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BÉ BREIJ

Pseudo-Quintilian's *Major Declamations* 18 and 19: two *controversiae figuratae*

Abstract: This article contributes to the study of figured speech by offering an analysis of pseudo-Quintilian's *Declamationes Maiores* 18 and 19, two *controversiae figuratae*. After an introduction of the relevant rhetorical concepts, an account is given of figured speech on all levels in both declamations. The tenor of both *controversiae* is determined by their declamatory law, which is examined and compared with attested Greek and Roman law. Figured speech on a smaller scale is studied with regard to *color*, *figura*, and *ductus*, and on the level of diction, with regard to *emphasis*.¹

In antiquity, the term "figured speech" could apply to a number of concepts. Often, it referred to the embellishment of a particular text by means of figures of speech and figures of thought. But nearly as often, it was used by speakers to cloak a potentially unpalatable message in such a way as to make it acceptable to their audience.² Figured speech in this sense

¹This article is an elaboration of a paper delivered at the Fourteenth Biennial Conference of the International Society for the History of Rhetoric, July 2003, Madrid and Calahorra. The two declamations are the subject of my PhD thesis to be completed at the Radboud University Nijmegen in 2006. I would like to thank Marc van der Poel and both *Rhetorica* referees for their invaluable help.

²In the latter capacity, it has received a great deal of attention. See B. Schouler, "Le déguisement de l'intention dans la rhétorique grecque," *Ktema* 11 (1986): 257-72; F. Desbordes, "Le Texte Caché: problèmes figurés dans la déclamation latine," *Revue des études latines* 71 (1993): 73-86; P. Chiron, "Quelques observations sur la théorie du discours figuré dans la techne du Ps.-Denys d'Halicarnassus," in L. Calboli Montefusco ed., *Papers on Rhetoric III* (Bologna: CLUEB, 2000), 75-94; M. Hillgruber, "Die Kunst der Verstellten Rede," *Philologus* 144 (2000): 3-21; L. Calboli Montefusco, "Ductus and color: the right way to compose a suitable speech," *Rhetorica* 21 (2003): 113-31.

could be confined to single words, e.g. as euphemism, but it could also govern entire rhetorical texts. The genre most suitable for this veiled approach was the *controversia*.³ When such a mock-forensic speech was used to hide the speaker's actual goal behind a different, ostensible goal, it was called a *controversia figurata*.

This article contributes to the study of figured speech by offering an analysis of pseudo-Quintilian's *DM* 18 and 19, two *controversiae figuratae* in the form of speeches for the prosecution and the defence in the fictional case of a Roman father who tortured his son to death because he suspected that the boy had an incestuous relationship with his mother. Afterwards, he is accused not of murder, but of maltreatment of his wife, because he refuses to tell her whether the boy said anything while he was being tortured.

After a short introduction of Roman rhetoricians' views on figured speech, I will give a short account of the content of both declamations. This will be followed by a discussion of the declamatory law on which the case is based. It will emerge that the law has a number of points in common with ancient Greco-Roman law, but that it is geared to declamation and, in the case of *DM* 18 and 19, essential for their development as *controversiae figuratae*. Finally, I will return to *DM* 18 and 19 to show how figured speech works in them, both on the macro-level of the declamations as a whole and on the micro-level of arguments and sentences.

³*Controversiae*, exercises in forensic oratory, formed the final part of higher education provided by *rhetores* (professors of rhetoric) throughout antiquity. Students were given a (usually fictitious) stock *thema* or *argumentum*, i.e. a concise description of a criminal or civil case, and the appropriate law or laws. These laws could be genuine Roman institutions, often rephrased or abbreviated, but sometimes they were Greek or fictitious. The students had to write and then deliver a speech (declamation) for the prosecution or defence (they were free to choose). Declamation was a hugely popular phenomenon, not just in the rhetors' schools, but also in literary salons, where rhetors and orators of repute competed in the creative treatment of sometimes improbable cases. Despite the popularity of the genre, we are left with only four collections of declamations: Seneca the Elder's *Oratorum et Rhetorum Sententiae Divisiones Colores* (1st cent. ce); Calpurnius Flaccus, *Declamationes* (ca. 100 ce); [Quintilian], *Declamationes Minores* (early 2nd cent. ce); the *Declamationes Maiores* ascribed to Quintilian (most likely 2nd cent. ce). Except for the *Declamationes Maiores*, hereafter *DM*, all collections consist of excerpts.

FIGURED SPEECH

For the Romans, figured speech involved three concepts: *color*, *schema* or *figura*, and *ductus*. The three terms are related, but this does not imply that they are parts of a comprehensive system. In fact, they are used alongside one another; sometimes they overlap, often they are interchangeable. The authors best consulted on the subject are Seneca the Elder, Quintilian, and Fortunatianus.

Up to the elder Seneca's time, the word *color*, in a rhetorical context, referred to style.⁴ For the declaimers figuring in his work, however, the term had a different connotation. In a shift from style to content, *color* came to mean "twist of argument" or "biased representation of events."⁵ In a forensic speech, then, *color* is a coloured version of the circumstances surrounding a certain crime, which is ideally introduced in the *narratio* and sustained in the *argumentatio*.⁶ Often, the *color* consists of a particular motive ascribed to a culprit.⁷

Color figures largely in a number of theoretical rhetorical works. It occurs frequently in Quintilian's *Institutio* and in some of the treatises of the *Rhetores Latini Minores*.⁸ As for its applications, the title of Seneca's collection of declamations already betrays his interest in *color*: for every *controversia* included, he gives a number of *colores* used by the various declaimers. Yet no definition of the concept occurs in any of these works, perhaps because *color* was such a common phenomenon that it seemed unnecessary to explain it. However, the Greek *χρῶμα* underwent a development identical to that of *color*. A helpful characterization of *χρῶμα* can be found Porphyrius' com-

⁴J. Fairweather, *Seneca the Elder* (Cambridge: Cambridge University Press, 1983) 166; Calboli-Montefusco, "Ductus and color," 114 (with references to Cicero's works and the *Rhetorica ad Herennium*).

⁵S. F. Bonner, *Roman Declamation in the Late Republic and Early Empire* (Berkeley: University of California Press, 1949) 55-56 defines *color* as " 'twist of argument,' 'plea,' 'excuse' ... By a slight shift of argument, by an added insinuation, or a guileless plea, [the *colores*] tone down the guilt or represent it in even more glaring colours." The Greek word *χρῶμα* underwent a similar development: H. Lausberg, *Handbuch der literarischen Rhetorik: eine Grundlegung der Literaturwissenschaft* (Stuttgart: Steiner, 1990), 64-5, 329, 1061.

⁶Quint. *Inst.* 4.2.94: "There is no point in using 'colours' in the Narrative unless they are consistent throughout the speech, especially as the only proof of some things consists of persistent assertion." (Translations of Quintilian's *Institutio Oratoria* are taken from D.A. Russell in the Loeb series). For prevailing opinions in Seneca's set, see Fairweather, *Seneca the Elder*, 168-69.

⁷For examples of *colores* see n. 12.

⁸Quint. *Inst.* 4.2.88-100; *Rhetores Latini Minores* (hereafter RLM): Aug. *De Rhet.* 1.16; Iul. Vict. *Ars Rhet.* II, IV.2.

ments on Hermogenes' work on *status* theory.⁹ Porphyrius reports that the followers of Hermagoras, a Greek rhetor of the 2nd century BCE who was Hermogenes' paradigm, equated *χρῶμα* with *μετάθεσις τῆς αἰτίας* ("shifting the blame"). The latter phrase can only refer to the *στάσις κατ' ἀντίθεσιν*, a *status* used for the defence in cases where it was agreed that a particular criminal act had taken place, but not (yet) that it was justified.¹⁰ It was subdivided into four categories: *ἀντίστασις* (Lat. *comparatio*, *comparativum*, *compensatio*: the act in question had beneficial consequences); *μετάστασις* (*remotio criminis*, *translatio*: the blame was transferred to another person or a thing); *ἀντέγκλημα* (*relatio* or *translatio criminis*: the act was in some way provoked, usually by the victim); *συγγνώμη* (*concessio*, *excusatio*, *venia*: a plea for pardon, often sustained by attenuating circumstances).

The definitions make it clear that this kind of *χρῶμα* is not concerned with style, but is a crucial factor in the substance of a speech. Seneca and his contemporaries did not use them, so we cannot take it for granted that they were familiar with all the technicalities.¹¹ Yet, if one looks at the *controversiae*, it is obvious that the declaimers were well acquainted with the underlying concepts.¹²

The subject of figured speech as a means to convey the speaker's true intentions indirectly is absent in rhetorical textbooks up to the *Institutio Oratoria*. This does not imply that it only came into vogue in Quintilian's day. Already in Seneca's anthology we find frequent use of the terms *figura* (or *figuratus*) and *schema* (synonymously). They always occur in the sections on *divisio* (the main lines of an

⁹Porphyrius in Hermog. *Sta., Rh. Gr.* IV 397.8 Walz = Hermagoras fr. 14a Matthes, cited in Fairweather, *Seneca the Elder*, 166 ff.; L. Calboli Montefusco, *Consulti Fortunatiani Ars Rhetorica: introduzione, edizione critica, traduzione italiana e commento* (Bologna: Pàtron, 1979), 275, 280; *La dottrina degli "status" nella retorica greca et romana* (Hildesheim: Olms-Weidemann, 1986), 17 n. 16; "Ductus and color," 115 n. 6.

¹⁰Latin: *constitutio iuridicialis assumptiva*, to be found in *Rhet. Her.* 1.24 ff; *Cic. Inv.* 1.15; 2.69 ff.; *Quint. Inst.* 7.4.4 ff. (under the heading *qualitas*).

¹¹Fairweather, *Seneca the Elder*, 167.

¹²E.g. *ἀντίστασις*: *Contr.* 10.4.15-16 (a man who cripples children before sending them out to beg, is accused of harming the state; a *color* for the defence is that the crippling results in making them more successful beggars); *μετάστασις*: *Contr.* 7.2.10 (Popilius is accused of misconduct after he has killed Cicero, who had defended him on a charge of parricide; a *color* for the defence is that Popilius was forced to kill Cicero); *ἀντέγκλημα*: *Contr.* 2.6.5-6 (a father is accused of madness when he begins to imitate his son's luxuriousness; for some declaimers, the father's defence rests on the assumption that the father's behaviour was a way to reprove or punish his son); *συγγνώμη*: *Contr.* 9.2.20 (Flamininus is accused of *lese majesté* after ordering a criminal to be decapitated in order to amuse a whore at a banquet; a *color* for the defence is that Flamininus was so drunk that he did not realize what he was doing).

argumentation) and *color* and can best be described as original twists on the argumentation. Their affinity with figured speech as a form of insinuation appears from turns of phrase like *non schemate, sed <de>recto* ("not by means of a figure, but directly," *Contr.* 2.4.10) and *illi, qui non quidem palam dicerent sed per suspiciones et figuras* ("others who, without open assaults, employed hints and figures," *Contr.* 7.1.20).¹³

The first Roman author to treat figured speech in a theoretical setting is Quintilian. He begins with an account of *emphasis*, a figure of thought which occurs *cum ex aliquo dicto latens aliquid eruitur*.¹⁴ He continues:

Huic vel confinis vel eadem est qua nunc utimur plurimum. Iam enim ad id genus quod et frequentissimum est et expectari maxime credo veniendum est, in quo per quandam suspicionem quod non dicimus accipi volumus, non utique contrarium ut in εἰρωνεῖα sed aliud latens et auditori quasi inveniendum. Quod, ut supra ostendi, iam fere solum schema a nostris vocatur, et unde controversiae figuratae dicuntur. Eius triplex usus est: unus si dicere palam parum tutum est, alter si non decet, tertius qui venustatis modo gratia adhibetur et ipsa novitate ac varietate magis quam si relatio sit recta delectat.¹⁵ Quint. *Inst.* 9.2.65-66

Quintilian marks out the use of figured speech for three different aims: for safety, for decency, and as an ornament. The first two are familiar from Greek rhetoric, the third has been added by Quintilian himself.¹⁶ A little further on he adds a fourth application:

¹³Seneca the Elder, *Declamations*, ed. M. Winterbottom (London and Cambridge, Mass.: Harvard University Press, 1999 [1974]); translations are by M. Winterbottom.

¹⁴*Inst.* 9.2.64: "when a hidden meaning is extracted from a phrase." See Lausberg, *Handbuch*, 905-6.

¹⁵"Related to, or identical with, this is a Figure which we use a lot nowadays. For it is time now to come to the very common device, which I am sure the reader is specially waiting for, *in which we want, by means of insinuation, to convey something that we are not saying* – not necessarily the opposite (as in Irony) but something hidden and left to the hearer to discover. As I pointed out above, this is almost the only form that our people call a Figure, and it is from this that Figured Controversies are so called. There are three uses of this device; (1) if it is unsafe to speak openly, (2) if it is unseemly to do so, (3) when it is employed simply for elegance and gives more pleasure by its freshness and variety than the straightforward statement would have done." The emphasized words are my translation. Russell's "in which we drop a hint to show that what we want to be understood is not what we are saying" assumes *non quod dicimus* instead of *quod non dicimus* and misses the point.

¹⁶See Pseudo-Dionysius of Halicarnassus VIII Περὶ ἐσχηματισμένων A 2-3 (Usener-Rademacher 295-96); Pseudo-Dionysius B 2 (Usener-Rademacher 324), Ap-sines Περὶ τῶν ἐσχηματισμένων (*RhG* I 330, Spengel-Hammer), the anonymous Περὶ

Quaedam etiam quae probare non possis figura potius spargenda sunt. Haeret enim nonnumquam telum illud occultum, et hoc ipso quod non apparet eximi non potest: at si idem dicas palam, et defenditur et probandum est.¹⁷ Quint. *Inst.* 9.2.75

Taking into account Quintilian's four uses of figured speech, the Romans seem to find more occasions to use figured speech than the Greeks, who restrict themselves to safety and decorum. On the other hand, the latter distinguish three species of σχήματα, that is, three kinds of figured speech. The first is relatively straightforward, expressing controversial issues in a euphemistic way, and this is reserved for occasions where decency and safety are at stake; it is called χρώμα.¹⁸ The second is ambiguous, because although some of the speaker's aims are expressed explicitly, they are used as a vehicle to convey his secret intentions. The third, finally, is meant to effect the opposite of what the speaker pretends to want.¹⁹ The Romans, by contrast, only approved of the first two kinds of σχήμα. The third was considered far-fetched and impractical:

Ut autem nemo contra id quod vult dicit, ita potest melius aliquid velle quam dicit: quo modo ille abdicatus, qui a patre ut filium expositum et ab eo educatum solutis alimentis recipiat postulat, revocari fortasse mavult, non tamen quod petit non vult.²⁰ Quint. *Inst.* 9.2.89

σχημάτων (*RhG* III, 118-19, Spengel) and their common source Pseudo-Hermogenes *Περὶ εὐρέσεως* (204-206 Rabe); Demetrius, *Περὶ ἐρμηνείας* 287 (ed. and transl. by D. Innes, Cambridge, Mass.: Harvard University Press, 1995). They are discussed in the articles mentioned under n. 2. The absence of the third usage does not mean that Greek rhetoricians were unfamiliar with the concept.

¹⁷"Some ideas which you could not actually make good should be sown in the mind with the help of a Figure. The hidden dart sometimes sticks; it cannot be removed, because it cannot be seen; but if you were to say the same thing openly, the defence can justify it and it needs to be proved."

¹⁸In this context, χρώμα refers to diction rather than a coloured account of events.

¹⁹The clearest and most helpful accounts of the three species of σχήματα can be found in Pseudo-Dionysius VIII A2 and B2.

²⁰"But while no one ever speaks against what he wants, a man may want a better result than he says – like the disowned son who asks his father to pay the maintenance and take back into the family another son whom he (the disowned son) had brought up; he may perhaps really want to be reinstated himself, but he also wants what he is asking for." Cf. also *Inst.* 9.2.85; [Quint.] *Minor Declamation* 337.1. A short and lucid discussion of the Roman attitude towards the third σχήμα can be found in Desbordes, "Le texte caché," 79-80.

The first *schema* suited the Romans. However, since it mainly functions on the level of diction and hardly exhausts the possibilities of figured speech, I will leave it aside until the discussion of *DM* 18 and 19 below. The second *schema*, on the other hand, is ideal to give shape to the *controversia figurata* because it uses the full potential of figured speech. Where this second *schema* occurs, the speaker uses a presentable cover to communicate his true intentions in a roundabout way. This does not mean, as sometimes assumed, that the speaker's formal aims are only a pretext to impart his hidden message.²¹ The speaker wants all he says he wants – and something else, as will become clear in the coming analysis of *DM* 18 and 19, in which the minor charge of maltreatment is used to get across an accusation of murder.

Fortunatianus (4th c. CE), to our knowledge the first author to discuss *ductus*,²² defines it as *quo modo tota causa agenda sit* ("the way to plead a cause as a whole"), thus contrasting it with *modus*,²³ which is used for parts of a speech. A plea's *ductus* depends on the speaker's *consilium* (intention), which in turn is determined by the *causativum litis* (the immediate cause for the case in question). If the latter is an established fact, the speaker has no option but to be straightforward (*ductus simplex*); if the *causativum litis* is situated in the present or the future, he can colour his speech. Fortunatianus distinguishes five kinds of *ductus*: 1. *ductus simplex*: cum simpliciter id agamus, ita ut in themate²⁴ positum est; 2. *ductus subtilis*: cum aliud est in themate, aliud in agentis voluntate; 3. *ductus figuratus*: cum palam dicere

²¹See Desbordes, "Le texte caché," 81: "les Latins semblent s'être plus intéressés au dévoilement de l'intention cachée, qu'à la construction d'un discours qui demande pour ne pas obtenir... Le plus souvent, chez eux, l'orateur veut bien ce qu'il demande ..., mais il veut en même temps autre chose, dénoncer indirectement"; cf. also p. 80, n.23; Quint. *Inst.* 9.2.89 (quoted above, n. 20); Hillgruber, "Die Kunst der verstellten Rede," 10-11. This use of figured speech returns explicitly in George of Trebizond's *ductus simplex simulatus*, which Calboli-Montefusco, "Ductus and Color," 125 hails as "totally new." Cf. Iulius Victor, *Ars* XXII (RLM 435) under the heading *obliquitas*; although his examples point to the third *schema*, his definition fits with the second: *in obliquitate ... et intellegi debes aliud velle, et tamen longe aliud dicendi arte perficere* ("in obliquitas you must make it clear that you want one thing, and yet with your eloquence bring about something completely different").

²²Calboli-Montefusco, "Ductus and Color," 121 argues that Fortunatianus must have had predecessors. Later, only Martianus Capella (5th c. CE) devoted a short paragraph to the subject (*De Rhetorica* 20, RLM 463-64).

²³*Modus* here = *color*, as becomes clear from Martianus Capella's treatment of the subject.

²⁴The term *thema* ("theme") makes it clear that Fortunatianus' exposé is concerned with school rhetoric.

pudor impedit; 4. ductus oblicus: cum periculum prohibet aperte agere; 5. ductus mixtus: quando non unus est ductus.²⁵

Connections with *figura* or *schema* and *color* are evident. *Color* is represented by *modus*. The *ductus subtilis* bears a strong resemblance to *figura* or *schema* and seems in fact to have been coined for the *controversia figurata*. In the *ductus figuratus* and *oblicus*, finally, we find the familiar motives of decency and safety from, among others, Quintilian's account of figured speech.

TWO *CONTROVERSIAE FIGURATAE*

Pseudo-Quintilian's *DM* 18 and 19 are literally textbook examples of the way the Romans employed the rhetorical concepts outlined above. Their *thema*, and the way it was commonly developed, was familiar in the declamatory schools, as appears from a brief reference in Tacitus (*Dial.* 35.5), but especially from the following observation by Quintilian:

Itaque non solum si persona obstaret rectae orationi, quo in genere saepius modo quam figuris opus est, decurrebant ad schemata, sed faciebant illis locum etiam ubi inutiles ac nefariae essent, ut si pater qui infamem in matrem filium secreto occidisset reus malae tractationis iacularetur in uxorem obliquis sententiis. Nam quid impurius quam retinuisse talem? Quid porro tam contrarium quam eum, qui accusetur quia summum nefas suspicatus de uxore videatur, confirmare id ipsa defensione quod diluendum est? At si iudicum sumerent animum, scirent quam eius modi actionem laturi non fuissent, multoque etiam minus cum in parentis abominanda crimina spargerentur.²⁶

Quint. *Inst.* 9.2.79-80

²⁵Fort. *Ars* I.5: 1. *ductus simplex*: when we plead a case straightforwardly, in line with its description in the theme. 2. *ductus subtilis*: the speaker wants something that is different from the thing for which he ostensibly has to plead. 3. *ductus figuratus*: when shame inhibits us from speaking frankly and freely. 4. *ductus oblicus*: when danger makes a straightforward plea impossible. 5. *ductus mixtus*: when there is not just the one *ductus* (both Fortunatianus and Martianus Capella restrict themselves to the combination of *ductus figuratus* and *ductus oblicus*).

²⁶"Consequently, it was not only where personality presented a problem for a straightforward treatment (this calls for moderation more often than for Figures) that they had recourse to Figures: they made room for them even where they were useless or downright immoral, for example, if the father, who had secretly killed a son suspected of incest with his mother, was accused of ill-treating his wife, and

Quintilian's biting criticism concerns the defence of the father, who has been charged with maltreatment of his wife. The charge makes it clear that we are concerned with a *controversia figurata*: the father is not reproached with the murder of his son, but with his suspicions of incest. His response to the accusation, moreover, is properly figured: instead of defending himself he repeats and underscores his suspicions, i.e., he actually accuses his wife.

DM 18 and 19 are the only extant declamations with this subject, and they deviate from the usual treatment as described by Quintilian. The original *thema* was evidently meant to form the basis of the father's defence, which is developed in DM 19; there is no evidence that a counterplea ever existed. DM 18, however, contributes a speech for the prosecution, which is an innovation, and, incidentally, may have been written after DM 19.²⁷ Furthermore, the *thema* has undergone a radical change. The father is accused of maltreatment not because of his suspicions, but because he refuses to tell his wife whether their son said anything during the brutal interrogation:

Malae tractationis sit actio. Speciosum filium, infamem, tamquam incestum cum matre committeret, pater in secreta parte domus torsit et occidit in tormentis. interrogat illum mater, quid ex filio compererit; nolentem dicere malae tractationis accusat.²⁸ Theme, Ps-Quint. DM 18 and 19

now launched indirect insinuations against her. What could be more discreditable than keeping a wife like that? What could be more damaging to his case than that a man who is accused because he is held to have had the darkest suspicions of his wife should confirm by his line of defence the very charge which has to be refuted? If they imagined themselves in the judges' place, the speakers would realize how intolerable they would have found such a pleading – and how even more intolerable when parents were the target of such abominable charges."

²⁷In my dissertation (n. 1 above), I argue that DM 18 answers the accusations and arguments put forward in 19, rather than the other way around. An external indication is the fact that the *subscriptio*, which appears in some of the better families of manuscripts to indicate the end of the DM, is in all cases found after 18, not 19.

²⁸Text from *Declamationes XIX Maiores Quintiliano falso ascriptae*, ed. L. Håkanson (Stuttgart: Teubner, 1982), DM translations from Lewis A. Sussman, *The Major Declamations Ascribed to Quintilian: a Translation* (Frankfurt a.M.: Verlag Peter Lang, 1987). "The Law: Maltreatment may be actionable. The Situation: A father tortured his handsome son in a secluded part of the house and killed him on the rack, since he suspected him of committing incest with his mother. The mother asked her husband what he had learned from their son. Since he refused to tell, she accuses him of maltreatment." The translation does not do justice to *infamem*, which implies that the son had fallen into discredit. The rumours about the supposed incest, which circulated about town, are an important element in both declamations.

The introduction of the father's stubborn silence allows the author of the declamations to obviate at least Quintilian's second objection, that the father "confirm[s] by his line of defence the very charge which has to be refuted" (*Inst.* 9.2.80). But more importantly and paradoxically, it is this very silence which is used as a striking form of figured speech. That is, the father contends that his silence serves to protect the reputations of both his wife and son. This claim amounts to an assertion that they have been guilty of incest, for if the father had wanted to protest their innocence, he could simply have stated that his son bravely denied his guilt until the end. The father has therefore turned his defence into a covert accusation. A similar ruse is used when the father has to answer for the murder of his son, which he cannot avoid. The father does not say outright that his son was guilty and never even specifies his suspicions—the word "incest" does not occur in his speech at all. Instead, he confines himself to announcing that his son deserved, and even wanted, to die; yet it does not become clear if his son said anything during the interrogation, and if so, whether the father heard it at all. Nor does he leave it at that: the murder was not a crime, but a harsh duty and a sacrifice, which reconciled him to his fatherhood. To sum up: the father's defence against the charge of maltreatment serves as a vehicle to justify the murder of his son and to accuse his wife and son of incest.

DM 18, the speech for the prosecution which is supposedly pronounced by the mother's advocate, also has three goals, which are exactly the reverse of those of DM 19. The father is accused of maltreatment; this is a serious accusation, but also the opening for an accusation of murder. Further, the advocate defends the mother against the suspicions of incest. The case is complicated and may be represented in a diagram which displays both the substance and the figured character of the speeches:

	Ostensible Goal	Underlying Goals
DM 18 (for mother)	accusation of maltreatment	1. defence against suspicion of incest 2. accusation of murder
DM 19 (for father)	defence against accusation of maltreatment	1. accusation of incest 2. defence against accusation of murder

MALAE TRACTATIONIS SIT ACTIO²⁹

The *actio malae tractationis* was, and essentially remained, a declamatory fiction conceived in Sophistopolis.³⁰ Though it was mostly used for *controversiae figuratae*, it bears traits of attested Greek and Roman laws. These will be discussed first; subsequently, the specific features of the *actio malae tractationis* will be examined in detail.

The declamatory *actio malae tractationis* is usually associated with the attested Athenian γραφή or εἰσαγγελία κακώσεως,³¹ a law concerning maltreatment of vulnerable persons such as aged parents,³² orphans, and heiresses (ἐπίκληροι).³³ It enabled victims of maltreatment to seek redress directly with the *archon*. Κάκωσις must have been regarded as a serious offence, since it merited heavy punishment;³⁴

²⁹ *Actio* is the rough equivalent of a modern civil action. On the declamatory action for maltreatment, cf. J. Sprenger, *Quaestiones in rhetorum romanorum declamationes iuridicae* (Diss. Halle: 1911), 192-95; F. Lanfranchi, *Il diritto nei retori romani: Contributo alla storia dello sviluppo del diritto* (Milano: Giuffrè, 1938), 235-39; Bonner, *Roman Declamation*, cited in n. 5 above, pp. 94-95; U.E. Paoli, "Droit attique et droit romain dans les rhéteurs latins," *Revue historique de droit français et étranger* 31 (1953): 187; A. Stramaglia, [*Quintiliano*] *I gemelli malati: un caso di vivisezione* (Declamazioni maggiori, 8) (Cassino: Edizioni dell'Università di Cassino, 1999), 94-95; N. Hömke, *Gesetzt den Fall, ein Geist erscheint: Komposition und Motive der ps-quintilianischen Declamationes maiores X, XIV und XV* (Heidelberg: Universitätsverlag Winter, 2002), 161-79.

³⁰ This term was coined by D.A. Russell, *Greek Declamation* (Cambridge: Cambridge University Press, 1983) for the fictitious Greco-Roman society that forms the background of most declamations.

³¹ *Mala tractatio* is a literal translation of κάκωσις. The Greek laws on κάκωσις are discussed extensively in M. H. E. Meier, G. F. Schömann, and J. H. L. Lipsius, *Der Attische Process* (Berlin: Calvary & Co, 1883-87), 352-60 and J. H. L. Lipsius, *Das Attische Recht und Rechtsverfahren* (Leipzig: Reisland, 1905), 342-53.

³² The γραφή κακώσεως τῶν γονέων is the foundation for the declamatory law *liberi parentes alant aut vinciantur*, for which see Sprenger, *Quaestiones iuridicae*, 192-94; Lanfranchi, *Il diritto nei retori romani*, 235-39; Bonner, *Roman Declamation*, 95-96; Paoli, "Droit attique et droit romain," 187. The moral obligation to provide for one's parents became a law under Antoninus Pius.

³³ Bonner, *Roman Declamation*, 95, n.1 remarks: "Dionysius, *Ant. Rom.* II.25 seems to imply that any wife could bring an action for κάκωσις in his day: οὔτε γαρμετῇ κατ' ἀνδρὸς αἰτιομένη κάκωσιν ἢ ἄδικον ἀπόλειψιν, i.e. Romulus did not permit this, as we do now. Indeed these words might almost be held to support the existence of a Roman equivalent of κάκωσις in Dionysius' day." The view that any woman could appeal to the law concerning κάκωσις is cogently opposed by Lipsius, *Das Attische Recht*, 343 and Sprenger, *Quaestiones iuridicae*, 192-93.

³⁴ Isaeus, *On the Estate of Pyrrhus* 47; *On the Estate of Cleonymus* 39.

the prosecutor, on the other hand, suffered no adverse consequences if a conviction could not be secured.³⁵

Lipsius discusses the known forms of maltreatment of ἐπικληροί: an adopted son committed κάκωσις if he refused to marry his adoptive father's daughter while being in possession of this father's property; so did near relatives who were not prepared either to marry an impecunious heiress or to provide a suitable dowry and marry her off to a third party. A husband was guilty of maltreatment if he failed to perform his marital duties³⁶ or committed adultery. While Lipsius uses historical and literary sources without distinction, Nicola Hömke separated the literary samples of κάκωσις from historical sources.³⁷ The former occur, for instance, in Old and New Comedy.³⁸ All literary sources have in common that no distinction is made between ordinary women and heiresses. Further, κάκωσις is always mentioned casually and without explanation, so that we can assume that the Greek public was familiar with the concept. This leads Hömke to believe that they are based on an independent literary *topos*, which may indicate a more obvious link with the declamatory *actio malae tractationis* than does the technical-juridical γρᾶφὴ κακώσεως.

To complete our picture of the reality beneath the *controversia figurata*, we must look at the Roman real-life counterpart of the *actio malae tractationis*, the Roman *actio rei uxoriae*.³⁹ Quintilian mentions several genuine civil actions which have given rise to declamatory counterparts:

Quibus similia etiam in vera rerum quaestione tractantur. Nam quae in scholis abdicatorum, haec in foro exheredatorum a parentibus et bona apud centumviros repetentium ratio est: *quae illic malae tractationis*,

³⁵Demosthenes, *Against Pantaenetus* 46; Aristotle, *Athenian Constitution* 56.6.

³⁶In compliance with the Solonian law τὸ τρις ἐκάστου μηνὸς ἐντυγχάνειν πάντως τῇ ἐπικλήρῳ τὸν λαβόντα ("that the husband of an heiress shall approach her thrice a month without fail"); if the husband proved impotent, the woman could marry one of his next of kin (Plut. *Sol.* 20; see also Pollux, *Onomasticon* VIII.53).

³⁷Lipsius, *Das Attische Recht*, 349-51; Hömke, *Gesetzt den Fall*, 170-77.

³⁸One of the examples she gives is of Comedy threatening the comedian Kratinos with a γρᾶφὴ κακώσεως because he neglects her for Drunkenness and bottles of young wine (Schol. Aristoph. *Eq.* 400). Hömke sees the heiress recur in Roman comedy as the *uxor dotata* (*Gesetzt den Fall*, 176-77).

³⁹The following summary of the *actio rei uxoriae* is based on Ulpianus, *Tituli VI De Dotibus*; P. E. Corbett, *The Roman Law of Marriage* (Oxford: The Clarendon Press, 1930) chapters 5, 6, 7, 12; A. Söllner, *Zur Vorgeschichte und Function der Actio Rei Uxoriae* (Köln, Wien: Böhlau Verlag, 1969); S. Treggiari, *Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian* (Oxford: The Clarendon Press, 1991) chap. 10.

*hic rei uxoriae, cum quaeritur utrius culpa divortium factum sit: quae illic dementiae, hic petendi curatoris.*⁴⁰ Quint. *Inst.* 7.4.11

The *actio rei uxoriae* to which Quintilian refers, was an action which enabled a divorced woman if she was *sui iuris* (or her *paterfamilias* if she was *filiafamilias*) to recover her dowry or at least part of it. The dowry (*dos*) was traditionally a woman's contribution to the household she married into, but the household as a whole was the husband's financial responsibility. Technically, the *dos* became the husband's property upon marriage. However, in response to the proliferation of divorce from the third century BCE onwards, when a marriage was dissolved, means were made available to return it to the wife or whoever had constituted it. The *dos* gradually came to be regarded as a kind of insurance for the wife; some jurists even dubbed it *patrimonium mulieris*.⁴¹

The earliest device to reclaim the *dos* was the *cautio rei uxoriae*: a stipulation concerning the disposal of the dowry in the event of a divorce or the death of either spouse. It remained in use when, some time later, the *actio rei uxoriae* was granted in cases where no stipulation had been made.⁴² It is assumed that this *actio* was originally a penal proceeding, in force only for faultless women who had been duped by their husbands. In classical times, however, it was also valid for women who had occasioned a divorce and for widows. Sometimes, the husband was entitled to *retentiones*, which authorized him to keep part of the dowry. If he had made his wife any gifts during the marriage, even if they were invalid,⁴³ he could reclaim them (or an equivalent) through *retentio propter res donatas*. Expenses necessary for the maintenance of the property were compensated for by a *retentio propter impensas*. If the wife had misappropriated any

⁴⁰"Problems like this are treated even in real investigations, since school themes about 'disowned' sons involve the same principles as cases in the forum about sons who are deprived of an inheritance by their fathers and make claims in centumviral courts. Similarly, wrongful treatment cases correspond to matrimonial disputes in which the question is which party is to blame for a divorce, and mental incapacity cases correspond to demands for the appointment of a guardian."

⁴¹Corbett, *Roman Law of Marriage*, 155, 179.

⁴²The incorporation of a *cautio* was more opportune: the stipulation could be enforced by the heirs of the person who gave the *dos*, and the husband had no right to deduct from the dowry *retentiones propter mores* or *retentiones propter liberos* (discussed below).

⁴³In principle, husband and wife could not make each other valid gifts (Ulp. *Dig.* 24,1,1).

part of the dowry, this was restored by the *retentio propter res amotas*.⁴⁴ Had the divorce been occasioned by the wife or her *paterfamilias*, then a sixth part could be deducted for every child (with a maximum of three: *retentio propter liberos*). Finally, in case of misbehaviour on the wife's part, there was a *retentio propter mores* of a sixth part in case of adultery (*mores graviores*) or an eighth part in case of less serious offences (*mores leviores*). If the husband did not at the time act upon his entitlement to the *retentio propter mores*, he could later bring an *actio de moribus*.⁴⁵ The latter two especially must have involved an investigation into the behaviour of both spouses, and thus prompted Quintilian to single out the question of guilt as characteristic of the *actio rei uxoriae*.⁴⁶

The Greek γράφῃ κακώσεως and the Roman *actio rei uxoriae* both gave women the opportunity to punish or get even with their husbands if they had been mistreated. This must have been the starting point for the declamatory *actio malae tractationis*. The latter does not have their peculiar characteristics: divorce is not an issue,⁴⁷ and the women who bring the action are never identified as heiresses. To learn more about the declamatory *actio* we will have to consult Roman rhetorical texts.

Apart from pointing out its resemblance to the *actio rei uxoriae* (*Inst.* 7.4.11), Quintilian mentions the *actio malae tractationis* on several other occasions. Cases of *mala tractatio* usually have a *status* or *constitutio qualitatis*,⁴⁸ he says, although sometimes the *status* is *coniecturalis* or *finitionis*.⁴⁹ Along with a number of other cases, they can be said to come under the category of *officia* ("themes of obligations," *Inst.* 7.4.24) and of *domesticae disceptationes* ("domestic disputes," *Inst.*

⁴⁴An action for *furtum*, "theft," was inadmissible because actions that caused *infamia* were forbidden between consorts.

⁴⁵For this *actio* and the related *iudicium de moribus*, see Corbett, *Roman Law of Marriage*, 130-33; Söllner, *Vorgeschichte und Funktion*, 78-83.

⁴⁶See Sprenger, *Quaestiones*, 193-94.

⁴⁷Lanfranchi, *Il diritto nei retori romani*, 237. As regards divorce, it is the declamatory *actio iniusti repudii* ("action on wrongful divorce") which shows the greater similarity to the *actio rei uxoriae*. The *actio iniusti repudii* figures in Sen. *Contr.* 2.5.17; D. *Min.* 251; 262; 327; 368.7; Calp. *Decl.* 10. It is discussed in Sprenger, *Quaestiones*, 193, 195-198, Lanfranchi, *Il diritto nei retori romani*, 235, 238-39.

⁴⁸This *status* characterizes all cases in which the key question is neither whether the defendant committed a certain crime (*status coniecturalis*) nor how this crime ought to be defined (*status finitionis*), but whether he was justified in doing what he did (*an iure fecerit*). See Herm. *Stat.* 2.11; Cic. *Inv.* 1.10 (*constitutio generalis*); *Rhet. ad Her.* 1.24 (*constitutio iuridicialis*); Quint. *Inst.* 3.6.10; 3.11.4.

⁴⁹*Inst.* 7.4.25; cf. also 7.3.2.

7.4.9-10; 31). In *actiones malae tractationis*, as in actions for disowning a son, the accuser should exercise moderation (*Inst.* 7.4.29); sometimes an apology or plea for forgiveness takes the place of a proper defence (*Inst.* 7.4.31).

Concerning the grounds for the *actio malae tractationis*, Quintilian writes (*Inst.* 7.4.26): quod tamen factum defendi non poterit, iure nitetur: et quos et quibus causis abdicare non liceat, et in quae crimina malae tractationis actio non detur, et cui accusare dementiae non permittatur.⁵⁰ Apart from this tantalizing observation, which merely tells us that there were offences for which the *actio* was not granted, Quintilian gives two more clues: Nam quid exponet quae zelotypum malae tractationis accusat? (*Inst.* 4.2.30);⁵¹ and the reference to the *thema* of DM 18 and 19 (*Inst.* 9.2.79-80), though it should be noted that in the *Institutio*, it is not the husband's silence, but his suspicions of incest that provoke his wife to sue him for maltreatment.

Fortunately, there is more information to be found in the many *controversiae* concerned with *mala tractatio*: Seneca *Contr.* 3,7; 4,6; 5,3;⁵² Calp. *Decl.* 51; *D. Min.* 363 and 383; *DM* 8; 10; 18; 19. In the four *DM*, the *argumentationes* are uniquely and conveniently preceded by comments on the law on maltreatment, and especially on its applications.

Gemini, quibus erat mater et pater, aegrotare coeperunt. consulti medici dixerunt eundem esse languorem. desperantibus reliquis promisit unus se alterum sanaturum, si alterius vitalia inspexisset. permittente patre executi infantem et vitalia inspexit. sanato uno accusatur pater ab uxore malae tractationis.⁵³

Theme Ps-Quint. DM 8

Pudeat vos, o iura legesque, quod miserrimi sexus dolorem his clusistis angustis. ita maritum, quod occisus est filius, malae tractationis uxor

⁵⁰"But if the fact cannot be defended, the case will rest on legal right: what persons is one not allowed to disown and for what reasons, for what offences is an action for wrongful treatment not allowed, who is not permitted to make an accusation of mental incapacity?"

⁵¹"For what is to be explained by the woman who accuses her jealous husband of ill-treatment?" This is the theme of *Minor Declamations* 363 and, less explicitly, 383.

⁵²Additionally, in *Contr.* 1.2.22 we find a casual remark in the context of a different *controversia*.

⁵³"A father and mother had twin sons who both became ill. The doctors who were consulted said it was the same disease. Although the rest of the doctors considered their cases hopeless, one of them guaranteed to cure one of the twins if he was allowed to examine the internal organs of the other. With the father's consent he dissected one child and examined his internal organs. After the other child was cured, the father is accused by his wife of maltreatment."

accusat? perdidit legem huius auctoritatem, quae ad illam uxorias querelas, matrimoniorum solent deferre delicias; ego illam datam miseris tantum matribus puto. potest autem ab iniquo coniuge explicare divortium, et contra maritales tuetur iniurias, ut nolis praestare patientiam. illis succurrit, quas nefas est abire, discedere, quas in pessimi coniugii durum perpetuumque complexum communium pignorum nexus artavit, quae malos maritos pariter et patres nec relinquere nec ferre sufficiunt. facinus est ideo evadere maritum, quia damnaretur, si de illo minore dolore quereretur. itaque impudenter facit, quod pro detracto + matrona cultu negatoque comitatu, fastiditis noctibus pulsataque facie filium complorat occisum?⁵⁴ *Discussion of the law, Ps-Quint. DM 8.6*

Quae amissum filium nocte videbat in somnis, indicavit marito. ille adhibito mago incantavit sepulcrum. mater desiit videre filium. accusat maritum malae tractationis.⁵⁵ *Theme, Ps-Quint. DM 10*

Videtur itaque mulier infelix a dignitatis dolore secedere, quod tam <quam> uxorias in forum querelas et tamquam delicata matronae desideria pertulerit? non enim vestes nec aurum nec ambitiosos quaerit ornatus; contenta est orbitas sordibus suis, ac ne pelicis quidem dolore compellitur, nec tacita gaudia mariti impatientia et muliebri vanitate complorat. sed nec relictum torum desertumque genialem velut contempta vilitas uxoris ulciscitur: alia longe, alia de noctibus cura est.⁵⁶

Discussion of the law, Ps-Quint. DM 10.9

⁵⁴“The laws and ordinances ought to be ashamed of themselves for limiting the grief of this poor, afflicted sex within these narrow restrictions. In a case such as this, when a husband has killed her son, can a wife only accuse him of maltreatment? Wives who usually lodge complaints regarding conjugal quarrels and bedroom matters under the jurisdiction of the law have impaired its effectiveness. But I believe that this law was enacted for mothers in real distress. Yes, for some women it is possible to arrange a divorce from a wicked husband and protect themselves against their spouses’ mistreatment which they refuse to take passively. But this law aids those for whom it is an offense against our sacred law to pick up and leave home, those whom the bonds of shared children have locked into the harsh and permanent stranglehold of an extremely unsatisfactory marriage, and women who do not have sufficient means either to leave or endure men who are equally bad husbands and fathers. Therefore it is usually a crime to escape a husband since there would be condemnation if she were to lodge a complaint about any lesser form of distress. And so, does a wife act brazenly when she bitterly mourns for a murdered son instead of clothing and jewels taken away, servants denied her, nighttime pleasures scorned, and a beaten face?”

⁵⁵“A woman who kept seeing her dead son in her dreams revealed this to her husband. He consulted a sorcerer who cast a spell on the tomb. The mother ceased seeing her son. She accuses her husband of cruel treatment.”

⁵⁶“Does this unfortunate woman therefore seem to be exceeding a dignified pose of grief because she has conveyed such typically female complaints and what one might call the frivolous petitions of a woman before this court? To be

DM 18 and 19 provide even more crucial information on the *actio malae tractationis*.⁵⁷

Malae tractationis agimus. placet ergo, iudices, ut illa voce, qua matrimoniorum conquerimur iniurias, gemitu, quo corporum contumelias, damna cultus et negatos in publicum deflemus egressus, orbitates ac liberorum suprema plangantur? quid tamen facere vultis miserum dolorem, si non habet aliam sexus hic legem, si intra iuris huius angustias omnis nuptiarum querela constricta est? mater, quae de morte filii maritum malae tractationis acusat, non vindicat, sed probare contenta est, quod non debuerit occidi.⁵⁸ *Discussion of the law Ps-Quint. DM 18.5*

Malae tractationis accusat. adeone, uxor, tibi parum videor dedisse poenarum post parricidium, ut labores, ne lucrifaciat pater, quod occidit filium suum? non pudet ergo, si <c> irasceris parricidae? quid tibi cum lege, quam propter alios minores accepistis adfectus? querelas habet ista, non gemitus, et matre seposita solam conplorat uxorem.⁵⁹

Discussion of the law Ps-Quint. DM 19.5

According to these texts, the declamatory law concerning *mala tractatio* would have covered the following kinds of misbehaviour: the withholding of the finery that suits a *matrona*; the refusal to supply

sure, she is not asking for fancy clothes, gold, or gaudy finery; in the loss of her son she is well content with her tattered and filthy mourning garments. She is not driven by resentment for a rival mistress, and she does not complain about her husband's secret sex life with a female's typical intolerance and foolishness. But she also does not avenge a deserted and abandoned marriage bed as a wife scorned and spurned. Different, far different, is her concern about the nighttime."

⁵⁷For their *thema*, see n. 28 above.

⁵⁸"The charge before us is one of maltreatment. In that case then, does it please the court that we mourn the death and burial of our children with the same language with which we complain about matrimonial disputes, and the grumbling by which we deplore the hardships of a woman's person – deprivation of nice clothing and permission denied to leave the house? Yet what would you have her do in her pitiful suffering if this sex has no other ordinance, if every marital dispute has been constricted within the narrow confines of this law? In the case of her son's death, a mother who accuses her husband of maltreatment is not exacting punishment for the murder, but is content with proving that he should not have been killed."

⁵⁹"Now she accuses me of maltreatment. My dear wife, do I actually seem to have paid so insufficient a penalty after doing away with my son that you are worried that a father may escape the consequences of killing his own son? Well now, aren't you ashamed to be so angered at your son's killer? What business have you with a law which you were provided with in regard to other, less important emotions? That law which you cite encompasses minor grievances, not serious charges. The law puts aside the question of motherhood and embraces complaints only regarding her role as a spouse.

servants or to allow one's wife to go out in public; physical abuse; infidelity; the withholding of sexual favours. The last two offences, and probably some of the others, indicate a similarity with the Greek law on *κακώσεις*, literary or otherwise. They are also likely to have played a part in many Roman divorce cases, and thus to have cropped up in *actiones rei uxoriae*.

However, there are only a few declamations in which complaints about these subjects are actually found. We have a brief mention in *Sen. Contr.* 1.2.22, which concerns the failure to consummate a marriage, and *D. Min.* 363 and 383 deal with jealousy on the husband's part. Perhaps one could say that *DM* 10 also denounces a husband who pesters his wife. But most declamations on *mala tractatio* are concerned with harm done not primarily to the wife, but to her son(s).⁶⁰ This is clearly the case in *DM* 8, 18, and 19, but there are more examples. In *Sen. Contr.* 3.7, a father has poisoned his son, who had gone mad and suffered from self-mutilation; in *Contr.* 4.6 the father has two sons, one of whom stems from a previous marriage, which had left him widowed. He takes them away for a long time; at his return, they are indistinguishable, and he refuses to tell his wife which is which. *Contr.* 5.3 deals with a father who had his sons trained as pancratiasts. When they have to fight each other at the Olympic games, he threatens to disinherit the one who loses, and they subsequently fight each other to the death. In *Calp. Decl.* 51, the father, who already has a son, acknowledges another son, who has sprung from the rape of another woman.

Therefore, we can conclude that frequently there is a flagrant disproportion between the nature of the offences and the law that their victims appeal to. But then why did they not choose a different course of action? According to *DM* 8.6 and 18.5, women simply had no other options. It is true that, as long as their marriage lasted, spouses were not allowed to start penal proceedings against each other, nor *actiones* that entailed *infamia* (loss of honour).⁶¹ Only in the 2nd century CE was an important exception made for women in some cases of murder: *non est permissum mulieri publico iudicio quemquam reum facere, nisi scilicet parentum liberorumque et patroni et patronae et eorum filii filiae nepotis neptis mortem exequatur*.⁶² It is

⁶⁰See Sprenger, *Quaestiones*, 193; Lanfranchi, *Il diritto nei retori romani*, 237; Bonner, *Roman Declamation*, 94.

⁶¹*Dig.* 25.2.2; *Cod. Just.* 5.21.2.

⁶²"A woman is not entitled to accuse in public proceedings, unless she is bringing charges in connection with the murder of parents, children, a patron, a patroness, and their son, daughter, grandson, granddaughter" (*Dig.* 48.2.1); in *Dig.* 48.2.2 a second

therefore debatable if in *Sen. Contr.* 3.7 and 5.3 and *DM* 8 the wives could have prosecuted their husbands for murder. But if they could not, could they not have had someone else prosecute them?

It might be objected that there is a unique phenomenon in Roman law which could have made such attempts useless. This is the *patria potestas*: the Roman father's absolute power over his children, which ensued from his archaic property rights. It even included the *ius vitae necisque*: the right to kill them.⁶³ In practice, Roman fathers seldom availed themselves of this right. The majority of killings took place in early republican times and concerned cases where the sons threatened the stability of the state.⁶⁴ Apart from these, we know of two cases where sons who had committed sexual offences were killed by their fathers. Both fathers were charged with murder and subsequently punished.⁶⁵ But although the *ius vitae necisque* plays an insignificant part in Roman history, it figures largely in Roman declamation, just like the whole concept of *patria potestas*. This is hardly surprising, because declamation was primarily an educational tool for young men at an age where they must have been busy asserting themselves in relation to their fathers. It has recently been suggested that declamations which focus on family relationships were meant to prepare young Roman men to take on the role of *paterfamilias*.⁶⁶

To sum up, the background of the declamatory world offers two reasons why the mothers in the said declamations have to resort to the *actio malae tractationis*. In the first place, it is assumed that they have

exception is made for cases involving the forgery, concealment, or defacement of certain wills. See Corbett, *Roman Law of Marriage*, 141-42.

⁶³For *patria potestas* and *ius vitae necisque* see Th. Mommsen, *Römisches Strafrecht* (Leipzig: Duncker & Humblot, 1899), 16-26; M. Kaser, "Der Inhalt der patria potestas," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 58 (1938): 62-87; J. Crook, "Patria Potestas," *Classical Quarterly* 17 (1967): 113-22; Y. Thomas, "Vitae necisque potestas: le père, la cité, la mort" in: *Du châiment dans la cité* (Rome: Collection de l'école française de Rome 79, 1984), 499-548.

⁶⁴E.g. V. Max. 5.8.

⁶⁵The cases date from the 2nd cent. BCE (Quintus Fabius Maximus) and 2nd cent. CE (an anonymous father under Hadrian). See R. P. Saller, *Patriarchy, Property and Death in the Roman family* (Cambridge: Cambridge University Press, 1994), 116.

⁶⁶M. Imber, "Practised Speech: Oral and Written Conventions in Roman Declamation," in J. Watson ed., *Speaking Volumes: Orality & Literacy in the Greek & Roman World* (Leiden: Brill, 2001), 199-216 (at 207-12); E. Gunderson, *Declamation, Paternity, and Roman Identity: Authority and the Rhetorical Self* (Cambridge: Cambridge University Press, 2003) is concerned with declamation as a means of creating a *vir bonus*; pp. 59-90, 115-53 especially deal with training young Romans to assume the role of *paterfamilias*.

no alternative; secondly, the prevalence of the *patria potestas* makes it impossible to act directly on behalf of their sons. Nicola Hömke offers a third explanation, which derives from the real world. For her, the declamatory *actio* has its origin in the literary variant of *κἀκώσεις*. This already occurred in Greek comedy, she argues, but comedy is a genre in which stereotypes and caricatures are used to give oversimplified illustrations of women's sufferings and conflicts between fathers and sons. Declamation, on the other hand, is more suitable to probe psychological conflicts in depth in *narratio* and *argumentatio*. Juridical aspects become subsidiary to psychological exploration, which turns declamations into *Schaustücke* (showpieces) instead of *Schulstücke* (rhetorical exercises).⁶⁷

It is certainly true that exploration of the protagonists' psyche and emotions plays a crucial part in the declamations. Yet the distinction Hömke draws between *Schul-* and *Schaudeklamationen* seems too rigid. Declamation as a means to explore not only psychological but also moral issues was a vital ingredient of Roman education.⁶⁸ Further, Quintilian explicitly states that the *actio malae tractationis* was used in the schools (*Inst.* 7.4.11).⁶⁹ It seems more profitable, therefore, to adopt Hömke's concept of *mala tractatio* as a literary *topos*, but one that is not exclusively so, and while avoiding a narrow distinction between *Schul-* and *Schaudeklamationen*. It is clear in any case that the *actio malae tractationis* granted an opportunity to discuss the character and suitability of the law in question, as well as scope to expatiate on the position, the role, and the emotions of wives and mothers, fathers and sons.

DM 18 AND 19

In DM 18 and 19, the use of the *actio malae tractationis* is appropriate on all three counts. DM 18.5 states that women have no other recourse⁷⁰ and the father invokes his *patria potestas* to reinforce his claim that he does not have to justify the murder of his son (DM 19.5). Further, in both declamations the complex relationships between father, mother, and son are explored exhaustively. There is

⁶⁷Hömke, *Gesetzt den Fall*, 176-81.

⁶⁸See n. 66 above.

⁶⁹See n. 40 above. Cf. also *Inst.* 9.2.81.

⁷⁰See n. 58 above; in DM 19.5 (n. 59 above) the father questions the appropriateness of the *actio*.

even a fourth reason that makes the *actio malae tractationis* crucial for *DM* 18 and 19: since it serves as a vehicle for the underlying accusations and defences in a case of murder and incest, it is what makes them figured.

Now that it is clear that the declamatory law on *mala tractatio* is essential for the figured character of *DM* 18 and 19 as a whole, it is time to take a closer look at how figured speech works in both declamations. There are two further levels in which figured speech is of paramount importance: the *narrationes* and *argumentationes* in which *colores*, *figura*, and *ductus* play an important part; and individual sentences, where figured speech takes the form of emphasis.

Both declamations have a *ductus subtilis*: the speakers have additional aims which are not explicitly mentioned in the *thema*. To achieve these aims, they use several *colores*. In *DM* 19, for instance, the father accounts for his silence by claiming that it serves to protect the reputation of his wife and son. To justify the murder of his son, moreover, he uses ἀντέγκλημα or *relatio criminis*: his son deserved to die, and wanted to. In *DM* 18, the mother's advocate claims that the rumours about incest originated from the father's attitude: he was so cold and harsh that mother and son had to take (innocent) refuge with each other. The advocate even suggests that it was the father who invented and spread the rumour. But the most important *color* is one in direct opposition to *DM* 19: the father is urged to speak out because he uses his silence not to protect his wife and son, but to imply guilt on their part. By this means, the advocate exposes the father's *color* and breaks it open, following Quintilian's advice on how to counter figured speech:

Et quidam semper ex diverso aperiendas [figuras] putaverant, sicut latentia vitia rescinduntur. Idque sane frequentissime faciendum est: aliter enim dilui obiecta non possunt, utique cum quaestio in eo consistit quod figurae petunt. ... Atque etiam si fuerint crebriores figurae quam ut dissimulari possint, postulandum est ut nescio quid illud quod adversarii obliquis sententiis significare voluerint, si fiducia sit, obiciant palam, aut certe non exigant ut, quod ipsi non audent dicere, id iudices non modo intellegant sed etiam credant.⁷¹ Quint. *Inst.* 9.2.93-94

⁷¹“Some think [figures] should always be exposed by the opponent, as hidden sores are opened up. This is indeed the right course on most occasions; there is no other way of refuting charges, at any rate when the Question hangs on the point targeted by the Figures. ... Even if the Figures are too numerous to pass unnoticed, we should ask our opponents if they have any confidence in their Cause, to put into plain words whatever it was that they intended to suggest by their oblique remarks –

About the mother's motives, too, the advocate is straightforward: the accusation of maltreatment is an occasion to refute the father's suspicions of incest (*DM* 18.1).

DM 19, on the other hand, is extremely figured. Apart from his innuendo and suggestive defence, the father even puts up veritable smoke screens at one point in his speech. Instead of revealing the full facts of the case or bluntly refusing to speak, he offers his wife and the judges a number of scenarios of what could have happened in the torture chamber, each of which is introduced with *puta* or *finge* ("imagine") (*DM* 19.11-14): imagine that the boy said something, but after the murder, I was too confused to remember it coherently; imagine he said something that was too monstrous to repeat; imagine he said nothing, for he just wanted to be punished and killed; imagine he said something which I was unable to catch through all the racket I was making during the torture; imagine he tried to say something, but I prevented him from speaking.

Finally, all of Quintilian's four uses of figured speech are present in this case. In neither declamation is it safe to speak openly, for both parties are suspected of serious crimes. Decency is also important, for the case is a delicate one and both mother and father are anxious to appear respectable. Here, too, there is a striking difference between *DM* 18 and 19. In *DM* 18, the mother's advocate is not afraid to bring up the subject of incest when he ridicules the father's suspicions. He even dares to define motherly love as a kind of infatuation (*DM* 18.9). In *DM* 19, by contrast, the word incest does not occur. Indeed, without the *thema* to point the way, it would be difficult for readers to figure out what the declamation was about. Further, the author of these *controversiae* clearly wanted to offer his audience intellectual amusement by inviting them to unravel the complex argumentation, the hidden motives, and the insinuations. But he really excels in Quintilian's fourth use of figured speech, that is, the use of innuendo in cases where accusations cannot be proved. This reveals itself mainly in his use of *emphasis*, an important figure of thought.

Emphasis occurs *cum ex aliquo dicto latens aliquid eruitur* ("when a hidden meaning is extracted from a phrase") (Quint. *Inst.* 9.2.64).⁷² The figure is prolific in both *controversiae*, but *DM* 19, being the more figured of the two, abounds with it. The following insinuating sentences, mostly *sententiae* from *DM* 19, are classified according to

or at any rate not require the judges not only to understand something which they themselves dare not say, but also to believe it."

⁷²For the ornamental use of *emphasis* see *Inst.* 8.3.83-85.

their targets. In some cases they are phrased like gnomic *sententiae*, (pseudo-) generic sentences, to give them more weight. Against the mother:

Ipsius animus potest scire, quid filius meus dixerit, quae me putat habere, quod dicam.⁷³ Ps-Quint. DM 19.2

Laudo, iudices, patientiam matris: cum et ipsa semper plurimum esset domi, et ab illo secreto fortasse non longe, intervenire noluit, interpellare non ausa est.⁷⁴ Ps-Quint. DM 19.4

Quid iuvenis in tormentis dixerit, tamquam ignoret, interrogat; nihil me comperisse non credit, tamquam sciat, quid dixerit!⁷⁵ Ps-Quint. DM 19.10

Against the son:

Ita tibi non videtur omnia respondere pro filio, qui dicit "occidi"?⁷⁶ Ps-Quint. DM 19.5

Mori voluit, ut taceremus.⁷⁷ Ps-Quint. DM 19.8

Iuvenem ... qui inter nos formosum malebat agere quam filium.⁷⁸ Ps-Quint. DM 19.9

Desidem domi perdebat aetatem ... non ducere volebat uxorem.⁷⁹ Ps-Quint. DM 19.9

Quaestionem illud vocas? poena, supplicium et malorum meorum exitus fuit.⁸⁰ Ps-Quint. DM 19.9

⁷³"She is able to know in her own heart what my son said, seeing that she thinks I have something to say."

⁷⁴"Gentlemen, I applaud his mother's forbearance. Although she herself was always at home most of the time and she was not far from that isolated room, she declined to intervene and did not venture to interrupt." The father refers to the torture scene and intimates that the mother's conscience forbade her to interrupt.

⁷⁵"She asks what the young man said under torture as if she didn't know; yet she doesn't believe that I heard nothing, as if she knows what he said!" Sussman's "yet she doesn't suppose I discovered anything, as if she knew what he would have said!" neglects *non*, thus missing the point.

⁷⁶"Really, doesn't the man who says, 'Yes, I killed him,' seem to you to be giving the fullest possible reply regarding his son?"

⁷⁷"He wanted to die so that we could remain silent."

⁷⁸"A young man ... who preferred to play the role of a pretty-boy among us rather than act like our own boy should."

⁷⁹"He wasted the flower of his youth at home in laziness ... and did not try to get married." This is a miniature *color*.

⁸⁰"Do you term it an inquest by torture? No, it was his penalty, capital punishment, and the end of my troubles."

Nihil ille delinquebat, quomodo liberi solent.⁸¹ Ps-Quint. *DM* 19.13

In fact, the father's silence and his comments on it play such an essential role in his defence that it must be regarded as a figure that governs the entire declamation. This is the figure of *aposiopesis* (*reticentia, obticentia, interruptio*), which is the conspicuous suppression of an outrageous or embarrassing fact or allegation in order to draw attention to it.⁸² The following passages exemplify the effect of silence:

Non quia occidi filium, taceo, sed occisus est, ut tacerem.⁸³
Ps-Quint. *DM* 19.1

Cur filium occiderim, indicare non possum, nec paenitet, quod occidi.⁸⁴
Ps-Quint. *DM* 19.2

Non prodo secretum.⁸⁵ Ps-Quint. *DM* 19.6

Quisquis de tacente queritur, multo minus ferre poterit loquentem.⁸⁶
Ps-Quint. *DM* 19.7

Non habent incredibilia vocem; quaedam maiora sunt, quam ut illa capiat modus sermonis humani.⁸⁷ Ps-Quint. *DM* 19.12

In spite of its roundabout accusations, *DM* 18 is less figured than *DM* 19. The mother's advocate rather picks up on the figures used by the father. Accordingly, his silence is attacked fiercely in itself, but at the same time it is exposed as a ploy to malign the mother, rather than a means to protect her reputation:

Ideo ad vos fugiendum fuit, ut sciretis non illi praestari, quod tacet maritus.⁸⁸ Ps-Quint. *DM* 18.1

⁸¹ "In no way did he misbehave as youngsters usually do."

⁸² Quint. *Inst.* 9.2.54-57 (figure of thought); 8.3.85 (form of *emphasis*); Lausberg, *Handbuch*, 887 surveys the evidence; Desbordes, "Le texte caché," 84-86 discusses the eloquence of silence and ends with a brief description of *DM* 18 and 19.

⁸³ "I am silent not because I killed my son, but, rather, he was killed so that I could remain silent."

⁸⁴ "I cannot reveal why I killed my son, but yet I have no regrets that I did kill him."

⁸⁵ "I do not betray a secret."

⁸⁶ "Whoever complains about keeping silent can much less tolerate one who opens his mouth."

⁸⁷ "Incredible events cannot be expressed in words; some things are too enormous for the limitations of human speech to encompass."

⁸⁸ "She had to seek refuge with you, so that you may be aware that the fact that her husband keeps silent is no guarantee for her." My translation; Sussman's translation, "so that you may be aware that the fact of her husband's silence should

Parcere nunc illum cuiquam tacendo creditis? Loqui se cum maxime putat, et, si bene artes et profundae mentis consilia perspicio, respondere sibi videtur plus quam mater interrogat.⁸⁹ Ps-Quint. *DM* 18.2

Non fallit nos, nefande, quid captes: hoc, quod supra silentium trahis alta suspiria, quod in prorumpenti videris exclamazione deficere, mendacio paratur auctoritas, et in fidem erupturae vocis adfertur, ut fateri videaris invitus. dic tamen!⁹⁰ Ps-Quint. *DM* 18.16

Rather than confining himself to playing along with the figure, the advocate, following Quintilian's advice (*Inst.* 9.2.93-94), breaks the figure open and confronts the hidden charge of incest:

Ante omnia igitur, iudices, mulier infelicissimi pudoris hoc ab adfectibus publicis petit, ne vobis accusare videatur: ream se incesti, ream parricidii putat.⁹¹ Ps-Quint. *DM* 18.1

Mater, quae de morte filii maritum malae tractationis accusat, non vindicat, sed probare contenta est, quod non debuerit occidi.⁹² Ps-Quint. *DM* 18.6

Because of its relative forthrightness, the mother's accusation contains few specimens of figured speech on the level of the sentence in comparison with the father's defence. Where they do occur, they have an accusatory vein:

not render him safe," seems to read *praestare* instead of *praestari* and takes *illi* to refer to the husband instead of the wife.

⁸⁹"Do you suppose that he is now showing mercy to anybody by keeping still? At this very moment he thinks that he is speaking, and if I read the tricks and designs of his crafty mind well, as it appears to him, he is giving more answers than the mother asks questions."

⁹⁰"You criminal, we know what you are up to: this is the reason that you heave deep sighs through your silence, that you are faltering in restraining a shout threatening to burst out – you are trying to supply an air of authority to your lies, and that you appear to admit it against your will is brought forward to produce credibility for a remark apparently ready to escape your lips. But speak out all the same!"

⁹¹"Therefore, gentlemen of the jury, above all, this woman, a miserable soul owing to her sense of decent behavior, asks this favor of the people's judgment, that she does not appear to you to be making an accusation. No, she considers herself a defendant on the charges of incest and killing her son."

⁹²"In the case of her son's death, a mother who accuses her husband of maltreatment is not exacting punishment for the murder, but is content with proving that he should not have been killed."

Laudo, iudices, laudo miseram, quod interrogare noluit domi, quod nihil fecit et ipso secreto.⁹³ Ps-Quint. DM 18.3

... qui unicum aspiceret animo, quo quandoque posset occidere.⁹⁴
Ps-Quint. DM 18.4

Ego vero iuxta hunc patrem non accuso rumorem. quae materia fabulae tam impudentis, qui fuerit auctor, iste probavit, qui credidit (DM 18.4).⁹⁵
DM 18.4

Mirabar et ego, iudices, si tam nefanda quaestio alium exitum potuisset habere quam mortem.⁹⁶ DM 18.14

CONCLUSION

Two *controversiae figuratae*, DM 18 and 19, have served to illustrate the use of figured speech in Roman declamation. It has become clear that figured speech can influence the contents of entire texts or parts of them, even mere sentences. Insofar as figured speech governs a text as a whole, it is itself determined by declamatory law, which often has points in common with attested law but is usually adapted for declamatory purposes. The application of the law to a given *thema* gives a declamation a particular *ductus*. On a smaller scale, figured speech, especially in the form of *colores*, can have a decisive influence on *narrationes* and *argumentationes*. In individual sentences, it takes the form of *emphasis*, or innuendo. All these forms of figured speech have been shown to be present in DM 18 and 19. *Controversiae* were useful and amusing exercises in how to mince one's words: they make up ingenious pleas, which exhibit great technical expertise and a sufficient grasp of the law. Their subject matter, however lurid,

⁹³"I commend this woman to you, yes I do, because she refused to interrogate her husband at home, and because she herself also did nothing in secret."

⁹⁴"He was the kind of man who looked upon his only son with the veiled intent of where and when he could kill him."

⁹⁵"No indeed, with a father like this I do not censure the rumor. Who it was who provided the fuel for such an indecent fib and who was the source, that man over there who believed it has proven."

⁹⁶"Yet I keep wondering, gentlemen of the jury, if such an evil interrogation could have any other outcome than death." The advocate means that if it could have another outcome, the son would have lived as a victim and witness of the father's wanton cruelty.

is a veritable *Fundgrube* for those who study ancient culture and mentality. Recent scholarly attention is good news.⁹⁷

⁹⁷ Apart from the publications mentioned above, Antonio Stramaglia (Cassino) has taken the initiative to publish separate commentaries on all *Major Declamations*. So far, the following volumes have appeared: A. Stramaglia, [*Quintiliano*] *I gemelli malati: un caso di vivisezione* (*Declamazioni maggiori*, 8) (Cassino: Edizioni dell' Università di Cassino, 1999); [*Quintiliano*] *La città che si cibò dei suoi cadaveri* (*Declamazioni maggiori*, 12) (2003); Catherine Schneider, [*Quintilien*] *Le soldat de Marius* (*Grandes déclamations*, 3) (2004).