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Articoli

| | | |
|-----------------------------|---|----|
| Maria Vittoria Bramante | A proposito della pubblicazione dell' <i>Edictum de pretiis</i> di Diocleziano: un testimone dall'Egitto in PSI. XVII 1685 recto? | 9 |
| Nephele Papakonstantinou | Roman Declamation, Roman Law, and Ancient Legal Medicine: the Case of <i>veneficium</i> | 29 |
| Carmen Pennacchio | <i>Tacitast melior mulier semper quam loquens</i> (Plaut. <i>Rud.</i> 1114). Processo al femminile: la reità, il patrocinio giudiziale e la testimonianza | 73 |

Ricordo di Franco Gnoli

| | | |
|--------------------------|--|-----|
| Iole Fargnoli | Premessa | 127 |
| Fabio Botta | Il <i>sacrilegium</i> negli scritti di Franco Gnoli. Rievocazioni e riflessioni leggendo gli 'Scritti scelti di diritto criminale' | 133 |
| Pierangelo Buongiorno | Franco Gnoli e il <i>crimen peculatus</i> : un itinerario storiografico | 145 |
| Chiara Buzzacchi | Agire secondo le parole. In memoria del professor Franco Gnoli | 161 |
| Salvatore Puliatti | Il <i>crimen expilatae hereditatis</i> negli studi di diritto criminale di Franco Gnoli | 165 |
| Ferdinando Zuccotti | Un ricordo di Franco Gnoli | 173 |

**I Seminari «Giuliano Crifò»
dell'Accademia Romanistica Costantiniana 2022**

| | | |
|-----------------------|--|-----|
| Anna Maria Giomaro | Luci e ombre del Tardoantico nelle Costituzioni Sirmondiane | 189 |
| Emanuela Prinziavalli | La letteratura cristiana nella produzione letteraria del tardo antico | 219 |

Varie

| | | |
|------------------|---|-----|
| Ulrico Agnati | Il diritto romano e le vie dei codici civili | 245 |
| Monica Ferrari | Diritto casistico alla corte imperiale di Costantinopoli. Presentazione dell'opera a cura di Dieter Simon e Diether Roderich Reinsch (Milano, 14 aprile 2023) | 273 |
| Lorenzo Lanti | Per i cinquant'anni della Costantiniana. Tra bilanci e prospettive: Oriente e Occidente in dialogo | 279 |
| Luigi Sandirocco | Indagine sulle origini della <i>paelex</i> : una riflessione ragionata su un ruolo dai profili giuridici sfumati | 289 |
| Fatima Teli | «Donne: storia, visioni, strategie». Incontro in Statale | 299 |

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Roman Declamation, Roman Law, and Ancient Legal Medicine: the Case of *veneficium* *

ABSTRACT – This paper discusses the Roman legal treatment of poisoning, grounded on the *lex Cornelia de sicariis et veneficis* (81 BCE), through the lens of school forensic declamations (*controversiae*). Sections 1-4 set the context and address key methodological issues. Section 5, the core of the research, examines Pseudo-Quintilian's *Declamatio minor 350 Aqua frigida privigno data* (Cold water given to stepson) – a fictitious legal case concerning a suspicious death caused by drinking cold water. It is argued that the medico-legal assumptions underlying this distinctly unique case are likely to have brought new content to the legal conceptualisation of the reckless administration of venena, and hence, to the juristic interpretation of the degree of criminal intent required in similar cases of suspected homicide. The overall objective is to provide new insights of multidisciplinary relevance into the intersections of Roman Imperial forensic rhetoric, Roman law, and Graeco-Roman medicine, by looking closer at the method of argument through which trials involving a charge of poisoning may have been conducted in actual court practice.

1. Introduction – 2. The Legal History of *veneficium* – 3. Terminological Framework – 4. Degrees of Criminal Intent – 5. Roman Declamatory Casuistry Between Law and Medicine – 6. Conclusion

1. The administration of poisons appears in Roman history and literature, including forensic declamations ¹, mainly under the configuration of a female

*) This paper stems from a two-year post-doctoral research project that has been generously funded by the Alexander von Humboldt Foundation. A previous version of it has been delivered at the Centre for the Study of Medicine and the Body in the Renais-

crime², committed by a woman who was viewed as an adulteress, a poisoner, and a sorceress³. The reason is that a woman's weak physiology (*infirmitas sexus*) was thought to play a role in her presumed fragile psychology (*levitas animi*) and insufficient resistance to erotic desire that necessarily pushed her to commit simultaneously various crimes⁴, such as poisoning (*veneficium*) and adultery (*adulterium*)⁵. The stereotype persisted throughout the centuries⁶, but this and similar ideologised lines of thinking did not discourage modern scholars from advancing alternative hypotheses on the Roman practice of *veneficium*⁷. As regards declamatory poisoning, emphasis has been

sance (Pisa, 21.02.2023), at the invitation of Fabrizio Bigotti, under the title «Poisoning and Suspicious Deaths in the Classical World. Venoms in Roman Legal and Rhetorical Treatises». My deepest gratitude goes to Thomas Baier for his trust, support, and guidance throughout the AvH project, whose results are now extended into a new, larger one.

¹) A useful synthesis (including Greek declamatory themes) can be found in L. PASETTI, *Cases of Poisoning in Greek and Roman Declamation*, in *Law and Ethics in Greek and Roman Declamation* (cur. E. AMATO, FR. CITTI, B. HUELSENBECK), Berlin/Munich/Boston, 2015, p. 155 ss., and esp., 182-196.

²) G. RIZZELLI, *Note sul veneficium*, in *Mulier. Algunas Historias i Instituciones de Derecho Romano* (cur. R. RODRÍGUEZ LÓPEZ, M.J. BRAVO BOSCH), Madrid, 2013, p. 297 ss.

³) See for example Liv. 8.18.6–11, 40.37.4; Quint. *Inst.* 5.10.2, 5.10.24, 5.11.39; Tac. *Ann.* 3.22-23, 4.52.1, 4.52.3, 12.66, 13.15; Val. Max. 2.5.3, 6.3.8; Cass. Dio 49.33.4.

⁴) See S. DIXON, *Infirmitas Sexus: Womanly Weakness in Roman Law*, in *TR*, 52, 1984, p. 343 ss.; R. QUADRATO, *Infirmitas sexus e levitas animi: il sesso "debole" nel linguaggio dei giuristi romani*, in *Scientia iuris e linguaggio nel sistema giuridico romano* (cur. F. SINI, R. ORTU), Milano, 2001, p. 154 ss.

⁵) Rhet. Her. 4.23. Adultery was understood as contamination in physiological and ethical terms, that is, as a metaphorical poisoning. The notion that an adulteress corrupted the family bloodline through her illicit sexual act appears in D. 50.16.225 (Tryph. 1 disp.); D. 48.5.2.3 (Ulp. 8 disp.).

⁶) Commenting on a statistic which showed that there were more females than males amongst the accused, Giuseppe Ziino, an Italian forensic physician of the end of the 19th century, presumed as an explanation «the innate weakness of women, even more than their perfidiousness» that «induces them to use a weapon which kills insidiously and does not force the (female) murderer to fight openly with the victim». See G. RIZZELLI, *Note*, cit., p. 302 who cites G. ZIINO, *Compendio di medicina legale e giurisprudenza medica secondo le leggi dello Stato ed i più recenti progressi della Scienza ad uso de 'medici e giuristi*, Milano, 1890³, p. 941; E. HÖBENREICH, G. RIZZELLI, *Poisoning in Ancient Rome: Images and Rules*, in *Toxicology in Antiquity* (cur. PH. WEXLER), London, 2019², p. 289 ss., and esp., 292.

⁷) C. PENNACCHIO, *Farmaco, un Giano bifronte. Dei veleni e medicinali, ovvero breve storia di un ossimoro*, in *SDHI*, 80, 2014, p. 117 ss., and esp., 139 nt. 89 points out with reference to Liv. 8.18.6–11 that «in età repubblicana la dimestichezza con la prepara-

placed on the legal underpinnings, wider cultural perceptions, and gender stereotypes that characterised the activity of using *venena* ⁸.

In complement to previous analyses to which my paper owes much ⁹, I propose to shift the focus towards the inner workings of the Roman law on *veneficium* to examine the problems of interpretation that could presumably arise in potentially real cases of poisoning at a time when the preparation and administration of poisons for the purposes of homicide had reached the Imperial court ¹⁰. The theoretical point of departure is the principle that Roman forensic declamations can be construed as an interdisciplinary interstice between Roman law and forensic rhetoric, with the potential to reveal possible correspondences between actual legal practice and declamatory fiction at the level of concepts and arguments ¹¹. By focusing on the power of arguments, I intend to support a burgeoning line of research, according to which there is the need for a novel hermeneutic operation, situating (school) forensic declamations ¹² within the context of the dialogue that Roman law had implicitly developed with forensic rhetoric in a spirit of complementarity, and even better, synergy ¹³.

zione di pozioni tossiche non dovette essere un'attitudine saltuaria, in cui si cimentavano annoiate signore della società bene alle prese con insopportabili compagni, ma piuttosto un'anomala rivendicazione di potere alternativo, talvolta non esente da un'impronta di rivolta contro la maggioranza politica».

⁸) See especially G. LONGO, [Quintiliano], *La pozione dell'odio (Declamazioni maggiori, 14-15)*, Cassino, 2008; G. CALBOLI, *L'eros nelle declamazioni latine (una pozione di contro-amore)*, in *Rhetorica: A Journal of the History of Rhetoric*, 28.2, 2010, p. 138 ss.; L. PASETTI, [Quintiliano], *Il veleno versato (Declamazioni maggiori, 17)*, Cassino, 2011; CH. VALENZANO, *Matrigne, avvelenatrici, donne incestuose: il paradigma di Medea nelle Declamationes minores*, in *Le Declamazioni minori dello Pseudo-Quintiliano. Discorsi immaginari tra letterature e diritto* (cur. A. CASAMENTO, D. VAN MAL-MAEDER, L. PASETTI), Berlin/Boston, 2016, p. 117 ss.

⁹) Most particularly, E. HÖBENREICH, G. RIZZELLI, *Poisoning*, cit..

¹⁰) See for example Tac. *Ann.* 3.22, 4.10, 4.52, 12.66-67, 13.15; Suet. *Calig.* 49.

¹¹) D. MANTOVANI, *I giuristi, il retore e le api. Ius controversum e natura nella Declamatio maior XIII*, in *Testi e problemi del giusnaturalismo romano* (cur. D. MANTOVANI, A. SCHIAVONE), Pavia, 2007, p. 323 ss., and esp., 327.

¹²) One special feature of these texts is that they provided parallels to real-life court practice, in preparation for which they were originally designed. See Quint. *Inst.* 4.2.29: *forensium actionum meditatio*.

¹³) Inaugurated by F. LANFRANCHI, *Il diritto nei retori romani*, Milano, 1938, this line of research is pursued with growing recognition of the potential of forensic declamations to provide valuable insights into the socio-cultural development of Roman law. See especially, and with further bibliography, D. MANTOVANI, *Declamare le Dodici Tavole*:

The approach adopted here aims to advance a hypothesis that I am currently building and testing through cogent theoretical and practical contexts; namely, that the Roman equivalent of what we today call medico-legal expertise¹⁴ in crime investigations would fall within the task of legal practition-

Una parafrasi di XII Tab. V, 3 nella declamatio minor 264, in *Fundamina*, 20.2, 2014, p. 597 ss.; M. LENTANO, *Retorica e diritto. Per una lettura giuridica della declamazione latina*, Lecce, 2014; E. AMATO, FR. CITTI, B. HUELSENBECK (cur.), *Law and Ethics in Greek and Roman Declamation*, Berlin/Munich/Boston, 2015; B. SANTORELLI, *Il denaro negato. Casi di infitiatio depositi nelle Declamazioni minori*, in *Le Declamazioni minori dello Pseudo-Quintiliano. Discorsi immaginari tra letteratura e diritto* (cur. A. CASAMEN-TO, D. VAN MAL-MAEDER, L. PASETTI), Berlin/Boston, 2016, p. 31 ss.; ID., *Quaeritur an servus sit: casi di schiavitù per debiti nella declamazione latina*, in *Maia*, 70.1, 2018a, p. 28 ss.; ID., *Il debitor delicatus tra due scogli (ps.-Quint. decl. mai. 9.19)*, in *Maia*, 70.3, 2018b, p. 544 ss.; ID., *Poteram quidem fortiter dicere: 'Pater iussu'. L'autorità paterna a scuola, tra retorica e diritto*, in *Anatomie della paternità. Padri e famiglia nella cultura romana* (cur. L. CAPOGROSSI COLOGNESI, FR. CENERINI, FR. LAMBERTI, M. LENTANO, G. RIZZELLI, B. SANTORELLI), Lecce, 2019, p. 73 ss.; ID., *Leno etiam servis excipitur. Vendita e tutela degli schiavi in due Declamazioni maggiori pseudo-quintiliane (Ps.-Quint. decl. mai. 3, 16; 9, 12)*, in *Omne tulit punctum qui miscuit utile dulci. Studi in onore di Arturo De Vivo*, 2 (cur. G. POLARA), Napoli, 2020, p. 911 ss.; G. RIZZELLI, *Declamazione e diritto*, in *La declamazione latina. Prospettive a confronto sulla retorica di scuola a Roma antica* (cur. M. LENTANO), Napoli, 2015, p. 211 ss.; ID., *Fra giurisprudenza e retorica scolastica: note sul ius a Sofistopoli*, in *Iura & Legal Systems*, 6, 2019, p. 102 ss.; ID., *Leggi declamatorie nel De specialibus legibus di Filone Alessandrino?*, in *Liber amicorum. Mélanges en l'honneur de Jean-Pierre Coriat* (cur. E. CHEVREAU, C. MASI DORIA, J.M. RAINER), Paris, 2019, p. 873 ss.; ID., *L'aequitas a Sofistopoli. Note sull'aequitas nell'antologia di Seneca padre*, in *Rivista di diritto romano*, 22, 2022, p. 1 ss.; ID., *Ius ipsum iniquum est. Aspetti dell'aequitas nelle Declamazioni minori attribuite a Quintiliano*, in *Ius hominum causa constitutum. Studi in onore di Antonio Palma*, 3 (cur. FR. FASOLINO), Torino, 2023, p. 1579 ss.; C. MASI DORIA, *Immagini del processo nelle declamazioni pseudo-quintiliane*, in *Le Declamazioni maggiori pseudo-quintiliane nella Roma imperiale* (cur. A. LOVATO, A. STRAMAGLIA, G. TRAINA), Berlin/Boston, 2021, p. 267 ss.; L. PASETTI, *I termini para-giuridici nelle Declamations maiores*, in *Le Declamazioni maggiori pseudo-quintiliane nella Roma imperiale* (cur. A. LOVATO, A. STRAMAGLIA, G. TRAINA), Berlin/Boston, 2021, p. 287 ss.; L. PELLECCHI, *Retorica di scuola, argomentazione forense e processo nella declamatio minor 336 dello Ps. Quintiliano*, in *Athenaeum*, 109.2, 2021, p. 513 ss.; N. PAKONSTANTINO, *Violenza sessuale e 'violenza di genere' nelle declamazioni latine di scuola: riflessioni retorico-giuridiche sul tema del consenso*, in *Iura & Legal Systems*, 10.1, 2023, B(2), p. 21 ss.

¹⁴ I use the adjective 'medico-legal', as opposed to 'forensic', to avoid confusion with the standard terminology used for declamations dealing with legal issues. Insofar as the roles of the 'expert' and the 'intellectual' were intertwined in a world without institutional accreditation or formalised training, ancient medico-legal expertise can be under-

ers to interpret «trace evidence» in cases of violent or suspicious crimes, in order to help the judge establish criminal liability¹⁵. To put it more plainly, my hypothesis is that under the High Roman Empire¹⁶, the logic governing fact-finding techniques in the reconstruction of a criminal fact, from the time of the crime to that of the trial¹⁷, was based on the fundamental criterion that relevant information would have to be extracted from physical or material evidence through conjecture (τεκμαιρεσθαι), to transform a «trace» into reliable proof, which would then have to be evaluated in light of the opposing parties' competing interests (*in utramque partem*)¹⁸. For proof was a completely technical rhetorical matter.

Despite methodological challenges relating mainly to the fact that there is no general theory of «trace evidence» in Roman law nor a distinct category of «expert witness»¹⁹, it is not unreasonable to assume that the aforementioned

stood as the fusion between specialised training, cultural authority, and social legitimacy. On ancient 'scientific' expertise, see generally J. KÖNIG, G. WOOLF (cur.), *Authority and Expertise in Ancient Scientific Culture*, Cambridge, 2017. On the interactions between medicine and law under the Roman Empire from the perspective of expertise and its construction, see CL. BUBB, M. PEACHIN (cur.), *Medicine and the Law under the Roman Empire*, Oxford, 2023, where the question of medico-legal expertise is not raised.

¹⁵) As I argue in N. PAPAΚONSTANTINOY, *Judicial Semiotics in Early Imperial Roman Culture*, in *Quintilian's Rhetoric and the Disciplines. Distinction, Confrontation, Assimilation* (cur. T. DÄNZER), Tübingen (forthcoming in early 2024), Quintilian's doctrine of the rhetorical *signum* (*Inst.* 5.9) provides a hitherto neglected semiotic paradigm according to which 'trace evidence' (= microscopic physical or material evidence, such as hair, fibre, bloodstains, dust, bodily fluids) was theorised as a type of proof on the basis of probabilistic reasoning.

¹⁶) And especially in the system of standing courts (*quaestiones perpetuae, iudicia publica*), where crime investigation, including the gathering of evidence, was a private matter incumbent upon the person who brought an accusation.

¹⁷) Cfr. Rhet. Her. 2.6, where we learn that *signum* allows for gaining evidence regarding the scene of the crime (*locum*), the time (*tempus*), the duration (*spatium*), the opportunity (*occasionem*), the hope of accomplishing the crime (*spes perficiendi*), and the hope of concealing it (*spes celandi*).

¹⁸) When brought together in a coherent set of traces, isolated clues are thought to produce reliable, evidential knowledge, but not in a categorical manner. In this sense, they have a very similar role in both ancient rhetoric and medicine – that of constituting signs or symptoms –, which raises the issue of observation and inferential reasoning in relevant contexts. For an in-depth investigation of the functioning of conjecture as a method of reasoning that renders rhetorical demonstration analogous to 'scientific' demonstration, see N. PAPAΚONSTANTINOY, *Judicial Semiotics*, cit. with specific reference to ancient medico-legal contexts drawn from Quintilian and Aulus Cornelius Celsus.

¹⁹) For this and other methodological pitfalls regarding proof and procedure, see in

task of legal practitioners would be compatible with the (perhaps institutionalised)²⁰ way in which ancient physicians appeared in judicial proceedings, from the petition of a private citizen requesting a medical inspection, to the order issued by the competent authority for the inspection to be carried out, to the inspection producing the medical report, and – in the event of a trial – to the use of the medical report (*προσφώνησις ιατροῦ*) as evidence in the judicial proceeding²¹. Because, back then, just as today, it was not possible for all experts working with medico-legal evidence to have had the same expertise²², or authority²³, in all different areas pertaining to crime investigations. A source of perplexity in this regard is that we know very little about the deployment of ancient physicians, outside of the case of Roman Egypt²⁴, as legally designated medical experts called upon in a recognised medico-legal capacity to make a

detail N. PAPA-KONSTANTINOU, *Judicial Semiotics*, cit..

²⁰ FR. MITTHOF, *Forensische Medizin im römischen und spätantiken Ägypten, in Vorträge zur griechischen und hellenistischen Rechtsgeschichte (Durham, 2-6. September 2007)/Papers on Greek and Hellenistic Legal History (Durham, September 2-6, 2007) (cur. E.M. HARRIS, G. THÜR)*, Wien, 2008, p. 301 ss., and esp., 310 for the idea that institutionalised forensic medicine as an integral part of the administrative and judicial apparatus was present in the Roman Empire, but its realisation was in its infancy.

²¹ Medical reports were official reports or accounts, in which a physician claimed to have carried out an inspection (= examination of a wound or autopsy) at the request of a judicial authority. There are thirty extant medical reports, mainly from Oxyrhynchus, the oldest being from 89-94 and the latest from 393. For the medical reports contained in the Greek papyri of Roman Egypt, see first and foremost N. REGGIANI, *I papiri greci di medicina come fonti storiche: il caso dei rapporti dei medici pubblici nell'Egitto greco-romano, in Aegyptus*, 98, 2018, p. 107 ss.

²² In the inquiry on the wounded or dead body, ancient medical experts were not expected to carry out a full criminal investigation in order to establish the possible perpetrator(s) of the event(s), but to give as accurate a description of the state of the body (in a potential crime scene) as possible. This point is made by FR. MITTHOF, *Forensische Medizin*, cit., p. 305-306; N. REGGIANI, *I papiri*, cit., p. 108.

²³ N. REGGIANI, *I papiri*, cit., p. 120 specifies that the public and legal value of medico-legal inspections in Roman Egypt was guaranteed, not by the physician, but by the representative of the competent authority (that is, the assistant, *ὑπηρέτης*, to the administrative official, *στρατηγός*).

²⁴ In Roman Egypt, the possibility of a physician's medico-legal deployment existed first in a private context (with the report being written by a private physician), while from the second half of the second century, it became the subject of public interest with the introduction of public physicians (*δημόσιοι ἰατροί*). The exact nature of the legal relationship that these physicians in the province of Egypt had with Roman administration remains unknown. See FR. MITTHOF, *Forensische Medizin*, cit., p. 308-309; N. REGGIANI, *I papiri*, cit., p. 108 nt. 3 for further bibliography on public physicians.

technical assessment by virtue of their «professional» competence. Although physicians appear in Justinian's *Digest* in cases of contested paternity²⁵, «medical malpractice»²⁶, or «mental disorder»²⁷, the institutional nature and frequency of (the possibility of) their deployment in medico-legal investigations are not directly inferable from available legal sources. This holds true for cases of suspected poisoning as well²⁸.

Given this context, the only way (at least at the current state of sources) to gain a more comprehensive and balanced view of Roman conceptions of medico-legal expertise is, in my view, to analyse the broader context that would be conducive to enabling the dialogue between medicine and law in the interest of the proper administration of justice; and by this, I mean the trial-related stakes of Roman legal procedure, as evinced in texts pertaining to Imperial forensic rhetoric. Let us take *veneficium* as an example. In the absence of technological means for retrospectively proving or disproving alleged poisoning in Roman Antiquity²⁹, we, modern scholars, are compelled to operate un-

²⁵) Such cases involve gynaecological and obstetrical examinations of women pregnant by their recently deceased husbands. The primary aim is of this procedure (*inspectio ventris*) is to ensure the legitimacy of the child. The relevant juristic fragments are to be found in Justinian's *Digest* Book 25 under the title 4 *De inspiciendo ventre custodiendoque partu*.

²⁶) D. 9.2.8 (Gai. 7 ad ed. provinc.). For the failure of the Romans to develop an autonomous medical malpractice law, see A. WATSON, *Failures of the Legal Imagination*, Philadelphia, 1988, p. 65-86.

²⁷) Although it is impossible at the current state of sources to ascertain whether the judicial assessment of *dementia* was standard procedure, G. RIZZELLI, *Modelli di follia nella cultura dei giuristi romani*, Lecce, 2014, p. 86 acknowledges on the basis of D. 1.18.14 (Macer 2 de iudic. publ.) that such an assessment would pass through consultation of medical diagnosis or of technical advice. See N. PAPA-KONSTANTINO, *Embodied Cognition and the Self in Roman Rhetorical Education: the Case of dementia*, in *Healing Classics and the Medical Humanities* (cur. M. MEEUSEN), Bern (forthcoming in early 2024) for declaratory extensions of Rizzelli's positive appreciation.

²⁸) D.W. AMUNDSEN, G.B. FERNGREN, *The Forensic Role of Physicians in Roman Law*, in *Bulletin of the History of Medicine*, 53.1, 1979, p. 39 ss., and esp., 49-50.

²⁹) Cfr. L. CILLIERS, F.P. RETIEF, *Poisons, Poisoning and the Drug Trade in Ancient Rome*, in *Akroterion*, 45, 2000, p. 88 ss., and esp., 98: «*Post mortem* changes considered typical of poisoning, e.g. darkening of the skin and early bloating, but delayed putrefaction, were hardly reliable. One must assume that many victims accused (and even executed) were indeed innocent»; J.B. RIVES, *Magic in Roman Law: The Reconstruction of a Crime*, in *Classical Antiquity*, 22.2, 2003, p. 313 ss., and esp., 319: «The limited physiological and pharmacological knowledge of the day meant that the presence of *venena* was difficult to detect and their effectiveness even more difficult to explain; consequently, their use was in many cases simply inferred from the effects. In such circumstances it was relatively easy to

der the principle that the presence of potentially toxic substances in the human body would be difficult to explain with conclusive evidence, *unless* criminal intent was inferred from the visible effects by an expert and unbiased eye, in legally acceptable terms. For the purposes of the present discussion, it is therefore important to distinguish between the ascertainment of poisoning as a question of fact (*quaestio facti*) and the ascertainment of potential responsibility, implicit to that fact, as a question of law (*quaestio iuris*). With respect to the second point, a further distinction must be made: in the system of standing courts (*publica iudicia*), perpetrators of homicide were punished only if they acted with criminal intent (*dolus malus, animus occidendi*)³⁰, while from Hadrian onwards, offences committed not in a fully malicious way, seem to have been punished *extra ordinem* with a mitigated (*lenior*) penalty compared to that provided for in the *lex Cornelia*³¹.

suspect *veneficium*, and allegations of *veneficium* were liable to follow on any death regarded as unusual or suspicious. Moreover, the difficulty in assigning responsibility meant that these allegations often allowed free rein to suspicions of conspiracy and the venting of personal hostilities»; H. KING, 'First behead your Viper': *acquiring Knowledge in Galen's Poison Stories*, in *It All Depends on the Dose: Poisons and Medicines in European History* (cur. O.P. GRELL, A. CUNNINGHAM, J. ARRIZABALAGA), Abingdon, 2018, p. 25 ss., and esp., 27: «It was never simple to know whether a death should be attributed to poisoning, or not; it depended on interpreting the event and its relationship to eating and drinking. [...] sudden deaths were most suspicious and [...] any death, whether rapid or gradual, could with hindsight be attributed to poison. Galen himself was adamant that there are no specific signs of poisoning a physician can detect; it is impossible to tell if something arises within the body or is due to material being added to that body (*Affected Parts* 6.5 and 6.6)». This picture is further complicated by the (mis)use of *veneficium* for political purposes and by the bias of extant sources (e.g., the relationship between *historia* and *autopsia*, or between luxury, morals, and drug trade), which distort our understanding of the workings of ancient pharmacological knowledge in legal settings.

³⁰) That could be inferred from the means with which the crime was committed. See F. BOTTA, *Osservazioni in tema di criteri di imputazione soggettiva dell' homicidium in diritto romano classico*, in *Diritto@storia*, 12, 2014, p. 5 ss., and esp., 13.

³¹) The borderline case is found in D. 48.8.1.3 (Marcian. 14 inst.). For a new legal exegesis of the fragment, see F. BOTTA, "Casu magis quam culpa", "casu magis quam voluntate". *Sul criterio di imputazione della responsabilità in D. 9.2.52.4 (Alf. 2 dig.) e in D. 48.8.1.3 (Marcian. 14 inst.)*, in *Studi in memoria di Giovanni Negri* (forthcoming). I have been able to consult the proofs of the chapter thanks to the author's generosity. The meaning of the expression *casu magis quam voluntate* is much debated. According to C. GIOFREDI, *Su l'elemento intenzionale nel diritto penale romano*, in *Studi in onore di G. Grosso*, 3, Torino, 1970, p. 35 ss., and esp., 48, as cited by F. BOTTA, *Osservazioni*, cit., p. 26 nt. 92, «casus è quanto avviene per disavventura, il che non esclude ad esempio l'imprudenza [...] casus è quanto si oppone [...] al determinato proposito. [...] con casus non si vuole alludere

In what follows, I shall not ask directly whether forensic declamations on *veneficium* are the closest to historical reality due to their familiarity with the terms of the *lex Cornelia*³². Rather, I propose to show the proximity of these texts to legal practice, by reconstructing the Roman way of conducting the type of crime investigations that would fall under the scope of what we today call «forensic toxicology»³³. In saying that, I do not intend to affirm by any means that ancient legal medicine acquired an institutionalised form at the turn of the first century CE. On the contrary, I wish to highlight (i) that the interpretation of the presence of potentially toxic substances in the human body, conducted with anticipation of the need to be defensible in a public court, was *structurally* incumbent upon the task of legal practitioners to help the judge establish causative agents and injurious effects in a legal matter, whose correct interpretation depended upon medical expertise; and indirectly, (ii) that forensic declamations and medical reports can be thought of as concordant pieces of evidence regarding the transmission of medico-legal knowledge in the High Roman Empire, insofar as they adopt the same method of reasoning from signs and symptoms³⁴. Within this framework, I will try to

al caso fortuito, ma piuttosto al fatto che oggi si qualifica come colposo». *Casus* therefore comprises the cases in which the *animus occidendi* cannot be reasonably assumed. Its theorisation as a legal concept occurs in D. 48.19.11.2 (Marcian. 2 de publ. iudic.).

³²) For that purpose, see S.F. BONNER, *Roman Declamation in the Late Republic and Early Empire*, Liverpool, 1949, p. 111-112. In a similar spirit, N. HÖMKE, *Gesetzt den Fall, ein Geist erscheint. Komposition und Motive der ps-quintilianischen Declamationes maiores X, XIV und XV*, Heidelberg, 2002, p. 185: «Übernahmen die Autoren von *Decl. mai.* XIV und XV lediglich den bloßen Begriff „Giftmischerei“ oder bezogen sie sich in ihren Plädoyers auch auf den Wortlaut und die Auslegungspraxis des realen Gesetzes?»

³³) Toxicology was not a foreign concept to Graeco-Roman Antiquity. A. TOUWAIDE, *Galien et la toxicologie*, in *Aufstieg und Niedergang der Römischen Welt*, 37.2, Berlin/Boston, 1994, p. 1887 ss., and esp., 1895 points out that in ancient times, toxicology formed a fairly separate discipline within the field of medicine, with its own subject, its own specific method and a body of knowledge that was already large and precise.

³⁴) A. RICCIARDETTO, *La réponse du médecin: les rapports d'inspection médicale écrits en grec sur papyrus (I^{er}-IV^e siècles)*, in *Ancient Greek Medicine in Questions and Answers Diagnostics, Didactics, Dialectics* (cur. M. MEEUSEN), Leiden/Boston, 2020, p. 133 ss. explains the similarity between the medical reports contained in the Greek papyri of Roman Egypt and the patient records found in the Hippocratic *Epidemics* presumably by the continuity of the diagnostic practices taught and applied in relation to semiotics. Of particular interest to some authors of *Major Declamations* is the medical sign in the form of *signum/indicium mortis*, for which see G. LONGO, *La medicina nelle Declamazioni maggiori pseudo-quintilianee*, in *Reading Roman Declamation. The Declamations ascribed to Quintilian* (cur. M.T. DINTER, CH. GUÉRIN, M. MARTINHO), Berlin/Boston, 2016,

show that forensic declamations dealing with *veneficium* add a new dimension to our research infrastructure – the heuristic use of judicial argumentation patterns in problematising questions of proof that were central to broader normative debates about health and legality –, which allows for a better understanding of how the inquisitive mind of legal practitioners was trained to argue in cases of suspected poisoning.

2. Although the original text of the *lex Cornelia de sicariis et veneficis* is lost, it can be partially reconstructed from later citations and allusions in legal and literary sources³⁵. The *crimen veneficii* – a conceptual hyponym to «homicide» – was committed by the administration of substances (*venena*)³⁶, which were considered to belong to the sphere of magic³⁷, and which could alter a person's health at a physical and cognitive level³⁸. The activity of using *venena* was criminalised and punished if the effects caused were deemed harmful or censurable from an ethical point of view³⁹. Indeed the term *venena* was regarded as ambivalent enough to include a wide range of substances, including licit ones that were used as love potions or somniferous drugs⁴⁰. The preparation and administration of a love potion (*amatorium*), for instance, were not considered to be a crime unless there was proof of criminal intent (*hominis necandi causa*)⁴¹. Insofar as it can be accurately reconstructed, the fifth clause of

p. 167 ss., and esp., 169-175. For the method of reasoning from signs and symptoms that is both medically and legally relevant, specific reference must be made to Quintilian. See in this regard N. PAPA-KONSTANTINO, *Judicial Semiotics*, cit..

³⁵) On this *lex*, see especially J.D. CLOUD, *The Primary Purpose of the Lex Cornelia de sicariis et veneficis*, in ZSS, 86, 1969, p. 258 ss.; J.-L. FERRARY, *Lex Cornelia de sicariis et veneficis*, in *Athenaeum*, 79, 1991, p. 417 ss.

³⁶) D. 48.8.1.1 (Marcian. 14 inst.).

³⁷) Cfr. Cic. *Brut.* 60; Petron. 118. For the interdependence between magic and medicine in Ancient Rome, see C.A. FARAONE, *Magic and Medicine in the Roman Imperial Period: Two Case Studies*, in *Continuity and Innovation in the Magical Tradition* (cur. G. BOHAK, S. SHAKED, I.J. YUVAL), Leiden/Boston, 2011, p. 135 ss.

³⁸) Plin. 25.25; Quint. *Inst.* 9.2.105.

³⁹) G. RIZZELLI, *Note*, cit., p. 297.

⁴⁰) Licit until they became equated with «poisons». For ancient sources, see J.B. RIVES, *Magic, Religion, and Law: The Case of the Lex Cornelia de sicariis et veneficis*, in *Religion and Law in Classical and Christian Rome* (cur. CL. ANDO, J. RÜPKE), München, 2006, p. 47 ss., and esp., 50 nt. 11. The administration of an *amatorium*, together with an *abortivum*, seems to have been punished from a time in history impossible to specify even when the death of the person has not followed, because it was considered as a «bad precedent» (*mali exempli res*). See in this regard P.S. 5.23.14 = D. 48.19.38.5 (Paul. 5 sent.).

⁴¹) D. 48.8.3.2 (Marcian. 14 inst.). This is because the legal provision punished the

the law criminalised the preparation (*fecerit*), sale (*vendiderit*), and possession (*habuerit*) of *venena* for the purpose of homicide (*necandi hominis causa*)⁴². Thus, the *lex Cornelia* did not only punish the intention to kill (*animus occidendi*) through the administration of poisons, but also each of the preparatory acts capable of leading to homicide, even if the latter was not actually carried out⁴³. Marcianus attests to an extension of the law to include the public sale of substances that were proved to be lethal (*mala medicamenta*), or their possession, with the intent to kill⁴⁴. He also records two senatorial decrees of uncertain date, the first of which extends the purview of the law to the lethal use of fertility drugs (*medicamenta ad conceptionem*), while the second extends in a supplementary way the penalty provided for by the *lex Cornelia* to the reckless administration (*temere*) of specific substances that could be used as aphrodisiacs⁴⁵. The problem of the underlying criminal intent, crucial in both senatorial decrees for reasons that will be analysed later⁴⁶, appears in a later legal text, the so-called *Pauli sententiae*, that mentions deportation as the penalty pro-

criminal intent inferred from the homicidal act (*animus, consilium*), not the act in itself (*dolus pro facto accipitur*) nor gross negligence (*culpa lata*). See D. 48.8.7 (Paul. lib. sing. de publ. iud.); Paul. 5 sent., *Coll.* 1.7.1-2. Cfr. D. 44.4.1.2 (Ulp. 71 ad ed.). Also, Quint. *Inst.* 7.3.30.

⁴²) D. 48.8.3 pr. (Marcian. 14 inst.). Cfr. Cic. *Cluent.* 148, where Cicero mentions that the same clause of the *lex Cornelia* punished anybody (*quicumque*) who prepared (*fecerit*), sold (*vendiderit*), bought (*emerit*), kept (*habuerit*), or procured (*dederit*) a *venenum* qualified as *malum*.

⁴³) In this sense, E. NICOSIA, *Sulla non intenzionalità nella repressione criminale romana*, in *Diritto penale romano. Fondamenti e prospettive I. Discipline generali*, t. II (cur. L. GAROFALO), Napoli, 2022, p. 977 ss., and esp., 1013 nt. 98 following Mommsen.

⁴⁴) D. 48.8.3.1 (Marcian. 14 inst.), with E. HÖBENREICH, *Due senatoconsulti in tema di veneficio* (Marcian. 14 inst. D. 48.8.3. 2 e 3), in *AG*, 108, 1988, p. 75 ss., and esp., 80 nt. 12 for the hypothesis of the extension.

⁴⁵) D. 48.8.3.2-3 (Marcian. 14 inst.). It is generally accepted that the decrees should be situated at the time of Hadrian or later on, but E. HÖBENREICH, *Due senatoconsulti*, cit., p. 94-97 dates them back to the 1st century CE. Since the aforementioned juristic fragments refer to interventions on concrete cases, they should not be interpreted as having a general character pertaining to all types of *venena*. *Contra*, and erroneously, T. WYCISK, *Quidquid in foro fieri potest. Studien zum römischem Recht bei Quintilian*, Berlin, 2008, p. 292 (with reference to D. 48.8.3.3 [Marcian. 14 inst.]).

⁴⁶) From a technical legal point of view, it is highly difficult to agree with J.B. RIVES, *Magic, Religion*, cit., p. 52 that «Marcian cites two *senatus consulta* that, while continuing to restrict the purview of the law to the handling of deadly substances, nevertheless shift the focus away from intent. Both of them deal with what we would now call malpractice». See *infra*.

vided for poisoning by the *lex Cornelia* ⁴⁷.

3. The use of ancient toxicological expertise in Roman criminal procedure is an under-explored topic that plays an important role in showing that murder from poisoning was, from a rhetorical-judicial perspective, a definitional problem ⁴⁸. The case of *veneficium* is perhaps the clearest example of the confusion that arises from the difficulty to distinguish technically between cause and effect (or signs and symptoms) in embodied acts of homicide. As we shall see below, the reason for this is the complex linguistic system in which *venena* were culturally embedded.

The modern category of poison refers exclusively to a harmful or lethal substance. However, much like its Greek counterpart *φάρμακον*, the Roman concept of *venenum* was a *vox media* – an oxymoron reminiscent of the Socratic antinomy between «antidotes» and «poisons» –, insofar as it denoted any substance which, when absorbed by the human organism, was capable of interacting with the body *both* in the direction of restoring the functions of the organs affected by a disease *and* of causing death ⁴⁹.

The relationship between *venena* and *medicamenta* is not well defined in legal terminology. In the history of Roman law from the Twelve Tables (8.25) to the 2nd century CE, as viewed by Gaius, *venenum* was a near-synonym of *medicamentum*, and more specifically, its hyperonym ⁵⁰. Gaius speaks of a substance that could alter the nature of the organism with which it came into contact (*quod adhibitum naturam eius, cui adhibitum esset, mutat*) ⁵¹. It is safe to assume that the meaning recorded by the jurist in this fragment reflected broader socio-cultural perceptions and was established as a technical term, on

⁴⁷) P.S. 5.23.1. Cfr. D. 48.19.28.9 (Call. 6 de cogn.).

⁴⁸) Quint. *Inst.* 7.3.7.

⁴⁹) C. PENNACCHIO, *Farmaco*, cit., p. 127 with reference to *φάρμακον*. Somewhat confusingly, J.B. RIVES, *Magic*, cit., p. 319-320 concludes that *venenum* «far from being ambiguous, denoted a consistent and fairly simple concept, namely, any natural substance that had an occult or uncanny power to affect something else», while also affirming in J.B. RIVES, *Magic, Religion*, cit., p. 49 that «the word is difficult to translate into English, since it could denote substances that we would distinguish as <poisons>, <potions>, and <drugs>».

⁵⁰) Also E. HÖBENREICH, *Due senatoconsulti*, cit., p. 80 nt. 12 notes with regard to D. 50.16.236 (Gai. 4 ad l. XII tab.) that «‘*medicamenta*’ sono le sostanze medicinali, anch’esse *species* della più ampia classe ‘*venenum*’». Cfr. C. PENNACCHIO, *Farmaco*, cit., p. 133 nt. 58 with reference to the same juristic fragment: «sembra voglia procedere ad un ragionamento per *genus* e *species*».

⁵¹) D 50.16.236 (Gai. 4 ad l. XII tab.).

a programmatic basis, with a view to ensuring its practical application in legal settings⁵². Significantly, in the juristic commentaries to the *lex Cornelia*, *venenum* was classified as a neutral term (*nomen medium*) that could be used both in the sense of «medicinal remedy» prepared for the purpose of healing (*ad sanandum*) and «noxious drug» prepared for the purpose of killing (*ad occidendum*); it is therefore plausible that the addition (*adiectio*) of the qualifying term *mala* in an extension of the *lex Cornelia*, presumably through a decree of the Senate, served to disambiguate this broad definition of *venena*⁵³. The addition of *mala* refers to dosage (= the quantity)⁵⁴, which is dependent on the agent's will or on circumstances⁵⁵, and which cannot be logically separated from an appreciation of the use to which substances were put (= the quality of the quantity) in order to become either noxious or therapeutic (*utrum mala an bona*)⁵⁶. Although the unclear relationship between *mala medicamenta* and *venena*⁵⁷ will remain ambiguous in Justinian's *Institutiones*⁵⁸, it is possible to assume a semantic analogy of relational similarity between these notions⁵⁹; and since it is difficult to establish a clear-cut distinction between them (due to their semantic overlap in the context of the same sentence), it is fitting to rely on contextual and pragmatic knowledge to interpret their «ontological» content correctly.

The jurisprudential conceptualisation of *venena* outlined above concurs with evidence drawn from non-legal sources that prioritise the negative connotations of «poison» conferred to the Latin term, as in *Dmin* 350⁶⁰. *Venenum*

⁵²) In the same spirit, C. PENNACCHIO, *Farmaco*, cit., p. 134-137.

⁵³) D. 48.8.3.2 (Marcian. 14 inst.).

⁵⁴) The idea is well known in ancient medicine: C.A. FARAONE, *Ancient Greek Love Magic*, Cambridge MA/London, 1999, p. 129 gives a table of substances and their effects depending on the dose administered. The principle of dosage will be celebrated as the beginning of the modern science of toxicology thanks to Paracelsus' innovations in sixteenth-century medical pharmacopoeia. See for example G.D. HEDESAN, *Alchemy, Potency, Imagination*, in *It All Depends on the Dose: Poisons and Medicines in European History* (cur. O.P. GRELL, A. CUNNINGHAM, J. ARRIZABALAGA), Abingdon, 2018, p. 81 ss.

⁵⁵) C. PENNACCHIO, *Farmaco*, cit., p. 133.

⁵⁶) The idea is present in D. 18.1.35.2 (Gai. 10 ad ed. prov.).

⁵⁷) D. 10.2.4.1 (Ulp. 19 ad ed.). An hendiadys?

⁵⁸) I. 4.18.5.

⁵⁹) Insofar as *medicamentum* is defined in relation to *venenum*, but is not equated with it because of *malum*.

⁶⁰) Cfr. C. PENNACCHIO, *Farmaco*, cit., p. 133 nt. 57 who believes that the order of adjectives *utrum malum an bonum* in D. 50.16.236 (Gai. 4 ad l. XII tab.) is not accidental: «se volessimo esasperare il valore psicologico della collocazione, dovremmo ipotizzare che Gaio, comunque, pensa al veleno innanzitutto come portatore di disgrazie».

was used in the sense of «poison» in non-medical literature of the 1st century (Pliny the Elder) by juxtaposition to *medicamentum* and *remedium* which referred to «antidote». Contemporaneous specialised pharmacological literature (Scribonius Largus) offered a treatment of *mala medicamenta* as both «poisons» (= ingested noxious substances) and «venoms» (= noxious substances transferred through bites or stings of animals). Consolidated usages of «poisons» allowed Galen to shape the medical paradigm of *δηλητήριον*, which served as a basis for his «toxicological model» of disease causation⁶¹. Given this context, and since expert manipulation of substances *could* be beneficial, it becomes clearer why Marcianus took no trouble to comment on the relationship between *mala medicamenta* and *venena*: there must have existed a shared cross-cultural and cross-disciplinary understanding that substances had the potential to act as both «remedies» and «poisons»⁶², and that the inherent ambiguity of *venenum*⁶³ laid in the notion of dosage⁶⁴. But whether this should be considered as the single determinant of the quality of a drug was a separate issue. Because as we shall see below, criminal intent inferred from the use of *venena* (and not from *venena* as such) was taken to be the crucial element in the definition of a disputed *crimen veneficii*.

4. Let us then turn to an important legal fragment that raises the question of the lethal potential of therapeutic practices:

D. 48.8.3.2 (Marcian. 14 inst.): [...] sed hoc solum notatur in ea lege, quod hominis necandi causa habet. Sed ex senatus consulto relegari iussa est ea, quae non quidem malo animo, sed malo exemplo medicamentum ad conceptionem dedit, ex quo ea quae acceperat decesserit.

⁶¹) That is, for the principle that «a small amount of something causes a disproportionate effect». The citation belongs to H. KING, *First behead your viper*, cit., p. 37.

⁶²) E. HÖBENREICH, *Due senatoconsulti*, cit., p. 82-83 nt. 22 and 89 nt. 49 for ancient sources. Cfr. V. BONET, *On Analgesic and Narcotic Plants: Pliny and His Greek Sources, the History of a Complex Graft*, in *'Greek' and 'Roman' in Latin Medical Texts. Studies in Cultural Change and Exchange in Ancient Medicine* (cur. BR. MAIRE), Leiden/Boston, 2014, p. 224 ss.; D. KING, *Painful Drinks: Poison and Pain Experience in Nicander's Alexipharmaca*, in *Pain Narratives in Greco-Roman Writings* (cur. J.R. CLARKE, D. KING, H. BALTUSSEN), Leiden/Boston, 2023, p. 44 ss.

⁶³) The ambiguity in question is probably a linguistic relic of the reception of ancient Greek terminology: *φάρμακον* referred to a herb or a drug in general without distinguishing between its beneficial or harmful effects. See H.J.F. HORSTMANSHOFF, *Ancient medicine between hope and fear: Medicament, magic and poison in the Roman Empire*, in *European Review*, 7.1, 1999, p. 37 ss., and esp., 43.

⁶⁴) Cfr. for example Plin. 25.150 with reference to mandragora.

A woman – probably a midwife (*obstetrix*) – ⁶⁵ gave (*dedit*) a fertility drug to another woman to facilitate conception ⁶⁶, but instead caused her death. In consequence of the sentence which concluded the trial ⁶⁷, she was found guilty of murder and punished with *relegatio in insulam*. The fact that the Senate intervened directly to sanction the homicide resulting from the act of procuring a *medicamentum ad conceptionem* as a bad precedent (*malum exemplum*) ⁶⁸

⁶⁵) E. HÖBENREICH, *Due senatoconsulti*, cit., p. 84 nt. 27 with prior bibliography. G. RIZZELLI, *Note*, cit., p. 307 nt. 26 justifiably expresses reservations about a case brought to the attention of the senatorial court «considerata la condizione sociale di un'ostetrica». On *obstetrices*, see N. DEMAND, *Monuments, midwives and gynecology*, in *Ancient Medicine in Its Socio-Cultural Context, vol. 1, Papers Read at the Congress Held at Leiden University, 13-15 April 1992* (cur. H.F.J. HORSTMANSHOFF, PH.J. VAN DER EIJK, P.H. SCHRIJVERS), Leiden/Boston, 1995, p. 275 ss.; D. GOUREVITCH, *La gynécologie et l'obstétrique*, in *Aufstieg und Niedergang der Römischen Welt*, 37.3, Berlin/Boston, 1996, p. 2083 ss., and esp., 2086-2092; R. FLEMMING, *Women, Writing and Medicine in the Classical World*, in *The Classical Quarterly*, 57.1, 2007, p. 257 ss.; C. LAES, *Midwives in Greek Inscriptions in Hellenistic and Roman Antiquity*, in *ZPE*, 176, 2011, p. 154 ss.; G. ECCA, *Fixing Ethical Rules for Midwives in the Early Roman Imperial Period: Soranus, "Gynaecia" I 3-4 / Die Festlegung ethischer Regeln für Hebammen in der frühen römischen Kaiserzeit: Soranos, Gynaecia I 3-4*, in *Sudhoffs Archiv*, 101.2, 2017, p. 125 ss.

⁶⁶) Cfr. Plin. 28.262 for an aphrodisiac; Sor. *Gyn.* 1.61-65 for different strategies and substances used for contraception and abortion. See also W. BROOKS MCDANIEL, *The Medical and Magical Significance in Ancient Medicine of Things Connected with Reproduction and its Organs*, in *Journal of the History of Medicine and Allied Sciences*, 3.4, 1948, p. 525 ss.; K. HOPKINS, *Contraception in the Roman Empire*, in *Comparative Studies in Society and History*, 8, 1965, p. 124 ss.; J. M. RIDDLE, *Contraception and Abortion from the Ancient World to the Renaissance*, Cambridge, MA/London, 1994, p. 25-65 for evidence drawn from Soranus and Dioscorides; PL. PRIORESCHI, *Contraception and Abortion in the Greco-Roman World*, in *Vesalius*, 1.2, 1995, p. 77 ss. The oldest known medical document recording the idea that female fertility could be regulated through the use of substances is the Kahun Medical Papyrus or Gynaecological Papyrus (c. 1825 BCE), conserved in the Petrie Museum of Egyptian Archaeology, University College London. See most recently H.T. LOPES, R.G. GURGEL PEREIRA, *The Gynecological Papyrus Kahun*, Intech Open, 2021.

⁶⁷) E. HÖBENREICH, G. RIZZELLI, *Poisoning*, cit., p. 295.

⁶⁸) G. RIZZELLI, *Note*, cit., p. 308 nt. 29 establishes a link with Ps.-Q. *Dmin* 385.4 with regard to the idea that the act of procuring an *amatorium* may set a bad example that can be the basis for a legal charge on *veneficium*. Cfr. the definition of *res mali exempli* in P.S. 5.23.19: [...] *etsi id dolo non faciant, tamen quia mali exempli res est* [...], where the act of procuring (*dare*) specific drugs that may prove to be lethal is prohibited and punished regardless and of the intent to kill and of an effective damage, because it constitutes a *res mali exempli*, and hence, an act that must necessarily be conscious and deliberate, insofar as it presupposes the agent's knowledge of the dangerousness of the drugs and the will to

represents a manifestation of the political will to discourage the dissemination of a social practice that was not criminalised at that time⁶⁹. The question is whether the *medicamentum* must be counted amongst the *venena bona* considering the purpose for which it was given, which in this case was not to kill (*non quidem malo animo*). But although the drug is qualified as *bonum*, the agent's act is nevertheless deemed worthy of sanction presumably *ex lege Cornelia*⁷⁰, because it caused the death of another person.

It is not clear from the juxtaposition between *non quidem malo animo* and *malo exemplo* to what mental state the agent's act is attributed, and it is not possible to affirm that the implied mental state coincides with «fault»⁷¹, because the concept of *culpa*⁷² did not gain any currency in Roman criminal law with regard to homicide⁷³. It has been claimed that in this fragment, Marcianus deals exclusively with the notion of criminal intent and that the *malum exemplum* appears as a criterion of assignment of responsibility for punishing death⁷⁴. Although it is correct to say that Marcianus insists on (the language of) criminal intent, it seems to me that the distinction marked by *quidem ... sed* is not made between *malo animo* and *non malo animo*, but between *malo animo* and a concept (i) that is definitely not *malus animus*, (ii) that the jurist

procure them in a damaging way. For this exegesis, see F. BOTTA, “*Nemica del marito, ostile alla natura*”: *l'aborto entro e fuori il matrimonio negli ordinamenti dell'Impero d'Oriente*, in *Jus online*, 6, 2020, p. 1 ss., and esp., 9.

⁶⁹) E. NICOSIA, *Sulla non intenzionalità*, cit., p. 1016 with further bibliography.

⁷⁰) The reason is the following: the Roman judge could not apply the sanction provided for by a legal norm to cases that were not explicitly described in the wording of the same norm, and the extensive application of a legal norm to similar cases was not allowed in Roman criminal law, unless through punishment *extra ordinem* or if a new legal norm intervened. See Ulp. 7 de off. proc., *Coll.* 1.11.1 in relation to Ulp. 7 de off. proc., *Coll.* 1.6.1.

⁷¹) E. HÖBENREICH, *Due senatoconsulti*, cit., p. 85-86 nt. 33 acknowledges this impossibility, but retains plausible the hypothesis of a culpable homicide.

⁷²) Understood as the agent's erroneous belief that «non si realizzi quella conseguenza che pur si presenta alla mente dell'agente, ma è da questi ritenuta improbabile». The citation belongs to G. MUCIACCIA, *Sull'uso del termine « casus » nel diritto penale romano*, in *Atti del II Seminario romanistico Gardesano*, Milano, 1980, p. 357 ss., as given by F. BOTTA, *Osservazioni*, cit., p. 26 nt. 83.

⁷³) F. BOTTA, *Osservazioni*, cit., p. 18-19.

⁷⁴) E. NICOSIA, *Sulla non intenzionalità*, cit., p. 1016 seems absolutely categorical about this: «l'elemento psicologico preso in considerazione è esclusivamente il dolo: la distinzione è tra presenza o assenza di dolo, senza che si provveda ad una graduazione dell'elemento psicologico diverso dal (e sottostante al) dolo. Piuttosto, è il *malum exemplum* di quella dazione che viene considerato come criterio di imputazione per la punibilità della morte di colei che lo ha assunto».

does not identify positively, and (iii) that results, socially speaking, in a *malum exemplum*. If we accept this premise, and if we take into account the fact that the notion of *malum exemplum* does not appear in Roman jurisprudential thought as a strict criterion of liability, the identification of the agent's mental state in the negative (*non malo animo*) must be interpreted as something that only resembles *malus animus*. In other words, it may well be that Marcianus envisages here the hypothesis of a homicide that was not committed with full criminal intent (= with the necessary knowledge and will to cause death), but in some other way that seemed to be *malus animus*, for it still threatened the psychophysical integrity of a human being, but only potentially to an absolute degree. If Marcianus' intention was to allude to this grey area, but not to legitimise it by naming it ⁷⁵, it becomes more understandable why the Senate intervened directly to punish a potentially lethal therapeutic practice, while circumventing a discourse on proof of the agent's mental state ⁷⁶: questions of proof belonged to the realm of forensic rhetoric.

Could this be a culpable homicide due to *imperitia*? If the woman who gave the fertility drug was an *obstetrix*, implicit to her implied mental state could be a presumption of *imperitia* ⁷⁷, that would generate further discussion on the way in which the substance was procured (*dare*), or administered by the medical practitioner (*si quidem suis manibus supposuit/si quis medicamentum alicui infundit*) or personally by the patient (*ut sibi mulier offerret*) ⁷⁸, to become a cause of death ⁷⁹. In such a case of «medical malpractice» ⁸⁰, the di-

⁷⁵) From a different, but not incompatible, perspective with regard to this specific point, E. NICOSIA, *Sulla non intenzionalità*, cit., p. 1021: «Le fonti testimoniano piuttosto come, rimanendo sempre ferma nel corso del tempo la distinzione tra *dolus*, punibile, e *casus*, non punibile, *ex lege Cornelia*, si sia ritagliato all'interno del *casus* uno spazio in cui era possibile prevedere la punibilità di nuove specificate condotte che si continuano a definire, quanto all'atteggiamento psicologico, in negativo e cioè come 'non dolose'».

⁷⁶) Including for instance the agent's expertise, the dead person's prior physiological condition, or circumstantial issues.

⁷⁷) To this extent, I share the opinion expressed by E. HÖBENREICH, *Due senatoconsulti*, cit., p. 85-86 nt. 33.

⁷⁸) In the context of the present discussion, the term «patient» does not translate any Latin word.

⁷⁹) D. 9.2.9 pr. (Ulp. 18 ad ed.); D. 9.2.9.1 (Ulp. 18 ad ed.). M. GENOVESE, *Responsabilità aquiliana nell'occidere tramite medicamentum dare dell'ostetrica e/o di altri: notazioni critico-propositive su D. 9.2.9 pr.-1 (Ulp. 18 ad ed.)*, in *Scritti per Alessandro Corbino* (cur. I. PIRO), 3, Roma, 2016, p. 307 ss. is of the opinion (without including the required justification) that these fragments deal with the death of a slave due to a *datio medicamenti* performed by an *obstetrix*, presumably because it is generally accepted in legal doctrine that the life of a free person could not be subject to financial compensation (*aestimatio liberi*

rect or adequate causal nexus between the wrongful act and the prejudice would have to be disputed in order to determine civil liability for culpable homicide⁸¹. But it is clear that whatever the «profession» of the agent, the hypothesis of a culpable homicide due to *imperitia* is not sustainable from the perspective of Roman criminal law⁸²: from the moment the decree mentioned by Marcianus emanates, there is a new norm that extends the purview of the *lex Cornelia*, by criminalising the lethal potential of the act of procuring fertility drugs, which means that it is henceforth simply forbidden to pursue that kind of activity, whether with full criminal intent or not in a fully malicious way.

As I will try to show, *Dmin* 350 offers a clear intellectual representation of the stage prior to the extension mentioned by Marcianus, when questions of proof of the agent's mental state could practically pose additional difficulties, precisely because a homicide committed, not for the purpose of killing, but still with some knowledge and will for harm, fell outside of the original scope of the *lex Cornelia*. I will argue that Pseudo-Quintilian reflects in an original way on the tension between *dolus/animus* and what Marcianus will term as «recklessness» (*temeritas*), by bringing the latter closer to what mod-

corporis). However, this claim is reasonably contestable from a philological point of view (given that the word *mulier* does not normally indicate a slave woman in legal or non-legal terminology), but also, from a technical legal point of view, for which see C. SANFILIPPO, *Il risarcimento del danno per l'uccisione di un uomo libero nel diritto romano*, in *Annali Catania*, 5, 1950-51, p. 118 ss.

⁸⁰) The Roman concept of medical malpractice is defined, for D. 9.2.8 pr. (Gai. 7 ad ed. prov.), through the hypothesis *si medicamento perperam usus fuerit*, and falls within the category of *culpa*. It is articulated around the notion of *imperitia*, for which cfr. D. 50.17.132 (Gai. 7 ad ed. prov.); D. 9.2.7.8 (Ulp. 18 ad ed.); D.1.18.6.7 (Ulp. 1 opin.); I. 4.3.7. Interestingly, D. 9.2.52 pr. (Alf. 2 dig.), talks about *inscientia* and *neglegentia* with regard to the same concept. A brief analysis of the Roman legal framework covering medical responsibility is found in A. BOTTIGLIERI, *Alf. 2 dig. D. 9.2.52 pr. Responsabilità del medico*, in *Il diritto romano caso per caso* (cur. L. SOLIDORO, M. SCOGNAMIGLIO, P. PASQUINO), Torino, 2018, p. 67 ss.

⁸¹) D. 9.2.7.6 (Ulp. 18 ad ed.) where we have a culpable *datio* of a *venenum pro medicamento*.

⁸²) Allow me to raise a reasonable doubt, *en passant*, with regard to culpable homicide due to *imperitia* in Roman civil law: how can it be said that in D. 9.2.9.1 (Ulp. 18 ad ed.) the hypothesis of a potentially lethal drug (*medicamentum*) administered through corporeal contact (*vel ore vel clystere*), or of a noxious drug (*malum venenum*) applied in the same way, by force or persuasion (*per vim vel suasum*), contains simply and exclusively elements of fault (*culpa*), and not also of criminal intent (*dolus*), specifically when considering the modalities of administration of the drug?

ern legal systems in Western countries with civil law systems qualify as *dolus eventualis*⁸³, and contiguously, as «colpa cosciente»⁸⁴. As I will try to show, the rhetorician does not engage with a positively defined concept of recklessness in Roman criminal law, but instead with the argumentative patterns that rendered the notion comparable to *dolus* or *culpa*⁸⁵, which suggests that his aim was not to discuss «recklessness» in itself, but its contextual proximity to the broader category of criminal intent⁸⁶. If the argumentative patterns elaborated by Pseudo-Quintilian reflect a «first-order recklessness» (= the conception of a degree of criminal intent that was discursively negotiated in everyday court practice), and if they complement a «second-order recklessness» (= the jurisprudential conceptualisation of *temeritas* as a legal category) in a way that affirms the centrality of *dolus* in the legal treatment of homicide, then the evidence drawn from *Dmin* 350 would suggest that the decree mentioned by Marcianus in D. 48.8.3.2 cannot precede Hadrian's time.

5. Given this background, I would like to raise three interconnected problems that are of direct relevance to the elaboration of the disputed *veneficium* in *Dmin* 350:

- (i) in a society where malicious poisoning or culpable abuses of medicines were frequent, what was the ethical framework that determined the re-

⁸³) I infer this element from E. NICOSIA, *Sulla non intenzionalità*, cit., p. 1019-1020 who states in a beneficial way that in Roman civil and criminal law «l'avverbio *temere* indica l'atteggiamento di colui che consapevolmente (dolosamente) tiene una condotta che sa di non dover tenere».

⁸⁴) I infer this element from E. HÖBENREICH, G. RIZZELLI, *Poisoning*, cit., p. 296 who interestingly (accept to) translate *temere* in D. 48.8.3.3 (Marcian. 14 inst.) with «careless». Carelessness shows less culpability than recklessness, and puts us on the side of 'gross negligence' (*culpa*). NB however that D. 48.8.3.3 does not deal explicitly with a case of homicide, which should temper the attractiveness of the hypothesis advanced by E. HÖBENREICH, *Due senatoconsulti*, cit., p. 94 that «il secondo intervento senatorio estende, in pratica, la repressione della *lex Cornelia de sicariis et veneficis* ad ogni ipotesi di omicidio colposo realizzato attraverso la dazione di sostanze medicinali, anche diverse da quelle *ad conceptionem*». Cfr. P. LAMBRINI, *Il paradosso del dolo colposo*, in *Studi Urbinati, A - Scienze Giuridiche, Politiche ed Economiche*, 71.3-4, 2020, p. 579 ss., and esp., 590-594 for the concept of «dolo colposo» in modern Italian civil law.

⁸⁵) Depending on the point of view adopted for each side.

⁸⁶) Cfr. Quint. *Inst.* 4.2.52: *si personas convenientes iis quae facta credi volemus constituerimus, ut furti reum cupidum, adulterii libidinosum, homicidii temerarium*; Ps.-Q. *Dmin* 265.14: *Et utcumque, temeraria licet, aliqua ratio tamen appareret facti tui si impetu lapsus esses, si ductus ira: nullam petulantiam magis odi quam quae se propter hoc exerit, quia putat licere*.

- sponsible use of *venena* given the absence of formal medical schools and licensing boards ⁸⁷?
- (ii) if a concocted potion must technically qualify as *venenum malum* for the *lex Cornelia* to be applied, through which conceptual tools could one prove the reckless administration of ingested substances in a case of suspected *veneficium*?
 - (iii) how does the reckless administration of *venena* relate to the perception of the dangerousness of therapeutic practices and to accusations against physicians of being quacks ⁸⁸?

In an attempt to give nuanced responses to these questions, I will use the term *veneficium* heuristically ⁸⁹, and much like ancient declaimers, I will conceive of the Roman category of «poisoning» as a debatable notion underlying a multifaceted social practice and cluster of moral concerns that compelled legal practitioners to negotiate its meaning in relation to the interests at stake in a given case. This approach is justified by the untranslatability of *venenum*, namely, that if we translate the word with «therapeutic medicine», we tend to emphasise its rational, «scientific» content while overlooking its magical component, in the same way that if we render it as «poison», we ignore the potential therapeutic dimension that could be inherent in its action ⁹⁰. My concern here is not with a legal policy intending to impose a more incisive control of the skills and morality of those who «professionally» prepared and traded controversial substances of the type indicated in legal sources ⁹¹, but with the arguments

⁸⁷) For the difficulties deriving from the absence of ancient medical licensing boards, cfr. V. NUTTON, *Murders and Miracles: Lay Attitudes to Medicine in Antiquity*, in *Patients and Practitioners: Lay Perceptions of Medicine in Pre-Industrial Society* (cur. R. PORTER), Cambridge 1985, p. 23 ss.; W.V. HARRIS, *Popular Medicine in the Classical World*, in *Popular Medicine in Graeco-Roman Antiquity: Explorations* (cur. W.V. HARRIS), Leiden/Boston/Köln, 2016, p. 1 ss.

⁸⁸) Cfr. Cels. 3.4, 5.26; Plin. 29.14-28; Mart. 1.30, 8.74, 9.96, 10.77; Iuv. 10.22.1.

⁸⁹) On the importance of the heuristic approach in reconstructing emic categories, see J.B. RIVES, *Magic*, cit., p. 315-317 with regard to the Roman category of «magic».

⁹⁰) See C. PENNACCHIO, *Farmaco*, cit., p. 127 for the same reasoning on φάρμακον, with the precision that «traducendo in un modo o nell'altro si finisce indebitamente per privilegiare in senso assoluto un valore singolo che depaupera il sistema testuale complesso in cui si riassumono diverse unzioni e si sedimentano diverse regioni della cultura».

⁹¹) On the ancient drug trade, see V. NUTTON, *The drug trade in antiquity*, in *Journal of the Royal Society of Medicine*, 78, 1985, p. 138 ss.; J. KORPELA, *Aromatarii, pharmacopolae, thurarii et ceteri. Zur Sozialgeschichte Roms*, in *Ancient medicine in its socio-cultural context* (cur. PH.J. VAN DER EIJK, H.F.J. HORSTMANSHOFF, P.H. SCHRIJVERS), Amsterdam/Atlanta, 1995, p. 101 ss.; L.M.V. TOTELIN, *Pharmakopólai: a Re-evaluation of the Sources*, in *Popular Medicine in Graeco-Roman Antiquity: Explorations* (cur. W.V.

that highlighted the criminal dimension of a not criminalised type of homicide (= the reckless administration of potentially lethal substances) under a specific law. If the legal answer as to «how degrees of criminal intent in the context of the reckless administration of *venena* could be evaluated» was a pragmatic one⁹², the argumentative patterns found in forensic declamations, according to which the resulting injury bore a direct, explicit, and objective causal link to the agent's act, even if the latter was not fully malicious, assume an even greater importance. Furthermore, if we consider that the historical development of pharmacological knowledge from Cato's «primitivisme médical» to Galen's sophisticated *ars sanandi* depended on the progress of medicine in understanding drug mechanisms⁹³, and that this progress would have a direct impact on the pharmacological technology that could legally constitute the «scientific» basis of rhetorical proof for poisoning, it is safe to assume that the primary point of contention in trials revolving around cases of *veneficium* would be the definition of *venena* and their legal qualification as *mala*.

It is against this inference that I now wish to examine Pseudo-Quintilian's *Dmin* 350 with a focus on the arguments used to qualify cold water – that is, a neutral substance – as «poison». The theme of the declamation⁹⁴ runs as follows:

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.

HARRIS), Leiden/Boston/Köln 2016, p. 65 ss.

⁹²) That is, an answer regarding the verifiable physical harm or deterioration in someone's health, as rightly pointed out by E. HÖBENREICH, *Due senatoconsulti*, cit., p. 91; E. HÖBENREICH, G. RIZZELLI, *Poisoning*, cit., p. 296.

⁹³) See especially A. TOUWAIDE, *La thérapeutique médicamenteuse de Dioscoride à Galien: du pharmaco-centrisme au médico-centrisme*, in *Galen on Pharmacology. Philosophy, History, Medicine* (cur. A. DEBRU), Leiden/New York/Köln, 1997, p. 255 ss.; V. BOUDON-MILLOT, *La thériaque selon Galien: poison salutaire ou remède empoisonné ?*, in *Le corps à l'épreuve. Poisons, remèdes et chirurgie: aspects des pratiques médicales dans l'Antiquité et au Moyen Âge* (cur. F. COLLARD, E. SAMAMA), Chaumont, 2002, p. 45 ss.; Y. LEHMANN, H. LEHMANN, *La pharmacologie romaine antique. Avènement, développement, prolongements*, in *Revue d'histoire de la pharmacie*, 101.384, 2014, p. 447 ss.; H. KING, 'First behead your viper', cit., p. 30–32. Cfr. PH. TEICHFISCHER, *Tiergifte als Heilmittel – ein Beitrag zur Geschichte der antiken Medizin / Venom as a Cure – some Notes on Ancient Medicine*, in *Medizinhistorisches Journal*, 50.4, 2015, p. 319 ss.

⁹⁴) Texts and translations are taken from D.R. SHACKLETON BAILEY, [*Quintilian*]. *The Lesser Declamations*, vol. II, Cambridge, MA 2006.

A man had a son. When he lost the boy's mother, he married another wife. The son fell gravely ill. Doctors were called in; they said he would die if he drank cold water. The stepmother gave him cold water. The youth died. The stepmother is accused of poisoning by her husband. (trans. Shackleton Bailey)

The causal sequence of events, as established by the theme, is the following: a man whose wife has died, remarried; his son from the first marriage fell gravely ill; the physicians diagnosed him as curable unless he drank cold water; the stepmother voluntarily gave him cold water, knowing that this would be fatal for him; as a result, the young man died; the father brings a charge of *veneficium* against his second wife⁹⁵. The accusation will argue that the damaging act was clearly motivated by the intent to kill (*animus occidendi*), because the cold water had a lethal effect to the son's organism. The defence will object that there is no basis for a charge of *veneficium*, because cold water is not a harmful substance (*venenum malum*) in itself. The accusation will then have to employ a syllogism (*sylogismus ratiocinativus*): shouldn't the stepmother be punished as if she had procured a *venenum malum* with the intention to kill⁹⁶?

The father brings a charge of *veneficium*, because he believes the case to fall within the scope of a fictitious law on (voluntary) homicide from poisoning⁹⁷. However, the theme does not explicitly state the presumed declamatory

⁹⁵) For the sake of simplicity, I employ the word «father», the meaning of which does not correspond perfectly to the Latin *pater familias*, that is, to the «head of the family», who had no direct ascendant in the male line or who had been emancipated by one who exercised *patria potestas* over him.

⁹⁶) Ps.-Q. *Dmin* 350.3-4: *interim putemus nullam legem huic sceleri proprie esse constitutam: nonne proxima utendum est?* Cfr. Quint. *Inst.* 7.8.2: *Sit enim lex: «venefica capite puniatur. Saepe se verberanti marito uxor amatorium dedit, eundem repudiavit: per propinquos rogata ut rediret non est reversa: suspendit se maritus. Mulier veneficii rea est.» Fortissima est actio dicentis amatorium venenum esse: id erit finitio. Quod si parum valebit, fiet syllogismus, ad quem velut remissa priore contentione veniemus: an proinde puniri debeat ac si virum veneno necasset.* In the same spirit, M. WINTERBOTTOM, *The Minor Declamations Ascribed to Quintilian*, Berlin/Boston/New York, 1984, p. 555.

⁹⁷) Technically speaking, the death of the son renders this homicide a parricide (*parricidium*). For this sense of parricide shared in Roman forensic rhetoric and law, see F. LANFRANCHI, *Il diritto*, cit., p. 491. The declamatory law on voluntary homicide is *Qui causa mortis fuerit, capite puniatur* (Ps.-Q. *Dmin* 270). Cfr. Sen. *Rhet. Contr.* 8.4 with S. F. BONNER, *Roman Declamation*, cit., p. 100-101 for the variant *Homicida insepultus abiiciatur*. The rhetorical law on involuntary homicide *Imprudens caedis damnatus quinquennio exulet* (Sen. *Rhet. Contr.* 4.3, 6.2; Ps.-Q. *Dmin* 248, 305; Quint. *Inst.* 7.4.43) may be based according to S.F. BONNER, *Roman Declamation*, cit., p. 98-100 «on magisterial

lex veneficii (350.8), which anticipates the problem of the applicability of the law treated in 350.3-6. If Pseudo-Quintilian uses the *lex Cornelia de sicariis et veneficis* as his implicit point of reference in this declamation, it is fair to assume that here we have a case of «private poisoning» in the context of a fictitious public criminal trial, as opposed to a «private civil action for poisoning». This consideration impinges on the way in which the declamatory trial is organised: what does *actio* in the declamatory expression *actio veneficii* refer to? It has been observed that the use of the term in forensic declamations is extended to both fields, the civil and the criminal, and that in the declamations discussing criminal matters, there is a mixed use of *agere* («pursue legal action in a civil court») and *accusare* («bring a charge in a criminal court») ⁹⁸. It has also been suggested that the term *quaestio* would perhaps be more pertinent, since in the period under investigation, cases of *veneficium* came before the standing court established by Sulla's criminal legislation (*quaestio de sicariis et veneficis*); which implies that when declaimers «are either using inaccurate terminology, or are rendering in Latin the *γραφή φαρμάκων* of Greek Law» ⁹⁹.

I would like to propose a different interpretation in this regard. The technical rhetorical use of *actio* with regard to the *crimen veneficii* may not be as incongruous as it appears at first sight, if we construe *actio* as a topical mode of dealing with the issue of poisoning in the schools of rhetoric, that left ample room for adversarial interpretation, when both criminal accusations and civil claims could arise in a simultaneous way from the same borderline case. This interpretation can, moreover, serve as a testing ground for accommodating the (very real) possibility of the concurrence between, and accumulation of, a criminal prosecution (*iudicium ex lege Cornelia*) and a civil lawsuit (*actio legis Aquiliae*) in cases of voluntary homicide ¹⁰⁰, that was transformed into a formal legal principle by the beginning of the 3rd century CE ¹⁰¹. This possibility

decisions in cases of strong negligence, which fixed a limit to the period of exile».

⁹⁸) F. LANFRANCHI, *Il diritto*, cit., p. 510.

⁹⁹) S.F. BONNER, *Roman Declamation*, cit., p. 111 cit..

¹⁰⁰) This possibility derives from the coincidence of the syntagm *hominis occisio* within both laws, and is a much debated problem in legal doctrine. See most recently M. MIGLIETTA, *Il terzo capo della lex Aquilia è, ora, il secondo. Considerazioni sul testo del plebiscito aquiliano alla luce della tradizione giuridica bizantina*, in *AUPA*, 55, 2012, p. 403 ss., and esp., 409 nt. 10.

¹⁰¹) In a fragment excerpted from Book 57 of Ulpian's commentary *Ad edictum*, the jurist establishes the principle of the cumulative nature of judgements (civil and criminal) on the subject of the voluntary killing of another person's slave. See D. 47.10.7.1 (Ulp. 57 ad ed.) with M. MIGLIETTA, *Servus dolo occisus. Contributo allo studio del concorso tra « actio legis Aquiliae » e « iudicium ex lege Cornelia de Sicariis »*, Napoli, 2001, p. 325. It is

might be implicit to *Dmin* 350.3-6 (see *infra*). If the accuser failed to persuade the judge that the cold water did function as a poison, and that the stepmother did procure it with full criminal intent, the defence would be able to make use of the exonerating cause (= the cold water is not technically speaking a «poison») to exclude criminal responsibility on the part of the stepmother. Should things evolve in this way, the alleged act of poisoning would not be qualified as a voluntary act of homicide, but as a wrongful act resulting to unlawful damage (*iniuria*), on account of which the victim could file a financial claim¹⁰². It can therefore be hypothesised that the scenario presented in *Dmin* 350 would not be far from actual legal practice: in the case of the murder of a *filius familias*, the father would be obliged out of duty and respect (*officium pietatis*) towards the deceased to bring a public accusation *ex lege Cornelia* to obtain the punishment of the culprit, and could also exercise a private action *ex lege Aquilia de damno iniuria dato* to receive financial compensation for the loss wrongfully caused that he personally suffered.

Let us now dwell upon the instance of suspicion which is offered in *Dmin* 350 by cold water (*aqua frigida*). The element of water is highly pertinent in early Greek philosophy and Hippocratic medicine in terms of its power to act upon the human body. Cold water in particular was known to impact on health, considering the complex interaction between its nature (heavy/light, hot/cold, unhealthy/healthy) and that of the patient¹⁰³. If one includes

possible to make an analogy, valid but not easy by Roman standards, between killing a slave and killing a son: the way in which a *filius familias* was subordinated to the *potestas* of his *pater* was in some respects similar to the way in which a *servus* was subdued to the *dominium* of his *dominus*. This analogy functioned mainly on the basis of the patrimonial increase that the *filius familias* could normally bring to his *pater*. According to A. GUARINO, *Diritto privato romano*, Napoli, 2001¹¹, p. 1021 nt. 97.2.2 (who is cautious about this), the *pater*, faced with the murder of his *filius*, could exercise the *actio legis Aquiliae* «in via utile», that is, *in factum* (and therefore in line with D. 9.2.33.1 [Paul. 2 ad plaut.]), since it would be a question of claiming compensation for what the *pater* would have gained from his son's «professional» activity, in addition to the expenses incurred for medical treatment (see D. 9.2.33 pr. [Paul. 2 ad plaut.] and similarly, D. 9.2.7 pr. [Ulp. 18 ad ed.]). Now, if the *lex Aquilia* did apply to the damage arising from the wounding of a *filius familias* (as is suggested in D. 9.2.5.3 [Ulp. 18 ad ed.] and D. 9.2.7.4 [Ulp. 18 ad ed.]), one is inclined to think that it would apply *a fortiori* in cases of murder of a *filius familias*.

¹⁰²) As it can be inferred from Ps.-Q. *Dmin* 350.4: *petitio pecuniae*.

¹⁰³) See esp. G.E.R. LLOYD, *The Hot and the Cold, the Dry and the Wet in Greek Philosophy*, in *The Journal of Hellenic Studies*, 84, 1964, p. 92 ss.; J. JOUANNA, *Water, Health and Disease in the Hippocratic Treatise Airs, Waters, Places*, in *Greek Medicine from Hippocrates to Galen: Selected Papers* (cur. PH.J. VAN DER EIJK), Leiden/Boston, 2012, p. 155 ss.

cold water drunk in excess amongst ancient toxic agents¹⁰⁴, the medical problem disputed in our declamation becomes a realistic, though exceptional, possibility of death. The diagnosis of abusive ingestion of cold water would involve different levels of explanation¹⁰⁵ of the state of health or illness, conducted in terms of balance or imbalance of hot/cold properties in the body according to humoral ideas to therapeutic practices¹⁰⁶. These levels of explanation would involve, on the one hand, the observation of immediately perceptible signs or symptoms betraying death¹⁰⁷, and on the other hand, the interpretation of the pathological experience, based on the observation of such signs. The medical diagnosis included in *Dmin* 350 constitutes an essential step towards appreciating in medico-legal terms (i) the expertise of the doctor called upon to treat the sick person and (ii) any negligence on the part of the father (who had a moral duty, *officium pietatis*, to protect his son) in providing the appropriate treatment timely. With this in mind, the crux of the controversy lies first in establishing the cause of death (*causa mortis*) of the sick stepson (first cognitive level) and then in determining whether the stepmother's act should be punished as a voluntary *veneficium* (second cognitive level). These considerations represent different sets of legal problems: on the one hand, the objective, material causal nexus between the criminal act and its final result; on the other hand, the agent's mental state underlying the (way in which the) criminal act (was committed)¹⁰⁸. Although the stepmother's act objectively appears to be fully malicious in the logical unfolding of the chain of events that led to the death of the stepson, it is one thing for the legal practitioner to establish that the agent's act was the direct cause of death of the stepson, and quite another to infer from the effect of this act the purpose of killing. Having said that, the issue at stake is to define the mental state that motivated the act of procuring cold water to the sick stepson by anchoring it into a convincing degree of liability. This is because the stepmother's act can be

¹⁰⁴) A. TOUWAIDE, *Les poisons dans le monde antique et byzantin: introduction à une analyse systémique*, in *Revue d'histoire de la pharmacie*, 79.290, 1991, p. 265 ss., and esp., 269.

¹⁰⁵) Cfr. A. TOUWAIDE, *Les poisons*, cit., p. 270 for a similar line of reasoning with regard to the cognitive levels of explanation contained in data of medical relevance.

¹⁰⁶) For the historical reception of the Hippocratic humoral theory about the nature of health and the causes of disease, see P. HORDEN, E. HSU (cur.), *The Body in Balance: Humoral Medicines in Practice*, New York, 2015.

¹⁰⁷) A. TOUWAIDE, *Galien*, cit., p. 1896 highlights the importance, in terms of method, of the observation of signs or symptoms of poisoning.

¹⁰⁸) I adopt in this regard the conceptual distinction established by F. BOTTA, *Osservazioni*, cit., 2014.

viewed as both acceptable (cold water is not an illicit substance) and not entirely free from culpability (cold water should not be given to this stepson due to his illness), though objectively malicious (because it runs counter to medical advice). In theoretical terms, this issue translates into the definition of the disputed mental state as intentional or reckless (depending on the prevailing point of view): intentional, if it is proved that the event of death has been caused with full criminal intent; reckless, if it is proved that the event of death has been caused through not a fully wilful act facilitated by a combination of adverse circumstances (= the son's ill health). Thus, it would not be incorrect to consider that the antagonistic negotiation of the stepmother's state of mind reflected trends in contemporaneous legal practice and worked in accordance with the way in which the jurists would eventually think about the dialectic between *voluntas* and *casus* in broadening the legal category of murder ¹⁰⁹.

Indeed, if we consider that *Dmin* 350 is an anomalous case, where a perfectly ordinary and lawful act (= procuring cold water) may prove to be lethal due to the agent's will (*voluntas*), and not due to the patient's ill health, as the stepmother would have it (*casus*), it becomes clear that there is a two-fold challenge for the declaimer: (i) when speaking as the accuser, he has to frame the stepmother's act in terms of «direct intent» (she foresaw and consciously intended together with, and as a result of, the damaging act the death of the stepson); (ii) when speaking as the accused, he has to use arguments that do not attract liability (the cold water was given therapeutically). The stepmother could look at «criminal negligence» (*culpa*) as a defence, but this element of liability cannot prevail, for the simple reason that she was aware of the risk of harm, as a result of the medical diagnosis. Her «recklessness» consists precisely (i) in knowing that procuring a potentially lethal substance under the guise of a therapeutic cure would be objectively unjustified in the given context, and (ii) in taking the risk anyway.

As we shall see, this hybrid element of criminal liability, comprising both knowledge and acceptance of the risk ¹¹⁰, emerges at the level of judicial argumentation from the tension between criminal intent (*dolus*) and fault (*culpa*) because of the context (*casus*) ¹¹¹. And it is constructed in a manner as to corre-

¹⁰⁹) Ulp. 7 de off. proc., *Coll.* 1.6.1-4; D. 48.8.1.3 (Marcian. 14 inst.).

¹¹⁰) Knowledge of the risk: whether the accused can reasonably be expected to have known about a foreseeable risk of harm and to be able to want it. Acceptance of the risk: whether the accused can reasonably be expected to have taken the right precautions to minimise the probability that the actual inevitable harm occurs.

¹¹¹) The cognitive mechanism was not foreign to Roman jurists. F. BOTTA, *Osservazioni*, cit., p. 15 has argued that in D. 48.8.1.3 (Marcian. 14 inst.), the jurist laid the foun-

spond to a mental state in which the agent knowingly and deliberately pursued a harmful course of action, while disregarding the foreseeable risk of harm related to the actual danger represented by the same action that a reasonable person would normally know or ought to have known¹¹². If my hypothesis is correct, *Dmin* 350 offers a practical application of the patterns of argumentation that would eventually represent a key moment in the juristic interpretation of the *lex Cornelia*: that of the widening of the legal category of murder to acts of harm that were not fully malicious, but still conscious and voluntary in a damaging way¹¹³.

Let us now examine in detail the arguments with which the accuser tackles the applicability of the law (350.3-6) and the qualification of cold water as «poison» (350.7-9). The speech opens as follows (350.1-2):

Veneficii ago. Filium meum perisse, et ea potionem quam dederit noverca perisse, non difficile probabo. Nam et datam a se potionem non negat, et eam periculosam fuisse quae praedicta sunt ostendunt. Ne ignorantia quidem defendi [2] potest: id quod accidit denuntiatum est. Itaque non tam in defensione fiduciam

dations for the construction of the criterion of *impetus*, intermediate between *voluntas delinquendi* and *casus*. In a similar spirit, E. NICOSIA, *Sulla non intenzionalità*, cit., p. 1003-1012 with nt. 92 suggested on the basis of Ulp. 7 de off. proc., *Coll.* 1.11.1-4 that *lascivia* emerged in Roman jurisprudential thought as an intermediary concept between *dolus* and *culpa*. F. BOTTA, *Casu*, cit., p. 149 now interprets the expression *casu magis quam culpa/voluntate* found in the aforementioned sources as a «“criterio” di imputazione orientato a tener conto della particolare interazione [...] di *culpa/voluntas* e *casus*», applicable to borderline cases.

¹¹² Cfr. D. 9.2.31 (Paul. 10 ad Sab.).

¹¹³ My hypothesis provides an additional proof of reliability of the claim made by F. BOTTA, *Osservazioni*, cit., p. 7 with respect to C.I. 9.16.4(5): «Ne consegue, dunque, che ancora a quell’altezza temporale [the end of 3rd century CE], nella prassi poteva anche non escludersi la repressione *ex lege Cornelia de sicariis* dell’evento morte di un essere umano (libero) involontariamente causata, senza che rilevasse, inoltre, il mezzo di causazione della stessa (e cioè si punisse, in forza di quella legge, un crimine a forma libera)». It seems to me that the conceptual premise of Botta’s claim underlies the stepmother’s line of argumentation in *Dmin* 350. In a complementary way, see G. RIZZELLI, *Note*, cit., p. 312 with regard to *Dmin* 350: «si presenti la necessità di arginare la diffusione di pratiche pericolose per la vita delle persone, perseguendo l’uso di *venena* che abbiano sortito, contro la volontà di chi li abbia dati, conseguenze mortali: ipotesi, questa, che non ricadrebbe nella previsione della *lex Cornelia*». In my interpretation, the expression «contro la volontà di chi li abbia dati» is not incompatible with the notion of «recklessness» emerging in *Dmin* 350 (see *infra*), insofar as it can be understood to refer to different levels of conscious will (as opposed to some sort of duress).

habet quam in lege, nec tam dicere potest scelus se non fecisse quam illud, impune fecisse. Negat enim se teneri posse veneficii, quoniam non dederit venenum.

This is a poisoning charge. I shall have no trouble proving that my son died, and died of the drink that his stepmother gave him. For she does not deny that she gave him the drink, and that it was dangerous the warnings show. She cannot even offer ignorance as a defense: what happened was predicted. So she does not rely so much on a defense as on the law and she can't so well say she did not commit the crime as that she committed it with impunity. For she says that she can't be liable for poisoning since she did not give him poison. (trans. Shackleton Bailey)

The accuser begins by establishing that this is not a conjectural case ¹¹⁴ (= did the poisoning «factually» occur): the stepmother does not deny that she gave the draught to her sick stepson (*datam a se potionem non negat*), knowing about its dangerous effect as a result of the medical diagnosis. But the term *potio* is ambiguous; it can either mean a therapeutic potion or a mortiferous draught ¹¹⁵. Given this element, the point of contention is whether what transpired is in fact an act of poisoning, or in other words, whether a neutral substance like water can be qualified as «poison» in this case. The primary Issue is therefore Definition (*status finitionis*) ¹¹⁶.

The accuser claims that he has no difficulty in proving that his son died from poisoning, and that the stepmother gave the mortiferous draught. In this way, he sets out to establish the direct causal nexus between the death of his son as a medical «fact» and the lethal action, from which he can infer the stepmother's full criminal intent. It is clear, in his view, that the stepmother cannot plead error, due to lack of information (*Ne ignorantia quidem defendi potest*): she cannot defend herself on the grounds that she ignored the «factual» circumstance that the cold water could have had a lethal effect ¹¹⁷, because this vital information had been made available by the physicians (*quae praedicta sunt ostendunt*) ¹¹⁸. The idea that the stepmother was well aware of the dan-

¹¹⁴) In this sense, also M. WINTERBOTTOM, *The Minor Declamations*, cit., p. 555.

¹¹⁵) OLD, s.v. *potio*.

¹¹⁶) In this sense, also M. WINTERBOTTOM, *The Minor Declamations*, cit., p. 555.

¹¹⁷) F. LANFRANCHI, *Il diritto*, cit., p. 403.

¹¹⁸) The term *praedicta* may be understood as referring to the Hippocratic concept of prognosis. Considering the patient's overall condition, prognosis was employed with a view to determining the right moment (*καρπός*) to apply the best treatment. For the ambiguous status of the concept in the Hippocratic corpus, see G. MANETTI, *Theories of the Sign in Classical Antiquity*, Bloomington/Indianapolis, 1993 [trans. from *Le teorie del segno*

gerousness of her act, can be inferred from *id quod accidit denuntiatum est*. *Denuntiatum* is an interesting lexical choice with regard to the procedural relevance of the physicians' diagnosis. Significantly, Quintilian uses the term *denuntiari* to refer to witnesses whose presence in public court was mandated by law, and who were normally available only to the accuser¹¹⁹, as opposed to voluntary witnesses, who could be summoned by both sides¹²⁰. If Pseudo-Quintilian follows here the Quintilianic doctrine, he must use *denuntiatum* for a witness «making an official declaration». It is difficult to infer from this whether the testimony arising from the medical diagnosis was obtained (i) on the initiative of the prejudiced party, that is, the father (in which case, the physician would be either the party's private physician or a physician appointed by the magistrate at the request of the party as an impartial official), or (ii) through the intervention of a magistrate (in which case, the physician would act in an assigned medico-legal capacity and with an officially recognised status). Whatever the case may be, it is safe to assume that the physicians' diagnosis would be construed at the preliminary stage of the fictitious criminal trial (*causae cognitio*) as an impartial «expert testimony»¹²¹, that is, as a piece of evidence that the father's advocate would incorporate in his speech at the stage of the trial (*apud iudicem*), which is why the father uses it as an argument.

It thus becomes apparent – as claimed by the accuser – that the stepmother relies more on the text of the law and less on the articulation of a defence (*non tam in defensione fiduciam habet quam in lege*). And since she cannot openly deny that she did not commit the crime (*nec tam dicere potest scelus se non fecisse quam illud*), she says that she committed an unlawful act with impunity (*impune fecisse*). Hence, she does not deserve to be punished, because she did not give the stepson «poison» (*Negat enim se teneri posse veneficii, quoniam non dederit venenum*). The implication is that in the stepmother's opinion, what she did is not illegal *per se*, nor does it correspond to the act punished by the *lex veneficii*: cold water is not normally classifiable as a noxious substance, and the law does not specifically mention cold water as a cause of death by poisoning. The stepmother's argument thus raises the implicit

nell'antichità classica, Milano, 1987 by Ch. Richardson], p. 37-39. Since prognosis, diagnosis, and treatment were integrally connected in Hippocratic medical thought, I employ «diagnosis» in the sense of «judgement of a disease after examination».

¹¹⁹) Cfr. Plin. *Ep.* 5.20.

¹²⁰) Quint. *Inst.* 5.7.9: *Et quoniam duo genera sunt testium, aut voluntariorum aut eorum quibus in iudiciis publicis lege denuntiari solet, quorum altero pars utraque utitur, alterum accusatoribus tantum concessum est [...]*.

¹²¹) Impartial, insofar as it was not exclusively construed as a testimony for the defence.

problem of the determinacy of the law ¹²² (= whether the crime of *veneficium* is described in clear and precise terms) and can be reconstructed as follows: she did not commit the crime of poisoning, because the element that would constitute the criminal act of *veneficium* from the perspective of the law is lacking: without a «poison» there can be no direct and objective causal nexus between what she did and the death of the stepson, which means that she should not be punished.

If this line of reasoning were to persuade the judge(s), the accuser would be thought of as having brought a false accusation (*calumniā*). In order to rebut the implicit possibility of malicious prosecution, the father entertains the hypothesis that there is no law applying to the criminal act committed by the stepmother, which enables him to broach the question of the applicability of the *lex veneficii* (350.3-6):

[3] Postea videbimus et quomodo intellegendum sit venenum et an hoc quod datum est illo tempore fuerit venenum; interim putemus nullam legem huic sceleris proprie [4] esse constitutam: nonne proxima utendum est? Non ignoro esse frequentem huiusmodi in iudiciis minoribus dumtaxat contentionem, ut <petitor> pecuniae excidisse formula, ut aliter quam oportuerit agere dicatur. Sed haec tunc valent cum ostenditur ius aliud quo agendum sit. 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 contendis, ut istud, etiamsi scelus sit, facere [5] licuerit. Atqui hoc etiamsi <sit> non proprie conscriptum, consuetudine iudiciorum consequens est, quotiens aliqua propria actio in rem non detur, uti proxima et simili. Nulla tanta esse potuit prudentia maiorum (quamquam fuit [6] summa) ut ad omne genus nequitiae occurrat. Ideoque per universum et per genera singula conscripta sunt iura. Caedes videtur significare sanguinem et ferrum; si quis alio genere homo fuerit occisus, ad illam legem revertemur: si [inciderit in latrones aut] ¹²³ in aquas praecipitatus, si in aliquam immensam altitudinem deiectus fuerit, eadem lege vindicabitur qua ille qui ferro percussus sit. Igitur et alia similia. Lex de aqua frigida scripta non erat: redeamus necesse est tamen ad eam quae venena coercet, cum aqua frigida id effecerit quod venenum.

¹²²) Cfr. the declamatory *actio inscripti maleficii* (ἄγραφον ἀδίκημα), which is thought to be a fictitious legal procedure for safeguarding against illicit acts that did not fall under the scope of existing law. See F. LANFRANCHI, *Il diritto*, cit., p. 504-507; S.F. BONNER, *Roman Declamation*, cit., p. 86-87. According to Quint. *Inst.* 7.4.36, in cases involving an *inscriptum maleficium*, the question is either whether the act is not specified by law (*aut hoc quaeritur, an inscriptum sit*) or whether it is indeed wrongdoing (*aut hoc, an maleficium sit*).

¹²³) Deleted by M. WINTERBOTTOM, *The Minor Declamations*, cit..

Later we shall see both how «poison» is to be understood and whether what was given at that time was poison; meanwhile, let us suppose that there is no law specifically applying to this crime: don't we employ the one that comes closest? I am not unaware that in trials of this sort, those of lesser consequence at least, it is often contended that <a claimant> has used the wrong form, is pleading incorrectly. But these arguments have force only when another law is pointed out under which the action should take place. So if you tell me under what other law I should have brought my charge, you are right to exclude this one under which I am pleading. But you neither admit this action of mine nor show me another to which I can withdraw when I am dislodged from this law; your contention is that what she did was legal, even though it is a crime. And yet, though this <may> not <have been> drafted with specific reference, it follows in customary trial procedure that, whenever an action specific to the matter is not to hand, we employ the one that comes closest, one similar. The wisdom of our ancestors (though it was of the highest order) could not be so great as to meet every kind of wickedness, and for that reason laws were written comprehensively through the several categories. 'Murder' seems to signify blood and steel; if someone is killed in some other way, we shall go back to that law. If he is flung into water or thrown down from an immense height, he will be avenged by the same law as the man who has been stabbed. And so on, therefore. No law had been written about cold water. However, we must go back to the law that punishes poisons, since cold water had the effect of poison. (trans. Shackleton Bailey)

Since the accuser cannot stand on the wording of a specific law, he needs to make the case at hand fall under the intention of another, similar law (350.4: *nonne proxima utendum est*)¹²⁴ through a syllogism¹²⁵. The father thus raises the question of the extensive interpretation of the fictitious law¹²⁶ through ar-

¹²⁴) Cfr. Quint. *Inst.* 7.8.1.

¹²⁵) Cfr. Quint. *Inst.* 7.8.7: *an, quotiens propria lex non est, simili sit utendum.*

¹²⁶) A note of caution. There is a difference between an extensive application of the law (found for instance in, D. 48.8.3.2-3 [Marcian. 14 inst.]) and an extensive (= analogical) interpretation of its wording: it is one thing for the legal practitioner and the judge to interpret through analogical reasoning vague elements in the description of a criminal offence to prevent cases not directly subject to the legal rule from escaping its regulation, and another thing for the Senate or the emperor to expand the original content of a legal rule to new, not explicitly delineated, cases. For extensive interpretation and analogical reasoning from the perspective of the Roman classical jurists, see A. MANTELLO, *L'analogia nei giuristi tardo repubblicani e augustei. Implicazioni dialettico-retoriche e impieghi tecnici*, in *Il ragionamento analogico. Profili storico-giuridici* (cur. C. STORTI), Napoli, 2010, p. 3 ss.; L. VACCA, *L'interpretazione analogica nella giurisprudenza classica*, in *Il ragionamento analogico. Profili storico-giuridici* (cur. C. STORTI), Napoli, 2010, p. 71 ss. For the reconstruction of the Quintilianic doctrine of legal precedent on the basis of the rhetorical theory of

guments that analogically extend its spirit to cases where a neutral substance that circumstantially functioned as a «poison» was the direct cause of death of a person. This intellectual move serves to bridge the gap between what is said and what is intended in the law, which is then corroborated by a comparison with civil procedure. The father's argument can be reconstructed as follows: in trials under civil law (*in iudiciis minoribus*), which are not of public importance¹²⁷, it is often contended that a claimant has brought the wrong prosecution claim. Implicit to this is the principle that a wrong prosecution claim would give the defendant the opportunity to deny the action, or to allege that what he did was something other than what he is charged with, or to defend his act, or (if he does nothing) to stand on his legal position; which would raise the issue of the legality of judicial proceedings (*quaestio actionis*)¹²⁸. And when challenging the very legitimacy of the legal action (*an actio non iure intenditur*)¹²⁹ – through a *status translationis* (μετάληψις)¹³⁰, or at the level of *intentio*, or with a *praescriptio*¹³¹ –, there is normally no need for the defendant to comment on his alleged culpability. According to the father, the argument regarding the wrong prosecution claim would have force, only if a more suitable law was brought forward (350.4: *cum ostenditur ius aliud quo agendum sit*). But as things stand, the stepmother attacks the validity of the prosecution claim without pointing out another law that would properly apply to the case at hand (350.4: *neque hanc actionem meam admittis neque aliud demonstras quo recedam ab hac lege depulsus*). Instead, her advocate uses argumentatively the spirit of the *lex veneficii* against the letter of the law in the manner of a *praescriptio*¹³², to contend that what she did was legal (350.4-5: *facere licuerit*), i.e. not punishable. We shall notice that overall, the father's line of reasoning is grounded on a careful and implied understanding of the functioning of Ro-

analogical reasoning, see N. PAKONSTANTINO, *Praejudiciorum vis: Legal Precedent and Analogical Reasoning in Roman Rhetorical Education under the Early Empire*, in *Rheinisches Museum für Philologie*, 166 (in press).

¹²⁷) In this sense, D.R. SHACKLETON BAILEY, [*Quintilian*], cit., p. 305 nt. 1.

¹²⁸) Quint. *Inst.* 7.5.1: *Qui neque fecisse se negabit neque aliud esse quod fecerit dicit neque factum defendet, necesse est in suo iure consistat, in quo plerumque actionis est quaestio.*

¹²⁹) Quint. *Inst.* 3.6.83.

¹³⁰) Quint. *Inst.* 3.6.68 with H. LAUSBERG, *Handbook of Literary Rhetoric. A Foundation for Literary Study*, Leiden/Boston/Köln, 1998 [trans. from *Handbuch der literarischen Rhetorik: eine Grundlegung der Literaturwissenschaft* München, Max Hueber Verlag, 1960 by D. F. ORTON, R. D. ANDERSON], p. 59-60 (§§131–133).

¹³¹) According to Quint. *Inst.* 7.5.2-4.

¹³²) As recommended by Quint. *Inst.* 7.5.4 when there was no ground for a formal *praescriptio*.

man formulary procedure, and that it is probably aimed to highlighting the absurdity of the (yet conceivable) idea that a homicide could be excused, and left unpunished, because of a wrong prosecution claim ¹³³.

In response, the father argues that although there is no law punishing poisoning by cold water expressly ¹³⁴, it is customary at the level of the procedure (*consuetudo iudiciorum*) that, in lack of a legal action specific to the matter (350.5: *quotiens aliqua propria actio in rem non detur*) ¹³⁵, the judge applies by analogy a similar action (350.5: *uti proxima et simili*). The father thus insists on the extensive interpretation of the law, with the argument that the impossibility of covering every kind of criminal act (*omne genus nequitiae*) led ancient lawmakers to draw up legal rules (*iura*) in terms of abstractness (*per universonum*) and with a view to providing a framework for individual cases (*per genera singula*) ¹³⁶. Then, by making an allusion to the *lex Cornelia*, the father claims that the category of «homicide», which relates to cases involving physical violence and armed agents (350.6: *Caedes videtur significare sanguinem et ferrum*), can also cover other forms of killing (*alio genere*) ¹³⁷, in which indirect causes lead to the death of a person ¹³⁸, through extensive interpretation (350.6: *ad illam legem revertemur*). The father therefore concludes: if the *lex veneficii* can be applied in similar cases, and if cold water is the relevant inference that renders it applicable to the case at hand because cold water had the effect of a «poison» (350.6: *cum aqua frigida id effecerit quod venenum*), then the stepmother's act is the singularly necessary cause for the stepson's death.

¹³³) Cfr. Ps.-Q. *Dmin* 260.4: *Sit tolerabile formula errare et in petitione pecuniae non uti iure concesso: aliquis caput hominis perperam petit, et errat ut occidat?*

¹³⁴) Ps.-Q. *Dmin* 350.6: *Lex de aqua frigida scripta non erat.*

¹³⁵) The legal expression *actio in rem* technically refers to a legal action designed to protect a subjective right conferring absolute and immediate power over a thing, by which the plaintiff claimed his property of a thing or his rights to a benefit from a thing. See M. TALAMANCA, *Istituzioni di diritto romano*, Milano, 1990, p. 309. The legal expression does not seem to be used in a technical manner in the declamation.

¹³⁶) D.R. SHACKLETON BAILEY, [*Quintilian*], cit., p. 307 nt. 2 reads *singula genera*. *Contra* M. WINTERBOTTOM, *The Minor Declamations*, cit., p. 556 ad loc.: «if taken with *genera*, this seems to blur the point (331.4 has merely *rerum genera*). Take, then, with *iura* (Håkanson): 'each (individual) law covers a broad sector of crimes.'» But *singula iura* does not appear in Latin literature, while *genera singula* is found in Cels. 5.27.3a.3 and in Vitr. 1.7.2.12.

¹³⁷) In the same spirit, D.R. SHACKLETON BAILEY, [*Quintilian*], cit., p. 306 nt. 2.

¹³⁸) As in the case of a fall from height or into the water (350.6: *si [inciderit in latrones aut] in aquas praecipitatus, si in aliquam immensam altitudinem deiectus fuerit*), where the direct cause of death is strictly speaking the act of falling, while the implied indirect cause is the act of pushing that causes the fall.

But can cold water be classified as a (*malum*) *venenum* (350.7-9)?

[7] Haec, ut remittam non fuisse hoc *veneficium*; nunc vero *venenum* quomodo interpretari et intellegere possumus? Ut opinor, potionem mortis causa datam. Non quaeritur qualis sit, sed quid efficiat. Nam ipsorum *venenorum* plura genera, plura nomina sunt, diversi etiam effectus. Aliud ex radicibus herbarum contrahitur, aliud ex animalibus mortiferis reservatur; sunt quae frigore sanguinem gelent, sunt quae calore nimio vitalia exurant: omnia tamen [8] haec sub unam legem *veneficii* veniunt. Quin illud etiam in rerum natura manifestum atque deprehensum est, alia esse aliis *venena*: quaedam, mortifera nobis, etiam in remedium quorundam animalium cedunt; quaedam, quae in voluptates etiam et luxuriam adhibentur, multis animalibus adferunt mortem. Similis ratio et remedium est. Cur igitur non sit differentia [cum veneno] ¹³⁹ etiam temporis? [9] Nihil interest quid faciat alias: nunc *venenum* est. Quomodo autem comprobare ista possumus? Ante omnia animo dantis, deinde effectum. Animus dantis qualis fuerit, mox probabimus; interim de effectu constat. Vultis aestimare? Adeo certum fuit hoc *venenum* esse ut praedictum sit. In summa, quid plus pati potuerat adulescens si *venenum* bibisset? Ponamus ex altera parte illam potionem cuius tu nomen subinde iactas, pone ex altera potionem quam tu dedisti: de utraque idem medici dicent. Si nihil interest mortis, nihil interest criminis.

This I say as conceding that this was not poisoning. But as matters stand, how can we interpret and understand poison? As I suppose, as a drink given to cause death. The question is not what it is but what it effects. For of actual poisons there are many varieties, many names, the effects too differ. One is drawn from the roots of herbs, another is put aside from deadly animals; some freeze the blood with cold, others burn the vitals with excess of heat. But all these come under the same law of poisoning. Furthermore, it is clear and discovered in the Nature of Things that different organisms have different poisons. Certain of them, lethal to us, actually become remedial for certain animals, certain others, that are even used for pleasure and luxury, bring death to many animals. It is the same with remedies. So why should there not be a difference of time too? What it does another time makes no difference: now it is poison. First, by the giver's intention, second, by the effect. What sort of intention the giver had, I shall prove presently; meanwhile, all agree about the effect. You wish to judge? That this was poison was so sure that it was predicted. In fine, what more could the young man have suffered if he had drunk poison? Let us put on one side that potion the name of which you bandy about from time to time and on the other side the potion which you gave: the doctors will say the name of both. If the death is no different, the crime is no different. (trans. Shackleton Bailey)

¹³⁹) Deleted by M. WINTERBOTTOM, *The Minor Declamations*, cit..

Even if the father concedes that what the stepmother did is not a *veneficium*¹⁴⁰, the question as to how can «poison» be defined (350.7: *nunc vero venenum quomodo interpretari et intellegere possumus*) remains open. And since the only possible answer, according to the father (*ut opinor*), is «a substance given to cause death» (*potionem mortis causa datam*), the point is not whether cold water is strictly speaking a «poison», but whether this neutral substance had the effect of a «poison» (350.7: *Non quaeritur qualis sit, sed quid efficiat*). The reason is, still according to the father, two-fold: (i) although there are many different types of toxic substances of plant and animal origin that can have lethal consequences, they all fall under the same law because they all produce the same effect¹⁴¹; (ii) *venena*, just as *remedia*, can have a healing or fatal effect depending on the organism that consumes them¹⁴². If then what matters from a medical point of view is not so much the nature of the substance as its harmful potential (alone or in conjunction with other causes) for the organism that receives it¹⁴³, the moment of consumption should not make a difference from a legal point of view (350.8: *Cur igitur non sit differentia [cum veneno] etiam temporis*): a *venenum* remains at all times a «poison» because of the agent's intention (*animo dantis*) and of the effect produced (*effectu*).

By linking to the precondition of the son's illness the *circumstantia* of time¹⁴⁴, the father frames the interpretation of *venenum* in such a way as to imply that the stepmother knew as a result of the medical diagnosis that in this specific context cold water would eventually function as «poison» (350.9: *Adeo certum fuit hoc venenum esse ut praedictum sit*). This means that the stepmother not only foresaw this particular effect, which is now not disputed (350.9: *interim de effectu constat*), but also did everything to obtain it. This is a first allusion to the implied concept of «recklessness». The father goes on to ask what more could his son have suffered if he had drunk what normally qualifies as *venenum* (350.9: *quid plus pati potuerat adulescens si venenum bibisset*)? Here is a rhetorical question, since it is indifferent whether the step-

¹⁴⁰ M. WINTERBOTTOM, *The Minor Declamations*, cit., p. 556 ad loc..

¹⁴¹ Ps.-Q. *Dmin* 350.7-8: *Nam ipsorum venenorum plura genera, plura nomina sunt, diversi etiam effectus. Aliud ex radicibus herbarum contrahitur, aliud ex animalibus mortiferis reservatur; sunt quae frigore sanguinem gelent, sunt quae calore nimio vitalia exurant: omnia tamen [8] haec sub unam legem veneficii veniunt.*

¹⁴² Ps.-Q. *Dmin* 350.8: *Quin illud etiam in rerum natura manifestum atque deprehensum est, alia esse aliis venena: quaedam, mortifera nobis, etiam in remedium quorundam animalium cedunt; quaedam, quae in voluptates etiam et luxuriam adbibentur, multis animalibus adferunt mortem. Similis ratio et remediorum est. Cfr. Cels. *Prooem.* 58.*

¹⁴³ Cels. *Prooem.* 59.

¹⁴⁴ *Differentia temporis* (350.8) recalls *ab illo tempore* (350.3).

mother gave, say, hemlock (350.9: *illam potionem cuius tu nomen subinde iactas*)¹⁴⁵ or cold water (350.9: *potionem quam tu dedisti*): the potion would in any case be defined as «poison» by the physicians (*de utraque idem medici dicent*), because the result would be lethal in both cases, and so should be the substance that caused it¹⁴⁶.

Having established that the stepmother was not in a situation that prevented her from being aware of the risks of her action, the father must now prove the stepmother's agency (*animus*) on the chain of causes that brought about his son's death, by comparing her conduct to a standard model of diligent and prudent behaviour. In that way, he will be able to demonstrate that the stepmother was not at fault, but that she acted with full criminal intent (350.10-12):

[10] Haec ad ius; sed ad ream legi suae applicandam sane scrutemur et animum. Non dico quae sit quae dederit; interim hoc respondeo, aquam frigidam dedit. Sane medici non vetuerint, non timuerint; satis est, non permiserunt. Personam non onero, denuntiationem dissimulo: dedisti [11] aegro quod pater non dedisset. Si unus aliquis ex medicis nocituram tantum potionem esse dixisset, dicerem tamen: fortasse moriturum non putaveris, nocere voluisti. Nunc inter omnes medicos constitit periturum esse si aquam frigidam [12] bibisset: dedisti postquam certum erat. Velim scire an aliquid tale in valetudine eius et ante feceris. Nam sive fecisti, apparet quomodo ad tantum periculum deductus sit; sive non fecisti, apparet fuisse causam propter quam faceres. 'Non putavi nocere, nec credidi medicis. Adeone ignota medicinae experimenta sunt?'

So much as to law. But to attach the defendant to her proper statute, let us by all means examine her intention too. I won't say *who* the giver is; meanwhile, I reply that she gave cold water. Suppose the doctors didn't forbid, had no fears: it is enough that they didn't give permission. I don't stress the persona, I say nothing of the warning: you gave a sick person what his father would not have given. If just one of the doctors had said that the potion would only harm, I would say in spite of all: perhaps you did not think he would die, you only wanted to harm.

¹⁴⁵) D.R. SHACKLETON BAILEY, [*Quintilian*], cit., p. 308 nt. 4 proposes hemlock, for which see J. SCARBOROUGH, *Pharmacology in the Early Roman Empire: Dioscorides and His Multicultural Gleanings*, in *Oxford Handbook of Science and Medicine in the Classical World* (cur. P.T. KEYSER, J. SCARBOROUGH), Oxford, 2018, p. 519 ss., and esp., 532-533. Less convincingly, M. WINTERBOTTOM, *The Minor Declamations*, cit., p. 556 ad loc. assumes *venenum* as a «word much bandied about by the stepmother in denying it could cover cold water».

¹⁴⁶) Ps.-Q. *Dmin* 350.9: *Si nihil interest mortis, nihil interest criminis*. A rhetorical *sententia*.

As it is, all the doctors agreed that he would die if he drank cold water. You gave it after there was a certainty. I should like to know whether you did anything like that before his sickness. For if you did, it is plain how he was brought into such danger; if you did not, it is plain that there was a reason why you did it. «I did not think it was harmful, and I did not believe the doctors. Are medical experiments so little known?» (trans. Shackleton Bailey)

The father says that he will not openly blame *her* who gave the «poison» (350.10: *non dico quae sit quae dederit*); he simply states that she gave cold water (*aquam frigidam dedit*). The topos of the cruel stepmother is not taken up¹⁴⁷, but the figure of irony does more to implicate this stepmother in giving the poison rather than to exonerate her. The father proceeds to appeal to the authority of the physicians. Supposing that they did not expressly forbid the disputed course of action (*non vetuerint*), as they did not fear the lethal potential of cold water (*non timuerint*), it suffices to say that they did not authorise it either (*non permisserunt*). So, even if the father does not accuse the stepmother (*Personam non onero*), and even if he conceals the physicians' expert testimony (*denuntiationem dissimulo*), the fact remains that the stepmother gave to her sick stepson something that even his own father would not have given (350.10-11: *dedisti aegro quod pater non dedisset*), thereby frustrating the healing process. The implication is triple: (i) she did not consult with her husband before employing treatment, which challenges the authority of the *pater familias* – the traditional all-knowledgeable healer according to Cato's ideal –¹⁴⁸ within the family; (ii) she harmed her stepson's physical integrity, as if she had absolute control over his life and death; (iii) she acted without the necessary technical pharmacological knowledge on the subject, as if she were a «professional» physician, which implies, at the very least, her wilful disregard for the risk of death (= recklessness).

Now if the physicians were not in agreement about the lethal potential of cold water, it could be defended, according to the father, that the stepmother did not foresee death, but that she desired a lesser harm (350.11: *fortasse moriturum non putaveris, nocere voluisti*), intending cold water as an antidote. However, as things stand, there is a total consensus amongst the physicians involved in the case that the sick son would die if he drank cold water (350.11: *inter omnes medicos constitit periturum esse*), which necessarily entails that the

¹⁴⁷) On the literary topos of the *saeva noverca*, see D. VAN MAL-MAEDER, *La fiction des déclamations*, Leiden/Boston, 2007, p. 128-136.

¹⁴⁸) For the need of deliberation in cases of medical treatment, see Ps.-Q. *DM* 8.4; 8.11.

stepmother gave the poison with full knowledge of the facts (350.12: *dedisti postquam certum erat*). An implicit analogy between the helpless stepson/patient and the unscrupulous stepmother/«physician» is established¹⁴⁹, making it impossible for the father to accept that an error intervened, or that a more serious event occurred than the one the stepmother intended to produce, and therefore that she did not act with the purpose of homicide. At this point, the stepmother's *animus* clearly emerges as «recklessness» specifically derived from *fortasse moriturum non putaveris, nocere voluisti*.

The stepmother's *animus* is further analysed when the father wonders whether she actually caused the stepson's illness by poisoning him slowly (350.12: *Velim scire an aliquid tale in valetudine eius et ante feceris*). The argument on chronic poisons and the extent of toxicity confirms awareness on the part of Pseudo-Quintilian of the causal relationship between dosage and effective harm in Roman specialised pharmacological thought¹⁵⁰. In this instance, the rhetorician may have thought of arsenic, whose success was guaranteed by the administration of small, continuous doses that produced a progressive state of prostration in the individual, and which could be interpreted as the course of a fatal disease in the absence of toxicological investigation¹⁵¹. If the stepmother acted in the way it is alleged, then the crime is solved because the father is successful in proving that his son's life was put in great danger (350.12: *apparet quomodo ad tantum periculum deductus sit*); otherwise, it is still proved according to the father that the stepmother had a motive to poison her stepson (350.12: *apparet fuisse causam propter quam faceres*).

One can only speculate on the nature of the alleged motive, since the declamation ends with the stepmother saying in the first person (ethopoeia) that she did not think cold water would be harmful, nor did she believe the physicians (350.12: *Non putavi nocere, nec credidi medicis*). As a last resort, the stepmother builds her argumentative strategy on an implied error, and contests the medical authorities invoked by the father, in order to question what the physicians said it would happen in relation to what «actually» happened in such an atypical case, where it would be more plausible to think that the stepson died from a series of events that encompassed a looser causal nexus with the administration of cold water that is normally a safe substance. This could count as an implicit accusation of «malpractice» on the part of the phy-

¹⁴⁹) For the topos of helplessness of the patient vis-à-vis the physician in non-medical literature, see especially Plin. 29.5.11.

¹⁵⁰) Scrib. 199: *Medicamentorum malorum non nocet nominum aut figurarum notitia, sed ponderis scientia*.

¹⁵¹) On arsenic, see C. PENNACCHIO, *Farmaco*, cit., p. 161.

sicians. The stepmother's focus is on justifying her *animus*, which can be perceived, at best, as total lack of concern for the sick stepson or, at worst, as malice aforethought. This is a difficult task mainly for two reasons: (i) although the misconduct imputed to her normally causes no harm, let alone death, the physicians gave a «scientific» rule in their diagnosis that she did not follow; (ii) although it was possible, and most probably advisable, to seek expert advice in cases of medical treatment¹⁵², it seems that in the stepmother's mind, expert advice alone was not expected to determine whether one should pursue with the proposed treatment. By admitting that she did not abide by the physicians' opinion, she ultimately displays the shocking ignorance and inattention¹⁵³ that a diligent and prudent person would not (and should not) normally have observed in the same situation.

Finally, the stepmother's strategy raises the question whether the medical diagnosis could be used as external unequivocal evidence that allows to identify her action as the direct *causa mortis*. Her answer comes in the form of a polemic against physicians running through her ethopoeia. The rhetorical question *Adeone ignota medicinae experimenta sunt?* (350.12) may be understood as discrediting the physicians' expert opinion, or as suggesting that giving cold water to the stepson under the known circumstances was an experiment on her part¹⁵⁴. But even if we accept that a decision for medical treatment could be based not only on medical diagnosis, but also on personal, non-medical factors, the idea that the stepmother intended to risk an ill-advised treatment out of pure affection for the stepson is not easy to work with. Rather, the notion that a lay person could employ a medical treatment, without taking into account expert advice¹⁵⁵, renders the stepmother an intellectual threat to the

¹⁵²) For medical deliberations in cases of suicide, cfr. Sen. *Ep.* 77.5-9; Plin. *Ep.* 1.22. See also D. GOUREVITCH, *Suicide among the sick in classical antiquity*, in *Bulletin of the History of Medicine*, 43, 1969, p. 501 ss., and esp., 514-515.

¹⁵³) Ignorance: a pretence of knowledge about how poisons function. Implicit to this is perhaps an oblique appeal for the responsible use of drugs, so as not to become «poisons» (cfr. Scrib. 1, 84, 114). Inattention: a sort of self-authorisation to deal with therapeutic substances.

¹⁵⁴) D.R. SHACKLETON BAILEY, [*Quintilian*], cit., p. 310 nt. 8. Significantly, we know of such experiments. Cels. 3.9-10 reports the case of a certain Petro who is said to have treated patients with fever by progressively administering doses of cold water, which he combined with other techniques if successful or not. Qualified as *temeraria medicina*, the whole treatment had a lethal potential and was therefore opposed to *circumspectio* («foresight», «caution»). For *temeraria medicina* as a line of treatment that was not always successful in cases of vesical calculi, see Cels. 7.26.2b.

¹⁵⁵) As regards the intriguing question whether a skilled man in ancient medicine

medical authorities invoked by the father, precisely because it conflicts with the long-standing Hippocratic principle that «medicine is the knowledge of healing, not harming»¹⁵⁶.

The element of recklessness, weighing upon the stepmother/«physician», offers insights into common perceptions of the «professional» physician¹⁵⁷ as someone who could commit murder with impunity¹⁵⁸, thereby problematising (i) the role of error in the learned physician's cognition¹⁵⁹ with regard to medico-legal investigations, (ii) the primacy of experience over experimentation (probably under the influence of the Empiricists)¹⁶⁰, and (iii) the

needed to be a «professional» physician, other than his own physician, V. NUTTON, *Murders*, cit., p. 41-42 observes that «the art of medicine may be necessary, but the intervention of physicians [...] is not always so».

¹⁵⁶) Scrib. *Praef. 5: scientia enim sanandi, non nocendi est medicina*. On ancient medical ethics, see D.W. AMUNDSEN, *The Physician's Obligation to Prolong Life: A Medical Duty without Classical Roots*, in *The Hastings Center Report*, 8.4, 1978, p. 23 ss.; P.J. CARRICK, *Medical Ethics in the Ancient World*, Washington D.C., 2001. For the perceived universality of such «mission statements», see H. BALTUSSEN, «Hippocratic» Oaths?: *A Cross-Cultural Exploration of Medical Ethics in the Ancient World*, in *The Frontiers of Ancient Science: Essays in Honor of Heinrich von Staden* (cur. B. HOLMES, K. FISCHER), Berlin/Boston, 2015, p. 47 ss. For the progression of medical art according to Galen's interpretation of Hippocratic ethics, see J. JOUANNA, *Galen's reading of Hippocratic ethics*, in *Greek Medicine from Hippocrates to Galen. Selected Papers* (cur. PH.J. VAN DER EIJK), Leiden/Boston, 2012, p. 261 ss.

¹⁵⁷) Cfr. Ulpian's definition in D. 50.13.1.1-3 (Ulp. 8 de omn. trib.).

¹⁵⁸) Plin. 29.8.18. For the perceived immunity of physicians to prosecution for medical malpractice, see D.W. AMUNDSEN, *The Liability of the Physician in Roman Law*, in *International Symposium on Society, Medicine, and Law* (cur. H. KARPLUS), Amsterdam / London / New York, 1973, p. 17 ss. For ancient literary biases on the incompetent or killer physician, see F. KUDLIEN, *Medical ethics and popular ethics in Greece and Rome*, in *Clio Medica*, 5, 1970, p. 91 ss., and esp., 97-107; V. NUTTON, *Murders*, cit.. For an overview of the ambivalent portrayal of physicians in Greek and Roman declamation, see C.A. GIBSON, *Doctors in Ancient Greek and Roman Rhetorical Education*, in *Journal of the History of Medicine and Allied Sciences*, 68.4, 2013, p. 529 ss.

¹⁵⁹) R. LO PRESTI, *The Physician As Teacher. Epistemic Function, Cognitive Function And The Incommensurability Of Errors*, in *Hippocrates and Medical Education. Selected Papers Presented at the XIIth International Hippocrates Colloquium, Universiteit Leiden, 24-26 August 2005* (cur. M. HORSTMANSHOFF), Leiden/Boston, 2010, p. 137 ss. with regard to Hippocratic medicine.

¹⁶⁰) Cfr. Ps.-Q. *DM* 8. On the place assigned to tests and experiments in ancient Greek theories of «scientific» method, see H. VON STADEN, *Experiment and Experience in Hellenistic Medicine*, in *Bulletin of the Institute of Classical Studies*, 22, 1975, 178-199. For the epistemological debate between the Dogmatists and the Empiricists on the dialectic between reason and experience, as interpreted and applied by Galen to pharmacology, see

physician's moral duty to engage in such an activity to protect health, advance knowledge, and enable progress¹⁶¹. One could trace here the deep mistrust of a defender of elite medical practice vis-à-vis an ill-educated or untrained layman acting irresponsibly and unscrupulously as someone who possesses medical expertise and who is qualified to speak «professionally». The underlying ideological concern, which does not preclude the possibility that the well-informed non-practitioner existed¹⁶², is all the more important, since «a great deal of Hippocratic medicine, and a fair amount of later elite medicine too, was in fact «popular» in the sense that it stemmed, without much admission to this effect, not from anatomical investigation or experimental results, but rather from centuries-long, perhaps even millennia-long, or relatively brief processes of trial and error carried out by interested amateurs; this must have been the case, for example, with those few elements in the classical pharmacopoeia that had some real positive effects»¹⁶³. If the declamation is incomplete, as it would seem¹⁶⁴, it is not unfair to conjecture in light of the above that the father's final response would have involved a critical reflection on the value of «pharmacological experimentation» and on the risks related to obtaining pharmacological knowledge from outside of the «profession»¹⁶⁵.

Overall, the stepmother's defence is weak and unconvincing. If physicians were expected to be cautious (*prudentes*) in employing treatment for which they could incur blame for the death of a person¹⁶⁶, and if there was a strong prejudice against them in cases of suspected poisoning¹⁶⁷, the step-

PH.J. VAN DER EIJK, *Galen's use of the concept of 'qualified experience' in his dietetic and pharmacological works*, in *Medicine and Philosophy in Classical Antiquity: Doctors and Philosophers on Nature, Soul, Health and Disease*, Cambridge, 2005, p. 279 ss.

¹⁶¹) For the role of medical experimentation and its relationship to the concept of progress, as well as of the physician's moral duty, see G.B. FERNGREN, *Roman Lay Attitudes towards Medical Experimentation*, in *Bulletin of the History of Medicine*, 59.4, 1985, p. 495 ss. with regard to Ps.-Q. DM 8.

¹⁶²) Cfr. P. PÉREZ CAÑIZARES, *The Importance Of Having Medical Knowledge As A Layman. The Hippocratic Treatise Affections In The Context Of The Hippocratic Corpus, in Hippocrates and Medical Education. Selected Papers Presented at the XIIth International Hippocrates Colloquium, Universiteit Leiden, 24-26 August 2005* (cur. M. HORSTMANS-HOFF), Leiden/Boston, 2010, p. 87 ss.

¹⁶³) W.V. HARRIS, *Popular Medicine*, cit., p. 23 cit..

¹⁶⁴) D.R. SHACKLETON BAILEY, [*Quintilian*], cit., p. 309 nt. 6.

¹⁶⁵) W.V. HARRIS, *Popular Medicine*, cit., p. 24-25 for examples of known ancient physicians accepting sound recipes from lay people.

¹⁶⁶) Cfr. Cels. 5.26.1.

¹⁶⁷) F. KUDLIEN, *Medical ethics*, cit., p. 102 refers to this as a «hysterical poisoning-phobia».

mother's will to try a potentially fatal experiment running counter to medical advice (and hence, to proven experience and reliable knowledge), without the father's consent, can only be explained in terms of homicide committed with full criminal intent. Her misconduct deeply complicates the tension between treatment within the family, quackery, and proper pharmacology with respect to medico-legal causation¹⁶⁸, at a time when the relevance of pharmacology for

¹⁶⁸) Cfr. Galen, *On Antecedent Causes* 14.183-186: *Concede autem michi et secundum enarrare iudicium, quod oportuit dicere prius. Accusatus est medicus quia dedit farmacum deliterium. Sed qui emit id famulus / erat mulieris quae indigebat eo. Illa vero, postquam obtinuit farmacum, adolescentem monens eorum qui famulabantur suo privigno dare ei bibere, per illud puberem interfecit. Omnes igitur consimiliter novercae condemnati sunt: qui dedit farmacum, et qui emit, et medicus qui tradidit. (184) Si igitur haberent hii advocatum ab Erasistrato eruditum, diceret utique: 'Quoniam mortuus est quidem puber, nullus contradicit. Non tamen a famulo qui dedit ei potum mortuus est sed a farmaco. Inconvenientissimum igitur est scientes mortis causam ad inculpabilem hominem referre. (185) Non enim est idem farmacum et homo, neque, si alterum in confessione deductum est mortem operari, iustum est reliquum molestare. Adhuc autem inconvenientius est incusare novercam hanc quae tribuit calicem, et multo magis eum qui tradidit. Neque enim, si funem dedit aliquis, deinde qui accepit suffocatus est per eam, iustum est accusare eum qui tradidit. (186) Singulum, ut puto, horum capitulorum sursum et deorsum vertens, et maxime si astutus fuerit in dicendo, suasisset iudicibus dimittere ab accusatoribus medicum. Sed nichil horum dixit, non enim fuit conversatus cum Erasistracis disceptantibus fortissime et docentibus nos quoniam non est plectoria causa egritudinum.* «Allow me to mention a second case, which I should have brought up earlier. A doctor was accused because he supplied a harmful drug. But its purchaser was a servant of the woman who needed it. And having got hold of it, she ordered a young man (who was one her stepson's attendants) to give it to him to drink; and it killed the boy. Everyone was then indiscriminately condemned, along with the stepmother: the man who administered the drug, the man who had bought it, and the doctor who had supplied it. (184) If these people then had an advocate schooled by Erasistratus, he would have spoken thus: «No one denies that the boy died; but he was not killed by the servant who administered the drink to him, but by the drug. It would be most inconsistent then for people who know the real cause of the death to transfer the blame to an innocent man. (185) For the man and the drug are not one and the same thing; and it is not right, if one thing has been agreed to be the cause of the death, to pursue the other. And it would be still more absurd to accuse the stepmother who provided the cup, and even more so the man who supplied the drug. If someone gave someone else a noose, and the recipient then hanged himself with it, it would not be right to accuse the man who supplied it». (186) Now he might, in my view, have persuaded the jurors to release the doctor from this accusers, especially if he was skilled at speaking, by twisting and turning each of the topics to the greatest advantage. But in fact he said none of these things, being unfamiliar with the powerful disputations of the Erasistrateans, and their teaching that repletion is not a cause of illness. Text and translation are taken from J. HANKINSON, *Galen. On Antecedent Causes*, Cambridge, 1998. Here, Galen reports the case of a doctor who sup-

the discipline of medicine, its contribution to Hippocratic ethics, and the intrinsic medical value of substances is still a subject of medical controversy¹⁶⁹.

6. In the preceding lines, I examined what appears to be a distinctly complex case of change in the socio-ideological perception of the Roman legal treatment of poisoning, in order to show that the issues explored in forensic declamations are not merely abstract, but significantly affect (and are affected by) broader socio-cultural understandings of various legal¹⁷⁰ and in this case, also medical, developments. *Dmin* 350 deals with the criminalisation of therapeutic activities that may prove to be lethal, and indirectly, with the boundaries of the «orthodox medical profession», thus offering irreplaceable insights into the ways in which «pharmacological experimentation» could be seen as an instance of homicide. For present purposes, I developed a line of thought that implicitly situates the medico-legal deployment of physicians in the Early Roman Empire at the upper level of reasonable possibilities. By focusing on the steps taken by Pseudo-Quintilian to examine the ethical issues and «professional» stakes involved in arguing this particular case of *veneficium*, I tried to shed new light into the forms of structured knowledge that show that (school) forensic declamations are likely to reflect what was already perceived as a medico-legal practice, and perhaps also what could amount to a social def-

plied a «noxious drug» (*farmacum deliterium*) that a stepmother ordered to be used to murder her stepson; as a result, she was condemned along with the doctor who procured the drug, the slave who bought it, and the slave who administered it. The outcome is in perfect accordance with the principles of Roman classical law regarding direct and adequate causality in cases of homicide. It is interesting however that Galen records an «alternative» line of legal reasoning, based on the principle that the *dominus* is not responsible for the crimes committed by his slave, which is crystallised in an imperial rescript of Severus Alexander almost in the same period. See C.I. 9.2.2 pr.-1 (a. 222). Cfr. also C.I. 9.19.2 (a. 340).

¹⁶⁹) The medical debate is exemplified in Scribonius Largus' Preface to *Compositiones Medicamentorum* and in Dioscorides' *De materia medica*. See V. NUTTON, *Ancient Medicine*, London/New York, 2013², p. 302-307. For the role of the «anti-pharmaceutical» argument defended by Asclepiades of Bithynia and the contribution of his medical theory, see J. SCARBOROUGH, *The Drug Lore of Asclepiades of Bithynia*, in *Pharmacy in History*, 17.2, 1975, p. 43 ss.

¹⁷⁰) I completely share the opinion expressed by J.B. RIVES, *Magic, Religion*, cit., p. 49-50: «Although these specific scenarios might be somewhat far-fetched, the legal/rhetorical they investigate are not», and also in nt. 10 with regard to Pseudo-Quintilian's *Declamationes minores*: «because they were used to teach students to isolate the key issues of a case according to the *stasis* system, they necessarily dealt with genuine issues, even if in hypothetical form».

inition of medico-legal expertise. If we accept that it was precisely the medico-legal relevance of *veneficium* that concerned Pseudo-Quintilian in *Dmin* 350, his discussion on «recklessness» can be read on more than one level: (i) as an intellectual elaboration of the technical meaning that this undefined element of criminal liability would eventually take in Roman jurisprudential thought; (ii) as an inquiry into contemporary medical problems and debates about the dual (therapeutic VS lethal) potential of substances, depending on the manner and the circumstances under which they were applied; (iii) as an argument-based approach to the way in which the *lex Cornelia de sicariis et veneficis* was likely to have concretely evolved through court practice. If my interpretation is correct, forensic declamations can be conceived of, in complement to medical reports, as proof of the existence of different branches of medico-legal activity in Roman Antiquity: one medical, related to the incorporation of expert opinions given by «professional» physicians within the rules of legal procedure, and the other rhetorical/judicial, linked to a method of reasoning and argument that put medical expertise at the service of justice.