Court of Appeal ruled that “hockey strategy is not a proper subject for judicial notice” (*National Post*, Sep. 3, 2015).

<sup>63</sup> Sometimes innovations are censured simply on “tactical” grounds: they are not the most effective way to help the case. For example, at 7.1.24, the case where the father ordered one son to kill the other, and the son obeyed only partially by sending his brother to sea in a disabled boat: Hispanus used a harsh *color* and said he altered the punishment in order to be *more* cruel. Seneca says: *Displcebat color hic prudentibus: quam enim spem habet absolutionis, si nec paruit nec peperit?* (“Sensible men were displeased by this *color*: for how can he hope to be acquitted if he neither obeyed his father *nor* showed mercy to his brother?”). Other examples are 1.1.20, 24; 1.3.9; 1.6.10; 7.1.24; 10.1.12. These are generally not as revealing of cultural values, as larger issues are not at stake.

<sup>64</sup> Fairweather, *The Elder Seneca*, has compiled a great amount of evidence that is extremely useful, even though my interpretations sometimes differ. Sometimes she is a bit too schematic, creating the impression that the words of criticism (e.g. *durus, strictus, asper, mixtus*) are almost technical terms.

<sup>65</sup> Note also [Quint.] 323, *Alexander templum dedicans*, where the *sermo* recommends playing up the divine angle: *Quam potest maxima religione iudicum implendus est animus est* (“The jury’s mind must be filled with religious feeling to all possible extent,” transl. by Shackleton Bailey).

<sup>66</sup> The pontifex Metellus, Sen. *Con.* 4.2 (see Chapter 3 for more on this case); Vestal Virgins, Sen. *Con.* 6.8.

innovations based on dreams or omens occurring to the speaker apparently *were* considered implausible. Seneca criticizes Junius Otho for his excessive reliance on them in his speeches,<sup>67</sup> and adds: *Sed ridiculum est adfectari quod falsum probari non possit. Non multum interest in causa sua falsum aliquis testem det an se: alteri enim credi non debet, alteri non solet* (“But it is ridiculous to assert something that cannot be proved false. It makes little difference to a case if someone presents a false witness, or himself as witness; the one should not be believed, the other tends not to be,” 2.1.33).

It may seem contradictory to accept divine interventions and yet reject warnings through dreams and visions; to modern readers, both belong to the category of supernatural events. In Roman declamation, however, the key distinction seems to have been between “public” and “individual” supernatural events. Divine interventions are pictured as part of public religion, which was a matter of state interest: there were priests and augurs who were tasked with interpreting these things and managing relations with the gods.<sup>68</sup> Even if declamation went beyond the types of events that real Roman priests investigated, their interpretation still had relevance to the state and its policies; this is why the themes themselves included oracles and qualifications for priesthood as topics for debate. Within the fictional world of declamation, these things would in principle be verifiable: religious authorities could observe the events, check the details, and interpret them; the body of citizens or jury was called upon to add its own evaluation. This category of *color* was not really different from any other; it gave declaimers practice at discovering types of arguments that would help them in a real court case, with the only constraint being what they could get the audience

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<sup>67</sup> Seneca gives an example of one of Junius’ *colores* in 7.7.15: *Otho Iunius pater praesagiis quibusdam et insomniis hanc fortunam praenuntiantibus agitatum se competisse dixit. Erat autem ex somniatoribus Otho: ubicumque defecerat color, somnium narrabat* (“Junius Otho senior said he had become a competitor because he had been troubled by certain omens and dreams that foretold this turn of events. Otho was one of the dreamers; wherever he was at a loss for a *color*, he told of a dream” – transl. by Winterbottom).

<sup>68</sup> On real Roman religion, see especially Mary Beard, John North, and Simon Price, *Religions of Rome* (2 vols. Cambridge, 1998); Clifford Ando, *The Matter of the Gods: Religion and the Roman Empire* (University of California Press: Berkeley, 2008).

to accept. Dreams and visions, however – the type for *color* which Otho was criticized – were in a different category by their very nature. These were appeals to an ostensibly external justification for an individual character’s actions: “I competed against my son in the election because I was troubled by omens and dreams” (cf. note 67 just above). But in the real world, as in declamation, the evidence existed purely within the character’s own mind; it was easy to make up, impossible to prove or disprove. While this was true to an extent of all *colores*, the more successful ones were those that contributed to a convincing portrayal of character, or reshaped the narrative according to exemplary values. Otho’s dreams failed because they were attempts to justify an action based on some new fact that would not be reliable even in principle.<sup>69</sup>

Declaimers could definitely be censured when their *colores* or lines of argument did not meet the community’s expectations of plausibility (for more examples, see Appendix B): in Sen. *Con.* 4.6, a man whose wife died in childbirth quickly had another son by a new wife; he sent both sons to the countryside to be educated, and when they came back, they were indistinguishable. The new wife asks which is hers, and he refuses to say, so she charges him with mistreatment (*malae tractationis*). The case is transmitted only in excerpt, but one lengthy passage quotes Latro and Cestius as having the husband say: *Nescio, sed etiamsi scirem non indicarem* (“I do not know, but even if I did, I would not tell”). Asinius Pollio did not approve: *Si dicit, inquit, “Nescio,” nulli fidem facit: uxor ipsa non quaereret ab illo nisi ille scire posset. Dicit enim contra virum potest: quaere a nutrice, a paedagogo. Verisimile non est neminem domi esse qui sciat* (“If he says ‘I do not know,’ he will persuade no one: the wife would not ask him unless he were capable of knowing. And it could be objected to the husband, ‘Ask the nurse, ask the *paedagogus*.’ It is simply not believable that there would be no one in the household who knows.”) So

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<sup>69</sup> This explanation does not preclude the possibility that someone could be censured for employing a divine intervention ineptly, or that a skilled declaimer could obtain good results with a dream or vision. Besides the variables of implementation, we have also seen that Seneca’s censures are not always impartial; this is seen in the case of Murredius, discussed later in this section.

this is an argument against this particular *color* based on its implausibility. Related to this, however, Asinius Pollio goes on to voice another type of criticism: *Ille autem mixtus color utrumque corrumpit, et ignorantis fidem et non indicantis fiduciam. Nam cum dicit "etiamsi scirem non indicarem," efficit ut illum scire index putet; cum dicit "nescio," efficit ut videatur indicare debere si scit* ("Mixing *colores* like this ruins the effects of both – his believability in not knowing, and his confidence in not telling. For when he says, 'Even if I knew I would not tell,' he makes the judge think that he does know; when he says, 'I do not know,' he makes it seem that if he did know, he ought to tell"). Once again, the larger goals of declamation come into view: this *color* detracts from the portrayal of the man as a strong, self-confident character: he would win greater admiration if he presented the concealment as a deliberate, consistent choice and took full responsibility for it. This is the type of *color* that Asinius himself uses: the father conceals their identities in order to prevent favoritism or sympathy for either side.<sup>70</sup>

Another implausible *color* is seen on Sen. *Con.* 7.3: a son who had been disinherited three times is caught preparing a *medicamentum* (ambiguously "medicine" or "poison"); he claimed that it was poison and that he wanted to die, and then poured it out; he was accused of plotting parricide. Seneca was unimpressed by Murredius' defense of the son: *Murredius pro cetero suo stupore dixit medicamentum se parasse ad somnum, quia adsiduae sollicitudines vigiliarum sibi consuetudinem <fecerint....>* ("In addition to his other stupidities, Murredius said he had prepared himself a potion for sleeping, since the continual harrassments had accustomed him to staying awake at night," 8). Here it is worth recalling once again the subjective nature of assessing plausibility, and its close connection with social expectations. This possibly extended even to the identity of the person using the *color*: as noted previously, Murredius is called stupid several other times by Seneca (while being cited thirteen times overall in the *Controversiae*). While modern readers would likely agree that this *color* of Murredius is

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<sup>70</sup> Cf. discussion of this passage by Berti, *Scholasticorum Studia*, 138-9.

unconvincing, it probably did not help him in Seneca's eyes that he had already earned a reputation for ineptitude. As with the censures for violating the theme, the application of this one seems to have been valid, but not necessarily always impartial.

Closely related to implausibility was something that could be called "banality," although no single Latin term was used to designate it. Sometimes Seneca applies the term *ineptus*, which often means simply "stupid" or "foolish" (like its English derivative "inept"), but might in these instances retain its basic idea of "not fitting" (*in + aptus*), i.e. "inappropriate" or "poorly judged."<sup>71</sup> What draws the criticism seems to be the fact that the declaimer takes the easy way out on a difficult ethical case. We have seen that most *controversia* themes are designed to set up a conflict of ethical values; the most effective arguments are those that demonstrate that a particular action is either morally right, or, failing that, at least not legally culpable. This particular type of censure, for "banality," is employed when a declaimer tries to create a positive evaluation for a morally indefensible action; instead of defending the character on legal grounds, which would have a better chance of success, he tries to defend him morally by changing the circumstances in ways that are trivial, banal, or gratuitous. In other words, the innovations are permissible on the *grammaticus* level – they do not technically contradict any of the facts of the theme – but they are not very effective rhetorically.<sup>72</sup>

This is seen clearly in Sen. *Con.* 9.2, the case of Flamininus, the proconsul, who executed a prisoner at a dinner party at the request of a prostitute.<sup>73</sup> As noted already in Chapter 1, Seneca himself highlights this case as one that requires a defense on legal grounds: *Quaedam controversiae sunt*

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<sup>71</sup> Cf. OLD s. v. *inepte*, *ineptus*.

<sup>72</sup> Our record of censures for banality is mainly from Seneca. Such things might have been permissible for schoolboy declaimers, but not for adult Romans. In general, many faults of declamation could be described using *puerilis* or *pueriliter*.

<sup>73</sup> MAIESTATIS LAESAE SIT ACTIO. *Flamininus proconsul inter cenam a meretrice rogatus, quae aiebat se numquam vidisse hominem decollari, unum ex damnatis occidit. Accusatur maiestatis.* ("LET THERE BE AN ACTION FOR HARMING STATE MAJESTY. Flamininus the proconsul, at the request of a prostitute at a dinner party who said she had never seen a man beheaded, executed one of the condemned men. He is accused of harming state majesty").

*in quibus factum defendi potest, excusari non potest; ex quibus est et haec. Non possumus efficere ut <reus> propter hoc non sit reprehendendus; non speramus ut illum iudex probet sed ut dimittat. Itaque sic agere debemus tamquam pro facto non emendato, non scelerato tamen* (“There are certain *controversiae* in which a deed can be defended but not excused, and this is one of them. We cannot prevent the defendant from deserving censure for his deed; we do not hope for the judge to approve of him but rather to acquit him. And so we must argue as though defending a deed that is not blameless, but not criminal either,” 9.2.18).<sup>74</sup> In response to the deeds of Flamininus, Triarius employs a *color* which Seneca labels as *ineptus*. Triarius imagines a new context in the immediately preceding conversation, where guests were remarking on the proconsul’s leniency and the infrequency of executions: *Dixit aliquis ex convivis: “ego numquam <vidi hominem occidi>.”*<sup>75</sup> *Dixit et mulier: “et ego numquam”* (“One of the guests said, ‘I have never seen a man killed.’ A woman also said, ‘Neither have I,’” 20); at this, Flamininus demonstrated his severity by executing a prisoner on the spot. Thus, where Seneca and the other declaimers regard the action as objectively bad, Triarius seeks to turn it into a positive good: as a magistrate, Flamininus needed to restore his reputation in the public eye. The problem, apparently, is that the way he goes about this is banal: he creates an innovation to the scene on the conversation level, scrupulously adhering to the given facts a way that a *grammaticus* would not fault; yet the new events he introduces are gratuitous and open to the charge of implausibility. The type of defense Seneca recommends is to focus on the legal facts and argue that Flamininus’ actions do not qualify as harming the state. There is no way to make the actions themselves appear admirable, and quibbling at the verbal level is no use. Instead of a *color*, which may seem weak and evasive, it turns out to be more effective to confront the facts directly by means of a vigorous legal defense – arguing

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<sup>74</sup> Cf. also 7.6.17, another case of morally indefensible action: *A parte patris magis defensione opus esse dicebat Latro quam colore* (“On the side of the father, Latro said there was more need for a defense than a *color*”).

<sup>75</sup> Emended by Bursian.

that the deed was not blameless, but not illegal given the law of the theme. (For more on possible legal defenses, see Chapter 1.)

Another good example is one of the cases mentioned earlier, where Fairweather believed the problem was that the *color* would require witnesses. Sen. *Con.* 10.5 involves the painter Parrhasius, who tortured an Olynthian slave to death as a model for a painting of Prometheus, which he then set up in the temple of Minerva; he is charged with harming the state (*rei publicae laesae*). Seneca criticizes the following speaker, whose name is textually uncertain: †Gallionis† *color intolerabilis est: dixit enim <se> senem ex noxiis Olynthiis emisse; quod si illi licet fingere, non video quare non eadem opera dicat et conscium proditionis Lastheni fuisse et se poenae causa torsisse* (“<\*\*\*’s> *color* was intolerable: he said he had bought the old man from among the guilty Olynthians. If he is allowed to invent this, I do not see what prevents him from saying on the same principle that the man was an accomplice in Lasthenes’ betrayal, and that he had tortured him for punishment,” 18). Note first that Seneca does not specify why he applies the harsh term *intolerabilis* to this *color*; he certainly does not say anything about the need for witnesses. But the following explanatory clause centers on the objection that the *color* makes the case too easy. The innovation seems gratuitous – as Seneca hints at with his *reductio ad absurdum* parallel. More importantly, it takes the form of a moral defense, but the way it operates is actually by sidestepping the central moral issue of the case. The theme creates a conflict between two moral values: a) not torturing innocent people/allies, and b) honoring the gods in their temples. So, by saying that the old man was one of the guilty Olynthians (*ex noxiis*), it removes him from category a). As a result, the speaker can argue his case successfully, but the result is banal, trivial, not connected to any larger issue or principle. The successful *colores* that we saw in Chapter 1 brought new, positive values into consideration: the *sacerdos prostituta* (1.2) could be evaluated positively if her story was transformed into one of divine favor; the man who crippled exposed children and forced them to beg could be portrayed as compassionate. This defense of Parrhasius does not really introduce any

positive values (a private citizen punishing a guilty individual from an allied state is not very generalizable); it merely takes one of the previous categories out of play.

These censures did not fall under a specific category in rhetorical theory, but they do reveal something about the intended purposes of declamation. Declaimers were expected to be learning what behaviors were beyond justifying and could only be defended legally. Speakers who tried to use *colores* on such cases were misunderstanding their purpose, no matter how much they adhered to the minutiae of the rules. A *color* that revised trivial facts in the circumstance of an otherwise heinous act was simply not persuasive; in order to be successful – that is, plausible – *colores* needed to revise the overall portrait of character. They needed to bring the character into conformity with accepted Roman values.

### ***Loss of control and Greek licentia***

We have been arguing that appearing strong, Roman, and in control of the material was the overarching goal of declamation, and that some of the censures for other things, such as implausibility and “ineptitude,” really boil down to this; likewise, the constraints on violating the theme could be treated as trivial if the larger goal was met. If this is true, then we should find passages where the issue of control, or the lack of it – *licentia* (“license, lack of restraint”) – appears more overtly in the text. The next few cases do indeed show a loss of control, either by the character portrayed in the *color*, or by the declaimer himself. A closer examination of these problems and the criticisms they received will lead us to a clearer formulation of what constituted the ideal declamation performance.

One character who fails to project control and confidence is the father in Sen. *Con.* 2.4, as portrayed by Albius. The theme states that this father was being accused of insanity by one of his

sons because he adopted the child of another son by a prostitute.<sup>76</sup> Albucius' defense of the father downplayed his agency in the matter, claiming that the child had simply followed him home: *Albucius ethicos, ut multi putant, dixit – certe laudatum est, cum diceret: exeuntem <me> puer secutus est. Non probabat hanc Messala sententiam: non habet, inquit, fiduciam, si mavult videri recepisse puerum quam adduxisse; et sine ratione est adoptatum esse non quia debuerit, sed quia secutus sit* (“Albucius spoke in character,<sup>77</sup> as many understand it; he was certainly praised when he said, ‘As I was going out, the boy followed me.’ Messala did not approve of this *sententia*; he said, ‘He lacks self-confidence if he wants us to think he let the boy come rather than brought him. It is not a result of rational choice if the boy was adopted not because it was the right action, but because he tagged along,’” 2.4.8 – transl. modified from Winterbottom). Some declaimers liked this *color* because it was realistic, or fit with the father’s presumed character; Seneca does not explicitly take a position, but he seems to call this evaluation into doubt with his parenthetic *ut multi putant* (“as many understand it”). Instead, he counters by citing Messala’s criticism, which is similar to that of Asinius Pollio mentioned in the previous section on *Con.* 4.6 – the father who said *Nescio, sed etiamsi scirem non indicarem*. The thrust of Messala’s point is that a defense should not try to have it both ways, justifying an action at the same time as disclaiming responsibility for it. It would be more in keeping with Roman character to portray the father as taking decisive action and justifying it according to a rational, moral purpose.

A similar fault is seen in the portrayal of the father in *Sen. Con.* 1.8: the theme opens with a law saying that one who has been a *vir fortis* (i.e. publicly recognized for heroism) three times may be free of military service. When a certain young man is in that position and wants to continue fighting, his father forbids him to go out again; when the son refuses to stay home, the father disinherits

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<sup>76</sup> *Abdicavit quidam filium. Abdicatus se contulit ad meretricem; ex illa sustulit filium. Aeger ad patrem misit; cum venisset, commendavit ei filium suum et decessit. Pater post mortem illius adoptavit puerum; ab altero filio accusatur dementiae.*

<sup>77</sup> OLD s.v. *ethicos*: “With dramatic propriety, so as to use words in keeping with the character portrayed.” Cf. also OLD s.v. *ethicus* 2: “Expressive of character, psychological.”

him.<sup>78</sup> One line of argument for the father is to claim that he is acting out of *indulgentia* or extreme fondness for his son. This latter approach would seem to require a rather un-Roman attitude; Seneca explains how some speakers utilized it: *Illi qui amantem patrem induxerunt hoc genere egerunt: "non possum pati, non possum desiderium tui sustinere"* ("Those who brought in a loving father argued like this: 'I cannot bear it, I cannot endure my longing for you'"). Seneca singles out the *color* of a declaimer named Aeschines: *Hoc loco Aeschines ex novis declamatoribus, cum diceret: non me gloria cupidiorum tui fecit, non omnibus admiranda virtus; "confitebor" inquit "adfectus patris, quos ut quisque volet interpretetur: οὕτως ἄν καὶ δειλὸν ἐφίλουν."* *Videbatur hic, dum indulgentiam exprimit, non servasse dignitatem patris* ("At this point in the speech, Aeschines, one of the new declaimers, was saying, 'Your glory did not make me more desirous of you; neither did your virtue which everyone admires.' Then he added, 'I confess my emotions as a father! Let each of you interpret them as he will: I would have loved my son like this even if he were a coward.' Thus Aeschines, while bringing out the father's *indulgentia*, seemed not to have maintained his dignity," 11) The way Seneca reports this statement may also be significant: he does not need to label it explicitly as un-Roman or call attention to the fact that Aeschines was a Greek; indeed, Seneca translates most of the quotation into Latin. But leaving the key offending line untranslated leaves no doubt about its provenance; in fact, putting only this line in Greek may actually call even more attention to it. As we will see further on, this association between the Greeks and the flaws of Roman eloquence is a pervasive one in Seneca, particularly on matters of *licentia* or lack of self-control.

As with other constraints in declamation, we find that even this principle of maintaining control is sometimes violated by good declaimers, those who understand the proper circumstances for it. The exceptions turn out to be revealing. Porcius Latro several times uses *colores* where

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<sup>78</sup> *QUI TER FORTITER FECERIT, MILITIA VACET. Ter fortem pater in aciem quarto volentem redire retinet; nolentem abdicat.*

someone is temporarily stunned or loses his wits. For example, on 1.4, the case of the *vir fortis* without hands who caught his wife with an adulterer, and ordered his son to kill them both in accordance with the law; the son did not, and was disinherited: this is his defense of the son: *Latro descripsit stuporem totius corporis in tam inopinati flagitii spectaculo et dixit: Pater, tibi manus defuerunt, mihi omnia. Et cum oculorum caliginem, animi defectionem, membrorum omnium torporem descripsisset, adiecit: antequam ad me redeo, exierunt* (“Latro told how his whole body was paralyzed at the sight of such an unexpected, outrageous crime; he said, ‘Father, you had no hands; I had nothing at all.’ He described how his vision went dark, his mind failed, all his members became sluggish, and added, ‘Before I returned to my senses, they had escaped,’” 1.4.7). On 7.1, in defense of the son who had been ordered to kill his brother: *Latro illum introduxit colorem rectum in narratione, quo per totam actionem usus est: non potui occidere. Et cum descripsisset ingenti spiritu titubantem et inter cogitationem fratris occidendi concidentem, dixit: noverca, aliud quaere in privignum tuum crimen: hic parricidium non potest facere* (“Latro brought in this straightforward [or possibly: honorable] *color* in his narration and used it through the whole speech: ‘I was not able to kill.’ He described the son staggering breathlessly and fainting at the thought of killing his brother, and then said, ‘Stepmother, look for some other crime in your stepson. This one cannot commit parricide,’” 7.1.20). What makes these *colores* acceptable or even successful? One common factor is that both of them involve sons in relation to paternal authority; both sons had disobeyed the father’s direct order, which puts them in a difficult position in terms of the law and in relation to audience sympathy. However, both times the father’s order was given under extreme circumstances, either in response to a horrific moral outrage (the mother’s adultery) or a murky legal situation (the trial of his brother at home, apparently at the instigation of the stepmother). So in these situations, Latro can portray the son’s loss of control or temporary paralysis as a justifiable response due to moral outrage.<sup>79</sup> The attitude exhibited in these *colores* can be considered good and

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<sup>79</sup> Latro employs a similar *color* on 1.7, in defense of the father who ordered the pirates to cut off his son’s

Roman in the proper circumstances; in fact, one of the outcomes of training in declamation is that one learns what the proper circumstances are.

The other type of loss of control is by the declaimer himself in composing or delivering his speech. This leads directly to the heart of what was considered good and bad in declamation. The ancient discourse about the “decline of eloquence” has been much discussed;<sup>80</sup> Seneca participates in that discourse in his preface, portraying newer declaimers as lazy, libidinous, and effeminate, in continuous decline since Cicero’s day (1.*praef.*:6-10). But it is helpful to set this discourse aside for a moment and continue the line of investigation that this chapter has undertaken: focusing on the rules and constraints on declamation, the circumstances under which they could be broken, and the goals and principles underlying them. Tying these things together allows us to present a more complete picture of the criteria by which declamation performances were evaluated.

The notion of speakers losing control of themselves is seen in several of Seneca’s critiques. For example on 7.6 (the father who gave his daughter in marriage to a slave), he says: *Mirari vos puto quod in hac controversia omnes declamatores mentis suae fuerint. Non fuerunt* (“I suppose you are amazed that all the declaimers stayed in their right mind on this case. Actually, they did not,” 24). This accusation of insanity introduces a section in which Seneca lists several statements from declaimers that he

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hands (after the son had killed one brother who was a tyrant, and the other in adultery, against his father’s pleading); here too *Latro* attributes the father’s harsh order to a sort of temporary insanity. Note that while the character loses control, the delivery requires a great amount of strength and control on the part of *Latro* himself: *Latro totum se ab istis removit coloribus et advocavit vires suas tanto totius actionis impetu, ut attonitos homines tenuerit; hoc enim colore usus est: nescio quid scripserim. olim iam mihi excussa mens est. ex quo vidi filium unum in arce, alterum in adulterio, tertium in parricidio, ex quo respersus sum fili morientis sanguine, ex quo relictus sum solus, orbis, senex, odi meos. hic color illius viribus approbandus est; quanta enim vi opus est, ut aliquis accusando se miserabilem faciat!* (“*Latro* separated himself completely from this type of *color*; he marshalled all his strength for such an onslaught throughout the whole speech that he held the whole audience astonished. This is the *color* he used: ‘I don’t even know what I wrote. I’ve been out of my mind for a long time now. Ever since I beheld one son in the castle, another in adultery, the third in the act of parricide – ever since I was spattered with the blood of my dying son – since I was abandoned alone, bereft, an old man – I hate my own sons.’ This *color* needs all of his forcefulness to make it successful. For what great strength is needed to make oneself pitiable by means of accusations!” 1.7.16). Cf. also 1.1.15: *Non feci ratione, adfectu victus sum. Cum vidissem patrem egentem, mens non constitit mihi ...*; 7.7.15: *De eo quod inscio senatu egressus est, Latro sic coloravit: amentem et attonitum protinus procurrisse.* Both of these involve familial affection.

<sup>80</sup> E.g. George A. Kennedy, *The Art of Rhetoric in the Roman World 300 B. C. – A.D. 300* (Princeton, 1972), 446-64; Sinclair, “Political Declensions in Latin Grammar and Oratory,” 104-5; Fairweather, *The Elder Seneca*, 133-48.

believes deserve censure. Similarly on 7.1 (the father who ordered one son to execute the other), Seneca quotes a discussion amongst the declaimers about whether it was better to accuse the stepmother openly or through insinuation; he goes on to say that many lost control of themselves in implementing these strategies: *Quidam principia tantum habuerunt in sua potestate, deinde ablati sunt impetu. Excusatius est autem in malum colorem incidere quam transire* (“Some had only the beginning under their control, and then were swept away in the delivery. But it is more excusable to stumble into a bad color than to transition to it deliberately,” 20).

Seneca often portrays this loss of control explicitly in terms of stereotypes of the Greeks. A number of scholars have discussed Seneca’s attitudes toward the Greeks in general; Bonner notes that the overall portrayal is negative, though not without exception: “Of the Greek declaimers, poor specimens of a master-race, he has a low opinion; he relegates them to the end of each exercise (perhaps because they declaimed after the Romans?) and frequently criticizes them adversely; yet he is not too prejudiced to give a word of approval for their better efforts.”<sup>81</sup> Fairweather poses the question of whether Seneca had a “patriotic” bias in favor of the Romans. She argues that his criticisms of individual Greek declaimers are no harsher than his criticisms of Romans, and adduces some passages where he praises Greek declaimers. As a summary of Seneca’s views she cites 10.4.23: *Graecas sententias in hoc refero, ut possitis aestimare primum quam facilis e Graeca eloquentia in Latinam transitus sit et quam omne quod bene dici potest commune omnibus gentibus sit, deinde ut ingenia ingeniis conferatis et cogitetis Latinam linguam facultatis non minus habere, licentiae minus* (“I quote the Greek *sententiae* for two reasons: first, so you can see how easy is the transition from Greek to Latin eloquence and how everything

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<sup>81</sup> Bonner, *Roman Declamation*, 147. On the question of Roman attitudes toward the Greeks most broadly, the literature is enormous: some particularly relevant sources are Anthony Corbeil, “Education in the Roman Republic: Creating Traditions,” in *Education in Greek and Roman Antiquity*, ed. Y. L. Too (Brill, 2001), 261-88; Thomas N. Habinek, *The Politics of Latin Literature: Writing, Identity, and Empire in Ancient Rome* (Princeton, 1998); Sarah C. Stroup, “Greek Rhetoric Meets Rome: Expansion, Resistance, and Acculturation,” in *A Companion to Roman Rhetoric*, ed. William Dominik and Jon Hall (Blackwell, 2007), 23-37.

that can be said well is common to both nations; secondly, so you may compare talents/natures with each other and recognize that Latin has no less resource than Greek, though it does have less license” – N. B. some editors move *non* after *licentiae*; more on this below). Fairweather emphasizes the positive side of this, the focus on eloquence as a common property of all nations. She argues that the “cautious weighing up of merits” seen throughout Seneca’s text does not “betoken blind prejudice.”<sup>82</sup>

My argument is that the categories of “prejudice” and “patriotism” miss a larger point: the issue is not Seneca’s fair appraisal of particular declaimers or their statements; it is the fact that he regularly invokes the Greeks as a standard of comparison for Roman faults. Even in the passage just quoted, with its warm positive statement, there is also a linking of the Greeks with *licentia* – which is true *regardless* of where one places the textually uncertain *non*. Whether the bad Roman declaimers have more or less of it, the Greeks are still the standard by which *licentia* is measured. It is true that the Greeks do not always come out on the negative side of a comparison: Seneca tacitly praises earlier Greek rhetoric in the preface to Book 1, where it is the mark which Ciceronian rhetoric was striving to equal or surpass: *Quidquid Romana facundia habet quod insolenti Graeciae aut opponat aut praeferat circa Ciceronem effloruit* (“All that Roman eloquence possessed which could either rival or surpass the haughty Greeks, flourished in Cicero’s time,” 1.praef.6). The terminology here, *insolens Graecia*, is both complimentary and adversarial. After that point, when referring to the rhetoric of his own day, Seneca regularly brings up the Greeks as a negative influence on Roman declaimers. He never gives an explanation for this, or a narrative of decline on the side of Greek rhetoric, or distinguishes clearly between earlier good Greek orators and the contemporary generation of Greek declaimers.

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<sup>82</sup> Fairweather, *The Elder Seneca*, 23-5.

But throughout the text, whenever Seneca compares Romans and Greeks, there is typically a pejorative judgement against the Greeks, overt or implied.

In 1.2, Seneca is criticizing the declaimers who showed too much licence in describing obscenity; he approvingly quotes Scaurus as identifying the Greeks as the source of this vice: *Hoc autem vitium aiebat Scaurus a Graecis declamatoribus tractum, qui nihil non et permiserint sibi et inpetrauerint* (untranslatable word play, but Winterbottom does well: “Scaurus used to say this fault derived from the Greek declaimers, who allowed themselves every license – and got away with it,” 1.2.22). The lurid case of the man who crippled exposed children was popular with Greek declaimers: *Multa ab illis pulchre dicta sunt a quibus non abstinerunt nostri manus, multa corrupte quibus non cesserunt nec ipsi* (“They said many admirable things which the Romans could not keep their hands off of; they said many corrupt things which they themselves proceeded to outdo,” 10.4.18). Those words, *non abstinerunt manus*, again employ the terminology of *licentia* and self-control.

On 10.5, where Parrhasius tortures an Olynthian slave to death in order to paint Prometheus, Seneca seems at first to say that the Greeks were more disciplined than the Romans: they passed up the chance to be clever in defending Parrhasius, apparently based on some moral scruples: *Graeci nefas putaverunt pro Parrhasio dicere; omnes eum accusaverunt, in eosdem sensus incurrerunt* (“The Greeks thought it was abominable to speak on the side of Parrhasius; they all prosecuted him, they all rushed into the same ideas,” 19). However, what Seneca goes on to describe is the Greeks’ complete insanity and license in accusing him. He gives several paragraphs of examples, including the following: *Spyridion honeste <dixisse> Romanos fecit; multo enim vehementius insanit quam nostri phrenetici* “Spyridion made the Romans look respectable: he was much more wildly insane than our lunatics,” 27).<sup>83</sup> (Note also the use of the transliterated Greek word, *phrenetici*.) The more one reads, the clearer

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<sup>83</sup> Spyridion’s offending statement was to claim that vultures flew up to the portrait that Parrhasius had produced. Seneca says this idea from the story of Zeuxis, who painted a boy holding grapes that looked so realistic that

it becomes that Seneca means *nefas putaverunt* ironically: they were so enthusiastic for the other, more sensational side, that it almost seemed that they had a moral compunction against doing anything else. Here the Romans and Greeks struggled in a sort of antiheroic competition at ineptitude; after cataloguing the Greeks' vices, Seneca adds ironically: *Sed nolo Romanos in ulla re vinci: restituet aciem Murre dius, qui dixit: Pinge Triptoleum, qui iunctis draconibus sulcavit auras* ("But I do not want the Romans to be defeated in any contest: Murre dius will restore the battle line, for he said, 'Paint Triptolemus, who ploughed the breeze with yoked dragons,'" 10.5.28).<sup>84</sup>

A statement that serves well to tie Seneca's opinions together is seen on 2.6, the case of the father of a debauched son who became debauched himself, and was accused by the son of insanity.<sup>85</sup>

Towards the end of his discussion, while listing the Greek *sententiae*, Seneca comments:

Agroitas Massiliensis longe vividiorem sententiam dixit quam ceteri Graeci declamatores, qui in hac controversia tamquam rixati sunt. Dicebat autem Agroitas arte inculca, ut scires illum inter Graecos non fuisse, sententiis fortibus, ut scires illum inter Romanos fuisse.

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birds tried to eat them. Of Spyridion, Seneca says: ... *fabula eleganti ad turpem sententiam perductus* ("... [he was] lured by a nice story into a shameful *sententiā*").

<sup>84</sup> Greek declaimers also posed some additional *quaestiones* (lines of argument) which Seneca finds ridiculous. *Con.* 1.7 centers on the law *LIBERI PARENTES ALANT AUT VINCIANTUR* ("Children must support their parents or be imprisoned"); the scenario involves a tyrannicide captured by pirates who wrote to his father for ransom; the father replied that he would give the pirates twice the ransom if they cut off his son's hands; later, the son is charged with failing to support his needy father. After listing the arguments of several Roman declaimers, Seneca says: *Graecorum improbam quaestionem satis erit in eiusmodi controversiis semel aut iterum adnotare: an in tyrannicidam uti pater hac lege possit; quasi sacras et publicas manus esse, in quas sibi ne piratae quidem licere quicquam putent. Nostri hoc genus quaestionis submoverunt* ("The Greeks posed a worthless question which only needs to be mentioned once or twice in this discussion: can a father use this law against a tyrannicide – as though his hands were sacred and public property, and not even pirates would think they are allowed to touch them. The Romans got rid of all these kinds of questions," 1.7.12). He makes a similar observation on the next case, 1.8, which involves a three-time war hero who is being disowned: *Graeci illam quaestionem primam solent temptare, quam Romanae aures non ferunt: an vir fortis abdicari possit. Non video autem quid adlaturo sint quare non possit: nam quod et vir fortis est et totiens fortiter fecit non plus iuris illi adfert, sed plus commendationis* ("The Greeks tend to start with this question, which Roman ears will not put up with: can a *vir fortis* be disinherited. I do not see what arguments they could marshal as to why he cannot. The fact that he is a *vir fortis* and acted bravely so many times does not give him greater legal rights, only greater honor," 1.8.7). These additional *quaestiones* could have been seen as indicating greater intellectual rigor or a desire to explore all possible lines of argument. Yet Seneca reacts to them using quite strong language; to him, they represent excessive quibbling, a failure to move past irrelevant distractions and zero in on the important issues of the case.

<sup>85</sup> *Quidam luxuriante filio luxuriari coepit. Filius accusat patrem dementiae.*

Sententia quae laudabatur haec fuit: ἐπὶ τῆς ἀσωτίας τοῦτο διαπεφωνήκαμεν· σὺ μὲν δαπανᾷς ἡδόμενος, ἐγὼ δὲ λυπούμενος.<sup>86</sup>

While Seneca’s purpose in this passage is to praise Agroitas, who was a Greek, he opens the discussion with a slam at the rest of the Greek declaimers: *tamquam rivalet rixati sunt* (“they brawled like rival lovers”). Gunderson points out that this censure echoes the words of Fuscus Arellius, who had been quoted a few paragraphs earlier as listing *turpes cum rivalibus rixas* (“disgusting brawls with rival lovers,” 9) among the characteristics of debauchery. In Gunderson’s words: “Bringing these two passages together, we can say that [in Seneca’s view] the Greeks play at declamation, but their wantonness is not mere sport: they really are as depraved as they may at times seem. Speakers ought themselves to be serious even if at times they pretend otherwise. Greek extravagance is often no act.” This is a particularly pointed criticism for Seneca to make on a case involving *luxuria*: “these clods are fighting in a rivalry over the best indictment of excess.”<sup>87</sup> After presenting the other Greeks as a negative example of excess and *licentia*, Seneca tells us what was admirable about Agroitas: he spoke with natural, unpolished skill (*arte inculta*),<sup>88</sup> which contrasted with the overly fine quibbling that he could have picked up from the other Greeks; he spoke with strength, vigor, and vitality, such as was characteristic of the Romans (*vividiorē sententiam, sententiis fortibus*). This brief assessment of Agroitas is a microcosm of what Seneca sees as good and bad in the practice of declamation as a whole.

The Greeks are helpful for Seneca because they are a picture of what can go wrong with declamation; it is not about their faults as individuals, or even about how Seneca portrays them as a

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<sup>86</sup> Agroitas from Marseilles delivered a much more vigorous *sententia* than the other Greek declaimers, who brawled in this case like rival lovers. But Agroitas spoke with unpolished skill, so you could see that he had not been with the Greeks, and with strong *sententiae*, so you could see that he had been with the Romans. This is his *sententia* that won praise: “In our debauchery we have this difference: you spend money with joy, I do it with sorrow,” 12.

<sup>87</sup> Gunderson, *Declamation, Paternity, and Roman Identity*, 127.

<sup>88</sup> No doubt Agroitas’ own name (from ἄγροικος, ‘rustic, uncultured’) provided the set-up for this contrast.

group – regardless of whether this is a fair and realistic assessment or not. The important thing is the stereotype: they represent the opposite of self-control, the opposite of Roman self-assertiveness. The Greeks were people who *nihil non et permiserint sibi et inpetraverint* (1.2.22 above): they had no power to say “no” to their own desires, and had no external authority to restrain them. A strong Roman man, by contrast, should not need someone else to tell him, “Ok, you may say this or that in your declamation.” He should be his own arbiter; he should have absorbed the *mos maiorum* so well that he embodies it, so that he produces a correct declamation based on his own internal qualities as a *vir bonus*.

### **III. The ideal declamation performance**

After surveying all of these constraints and censures from Seneca and [Quint.], and also the speeches that we might have expected to be censured, but were not, it becomes possible to elucidate more clearly what Roman teachers and audiences expected from a declamation performance. Stated negatively, the point of declamation was not to teach a student how to parse the theme and make sure that his *color* conformed to it. This was undeniably an important skill, but even in a real case, the value of “facts” was not so high as to justify exclusive focus on them. We tend to associate modern lawyers with a close concern for words and details, but this was not a characteristic of advocates at Rome: as noted earlier, there were important differences between Roman advocates and jurisconsults.

The ideal declamation performance would portray a strong, Roman man in control of the situation and of himself. His task was to confront the chaotic facts he was given and exert control over them. Kaster has talked about how declamation themes typically portray a “social mess”: the rapes and homicides smash “the social surfaces that shape and constrain ordinary life. It becomes the declaimer’s job to put the surfaces back into some sort of acceptable, more or less conventional

order – which is precisely the role for which the declaimer is being trained.”<sup>89</sup> Although different speakers might implement the ideal differently – Latro did not mind if his characters personally were overcome by emotions – still, there was consensus that it was bad to justify un-Roman behavior, or to justify an act at the same time as disclaiming responsibility for it; and also bad for the speaker to lose control of himself in delivering the speech. There was an element of tension arising from the fact that declamation was an emotion-driven genre, noted for its fiery rhetoric and sensational displays of bombast; speakers felt a continual pull in that direction, an impulse to out-do one another in creativity. Balancing this creativity was the constraint, not based on trivial rules imposed externally, but on the need to control oneself as a Roman *vir bonus*. The emotionalism of declamation was supposed to be directed at the audience; in this way, the speaker learned how to remain in control of himself, and to exert this control over others by simulating and manipulating emotions.<sup>90</sup>

### ***A comparison with literary translation***

The fact that Seneca, in assessing the declaimers’ efforts, often chooses to frame them in terms of competition with the Greeks is not an aberration from Roman practice in other fields. A brief comparison with the activity of literary translation shows that the concepts of strength, control, Romanness, and competition with the Greeks are inseparably related there as well.

We possess numerous literary works, complete or in fragments, that the Romans translated from Greek: Livius Andronicus produced an *Oduusia*, condensing the twenty-four books of Homer’s *Odyssey* into one; Plautus and Terence translated the comedies of Menander and other Greek poets;

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<sup>89</sup> Kaster, “Controlling Reason,” 328.

<sup>90</sup> The importance of the right balance between self-control and emotionalism is seen in Seneca’s observation about Fabianus. After his conversion to philosophy, Fabianus became a less effective declaimer because he lost the ability to stir up emotions in the audience: *Cum veros compressisset affectus et iram doloremque procul expulisset, parum bene imitari poterat quae effugerat* (“Since he had suppressed his real emotions and driven grief and anger far away, he was insufficiently able to simulate what he had shunned,” 2.praef.2).

Cicero's *De Republica* translates portions of Plato's *Republic*; at least four Romans during classical times are known to have translated Aratus' *Phaenomena* (Cicero, Varro of Atax, Ovid, and Germanicus Caesar, not counting Manilius' reworking of portions in his *Astronomica*); Catullus translated individual poems of Sappho and Callimachus; Baebius Italicus produced the *Ilias Latina*. The striking thing about these translations is that they follow principles that are utterly unlike those of modern translations. The Latin versions of Homer are like epitomes for large stretches, retelling only key scenes in detail; comic playwrights merged several Greek plays into one (a process known as *contaminatio*); Catullus added a new stanza at the end of Sappho's famous poem. Roman translations of Greek prose works leave out large sections and add other parts in the translator's own voice. In fact, these translators exhibit a degree of inventiveness and creativity that is not unlike what declaimers do in developing a speech out of the narrative kernel of a theme. But there is another, even more important feature that literary translation has in common with declamation. McElduff, in a recent monograph, writes: "The overriding concern of Roman translation was not fidelity or free translation, but control. Roman translators were supposed to be able to dominate and manage their Greek sources, and translate them in ways that showed that control and enabled their own voice to be heard through their new text." The reason they could do this was because the purpose of translation was not to make the text accessible to an audience who could not read Greek. "Romans manipulated their STs [i.e. source texts] so extensively in part because they could: elites frequently translated for other elites who could read the original in Greek if they so wished. In fact, part of the pleasure of reading a translation was seeing what changes had been made and how skillfully they had been done."<sup>91</sup> Roman translators thus in that respect differed from the relatively

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<sup>91</sup> Siobhán McElduff, *Roman Theories of Translation: Surpassing the Source* (Routledge, 2013), 10-11.

anonymous modern translators, who strive to efface their own personality and style from the translation and allow the original to shine through as clearly as possible.

This loss of individual personality was, in fact, precisely what the Roman literary translator sought to avoid. The self-effacing style was associated with translations done by scribes for official purposes, such as inscriptions and legal treaties. With its slavishly literal focus on individual words, it also evoked a connection with the *grammaticus*, who, as we have seen, was at a level of society below the rhetorically-trained elite. McElduff demonstrates how these attitudes are seen in Cicero's writings about translation. In *De Finibus* 3.15, Cicero seems at first glance to be simply weighing the merits of free versus literal translation: *Nec tamen exprimi verbum e verbo necesse erit, ut interpretes indiserti solent, cum sit verbum, quod idem declarat, magis usitatum. Equidem soleo etiam quod uno Graeci, si aliter non possum, idem pluribus verbis exponere* ("Though all the same it need not be a hard and fast rule that every word shall be represented by its exact counterpart, when there is a more familiar word conveying the same meaning. That is the way of a clumsy interpreter. Indeed my own practice is to use several words to give what is expressed in Greek by one, if I cannot convey the sense otherwise." – transl. by Rackham, modified). McElduff argues that more is at stake for Cicero than just clarity of expression; the key for him is that interpreters are *indiserti*, which in context has the connotation of "not rhetorical." With their focus on weighing individual words, they did not rise above the level of the *grammaticus*. A writer of Cicero's level of accomplishment would be expected to rework the text at a higher level, demonstrating his expert knowledge and skill at oratory.<sup>92</sup> In McElduff's words, "Cicero translates the way he does out of regard for his own status as an elite orator/translator rather than out of concern for rendering the meaning of the Greek. There was nothing worse than

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<sup>92</sup> McElduff, *Roman Theories of Translation*, 115-6.

becoming the parrot of another writer (as the interpreter was of a speaker).”<sup>93</sup> Instead, Cicero takes control of the content of the Greek text and makes it his own.

The element of competition with earlier Greek literature is seen in Seneca as well. In 9.1.13, Fuscus Arellius is criticized for borrowing and translating a *sententia* from the famous Greek rhetorician Adaeus.<sup>94</sup> Fuscus responds with a statement of translation philosophy: *Aiebat non commendationis id se aut furti sed exercitationis causa facere. Do, inquit, operam ut cum optimis sententiis certem, nec illas corrumpere conor sed vincere. Multa oratores, historici, poetae Romani a Graecis dicta non subriperunt sed provocaverunt* (“He said that he did not do it in order to plagiarize, but for practice. ‘I always try to do battle with the best *sententiae*; not to corrupt them but to conquer them. Many Roman orators, historians, and poets have – not stolen sayings from the Greeks, but challenged them to combat”).<sup>95</sup> Fuscus then quotes a line attributed to Thucydides that had been borrowed by reworked by Sallust: *δειναὶ γὰρ αἱ εὐπραξίαι συγκρύψαι καὶ συσκιᾶσαι τὰ ἐκάστων ἀμαρτήματα* (“For successes have a wonderful way of covering and overshadowing each person’s flaws”).<sup>96</sup> Sallust changes this to: *Res secundae mire sunt vitiis obtentui* (“Successes are a wonderful cover for vices,” *Sal. Hist.* 1.55.24 Maurenbrecher). Further analysis follows in Seneca’s voice (though he may be summarizing Fuscus):

Cum sit praecipua in Thucydide virtus brevitatis, hac eum Sallustius vicit et in suis illum castris cecidit; nam in sententia Graeca tam brevi habes quae salvo sensu detrahas: deme vel συγκρύψαι vel συσκιᾶσαι, deme ἐκάστων; constabit sensus, etiamsi non aequè comptus, aequè tamen integer. At ex Sallusti sententia nihil demi sine detrimento sensus potest.<sup>97</sup>

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<sup>93</sup> McElduff, *Roman Theories of Translation*, 118.

<sup>94</sup> Adaeus: ἀχάριστός σοι δοκῶ, Καλλία; οὐκ οἶδας ποῦ μοι τὴν χάριν ἔδωκας; (“Do you think I am ungrateful, Callias? Don’t you know where I was when you gave me the benefaction?”). Fuscus: *Non dices me, Callia, ingratum: unde redemeris cogita* (“Don’t call me ungrateful, Callias. Consider where you ransomed me from”).

<sup>95</sup> The last sentence is found only in the *excerpta*, and is assigned here by Winterbottom following Castiglioni.

<sup>96</sup> Winterbottom’s note points out that this is not really from Thucydides, but from pseudo-Demosthenic *in Ep. Phil.* 13, based on *Ol.* 2.20.

<sup>97</sup> “While Thucydides’ chief virtue is brevity, Sallust has beaten him in this very thing and defeated him in his own camp. For in the Greek *sententia*, short though it is, you find things that could be removed; if you take out

Seneca goes on to observe that Livy criticized Sallust for this borrowing, but for selfish reasons: *nec hoc amore Thucydidis facit, ut illum praeferat, sed laudat quem non timet et facilius putat posse a se Sallustium vinci, si ante a Thucydide vincitur* (“He does not do this out of love for Thucydides, in order to extoll him. Instead, he praises an author that he does not fear, because he thinks that he himself can beat Sallust more easily if Sallust has already been beaten by Thucydides, 14). Roman speakers and writers are competing against each other at the same time that they are competing against the Greeks.

In more general terms, then, Roman literary translation shares some of the same preoccupations we have observed in declamation: avoiding the slavish literalism of a *grammaticus* or *interpres*,<sup>98</sup> portraying oneself as an elite Roman in charge of the material, and competing with the Greeks, although this third point took somewhat different forms in the two fields. A literary translator deals directly with a Greek text, which he strives to recreate and improve in Latin. In declamation, by contrast, instances of direct translation like Seneca discusses above are rarely encountered; the “Greekness” of declamation is found in the very source material of the themes, many of which show traces a Greek cultural milieu or contain laws of Greek origin.<sup>99</sup> So it is interesting that Seneca provides no acknowledgment of this Greek background, either because he

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‘covering,’ ‘overshadowing,’ or ‘each person’s,’ the sense will be the same – perhaps not as nice, but just as complete. But from Sallust’s *sententia* nothing can be removed without changing the meaning,” 13.

<sup>98</sup> Declamation in relation to *grammatici* has been discussed previously. Its relation to interpreters and the Greeks receives an explicit mention in Sen. *Con.* 9.3.14. Seneca notes that Clodius Sabinus declaimed in both Greek and Latin on the same day, and some wondered why he did not get paid extra because he taught two subjects; in response to them, Haterius quipped: *Numquam magnas mercedes accepisse eos qui hermeneumata docerent* (“People who teach interpreting have never made a lot of money,” 9.3.14). Thus, Sabinus’ display of bilingual skill is denigrated to the level of interpreting. He also received derision from other members of declamatory community: Maecenas quoted a line of Homer in Greek, *Τυδείδην δ’ οὐκ ἄν γνοίης ποτέροισι μετεΐη* (“You would not have known which side the son of Tydeus was fighting on,” *Il.* 5.85) – once again bringing in a metaphor of mock-heroic combat between Greeks and Romans. Cassius Severus, when asked how Sabinus had performed, replied, *Μαλε καὶ κακῶς* (“Badly” – in both languages).

<sup>99</sup> On the Greek origins of themes, see Fairweather, *The Elder Seneca*, 104-31.

did not know about it, or because he chose not to mention it.<sup>100</sup> From one point of view, it could be said that Roman competition with Greek declamation has already been completely successful: the Greek antecedents of the practice have been erased entirely from Roman declaimers' consciousness. Instead, the need to compete against the Greeks resurfaces in another arena: in Seneca's text, it is directed against the Greek declaimers of his own day, who come to serve as a stand-in for all that is corrupt and un-Roman about contemporary rhetoric.

#### IV. Conclusion

It is well known that declamation provided training for elite Roman men,<sup>101</sup> and one of the things this chapter does is show specifically how it did that. While all genres must have rules or constraints in order to keep them recognizable, the constraints of declamation work toward certain more or less clearly defined goals: for the courtroom, students learned to raise disputes about the law and to make legal arguments; they also learned that they did not need extensive legal knowledge: their role as advocates was tacitly yet practically distinguished from that of a *grammaticus* on one hand and a *iurisconsultus* on the other. They learned to place the proper amount of emphasis on facts, witnesses, and evidence: for their own side, they gained practice at searching for or inventing details which, if established, would help the case. In response to the other side, they learned how facts could be trumped by portrayal of character. These lessons had applicability outside the courtroom as

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<sup>100</sup> Fairweather, *The Elder Seneca*, 115, argues for the former position: "About the Greek background to the declamatory practices of his own time Seneca the Elder seems to have had only the vaguest knowledge. He tells us that declamation was unknown in the time of Aeschines (*Con.* 1.8.16), misinformation most probably derived from tirades by critics of the schools, such as Petronius puts into the mouth of one of his characters in *Sat.* 2, to the effect that the great figures of classical Greek literature had managed perfectly well without declamation . . ." She notes that Seneca does show awareness of some Greek technical terms. "But he nowhere refers explicitly to the debt owed by Rome to Greek educational methods or shows any sign of having made a clear assessment of it."

<sup>101</sup> Cf. Habinek, *The World of Roman Song*, 113, on the importance of "play" (*ludus*) in Roman culture: "[T]he authority of oratorical practice in the forum derives from the school, and not the other way around. It is school that makes the ability to speak, dress, gesture – in short, perform in a certain way – the mark of a 'good,' (i.e. successful), high-status orator."

well. The need for plausibility in argumentation taught social expectations for what usually occurs, for how certain classes of people are likely to behave. Through the need to maintain control and avoid Greek *licentia*, declaimers learned how to manage their public image: how to define themselves as Romans in contrast to the Greeks, and make appropriate use of Greek knowledge and culture. They learned specifically what was considered “good taste,” in keeping with this image, and what was not: the distinctions were so subtle that it is impossible for modern readers to articulate them just from the texts of Seneca and [Quint.].

In the earlier times of the Roman republic, much of this training would have been done through the *tirocinium fori*, a sort of apprenticeship that allowed a young man to learn directly from a practicing orator. Now, there were diminished opportunities for students to become orators and participate in the political process, but similar kinds of practice and acculturation were provided by schools of rhetoric. The system of rhetorical education exerted control over its students, with certain types of rules and harsh censures; at the same time, these students were being taught when they could exert their own will and ignore the rules. The goal would have been for them first to internalize the entire system of Roman elite evaluation (and the rules imposed on them taught them to do this); then, when they had arrived and become full elites themselves, they could turn outward and exercise control over those beneath them – women, slaves, Greeks, provincials. Bloomer argues that through declamation, “the boy was learning to command; he was rehearsing the role of slave owner, father, advocate, all the roles of *paterfamilias*.”<sup>102</sup> As new generations of Roman elites were trained on these methods, traditional values were transmitted, but they were practiced in new ways and applied to new types of situations.

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<sup>102</sup> Bloomer, “Schooling in Persona,” 58.

But this chapter also returns focus to the ethical component of declamation. The constraint on banality taught what kinds of behavior were beyond justifying, and could only be defended on straight legal grounds. Practitioners of declamation learned not to rely too heavily on verbal trickery, cleverness of argumentation, or generally evading responsibility for actions. The characters in declamation were expected to take responsibility for their moral choices. Naturally, the concept of moral responsibility was subjected much more sophisticated scrutiny by philosophers: Aristotle wrote the *locus classicus* on voluntary and involuntary actions and their implications for *prohairesis* (“choice”), responsibility, praise, and blame (*Nicomachean Ethics* 3.1-5 = 1110a-1115a). Declamation characteristically taught this through concrete scenarios instead of in the abstract. It showed students how to make moral judgments in keeping with the the elite Roman value system, and also, practically, how to portray their client as a strong, responsible moral agent in court.

### CHAPTER 3

#### INTERSECTIONS OF FICTIONALITY AND FACTUALITY IN DECLAMATION

Declamation stages debates about ethical issues within a fictional world. In principle, ethical debates about a fictional world should be no different from those about the real world, provided that one suspends disbelief about its unreality and evaluates it according to the same ethical standards as the real world. Roman declaimers do this, for the most part; however, they occasionally betray an awareness that the events of the theme are implausible by real-world standards, and exploit this recognition for argumentative purposes. This becomes more significant when we consider how declaimers applied supposedly real Roman historical *exempla* to the fictional world of declamation. When declaimers are uncomfortable with the moral implications of an *exemplum* – for instance, the stern fathers of Early Rome who killed their sons – they could exploit the implausibility or malleability of the theme in order to make the *exemplum* less applicable. This chapter also shows that declamation does not stage debates directly about the received versions of *exempla*. In contrast to the historians, who continued to debate and reshape the meaning of Roman history, rhetoricians and declaimers by this time treated the *exempla* as fixed and not open to contestation.

The fictionality of the declamatory world has been discussed since ancient times, often as a point of criticism. In Petronius *Satyrica* 1-2, Encolpius makes it the centerpiece of his “declamation” against declamation,<sup>1</sup> addressed to the rhetorician Agamemnon:

Et ideo ego adulescentulos existimo in scholis stultissimos fieri, quia nihil ex his quae in usu habemus aut audiunt aut vident, sed piratas cum catenis in litore stantes, sed tyrannos edicta scribentes quibus imperent filiis ut patrum suorum capita praecidant, sed responsa in pestilentiam data ut virgines tres aut plures immolentur, sed mellitos verborum globulos, et omnia dicta factaque quasi papavere et sesamo sparsa. Qui inter haec nutriuntur non magis sapere possunt quam bene olere qui in culina habitant.<sup>2</sup>

Similar criticism, in a more serious vein, is voiced by Messalla in Tacitus’ *Dialogus de Oratoribus*.<sup>3</sup>

Modern critics until fairly recently have tended to follow the ancient line; as one example among many, Conte observes, “The imaginary plots of declamations are like little novels, narratives of stupefying artificiality.”<sup>4</sup> In the Introduction to this dissertation, we looked at some explanations that have been offered for the purpose of declamation as a whole, and its unreal themes in particular.

The earliest answer comes from Quintilian, who argued that the fantastic subject matter could be useful in small doses in order to maintain the students’ interest; beyond that, however, he thinks the

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<sup>1</sup> These are the words of Encolpius the narrator, who says after the end of the speech: *Non est passus Agamemnon me diutius declamare in porticu...* (“Agamemnon did not let me stand there declaiming any longer in the portico,” 3). For further discussion, see Fairweather, *The Elder Seneca*, 299, and Gunderson, *Declamation, Paternity, and Roman Identity*, 9-12 and 140: “The critique of declamation is itself declamatory.”

<sup>2</sup> “And this is why I think our young men become complete idiots in the rhetorical schools: they neither hear nor see anything of what we have in daily life; it is all about pirates standing in chains on the shore, about tyrants giving orders for sons to chop off their fathers’ heads, about oracles stating that three or more virgins must be sacrificed to stop a plague. It is all sticky-sweet globs of words, and everything sprinkled over with poppy seeds and sesame. I tell you, people who are raised on such a diet cannot have good taste any more than those who live in a kitchen can smell good.”

<sup>3</sup> (Scil. *controversiae*) *Quales, per fidem, et quam incredibiliter compositae! Sequitur autem ut materiae abhorrenti a veritate declamatio quoque adhibeatur. Sic fit ut tyrannicidarum praemia aut vitatarum electiones aut pestilentiae remedia aut incesta matrum aut quidquid in schola cotidie agitur, in foro vel raro vel numquam, ingentibus verbis persequantur ...* (“What strange and unbelievable scenarios! And then a declamation is based on this material which is already so contrary to reality. Thus it turns out that the rewards of tyrannicides, or the choices of raped girls, or remedies for plagues, or incestuous affairs of mothers, or all those things that come up every day in rhetorical schools and rarely or never in the forum, are hashed out in the most grandiloquent language.”)

<sup>4</sup> Gian Biagio Conte, *The Hidden Author: An Interpretation of Petronius’ Satyricon* (Berkeley, 1996), 49. Referenced by Gunderson, *Declamation, Paternity, and Roman Identity*, 11-12, who notes that that modern accounts often treat Petronius’ satire as factual information about declamation; for instance, the “pirates in chains on the shore” are frequently referenced, but that detail is not found in any extant declamation theme or quotation.

themes should be kept as close as possible to things that could occur in real cases (*Inst.* 2.10, 2.20.4). Writers in the last century, especially Lanfranchi, Parks, and Bonner, have tried to identify similarities between declamatory laws and real Roman laws; Bonner concludes that the majority have at least some connection. He describes the chaos and upheaval in the Roman world at the time, pointing out that piracy remained a problem, people did get raped or poisoned, and so forth.<sup>5</sup> But Crook argues that this is missing the point; a sufficient explanation can be found in the fact that declamation taught legal reasoning; for this purpose, fictional scenarios were just as useful as realistic ones.<sup>6</sup> Kaster has focused on declamation's role in the acculturation of elite young men: the fantastic themes taught them how to fix the "social mess," and showed them repeatedly that Roman tradition and convention were sufficient for resolving even "the most startling, novel, or extravagant circumstances."<sup>7</sup> Most recently, Bernstein and Lentano have argued convincingly that the fantastic scenarios and mimesis of legal conflict were useful for exploring ethical issues, particularly those at the fringes of what was covered by laws at the time.<sup>8</sup> On this view, the declamatory world was useful for ethical debates precisely because it was detached from the real world: it allowed the exploration of hypothetical situations, which tested the limits of the Roman *mos maiorum*.

These accounts have value in looking at what purpose the unreal subject matter served for the original audience. Another recent approach is to investigate the fictionality of declamation using the tools of narratology. Mal-Maeder analyzes connections between the declamatory world, the world of the declaimers, and the texts through which we encounter it: the themes introduce characters, who are then acted out by declaimers by giving a speech in their persona; this speech may

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<sup>5</sup> Bonner, *Roman Declamation*, 33-7.

<sup>6</sup> Crook, "Once again the *controversiae* and Roman law"; *Legal Advocacy in the Roman World*.

<sup>7</sup> Kaster, "Controlling Reason," 325.

<sup>8</sup> Bernstein, *Ethics, Identity, and Community*, 5; Lentano, "Un nome più grande di qualsiasi legge," 566.

contain intertextual references to speeches by other declaimers, or to outside works of Latin literature; the speeches are then recorded or summarized by Seneca or [Quint.], and made part of a collection in keeping with still other aims and goals.<sup>9</sup> She also explores connections between declamation and overtly fictional genres such as the ancient novel. Nevertheless, for much of her work Mal-Maeder maintains a broad perspective on the genre as a whole, identifying and classifying features that are common across the corpus of declamations, rather than delving deeply into specific cases and ways that declaimers interact with the fictionality of the theme.

The question of whether declamation would have been better off without so many pirates and murderous stepmothers has been debated at length and probably does not have one right answer. A more profitable line of inquiry is to look at some specific areas where the fictionality of declamation becomes important: when declaimers openly show awareness that the scenario is implausible, and when the scenario intersects with the *exempla* of Roman history. Chapter 2 talked about implausibility as a factor in criticizing *colores*; the present discussion is about how declaimers applied it to the events of the theme.

## I. Plausibility and the events of the theme

Fictional worlds may be compared with the real world in terms of both the realism of events and their ethical evaluation. That is to say, when a reader or viewer encounters a work of fiction, he or she brings along a set of knowledge about his or her own world, which is applied to form an understanding of the fictional world.<sup>10</sup> Marie-Laure Ryan has formulated a “principle of minimal departure,” by which “we construe the world of fiction and of counterfactuals as being the closest possible to the reality we know. This means that we will project upon the world of the statement

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<sup>9</sup> Mal-Maeder, *La fiction des déclamations*.

<sup>10</sup> On this topic, Pavel, *Fictional Worlds* (Harvard, 1986).

everything we know about the real world, and that we will make only those adjustments which we cannot avoid.”<sup>11</sup> Even when readers recognize that a fictional world differs from their own world in certain ways, this does not necessarily stop them from immersing themselves in it anyway. Readers may suspend disbelief and accept the fictional world on its own terms, evaluating it for its internal consistency, playing along with events as they are presented within that world, recognizing that there may be different standards of what regularly or normally occurs.

Likewise regarding morality, readers can evaluate fictional events according to the ethical standards which they actually hold, or they may suspend these and imagine a world where different morality applies. Landy summarizes an interesting ongoing debate about the extent to which readers may permanently change their ethical outlook through reading or experiencing fiction. Some have argued that fiction can bring moral improvement, but that the reverse is not true: when faced with a fictional world where, say, murder is a positive value, readers exert an “imaginative resistance” and remain unaffected by the values they reject.<sup>12</sup> Landy brings in the counterexample of Mafia fiction: “Far from resisting the different, sometimes opposite, values of the fictional world, we positively delight in trying them on for an hour or two, like a carnival costume.”<sup>13</sup> His own view is that the moral impact of fiction must be symmetrical; in and of itself fiction can have neither a positive nor a negative moral influence. Instead, what fiction can do is reinforce or bring greater awareness of the moral views that readers already hold.

Participants in declamation had to be aware of both these categories, realism and morality; but there was a certain underlying contradiction. The fact that declaimers were engaging in legal

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<sup>11</sup> Marie-Laure Ryan, “Fiction, Non-Factuals and the Principle of Minimal Departure,” *Poetics* 9 (1980), 406, quoted by Pavel, *Fictional Worlds*, 87-88.

<sup>12</sup> Landy, *How to Do Things With Fictions*, 29-30. The term “imaginative resistance” is from Tamar Gendler. Landy also places David Hume and Martha Nussbaum in this group of theorists, although of course there is a great deal of nuance and complexity to their views.

<sup>13</sup> *Ibid.*, 30.

debates required them to take the fictional world seriously on a moral level: to accept the high stakes of the situations, to evaluate actions according to the Roman *mos maiorum*, and to simulate moral outrage at violations. There was no question of adopting a fictional ethical code; while the exuberant descriptions of torture and sexual crimes may have been entertaining for speakers and audiences, just like the Mafia stories in Landy's example, it is clear that the moral standards in the declamatory world were supposed to be those of the real Roman world.<sup>14</sup> Declamation was designed to instill and reinforce those standards. The contradiction, however, arises from the way in which participants had to view the reality of events: in evaluating individual situations, they were expected to disregard the strangeness of the declamatory world as a whole. In a way, the rules of the game expect them to set aside Laure's "principle of minimal departure" – that is, they were supposed to accept the tyrants and pirates and contrived, paradoxical situations as normal *for that world*, and refrain from projecting upon it the knowledge that these things would not be normal for their own world. The unstated principle was that declamations took place in a world where those types of things just happened. Thus, the rules of the game required a sort of balancing act on the part of the declaimer: recognizing that normality in the declamatory world was different from their own, but the same morality applied. This section looks at some exceptions or refusals to follow that balancing act, where declaimers seem to import their expectations of normality along with the standards of morality, and point out, in effect: "In our world, this would not normally happen; if it did, it would have some significance beyond mere chance." And they apply that significance to their moral or legal argumentation: for instance, claiming that the events were the result of divine involvement, or the conscious plan of some character, or collusion between characters.

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<sup>14</sup> It would, in fact, be hard to think of any genre in Roman literature where fictional ethical standards are envisioned. The protagonists of Petronius' *Satyricon* exhibit very un-Roman actions and attitudes, but the interpretation of the work is much disputed.

Ancient rhetoric had a tradition of examining the plausibility of events: as discussed briefly in Chapter 2, this came from the concept of *eikos* in Greek rhetorical theory. There were some similarities but also key differences from what we see in declamation. *Eikos* arguments are introduced perhaps most clearly in Antiphon's *First Tetralogy*: a set of corresponding speeches, two by the prosecution and two by the defense, of a fictional murder case. The prosecution argues that all the circumstantial evidence points to the defendant as the likely murderer; the defendant reverses the argument and claims this very evidence makes it unlikely that he would have committed the crime, as he would have known that he would be the prime suspect. *Eikos* arguments were available any time the case was conjectural, i.e. asking "Did he do it or not?", and there was no direct, factual evidence available. The *First Tetralogy* seems designed to highlight the paradox of this type of argumentation, and to show that other evidence, such as the testimony of witnesses, would be more compelling if it were available.<sup>15</sup> Antiphon does not employ *eikos* argumentation in the *Second Tetralogy*, which is not a conjectural case, and instead deals with imputation of responsibility for an accidental killing.

The concept of *eikos* in Greek is closely linked to social expectations. Translating the word as "likely" or "probable" in English can be misleading, as these terms presuppose a frequency-based understanding of probability that did not, in fact, arise until the 17<sup>th</sup> century. Hoffman, based on a lexical study of 394 occurrences of the lemma ἔοικα from Homer through Isocrates, argues that the core idea of the word is "to be similar," and that other meanings arise by extension. Particularly, in relation to judgments about "the occurrence of events and/or the truth of accounts: an account has the quality of verisimilitude when it *resembles* or is *similar* to what is known to be true."<sup>16</sup> When

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<sup>15</sup> Tindale, *Reason's Dark Champions*, 74.

<sup>16</sup> Hoffman, "Concerning *Eikos*, 3. His account of the development of frequency-based probability in the 17<sup>th</sup> century draws upon Ian Hacking, *The Emergence of Probability* (Cambridge, 1975).

employed in rhetoric, an argument from *eikos* usually centers around a claim that actions fit a particular profile: “Social expectations, because they have nearly the force of truth, have a large role to play in judgments of verisimilitude. They often define a ‘profile’ against which accounts are compared. If the characters and events of a courtroom account seem typical in that they describe events that the audience would expect under the circumstances, then the narrative is *eikos*, and apparently true. It ‘fits the profile.’ If the characters and events are strange and atypical, then the narrative is not *eikos*, and apparently false. It does not fit the profile.”<sup>17</sup> The same sense can be seen in Latin rhetoric as well, for instance, in the young Cicero’s definition: *Probabile autem est id quod fere solet fieri aut quod in opinione positum est aut quod habet in se ad haec quandam similitudinem, sive id falsum est sive verum* (“‘Probable’ means something that usually happens or that is believed to by general opinion or that has within itself some similarity to these things, regardless of whether it is false or true,” *De Inv.* 1.46). Chapter 2 discussed how declaimers sometimes use the word *verisimile* in evaluating *colores* – again showing how the concept of “similarity” or “conformity to what usually happens” is central.

The key difference between declamation and cases like Antiphon’s *First Tetralogy* is that most declamation cases were not conjectural – that is, they did not center on questions of fact. Instead, as noted elsewhere, most declamations are designed to set up conflicts between ethical values or to weigh the importance of social goods.<sup>18</sup> For those that were conjectural, we do see *eikos*-type arguments, such as Sen. *Con.* 7.5 and [Quint.] 321, both dealing with mutual accusations of murder

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<sup>17</sup> Hoffman, “Concerning *Eikos*,” 21. Cf. also Tindale, *Reason’s Dark Champions*, 82: *Eikos* arguments “tap into [the audience’s] general fund of knowledge concerning the customs of their society, their community, and how they know people to generally behave.”

<sup>18</sup> Roller, “*Color*-blindness,” 113. Kaster, “Controlling Reason,” 319-20 also notes a “tendency for the conflict to derive, say, from the application of contradictory laws or from a distinction between the letter and the spirit of a law.”

and only circumstantial evidence.<sup>19</sup> On these types of cases, *eikos*-arguments are appropriate: the declaimer gains practice at manipulating the circumstantial facts and creating a generally believable version of events. However, only a few *controversiae* are like this; probably it was not useful to have too many cases that dealt with questions of fact, since the details needed to be too precise and could not be verified anyway.<sup>20</sup> It is the non-conjectural cases that concern us here, because on these cases, declaimers do occasionally bring in the concept of implausibility, directed not toward the adversary's version of events – as would be expected in a conjectural case – but toward the events of the theme itself. Since the claim of implausibility is not the central issue of the case (“Did he do it or not?”), it is in that sense optional, serving some other purpose in the argument – which makes it all the more significant, as the following examples will illustrate.

Chapter 1 looked in detail at the case of the *sacerdos prostituta* (Sen. *Con.* 1.2) – the girl who was captured by pirates, sold to a pimp and made a prostitute, killed a soldier who was attempting to use her services, was acquitted of murder, and finally seeks a priesthood.<sup>21</sup> The case hinges on whether the girl can meet the definition of *casta* that the declamatory law requires for priestesses; the question of fact – whether or not she is technically a virgin – is only ancillary. Now, this scenario is based on the kind of fantastical, improbable series of events that is characteristic of declamation themes, and which would rarely if ever happen in real life, all to the same person. Some speakers, instead of taking the events as normal for the declamatory world, import real-world standards of

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<sup>19</sup> Discussed by Fairweather, *The Elder Seneca*, 111-13. The reverse *eikos* argument is rarely seen in Roman oratory, as pointed out by Andrew Riggsby, “Appropriation and Reversal as a Basis for Oratorical Proof,” *Classical Philology* 90.3 (1995): 253 n. 34.

<sup>20</sup> Cf. Fairweather, *The Elder Seneca*, 158.

<sup>21</sup> SACERDOS CASTA E CASTIS, PURA E PURIS SIT. *Quaedam virgo a piratis capta venit. Empta a lenone et prostituta est. Venientes ad se exorabat stipem. Militem qui ad se venerat, cum exorare non posset, colluctantem et vim inferentem occidit. Accusata et absoluta remissa ad suos est. Petit sacerdotium* (“A PRIESTESS MUST BE CHASTE FROM AMONG THE CHASTE, PURE FROM AMONG THE PURE. A virgin was captured by pirates and sold. She was bought by a pimp and made a prostitute. She persuaded the clients who came to her to give her alms. When she was unable to persuade a soldier who had come to her, as he was struggling and applying force she killed him. She was accused and acquitted, and then sent back to her family. She seeks a priesthood”).

normality and attribute the girl's experiences to divine involvement: the gods led her through the misfortunes, preserving her chastity, in order to display her as their clear choice as priestess. This was the *color* of Fuscus Arellius, as summarized by Seneca: *Voluerunt di immortales in hac puella vires suas ostendere, ut appareret quam nulla vis humana divinae resisteret maiestati: putaverunt posse miraculo esse in captiva libertatem, in prostituta pudicitiam, in accusata innocentiam* ("The immortal gods wanted to display their strength through this girl, so it might be clear that no human force could resist the divine majesty. They thought it would count as a miracle for there to be in a captive, freedom; in a prostitute, chastity; in a defendant, innocence," 17). These defenses of the *sacerdos prostituta* seem to have met with some success, because, as Chapter 1 discussed in detail, there were parallels in Roman exemplary literature. Revising the narrative brought it into accord with exemplary stories of divine involvement, and thus the girl could receive a favorable evaluation. Other claims of divine involvement based on implausibility are seen in Sen. *Con.* 1.3, the *incesta de saxo*.<sup>22</sup> It would be unlikely for the girl to survive her fall from the rocks, and therefore some speakers claim that the gods protected her in order to vindicate her innocence. Both of these themes seem designed to allow these argumentative possibilities, and – particularly in the latter case – give practice at refuting them. So the application of plausibility here does not seem out of place.

Several other cases reveal the extent to which the notion of plausibility depended on culture-specific expectations; in fact, these themes, both involving rape, almost seem designed to reinforce a particular societal stereotype.<sup>23</sup> Sen. *Con.* 1.5 is the case of a young man who raped two girls in the same night; declamatory law allows a *rapta* to choose either the *raptor's* death, or marriage to him

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<sup>22</sup> *INCESTA SAXO DEICLATUR. Incesti damnata, antequam deiceretur de saxo, invocavit Vestam. Deiecta vixit. Repetitur ad poenam* ("LET AN UNCHASTE WOMAN BE THROWN DOWN FROM THE ROCK. A woman convicted of unchastity appealed to Vesta before being thrown down. She was thrown down and survived. She is sought for punishment again").

<sup>23</sup> On the rape cases in declamation, see Brescia, *La donna violata*.

without dowry; in this instance, one of the girls chooses death, the other chooses marriage.<sup>24</sup> This is another one of those themes that tend to surprise modern readers due to the fantastic, far-fetched nature of the events. So it is particularly fascinating to note what aspect of the case the Roman declaimers single out as implausible: it is not the unlikely or sensationalized collocation of circumstances; it is the fact that one of the girls chose marriage. Cestius Pius says, *Quantum suspicor, ne rapta quidem es. Quaeris argumentum? Non irasceris* (“According to my suspicions, you were not even raped. Do you ask for proof? You are not angry,” 1). Again in the *colores* section: *Cestius et coniecturalem quaestionem temptavit: an haec cum raptore colluserit et in hoc rapta sit, ut huic opponeretur* (“Cestius also tried a conjectural question: Did she collude with the *raptor* and allow herself to be raped for this very purpose: so she could be set against the other girl?” 8). Pompeius Silo exclaims, *At quam benemimum egit, quomodo raptam se quæsta est, qua vociferatione! quam paene illi optione cessimus!* (“But how well she acted the part! How she complained of rape, how she screamed! How near we came to letting her have her choice!” 2 – transl. by Winterbottom, modified). Fuscus Arellius senior puts the same thought into overblown poetic terms: *Retro amnes fluant, sol contrario cursu orbem ducat, confugiat sacrilegus ad aras: raptorem rapta vindicat!* (“Let rivers flow backward, let the sun trace its course in the opposite direction, let the sacrilegious take refuge at the altars: a *rapta* is sparing her *raptor!*” 2). Thus, he puts the idea of a *rapta* choosing marriage in the same category as impossible things in nature. These arguments work toward a conclusion that would scarcely occur to a modern audience: that one girl conspired with the rapist in order to provide him cover for the other rape he intended to commit.<sup>25</sup>

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<sup>24</sup> I follow the convention of using *raptor* and *rapta* instead of “rapist” and “victim,” in order to avoid misleading modern associations.

<sup>25</sup> Or had already committed; the question of what order the rapes occurred does not arise in the material Seneca quotes. Since the theme does not provide this information, it would have been difficult to make much of an argument in either direction.

Other rape cases also contain arguments about collusion, based in turn on the perceived implausibility of events as stated in the theme. In fact, in any case where a *raptā* chooses marriage, someone is typically there to argue for collusion.<sup>26</sup> The same is seen on Sen. *Con.* 2.3, involving not the girl's choice, but that of her father: the theme states that a *raptor* must win pardon from both his own father and the girl's father within thirty days or be executed; a certain *raptor* wins over the girl's father but not his own; he accuses his father of insanity.<sup>27</sup> Here the declaimers show a striking unanimity, according to Seneca, in rejecting the possibility that the *raptor* had legitimately won over the girl's father: *Omnes infamaverunt raptae patrem quasi cum raptoe conludentem* ("They all attacked the girl's father as being in collusion with the *raptor*," 17). It is simply not plausible, in their eyes (or the eyes of their audience) that a father would willingly forgive the young man who raped his daughter; it is much more likely that this was a scheme to get her married without paying a dowry.

Several things can be said regarding implausibility and the *raptā*'s choice: first, these types of arguments are like a fiction within a fiction. In the real Roman world, *raptae* did not get to choose marriage or death for the *raptor*: that law existed only within the world of declamation.<sup>28</sup> (On the unreal laws of declamation, see Chapter 4.) So for these cases a probability-based approach was not even theoretically available: there could be no "data" or even anecdotal evidence that, say, seven out of ten girls chose death for the *raptor*. Declaimers could imagine it to be as rare or frequent as they wanted, based on their cultural presuppositions or on the needs of the case. What they are doing is selectively refusing to suspend disbelief about the normality of events in the declamatory world: they accept that it is the kind of place where multiple girls get raped in the same night, and where a

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<sup>26</sup> E.g. [Quint.] 349.10. Collusion arguments are found in non-rape cases as well; they are often, though not always, based on perceived implausibility of the theme. E.g. Sen. *Con.* 1.8.14.

<sup>27</sup> RAPTOR, NISI ET SUUM ET RAPTAE PATREM INTRA DIES TRIGINTA EXORAVERIT, PEREAT. Raptor raptae patrem exoravit, suum non exorat. Accusat dementiae.

<sup>28</sup> Bonner, *Roman Declamation*, 49-50 emphasizes partial parallels in a number of Greek and Roman legal codes, but recognizes that the form of the law seen in declamations is contrived.

fictional choice is available to the *raptae*, but they are importing some outside understanding of how the *raptae* are likely to behave. This understanding can then be pressed into service for argumentative purposes, in order to convince the real-world audience that is listening to the declamation.

Ultimately, it is the cultural expectation of that audience that informs and provides constraints on what declaimers can present as plausible and implausible.

The last two examples in this section seem to go beyond the constraints of what the audience will accept, as both are subjected to criticism from Seneca or other declaimers. In both cases, speakers claim that the events of the theme would be implausible if they were not the result of someone's conscious plan. In itself, this strategy should not be objectionable, but the problem may be in the implementation. Sen. *Con.* 1.6 opens with the following scenario:

Captus a piratis scripsit patri de redemptione; non redimebatur. Archipiratae filia iurare eum coegit ut duceret se uxorem si dimissus esset; iuravit. Relicto patre secuta est adulescentem. Redit ad patrem, duxit illam. Orba incidit. Pater imperat ut archipiratae filiam dimittat et orbam ducat. Nolentem abdicat.<sup>29</sup>

Nearly all the declaimers side with the father in wanting to end the son's marriage to the pirate's daughter; nevertheless, an ethical conflict arises because the son had sworn an oath to her, and also because she seems to deserve some credit for freeing him from the pirates. In order to take away this point in favor of the girl, Buteo argues that they would have been unlikely to get away unless the pirate captain allowed it. Here is his *color*, along with the criticism it received:

Buteo longe arcessito colore usus est; voluit enim videri non invito patre, sed secreto suadente, palam dissimulante totum hoc gestum; <arte illa><sup>30</sup> honestam condicionem nuptiarum inventam, cum alio nullo modo posset; neque enim aliter effugere illos potuisse

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<sup>29</sup> "A young man who had been captured by pirates wrote to his father for a ransom. He was not being ransomed. The pirate captain's daughter forced him to swear that he would marry her if he was released; he swore. She left her father and followed the young man. He returned to his father and married her. An orphan girl came along. The father ordered his son to divorce the pirate captain's daughter and marry the orphan. When he refuses, the father disinherits him."

<sup>30</sup> Emendations by Gertz and Winterbottom; MSS *re illa* or *re illam*.

nisi patiente patre. Sed aiebat Latro non esse tanti detrahere illi commendationem soluti adolescentis, ut detraheretur invidia relictis patris.<sup>31</sup>

We should ask first whether Buteo actually interprets the theme correctly: he uses the word *effugere* (“escape”), but the theme simply has the youth swear to marry her *si dimissus esset* (“if he was released”). The circumstances of their departure are not narrated; after *iuravit* (“he swore”), the next event is *Relicto patre secuta est adolescentem* (“She left her father and followed the young man”). So one could argue that the theme itself is not implausible, and that Buteo is arguing against a straw-man interpretation of it – although that interpretation is shared by other declaimers and is not unique to him.<sup>32</sup> However, his focus seems to be not so much on the freeing of the young man as on the girl’s leaving her father and following him home. Although Buteo’s argument is overly compressed – either by his own fault, or due to Seneca’s reporting – it is clear that he intends to argue something like this: it is unlikely that they could have escaped from the pirate captain against his will; it is also unlikely that he would have given permission for his daughter to leave unless there were strings attached. And like all arguments from likelihood in ancient rhetoric, this is based in large part on the cultural expectations: the pirate father’s most likely goal in letting them go was to secure an honorable match for his daughter. Buteo does not intend to show him sympathy in this: the argument is designed to discredit the girl’s motives in freeing and marrying the son, and to justifying the more reputable father in breaking up the marriage.

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<sup>31</sup> “Buteo used a far-fetched *color*: he wanted it to seem like all this had not been done against the pirate’s will, but instead, he was secretly urging it while publicly disguising it. By means of this plan he had procured an honorable marriage for his daughter, which she could not have had any other way. ‘Because,’ he said, ‘they could never have escaped from the pirates unless the girl’s father actually allowed it.’ But Latro said that taking away her credit for freeing the young man was not worth the loss of her *invidia* for abandoning her father,” 9-10.

<sup>32</sup> Other declaimers who interpret it as an escape or departure against the father’s will: Latro refers to *soluti adolescentis* (“freeing the young man,” 10) and says it was a *parricidium* (“parricide”) for the girl to abandon her father (1). Fuscus Arellius calls her *impium in patrem* (“feeling no duty toward her father,” 10). For the other side, Julius Bassus also assumes it was an escape and that both fathers ended up hostile to the couple: he has the young man tell the girl, *Pater tuus nobis maria praeclusit, meus terras* (“Your father has shut off the seas to us; my father has shut off the land,” 6).

Seneca criticizes this *color* in the very introduction of it, labelling it as *longe arcessitus* (“far-fetched”). It is worth asking on what grounds he makes this evaluation; within the declamatory world where respectable young men marry pirate daughters and are ordered by their fathers to divorce them and marry rich orphans, it does not seem *prima facie* more far-fetched that a pirate captain would try to orchestrate a better marriage for his daughter. These things are subjective, and it may well be that Buteo’s *color* simply pushes the fictional scenario one step farther than what the audience is willing to accept. And in practical terms, the *color* is needlessly complex: it is not the simplest or most logical explanation of the facts of the theme, and it does not accord with anyone’s everyday experience. Seneca moves on to quote Latro’s criticism on what could be called “tactical grounds.” If the goal is to take away the girl’s credit for freeing the son, Buteo certainly does accomplish that; but he does it at the cost of losing the negative points (*invidia*) that the girl had earned by abandoning her father. In Latro’s view, this is not a worthwhile trade-off. More important than both of these critiques, possibly, is the unstated problem that this *color* ignores the central ethical problem of the theme: the question of whether an oath sworn under duress was valid, whether a father had the right to order his son to violate the oath.<sup>33</sup> The more skilled declaimers addressed these things in their *divisiones*, as reported by Seneca. As we saw in Chapter 2, *colores* that evaded the central ethical issue were liable to receive censure for their banality.

The next example is similar: previous chapters have mentioned Sen. *Con.* 7.2, the case of Cicero and Popillius:

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<sup>33</sup> Cf. the partially parallel theme of [Quint.] 376, which presents the same ethical problem arising from a different source: *Quidam moriens adulescenti, quem pro filio educaverat, indicaturum se veros parentes pollicitus est si iurasset se filiam quam relinquebat ducturum uxorem. Iuravit adulescens. Ille dixit. Post mortem educatoris a naturali patre receptus, quia non vult orbam divitem ducere uxorem, abdicatur* (“A certain man, on his death bed, promised his foster son that he would tell him who his natural parents were, if he swore to marry the daughter that he was leaving behind. The young man swore. The foster father told him. After the foster father’s death, the young man was accepted by his natural father; but when he refuses to marry a rich orphan, he is disowned”).

DE MORIBUS SIT ACTIO. Popillium parricidii reum Cicero defendit. Absolutus est. Proscriptum Ciceronem ab Antonio missus occidit Popillius et caput eius ad Antonium rettulit. Accusatur de moribus.<sup>34</sup>

Seneca tells us that this scenario, apart from the barest historical kernel, was mostly contrived by rhetoricians: *Popillium pauci ex historicis tradiderunt interfectorem Ciceronis et hi quoque non parricidi reum a Cicerone defensum sed in privato iudicio; declamatoribus placuit parricidi reum fuisse* (“As for Popillius, very few historians report that he killed Cicero, and even these say that Cicero had defended him not on a parricide charge, but in a private suit. It was the declaimers who decided he had been on trial for parricide,” 8). Roller argues that earlier versions of this *controversia* probably did not specify the charge on which Cicero defended Popillius; the idea of parricide would have originated as a *color* for the prosecution, which eventually became part of the facts of the case.<sup>35</sup> The reason why rhetoricians liked the parricide charge, no doubt, was because it made the situation as paradoxical as possible and set up an interesting conflict of ethical values: loyalty to one’s *patronus* (and to the hero of oratory, Cicero) versus obedience to a superior.<sup>36</sup>

Upon closer inspection, however, we can see that the paradox also makes the scenario less likely to have happened by chance – the very man that Cicero had defended for parricide ended up being sent to kill him. For some, this fact in itself might not seem noteworthy: declamations – even semi-historical ones – take place in the kind of world where paradoxical coincidences happen. For the prosecution, the coincidence is attributed to Popillius’ character: he was the type of man who

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<sup>34</sup> “LET THERE BE AN ACTION FOR MISCONDUCT. Cicero defended Popillius against a charge of parricide. He was acquitted. When Cicero had been proscribed, Popillius was sent by Antony to kill him; he killed him and brought back his head to Antony. He is charged with misconduct.” The *actio de moribus* (“misconduct”) is also fictitious. Bonner, *Roman Declamation*, 124 notes that this term in real Roman law occurred only in divorce cases, where a husband could bring this action to counter the wife’s claim for dowry; the present theme seems to be an envisioning a *iudicium* of Popillius before the censors, “who would have been competent to stigmatize his action with the *nota censoria*.”

<sup>35</sup> Roller, “Color-blindness,” 125. See also Robert A. Kaster, “Becoming ‘CICERO,’” in *Style and Tradition: Studies in Honor of Wendell Clausen*, ed. P. Knox and C. Foss (Stuttgart: Teubner, 1998); more recently, Lentano, “*Concessum est rhetoribus ementiri*.”

<sup>36</sup> Cf. Roller, “Color-blindness,” 112.

could commit parricide – or against whom a parricide charge early in life would be believable – thus it was natural that he would progress to greater crimes.<sup>37</sup> But for the defense, several declaimers seize upon a bolder strategy: they claim that Antony specifically chose Popillius for the mission because of his known closeness to Cicero. *Albucius dixit in poenam Ciceronis electum amicissimum Ciceroni, quasi exprobraturus per hoc illi fortunam esset: molestius, inquit, feret se a Popillio occidi quam occidi* (“Albucius said that Popillius had been chosen as a punishment for Cicero, since he was a dear friend of his; the choice of Popillius would seem to mock Cicero’s change of fortune. Antony thought, ‘He will grieve more to be killed by Popillius than simply to be killed,’” 10). Pompeius Silo says that Popillius spoke out against the proscription to Antony, who then made him kill Cicero as punishment.<sup>38</sup> Various forms of this *color* are also made by Buteo, Cestius, and Fuscus Arellius.

Seneca does not comment on the effectiveness of these *colores* as a group. They could be classified under the broader strategy of a defense based on *necessitas* (“compulsion, necessity”) – claiming that Popillius had no choice but to comply with Antony’s orders during a time of civil war. Seneca seems to approve when Latro employs this defense openly: *Colorem pro Popillio Latro simplicem habuit: necessitate coactum fecisse; et hoc loco illam sententiam dixit: miraris si eo tempore necesse fuit Popillio occidere quo Ciceroni mori?* (“Latro’s *color* for Popillius was straightforward: he had acted under compulsion. And at this point he spoke his well-known *sententia*: ‘Is it any wonder that Popillius was forced to kill during times when Cicero was forced to die?’” 10). As a supporting argument for that strategy, the

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<sup>37</sup> E.g. Latro in 7.2.1: *Prorsus occisurus Ciceronem debebat incipere a patre* (“Naturally the one who was destined to kill Cicero had to start with his own father”) and 7.2.9: *Latro accusavit illum de moribus, primum quod sic vixisset ut causam parricidii diceret* ... (“Latro accused him of misconduct, first because he had lived in such a way as to be accused of parricide ...”; Cornelius Hispanus in 7.2.4: *Dic: Antoni, ego istud scelus facere possum: et patrem occidi* (“Say: ‘Antony, I can commit this crime: I even killed my father’”).

<sup>38</sup> *Silo Pompeius hoc colore usus est: Offendebar, inquit, proscriptione et quaedam liberius loquebar. “Non miror; Ciceronis cliens es: tanto magis occide Ciceronem tuum.” Et dixit non suae infirmitatis sententiam: Uterque, inquit, sed diverso genere punitus est: Ciceronis proscriptio fuit occidi, mea occidere* (“Silo Pompeius used this *color*: ‘I was outraged by the proscription and spoke some things rather too freely. “No wonder, you are Cicero’s client: all the more reason why you must kill your dear Cicero yourself.” And he used a *sententia* that avoided his usual feebleness: ‘Each of us was punished in a different way: Cicero’s proscription was to be killed, mine was to kill him,’” 11).

concept of implausibility – that Popillius would not have ended up on that mission by mere chance – can work in small ways to improve Popillius’ reputation. If Antony specifically chose him, it must have been because he was close to Cicero, loyal to him, highly regarded by him – something positive of this nature.<sup>39</sup> At the same time, however, many of these *colores* are open to the same criticism as Buteo’s on 1.6: they sidestep the central moral conflict of the time, and thereby slide into banality. If the theme is designed to set up a conflict between loyalty to one’s patron and obedience to a superior, then choosing to focus on unintended implications of the scenario is unlikely to be very effective. It comes close to the type of quibbling that was associated with a *grammaticus*, as discussed in Chapter 2; it does not portray the declaimer as a strong Roman man, vigorously taking control over the material.

Nevertheless, it is conceptually interesting that declaimers do sometimes apply the notion of plausibility to the theme itself, picking up implications of events that might not have been intended. These types of arguments pull back the curtain, so to speak, on the constructed nature of declamation scenarios; the implausible turn of events that they identify *is* the result of someone’s plan – that of the rhetorician who made up the theme. One thinks of the famous scene in the movie *Casablanca*, where Rick Blaine (Humphrey Bogart) is lamenting the fact that the woman he loved in Paris has just turned up at his bar in Casablanca, married to another man. Rick exclaims, “Of all the gin joints in all the towns in all the world, she walks into mine.” The audience of the movie obviously knows that these events are not a real coincidence: they are the invention of the movie’s writer, designed to set up the conflict around which the whole story will revolve. Even so, audiences are able to suspend disbelief, immersing themselves in the fictional world of the story and accepting, along with Rick, that the events really are a remarkable coincidence. Compared to this acceptance of

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<sup>39</sup> Or so the argument goes. The prosecution can say that Antony chose him especially for his ruthlessness or depravity. E.g. Gavius Sabinus: “*Popilli, potes*” inquit “*Ciceronem occidere; potes vel patrem*” (“Antony said, ‘Popillius, you are capable of killing Cicero; you are capable of killing even your own father’”).

the fiction, the approach of declaimers like Buteo or Albucius is jarring; it would be like a revisionist analysis of the movie which claims something like, “Yes, it *is* strange that Ilsa showed up at Rick’s bar – it must have been orchestrated by the Nazis!” This is a risky strategy, because declaimers are supposed to accept that the remarkable coincidences really are coincidences; the declamatory world, like the world of cinema, is the kind of place where these things just happen.<sup>40</sup>

## II. Applying historical *exempla* to implausible fictional cases

So we have seen that Roman declaimers sometimes show awareness of – and exploit – a mismatch between the normality of the declamatory world and the normality of the world outside declamation. This fact forms an important backdrop for the next phase of inquiry: how declaimers applied supposedly real historical *exempla* to these unreal, constructed scenarios. This section also brings up the possibility of ethical mismatches: when the lessons of traditional Roman *exempla* fit awkwardly with the world of declamation. The concept of plausibility will turn out to be important yet again: implausibility arguments can be used to evade the uncomfortable implications of *exempla*; however, the *exempla* themselves are never treated as implausible and their received interpretations are never questioned.

Modern scholarship is skeptical about the factuality of early Roman history: there is little in the way of solid evidence, and most accounts seem to have been greatly reshaped in the transmission so as to assume almost the character of myth.<sup>41</sup> But for the Romans themselves during the historical

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<sup>40</sup> Cf. Christopher Pelling, *Plutarch and History: Eighteen Studies* (London: Duckworth, 2002), 176, on how Plutarch applied *eikos* reasoning to the world of myth in his *Theseus-Romulus*. Based on “the assumption that life then was more or less as life is now,” Plutarch rejected some versions of the myth as implausible in light of common experience (e.g. that Theseus’ mother would have been captured if he was present to defend her); other times he suspends disbelief and accepts things, such as the existence of Amazons, as “believable *within that world*” (emphasis Pelling’s). The latter position is the one normally adopted by declaimers toward their subject matter; the former is like the approach of Buteo and Albucius.

<sup>41</sup> Roller, “Exemplarity in Roman Culture,” 9, summarizes how source critics have identified Indo-European archetypes behind exemplary stories, such as that of Horatius Cocles.

period, the distant past was held to be factually real and, moreover, subject to the same ethical standards as their own present day.<sup>42</sup> Roller argues: “In the discourse of exemplarity, the past is by no means a ‘foreign country,’ but is ethically and culturally homogeneous with the present.”<sup>43</sup> This is his description of how exemplary discourse typically worked, when a reader or viewer encountered a narrative or monument of some previous exemplary deed: “The monument, then, makes our spectator complicit in a temporal collapse of past and present. For the spectator is pulled backward in time, required to evaluate a past action by the same criteria that he or she would use in evaluating a contemporary action, and finally dispatched back to his or her own present with the idea that that deed thereby discovered is ethically relevant to one’s own choices and actions, and those of one’s contemporaries.”<sup>44</sup>

Historical *exempla* were not by their nature indisputable, and exemplary discourse was not static. Roller notes that sometimes the historical record contains traces of conflicting evaluations by the original audience: Cloelia’s *virtus* elicited dismay from the consul, Valerius Publicola (according to Plutarch), because it also constituted a breach of *fides* with the Etruscans;<sup>45</sup> Horatius was criticized on account of his crippled leg by political opponents who “who inserted the wound into a different discourse, one in which physical imperfection correlates with moral and social inadequacy.”<sup>46</sup> Sometimes later generations of Romans arrived at different evaluations than the original spectators did: for example Pliny (*Nat.* 34.28) expresses an opinion that Lucretia and Brutus should have been ranked above Cloelia. As Roller points out, these passages “illustrate how exemplary discourse

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<sup>42</sup> E.g. Rebecca Langlands, “Roman Exemplarity: Mediating Between General and Particular,” 69, says of Roman *exempla* that “their claim to be real historical events lends them the force of precedent and empiricism ....”

<sup>43</sup> Roller, “Exemplarity in Roman Culture,” 38.

<sup>44</sup> Ibid., 32. His note indicates an indebtedness to M. Jaeger, *Livy’s Written Rome* (Ann Arbor, 1997), 15–18, “itself an interpretation of a difficult passage in Varro (*Ling.* 6.49).”

<sup>45</sup> Ibid., 43, citing Plut. *Publicola* 19.3.

<sup>46</sup> Ibid., 12-13, citing Servius *in Aen.* 8.646.

presupposes the principle of ethical continuity. When Romans of the late Republic and Empire pass judgment on an ancient deed, they assume that both they and the original judging audience are playing the same game by the same rules. They may disagree with the original verdict, but they nevertheless assume that both parties pass judgment in light of persistent ethical standards that obtain equally in both eras.”<sup>47</sup> Chaplin shows other factors that kept exemplary discourse from becoming static: older exempla were continually being replaced with newer ones. In her analysis of speeches in Livy, “each speaker recognizes that examples from recent history can have more relevance than those from the remote past; this recognition indicates that for Livy the lessons of history are fluid and change over time as each generation of Romans seeks to find answers in its own immediate past.”<sup>48</sup> She goes on to reconcile this with Livy’s preface, which portrays all of history as source of *exempla*: “Throughout Livy’s narrative the past offers a guide to conduct; whatever period is studied, people are learning from history. The most important idea in Preface 10 is not the image of history as a repository of lessons, but rather the conception of it as something to be gazed at, pondered, and acted upon. Livy describes history as an activity: *cognitio rerum* has verbal force....” Thus Livy’s preface argues that “the past has lessons, but the student takes an active part in determining their relevance to his circumstances.”<sup>49</sup>

Langlands also talks about how Roman historical *exempla* remained relevant to later eras. She references other recent discussions of *exempla* for moral reasoning; critics have noted a tendency for them to become rigid and difficult for people to apply to new situations. Langlands admits that this could be a problem “not least when the heroic deeds of outstanding individuals are inimitable by ordinary people, or when the deeds of long ago no longer seem relevant or practicable in the present

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<sup>47</sup> Roller, “Exemplarity in Roman Culture,” 34.

<sup>48</sup> Chaplin, *Livy’s Exemplary History*, 121.

<sup>49</sup> *Ibid.*, 135-6.

climate.”<sup>50</sup> However, there was an elaborate, well-thought-out mechanism – the “situation ethics” we have talked about previously – whereby one compared the character and circumstances of the hero with one’s own situation, and determined how to apply the *exemplum*. This also presupposes a continuity of ethical systems, no significant break between past and present.

So if the Romans viewed the exemplary past as continuous with their own present time, how did they apply it to the fictional worlds created by declamation? Are there any mismatches between past and present, real and fictional in declamation? Recall Roller’s statement above about how exemplary discourse works, and consider where something could go wrong: the later viewer is “complicit in a *temporal collapse of past and present*. For the spectator is pulled backward in time, required to evaluate a past action *by the same criteria that he or she would use in evaluating a contemporary action*, and finally dispatched back to his or her own present with the idea that that deed thereby discovered is *ethically relevant to one’s own choices and actions*, and those of one’s contemporaries” (emphasis added). With these criteria in mind, we could distill them down and posit two general areas where difficulty might arise: 1) people could question or criticize the exemplary story in light of present values – e.g., by doubting that it really happened or should be evaluated in the way traditionally taught; 2) they could accept the reality and meaning of the *exemplum* and revise their understanding of present circumstances in some way.

When we look at the evidence of Seneca and [Quint.], we do not find any instances of the first type. Declaimers always treat the Roman historical *exempla* as factually real – we might even say, *more* real than the material in the declamation. On an ethical level, they never challenge the received interpretation of the *exempla*. In a certain sense, this should not be surprising: the *exempla* were the agreed-upon standards by which conduct in the declamation was judged, not the reverse; orators

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<sup>50</sup> Langlands, “Roman *Exempla* and Situational Ethics,” 102 and note 11. She cites the criticism of exemplary moral reasoning summarized by Inwood, “Rules and reasoning in Stoic Ethics,” 107-9.

cited them because they expected the audience to share their evaluation. But there is also a structural reason that militates against changes in the interpretation of *exempla*: the fact that declaimers did not have to respond to *exempla* as they were actually used by other speakers; thus, there was little opportunity for conflict about their meaning or interpretation. Critics since ancient times have pointed out that the speeches in declamation are one-sided. Montanus Votienus, in Sen. *Con. 9 praef.* 2, lists some ways in which declamation sometimes harms its practitioners when they come to the forum; among them is the fact that *adversarios quamvis fatuos fingunt: respondent illis et quae volunt et cum volunt* (“they invent opponents who are as vacuous as needed; they can answer them however they want, whenever they want”). Whether this was pedagogically useful or not can be analyzed elsewhere, but in this situation, we can see that these rules of the declamatory game produced a very clear result. Declaimers cited *exempla* in the way they thought they should be applied; if they had any doubts about the applicability of a particular historical *exemplum*, all they had to do was not cite it: they could cite a different one, something that they did identify with, but still encoding traditional values. There was no real incentive to delve into a detailed critique of another declaimer’s interpretation of history; it was more important to assemble a convincing argument in one’s own speech.<sup>51</sup>

The only passage where Seneca criticizes the use of *exempla* is 7.5.12-13: he notes that since declaimers have memorized so many of them, they become overly eager to force them into every speech regardless of the subject matter.<sup>52</sup> He singles out Musa’s inept use of an *exemplum* on the

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<sup>51</sup> The *Auctor ad Alexandrum* 8.14 = 1430a8-11 provides advice on refuting *exempla* and on not using those *exempla* that are easily refuted. See further discussion by Michèle Lowrie, *Horace’s Narrative Odes* (Oxford, 1997), 46-8. Cf. Quint. *Inst.* 5.11.

<sup>52</sup> *Gravis scholasticos morbus invasit: exempla cum didicerunt, volunt illa in aliquod controversiae thema redigere. Hoc quomodo aliquando faciendum est, cum res patitur, ita ineptissimum est luctari cum materia et longe arcessere ...* (“A serious disease has seized the schoolmen: since they have memorized *exempla*, they want to force them into any *controversia* theme. While this can be appropriate when the subject matter allows it, it is ridiculous to struggle against the material and seek out *exempla* from far afield...”).

passage in question: the theme mentioned a five year-old child, and so Musa brought up Croesus' son who had been dumb for five years; *putavit ubicumque nominatum esset quinquennium, sententiam fieri* ("he thought that anywhere 'five years' was mentioned, it counted as a *sententia*").<sup>53</sup> Here Seneca provides good practical and stylistic advice, but there is no sign of a serious debate about the moral evaluation of events in Roman history. On Sen. *Con.* 7.6.18, Albucius advocated an unpopular position: that the father was justified in marrying his daughter to a slave. He made the argument philosophically, pointing out that no one is a slave by birth, and also cited the historical example of king Servius (*rettulit et Servium regem*), who was traditionally of servile origin. As far as Seneca reports, none of the declaimers challenged this use of the *exemplum*, which they surely disagreed with; apparently they just ignored it. When it came to thinking about the meaning of *exempla*, the procedural structure of declamation gave speakers basically two choices: to use them, or not to use them, with the only constraint being what they thought the audience would find persuasive.

Still, scholars like Mary Beard have argued that declamation can be viewed as a sort of Roman mythology, where fact and fiction are blurred and traditional interpretations of history are open to contestation.<sup>54</sup> In light of this claim, one might have expected to see at least a few instances of *exempla* being challenged or questioned in the extant declamations. Section III of this chapter will return to this issue, and investigate the extent to which declamation really did allow Roman history to be contested through the content of the themes themselves.

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<sup>53</sup> Van der Poel, "The Use of *Exempla* in Roman Declamation," 332-53, seeks to refute Seneca – using data provided by Seneca – and show that declaimers generally did not employ *exempla* as ineptly as Seneca says. This seems to be a methodological flaw, as there is good reason to doubt that Seneca is providing a representative sample; just as he does not reproduce the commonplaces, we would not expect him to quote all the *exempla* that he considers superfluous or repetitive. Seneca intends his one quotation of Musa to stand for a host of others, but there is no source outside of Seneca with which to check its representativeness.

<sup>54</sup> Beard, "Looking (Harder) for Roman Myth."

### *Avoiding the implications*

For the present, that leaves the second type of difficulty introduced above: since the material of the declamation was fictional and often implausible, did this ever cause problems for the application of the *exemplum*? Do we see any hesitations about applying it, or situations where the application seems forced? As an illustration of what this might look like – how something in the distant past, perceived to be real, can cause problems of interpretation in the present – consider modern Christians applying the lessons of problematic Biblical narratives. For some groups of Christians, Biblical narratives are considered literally true and normative for believers today. Take for instance the calling of the prophet Samuel, told in I *Samuel* 3. The story contrasts the elderly priest Eli, who was disobedient and out of favor with God, and the young Samuel, who one night heard God speaking to him in an audible voice, while Eli heard nothing. Those with backgrounds in Evangelical churches may recall hearing a pastor struggle to apply stories like this to contemporary experience: “Well, I’ve never heard God speak with an audible voice, but you know how you just feel that sense like God is leading you – that must be what the Bible is talking about.” In effect, what happens here is that the Biblical “*exemplum*” causes an uncomfortable implication for the present: if God speaks audibly to his chosen followers, and if none of us has personally heard God speak out loud, then perhaps we are out of favor with God, like the old priest Eli. The pastor cited above resolves the difficulty by changing his understanding of present reality: the subjective hunches that he feels are equivalent to God’s audible voice to Samuel, and he can evade the conclusion that his relationship with God does not live up to the exemplary standard.<sup>55</sup> This is not wholly unlike phenomena that we see in Roman declamation. The speakers view the exemplary narratives as real, historical, and normative for the present; they feel that they ought to be applicable to the fictional

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<sup>55</sup> Cf. Gary Friesen, *Decision Making and the Will of God* (Colorado Springs: Multnomah, 1980), with a discussion of Christian views on this topic.

cases as well, and so they do attempt to apply them; but sometimes there is a mismatch. As we will see, since the declamations are fictional, speakers can almost literally change the present reality. An implausibility argument can be a way of getting around an uncomfortable fit between the *exemplum* and the “reality” posed by the declamation.

Sen. *Con.* 7.7 is a case that shows how things work when there is no conflict between the exemplary world and the declamatory world; the case is a conjectural one, so it is natural that speakers employ *eikos* argumentation in response to the factual question of whether or not the father betrayed his son. The theme is as follows:

PRODITIONIS SIT ACTIO. Pater et filius imperium petierunt. Praelatus est patri filius; bellum commisit cum hoste; captus est. Missi sunt decem legati ad redimendum imperatorem. Euntibus illis occurrit pater cum auro; dixit filium suum crucifixum esse et sero se aurum ad redemptionem tulisse. Illi pervenerunt ad crucifixum imperatorem; quibus ille dixit: “cavete proditionem.” Accusatur pater proditionis.<sup>56</sup>

In the father’s version of events, he brought gold to the enemy intending to ransom his son, arrived too late, and is now returning with the gold; but the theme sets up the suspicion that the father betrayed the son and received the gold as a reward. Several speakers for the defense use *eikos* argumentation to portray the father’s story as more believable. Fuscus Arellius argues that it is inherently unlikely that a father would betray his son, particularly for such a small sum: *Et filium et patriam vendidit: tam exiguum auri accepit ut unus senex portare possit?* (“He sold his son and his country – and received such a small amount of gold that one old man can carry it?” 9 – although the theme does not say that he was carrying the gold by hand). Cestius Pius says, *Non quaesivi secretos tramites et occultum iter: proditor eadem via veni qua legati* (“I did not seek out hidden trails or a secret route: as ‘traitor,’ I took the same road as the legates,” 17). If the father had really betrayed the son, one

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<sup>56</sup> “LET THERE BE AN ACTION FOR TREASON. A father and son both sought a command; the son was chosen instead of the father; he went to war with the enemy, and was captured. Ten legates were sent to ransom the commander. As they were en route, they met the father [i.e. coming in the opposite direction] with gold; he said his son had been crucified, and he had brought the money too late to ransom him. The legates arrived at the crucified commander, and he told them, ‘Beware of treason.’ The father is charged with treason.”

would expect him to come home by a more secretive way. In the absence of certain and established facts, these arguments are one way of dispelling suspicion from the father.

In order to bolster their overall argument based on likelihood, some declaimers apply actual Roman historical *exempla* to the case. Albius presents the following *color* to explain why the father competed with the son in the first place: *Aiebant, inquit, alii imperatorem <adulescentem> fieri debere, qualis Scipio fuisset, alii senem, qualis Maximus [fuit]; <adulescentem acriter pugnaturum>, senem nihil temere facturum. Utriusque populo copiam feci.* (“Some were saying that a young man should be commander, like Scipio had been; others called for an old man, like Maximus: a young man would fight fiercely, while an old man would do nothing rashly. I made both options available for the people,” 13).<sup>57</sup> This is actually an *exemplum* within a *color*: that is, Albius is inventing fictional citizens within the backstory to the scenario; these citizens were Romans who knew the *exempla* of Scipio and Maximus, and applied the received meanings to their own situation. Albius in turn, by using this *color*, supposes that the audience of his declamation will share the values and approve. On a later point in the narrative, another speaker mentions historical *exempla* to explain why the father went all alone to ransom the son: *Sepullius Bassus ait non expectasse se curiam quia putaverit futuros qui redimendum negarent, quod factum apud Romanos saepius erat; itaque ante se voluisse redimere quam posset aliquid de non redimendo constitui* (“Sepullius Bassus said he had not waited for a senate meeting because he expected that some would oppose the ransom – something which had happened frequently at Rome; and so, he had wanted to ransom him before any decision could be made to the contrary,” 17). Here again, a character within the *color* believes that other fictional characters within the declamation would follow *exempla* from Roman history – in this case, the instances when the senate refused to ransom Roman soldiers who had been captured. (Most famously after Cannae, Livy 22.58 ff.) Thus, he is importing into the

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<sup>57</sup> Emendations by Kiessling, Novák, Müller, Vahlen, and Winterbottom.

declamatory world a real-world complexity that existed in the exemplary tradition, namely, differences of opinion on how to apply the *exempla* to a given situation. Bassus' character disagrees with the application that he thinks the other characters will want to make: he believes that his son should be ransomed – which is not a very radical position, since the theme presents the senate as eventually reaching the same decision. Still, it may be significant that the declaimer is arguing on the side of natural familial affection in opposition to traditional harshness. The next set of examples suggests that this is part of a larger pattern.

Harshness is an area where declaimers often have trouble accommodating the scenario of the theme to the traditional values of *exempla*. (It is seen most clearly on this topic, but there may be others.) These cases show declaimers revising the narrative to make it *not* like the *exemplum*. Chapter 1 looked at how they can revise negatively-evaluated behavior to make it conform with a positive *exemplum*; here, the behavior starts out aligned with a supposedly positive *exemplum*, but they still change it in small ways, toning down the harshness, or stepping back from the full implications of the *exemplum*. This suggests that the speakers and the audience view that *exemplum* as ideal, but they do not actually want to see it applied. Let us start by revisiting Sen. *Con.* 7.1, already discussed in Chapter 1: it is the case where a father condemned one son for parricide in a trial held at home, then ordered another son to punish him; that son sent him out to sea in a disabled boat, but the first son survived and later became a pirate captain. The father disinherits the son who failed to kill him.<sup>58</sup> In Chapter 1, we argued that the two sides' responses betray confusion about where the audience's sympathy lies: neither side acts as if the audience is in its favor. As a possible explanation, it was

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<sup>58</sup> *Mortua quidam uxore, ex qua duos filios habebat, duxit aliam. Alterum ex adolescentibus domi parricidii damnavit; tradidit fratri puniendum. Ille exarmato navigio imposuit. Delatus adolescens ad piratas archipirata factus est. Postea pater peregre profectus captus est ab eo et remissus in patriam. Abdicat filium* (“A man had lost his wife, from whom he had two sons, and married another. He condemned one of the young men at home for parricide; he entrusted him for punishment to his brother, who placed him on a boat stripped of all equipment. The young man was carried to some pirates and became a pirate chief. Later the father, while traveling abroad, was captured by him and released back to his country. He disowns his [other] son”).

suggested that those on the son's side are playing along with the declamatory fiction that they are in a world where *vitae necisque potestas* still applies and that the audience supports it. This imagined audience is inclined to side with the father, though they have doubts about the stepmother and the private trial; even so, they need *colores* to bring them around to side fully with the son and endorse his disobedience. Those arguing for the father's side, on the other hand, know that the real Roman public of their day was not sympathetic to acts of paternal cruelty, despite the exemplary tradition of stern fathers killing their sons. Returning to the present argument, we can focus on an additional point: that one way out of the harsh dilemma posed by the exemplary tradition is to appeal to the implausibility of the theme itself. Several of the *colores* for the son are of this type: Passienus says, *Non putavi patrem velle utique occidi filium. Videbatur mihi omnia misericordiae praeeparasse: quod domi cognoverat, quod inter suos. Fratri, inquam, tradidit: age, si parcere voluisset, cui tradidisset?* ("I did not think my father wanted me to kill his son at all. It looked to me like he had made all the preparations for mercy: he had tried him at home, in the midst of his family. I said, 'He handed him over to his brother. Come, if he wanted him spared, who else would he have given him to?'" 22). The same idea is expressed a little less clearly by Musa: he says the son felt pity, and that he got that trait from his father: *An non putatis misericordem qui quem damnavit puniendum fratri dedit* ("Or don't you think someone is merciful if he condemns a son, but hands him over to his brother to be punished?" 15). These speakers are accepting, at least on the surface, the traditional exemplary position that a father could be harsh to his son. But they are evading its applicability to the present situation by claiming that the theme is implausible: a father who *actually* wanted his son killed would not have asked the other son to do it. They might have recognized that in the declamatory world, these things just happen, and the very bizarreness of the situation is not supposed to be significant; what they do instead is take advantage of the unreal nature of that world in order to escape the awkward implications of the traditional position.

In several other cases as well, declaimers seem uncomfortable with how traditional or exemplary values fit with the present theme; these also deal with the concept of harshness. Sen. *Con.* 10.3 has a very loosely historical setting, during an unspecified civil war:

DEMENTIAE SIT ACTIO. Bello civili quaedam virum secuta est, cum in diversa parte haberet patrem et fratrem. Victis partibus suis et occiso marito venit ad patrem; non recepta in domum dixit: “Quemadmodum tibi vis satisfaciam?” Ille respondit: “Morere!” Suspendit se ante ianuam eius. Accusatur pater a filio dementiae.<sup>59</sup>

Most declaimers take the side of the son in accusing the father of madness.<sup>60</sup> Clodius Turrinus senior justifies the daughter for following her husband in the war: he cites *exempla* of faithful wives in history and myth: “*Quare secuta est virum?*” *Adeo tibi vetera exempla exciderunt bonarum coniugum, in quae filiam tuam solebas sanus hortari? Aliqua spiritum viri redemit suo, aliqua se super ardentis rogam misit* (“Why did she follow her husband? Have you so forgotten the old *exempla* of noble wives, with which you used to exhort your daughter when you were sane? One wife ransomed her husband’s life with her own, another threw herself on his burning pyre,” 2). In praise of clemency in civil war, Labienus mentions Caesar’s willingness to spare Cato; in praise of respect for the vanquished, Musa mentions how Caesar averted his eyes when Pompey’s head was brought to him (5). These are mostly conventional; more interesting is what happens for the other side. Latro, in his defense of the father, cites some traditional *exempla* of harshness but changes the force of the argument slightly:

*Animadvertit Manlius in filium et victorem, animadvertit Brutus in liberos non factos hostes sed futuros: vide an sub his exemplis patri fortius loqui liceat* (“Manlius even executed a son who had been victorious in battle;

Brutus executed his children who were not yet enemies but were intending to be. So in light of these

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<sup>59</sup> “LET THERE BE AN ACTION FOR MADNESS. In a civil war, a woman followed her husband, while her father and brother were on the other side. When her side was defeated and her husband killed, she returned to her father; but as she was not admitted into the house, she asked, ‘How can I make satisfaction to you?’ He answered, ‘Die!’ She hanged herself outside his door. The son accuses the father of insanity.”

<sup>60</sup> For a valuable discussion of this case in terms of father-son relations and the temporary insanity of civil war, see Gunderson, *Declamation, Paternity, and Roman Identity*, 132-5.

*exempla*, consider whether a father may not *speak* a little strongly,” 8). Latro cites the traditionally accepted principle, that fathers could punish their sons harshly; here, however, he uses it as evidence that the father could do something *less* harsh, namely, use harsh words but not harsh actions (an *a fortiori* argument in the most literal sense of the term). He then goes on to say that the father did not *actually* intend for the daughter to die: *Dixi, inquit, iratus, cum vellem castigare, non occidere* (“I spoke out of anger; I wanted to chastise, not to kill,” 9). So at first glance, all that happens is that both sides toss back and forth fairly conventional *exempla*, some for clemency and some for harshness. But significantly, those on the side of harshness stop short of fully applying their *exempla* to the present situation.

This turns out to be a pattern that is seen elsewhere: characters stake out a harsh position based on exemplary precedent, but then purposefully pull back from it. [Quint.] 349 is parallel to Sen. *Con.* 2.3, mentioned earlier: the *raptor* wins pardon from the girl’s father, but as his own father delays in pardoning him within the thirty-day limit, he accuses him of insanity. In [Quint.]’s version, the father threatens the son with a comparison to the stern discipline of prior ages: *Si incidisses in illos felicioribus saeculis natos, [cum] quibus virtus magis commune bonum erat, non expectasset legem, non expectasset tricesimum diem* (“If you had met with those born in happier ages, who held virtue as more of a common good, your father would not have waited for the legal process, he would not have waited till the thirtieth day,” 7). Further on, he alludes more specifically to the exemplary fathers L. Manlius Torquatus Imperiosus and Spurius Cassius Vecellinus: *Tu, si incidisses <in> illum qui laureatas filii sui cervices amputavit, si incidisses in illum qui iudiciis propinquorum atque amicorum contentus fuit, opinor habuisses tempus quaerendi, habuisses tempus non dico deferendi patrem sed diutius rogandi* (“If you had met with that man who cut off his son’s laurelled beard, or that man who was content with the judgments of relations and friends, I’m sure you would have had time to complain, I’m sure you would have been

able keep begging your father at length, not to mention prosecuting him!” 8).<sup>61</sup> This speech is noteworthy because it explicitly consigns those *exempla* to an earlier time – *felicioribus saeculis*, earlier and happier. It may also be the closest we see any declaimer get to doubting the applicability of historical *exempla*: he recognizes them as an ideal, but hesitates in applying them to his own situation. Once again the theme influences him somewhat: it leaves open the possibility that he could still pardon the son before the thirty days are up. Still, it would have been perfectly possible to make a harsh argument, saying the son deserves to die and he intends for that to happen. The only constraint is really the audience: are they inclined to favor that kind of argument, or do they prefer something more merciful? The *sermo* at the beginning of the case gives [Quint.]’s view: *Non dubie pater hic intellegi vult se filii sollicitudine esse contentum et hanc triginta dierum moram pro ultione habere. Sed hoc si palam indicaverit, perdet artem ...* (“Without a doubt this father wishes it to be understood that he is content with his son’s anxiety and regards the thirty days’ delay as a punishment. But if he admits this openly, he will lose his device [i.e. of keeping the son in suspense],” 1, modified from Shackleton Bailey). In fact [Quint.] takes that interpretation as self-evident (*non dubie*) – he does not even consider the possibility of taking a harsher position, apparently knowing that the audience would not be receptive to it – or perhaps he himself was not receptive to it.<sup>62</sup>

Scholars such as Breij have emphasized that a father’s right to kill a son was still in force throughout this time period; she examines all the instances in declamation (including the *Maiores* and Calpurnius Flaccus) of fathers killing or wanting to kill their sons, and claims that the evidence

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<sup>61</sup> Identification by Shackleton Bailey, following Winterbottom ad loc.

<sup>62</sup> One more example: on [Quint.] 344, a poor man’s son was in love with a prostitute and seemed about to kill himself over her; a rich man ransomed the prostitute for him; the poor man charges the rich man with *inscripti maleficii* (“unwritten wrongdoing”). The poor man alludes to the exemplary tradition in what his attitude *should be* regarding his son’s possible death: *Scio quae partes forent (Cj. Rohde: fuerint MSS) severioris patris: diceret ille, “Mallem: levior ad me dolor pervenisset ex morte ...”* (“I know what the role of a harsher father would be. He would say, ‘I prefer it; I would have received lighter pain if he had died...’” 7). However, this father goes on to argue that his son was not, in fact, going to commit suicide – thus removing the present situation from the *exempla*’s range of applicability.

shows that these declamations “serve to confirm rather than undermine the *patria potestas*.”<sup>63</sup> This is no doubt true, if she means the theoretical right. However, a closer look at the cases in Seneca and [Quint.] show that declaimers treat this right as an ideal, but hesitate about actually applying it. This is seen even more clearly if one broadens the search beyond Breij’s focus on killing sons, and looks at instances of cruel or harsh paternal behavior in general, as we have done here. Considering this wider discourse, we see that declamation rarely allows the father’s *vita necisque potestas* to be debated head-on. Part of the debate is shifted into these other themes dealing with harsh punishment; even on the examples that Breij cites, there are other complicating factors, which serve not just to make the case sensational and entertaining, but to muddy the discussion about what the father’s exact rights would be under normal circumstances. We have talked several times about Sen. *Con.* 7.1: the case does not ask straightforwardly, “Does a father have the right to execute his son for parricide in a trial held at home?” Rather, the question is, “Does a father have the right to disown a son who sent his brother to sea in a disabled boat, when the father had ordered him to kill that brother after having convicted him of parricide in a trial held at home, possibly under the influence of a stepmother?”<sup>64</sup> The difference between the two questions is more than mere sophistry for its own sake. The next section will include a discussion of the extent to which core values or historical *exempla* are actually open for debate in declamation.

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<sup>63</sup> Breij, “*Vitae Necisque Potestas* in Roman Declamation,” 55. More on this topic: Lewis A. Sussman, “Sons and Fathers in the Major Declamations Ascribed to Quintilian,” *Rhetorica* 13 (1995): 179–92; M. E. Vesley, “Father-Son Relations in Roman Declamation,” *The Ancient History Bulletin* 17 (2003): 158–180; A. Feldherr, *Spectacle and Society in Livy’s History* (Berkeley, 1998), 105–11 on the *exemplum* of Manlius killing his son.

<sup>64</sup> Cf. Lentano, “Un nome più grande di qualsiasi legge,” 577–84, cited previously in Chapter 1. Lentano argues that no matter how absolute the father’s authority seems to be in principle, the structure of declamation means that it is always set in conflict with some other law or norm. Declamatory fathers assert their powers tendentiously, but are undercut by the fact that they have to justify those powers through persuasion.

### III. Contesting or not contesting history through declamation

This section will look at declamation in relation to Roman history. It will argue that *controversia* themes included only fictionalized vignettes from history. By changing the received historical details, these served to teach the process of moral reasoning through situation ethics; at the same time, the changed situations shielded actual Roman history from coming under reevaluation. Declamation treated historical *exempla* as stable, with no space for anything other than the received interpretations. This was in contrast to the Roman historians, who still treated history as malleable and open to contestation.

The previous section showed some uneasiness on the part of the Romans about applying the harsh *exempla*. However, it would have been interesting if we had evidence of the first type of difficulty identified above: if declaimers questioned or challenged the *exempla* themselves, for their factuality or interpretation. As a point of comparison for what *could* have happened, consider once again the responses of modern Christians and Jews faced with “*exempla*” from the Old Testament. A particularly troublesome story is found in Genesis 22, where God commands Abraham to sacrifice his son Isaac, after God had already promised that he would make Abraham into a great nation through offspring that would come through Isaac. So this was a test of Abraham’s faith; Abraham passed the test by putting Isaac on the altar and raising the knife to strike him; only at the last second did an angel intervene and stop him. Christians and Jews in many periods of history have viewed this story as normative, illustrating the lengths to which believers should be willing to go in trusting and obeying God. Without going into the details of that long and varied interpretive history, it is useful to look at a few very recent contributions to the debate. Rachel Held Evans, in a 2014 blog post entitled “I would fail Abraham’s test (and I bet you would too),” explores the doubts that

she had always felt about the traditional, harsh interpretations of the story.<sup>65</sup> She singles out a 2010 article by John Piper, who asserted, “It’s right for God to slaughter women and children anytime he pleases... God is God!”<sup>66</sup> Evans responds by arguing that God would not teach us a morality based on love and then himself act in a way that looks like exactly the opposite of love; in that case, “our moral compass is rendered totally unreliable.” Evans appeals to common experience and contemporary values (though these are not her terms): neither she nor her readers would actually kill their children in the name of religion; she then resolves the conflict with the Biblical *exemplum* by reinterpreting its meaning: “Maybe the real test isn’t in whether you drive the knife through the heart. Maybe the real test is in whether you refuse.”

A contemporary Jewish Rabbi, Hyim Shafner, describes a similar process of wrestling with the story of Abraham and Isaac: “I concluded that none of the apologetic paths were satisfactory and that the real test was for Abraham to confront God as he did at Sodom, thus teaching his children ‘righteousness and justice’ and ultimately to say ‘no’ to God. Perhaps, on some level in the narrative of the Akedah [i.e. ‘binding’ of Isaac], Abraham failed the test.” He offers as evidence the fact that in the Biblical narrative, God never again speaks directly to Abraham; all his subsequent communication is through angels as emissaries. Shafner notes that this alternate interpretation has a long tradition within Judaism: “Indeed midrash after midrash depicts just such a counter narrative, Abraham crying, the angels crying and arguing with God and ultimately, Sara’s cries when she hears of the Akedah that according to the midrash are the source of the shofar’s sound.” In conclusion, Shafner says, “Perhaps if we begin to see the Akedah as a test in which the right answer is to protect an innocent child rather than sacrifice him in obedience to God, our world might be a bit different,

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<sup>65</sup> Accessed Nov. 1, 2014. <http://rachelheldevans.com/blog/fail-abraham-test>.

<sup>66</sup> Accessed Nov. 1, 2014. <http://www.desiringgod.org/interviews/what-made-it-ok-for-god-to-kill-women-and-children-in-the-old-testament>. In the article, Piper not only justifies the instances when God killed people directly, but also extends the principle to cases where he ordered his followers to do it.

perhaps for the better.”<sup>67</sup> Thus, when faced with the morally perplexing *exemplum* of Abraham sacrificing Isaac, these Jewish and Christian thinkers do not simply ignore it or hesitate about applying it; they confront it head-on and reinterpret its meaning in light of present values, arguing that it must have been intended to say something else – in fact, the exact opposite of how it was traditionally interpreted.

There is no evidence of conversations like this anywhere in Roman declamation. Why not? The previous section addressed one structural reason: speakers cite *exempla* that they agree with, and there is no incentive to critique the *exempla* of other speakers. So, if declaimers were to debate the meaning of exemplary historical events, the themes would have to be about those events themselves. The equivalent of the Jewish and Christian debate about the meaning of Abraham’s sacrifice would be a *controversia* theme such as, “During a time of truce, Cloelia frees herself and other Roman hostages through an act of *perfidia* against the enemy. She is charged with harming the state.” There certainly are *controversia* themes that deal with Roman history. But the question is what types of debates were actually allowed by those scenarios.

The impression that Roman historical events were contested through declamation has been conveyed by several influential articles. Mary Beard, as mentioned earlier, argues, “The simple fact that *controversiae* were ever constructed around historical figures and incidents shows clearly that Roman myth-history was not merely *exemplary*. Rome’s past and its heroes were not just being held up for admiration, as models to follow or counter-models to abhor. The figures of the past and their conduct were the focus of negotiation and re-negotiation, of mythic re-resolution.”<sup>68</sup> She stresses

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<sup>67</sup> Accessed Nov. 1, 2014.  
[http://www.jewishjournal.com/morethodoxy/item/did\\_abraham\\_fail\\_his\\_final\\_test\\_by\\_rabbi\\_hyim\\_shafner](http://www.jewishjournal.com/morethodoxy/item/did_abraham_fail_his_final_test_by_rabbi_hyim_shafner).

<sup>68</sup> Beard, “Looking (Harder) for Roman Myth,” 61 (emphasis original).

that declamation blurred history and myth, past and present, as historically-based themes were expounded in a fantasy setting:

In part this served to reinforce the *debatability* of Roman history: just as the issues surrounding the blind boy's conflict with the stepmother<sup>69</sup> were obviously up for negotiation, so also was the conduct of the heroes (and villains) of the Graeco-Roman past. But the juxtaposition was also crucial in the construction of the "mythic time" of the declamatory arena – a continuum in which the past and the non-existent world of quasi-contemporary fantasy were joined together in the "here and now" of declamation. History here was repeatedly recaptured for the present. Declamation was one important means of turning dead and buried myth-history into an issue of the present: constant *re-presentation*.<sup>70</sup>

A similar impression is given by a passing remark of Langlands, while discussing the historical example of Regulus and its importance in Cicero's ethical thought. She notes that in *De Officiis* 100-110, "Cicero responds in detail to a series of objections to Regulus' decision posed by imaginary interlocutors, which are clearly reprising well-known arguments about the case, perhaps from declamatory exercises."<sup>71</sup> After reading Beard's and Langlands' articles, one could reasonably think that the great *exempla* of Roman history were frequently debated and reevaluated in declamation halls. Beard does not quite say that the past was treated as fantasy, but it would be easy to assume from her argument that the distant historical *exempla* became somehow less real when they were joined with the fantasies of declamations.

A closer look reveals that this impression needs some clarification. We can look at the declamations that remain and see what type of history is presented in them. First, historical cases are comparatively few; second, those that were declaimed are fictionalized in ways that were clearly motivated by situation ethics. As to their frequency, of the 164 themes preserved from [Quint.] *Decl. Minores* and *Maiores*, only one deals with a Roman historical topic: *Decl. Maior* 3, in which a soldier in

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<sup>69</sup> [Quint.] *Decl. Maior* 2.

<sup>70</sup> Beard, "Looking (Harder) for Roman Myth," 62 (emphasis original).

<sup>71</sup> Langlands, "Roman *Exempla* and Situation Ethics," 106. Regulus did become a frequent topic of debate later, for Augustine. Eg. at *Civ.* 1.15, in response to the claims of pagans that Rome had been sacked because it abandoned the gods, Augustine argued that Regulus had obeyed his gods scrupulously and still underwent extreme torture and death.

Marius' army kills a tribune, and relative of Marius, who was soliciting him for sex.<sup>72</sup> In Seneca, there are only three historical-themed *controversiae*: 4.2 (excerpts) involving the pontifex Metellus, discussed further below; 7.2, the case of Popillius who killed Cicero, already discussed; and 9.2, Flamininus charged with *laesa maiestas*, also discussed previously.<sup>73</sup> Then there are two *suasoriae*: 6 and 7, dealing with Cicero's proscription by Antony.<sup>74</sup> As for other ancient testimonies to declamation, Kohl in 1915 undertook the laborious task of assembling all references to historical declamation themes in extant literature.<sup>75</sup> He finds that most of these are drawn from Greek rather than Roman history – by a margin of 356 to 64. Furthermore, the bulk of Kohl's examples come from rhetorical handbooks, and these might not have been declaimed; they simply provided illustrations of different types of cases using events that were well known. For instance, the late rhetorical treatise of Julius Victor (RLM 381, 28) gives the following illustration of the *translatio criminis* defense: *ut si Ahala Servilius Spurio Maelio occiso ita se defenderet, occidisse quidem, sed inssu dictatoris* (“such as if Ahala Servilius, after killing Spurius Maelius, defended himself by admitting the killing, but claiming he had acted on the orders of the dictator,” Kohl ex. 361). This is a famous historical *exemplum* from Cicero's speeches; but its mere citation by Julius Victor does not show that it was actually declaimed as a *controversia*.<sup>76</sup>

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<sup>72</sup> *Bello Cimbrico miles Mari tribunum stuprum sibi inferre conantem, propinquum Mari, occidit. Reus est caedis apud imperatorem.* This took place in 104 BCE.; historical sources are Val. Max. 6.1.12, Plut. *Marius* 14.3-6, Cic. *Mil.* 9. For a detailed analysis of *Decl. Maior* 3 from a psychoanalytic perspective, see Gunderson, *Declamation, Paternity, and Roman Identity*, Chapter. 5.

<sup>73</sup> This count excludes 10.3, already discussed; although the setting resembles the civil war between Antony and Octavian, it contains no historical events.

<sup>74</sup> *Deliberat Cicero an Antonium deprecetur* (“Cicero deliberates whether to beg mercy from Antony,” 6), and *Deliberat Cicero an scripta sua comburat, promittente Antonio incolumitatem si fecisset* (“Cicero deliberates whether to burn his books, since Antony is promising to spare him if he does so,” 7).

<sup>75</sup> R. Kohl, “De scholasticarum declamationum argumentis ex historia petitis” (PhD diss., Paderborn, 1915).

<sup>76</sup> Cf. Kohl 358, in which Lucretia deliberates whether to commit suicide. This looks like it is directly debating an exemplary story; however, 1) the citation is from Euporius, who is sixth century or later; and 2) even he mentions it only in an illustrative context, so it may have never been declaimed.

Even more important is the way in which the historical themes were fictionalized: by carefully changing one or two parameters, in order to invite practice in situation ethics. This is seen most clearly by looking at a case in detail – one specifically cited by Beard, *Sen. Con.* 4.2:

SACERDOS INTEGER SIT. Metellus pontifex, cum arderet Vestae templum, dum Palladium rapit oculos perdidit. Sacerdotium illi negatur.<sup>77</sup>

She mentions this as one of the “well known personalities or incidents from Greek and Roman history – such as the blinding of the pontifex Metellus or the proscription of Cicero.” In her analysis, “The task of the declaimer was either to defend Metellus’ right to keep his priesthood, or to justify his removal from office, despite his great service to the *sacra*. Instantly problematized in that debate was the whole notion of Roman heroism, correct conduct and bodily perfection. There was no single answer to the question ‘how does a Roman act correctly,’ only an endless series of claims and counterclaims.”<sup>78</sup> This is true as far as it goes, but it is important to consider a factor that Beard does not mention: in much of the Roman historical tradition, Metellus was *not* blinded; this detail was likely invented by rhetoricians.<sup>79</sup> The change in the story is important because it removes the issues that were actually at stake in the original situation. We have repeatedly seen the importance of situation ethics to Roman thought, including declamation: one had to consider the situation before making an ethical judgment. The historical-themed declamations almost always changed the situations, so the original *exempla*, and how they were evaluated in the original situation, were never questioned. The Metellus of the historical tradition rescued the Palladium, and his deed received a

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<sup>77</sup> “A PRIEST MUST BE WITHOUT DEFECT. When the temple of Vesta was on fire, the pontifex Metellus lost his eyes while rescuing the Palladium. He is forbidden to continue as priest.”

<sup>78</sup> Beard, “Looking (Harder) for Roman Myth,” 61-2.

<sup>79</sup> This is the conclusion of the early analysis by O. Leuze, “Metellus Caecatus,” *Philologus* 64 (1905): 95-115. He is followed by Kohl, “De scholasticarum declamationum argumentis,” 92, and Winterbottom ad loc., note 2. On the other hand, Angelo Brelich, “Il mito nella storia di Cecilia Metello,” *Studi e Materiali di Storia delle Religioni* 15 (1939): 30-41, believes that the legend of blindness goes back somewhat farther than the rhetoricians. If that is the case, then the point remains that they selected the version of the story that was most suitable for debating situation ethics.

positive evaluation from the community at the time.<sup>80</sup> No dissenting opinion was passed down. What this declamation does is pose a counterfactual question: “Suppose Metellus performed his meritorious deed, but was blinded in the process. Would that change the evaluation? Does it imply divine disfavor?” This is somewhat different from Beard’s claim that the case “problematized ... the whole notion of Roman heroism, correct conduct and bodily perfection”; that would imply that these concepts were present in the original story, and that the declamation merely focuses critical attention on them. Instead, the theme writers carefully *introduced* those concepts, by changing the accepted historical details, in order to create a paradoxical scenario for debate. So, Roman history was not so much being contested or reevaluated as it was being used as a jumping-off point for the discussion of other ethical dilemmas.<sup>81</sup>

The other historical-themed declamations are similar. We have already seen that the Popillius case (Sen. *Con.* 7.2) was completely rearranged by rhetoricians in order to make it more paradoxical. And the paradox centered on a conflict of situation ethics: loyalty to one’s patron tested by the exigencies of civil war and the orders of a commander. Likewise with Flamininus (Sen. *Con.* 9.2), Mal-Maeder notes that the rhetoricians, “who know well that history is not absolute, take advantage of its variants in order to fashion the theme in the way most suitable for practice”; here they choose the least compromising version of the story in order to give Flamininus more of a chance.<sup>82</sup> There

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<sup>80</sup> Ovid tells the traditional version: (scil. *Metellus*) “*Ignoscite,*” dixit / “*sacra: vir intrabo non adeunda viro. / Si scelus est, in me commissi poena redundet: / sit capitis damno Roma soluta mei.*” / *Dixit, et irrupit: factum dea rapta probavit, / pontificisque sui munere tuta fuit* (“Metellus said, ‘Forgive me, sacred things: as a man, I will enter where a man must not go. If it is a crime, let the punishment fall upon my head; let Rome be spared by the punishment done to me!’ He spoke and rushed in; the goddess, snatched up, approved his deed, and was rescued by the service of her priest,” *Fasti* 6.449-54).

<sup>81</sup> Mal-Maeder, *La fiction des déclamations*, 9 suggests a practical reason why both historical and mythological themes were avoided: the details of the cases were so well known that they allowed the declaimers less scope to exercise their own inventiveness. (“... les figures mythologiques, comme les figures historiques exemplaires, sont à tel point chargées d’ « histoire », leurs antécédents sont si connus, qu’elles ne laissent aux déclamateurs qu’une marge de manoeuvre réduite dans l’argumentation et dans le choix des couleurs, c’est-à-dire des motivations particulières prêtées aux personnages mis en cause.”)

<sup>82</sup> *Ibid.*, 5-6 : “... les rhéteurs, qui savent bien que l’Histoire n’est pas absolue, se servent de ses fluctuations pour façonner un cas de la manière la plus propice à l’exercice.... Cette variante – au moins aussi dramatique malgré ce

was a greater tendency for *suasoriae* to deal with historical events; however, Sen. *Suas.* 7, where Antony offers Cicero the chance to burn his writings in exchange for sparing his life, is pure invention. Even when *suasoriae* were grounded in factual settings, such as Hannibal crossing the Alps (famously satirized by Juvenal: *I, demens, et saevas curre per Alpes / ut pueris placeas et declamatio fias*, 10.166-7), this is not the same as really wrestling with the meaning of an *exemplum*. In fact, Kohl's collection indicates that, apart from the illustrations mentioned in rhetorical treatises, declamation themes typically do not touch on the key *exempla* of Roman history. Instead, "very often events were changed so that the scenarios would turn out more elegantly ("ut ... elegantius evaderent"), even though the rhetoricians were not unaware of how things had really happened."<sup>83</sup> My argument is that this "elegantius" was often more specifically motivated by discussions of situation ethics.<sup>84</sup>

It could even be said that the rhetoricians were treating Roman history as more stable than the historians were. By creating self-consciously fictionalized versions of the canonical stories, they were tacitly accepting that there was a "correct" version of the story, which could not be touched.

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qu'en dit H. Bornecque – présente tant d'éléments défavorables à Flamininus (son homosexualité, le fait que la victime était un suppliant et non pas un condamné, le manque de dignité d'un haut magistrat, sa brutalité) qu'elle aurait offert moins de possibilités de défense que la version choisie par les rhéteurs."

<sup>83</sup> "Saepissime autem rerum fiebat mutatio, ut argumenta elegantius evaderent, quamquam non ignorabant rhetores, quomodo vere gestae essent res," Kohl, "De scholasticarum declamationum argumentis," 110. This is the culmination of his interesting taxonomy of the degrees of fictionalization. The preceding categories are: 1) Cases based on historical legal conflicts that portray one party as present to argue his side when in reality he was absent. 2) Cases based on the historians' report that someone was criticized for some action, but no court case actually occurred. 3) Cases that debate the consequences of laws or proposals that historically were not enacted. 4) Cases in which real events are transported to a different time period or attributed to different characters. On the origins and development of historical themes, see also Lentano, "*Concessum est rhetoribus ementiri*."

<sup>84</sup> Imber, "Practiced Speech," 208 suggests some other reasons why the historical themes became fictionalized, applying the work of Jan Vansina, *Oral Tradition as History* (Madison: University of Wisconsin Press, 1985), 165-73: "Jan Vansina argues that oral traditions are structured; that is, in the process of repetition and transmission over generations, 'disconnected short items of recent information' are discarded, while narratives of definite patterns treating matters of social and cultural importance endure. In other words, specific details like those Cicero recalled from his youthful declamations might be lost, but narrative patterns that reflected cultural values and conflicts would survive. The corpus of declamations, accordingly, reflects a 'structured' narrative tradition in Rome. On any given day a *rhetor* could create and assign a *controversia* that referred to a contemporary political crisis or legal dispute. Such a *controversia* was unlikely to survive in the corpus of declamations, to be borrowed by and handed down to other teachers, if it did not also explore core issues of *Romanitas*. If the *controversia* did explore these issues and thus survive, its original details and topicality might nevertheless disappear from the tradition over time."

For the historians, by contrast, historical events were still malleable, contestable, subject to change in the retelling. To name a few examples, Levene discusses how Sallust's *Catiline* presents competing evaluations of Cato the Censor through the speeches of Caesar and the Younger Cato.<sup>85</sup> Many scholars have recognized that Velleius Paterculus provides a different view of the late Republic and early Principate than do Livy and Tacitus. Bispham shows how his account of the Gracchi and the Social War includes details that contrast with the standard version; Velleius seems to present events from the perspective of the Italian allies.<sup>86</sup> If historical events had this much flexibility among the historians, there was a sense in which declamation was contributing to its stabilization. The malleability that still remained in historiography was being transferred to the innovations of the rhetoricians, who treated the changes overtly as fictions; but for the students who declaimed the scenarios, the details and interpretations of "real" events were fixed. This process of stabilization is also seen in compilers like Valerius Maximus, who neatly classified all the *exempla* under their appropriate headings (*fidelicia*, *puericia*, *crudelitas*, etc.); by this time, they could only be slotted into debates about other things.<sup>87</sup>

#### IV. Conclusion

While many have pointed out the one-sidedness of declamation as a negative thing, this chapter shows a way that it could be considered positive, from a certain perspective. For those who set up the system of rhetorical education, and consciously or unconsciously used it to train and

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<sup>85</sup> D. S. Levene, "Sallust's *Catiline* and Cato the Censor," *The Classical Quarterly* 50 (2000): 170-91.

<sup>86</sup> Edward Bispham, "Time for Italy in Velleius Paterculus," in *Velleius Paterculus: Making History*, ed. Eleanor Cowan (The Classical Press of Wales, 2011), 21-24.

<sup>87</sup> Bloomer, *Valerius Maximus*, talks in detail about how Valerius removes controversy and nuance from the memory of the Roman civil wars, and reduces the characters to standard personifications of ethical qualities. "Valerius is exemplifying what to know of the past and how to communicate that knowledge," 249. Bonner, *Roman Declamation*, 61-2 describes how *exempla* in declamation were connected with commonplaces: every topic had standard names that could be cited to illustrate it. For instance, the fickleness of fortune was regularly associated with Croesus, Marius, and Crassus (Sen. *Con.* 1.1.3, 2.1.7).

acculturate Roman men, the process worked as intended: it allowed a certain form of discussion about important issues, but never let core values be threatened or opened up to question. The previous chapter, on constraints, mentions how the declamation scenarios made only certain lawsuits possible, and allowed only certain characters to be protagonists. This chapter identifies an even more basic constraint in the themes: the choice of subject matter, placing certain historical events and characters off limits for debate. Roman exemplary discourse did have mechanisms for reconsidering historical *exempla* from the more distant past, replacing them with recent *exempla*. But declamation was not part of that process. Rhetoric teachers were primarily interested in using the past for the purposes of rhetorical education; it was not their goal to think deeply about the past for its own sake, or about reinterpreting its applicability to the present day. Probably the only way that real innovation could have happened through declamation was if a group declaimed together regularly, took serious interest in larger philosophical questions, and responded thoughtfully to each other's arguments. This certainly does not describe the declaimers Seneca reveals to us. So the constraint in a way depended on the system as well as on the people who made up the system: teachers, speakers, and those who were present in the audience to hear and evaluate declamation performances.

Declamation created debates about a fictional world; declaimers stepped into that world and for the most part treated the fictionality as real. Occasionally they made arguments based on implausibilities of the plot – treating the fiction as more real than perhaps its creators intended. But the “most real” element in all of declamation is the exemplary stories from the Roman past, no matter how legendary they may seem to us. Speakers invented characters within their narratives who were relying on those historical exempla for decision-making, just as Romans in the real world did. In the event of a mismatch, they would revise the scenario of the theme sooner than question or challenge the lesson of the *exempla*. The meaning of Roman history continued to be negotiated

elsewhere in Roman society, such as in historiography, but as far as the surviving evidence shows, declamation was not an arena where that happened.

## CHAPTER 4

### LEGAL INTERPRETATION IN DECLAMATION

Since declamation consisted of fictional legal cases, it inevitably required discussions about the interpretation of law. This chapter is not primarily about the actual legal arguments made in declamation; they were as conventional as they were technical, and have been well discussed elsewhere.<sup>1</sup> It is about the thought processes and conversations about interpretation which surrounded these arguments, and how these were connected to other developments in Roman society. As we will see, declamation focused on aspects of interpretation that were useful to the advocate, particularly, its ethics and utility as opposed to its legal correctness; the legal problems posed in declamation were usually designed to be insoluble anyway, so they would rarely be the main focus of the case. Nevertheless, declamation did provide a condensed version of real aspects of the legal process; it touched on issues of legal interpretation that were salient in the early Empire, such as the specificity of laws, the employment of legal fictions, mythical early Rome and the intentions of lawgivers.

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<sup>1</sup> A good recent analysis with references is Berti, "Law in Declamation." See also Tonia Wycisk, *Quidquid in foro fieri potest. Studien zum römischen Recht bei Quintilian* (Berlin: Duncker & Humblot, 2008), who sorts [Quint.]'s cases based on the real legal principles they contain.

This dissertation as a whole has been looking at what types of responses the different themes elicited. The Introduction discussed ways in which the themes were consciously designed, or remained in use, because they were useful for particular pedagogical goals. The structure of declamation granted the theme writer a presiding role analogous in some ways to that of the praetor in a Roman private-law suit. The two parties would bring their dispute before the praetor, with the plaintiff seeking legal remedy based on the list of actions in the praetor's annual Edict. The praetor determined what facts were agreed upon by the litigants, what was in disagreement, and condensed them into a formula to be investigated and decided by a lay judge (*iudex*).<sup>2</sup> The two sides then presented their evidence and arguments before the judge, commonly employing advocates to speak on their behalf. The declaimer naturally corresponded to the advocate on a real trial: he was presented with a set of facts, to be taken as "given" or agreed upon by the parties, and a legal question to be decided. His task was to make a speech in advocacy for one or the other party. But the position of the theme writer, though less obvious, is also significant. Like the praetor, it was the theme writer who framed the legal conflict; he decided what facts had been agreed upon by the two parties, and who was seeking what from whom based on what laws. Since the theme writer was working entirely with fictional information, he had complete latitude to frame the case – consciously or unconsciously – in such a way as to require any type of legal or ethical discussion.

The themes that the rhetoricians created can be grouped into two broad categories based on the degree of focus on the law. All *controversiae*, by their nature, deal with the law to some extent. In one category are those cases where the legal question is primary; these often center on the ancient rhetorical topics of *leges contrariae* (conflicting laws), *scriptum et voluntas* (letter vs. intent), and *ratiocinatio*

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<sup>2</sup> A sample formula from the Introduction is repeated here: "Let Gaius be judge. If it appears that the slave which is at issue belongs to Aulus Agerius at civil law, and it has not in the opinion of the judge been restored to Aulus Agerius, whatever its value shall be let the judge condemn Numerius Negidius to pay that to Aulus Agerius; if it does not so appear, let him absolve." Johnston, *Roman Law in Context*, 114, synthesized from Gaius *Inst.* 4.39-52.

(reasoning by analogy),<sup>3</sup> and contain only limited story elements and development of characters. An example of conflicting laws is [Quint.] 274 *Tyrannus fulminatus* (“The tyrant struck by lightning”):

QUO QUIS LOCO FULMINE ICTUS FUERIT, EODEM SEPELIATUR. TYRANNI CORPUS EXTRA FINES ABICIATUR. Tyrannus in foro fulminatus est. Quaeritur an eodem loco sepeliatur.<sup>4</sup>

Here, the only character is the completely generic *tyrannus*; there are no past actions to justify or condemn, other than his simply being a tyrant. The case centers on the question of what to do when two laws make irreconcilable demands. [Quint.] 329 *Sepultura tyranni qui se occidit* (“Burial of a tyrant who committed suicide”) introduces a question of letter vs. intent:

QUI TYRANNUM OCCIDERIT IN FORO SEPELIATUR. In pestilentia responsum est tyrannum occidendum. Ipse se occidit. Petunt propinqui ut in foro sepeliatur.<sup>5</sup>

Thus, a situation is contrived in which the letter of the law requires an action that seems contrary to what the lawgiver intended. Arguing by analogy (*ratiocinatio*) is called for on [Quint.] 350 *Aqua frigida privigno data* (“Cold water given to a stepson”):

Qui habebat filium, amissa matre eius, aliam uxorem duxit. Incidit in gravem valetudinem filius. Convocati sunt medici; dixerunt moriturum si aquam frigidam bibisset. Dedit illi noverca aquam frigidam. Perit iuvenis. Noverca accusatur a marito veneficii.<sup>6</sup>

The declaimer can argue that the law against poisoning is applicable here, since giving cold water to the sick boy is analogous to giving hemlock or some other lethal substance.

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<sup>3</sup> Introduced, for instance, in *Rhet. Her.* 1.19-23. For additional references and discussion see Section III below. For a discussion of how Seneca’s declaimers implement ancient *status* theory on legal-themed cases, see the recent work by Berté, “Law in Declamation.”

<sup>4</sup> “IN WHATEVER PLACE A PERSON IS STRUCK BY LIGHTNING, IN THE SAME HE MUST BE BURIED. THE BODY OF A TYRANT MUST BE CAST AWAY OUTSIDE THE BOUNDARIES. A tyrant was struck by lightning in the forum. It is inquired whether he must be buried in the same place.”

<sup>5</sup> “WHOEVER KILLS A TYRANT MUST BE BURIED IN THE FORUM. During a plague, an oracle responded that the tyrant must be killed. He killed himself. His relatives ask that he be buried in the forum.”

<sup>6</sup> “A man had a son; the son’s mother died and the man remarried. The son became severely ill. Doctors were summoned; they said he would die if he drank cold water. His stepmother gave him cold water. He died. The man accuses the stepmother of poisoning.”

In the other category, by contrast, are those cases that place the primary emphasis on characters, family conflicts, or general ethical questions, and end with a legal question almost *pro forma*. The difference cannot be defined or quantified precisely, since the categories are more poles of a continuum than discrete groups.<sup>7</sup> However, as a rough measuring stick, the most common family conflicts are easy to identify and count; these include disinheritance (*abdicatio*), an insanity suit against a father (*actio dementiae*), or a wife's suit against a husband for ill-treatment (*malae tractationis*) or unjust divorce (*iniusti repudii*). We might add several that are vague by their very nature: a charge for unwritten wrongdoing (*inscripti maleficii*), ingratitude (*ingrati*), or morals (*de moribus*). All these types of cases fall more toward the ethical or character-focused end of the spectrum. By this criterion, 41% of cases in Seneca fall toward the family or character end of the spectrum (30/74),<sup>8</sup> while for [Quint.] the figure is only 23% (34/145). This means that [Quint.] has a higher proportion of cases with a legal focus. It is difficult to be sure if this represents diachronic change in the practice of declamation, or a selection bias, or a difference in social setting. We will revisit this question in the conclusion, and note how a diachronic difference, if real, could be connected to other changes in Roman society.

This chapter will investigate what types of discussions about legal interpretation are elicited by the two types of cases, family- and legal-focused. The topic is important because many declamatory laws do require interpretation; in fact, numerous cases presuppose a vague or poorly coordinated system of laws, which gives rise to so many conflicts between laws, so many issues of intent or analogical application. The paradox is that these arguments were not permitted in real court cases: an advocate could not go before the judge and ask him to rule based on the supposed intent

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<sup>7</sup> Ancient *status* theory provided its own classification, but here it is helpful to apply a less rigid framework in order to allow other connections to be seen.

<sup>8</sup> This includes those that are preserved only in excerpt.

of the lawgiver. The judge was limited to the formula that the praetor had delivered to him.<sup>9</sup> Nevertheless, this chapter will argue that declamation did mirror interpretive discussions that went on in other phases of the legal process, and that these were not without value to the advocate. While Chapter 1 showed that most themes are imbalanced in terms of audience sympathy, and that these provided practice at different ways of arguing, here we will see that the themes tended to be equally balanced in terms of the law. Regardless of whether the cases were more character-focused or more legal-focused, the themes typically made the legal conflicts insoluble; thus, they brought the discussion back to the things that were really useful for the advocate in all circumstances: ethics and utility. Quintilian's advice on conflicting laws is: *Plurimum tamen est in hoc, utrum fieri sit melius atque aequius: de quo nihil praecipere nisi proposita materia potest* ("But the most important question is this: which law is it better or more just to follow. Concerning this, nothing can be taught unless actual material is set forth," *Inst.* 7.7.7-8). This statement is in fact a good rationale for the entire genre of declamation: the advocate could always get mileage out of discussing things like utility and fairness, and yet, detailed guidelines could not be given in advance; the student had to learn from actual cases. Declamation provided that practice by removing debates from the realm of the abstract and allowing students to work with concrete examples.

## **I. Family cases in declamation**

It is helpful to start with the role of the laws and their interpretation in those cases involving family disputes (father-son, husband-wife). All *controversiae*, as noted previously, focus on the law to some extent: it is a defining feature of the genre that no matter what subject matter is to be debated, it is always set in the format of a legal dispute between two parties. This is what leads Lentano to

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<sup>9</sup> Schulz, *History of Roman Legal Science*, 132-4.

characterize declamation as a “juridicization of ethics.”<sup>10</sup> We have been talking about cases that group toward poles of the continuum between more legal-focused, and more family- or character-focused. The mere fact that a case deals with a family conflict does not preclude its falling toward the legal end of the spectrum: [Quint.] has a great many cases about wills and dowries – fundamentally family issues – which nevertheless delve into fine legal minutiae. But the cases that interest us here – mainly from Seneca – are ones where the legal questions call for only a brief treatment, and instead, the declamation is forced to focus on ethical issues.

What forces these cases away from law and toward ethics is the fact that *abdicatio* (disinheritance) and *dementia* (madness) are never given a legal definition within the genre of declamation. These were not real legal actions at Rome, although they did have parallels. For instance, a father wishing to disinherit a son simply had to say so in his will; there was no court case like that envisioned in declamation, in which the father presented reasons for disinheritance and the son responded. The closest parallel was the *querela inofficiosi testamenti* (“complaint of a will contrary to duty”), a suit which relatives left out of a will could bring *after* the testator’s death.<sup>11</sup> Since the declamatory action was not identical to any real legal action, its definition had to come within the realm of declamation, not real law. The result was that Seneca’s declaimers regularly started with basic questions about the law’s applicability: *An filius ob [...] abdicari possit?* (“Can a son be disinherited for X reason?”)<sup>12</sup> *An possit dementiae agi cum patre ob ullam aliam rem quam ob dementiae?*

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<sup>10</sup> Lentano, “Un nome più grande di qualsiasi legge,” 566.

<sup>11</sup> See the detailed summary in Borkowski and Du Plessis, *Textbook on Roman Law*, 235-40. Bonner, *Roman Declamation*, surveys the similarities and differences between declamatory laws and real laws: 93-4 on *dementia*, 101-3 on *abdicatio*. Quintilian notes some parallels at *Inst.* 7.4.11. Regarding the Quintilian passage, Crook, “Once again the *controversiae* and Roman law,” 71, responds: “But, *nota bene*, he knows the difference: he is not claiming that the *controversiae* in these cases are quoting Roman law – exactly not.”

<sup>12</sup> E. g. *Prima quaestio illa ab omnibus facta est vulgaris: an filius ob id, quod sui iuris sit, abdicari possit* (“The first question is the common one that everyone asks: Can a son be disinherited for something that is within his legal rights,” 1.8.7).

“Can a father be charged with madness for any reason other than [literal] madness?” Sen. *Con.* 10.3.7). The fact that the term itself was undefined left procedure uncertain and open to debate.

These procedural questions were the only legal points to debate on these cases; however, there was not much that could be said about them, and some declaimers thought they should be dispensed with. Seneca quotes Latro’s views on 2.3, a case of a madness suit against a father:

Latro eleganter dicebat quasdam esse quaestiones quae deberent inter res iudicatas referri .... Inter has putabat et hanc esse, an pater ob dementiae quae morbo fieret tantum accusari a filio debeat; aiebat enim manifestum esse e lege et de officio patris quaeri et fingi quasdam controversias in quibus pater furiosus probari non possit, <nec> absolvi tamen propter impietatem nimiam, libidinem foedam. Quid ergo? aiebat; numquam utar hac quaestione? Utar cum aliis deficiat.<sup>13</sup>

Latro feels that this basic question is superfluous: the declamatory suit for madness should be allowed to extend to other things besides literal madness (i.e. the kind resulting from a disease). The reason Latro adduces is the very purpose of declamation: certain themes are designed (*fingi quasdam controversias*) in order to open up debate about a father’s ethical duties. On these cases, the father cannot be proved literally *furiosus* – in other words, the legal question is insoluble, if the question is solely about madness; however, the father can indeed be condemned for his lack of dutiful affection (*impietatem nimiam*) or his disgraceful passions (*libidinem foedam*). Declaimers should recognize that the purpose of these themes is to open up debate on the relevant ethical issues. Nevertheless, Latro does not go so far as to remove the basic procedural question completely from the declaimer’s repertoire: “I will use it when I have no other question to ask,” i.e., it is useful to know how to make these kinds of arguments, as a last resort.

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<sup>13</sup> “Latro used to say very wittily that there were certain *quaestiones* that should be regarded as legally settled .... Among them is the present one: Should a son charge a father with madness only when it results from an illness? He said it was clear from the law that the question was also about the duties of a father; certain *controversiae* are designed such that the father cannot be proved [literally] mad, but <neither> can he be absolved of his excessive lack of dutiful affection or his disgraceful passions. “What then? Shall I never use this question? I will use it when I have no other question to ask,” 2.3.12.

Asinius Pollio agrees with Latro on the usefulness of procedural points of law: *Remittit, inquit, eam quaestionem quae semper pro patribus valentissima est* (“He said, ‘Latro is abandoning the question that is always most powerful in defense of fathers,’” 13). In other words, the basic definitional questions may seem superfluous, but they can be effective under the right circumstances; since the legal action was undefined, there was always scope for declaimers to begin by questioning it. This is in spite of the fact that the declamatory action was known to be parallel to a real Roman legal action, the grounds of which were closely circumscribed; as Pollio goes on to state: *Ego scio nulli a praetore curatorem dari quia iniustus pater sit aut impius, sed quia furiosus; hoc autem in foro esse curatorem petere quod in scholastica dementiae agere* (“I recognize that the praetor does not appoint a guardian to any father on the grounds that he is unjust or undutiful, but only because he is [literally] mad; and in the forum, this action of seeking a *curator* is what we call a suit for madness in declamation,” 13).<sup>14</sup> The parallel with the real praetorian action did not, for all or most declaimers, turn the grounds of an insanity suit into a *res iudicata*, a question legally settled; it remained to be asked, whenever it was useful.<sup>15</sup>

As Latro’s observations reveal, since the legal questions on these cases are insoluble, what remains is to argue about ethical issues. It may well be that the character seems to be in a weak position because of something else he did: such as, the son who refused to divorce his pirate wife (Sen. *Con.* 1.6); or the son who refused to kill his adulteress mother at the orders of his war-hero father with no hands (Sen. *Con.* 1.4); or the father who gave his daughter in marriage to a slave as a reward for not raping her when he could have (Sen. *Con.* 7.6). Even so, the fact that the actual *iudicandum* is a disinheritance or madness question makes it legally undefined. All prior events shift to

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<sup>14</sup> Editors differ on whether these words are part of Pollio’s statement or whether Seneca resumes in his own voice. Winterbottom takes the later view. The implications for my argument are not changed either way.

<sup>15</sup> Similarly [Quint.], a century later, continues to raise definitional questions on the hero’s choice (*Vir fortis optet quod volet*): Does the law grant a hero the right to choose anything he wants without exception? Is he permitted to choose something that goes against another law? See also Section IV below.

the realm of *aequitas* – “Should he have done X?”<sup>16</sup> – and are more a matter of audience sympathy (see Chapter 1) than legal argumentation. Thus, the bulk of the actual discussion on the case turns out to be about character or ethics. Gunderson notes that a suit for *dementiae* was the only venue through which a declamatory son could protest against his father’s actions;<sup>17</sup> in other words, this was the fictional legal form into which the *controversia* as a genre converted this type of ethical discussion or conflict.

The comparatively minor importance of the actual laws is seen by a rare co-occurrence of four parallel cases which pose different legal questions but deal with the same ethical problem:

[Quint.] 287, 371, 375, and Calpurnius Flaccus 32. The simplest version is seen in [Quint.] 371:

ABDICARE LICEAT. VIR FORTIS OPTET QUOD VOLET. Qui prodicionis patrem reum habebat fortiter pugnavit. Rogante patre ut optaret abolitionem suum, non optavit, sed in iudicio reo adfuit. Absolutus pater abdicat filium.<sup>18</sup>

The other two [Quint.] cases differ only in small details: they introduce another son who deserts in the same battle; the hero son uses his option to protect his deserter brother, and *then* appears successfully in his father’s defense. ([Quint.] 371 and 287 present the speech for the son, 375 that for the father.) But the important contrast is with Calpurnius Flaccus 32:

Qui filios habebat unum oratorem, alterum militem, reus prodicionis factus est. Pendente iudicio miles fortiter fecit. Petit praemio abolitionem iudicii. Contradicit frater orator.<sup>19</sup>

Thus, on the surface, [Quint.]’s cases are about a father’s right to disown his son, while Calpurnius’ deals with a public policy question: should the state allow a hero to opt for the quashing of a trial?

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<sup>16</sup> E.g. *An sic filiam collocare debuerit?* (“Should he have given his daughter thus in marriage?” 7.6.13). Also 1.1.13-14; 1.4.6; 2.1.20; 7.1.17, 19; 10.2.8, 11.

<sup>17</sup> Gunderson, *Declamation, Paternity, and Roman Identity*, 115-6.

<sup>18</sup> “LET IT BE PERMITTED TO DISOWN. LET A HERO CHOOSE WHATEVER HE WISHES. A man whose father was on trial for treason became a hero. Though his father asked him to choose the quashing of his trial, the son did not choose this, but instead, spoke at the trial in his father’s defense. The father was acquitted and disowns the son.”

<sup>19</sup> “A man who had two sons, an orator and a soldier, was put on trial for treason. While the trial was still pending, the soldier son became a hero. As his reward, he asked for his father’s trial to be quashed. His brother, the orator, speaks in opposition.”

The significant thing is this: the orator son makes the exact same arguments against his brother's option that the brother himself makes in [Quint.]'s cases about why he should not make the option. It does not matter that [Quint.]'s cases were framed as disinheritance cases: the defense against disinheritance was the ethical claim that the son had chosen the right course of action.<sup>20</sup> (Both sons also argue that quashing the trial is not in the father's best interest, as this makes him appear guilty.) So, this case illustrates that the same core scenario can be turned into different types of legal conflicts; however, none of the legal conflicts necessarily have to be about the law: they are more often about broader principles of policy or ethics.

These family cases, which really invited ethical discussions, would always be valuable practice for an advocate. This may explain why they are found in all declamation collections from all time periods. Nevertheless, in [Quint.] it is the opposite end of the continuum, the legal-focused themes, that come in the highest proportion. Before discussing what types of discussions were elicited by these cases, we must look at some areas where problems of legal interpretation arose in Roman jurisprudence.

## II. Legal interpretation in Roman jurisprudence

It is a timeless characteristic of law that it requires interpretation.<sup>21</sup> Here we can highlight several key areas in Roman law that are relevant to declamation: the wording of laws, conflicts between laws, and cultural distance from the time of writing.

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<sup>20</sup> [Quint.] 371.3: *Quid petisti? Ut abolitionem optarem. Memento non omnia, pater, nos posse petere: praemium accepimus, non regnum. Nescis quantum sit abolitionem petere: accusatori silentium indicere, reum eximere, leges tollere* ("What did you ask me to do? To opt for the quashing of your trial. Remember, father, that we cannot opt for everything: we have received a reward, not a kingship. You do not realize what a momentous thing it is to ask for a quashing: it is to impose silence on the prosecutor, set the defendant free, abolish the laws"). Calpurnius Flaccus: *Publicae utilitatis est omnium reorum iudicari causas ne aut nocens evadat poenam aut innocens patiatur infamiam* ("It is in the public interest for the cases of all defendants to be heard, lest either a guilty man escape punishment, or an innocent man suffer disgrace").

<sup>21</sup> This section is much indebted to classes and conversations with Cliff Ando; any deficiencies or oversights are, of course, my own responsibility.

The earliest Roman laws were famously terse in their wording; surviving quotations from the Twelve Tables show almost no definitions or specifications of circumstances: *Si furiosus escit (= erit), adgnatum gentiliumque in eo pecuniaque eius potestas esto* (“If a person shall be mad, his male relatives and kinsmen shall have power over him and his money”) – thus, *furiosus* is presented without definition. When Rome was a small community, interpretation could have been done by consensus, without the need for more precise specification. It would, however, be a mistake to assume that Roman laws continuously increased in specificity over time. Both generic and specific wordings were employed in all time periods, as there were advantages and disadvantages to both methods. The *Lex Agraria* of 111 B.C.E., one of the earliest of which we possess the actual text in inscription form, spells out each of its numerous provisions very precisely, even redundantly, identifying all conceivable individual members of a given set: *Neive quis facito quo, quovius eum agrum locum aedificium possessionem ex lege plebeive scito esse oportet oportebitve, eum agrum locum aedificium possessionem minus oetatur fruatur habeat possideatque ...* (“Nor shall anyone so act that the person to whom such land, place, building, or possession is or will properly be assigned by law or plebiscite ... any the less shall use, have the usufruct of, hold, or possess such land, place, building, or possession ...” – transl. *ARS* 51.7).<sup>22</sup> Similarly, the *Lex Quinctia de aquaeductibus*, from 9 B.C.E., undertakes to provide an exhaustive list of all the activities that it forbids along the right-of-way of the aqueduct: *Ne quis in eo loco post hanc legem rogatam quid obponito molito obsaepito figito statuito ponito conlocato arato serito ...* (“After the passage of this law no one shall obstruct, construct, fence, fix, establish, set up, locate, plow, or sow anything therein ...” – transl. *ARS* 143.5). These two laws, written well before the classical period in Roman jurisprudence, take the movement towards specificity about as far as it could possibly go. They attempt to leave as little uncertainty as possible to the implementation stage: by listing every

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<sup>22</sup> Allan Chester Johnson, Paul Robison Coleman-Norton, and Frank Card Bourne, *Ancient Roman Statutes: A Translation with Introduction, Commentary, Glossary, and Index* (Austin: University of Texas Press, 1961).

conceivable member of the set, they allow no room to debate what is and is not covered under the law.

Nevertheless, this level of specificity can pose a problem: it is possible for the law's writers to omit something. An alternative solution is to provide an umbrella term that identifies the entire set of entities, without attempting to enumerate all its members. This approach can be seen in a different part of the *Lex Agraria* of 111 B.C.E.; paragraph 27 of the law states that it applies *sei quae* (scil. *ager*) *coloniis seive moinicipieis seive quae pro moinicipieis coloniisve sunt civium Romanorum ... fruendus datus est* ("if any land has been given on usufruct to colonies or to municipalities or to towns with the status of municipalities or colonies of Roman citizens ..."). There is no historically known class of towns that received the label *pro municipiis* or *pro coloniis*; the Latin seems to mean simply "all towns, whether they bear the actual title of *municipium* or *colonia* or not." This terminology is a kind of equivocation: it shifts the burden of interpretation to the person in charge of implementing the law. Such a strategy could actually result in greater administrative efficiency, since the officials within a given province would be expected to know to what entities it should apply. For them, the general category term would be sufficient. The disadvantage is that the interpretative decisions of those officials could potentially be challenged through litigation. So both strategies – specificity and generality – were open to exploitation.<sup>23</sup>

Frier argues that the vagueness of laws became a problem during the late Republic due largely to the rise of rhetorical advocacy. Orators were increasingly able to exploit unclear wording and gain victories for their clients. The response of the jurists was to "increase the intellectual content of law and to bound it more adequately against disruptive influences on the judicial

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<sup>23</sup> See Clifford Ando, *Roman Social Imaginaries: Language and Thought in Contexts of Empire* (Toronto: University of Toronto Press, 2015), 29-35 for a discussion of the juristic use of *glans* ("acorn") as a generic term for all fruits.

system”<sup>24</sup> – that is, they had to make interpretation more airtight and less susceptible to rhetorical argumentation. The jurist Q. Mucius Scaevola was at the forefront of these innovations, introducing analytical techniques from other fields to jurisprudence for the first time. He placed great importance on definitions, which are “highly normative, in that they become a basis for applying or not applying pertinent law to specific cases.”<sup>25</sup> He also organized laws more systematically by *genera* and *species*, introduced previously from Greek philosophy.<sup>26</sup> The activities of Scaevola, carried further by subsequent generations, contributed greatly to the professionalization of Roman jurisprudence. Cicero’s speech *Pro Caecina* is illuminating because it came at a transitional point in this process: the dispute centered on the interpretation of the praetor’s Edict, both sides sought advice from jurists, but there were “no fixed canons of interpretation”;<sup>27</sup> the jurists’ opinions counted merely as advice, and were not binding. In subsequent times, jurists and their *responsa* rose to the level of authoritative pronouncements which judges had to follow; the power of advocates was reined in and they were expected to adhere more closely to the legal points of the case.<sup>28</sup> But disputes about wording and interpretation could never be eliminated entirely, in Roman times or indeed in the present day.

The second issue was conflicts between different sources of law – for instance, between statutes (*leges*), which were enacted by assemblies, and the Edict, announced annually by the praetor. The Edict was introduced, in Papinian’s well-known definition, *adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam* (“in order to aid, supplement, or correct civil law, for public benefit,” *D. 1.1.7.1*). Thus, while it modified statutes in various ways, it did not abrogate them; they remained valid at least in principle. The Edict could also conflict with itself from year to year, as

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<sup>24</sup> Frier, *The Rise of the Roman Jurists*, 158.

<sup>25</sup> *Ibid.*, 160.

<sup>26</sup> See Schulz, *History of Roman Legal Science*, 38-98.

<sup>27</sup> Frier, *The Rise of the Roman Jurists*, 127.

<sup>28</sup> *Ibid.*, 264. On the development of Roman jurisprudence, see also Harries, *Cicero and the Jurists*.

each praetor was expected to introduce his own version; only the current version was in force, but contracts or wills might have been drafted with an earlier year's wording in view. There was disagreement on whether the praetor was bound to abide by his own Edict, or whether he could exercise discretion in granting actions – such as, to prevent unworthy parties from using the courts, or in order to provide political favors for the upper classes. The *Lex Cornelia* of 67 B.C.E was an attempt to enforce the first position, limiting the praetor's discretion and requiring him to follow the terms of his Edict. Still, the fact that the Edict continued to change from year to year, and could intervene to fill in gaps between *leges*, posed both practical and theoretical problems for the jurists.<sup>29</sup>

The third problem is cultural distance. For Aulus Gellius, writing late in the 2<sup>nd</sup> Century C.E., the interpretation of laws required confronting another kind of difficulty: the form of Latin was archaic and the rationales were specific to a culture that was significantly different from that of his own day. The more specific the laws were, the more difficult they became to interpret as society around them changed. Gel. 20.1 records a conversation between the jurist Sextus Caecilius and the philosopher Favorinus regarding the Twelve Tables; in response to the philosopher's criticism that the early laws are very obscure or cruel (*obscurissima aut durissima*), Caecilius argues that these difficulties are due primarily to the passage of time: *Nam longa aetas verba atque mores veteres obliteravit, quibus verbis moribusque sententia legum comprehensa est* ("For long lapse of time has rendered old words and customs obsolete, and it is in the light of those words and customs that the sense of the laws is to be understood," 6 – transl. by Rolfe). Caecilius goes on to explain, for instance, what was meant by *arcera* ("covered wagon"), *morbis* ("sickness"), and *iumentum* ("pack animal") in archaic times, and to demonstrate that their employment in the law on summons to court was not cruel when

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<sup>29</sup> On the Edict, see the detailed discussion in Frier, *The Rise of the Roman Jurists*, 42-92.

understood in the proper context.<sup>30</sup> This discussion shows that these interpretive issues were at the forefront of Roman thinking in the second century. The problem of archaic legal language and cultural distance can also be seen as connected to the larger movement of antiquarianism: investigating the distant Roman past, wondering how to apply its laws and customs in the present day. Stevenson talks about how antiquarian interest was stirred up at particular times – the turmoil of the Gracchan period, later Varro in the crisis of the late Republic – but that it was sustained throughout the Principate. “Antiquarianism provided the ‘factual background’ to public life. It explained institutions, procedures, and customs: matters which were apparently not within the curriculum of Roman education.”<sup>31</sup> Gellius’s writings highlight the importance of antiquarianism in the second century, but in fact, there was perpetually a need for Romans to look back at their legal system in earlier times.

Thus, in the real legal system, the problem of how to interpret laws could arise at many different phases of the legal process: praetors had to consider the meaning of previous statutes and Edicts when composing their own Edicts; in the course of a trial or lawsuit, judges and advocates had to interpret the praetor’s formula and decide what it was that he was telling them. As the following will show, declamation raised many problems of a similar nature. Thus, while theme writers often corresponded to the praetor, defining an issue which the advocates were to argue before the judge, they could also take a higher-order role, setting up conflicts over procedure and questions about the relationship between laws.

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<sup>30</sup> *Si morbus aevitasve vitium escit, qui in ius vocabit iumentum dato; si nolet, arceram ne sternito* (“If sickness or old age present difficulty, the summoner shall provide a beast; if he does not wish, he need not outfit a wagon”). Caecilius explains that *morbis* meant a minor indisposition and *iumentum* could include a team of animals drawing a carriage, while *arvera* meant something unnecessarily luxurious. Favorinus had pictured a mortally ill old man slung over a pack animal.

<sup>31</sup> Andrew Stevenson, “Gellius and the Roman Antiquarian Tradition,” in *The Worlds of Aulus Gellius*, ed. L. Holford-Strevens and A. Vardi (Oxford, 2004), 120-1.

### III. The lawgiver's intention and the mythic past

The preceding section noted the problem of specificity in laws, and how both options – making the law more specific or more general – opened the door to rhetorical exploitation. There was a large class of declamation themes that invited discussion on the wording and intention of laws.<sup>32</sup> The arguments made on these cases were, to a large extent, conventional; it seems that the primary purpose of these themes was to provide advocates with a standard repertoire of arguments. However, as this section will go on to show, several other effects can be discerned: first, declamation shows an overlap with the interest of the antiquarians, in that the intention of the lawgiver is sought in mythical early times. By flinging the questions back to the *mos maiorum*, these cases make the discussion primarily about ethics, once again, but ethics in relation to an imagined earlier era. And secondly, by presenting so many instances of conflict and vagueness, and by demonstrating the circularity of arguments, these cases may have reinforced the impression that the law should be more clearly defined, that more things should be placed under the sphere of law rather than unwritten ethics.

The standard arguments need little illustration: they were found in rhetorical handbooks like *Rhetorica ad Herennium* and Cicero's *De Inventione*, which in turn closely followed earlier Greek sources. [Quint.] 329 *Sepultura tyranni qui se occidit* ("Burial of a tyrant who committed suicide"), cited previously, would be a textbook example of a conflict between *scriptum* and *voluntas*, or letter vs. intent:

QUI TYRANNUM OCCIDERIT IN FORO SEPELIATUR. In pestilentia responsum est tyrannum occidendum. Ipse se occidit. Petunt propinqui ut in foro sepe liatur.<sup>33</sup>

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<sup>32</sup> On letter vs. intent in general, see B. Vonglis, *La Lettre et l'Esprit de la Loi dans la Jurisprudence Classique et la Rhetorique* (Publications de l'Institut de droit romain de l'Université de Paris; Paris, 1968).

<sup>33</sup> "WHOEVER KILLS A TYRANT MUST BE BURIED IN THE FORUM. During a plague, an oracle responded that the tyrant must be killed. He killed himself. His relatives ask that he be buried in the forum."

For these types of cases, the handbooks contain lists of standard arguments for both sides, explicitly labelled as *loci* (“commonplaces,” *Rhet. Her.* 2.13 and *Cic. De inv.* 2.125).<sup>34</sup> *Rhetorica ad Herennium*, for example, prescribes the following approach on the side of letter: first, to lavish praise of the law’s writer; then to ask the opponent if he was aware of the law’s existence; to point out that the law was written with careful consideration, while the opponent’s interpretation is contrived and *ad hoc*; to point out that that the writer could have worded the law differently if he had so intended; to expound upon the writer’s actual intention, and show that the law’s wording is clear and precise in keeping with that aim; to stress what dangers would arise if we depart from the letter of the law; and lastly, to impugn the opponent for knowingly violating the law and expecting to be justified. These are typical arguments that Cicero uses or references in his own speeches, such as *Pro Caecina*.<sup>35</sup> They are what we see in declamation as well.

A small but important difference between the rhetorical handbooks and declamation is that the handbooks present the standard arguments as abstractions, removed from any particular time and place. Declamation provides the chance to apply them to specific settings – though these settings are, like all declamation, fictional. This means that declamatory arguments about the lawgiver’s intention are like a fiction within a fiction: they look to a world that characters in declamation imagine as the time and place when their lawgivers made the laws. Just as the world of declamation is a fictionalized Rome, with a sizable share of Greek influence, the sub-fictional world of the lawgivers is a fictionalized Early Rome – a non-specific Early Rome, which could almost be

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<sup>34</sup> Other references in rhetorical handbooks: *Rhet. Her.* 1.19 defines letter vs. intent, 2.13-14 gives arguments (cf. *De Inv.* 2.125); 1.20 defines conflicting laws, 2.15 gives arguments; 1.23 defines analogy, 2.18 gives arguments. See also *Cic. Part.* 132-9.

<sup>35</sup> E.g. *Caec.* 65.

Early Greece, except that declaimers regularly view it as Rome.<sup>36</sup> It invites the creative re-imagining of the legal and cultural landscape of Early Rome, but the actual details are not important: the key in declamation is its ethical landscape. In this respect, declamation shares in the interests of antiquarianism, up to a point. Gellius' characters sought to understand the Twelve Tables by looking for actual information, though that information was often little known. In declamation, there was no actual information to be found, but speakers got to practice what *kinds* of questions to ask. Just as Chapter 2 showed with *colores*, that inventing information taught declaimers to think about, "What kind of details, if I could establish them, would help my client?" So with the fictional lawgivers, the question was, "What kind of portrait of the *maiores* will convince people today?"

We can look in more detail at the mythical world as portrayed on both sides, and see how they use it to support their arguments. Synthesizing the statements that are made in a variety of cases results in a sort of "Tetralogy" like that of Antiphon. The themes and relevant passages ([Quint.] 264, 274, 306, 314, 315, 331, and Sen. *Con.* 1.5) are listed in full in Appendix C. As the following will show, both sides of the letter vs. intent debate in declamation start out with a similar view of the romanticized earlier time. Yet the arguments that follow cancel each other out: what then remains is to argue on *aequitas* ("fairness") and *utilitas* ("utility"), and (on another level) to make the laws more specific.

1. Both sides portray an idealized early Roman society, when their ancestors followed simple principles of justice and had simple laws (264.9 for *scriptum*, 306.11 for *voluntas*).<sup>37</sup> They were rustic

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<sup>36</sup> E.g. [Quint.] 331.17-8 describes laws as made by the *senatus* and *populus*; 274.9 mentions the Forum. The theme of Sen. *Con.* 3.9 includes an appeal to the tribunes; a speaker on that case references the *Lex Cornelia* (i.e. *de sicariis et veneficis*, 81 B.C.E.).

<sup>37</sup> *Et credo fuisse tempora aliquando quae solam et nudam iustitiae haberent aestimationem* (264.9); *Sibi sane tulerit iura simplicius aetas vetus* (306.11).

military men who wanted to reward war heroes (306.11);<sup>38</sup> they also favored harsh punishments for specific things like tyranny (274), desertion (315), and rape (Sen. *Con.* 1.5); they believed in the gods and Furies who would drive guilty people to confess crimes (314). These observations about the simplicity of early laws no doubt have some historical validity, as seen for instance in fragments of the Twelve Tables. There is also a recognition of cultural change: the (fictional) reward granted to a war hero makes sense when set in an earlier time, with rustic citizen soldiers and continuous wars with nearby cities.

2. From this starting point, the side of *voluntas* stresses that the lawgivers could not cover every eventuality. They obviously would have wanted exceptions for certain very rare scenarios such as those that turn up in declamation, but they could not foresee them (274, 315.12). They wrote the laws with simple wording because there was no need to be more specific: they did not fear that the laws would be twisted by those who had to interpret them (306.11). They expected war heroes to exercise their reward not out of greed, but by selecting the legitimate spoils of war (306.11, 12). They intended for laws to be understood as applying to entire categories (*genera*) of crimes even if they did not list every *species*; uncertainties should be interpreted according to fairness (*aequitas*), using analogy; in fact, they deliberately did not make the laws too detailed, because this would make them confusing and actually add uncertainty (331.3-4). These arguments also have some connection with reality: as discussed previously, attempts to write laws exhaustively opened up the danger that something would be left out. The appeal to *genus* and *species*, however, may be a *post factum* rationalization designed to bring in Hellenistic concepts to the discussion; situating this line of reasoning in Early Rome seems anachronistic. On rewarding war heroes, an argument can be made

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<sup>38</sup> *Has enim primas rudibus illis ac militaribus viris existimo placuisse leges quibus inter continua bella praemium non avaris virtutibus dabatur* (306.11).

based on cultural distance: since the law reflects the values and setting of an earlier era, it should be enforced based on an understanding of its rationale in context.

3. The side of *scriptum* replies by stressing the danger of looking to *voluntas*. The reason why laws were written in the first place is because everyone interprets *aequitas* differently; its principles had to be formalized through laws, which serve as a guide to conduct (264.9). Once people start looking for *voluntas*, it allows clever twisting of words; it disrespects the ancients by implying that they were stupid and did not know how to write laws clearly (264.7). More broadly, it circumvents the legislative process and amounts to making new laws (264, 331). If the application of a particular law is contrary to *aequitas*, we should change the law, not make a new law in court; looking to *voluntas* makes it possible to twist the laws to suit one's own *utilitates* (264.9).

4. Finally, the side of *voluntas* can reply that excessive focus on the letter of the law is *calumnia* (“trickery” or “evasion”);<sup>39</sup> it can be a guise for shameful behavior, binding the state in servitude (306.10, 12, 13). It can also result in absurd contradictions like a rapist being spared because he deserves to die twice (Sen. *Con.* 1.5), or a tyrant being given burial in the forum (274), or a war hero being allowed to marry his mother (306). Is this really what those rustic military men of early Rome would have intended?

All these arguments would be useful in court. But it is worth thinking about them as a set in dialogue with each other, as things that declaimers would participate in and be exposed to on a regular basis. Viewed in this way, the only conclusion that can be reached from these arguments is, just follow the *mos maiorum*. You should follow the letter – i.e. the written transmission of antique *mos* – unless it allows you to do something shameful; in that case, follow *voluntas* – i.e. your interpretation of antique *mos*. But obviously, this is not decisive: people may currently differ as to

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<sup>39</sup> Cf. Cic. *Caec.* 65, summarizing conventional arguments: *Scriptum sequi calumniatoris esse bonique iudicis voluntatem scriptoris auctoritatemque defendere* (“A pettifogger follows the letter of the law; a good judge defends the intention and authority of the lawgiver”).

what *mos* is, just as the simple people of the imagined past differed as to what justice was. And in the same way that those ancients saw the need to define justice through written laws, likewise in the present: it would be better to continue that task by making the laws more specific, or at least more carefully worded. If the hero's choice was intended to apply only to war booty – to name a common declamatory problem – why not change the law to say so? It would be a simple matter to add the words *ex praeda* to the typical formulation, *Vir fortis optet quod volet*. So in a way, declamation arrives at a mythical justification for the ongoing project of the jurists: increasing the specificity and precision of laws can be seen as a continuation of the ancient labors of the *maiores*. Declamation did not have anything to say about actual Roman laws; however, by continually exposing the problems raised by fictional laws, it contributed indirectly to thinking about legal language.

Often what triggers a discussion of *voluntas* in declamation is the fact that the events of the theme are so unlikely.<sup>40</sup> While the law's meaning and application may be perfectly clear under normal circumstances, the theme constructs a series of events that lead to manifest injustice or absurdity if the law is applied. These cases are naturally unsolvable from a legal standpoint, since no one can know the intention of a fictional lawgiver; however, this did not make them radically different from real cases. Frier notes that even in Cicero's *Pro Caecina* – one of the few cases in which it actually was relevant to argue about *voluntas* in court – Cicero “does not intend any specific historical ‘will’; for he adduces no historical information of any kind to back up his claims concerning the interdict's ‘intent.’ Rather, he presumes a more general social purpose underlying the Praetor's Edict, a purpose that will not, for instance, leave the victim of armed aggression without legal recourse.”<sup>41</sup> It was this “general social purpose” that was in view in declamatory arguments about intent. Declamation

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<sup>40</sup> On the concepts of plausibility or likelihood in declamation, see Chapter 3.

<sup>41</sup> Frier, *The Rise of the Roman Jurists*, 129.

invited reflections about the utility and equity of possible interpretations of laws, and in that way was working alongside jurisprudence toward increasing the precision of their wording.

Declamation did not debate ethics in the abstract; instead, it invited exploration of the issues through specific scenarios, comparison with *exempla*, and situation ethics. The extreme scenarios of declamation pushed the limits of what the law did or should cover. This is similar to Lentano's recent analysis of how declamation is concerned with ethics more broadly than just law. Noting that Quintilian distinguishes *leges* ("statutes") from *mores* ("ethical principles, customs") at 6.10.11, Lentano goes on to say: "Thus we see firmly rooted in ancient cultures the knowledge that at the margins of the rules codified by the law there extends a much wider sphere of duties without a true and proper legal sanction and yet felt by the subject as equally binding."<sup>42</sup> Quintilian and the other rhetoricians were aware of a mismatch between ethical rules and juridical norms, and it is this gap that underlies many of the conflicts presented in *controversiae*.

The laws referred to in declamation – those laws so far moved from real jurisprudence – in fact seem laid out specifically to bridge the gap, repeatedly perceived in contemporary culture, between legal and moral duties, or, if you will, between *leges* and *mores*. In other words, these laws work toward broadening the sphere of the *regula iuris*, incorporating into it practices and duties that at Rome belonged more to the realm of ethics than to that of codified law.<sup>43</sup>

Thus, the purpose of the fictional laws was to stand in for real ethical principles that existed, well attested, on another level in Roman society. Declamation invoked principles that were vague, unwritten, or customary, and sought to apply them to concrete scenarios as if they were actually

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<sup>42</sup> Lentano, "Un nome più grande di qualsiasi legge," 565: "Nelle culture antiche appare dunque ben radicata la consapevolezza che a margine delle norme codificate dal diritto si estende una sfera assai più ampia di doveri privi di una vera e propria sanzione giuridica e tuttavia avvertiti dal soggetto come ugualmente vincolanti."

<sup>43</sup> Ibid., 566: "Le leggi cui fa riferimento la declamazione, quelle leggi per tanti versi lontane dalla giurisprudenza reale, sembrano tese infatti proprio a colmare lo iato, ripetutamente percepito dalla cultura coeva, tra norme giuridiche e doveri morali, o, se si preferisce, tra *leges* e *mores*: esse, in altri termini, operano nel senso di ampliare la sfera della *regula iuris* incorporando in essa pratiche e doveri che a Roma appartenevano all'ambito dell'etica più che a quello della norma codificata."

codified laws. This was true of most declamation cases, as Lentano observes, and particularly true of the themes involving letter vs. intent and conflicting laws.

#### IV. Fairness, utility, and legal fictions

The concepts of *aequitas* (“fairness”) and *utilitas* (“utility”) arose with particular frequency on cases of conflicting laws or the lawgiver’s intention. Since declamation could not settle these questions on legal grounds, fairness and utility were left as the main criteria to which speakers could appeal. As noted before, these could not generally be used as arguments in the courtroom: the judge’s duty was simply to decide the question presented to him by the praetor. Nevertheless, as this section will show, the concepts of fairness and utility were not absent from the toolbox of the jurists. They employed them behind the scenes in the creation of legal fictions, which were a way of modifying laws when they seemed to cause unjust or undesirable outcomes. Declamation frequently offered a parallel, though condensed, version of this process.

Legal fictions were a tool for preserving the sanctity or integrity of the original law, but changing its outcome in practice.<sup>44</sup> As Ando describes them, legal fictions were used “both explicitly, to expand the scope of the law, and retroactively, in jurisprudential literature, to resolve conflicts of law.”<sup>45</sup> These fictions usually worked on the basis of analogy: the original law was not altered in any way, but its applicability was changed by declaring that a new situation – analogous to but not identical to what the law described – was to be treated as identical. This is best seen through examples. In one instance, the praetor’s Edict used a fiction to correct a problem arising out of earlier statute law. The statute defined heirs (*sui heredes*) as those persons who were under a father’s

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<sup>44</sup> An early, detailed account is Yan Thomas, “*Fictio legis*: L’empire de la fiction romaine et ses limites médiévales,” *Droits* 21 (1995): 17-63, with numerous examples from legal and juristic literature. More recent and expansive analysis is found in Ando, *Law, Language, and Empire* and “Fact, Fiction, and Social Reality in Roman Law,” in *Legal Fictions in Theory and Practice*, ed. Maksymilian Del Mar and William Twining (Cham, Switzerland: Springer, 2015), 295-323.

<sup>45</sup> Ando, *Law, Language, and Empire*, 6.

*potestas* at the time of his death; this left out children, known as *postumi*, who were born in the months after their father had died. Gaius, in his *Institutes*, characterizes these resulting situations as *iuris iniquitates* (“inequities of the law”). And while it would have been possible to change the law or draft a new one with wording that included *postumi* as heirs, instead these inequities *emendatae sunt* (“were corrected”) through the praetor’s Edict, which treated *postumi* as heirs based on a fictional premise: *Nam eos omnes qui legitimo iure deficiuntur vocat ad hereditatem proinde ac si in potestate parentis mortis tempore fuissent ...* (“In the case of those who fall short by legal rights, the Edict summons them into inheritance exactly as if they had been in their father’s *potestas* at the time of his death ...,” Gaius 3.25-6).<sup>46</sup>

A legal fiction was similarly employed in the *Lex Cornelia* of ca. 80 B.C.E.<sup>47</sup> which restored legal validity to the wills of soldiers taken prisoner of war. Since soldiers taken prisoner lost their status as Roman citizens, according to ancient custom, and non-citizens could not write legally binding wills, the wills of these prisoners were rendered invalid. There was apparently no movement to change the custom regarding loss of citizenship, but the implication for prisoners’ wills was regarded as inequitable; therefore, the *Lex Cornelia* intervened and declared that such wills were valid by analogy: *perinde ... atque si in civitate decesserint* (“just as if they had died with the status of citizens”).<sup>48</sup> Thus, the law’s applicability was extended by treating an analogous situation as identical to the one specified in the law.

The examples cited so far show at least four parallels with declamation. First, the original laws were vague or limited in various senses: the law on inheritance followed a clear principle in stating that children *in potestate* would become heirs, but did not specify what should happen in the

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<sup>46</sup> For further discussion, see Ando, *Law, Language, and Empire*, 9.

<sup>47</sup> *Ibid.*, 14.

<sup>48</sup> Paul, *D.* 35.2.1.1, cf. Julian *Dig.* 28.6.28.

case of *postumi*; the loss of citizenship by prisoners of war was a long-established custom, but not part of a carefully articulated legal doctrine. In the second place, it was the concept of inequity that provided the impetus for devising the fiction; while *aequitas* was not accepted as an argument in court, it did underlie the shaping of the Edict or statutes, under the guiding influence of Roman jurists. Thirdly, both the legal fiction and declamation could be motivated by a desire to change the outcome of the law, coupled with a recognition that the law itself could not or should not be changed. Jurists could not change the law because they were acting in an advisory capacity; praetors could intervene by introducing supplementary actions, but could not revoke the statutes passed by legislative assemblies. Advocates and declaimers, obviously, had to work with the laws that were presented to them. But it was rhetorically advantageous for advocates to deal in counterfactual scenarios about the law's application – to envision the outcome that was desired by their client; hence the similarity in the thought process.

The mechanism of this thought process was the fourth point of similarity: it operated by means of analogy. In jurisprudence, *postumi* are to be legally treated as heirs following the same principle – *proinde ac si* – “just as if” they had been subject to the qualifications of the first statute; prisoners of war can write valid wills just as if they had died with full citizenship. This same mechanism of reasoning by analogy (*rationatio*) is invited on numerous declamation themes, such as [Quint.] 350, the stepmother who killed the sick boy with cold water (cited at the beginning of the chapter).<sup>49</sup> The speaker on the case naturally does not mention legal fictions; since he is playing the part of an advocate, he has no authority in the sphere of making or modifying law. Nevertheless,

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<sup>49</sup> *Qui habebat filium, amissa matre eius, aliam uxorem duxit. Incidit in gravem valetudinem filius. Convocati sunt medici; dixerunt moriturum si aquam frigidam bibisset. Dedit illi noverca aquam frigidam. Perit iuvenis. Noverca accusatur a marito veneficii* (“A man had a son; the son's mother died and the man remarried. The son became severely ill. Doctors were summoned; they said he would die if he drank cold water. His stepmother gave him cold water. He died. The man accuses the stepmother of poisoning”).

with the tools that the declamatory world provides him, he argues that analogical reasoning is standard procedure when no other law applies:

Itaque si dicis qua lege alia accusare debuerim, merito excludis hanc qua ago. Sed neque hanc actionem meam admittis neque aliud demonstras quo recedam ab hac lege depulsus: hoc condendis, ut istud, etiamsi scelus sit, facere licuerit. Atqui hoc etiamsi <sit> non proprie conscriptum, consuetudine iudiciorum consequens est, quotiens aliqua propria actio in rem non detur, uti proxima et simili.<sup>50</sup>

Even without an overt mention of legal fictions, this amounts to something very similar. It is based on the recognition that the letter of the law, if accepted, would lead to an unjust outcome: the manifestly *scelus* action of the stepmother would be legally permissible; it would be more equitable and just to extend the law's applicability to this different but analogous situation. When a declaimer argues that the law against poisoning ought to apply, he is in a sense stepping into the role of a jurist or praetor who supplements the law on poisoning by granting an additional action: "If someone gives cold water a sick person so as to cause death, he will be capitally punished, just as if – *proinde ac si* – he had given poison." In declamation as in the Edict, this was a way of recognizing that the letter of the law leads to an unjust outcome, and that it can be corrected through analogical reasoning.<sup>51</sup>

Declamation, however, is about the weighing of competing interests, so we should consider parallels with legal fictions in that area as well. Ando points out that there is no attested instance of anyone opposing the use of a legal fiction, and in fact, the opportunities for doing so would have been restricted:

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<sup>50</sup> "If you tell me under what other law I ought to prosecute her, you can rightly reject prosecution under this one. But you neither admit this prosecution of mine nor indicate which other law I can fall back on if dislodged from this one. You are actually contending that what she did, even though wicked, was not illegal. And yet, even if this was not expressly forbidden, it is the custom

<sup>51</sup> The question of whether rhetoric influenced jurisprudence or vice versa, and to what extent, has been debated extensively. During the 20<sup>th</sup> century, an influential article by Johannes Stroux, "*Summum ius summa iniuria*. Ein Kapitel aus der Geschichte des *interpretatio iuris*," in *Festschrift Paul Speiser-Sarasin zum 80 Geburtstag* (Leipzig: Teubner, 1926), argued for widespread influence of rhetoric on jurisprudence. For a more recent assessment (that "the tide of Strouxianism has receded"), see Crook, "Once again the *controversiae* and Roman law," 70, with references.

[In] the case of procedural fictions, it was only at the moment of their first devising that they might truly have been contested. Thereafter, like all formulae, they became part of the repertoire of available actions, to be imposed by the magistrate holding jurisdiction when the facts, whether true or contrived, fit the model. In classical procedure, the moment for pleading came later, before the lay judge charged with adjudicating the dispute in light of the model the Praetor had applied.<sup>52</sup>

In the examples cited above, the fictions seem to have been uncontroversial and could have received nearly unanimous support. They worked to the benefit of *postumi* and heirs of soldiers who died in enemy hands; they were detrimental only to loosely coherent and hypothetical groups: people who would have benefitted from intestacy, or co-heirs of *postumi* whose share of the inheritance was reduced. Nevertheless, not all fictions were like this. In at least one example, the interests of powerful stakeholders did need to be taken into account, and the initial fiction was modified by means of a second fiction. This is the case of informally manumitted freedmen: a great many slaves had always been freed informally, without undergoing the complicated legal ceremony of manumission. By civil law these persons were technically counted as slaves; but in practice, the praetor's Edict had customarily protected them in the status of freedmen. Like other freedmen, they were not permitted to leave property to heirs; instead, their possessions reverted to their patrons (former owners) at death. The *Lex Iunia* of the first century C.E. formalized the rights of these freedmen who had been informally manumitted; instead of granting them full Roman citizenship, it instead employed a legal fiction to give them a diminished set of rights, the *ius latinum* (Latin status) possessed by certain Roman colonies and allied cities: they were to be regarded "exactly as if" they had been Roman citizens who went off to join a Latin colony. While this portion of the *Lex Iunia* formalized the rights of freedmen (who came to be known as Junian Latins), it posed a problem for their former patrons: the freedmen were now legally regarded as though they had never been slaves at all, and thus their possessions would no longer pass to their patrons. There is no historical record

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<sup>52</sup> Ando, "Fact, Fiction, and Social Reality in Roman Law," 299.

of debate on the subject, but Gaius recognized that the author of the law was also looking out for the interests of these patrons: the law contained a second fiction requiring the estates of these freedmen to go to their patrons “exactly as if” the law had not been passed.<sup>53</sup>

While the details and contexts differ, these are exactly the kinds of things to which declaimers had to develop a fine sensitivity. In fact, declamation can be seen as providing a mimesis of the entire process, from juristic deliberation through arguments in court; the difference is that declamation collapses all the stages into one. First, as noted above, declaimers who argue on the side of analogy or the lawgiver’s intention are employing a reasoning process similar to that used by jurists and praetors in devising legal fictions. But in addition, declamation encouraged its practitioners to consider what was at stake for the other side, either by rebutting the opponent’s position or by working to accommodate it. In jurisprudence, these discussions are rarely visible, but we see evidence of them in cases such as that of the Junian Latins. They would have taken place at the procedural phase of actual juristic discussion – perhaps not even in court, but in the praetor’s *consilium* or at the drafting stage of a statute. Declamation provided a chance for students to deliberate on this part of the process. Then, within the same speech, they would move on to the next phase of the legal process: pleading the case as though they were advocates before a *iudex*, with procedural questions already having been laid to rest.

All these aspects are seen together on, for instance, the family cases discussed in Section I: declaimers first debate whether a trial for madness can even be extended to a father who is not literally mad. Then, with the assumption that the procedural “fiction” had been accepted, they move

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<sup>53</sup> *Legis itaque Iuniae lator, cum intellegeret futurum ut ea fictione res Latinorum defunctorum ad patronos pertinere desinerent ..., necessarium existimavit, ne beneficium istis datum in iniuriam patronorum converteretur, cavere ut bona eorum proinde ad manumissores pertinerent, ac si lex lata non esset* (“And so, since the author of the *Lex Iunia* understood that by this fiction the possessions of deceased Latins would no longer revert to their patrons ..., he thought it necessary to add a provision in order to prevent this benefit granted to the Latins from causing harm to their patrons: he stated that their possessions would belong to their patrons just as if the law had not been passed”, Gaius *Inst.* 3.55-6). Discussed extensively by Ando, *Law, Language, and Empire*, 12-14 and “Fact, Fiction, and Social Reality in Roman Law,” 314-17.

on to the second stage: the actual prosecution or defense of the father. A greater focus on the procedural question, and who benefits from it, is seen on the numerous cases involving the hero's choice: *Vir fortis optet quod volet* ("Let a war hero choose whatever he wishes"). Since the choice always comes into conflict with some other law, value, or social good, these cases necessarily require a weighing of benefits and detriments to interested parties. For example: [Quint.] 266 *Ex proditore exul fortis* ("The man exiled for treason who became a hero"):

<VIR FORTIS OPTET QUOD VOLET.> BIS DE EADEM RE AGERE NE LICEAT. In quadam civitate prodicionis damnatus missus est in exilium. Bello eadem civitate laborante revocati sunt exules. Is qui prodicionis damnatus fuerat fortiter fecit. Petit ut iterum causam suam agat. Accusator praescribit quod bis de eadem re agere non liceat.<sup>54</sup>

The first question, logically, is whether this legal situation needs correction: declaimers must balance the integrity of the second law with the interests of the state, which wishes to reward war heroes and also needs to find out the truth about a possible treason. If it seems fair and advantageous to grant the hero another trial, this would be the type of problem that could be solved through a legal fiction: a war hero could be allowed to plead his case "just as if the second law had not been passed" (in Gaius' wording above). Once again, the speaker argues for this not by explicitly referencing the legal fiction, but using the equivalent tools in the declamatory world: the concepts of fairness and utility, combined with the need to uphold the first law. Then, just like the author of the *Lex Iunia* as envisioned by Gaius, he goes on to consider those parties who might be harmed by the decision. On this case, the main stakeholders would seem to be the prosecutor and jury from the previous case, whose decision runs the risk of being discredited. The speaker argues that the prosecutor should not worry, because he (the defendant) will be pleading his case from a weaker position the second time

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<sup>54</sup> "<LET A HERO CHOOSE WHAT HE WISHES.> IT SHALL NOT BE PERMITTED TO GO TO LAW TWICE FOR THE SAME MATTER. In a certain state, a man was convicted of treason and sent into exile. While this same state was hard pressed by war, exiles were summoned home. The man who had been convicted of treason became a war hero. He asks to plead his case again. The prosecutor objects that it is not permitted to go to law twice for the same matter."

around.<sup>55</sup> The jury likewise should not worry, because false convictions are not necessarily the jury's fault: they can be caused by bribery, poor defense, or even the defendant's confidence.<sup>56</sup> These observations are not particularly deep, or even correct; they are rhetorical misdirection of an advocate, not the work of a jurist. Nevertheless, the reasoning process employed on the case follows the same steps as a jurist devising a legal fiction: recognizing the undesirable outcome of the law or laws, employing a counterfactual solution that operates by analogy, and considering who is harmed by or benefits from the new situation.

### ***Declaimers and the inequities of the legal system***

These parallels between declamation and the legal fictions of jurists are clear enough, though subtle. But we should also ask how far the parallels go: to what extent did declamation really invite reflection on the *iuris iniquitates*, the “inequities of the law” that Gaius mentions? Were declaimers asked to think about the contours of the legal system as a whole – how laws worked in combination, what was covered and what was not? The *controversia* themes do include some laws or combinations of laws that seem deliberately designed to be “bad,” or cause problems. Advocates were not overtly tasked with evaluating the fairness of these laws; that was the province of jurists and praetors and legislative assemblies (and later, emperors); the job of advocates was to argue for the applicability of the law as given. Nevertheless, declamation did encroach upon this territory: when there was a conflict between two laws or a question about a law's intent, declaimers had two options: to say, “This is clearly not the outcome that the lawgivers intended, so we should follow their intention”;

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<sup>55</sup> *Tum detulerat eum cui nihil obici posset; hodie defert damnatum* (“That time he was charging a man against whom nothing could be said; today he is charging one already found guilty,” 10).

<sup>56</sup> *Sed non semper iudicum culpa erit cum innocens damnatus est: aliquando testis corrumpitur, aliquando parum diligenter causa defenditur, aliquando reo nocet et ipsa fiducia* (“It is not always the judges' fault when an innocent man is found guilty. Sometimes a witness was bribed, sometimes the case was defended ineptly, sometimes the very confidence of the defendant becomes a point against him,” 12).

or, “It does not matter if this is a bad law or not, we have to follow it. If you want to change it, go through the legislative process.” But in this way, these types of cases did become a sphere in which discussions on the merits of laws could take place.

This is seen on several cases involving automatic or reverse punishment in specified circumstances. [Quint.] 314 opens with the law, *Magistratus de confesso sumat supplicium* (“A magistrate must punish anyone who confesses a crime”), thus making punishment automatic in case of a confession.<sup>57</sup> The law of [Quint.] 313 is, *Qui caedis reum accusaverit neque damnaverit, ipse puniatur* (“Whoever brings a capital charge and fails to convict shall himself be punished”).<sup>58</sup> [Quint.] 331 is based on nearly the same law, paired with the following: *Qui ter iniuriarum damnatus fuerit, capite puniatur* (“Whoever is convicted of injury three times must suffer capital punishment”) – without specifying whether three *iniuria* charges were to equal one capital charge for the purposes of reverse punishment.<sup>59</sup>

As is to be expected, the themes create scenarios that pose problems for these laws, and speakers had to wrestle with their implications. On 314, a magistrate executes an insane man who confessed to a crime. Accused of homicide for this, the magistrate argues that the law has removed judgment from his hands: *Fingite enim esse aliquem qui aliquo modo confessus sit, hunc a magistratu occisum,*

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<sup>57</sup> <MAGISTRATUS DE CONFESSO SUMAT SUPPLICIUM.> *Parricidii reus paribus sententiis absolutus furere coepit et dicere per furorem frequenter: ‘ego te, pater, occidi.’ Magistratus tamquam de confesso supplicium sumpsit. Reus est caedis* (“A MAGISTRATE MUST PUNISH A CONFESSED OFFENDER. A man acquitted of parricide on equal votes began to go mad and to say frequently in his madness, ‘I killed you, father.’ The magistrate punished him as a confessed offender. He is accused of murder,” [Quint.] 314).

<sup>58</sup> *QUI CAEDIS REUM ACCUSAVERIT NEQUE DAMNAVERIT, IPSE PUNLATUR. DAMNATORUM SUPPLICIA IN DIEM TRICESIMUM DIFFERANTUR. Accusavit quidam et damnavit. In diem tricesimum dilata †damnatio† est. Interuenit is qui occisus dicebatur. Petit reus poenam accusatoris* (“WHOEVER BRINGS A CAPITAL CHARGE AND FAILS TO CONVICT SHALL HIMSELF BE PUNISHED. PENALTIES FOR THOSE CONVICTED SHALL BE DELAYED FOR THIRTY DAYS. A certain man accused and convicted. The penalty was delayed for thirty days. In the meantime, the man who was said to have been murdered appeared. The defendant seeks a penalty from the prosecutor,” [Quint.] 313).

<sup>59</sup> *QUI CAPITIS REUM NON DAMNAVERIT, IPSE PUNLATUR. QUI TER INIURIARUM DAMNATUS FUERIT, CAPITE PUNLATUR. Bis damnatus iniuriarum tertio a quodam postulatus absolutus est. Agit cum accusatore tamquam capitis accusatus* (“WHOEVER FAILS TO CONVICT ON A CAPITAL CHARGE SHALL HIMSELF SUFFER CAPITAL PUNISHMENT. WHOEVER IS CONVICTED OF INJURY THREE TIMES MUST SUFFER CAPITAL PUNISHMENT. Someone who had been convicted twice of injury was charged a third time and acquitted. He charges the prosecutor as though he had been accused on a capital charge,” [Quint.] 331).

*postea apparuisse aliquo casu falsum fuisse quod dixisset: num agi cum magistratu potest? Lex quae confessum puniri iubet sententiam ipsi relinquit* (“Imagine that a man confesses in some way and is killed by a magistrate, and it later turns out by chance that what he said was false. Can the magistrate then be charged? The law which orders a confessor to be punished leaves the judgment to the person himself,” 9). This anticipates the type of argument that could go on in a legislative assembly considering the merits of the law. Likewise, the speaker on 313, while upholding the law’s basic principle – that failed prosecutors should be punished – admits that it creates problems: *Per se difficilem rationem vindictae et ultionis <difficiliorem> facimus; paene licentiam grassatoribus et latronibus damus, quod nemo accusare sine periculo capitis sui potest* (“The process of punishment and retribution is difficult enough in itself; we make it even more difficult. We practically grant free rein to thieves and muggers, because no one can prosecute them without putting his own life in danger,” 10). And on 331, where the laws do not specify whether a failed third charge for *iniuria* should carry a penalty of death for the prosecutor, the speaker argues against this interpretation: its outcome would be that a person twice convicted of injury would have virtual impunity, because no one would ever prosecute him. These arguments are directed against interpretations of the laws, not the laws themselves; nevertheless, the fact that the wording leaves open this obviously harmful outcome is a point against creating such wording in the first place. Declaimers on these cases are rehearsing the kinds of deliberative discussions that could go on in a legislative assembly, or the *consilium* of a praetor preparing his Edict.

Critiquing declamatory laws is one thing; a further step of positing laws that ought to exist is seen on [Quint.] 341. The law states that any item not declared at customs, if discovered, becomes property of the publicans; when a certain stolen item was not declared, the publicans kept it; the original owner goes to court in order to claim it.<sup>60</sup> The declamation speaker – representing the

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<sup>60</sup> *QUOD QUIS PER PUBLICANOS IMPROFESSUM TRANSTULERIT, COMMISSUM SIT. Quidam rem furtivam transtulit per publicanos, non professus est. Deprehensa res est. Publicani cum domino contendunt. Illi tamquam commissam rem vindicant, ille tamquam*

publicans – argues for the letter against the other side’s claim of fairness: there is no law that says confiscated stolen property must be returned to its owners. There clearly should be a law that satisfies the owner in some way, but within the microcosm of this declamation case, none is introduced. So in order address the fairness problem, the speaker appeals to another law that is not listed in the theme: *Ille, etiamsi non ipsam rem acceperit, pro re tamen accipere poterit: habet actionem quidem de illa. Nam et in quadruplum litigatur* (“As for the owner, even if he does not receive the item itself, he can still receive something in its stead: he has an action that he can use for this. It is possible to sue for fourfold,” 11-12) Now it happens that the suit for fourfold damages is a real Roman law, the *actio furti*,<sup>61</sup> so this speaker is not exerting his imagination too far. Nevertheless, by reaching outside the declamatory world, he is introducing a law based on how he believes the declamatory legal system *ought* to be. This is, perhaps, analogous to filling a gap in *ius civile* through the praetor’s Edict. A jurist could advise the praetor to amend his Edict in order to read: “If someone passes an undeclared item through customs, it belongs to the publicans by Quiritary right; however, if the property was stolen, I will also grant a fourfold action against the thief.” While publicans might care little about fairness in real life, a declaimer representing them in fiction would have the chance to think about fairness in relation to the system of laws governing their activity.

## V. Conclusion

At the beginning of this chapter, it was observed that [Quint.] contains a higher proportion of legal-themed cases than Seneca.<sup>62</sup> Caution is required in interpreting this difference. The sample

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*suum* (“IF ANYONE BRINGS AN ITEM THROUGH CUSTOMS WITHOUT DECLARING IT, IT SHALL BE CONFISCATED. Someone brought a stolen item through customs and did not declare it. It was discovered. The publicans are in court with the original owner. They claim it as their confiscated property, he claims it as his own,” [Quint.] 341).

<sup>61</sup> Discussed in detail by Borkowski and Du Plessis, *Textbook on Roman Law*, 334-7, based primarily on *D.* 47.2 and Gaius *Inst.* 4.4.

<sup>62</sup> The degree of legal focus on a case is difficult to specify and count. As was stated previously though, 41% of cases in Seneca definitely do *not* have a legal focus, compared to 23% in [Quint.] that do not.

size is small, and there could very well be a selection bias: since Seneca's goal was to record the memorable performances of the leading declaimers, he may have chosen a higher proportion of the more entertaining cases. The difference could also lie in the social setting: Seneca's declaimers were mostly rhetoric teachers themselves, declaiming for amusement or to gain social advancement, while [Quint.] reflects more of the everyday practice of the schoolroom. Nevertheless, it is possible that wider developments like the professionalization of jurisprudence and the rise of antiquarian interests had some impact on declamation. It does seem to be the case that [Quint.], to a greater degree than Seneca, thematizes those issues of legal interpretation that remained important during the Principate. If real laws were becoming more carefully worded and their interpretation was to some extent governed by juristic sanction, then advocates would need less training in making broad claims that presupposed a blank interpretive slate; they needed to practice more focused arguments that fit within the constraints laid down by the law. Cases about pirates, disinheritance, and suits against fathers for madness would still have value, and we do find such cases in [Quint.] and even later; however, there would be a greater need for those themes that directly focus discussion on the wording and interpretation of the law – the kind of case that is very common in [Quint.]'s *Declamationes Minores*.

Declamation regularly elicited thinking about the interpretation of laws. Since the legal questions tended to be evenly balanced, this required reasoning about ethics in general, and about fairness and utility in particular. Declamation did not hold actual Roman laws up to scrutiny. But consciously or not, it did often invite declaimers to weigh the merits and think through the implications of laws and the legal system. The overt rationale would have been that the advocate needed these skills for courtroom argumentation, not in order to participate in drafting legislation. Declamation became widespread immediately *after* the time when elites could have real lawmaking

powers, although there was still the fiction that Augustus was governing through the Senate. But the principles seen in declamation were not unlike the tools used by jurists and praetors at Rome.

Moreover, we should not overlook the possible applications of this reasoning process in provincial administration. Sullivan describes how Roman judges did have discretion to look for “substantive justice” in choice-of-law situations, i.e. disputes between two foreigners or between a Roman citizen and a foreigner, when there was a question of which legal code or forum to apply. While there were typically rules for determining jurisdiction, judges could also use the principle of *bonum et aequum* (“goodness and fairness”) to resolve disputes, overriding local custom.<sup>63</sup> In the provinces, in general, Roman judges may have had to exercise greater discretion, in the absence of clear guidelines from jurists for the situations they faced.<sup>64</sup> Thus, for members of the elite who went out to govern provinces or participate in a governor’s *consilium*, their earlier training in declamation would have provided useful practice.

For normal courtroom situations, declamation helped aspiring advocates to practice standard arguments; the fact that they were standard does not lessen their importance. Frier emphasizes that rhetorical advocacy, by its almost ritual nature, contributed to the legitimacy of the courts: “The art of rhetoric sought to reduce the universe of possible argumentation to a standard repertory of those arguments that could predictably command support within the community values of the ancient world. In doing this, it transformed disputes into a sort of chivalrous combat in which the disputants, despite their conflict, were still overtly united in their subscription to the common stock of values.”<sup>65</sup> Practicing these arguments in a school setting gave declaimers a sensitivity to the methods of winning support in their community. If the sentiments were not very original, that was

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<sup>63</sup> Will Sullivan, “Substantive justice and choice of law in classical Roman law” (forthcoming).

<sup>64</sup> See Lisa Pilar Eberle, “Beyond public and private law in the Roman Empire: Legal pluralism and Roman landholdings in the provinces of the Greek East” (forthcoming).

<sup>65</sup> Frier, *Rise of the Roman Jurists*, 247.

the whole point: conventional thinking was the best way to win a case. Declaimers rehearsed that ethical thinking in a characteristically Roman form: not through abstract discussion, but by applying it to concrete situations and exploring the consequences.

## CONCLUSION

If our topic has been the interplay of creativity and constraints in declamation, the side of creativity has perhaps received too little emphasis. Scholarship has tended not to give declamation much credit as a creative endeavor. Obviously, it was not high literature – or even literature at all, depending on the definition – and if one is determined to ignore anything that was not on par with Vergil or Horace, Cicero or Livy, there is little else to say on the subject.<sup>1</sup> Nevertheless, declamation had elements of artistry, inventiveness, and skill in composition, put on display through public performance. Contemporary American culture has seen a resurgence of spoken word events: stand-up comedy has a long history; poetry slams were popular for some time, and more recently, competitive storytelling. For instance, The Moth presents “StorySLAM” events in New York, Chicago, and now other cities: a topic is announced in advance, such as “weddings” or “regrets”; members of the audience put their names in a hat before the show; ten are chosen at random to share their stories on stage without notes. The stories must be true, must be about the speaker personally, and must not go over six minutes in length. A panel of judges, picked from the audience,

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<sup>1</sup> See Eagleton, *Literary Theory*, 1-19, for a lively survey of attempts to define the word “literature.” On the literary merits of declamation, Amato, Citti, and Huelsenbeck, *Law and Ethics in Greek and Roman Declamation*, 2, stake out a favorable position and then equivocate: “Declamation, where literary conventions and commonplaces can be readily traced, is in fact literature, or at any rate is in some way connected to ancient literature.” Kennedy, *Quintilian*, 53 offers a charitable assessment: declamation “emphasized ingenuity, an imaginative response to a verbal problem, and a kind of colorful, if often superficial, originality. Though [Roman education] began with rote memorization, it ended by trying to create literature.”

scores the performances and chooses a winner.<sup>2</sup> Good performances require at least the following skills: structuring of narrative; creation of persona; humor, timing, diction; a good sense of what the audience will like or approve of. The audience is raucous and enthusiastic, probably much like in a declamation hall; the shows regularly sell out in advance.<sup>3</sup>

Declamation was in one sense more frivolous than all this, with its fantasy world of pirates and virgins and murderous stepmothers, but in another sense, much more serious. Storytellers at The Moth gain five minutes of fame and perhaps a gift card; declamation prepared the way for Roman public life and membership in the elite – or could lead to acute embarrassment in the presence of emperors.<sup>4</sup> It was a key tool in acculturation, construction of masculinity, practice in moral reasoning, and numerous other spheres. The artistic and entertaining nature of the performance no doubt contributed to its pedagogical effectiveness, as Quintilian noted; the verbal resourcefulness would have been an important skill for advocates and anyone going into public life, although stylistic adjustments would often need to be made. This dissertation has talked about more specific things that were accomplished by different types of declamatory scenarios. Chapter 1 showed that most themes were unbalanced in terms of audience sympathy. These gave two kinds of practice: for the stronger side, conventional moral denunciation; for the weaker side, revising the narrative to align with traditional *exempla* – but still with a conventional moral outlook. Chapter 2 explained that there were necessarily constraints, but the larger goal was to create one’s image as a strong Roman male in control of the circumstances and of himself. Seneca uses the Greeks as

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<sup>2</sup> Details at <http://themoth.org/about/programs/the-moth-storyslam> (accessed Sep. 12, 2015).

<sup>3</sup> Bonner, *Roman Declamation*, writing in 1949, compares declamation to jazz, with its focus on improvisation. Bernstein, *Ethics, Identity, and Community*, 6, lists other comparisons that have been made: to “the cinema, concert performances in the prerecording era, and a poetry slam.” Parallels can be found in many eras: creative performances outside the sphere of high culture, but with cultural significance and influence.

<sup>4</sup> While declaiming before Augustus and Agrippa, Porcius Latro launched into a commonplace against adoption as a means of social advancement – not realizing that Augustus was considering adopting the children of Agrippa, who was of humble origin (Sen. *Con.* 2.4.12-4). Other declaimers were reportedly punished for speaking too pointedly against fictional tyrants (Cassius Dio 59.20.6, 76.12.5; more references at Bernstein, *Ethics, Identity, and Community*, 6).

shorthand for Roman faults in declamation. Chapter 3 compared the fictional declamatory world with the quasi-mythical world of early Roman history. Declaimers treat Roman history as factual – more so than the historians do – and treat the meaning of *exempla* as fixed. Still, declamation uses history as a stage for ethical debates, not by debating what actually happened and the ethics thereof, but by self-consciously changing the events and regarding the new situation as counterfactual. Chapter 4 examines the cases that focus on law rather than character or audience sympathy, and shows that these, just like the other cases, turn out to be more about ethics. Fictional early Rome comes into play to provide mythic justification for making the laws more specific – an enterprise in which jurists of the time were also engaged.

A thread that has run through all these chapters is the fact that declamation dealt with ethics in concrete situations. Speakers rarely engaged in abstract philosophical speculation, and Seneca’s references to those who did so are not favorable. In the preface to Book 7 he mentions how Albuicius often lost focus in front of large audiences: *Illa intempestiva in declamationibus eius philosophia sine modo tunc et sine fine evagabatur* (“Then his philosophizing, so out of place in declamation, wandered without restraint and without end,” *pr.*1, modified from Winterbottom). This is seen on 1.3, the case of the unchaste woman who survived being thrown from a cliff, where Albuicius expanded minor sub-points of the *quaestio* into *problemata philosophumena* (“philosophical puzzles”) – things like *An dii immortales rerum humanarum curam agant; etiamsi agunt, an singulorum agant* (“Do the gods care about human affairs; if so, do they care about those of individuals”).<sup>5</sup> On 7.6, where a father had given his daughter in marriage to a slave, Albuicius defended the father based on philosophical principles: *Albuicius et philosophatus est: dixit neminem natum liberum esse, neminem servum; haec*

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<sup>5</sup> Cestius also raised these questions, but criticized Albuicius for going beyond the degree of emphasis that was appropriate: *Improbabat Albuicius, quod haec non tamquam particulas incurrentes in quaestionem tractasset sed tamquam problemata philosophumena* (“He disapproved of Albuicius, because he discussed these things not as incidental sub-points to the question, but as full-blown philosophical puzzles,” 1.3.8).

*postea nomina singulis imposuisse Fortunam* (“Albucius also philosophized: he said that no one is born free, no one is born a slave; Fortune has placed these names on each person afterwards,” 18). This was out of step with the standard Roman opinion on the case, which viewed the father’s actions as unjustifiable. (The best strategy was a legal defense rather than a moral justification, said *Latro* – 7.6.17.) We know that Seneca otherwise thought highly of Albucius: he ranks him among the top four declaimers, along with *Latro*, *Fuscus*, and *Gallio* (7.*pr.*13). But it seems that Albucius relied too heavily on philosophy as a means of moral persuasion, and granted it too much importance as an end in itself; this detracted from his effectiveness as a declaimer.

By no means is it true that Greek and Roman philosophers were unconcerned with ethics in concrete situations. Griffin notes that the philosophical schools were also interested in “the art of casuistry, that is, skill in deciding what particular action here and now followed from a general philosophical dogma, what remedies for the soul were appropriate on each occasion.”<sup>6</sup> For instance, the Younger Seneca offers the following narrative and lesson:

Urbem cuidam Alexander donabat, vesanus et qui nihil animo nisi grande conciperet. Cum ille cui donabatur se ipse mensus tanti muneris invidiam refugisset dicens non convenire fortunae suae, “Non quaero” inquit, “quid te accipere deceat, sed quid me dare.” Animosa vox videtur et regia, cum sit stultissima. Nihil enim per se quemquam decet; refert qui det, cui, quando, quare, ubi, et cetera, sine quibus facti ratio non constabit. Tumidissimum animal! Si illum accipere hoc non decet, nec te dare; habetur personarum ac dignitatum portio et, cum sit ubique virtus modus, aequè peccat quod excedit quam quod deficit.<sup>7</sup>

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<sup>6</sup> Miriam Griffin, “Philosophy, politics, and politicians at Rome,” in *Philosophia Togata: Essays on Philosophy and Roman Society*, ed. Miriam Griffin and Jonathan Barnes (Oxford, 1989), 32.

<sup>7</sup> “Alexander was once rewarding someone with a city – madman that he was, and unable to conceive of anything that was not extravagant. When the intended recipient took a measure of himself and, wanting to escape the envy that would result from such a gift, said it was not in keeping with his station, Alexander said, ‘I do not care about what is appropriate for you to receive. I care about what is appropriate for me to give’ – a spirited and regal statement, but also a stupid one. For nothing in itself is appropriate for anyone; it depends on who gives it, to whom, when, why, where, and so forth. Without these considerations, the value of a deed cannot be assessed. You arrogant creature! If it is not appropriate for him to receive the gift, then it is not appropriate for you to give it. The persons and their stations are held in proportion; since virtue is everywhere a mean, too much and too little are equally wrong,” Sen. *Ben.* 2.16).

Here, again, is situation ethics: in evaluating any action, one must consider who, what, when, where, and so forth. Seneca states the principle and illustrates it with a narrative. But declamation goes much farther in exploring alternate narratives, providing specific changes in these circumstances, and requiring students to argue for their evaluation.

Hammer has written about why Roman political theory has seemed so much less interesting than Greek theory to modern analysts: “To political theorists steeped in reason and abstraction, the Roman [mental] map seems almost embarrassingly affective and tangible: it is filled with recollections of laws and institutions, names and places, and events and traditions.”<sup>8</sup> He adds, “Political concepts like liberty, power, and authority are neither born from the mind of the philosopher nor shaped by the tidiness of reason but forged in collective experiences that are messy, often ugly, and, even with the careful juridical thinking that shows up with the later jurists, ambiguous.”<sup>9</sup>

As this dissertation shows, much the same thing could be said about Roman declamation. The reason why the *controversia* rose to become the mainstay of rhetorical education probably has something to do with the fact that it accorded so well with Roman thought processes in other areas. Up until Cicero’s time, most rhetorical practice had been done by arguing an abstract question called a *thesis*, such as *An uxor ducenda est?* (“Should a man marry?”), *Sitne virtus finis?* (“Should virtue be an end?”). An alternative exercise, known as a *hypothesis*, included specific characters or circumstances; out of this developed the *suasoria*, with its focus on deliberation, and the legal exercise that Cicero called the *causa* and later came to be known as the *controversia*.<sup>10</sup> Thus, the inclusion of concrete details was from the outset a feature that distinguished the *controversia* (or *hypothesis* or *causa*)

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<sup>8</sup> Dean Hammer, *Roman Political Thought and the Modern Theoretical Imagination* (Norman: University of Oklahoma Press, 2008), 7. Cf. also Joy Connolly’s favorable review of Hammer in *Political Theory* 40:6 (2012):847-850.

<sup>9</sup> Dean Hammer, *Roman Political Thought: From Cicero to Augustine* (Cambridge, 2014), 3-4.

<sup>10</sup> Details on this development and terminology are provided by Bonner, *Roman Declamation*, 1-31.

from the *thesis*. Some *controversiae* did remain fairly abstract; as seen in Chapter 4, those with vague and conflicting laws could direct the discussion largely toward ethical duties or utility. Latro chose to treat Sen. *Con.* 7.6 as a *thesis*, in Seneca's words: he posed no questions of law, but focused entirely on a comparison of the duties owed to a father and to a mother.<sup>11</sup> But overall, the *controversia* opens up many more possibilities – and more valuable ones – than the *thesis*, and this may explain why the *thesis* gradually fell into disuse. The *controversia* (and to a lesser extent, the *suasoria*) offered the chance to argue in character (*ethopoiia*), not simply talking about a value, but actually embodying it; it lent ethics greater urgency by testing their applicability to a specific person in a moment of crisis; it necessitated the construction of an implied audience, which could be different from the audience that was physically present for the speech. This in turn made a lively and emotional appeal appropriate or even essential to an effective performance. Exemplary narratives were already a key component of moral reasoning at Rome, and the *controversia* brought them on stage in a way that was vivid, entertaining, and memorable.

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<sup>11</sup> *Latro hanc controversiam quasi tota officii esset declamavit; nullas quaestiones iuris inseruit, sed comparavit inter se incommoda patris et matris et tamquam thesim dixit: utrum ad redimendum potius captum patrem ire filius deberet an ad alendam caecam matrem subsistere ...* (“Latro declaimed this *controversia* as though it were entirely concerned with duty. He posed no questions of law, but rather compared the sufferings of the father with those of the mother and argued as though on a *thesis*: should a son go and ransom a captive father, or stay and help a blind mother...” 3).

## APPENDIX A: IMBALANCED THEMES

Thirty-five cases in Seneca are preserved complete or nearly complete. The two that are “nearly complete” are 2.7, which begins with a long speech by Latro and then breaks off; and 10.7, which begins with *sententiae* from seven declaimers and then breaks off. They are included in this sample because there is sufficient information to assess how the declaimers handled the case. Cases preserved only in *excerpta* are omitted from analysis. Since *abdication* (disinheritance) and *dementia* (insanity) are legally undefined, these cases automatically go into one of the groups with uncertain legal facts.

As the table shows, the majority of cases (30/35 or 86%) show a clear audience preference for one side or the other. On the other hand, an almost equally large majority (27/35 or 77%) show uncertain or undefined legal facts.

**Table 1: Imbalanced themes**

		Legal facts		
		Stronger	Uncertain	Weaker
Audience sympathy	Stronger	2	22	6
	Uncertain	-	5	-

The following list provides more details about each group. The second column tells whether the favored side is prosecution/plaintiff or defense, father or son, etc.

### Stronger audience sympathy, stronger legal facts

- |                                 |                          |
|---------------------------------|--------------------------|
| 1.2 <i>Sacerdos prostituta.</i> | Against the girl’s claim |
| 1.3 <i>Incesta de saxo.</i>     | Prosecution              |

### Stronger audience sympathy, uncertain legal facts

- |   |  |
|---|--|
| 1.1 <i>Patruus abdicans.</i>                  | Son (disinheritance)                     |
| 1.4 <i>Fortis sine manibus.</i>               | Father (disinheritance)                  |
| 1.5 <i>Raptor duarum.</i>                     | <i>Rapta</i> choosing death (procedural) |
| 1.6 <i>Archipiratae filia.</i>                | Father (disinheritance)                  |
| 1.7 <i>A piratis tyrannicida dimissus.</i>    | Son                                      |
| 1.8 <i>Ter fortis.</i>                        | Father (disinheritance)                  |
| 2.1 <i>Adoptandus post tres abdicaciones.</i> | Son (disinheritance)                     |
| 2.3 <i>Raptor patrem non exorans.</i>         | Father (insanity)                        |
| 2.4 <i>Nepos ex meretrice susceptus.</i>      | Father (insanity)                        |
| 2.5 <i>Torta a tyranno pro marito.</i>        | Prosecution (ingratitude)                |
| 2.6 <i>Pater et filius luxuriosi.</i>         | Father (insanity)                        |

2.7 <i>Peregrinus negotiator.</i>	Prosecution
7.3 <i>Ter abdicatus venenum terens.</i>	Prosecution
7.5 <i>Quinquennis testis in procuratorem.</i>	Son (mutual accusation)
7.6 <i>Demens qui servo filiam iunxit.</i>	Son (insanity)
7.7 <i>Cavete proditorem.</i>	Prosecution
9.1 <i>Cimon ingratus Calliae.</i>	Defense (ingratitude)
9.5 <i>Privignus ab avo raptus novercae.</i>	Defense
9.6 <i>Filia conscia in veneno privigni.</i>	Defense
10.2 <i>Fortis non cedens forti patri.</i>	Son (disinheritance)
10.3 <i>Demens quod mori coegerit filiam.</i>	Son (insanity)
10.6 <i>Fur accusator proditionis.</i>	Prosecution

### Stronger audience sympathy, weaker legal facts

7.2 <i>Popillius Ciceronis interfecto.</i>	Prosecution
9.2 <i>Flaminius in cena reum puniens.</i>	Prosecution
9.4 <i>A filio in arce pulsatus.</i>	Defense
10.1 <i>Lugens divitem sequens filius pauperis.</i>	Defense
10.4 <i>Mendici debilitati.</i>	Prosecution
10.5 <i>Parrhasius et Prometheus.</i>	Prosecution

### Uncertain audience sympathy, uncertain legal facts

2.2 <i>Iusiurandum mariti et uxoris.</i>	Daughter (disinheritance)
7.4 <i>Mater caeca filium retinens.</i>	Equal – mother and son
7.8 <i>Mutanda optio raptore convicto.</i>	Raptor (procedural)
9.3 <i>Expositum repetens ex duobus.</i>	Equal – natural father and foster father
7.1 <i>Ab archipirata filio dimissus.</i>	Son (disinheritance)

### Details of each case

Listed below are the themes of each case, along with a brief discussion about how the legal facts and audience sympathy can be assessed. The exact number of speakers and word count are cited only when the cases are close.

1.1. *LIBERI PARENTES ALANT AUT VINCIANTUR. Duo fratres inter se dissidebant. Alteri filius erat. Patruus in egestatem incidit. Patre vetante adulescens illum aluit; ob hoc abdicatus tacuit; adoptatus a patruo est. Patruus accepta hereditate locuples factus est. Egere coepit pater; vetante patruo alit illum. Abdicatur.*

“CHILDREN MUST SUPPORT THEIR PARENTS OR BE IMPRISONED. Two brothers had a falling out. One of them had a son. The uncle fell into need. The young man supported him against his father’s orders; because of this he was disinherited, and did not contest the disinheritance. He was adopted by his uncle. The uncle received an inheritance and became rich. The father has fallen into need; the young man is supporting him against his uncle’s orders. He is disinherited.”

There is more moralizing invective for son's side; there are some narrative revisions for both sides, but more for uncle/adoptive father. *Latro* says emotional or moral appeal for son was *potentius quam ullam quaestionem* (15), and that the the uncle/adoptive father's side is *durior* (21). This indicates that the son's side is stronger in audience sympathy. Legal facts on a disinheritance case are undefined.

**First side:**

- Son (disinheritance)
- More material
- Stronger audience sympathy
- Uncertain legal facts

**Second side:**

- Uncle/adoptive father (disinheritance)
- Less material
- Weaker audience sympathy
- Uncertain legal facts

1.2. *SACERDOS CASTA E CASTIS, PURA E PURIS SIT. Quaedam virgo a piratis capta venit. Empta a lenone et prostituta est. Venientes ad se exorabat stipem. Militem qui ad se venerat, cum exorare non posset, colluctantem et vim inferentem occidit. Accusata et absoluta remissa ad suos est. Petit sacerdotium.*

“A PRIESTESS MUST BE A CHASTE FROM AMONG THE CHASTE, PURE FROM AMONG THE PURE. A virgin was captured by pirates and sold. She was bought by a pimp and made a prostitute. She persuaded the clients who came to her to give her alms. When she was unable to persuade a soldier who had come to her, as he was struggling and applying force she killed him. She was accused, acquitted, and sent back to her family. She seeks a priesthood.”

Discussed in Chapter 1.

**First side:**

- Against girl's claim to priesthood
- More material
- Stronger audience sympathy
- Stronger legal facts

**Second side:**

- In favor of girl
- Less material
- Weaker audience sympathy
- Weaker legal facts

1.3. *INCESTA SAXO DEICLATUR. Incesti damnata, antequam deiceretur de saxo, invocavit Vestam. Deiecta vixit. Repetitur ad poenam.*

“LET AN UNCHASTE WOMAN BE THROWN DOWN FROM THE ROCK. A woman convicted of unchastity appealed to Vesta before being thrown down. She was thrown down and survived. She is sought for punishment again.”

The case shows moralizing invective for prosecution, clear legal arguments; *colores* for defense. Prosecution needs *colores* to explain away divine intervention implied by theme. (Discussed in Chapter 1.)

**First side:**

- Prosecution
- More material
- Stronger audience sympathy
- Stronger legal facts

**Second side:**

- Defense
- Less material
- Weaker implied audience sympathy
- Weaker legal facts

1.4. *ADULTERUM CUM ADULTERA QUI DEPRENDERIT, DUM UTRUMQUE CORPUS INTERFICIAT, SINE FRAUDE SIT. LICEAT ADULTERIUM IN MATRE ET FILIO VINDICARE. Vir fortis in bello manus perdidit. Deprendit adulterum cum uxore, ex qua filium adolescentem habebat. Imperavit filio ut occideret; non occidit; adulter effugit. Abdicat filium.*

“WHOEVER CATCHES AN ADULTERER WITH AN ADULTERESS, PROVIDED THAT HE KILLS BOTH, SHALL GO FREE. A SON TOO MAY PUNISH ADULTERY ON THE PART OF HIS MOTHER. A hero lost his hands in war. He caught an adulterer with his wife, by whom he had a young son. He told the son to kill them. The son refused. The adulterer fled. The father disinherits the son.”

The case shows moralizing invective for father; *colores* for son to explain why he did not obey. Legal facts on a disinheritance case are undefined.

**First side:**

- Father (disinheritance)
- More material
- Stronger audience sympathy
- Uncertain legal facts

**Second side:**

- Son (disinheritance)
- Less material
- Weaker audience sympathy
- Uncertain legal facts

1.5. *RAPTA RAPTORIS AUT MORTEM AUT INDOTATAS NUPTIAS OPTET. Una nocte quidam duas rapuit. Altera mortem optat, altera nuptias.*

“A *RAPTA* MAY CHOOSE EITHER THE DEATH OF THE *RAPTOR* OR MARRIAGE TO HIM WITHOUT DOWRY. On the same night a man raped two girls. One of them chooses death, the other marriage.”

Many declaimers argue that the girl who chose marriage was in collusion with the *raptor*. As it is a case of conflicting laws, the legal facts are uncertain. (See also Chapter 4.)

**First side:**

- The *rapta* who opts for death
- More material
- Stronger audience sympathy
- Uncertain legal facts

**Second side:**

- The *rapta* who opts for marriage
- Less material
- Weaker audience sympathy
- Uncertain legal facts

1.6. *Captus a piratis scripsit patri de redemptione; non redimebatur. Archipiratae filia iurare eum coegit ut duceret se uxorem si dimissus esset; iuravit. Relicto patre secuta est adolescentem. Redit ad patrem, duxit illam. Orba incidit. Pater imperat ut archipiratae filiam dimittat et orbam ducat. Nolentem abdicat.*

“A young man who had been captured by pirates wrote to his father for a ransom. He was not being ransomed. The pirate captain’s daughter forced him to swear that he would marry her if he was released; he swore. She left her father and followed the young man. He returned to his father and married her. An orphan girl came along. The father ordered his son to divorce the pirate captain’s daughter and marry the orphan. When he refuses, the father disinherits him.”

This is one of the rare cases where Seneca quotes more material for the second side. Nevertheless, it is clear from his comments that more declaimers took the first side (*in hac controversia nihil litium fuit: fere omnes consentiunt*, 8). Speakers are very hostile to the pirate’s daughter from the outset, as her background is disreputable. Since this is a disinheritance case, the legal facts are undefined.

**First side:**

- Father (disinheritance)
- Less material quoted (two declaimers, 60 words)
- Stronger audience sympathy
- Uncertain legal facts

**Second side:**

- Son (disinheritance)
- More material quoted (three declaimers, 650 words)
- Weaker audience sympathy
- Uncertain legal facts

1.7. *LIBERI PARENTES ALANT AUT VINCIANTUR. Quidam alterum fratrem tyrannum occidit, alterum in adulterio deprehensum deprecante patre interfecit. A piratis captus scripsit patri de redemptione. Pater piratis epistulam scripsit: si praecidissent manus, duplam se daturum. Piratae illum dimiserunt. Patrem egentem non alit.*

“CHILDREN MUST SUPPORT THEIR PARENTS OR BE IMPRISONED. A man killed one of his brothers, a tyrant; he caught the other in adultery and killed him in spite of their father’s pleas. He was captured by pirates and wrote to his father requesting a ransom. The father wrote back to the pirates and said he would pay double if they cut off his hands. The pirates released him. Now the father is destitute and the son is not supporting him.”

The case shows narrative revisions to defend the father, and the audience seems to view him as excessively cruel. Legal facts are uncertain. Discussed in Chapter 1.

**First side:**

- Defense
- More material
- Stronger audience sympathy
- Uncertain legal facts

**Second side:**

- Prosecution
- Less material
- Weaker audience sympathy
- Uncertain legal facts

1.8. *QUI TER FORTITER FECERIT, MILITIA VACET. Ter fortem pater in aciem quarto volentem exire retinet; nolentem abdicat.*

“ANYONE WHO HAS BECOME A HERO THREE TIMES SHALL BE EXEMPT FROM MILITARY SERVICE. When a certain man had become a hero three times and wanted to go out to battle a fourth time, his father tried to stop him. When the son refuses to stay, the father disinherits him.”

Since this is a disinheritance case, the legal facts are undefined.

**First side:**

- Father (disinheritance)
- More material
- Stronger audience sympathy
- Uncertain legal facts

**Second side:**

- Son (disinheritance)
- Less material
- Weaker audience sympathy
- Uncertain legal facts

2.1. *Dives tres filios abdicavit. Petit a paupere unicum filium in adoptionem. Pauper dare vult; nolentem ire abdicat.*

“A rich man disinherited his three sons. He asks a poor man for his only son to adopt. The poor man is willing to provide him; when the son refuses to go, the father disinherits him.”

This case shows a few narrative revisions for the son's side, but many more for the father. His side looks bad because he is seen as trying to profit from the disinheritance of the rich man's sons. As this is a disinheritance case, the legal facts are undetermined.

**First side:**

- Son (disinheritance)
- More material
- Stronger audience sympathy
- Uncertain legal facts

**Second side:**

- Father (disinheritance)
- Less material
- Weaker audience sympathy
- Uncertain legal facts

2.2. *Vir et uxor iuraverunt ut, si quid alteri optigisset, alter moreretur. Vir peregre profectus misit nuntium ad uxorem, qui diceret decessisse virum. Uxor se praecipitavit. Recreata iubetur a patre relinquere virum; non vult. Abdicatur.*

“A husband and wife swore an oath that if anything happened to one of them, the other would die. The husband went abroad, and sent a messenger to his wife to tell her that he had died. The wife threw herself from a cliff. She was revived, and then ordered by her father to divorce her husband. When she refuses, she is disinherited.”

Seneca says this case is mainly concerned with equity, not much with legal facts (5). But it seems that he is not very interested in the case for its own merits; he mainly uses it in order to discuss Fabianus, and then use him as a segue to Ovid. (Ovid took daughter's side.)

**First side:**

- Daughter (disinheritance)
- More material
- Stronger audience sympathy
- Uncertain legal facts

**Second side:**

- Father (disinheritance)
- Less material
- Weaker audience sympathy
- Uncertain legal facts

2.3. *RAPTOR, NISI ET SUUM ET RAPTAE PATREM INTRA DIES TRIGINTA EXORAVERIT, PEREAT. Raptor raptae patrem exoravit, suum non exorat. Accusat dementiae.*

“IF A RAPTOR DOES NOT WIN PARDON FROM BOTH HIS OWN FATHER AND THE RAPTA'S FATHER WITHIN THIRTY DAYS, HE SHALL DIE. A raptor won over the *raptae's* father, but is unable to win over his own. He accuses his father of insanity.”

The case shows moralizing invective for the father, insinuations against the girl's father: *Omnes infamaverunt raptae patrem ...* (17) Narrative revisions for son. As this is an insanity case, the legal facts are undefined.

**First side:**

- Father (insanity)
- More material
- Stronger audience sympathy
- Uncertain legal facts

**Second side:**

- Son (insanity)
- Less material
- Weaker audience sympathy
- Uncertain legal facts

2.4. *Abdicavit quidam filium. Abdicatus se contulit ad meretricem; ex illa sustulit filium. Aeger ad patrem misit; cum venisset, commendavit ei filium suum et decessit. Pater post mortem illius adoptavit puerum; ab altero [pater] filio accusatur dementiae.*

“A man disinherited his son. The son, after being disinherited, went to a prostitute and raised a son by her. He became ill and sent for his father. When the father came, the young man entrusted his son to him and died. After his death the father adopted the boy. He is accused by his other son of insanity.”

The case is complicated on the level of sympathy because it puts the father and the prostitute on the same side. *Omnes infamaverunt adulescentem ...* (“They all reviled the young man,” 7) points to less sympathy for the son; there are more narrative revisions for his side (although there are a few for father as well, praising the prostitute for her dutiful qualities). Thus, we can say that the audience sides slightly more with the father, but it is very close. As this is an insanity case, the legal facts are undefined.

**First side:**

- Father (insanity)
- More material (six declaimers, 454 words)
- Stronger audience sympathy
- Stronger legal facts

**Second side:**

- Son (insanity)
- Less material (six declaimers, 207 words)
- Weaker audience sympathy
- Weaker legal facts

2.5. *Torta a tyranno uxor, numquid de viri tyrannicidio sciret, perseveravit negare. Postea maritus eius tyrannum occidit. Illam sterilitatis nomine dimisit intra quinquennium non parientem. Ingrati actio est.*

“A wife was tortured by a tyrant to find out if she knew anything about her husband’s plot to kill him; she steadfastly denied it. Afterwards her husband killed the tyrant. He then divorced her on grounds of barrenness when she bore no sons within five years of marriage. She brings a suit for ingratitude.”

The case shows much more material for the wife: moral denunciations of the husband, gory descriptions of what she suffered. The only narrative revisions for the wife say that many women were sterile during the tyranny, out of fear or stress. *Colores* for the husband center on his not having told anything to the wife yet; or conversely, having told her everything, which makes her silence an act of loyalty or patriotism, not a benefit. The defense of the husband hinges more on legal grounds, definitions, since the action for ingratitude is undefined.

**First side:**

- Prosecution (for ingratitude)
- More material
- Stronger audience sympathy
- Uncertain legal facts

**Second side:**

- Defense (for ingratitude)
- Less material
- Weaker audience sympathy
- Uncertain legal facts

2.6. *Quidam luxuriante filio luxuriari coepit. Filius accusat patrem dementiae.*

“A certain man whose son was debauched started to be debauched himself. The son accuses the father of insanity.”

The father is the more sympathetic side from the outset; the audience is very likely to believe that he is acting debauched for some good reason: namely, to reform his son. Nearly all speakers adopt this line. The case for the son requires more work, e.g. blame his debauchery on lax upbringing (7). As this is an insanity case, the legal facts are undefined.

**First side:**

- Father (insanity)
- More material
- Stronger audience sympathy
- Uncertain legal facts

**Second side:**

- Son (insanity)
- Less material
- Weaker audience sympathy
- Uncertain legal facts

2.7. *Quidam, cum haberet formosam uxorem, peregre profectus est. In viciniam mulieris peregrinus mercator commigravit. Ter illam appellavit de stupro adiectis pretiis; negavit illa. Decessit mercator; testamento heredem*

*omnibus bonis reliquit formosam et adiecit elogium: "pudicam repperi." Adit hereditatem. Redit maritus; accusat adulteri ex suspicione.*

"A man who had a beautiful wife went abroad. A foreign merchant moved into the woman's neighborhood. Three times he solicited her for sex, and named prices; she refused. The merchant died; in his will he made the beautiful woman heir to all his possessions, adding the clause: 'I found her chaste.' She accepted the inheritance. The husband returns and accuses her of adultery on suspicion."

Lacuna; a lengthy speech of Latro for the prosecution is all that survives in entirety, the rest is only in *excerpta*. Latro employs moralizing invective, appears to presuppose audience sympathy.

**First side:**

- Prosecution
- Quantity of material uncertain (appears to be more, based on *excerpta*)
- Stronger audience sympathy
- Uncertain legal facts (conjectural case)

**Second side:**

- Defense
- Quantity of material uncertain (appears to be less, based on *excerpta*)
- Weaker audience sympathy
- Uncertain legal facts (conjectural case)

7.1. *Mortua quidam uxore, ex qua duos filios habebat, duxit aliam. Alterum ex adolescentibus domi paricidii damnavit; tradidit fratri puniendum. Ille exarmato navigio imposuit. Delatus adolescens ad piratas archipirata factus est. Postea pater peregre profectus captus est ab eo et remissus in patriam. Abdicat filium.*

"A man had lost his wife, from whom he had two sons, and married another. He condemned one of the young men at home for parricide; he entrusted him for punishment to his brother, who placed him on a boat stripped of all equipment. The young man was carried to some pirates and became a pirate chief. Later the father, while traveling abroad, was captured by him and released back to his country. He disowns his [other] son."

Uncertainty about sympathy. Legally undefined, as it is a disinheritance case. See discussion in Chapter 1.

**First side:**

- Son (disinheritance)
- More material
- Uncertain audience sympathy
- Uncertain legal facts

**Second side:**

- Father (disinheritance)
- Less material
- Uncertain audience sympathy
- Uncertain legal facts

7.2. DE MORIBUS SIT ACTIO. *Popillium parricidii reum Cicero defendit. Absolutus est. Proscriptum Ciceronem ab Antonio missus occidit Popillius et caput eius ad Antonium rettulit. Accusatur de moribus.*

“LET THERE BE AN ACTION FOR MISCONDUCT. Cicero defended Popillius against a charge of parricide. He was acquitted. When Cicero had been proscribed, Popillius was sent by Antony to kill him; he killed him and brought back his head to Antony. He is charged with misconduct.”

Seneca says, *Sic autem eum accusant tamquam defendi non possit, cum adeo possit absolvi ut ne accusari quidem potuit.* Latro says everything Popillius did was permissible because it was war-time. The only point against him was that he killed his own previous defense council. Latro himself gives *colores* for defense, that it was necessity. Many in fact take this side. The prosecution seems to have weaker legal facts, based on Seneca’s and Latro’s discussion, and the fact that *de moribus* is so vague. (This case could be classified with uncertain legal facts as well.)

**First side:**

- Prosecution
- More material
- Stronger audience sympathy
- Weaker legal facts

**Second side:**

- Defense
- Less material
- Weaker audience sympathy
- Stronger legal facts

7.3. *Ter abdicatus, ter absolutus comprehensus est a patre in secreta parte domus medicamentum terens. Interrogatus quid esset, dixit venenum et velle se mori, et effudit. Accusatur parricidi.*

“A son who had been disinherited three times and successfully contested disinheritance three times was caught by his father grinding up a potion in a secluded part of the house. When asked what it was, he said it was poison and that he wanted to die. Then he poured it out. He is accused of parricide.”

This is one of the few with more material for the second side. It is conjectural (question of fact), so many of the usual structural clues do not apply. Seneca does not seem very interested in this case, using it as segue to discuss other things. For the son, there are narrative revisions, so it seems he needs more spin. No real ethical issues are in conflict (except permissibility of suicide).

**First side:**

- Defense
- Less material (six speakers, 172 words)
- Weaker audience sympathy
- Uncertain legal facts (conjectural)

**Second side:**

- Prosecution
- More material (nine speakers, 354 words)

Stronger audience sympathy  
Uncertain legal facts (conjectural)

7.4. *LIBERI PARENTES ALANT AUT VINCIANTUR. Quidam, cum haberet uxorem et ex ea filium, peregre profectus est. A piratis captus scripsit de redemptione epistulas uxori et filio. Uxor flendo oculos perdidit. Filium euntem ad redemptionem patris alumenta poscit; non remanentem alligari volt.*

“CHILDREN MUST SUPPORT THEIR PARENTS OR BE IMPRISONED. A man who had a wife and a son by her went abroad. Captured by pirates, he wrote to his wife and son asking to be ransomed. The wife went blind from crying. As the son was about to go ransom his father, she asks for sustenance from him; when he refuses to stay, she seeks to have him imprisoned.”

The sides are almost equal in material, and there is no clear sympathy with either side or consensus about the legal facts. Most speakers use the case simply to compare the duties owed to a father and to a mother.

**First side:**

Prosecution  
More material (six speakers, 120 words)  
Uncertain audience sympathy  
Uncertain legal facts

**Second side:**

Defense  
Less material (five speakers, 98 words)  
Uncertain audience sympathy  
Uncertain legal facts

7.5. *Mortua quidam uxore, ex qua filium habebat, duxit aliam, sustulit ex ea filium. habebat procuratorem in domo speciosum. cum frequenter essent iurgia novercae et privigno, iussit eum semigrare; ille trans parietem habitationem conduxit. rumor erat de adulterio procuratoris et matris familiae. quodam tempore pater familiae in cubiculo occisus inventus est, uxor vulnerata, communis paries perfossus. placuit propinquis quaeri a filio quinquenni, qui una dormierat, quem percussorem cognosceret; ille procuratorem digito denotavit. accusat filius procuratorem caedis, ille filium parricidi.*

“A man lost his wife, by whom he had a son, remarried and raised a son by his second wife. He had a good-looking agent in his household. The step-mother and step-son quarrelled frequently, and he ordered his son to move; he rented a house next door. There was a rumor of adultery between the agent and the mother. One day the father was found killed in his bedroom, his wife injured and the party-wall dug through. The relations decided to ask the five-year-old son who had slept in the same room whom he recognized as the assassin; he identified the agent by pointing at him. The (elder) son accuses the agent of murder, while the agent accuses the son of parricide.” (Transl. by Winterbottom)

This is a conjectural case (question of fact), so legal facts are not really applicable. Disclaimers all take the son’s side, apparently because of who he is; the *procurator* is not seen as an available protagonist.

**First side:**

Son (mutual accusation)  
 All the material  
 Stronger audience sympathy  
 Uncertain legal facts (conjectural)

**Second side:**

Procurator (mutual accusation)  
 No material  
 Weaker audience sympathy  
 Uncertain legal facts (conjectural)

7.6. *Tyrannus permisit servis dominis interemptis dominas suas rapere. Profugerunt principes civitatis; inter eos qui filium et filiam habebat profectus est peregre. Cum omnes servi dominas suas vitiasent, servus eius virginem servavit. Occiso tyranno reversi sunt principes; in crucem servos sustulerunt. Ille manu misit et filiam conlocavit. Accusatur a filio dementiae.*

“A tyrant gave slaves permission to kill their masters and rape their mistresses. The chief men of the state fled; among them one who had a son and a daughter set off abroad. Though all the other slaves raped their mistresses, this man’s slave preserved the girl as a virgin. When the tyrant had been killed, the chief men returned and crucified their slaves. But this man freed his slave and gave his daughter to him in marriage. He is accused by his son of insanity.”

Clear moral outrage on behalf of son, narrative revisions or legal defense for father. The actual legal situation is uncertain because insanity cases are undefined.

**First side:**

Son (insanity)  
 More material  
 Stronger audience sympathy  
 Uncertain legal facts

**Second side:**

Father (insanity)  
 Less material  
 Weaker audience sympathy  
 Uncertain legal facts

7.7. *PRODITIONIS SIT ACTIO. Pater et filius imperium petierunt. Praelatus est patri filius; bellum commisit cum hoste; captus est. Missi sunt decem legati ad redimendum imperatorem. Euntibus illis occurrit pater cum auro; dixit filium suum crucifixum esse et sero se aurum ad redemptionem tulisse. Illi pervenerunt ad crucifixum imperatorem; quibus ille dixit: “cavete proditionem.” Accusatur pater proditionis.*

“LET THERE BE AN ACTION FOR TREASON. A father and son both sought a command; the son was chosen instead of the father; he went to war with the enemy, and was captured. Ten legates were sent to ransom the commander. As they were en route, they met the father [i.e. coming the opposite direction] with gold; he said his son had been crucified, and he had brought the money too late to

ransom him. The legates arrived at the crucified commander, and he told them, 'Beware of treason.' The father is charged with treason."

**First side:**

- Prosecution
- More material
- Stronger audience sympathy
- Uncertain legal facts (conjectural)

**Second side:**

- Defense
- Less material
- Weaker audience sympathy
- Uncertain legal facts (conjectural)

7.8. RAPTA RAPTORIS AUT MORTEM AUT INDOTATAS NUPTIAS OPTET. Rapta producta nuptias optavit. Qui dicebatur raptor negavit se rapuisse. Iudicio victus vult ducere. Illa optionem petit.

"A *RAPTA* MAY CHOOSE EITHER THE DEATH OF THE *RAPTOR* OR MARRIAGE TO HIM WITHOUT DOWRY. A girl who had been raped was brought to court and chose marriage. The alleged *raptor* said he not done it. He was convicted in court, and is now willing to marry her. She asks for another choice."

Most take the *raptor's* side, but feel he needs *colores*. Legal arguments seem to be inconclusive. In this case, sympathy can be separated into two categories: the *raptor* is weaker in terms of reputability, but his claims are seen to be stronger on grounds of fairness. So they apply *colores* to improve his position.

**First side:**

- Raptor* (procedural)
- More material
- Stronger audience sympathy
- Uncertain legal facts

**Second side:**

- Rapta* (procedural)
- Less material
- Weaker audience sympathy
- Uncertain legal facts

9.1. ADULTERUM CUM ADULTERA QUI DEPRENDERIT, DUM UTRUMQUE CORPUS INTERFICIAT, SINE FRAUDE SIT. INGRATI SIT ACTIO. Miltiades peculatus damnatus in carcere alligatus decessit. Cimon, filius eius, ut eum sepeliret, vicarium se pro corpore patris dedit. Callias dives sordide natus redemit eum a re publica et pecuniam solvit; filiam ei suam collocavit, quam ille depremsam in adulterio deprecante patre occidit. Ingrati reus est.

"WHOEVER CATCHES AN ADULTERER WITH AN ADULTERESS, PROVIDED THAT HE KILLS BOTH, SHALL GO FREE. LET THERE BE AN ACTION FOR INGRATITUDE. Miltiades was convicted of

embezzlement and died in prison. His son Cimon gave himself as substitute for his father's body so that it could be buried. Callias, a rich man of low birth, ransomed him from the state and paid the money; he also gave his daughter to him in marriage. Cimon caught her in adultery, and killed her despite her father's pleas. He is accused of ingratitude."

The case seems skewed against Callias from the very mention in the theme that he is *dives sordide natus*. Declaimers sympathize with Cimon, the defense. Legal facts are uncertain because ingratitude is not defined.

**First side:**

- Defense (for ingratitude)
- More material
- Stronger audience sympathy
- Uncertain legal facts

**Second side:**

- Prosecution (for ingratitude)
- Less material
- Weaker audience sympathy
- Uncertain legal facts

9.2. *MAIESTATIS LAESAE SIT ACTIO. Flamininus proconsul inter cenam a meretrice rogatus, quae aiebat se numquam vidisse hominem decollari, unum ex damnatis occidit. Accusatur maiestatis.*

"LET THERE BE AN ACTION FOR HARMING STATE MAJESTY. Flamininus the proconsul, at the request of a prostitute at a dinner party who said she had never seen a man beheaded, executed one of the condemned men. He is accused of harming state majesty."

Discussed in Chapters 1 and 2.

**First side:**

- Prosecution
- More material
- Stronger audience sympathy
- Weaker legal facts

**Second side:**

- Defense
- Less material
- Weaker audience sympathy
- Stronger legal facts

9.3. *PER VIM METUMQUE GESTA NE SINT RATA. PACTA CONVENTA LEGIBUS FACTA RATA SINT. EXPOSITUM QUI AGNOVERIT SOLUTIS ALUMENTIS RECIPLAT. Quidam duos filios expositos sustulit, educavit. Quaerenti patri naturali pollicitus est se indicaturum ubi essent, si sibi alterum ex illis dedisset. Pactum interpositum est. Reddit illi duos filios, repetit unum.*

“ACTS DONE OUT OF FORCE OR FEAR SHALL NOT BE VALID. AGREEMENTS MADE ACCORDING TO THE LAW SHALL STAND. A MAN WHO ACKNOWLEDGES A CHILD HE HAS EXPOSED MAY TAKE HIM BACK AFTER PAYING FOR HIS UPBRINGING. A man took in and educated two boys who had been exposed. When the natural father made enquiries, the foster father promised he would reveal where they were if he was given one of them. They made an agreement. He gives him back his two sons, but asks for one to be returned to him.”

This is one of the rare very balanced cases. Legal arguments can be made for either side (hinging on what constitutes *per vim metumque gesta*). There are *colores* of sorts, but not decisive.

**First side:**

- Natural father
- Equal (seven speakers, 309 words)
- Uncertain audience sympathy
- Uncertain legal facts

**Second side:**

- Foster father
- Equal (seven speakers, 167 words)
- Uncertain audience sympathy
- Uncertain legal facts

9.4. *QUI PATREM PULSAVERIT, MANUS EI PRAECIDANTUR. Tyrannus patrem in arcem cum duobus filiis accersit; imperavit adolescentibus ut patrem caederent. Alter ex his praecipitavit se, alter cecidit. Postea in amicitiam tyranni receptus occiso tyranno praemium accepit. Petuntur manus eius. Pater defendit.*

“WHOEVER STRIKES HIS FATHER SHALL HAVE HIS HANDS CUT OFF. A tyrant summoned a man and his two sons up to the castle; he ordered the young men to beat their father. One of them jumped down to his death, the other beat his father. Later he was accepted into the tyrants circle of friends; he then killed the tyrant and received the reward. His hands are sought. His father defends him.”

The audience wants to sympathize with the father/young man; but that side has some legal weakness that needs to be remedied (and it needs to be solidified that the young man’s actions really were from a good motive). For the other side, it is not enough just to point to the letter of the law; they need narrative innovations to make the son into a terrible person.

**First side:**

- Defense
- More material
- Stronger audience sympathy
- Weaker legal facts

**Second side:**

- Prosecution
- Less material
- Weaker audience sympathy
- Stronger legal facts

9.5. *DE VI SIT ACTIO. Quidam duos filios sub noverca amisit: dubia crudelitatis et veneni signa insecuta sunt. Tertium filium eius maternus avus rapuit, qui ad visendos aegros non fuerat admissus. Quaerenti patri per praeconem dixit apud se esse. Accusatur de vi.*

“LET THERE BE AN ACTION FOR VIOLENCE. A certain man lost two sons under the care of a stepmother; they were accompanied by ambiguous signs of indigestion or poisoning. The third son was snatched away by his maternal grandfather, who had not been allowed in to visit the sick children. When the father inquired, he told him through a messenger that the boy was with him. The grandfather is charged with committing violence.”

More speakers want to defend the grandfather; most make up innovations for him, as if they think he needs it. But these are mainly to fill out what the theme implies: namely, the stepmother looks very suspicious. It requires a *bigger* innovation for the prosecution, to say that the grandfather always hated the stepmother and is now trying to bring suspicion on her. Legal facts are uncertain.

**First side:**

- Defense
- More material
- Stronger audience sympathy
- Uncertain legal facts

**Second side:**

- Prosecution
- Less material
- Weaker audience sympathy
- Uncertain legal facts

9.6. *VENEFICA TORQUEATUR DONEC CONSCIOS INDICET. Quidam mortua uxore ex qua filium habebat, duxit alteram et ex ea filiam sustulit. Decessit adolescens. Accusavit maritus novercam venefici. Damnata, cum torqueretur, dixit consciam sibi filiam esse. Petitur puella ad supplicium. Pater defendit.*

“A POISONER SHALL BE TORTURED UNTIL SHE REVEALS HER ACCOMPLICES. A man lost his wife, by whom he had a son, married again and raised a daughter by his new wife. The young man died. The husband accused the stepmother of poisoning him. After being convicted, she was tortured and said her daughter was her accomplice. The girl is to be executed. Her father defends her.”

The audience knows the stepmother has already been convicted of poisoning, and thus will be disinclined to believe anything she said. All that is necessary for the other side is to explain some difficult points, such as, why *would* the stepmother implicate her daughter, even falsely. The case is conjectural and the legal facts are uncertain.

**First side:**

- Defense
- More material
- Stronger audience sympathy
- Uncertain legal facts (conjectural)

**Second side:**

- Prosecution
- Less material
- Weaker audience sympathy
- Uncertain legal facts (conjectural)

10.1. *INIURLARUM SIT ACTIO. Quidam, cum haberet filium et divitem inimicum, occisus in spoliatus inventus est. Adulescens sordidatus divitem sequebatur. Dives eduxit in ius eum et postulavit ut si quid suspicaretur accusaret se. Pauper ait: "accusabo cum potero," et nihilominus sordidatus divitem sequebatur. Cum peteret honores dives, repulsus accusat iniuriarum pauperem.*

“LET THERE BE AN ACTION FOR INJURY. A man who had a son and a rich enemy was found killed but not robbed. The young man, in mourning clothes, began to follow the rich man around. The rich man took him to court and demanded that if he had any suspicions he should accuse him. The poor man said, ‘I will accuse when I can,’ and even so continued to follow the rich man in mourning clothes. The rich man sought a public office but lost the election; he accuses the poor man of injury.”

The son’s side argues through moralizing invective. They seem confident that *aequitas* – and the audience – are on their side; do not care so much about the legal facts. They add *colores* – details in the narrative – but these are in line with what the theme implies, namely, that the young man suspected the rich man.

The legal question is what constitutes injury. This is not defined in declamation, but based on real Roman practice (discussed by Winterbottom), the rich man’s position seems stronger.

**First side:**

- Defense
- More material
- Stronger audience sympathy
- Weaker legal facts

**Second side:**

- Prosecution
- Less material
- Weaker audience sympathy
- Stronger legal facts

10.2. *VIR FORTIS QUOD VOLET PRAEMIUM OPTET. SI PLURES ERUNT, IUDICIO CONTENDANT. Pater et filius fortiter fecerunt. Petit pater a filio sibi cederet. Ille non vult; iudicio contendit; vicit patrem. Praemio statuas patri petivit. Abdicatur.*

“A HERO MAY CHOOSE WHATEVER REWARD HE WISHES. IF THERE ARE HEROES, THEY MUST CONTEND IN COURT. A father and son both became heroes. The father asked the son to give way to him. The son refuses. He contended in court and defeated his father. As his reward he asked for statues to be erected to his father. The father disinherits him.”

Most speakers argue that the son should be forgiven, he must have disobeyed his father for some good cause, or because he was young and carried away. Since it is a disinheritance case, it is legally uncertain.

**First side:**

- Son (disinheritance)
- More material (probably – there is a lacuna)
- Stronger audience sympathy
- Weaker legal facts

**Second side:**

- Father (disinheritance)
- Less material
- Weaker audience sympathy
- Stronger legal facts

10.3. *DEMENTIAE SIT ACTIO. Bello civili quaedam virum secuta est, cum in diversa parte haberet patrem et fratrem. Victis partibus suis et occiso marito venit ad patrem; non recepta in domum dixit: "Quemadmodum tibi vis satisfaciam?" Ille respondit: "Morere!" Suspendit se ante ianuam eius. Accusatur pater a filio dementiae.*

“LET THERE BE AN ACTION FOR MADNESS. In a civil war, a woman followed her husband, while her father and brother were on the other side. When her side was defeated and her husband killed, she returned to her father; but as she was not admitted into the house, she asked, ‘How can I make satisfaction to you?’ He answered, ‘Die!’ She hanged herself outside his door. The son accuses the father of insanity.”

There are many *sententiae* for the son, none for the father. There are a few narrative revisions on the son’s side to make the father seem more harsh; more numerous and extensive revisions in the father’s defense.

**First side:**

- Son (insanity)
- More material
- Stronger audience sympathy
- Uncertain legal facts

**Second side:**

- Father (insanity)
- Less material
- Weaker audience sympathy
- Uncertain legal facts

10.4. *REI PUBLICAE LAESAE SIT ACTIO. Quidam expositos debilitabat et debilitatos mendicare cogebat ac mercedem exigebat ab eis. Rei publicae laesae accusatur.*

“LET THERE BE AN ACTION FOR HARMING THE STATE. A certain man crippled exposed children and forced them to beg and demanded the income from them. He is accused of harming the state.”

Discussed in Chapter 1.

**First side:**

- Prosecution
- More material
- Stronger audience sympathy
- Weaker legal facts

**Second side:**

- Defense
- Less material
- Weaker audience sympathy
- Stronger legal facts

10.5. *LAESAE REI PUBLICAE SIT ACTIO. Parrhasius, pictor Atheniensis, cum Philippus captivos Olynthios venderet, emit unum ex iis senem. Perduxit Athenas, torsit et ad exemplar eius pinxit Promethea. Olynthius in tormentis perit. Ille tabulam in templo Minervae posuit. Accusatur rei publicae laesae.*

“LET THERE BE AN ACTION FOR HARMING THE STATE. When Philip was selling Olynthian prisoners, Parrhasius the Athenian painter bought one of them, an old man. He brought him to Athens, tortured him, and painted Prometheus with him as model. The Olynthian died during the torture. Parrhasius set up the painting in the temple of Minerva. He is accused of harming the state.”

Discussed in Chapter 1.

**First side:**

- Prosecution
- More material
- Stronger audience sympathy
- Weaker legal facts

**Second side:**

- Defense
- Less material
- Weaker audience sympathy
- Stronger legal facts

10.6. *FUR CONTIONE PROHIBEATUR. Quidam, cum divitem prodicionis postulasset, noctu parietem eius perfodit, et scrinium in quo erant missae ab hostibus epistulae sustulit. Damnatus est dives. Accusator contionari cum vellet, a magistratu prohibitus agit iniuriarum.*

“A THIEF SHALL BE BARRED FROM SPEAKING IN ASSEMBLIES. A man who had accused a rich man of treason dug through his wall at night and took a writing-case containing letters from the enemy. The rich man was convicted. When the accuser wanted to speak in an assembly, he was barred by the magistrate. He sues the magistrate for injury.”

Incomplete, continues only in excerpt.

**First side:**

Prosecution

Uncertain amount of material (lacuna in full text, rest known by *excerpta*)

Stronger audience sympathy

Uncertain legal facts

**Second side:**

Defense

Uncertain amount of material (lacuna in full text, rest known by *excerpta*)

Weaker audience sympathy

Uncertain legal facts

## APPENDIX B: CONSTRAINTS ON CREATIVITY

### I. Additional material on witnesses and evidence

[Quint.] 351 is a conjectural case in which a rich man is accused of plotting tyranny, but with only circumstantial evidence against him. The *sermo* presents a counternarrative to explain the evidence differently; it is full of extraneous details, all of which would require witnesses.

Sen. *Con.* 5.7 *excerpta* begins with two laws: *Nocte in bello portas aperire ne liceat. Imperator in bello summam habeat potestatem* (“It shall not be permitted to open the gates at night during wartime. A general shall have supreme power during wartime”). The theme states that three hundred captives escape from the enemy and return at night, the commander does not open for them, the enemy comes and kills them, and the commander is accused of harming the state. There is a feeble attempt at a *color*: *Infestus trecentis fuit; iniquo conlocavit loco; hoc ne argui posset non recepit* (“He was hostile to the three hundred; he stationed them on unfavorable ground. To prevent this from being proved, he did not receive them back”). One would think witnesses were required to establish this supposed pattern of hostility.

### II. Additional material on implausibility and banality

Some “correct” ways that plausibility in innovations is handled. In [Quint.] 364, a poor man frequently came to a rich man’s house at night to jeer at him; one night the rich man sent out ten slaves to escort the poor man home on grounds that he was insane; the next day the poor man was found murdered along with all the slaves; the rich man is charged with murder. In the *sermo* that follows, the narrative innovations are explicitly presented as conjectural: the poor man may have had companions that he kept in hiding in order to back him up; a fight broke out between them and the rich man’s slaves; perhaps the companions killed the poor man in the fight, so he would not be charged and later reveal them as accomplices (1-3). The *sermo* goes on to say: *Et hoc dubie ponendum est;*

*quae constitutio in reliqua quoque causae parte servanda est. Nihil enim pro certo adfirmare debemus, sed tantum suspicionem iudicum a nobis alio praevertere* (“And this is to be presented tentatively, which approach is to be kept up for the rest of the case too. For we should not assert anything positively, but only turn the jury’s suspicions in advance away from us to another quarter,” 4 – transl. Shackleton Bailey). This shows how narrative innovations are designed to be employed: they do not always have to be believed or proved; they can be presented tentatively, and they only need to be just plausible enough to plant doubts in the jury’s mind.

One more: In [Quint.] 369, a man took weapons from the tomb of a *vir fortis* because he had lost his own in battle; after winning a victory, he replaced them, but was charged with violating the tomb. The declaimer argues that not every disturbance of a tomb counts as violation (for instance, people might repair or decorate it); what counts is intention. Then he asserts: *Si ergo mens in factis spectatur, meam inspicate. Quare violo? Inimici sepulcrum est? Immo etiam commilitonis, amici; credibile enim est similes propositis amicos fuisse* (“Is it the tomb of an enemy? No, even of a comrade, of a friend; for it is credible that persons with similar ways of life were friends,” 3 – transl. Shackleton Bailey). He does not actually say they were friends; instead, his argument is more “meta,” along the lines of: “In a declamation, it would be plausible for me to claim that we were friends.” Shackleton Bailey’s note interprets it as meaning that the two soldiers did not actually know each other, but if they did, they would have been friends. This is also possible. In either case, it is a way of planting an idea in the audience’s mind without actually asserting something unprovable or implausible.

Another that could be cited is [Quint.] 324 *Bona sacrilegi*, a case of conflicting laws. When embarking on the *legum comparatio* (“comparison of laws”), the declaimer deliberately limits his assumptions in order to stay within the rules of the game: *Idem demus utrique tempus* (“Let’s assume both laws were passed at the same time,” 2).

### III. Censure for implausible innovations

Sen. *Con.* 2.3.21 is implausible based on the declamatory legal system, in which (it is supposed that) a father's decision to pardon his rapist son is final: *Triarius a parte adolescentis dixit: Timeo ne mutetur, etiamsi exoratus est. Hunc sensum non imprudenter Silo Pompeius improbabat; aiebat enim non posse mutari semel latam sententiam* ("On the side of the young man, Triarius said, 'I am afraid he will change his mind, even if he is won over.' Silo Pompeius sensibly rejected this; he said it was not possible to change a verdict once it was delivered").

7.2.14, on Cicero's murder by Popillius, is too contrived: *Inepte Sabidiennus Paulus, qui induxit Ciceronem cum maxime <pro> Popillio orationem legentem* ("Sabidienus Paulus presented Cicero as being killed exactly when he was reading the speech he had delivered for Popillius.")

Sen. *Con.* 1.6.9-10, discussed further in Chapter 3, is referred to as *longe arcessitus* ("far-fetched"): *Buteo longe arcessito colore usus est; voluit enim videri non invito patre sed secreto suadente, palam dissimulante totum hoc gestum: <arte illa> honestam condicionem nuptiarum inventam, cum alio nullo modo posset; neque enim aliter effugere illos potuisse nisi patiente patre* ("Buteo used a far-fetched *color*. he wanted it to seem like all this had not been done against the pirate's will, but instead, he was secretly urging it while publicly disguising it. By means of this plan he had procured an honorable marriage for his daughter, which she could not have had any other way. 'Because,' he said, 'they could never have escaped from the pirates unless the girl's father actually allowed it.'").

Sen. *Con.* 1.3.11 is about an unchaste woman who appealed to Vesta before being thrown down from the rock; she survived the fall, and was sought for punishment once again. Seneca criticizes some of the *colores* that are contrived to explain her survival without divine intervention: *Othonem Iunium patrem memini colorem stultum inducere . . . . Fortasse, inquit, poenae se preparavit, et ex quo peccare coepit cadere condidicit* ("I remember that Junius Otho used a ridiculous *color*: he said, 'Perhaps she prepared herself for punishment. Since the time when she began to sin, she took lessons in

falling’). Aietius Pastor was criticized by Cestius for the following: *sic veneficiis corpus induruit ut saxa reverberet inultum* (“She used potions to make her body so hard that it bounced off the rocks unharmed”).

Sen. *Con.* 10.5.25 lists two that seem to commit a *non sequitur* fallacy. The problem is not that they are too powerful (because they are not), nor simply that they are implausible (although they are): it is more that, even if accepted, they would not really work to mitigate the charge: *Otho pater, cum pro Parrhasio diceret, in hoc colore derisus est: quia conciderat, inquit, per proditores Olynthos, volui pingere iratum proditori suo Iovem. Gargonius multo stultius quare Promethei Parrhasius supplicium pinxisset: ego, inquit, ardente Olyntho non odissem ignium auctorem?* (“Otho senior, speaking on behalf of Parrhasius, was mocked for this *color*: ‘Since Olynthus fell through traitors, I wanted to paint Jupiter angry with his own betrayer.’ Gargonius gave a much stupider reason for why Parrhasius painted the torture of Prometheus: ‘While Olynthus is burning, should I not hate the inventor of fire?’”). Perhaps this is another reason why such a *color* could be considered *ineptus*, i.e. “not fitting, unsuitable, inappropriate.”

## APPENDIX C: SELECTED PASSAGES ON LETTER VS. INTENT

### I. On the side of the letter (*scriptum*)

[Quint.] 264.7-9 *Fraus legis Voconiae* (“Cheating the Voconian law”), arguing on the side of letter: the law forbids giving more than half the estate to a woman; therefore giving halves to two women is permissible. The other side is claiming that this violates the intention of the lawgiver.

*Nunc peritissimi litium homines ad interpretationem nos iuris adducunt. Non enim hanc esse legis voluntatem quae verbis ostendatur videri volunt. Quorum ego prudentiam, iudices, magnopere miror: tantum vicerunt illos maiores nostros, illos constitutores iuris, illos qui rudem civitatem legibus ac iure formarunt, ut hoc approbare conentur, defuisse his sermonem, defuisse consilium. Ac priusquam rationem ipsius legis excutio, interim hoc dico, iudices, perniciosissimam esse civitati hanc legum interpretationem. Nam si apud iudicium hoc semper quaeri de legibus oportet, quid in his iustum, quid aecum, quid conveniens sit civitati, supervacuum fuit scribi omnino leges. Et credo fuisse tempora aliquando quae solam et nudam iustitiae haberent aestimationem. Sed quoniam haec ingeniis in diversum traheretur, nec umquam satis constitui poterat quid oporteret, certa forma ad quam viveremus instituta est. Hanc illi auctores legum verbis complexi sunt; quam si mutare et ad utilitates suas pervertere licet, omnis vis iuris, omnis usus eripitur. Nam quid interest nullae sint an incertae leges?*

“Now persons highly expert in litigation bring us to the interpretation of the law. They want it to appear that the intention of the statute is not what is shown by its words. Gentlemen, I am full of admiration for their skill. They are so much superior to those ancestors of ours, the founders of our legal system, who shaped our primitive community by statute and law, that they try to prove them lacking verbally and lacking intellectually. Before I examine the purport of the law itself, this, gentlemen, I say for now: that this interpretation of laws is thoroughly pernicious to the community. For if in court there is always to be question about laws, what is just in them, what equitable, what convenable to the community, there was no need for laws to be written at all. And I do believe there were times in the past when justice rested on judgment, alone and unsupported. But men’s minds pulled it this way and that, and the right course could never be adequately determined; for that reason a fixed pattern was put in place by which we were to live. Those authors of our laws embraced this pattern in words; if this may be changed and perverted to suit particular interests, there goes the whole meaning and use of law. For what does it matter whether laws are nonexistent or whether their import is doubtful?” – transl. Shackleton Bailey.

[Quint.] 274.3-4 *Tyrannus fulminatus* (“The tyrant struck by lightning”), arguing on the side of the letter of this law (tyrant be thrown away unburied), against letter of the other law (*eo sepeliatur*).

Comparing the utility of the laws, he asks:

*Fulmine icti ut eodem loco sepeliantur quo sunt percussi ad quam tandem civitatis pertinet utilitatem? At bercule ut insepultus abiciatur tyrannus ad vindictam, ad securitatem pertinet. Non satis putaverunt maiores*

*eas poenas adversus tyrannum constituere quas possit excipere in vita. Multos magis tangit sepultura; ad cogitationem post se futurorum plerique gravius moventur. Vultis scire? Propter hoc litigatur.*

“That persons struck by lightning be buried in the same place where they were hit, to what utility of the community does that, I ask, pertain? But that a tyrant be cast out unburied pertains, upon my word, to vengeance, to security. Our ancestors thought it not enough to lay down punishments against a tyrant which he might receive in his lifetime. With many people burial goes deeper, most are more heavily affected by the thought of what comes after them. Would you like to know? This is the reason for our litigation.” – transl. Shackleton Bailey.

**[Quint.] 314.14** *Ego te, pater, occidi* (“I killed you, father”), arguing on behalf of magistrate who followed letter of the law. Required him to execute someone who confessed. Argues not quite about the intention of this law, but generally: the traditional idea that the Furies drove people to confess:

*Non sine causa videlicet vetus illa et antiqua aetas tradidit eos qui aliquod commiserunt scelus Furiis agitari et per totum orbem agi. Ut nomina mentita sint, ut aliquid fabulae fingant, ab aliquo tamen exemplo ista <et > experiment venerunt. etc.*

“With good reason, it seems, did the old, antique time hand it down that those who have committed a crime are harassed by the Furies and pursued through all the world. Names may have been falsified, legends may be part invention, but these stories come from some example <and> experience,” etc. – transl. Shackleton Bailey.

**[Quint.] 331.17-8** *Bis damnatus iniuriarum tertio absolutus*, arguing on the side of letter: it was not a capital trial and so the other law does not apply. The other side will object that we should follow *similitudine quadam legis* (“a certain similarity between the laws”):

*Hic iam desinit privata esse lis. Nam si accusatori licet constituere iura et leges ferre, si quod antea fieri per populum, per senatum licebat, constituitur inter subsellia pro dolore cuiusque vel pro auctoritate, supervacua sunt suffragia, supervacuus tantus ambitus in constituendo iure. Non de eo quaeritur apud hos, an aequum sit; nos venimus in iudicium quaesituri hoc solum, an ego ista lege teneam. ‘At oportet et iustum est ea quae similia sunt simili poena contineri.’ Adhabe senatum, adhabe populum. Emendandum sit fortasse ius: hoc interim vivamus, hoc utimur.*

“Here this ceases to be a private dispute. For if a prosecutor is allowed to constitute statutes and pass laws, and if what could formerly be done only through the people and the senate is now laid down among the courtroom benches according to individual passion and influence, votes will be superfluous, as will all the campaigning that goes on in constituting the law. The question before these gentlemen is not whether it is fair. We have come to court only to examine whether I am liable under this law. ‘But it is right and just that like offenses be

covered by like punishment.’ Call the senate, call the people. Perhaps the law should be amended. Meanwhile, we live by this law and use it.” – transl. Shackleton Bailey.

## II. On the side of intention (*voluntas*)

[Quint.] 306.10-13 *Expositus negante matre*<sup>1</sup> *nuptias petens* (“The exposed child, denied by his mother, seeking marriage with her”). A young man claimed to be a rich woman’s exposed child; she denied it. When he became a hero, he requested marriage to her. The theme sets up the suspicion that the young man did not really wish to marry the woman; he wanted her to refuse on grounds that he was her son; this would strengthen his claim to be her legal heir. The advocate for the woman argues against the letter of the law granting the hero anything he wishes:

*‘Licet’ inquit ‘mibi optare quod velim’. Nullum manifestius improbae optionis argumentum est quam vim lege adhibere. Quis enim dicit ‘necesse est’ qui dicere potest ‘oportet’? Non tamen hoc natura recipit, ut tam gravi servitute iuris obstrinxerit rem publicam qui legem dicebat.*

*Sibi sane tulerit iura simplicius aetas vetus, minor que fuerit verborum custodia cum intellecturi non timebantur. Has enim primas rudibus illis ac militaribus viris existimo placuisse leges quibus inter continua bella praemium non avaris virtutibus dabatur. Neque ego crediderim optionem tunc illam respexisse ad onera rei publicae: liberalis erat populus ex praeda. Testis carminum antiquitas, ubi illi primi heroes canebantur. Bellator huic currus, huic ducum excuviae, nonnulli \*. Captivae forma praestantior ultima sors habebatur [quamlibet nobilis peteret]. Legisti ne circa decennis belli | excuvias contendisse clarissimos reges? Haec sacra sunt merita, haec coniurata virtus. Hoc erat illud ‘quod volo’. Si vero isto verbo immodice abuteris, respondebit tibi res publica: ‘Quid mihi prodest vicisse si adhuc aliquid negare non possum? Sic me cum loqueretur victor hostis. Quid si templorum incendia petas, legum obliviones? Hoc modo et nuptias matris optares’.*

“I may opt for whatever I want,’ he says. Nothing is clearer proof of a shameless option than the use of violence by means of a law. For who says ‘must’ that can say ‘ought’? But nature does not admit that the lawgiver constrained the commonwealth in so onerous a legal bondage.

“To be sure, in the old days they passed laws for themselves more naively, there was less care about the wording when they were not afraid of those who would be understanding them. I judge that those first laws were approved by those unsophisticated military men, laws in which amid continual wars a reward was granted to uncovetous valor. And I should not believe that in those days that option looked to the commonwealth’s burdens. The people were generous out of booty. Witness the ancient lays in which those early heroes were sung. To one a war chariot, to another the spoils of commanders, to some \*. The outstanding

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<sup>1</sup> Dingel’s emendation for *negatae matris*.

beauty of a captive was considered the bottom lot. Have you not read that the most illustrious kings contended with each other about the spoils of a ten-year war? These are sacred merits, this is valor bonded together. That was ‘whatever I want.’ But if you abuse that phrase unconscionably, the commonwealth herself will answer you: ‘What boots my victory if it means I cannot say no to anything?’ This is how a victorious army might talk to me. What if you should ask for a temple to be burned, laws to be put out of mind? In this fashion you might have shamelessly opted to marry your mother.” – transl. Shackleton Bailey.

**[Quint.] 274.9** *Tyrannus fulminatus* (“The tyrant struck by lightning”), arguing on the side of intention, against the law saying that a person struck by lightning must be buried there.

*Si mebercule aliqui liberalis civis, immo si optime meritis in foro fulmine ictus esset, dicerem tamen excipienda quaedam. Non enim omnes casus providere legum latores potuerunt; nec templa excepta sunt.*

“Upon my word, if some munificent, or rather excellently deserving, citizen had been struck by lightning in the Forum, I should say all the same that some exceptions should be made. For our lawgivers could not provide for all contingencies; even temples were not excepted.” – transl. Shackleton Bailey.

**[Quint.] 315.12** *Fortis pater desertoris* (“The hero father of a deserter”), arguing on the side of intention, against the letter of the law requiring a hero to kill a deserter (his son) with his own hand; argues that the lawgivers would have intended exceptions. Many things can happen that prevent the hero from killing the deserter, like if he lost his hand in battle.

*Praeterea lex quae desertorem a viro forti occidi iussit nihil cogitavit de hac necessitate. Quaedam, etiamsi nulla significatione legis comprehensa sint, natura tamen excipiuntur. An hoc cogitatum esset, ut pater filium occideret? Ut frater fratrem occideret? Nam id quidem profecto vix natura ipsa videbatur admittere, ut in eadem acie pater fortiter faceret, filius desereret.*

“Besides, the law which ordered a deserter to be killed by a hero never contemplated *this* situation. Some exceptions are made by nature, even if they are not specifically mentioned in the law. Did the law ever contemplate a father killing his son? Or a brother killing his brother? Surely nature herself hardly seemed to admit that in the same battle a father should become a hero and his son desert.” – transl. modified from Shackleton Bailey.

**Sen. Con. 1.5.7** *Raptor duarum* (“The man who raped two girls”); there is no real “letter” side to the discussion, as the applicability is conflicted. Arguing for the harsher penalty though, on the basis of intention:

*Fuscus Arellius primam quaestionem hanc fecit: <an> qui duas rapuit, perire utique debeat: lex, inquit, quae dicit: rapta raptoris aut mortem optet aut nuptias de eis loquitur qui singulas rapuerunt. Non putavit quemquam futurum qui una nocte raperet duas.*

“Arellius Fuscus made this his first question: Ought someone who has raped two girls die in any case? ‘The law that says a raped girl may choose her ravisher’s death or marriage to him is talking about ravishers of one girl. It did not imagine that there would be anyone who would seduce two girls on one night.’ – transl. by Winterbottom.

**[Quint.] 331.3-4** *Bis damnatus iniuriarum tertio absolutus* (“Convicted three times, acquitted the third”),

arguing on the side of intention using principle of analogy.

*‘Non accusavi te,’ inquit ‘capitis sed iniuriarum.’ Primum igitur hoc intueri vos oportet: si quid damnatione, si quid damnatione, si quid ultione dignum non habet ius suum, debet iudex sequi <simile>, debet sequi proximum. Nulla tanta providentia potuit esse eorum qui leges componebant ut species criminum complecterentur; nam et semper caventes nequitia vicisset et ius ita multiplex atque diffusum esset ut pro incerto haberetur [ignotum]. Fecerunt ergo ut rerum genera complecterentur et spectarent ipsam aequitatem. Multa ergo inveniuntur frequenter quae legum verbis non teneantur, sed ipsa vi et potestate teneantur: quale hoc est.*

“He says: ‘I did not accuse you of a capital offense but of injuries.’ First you must look at this: if an offense deserving of conviction and retribution does not have a law special to itself, the judge should follow what is similar, what comes closest. Those who drafted the laws could not have the foresight to cover the varieties of offenses; for wickedness would always have got the better of their precautions and the law would have been so complex and extensive that it would have been regarded as uncertain. They therefore decided to embrace categories of things and pay attention to actual equity. Many things will therefore often be found that are not covered by the words of laws but are covered by their very meaning and force: as is this.”

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