Ab impetu ad rationem redit *(Quint.* Inst. *6.1.29): Mapping Ancient Emotions onto the Roman Judge*

I. *Research hypothesis*

Quintilian's account of appeals to emotion (*Inst.* 6.1-2) has been the subject of thought-provoking analyses, from which my paper benefited much[1]. Unlike previous approaches, I propose to focus on a dimension that remains unexplored: the embodied aspects of emotion in teaching about legal judgement in the schools of rhetoric at «the golden moment of Quintilian»[2], in which a good orator was expected (at least according to Quintilian's perception of Cicero's ideal in the *De oratore*) to have a solid education in Rhetoric, Law, and Philos-

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[1] Especially J.A.E Bons, R.T. Lane, *Quintilian VI.2: On emotion*, in O. Tellegen-Couperus (ed.), *Quintilian and the Law. The Art of Persuasion in Law and Politics*, Leuven 2003, 129-144; M. S. Celentano, *Book VI of Quintilian's Institutio oratoria: the Transmission of Knowledge, Historical and Cultural Topicalities and Autobiographic Experience*, in Tellegen-Couperus (ed.), *Quintilian and the Law* cit. 119-128; R.A. Katula, *Quintilian on the Art of Emotional Appeal*, in *Rhetoric Review* 22.1, 2003, 5-15; Id., *Emotion in the Courtroom. Quintilian's Judge - Then and Now*, in Tellegen-Couperus (ed.), *Quintilian and the Law* cit. 145-155; J.D.R. Rodríguez Martin, *Moving the Judge: A Legal Commentary on Book VI of Quintilian's* Institutio Oratoria, in Tellegen-Couperus (ed.), *Quintilian and the Law* cit. 157-167; M. Leigh, *Quintilian on the Emotions (Institutio Oratoria 6 Preface and 1-2)*, in *JRS.* 94, 2004, 122-140.

[2] It hardly needs arguing that Quintilian was an influential writer. His popularity is demonstrated amongst other things by the fact that the *Institutio* gathers the wisdom of twenty years spent in education (*Inst.* 1 pr. 1), with pupils including Domitian's two grand-nephews (*Inst.* 4 pr. 2), whom he planned to make his heirs (Suet. *Dom*. 51). On the life and career of Quintilian, see G. Kennedy, *Quintilian: A Roman Educator and His Quest for the Perfect Orator,* Sophron 2013[2]. The «golden moment of Quintilian» did not last long: in later times (but see already the 'Juristenkomik' in Cic. *Mur*. 19-30), jurisprudence was criticised as «a task for duller minds», which meant the «final victory of a conception of court acting in which legal techniques were considered as useless in comparison with effective paying on the feelings of the judges». See Rodríguez Martin, *Moving the Judge* cit. 165.

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ophy. Approached as distinctive to Roman legal practice[3], Quintilian's theory of appeals to emotion is hereby described as an introspective move and ethical assessment of the (orator's and the) judge's mind, that raises questions about the function of proofs from emotion in legal argumentation[4]. When Quintilian, a professor of rhetoric and legal practitioner, talked about emotions and the law in his classroom, what exactly did he have in mind? How did he instruct the judge apprentice to weigh proofs from emotion in reaching his decision? And what was the law's attitude towards a judge when in doubt[5]?

My argument is that in a theoretical yet philosophically parsimonious approach, Quintilian dealt with the probative value of the emotions in court practice, treating emotions as part and parcel of the orator's logical and moral training. This is not to say that he viewed emotions as *imposed* to legal reasoning and judicial interpretation, but rather, as a cognitive interaction that culminated at the final stage of the orator's speech or as an impediment to the persuasion and decision-making process when unsuccessfully deployed. Even though emotions were an intrinsic part of figured speech (*sermo figuratus*) that maximised emotive effect[6], Quintilian did not go so far as to hypostasise different types of emo-

[3] Although legal institutions underwent transformation from the Late Republic to the Early Empire to suit the needs of the new regime, the structure of Roman legal practice must have remained basically unaltered from the age of Cicero to that of the Severan emperors. See P. Garnsey, *Social Status and Legal Privilege in the Roman Empire*, Oxford 1970, 3: there was a «fundamental continuity from Republic to Empire in the spirit in which the law was administered».

[4] Arguments from character (ἦθος) will be examined in an *ad hoc* manner to corroborate the hypothesis.

[5] These questions also apply to the study of Roman declamations and can further illuminate the interaction between Roman law, forensic rhetoric, and jurisprudence. For a heuristic framework of this interaction, see M. Lentano, *Retorica e diritto. Per una lettura giuridica della declamazione latina*, Lecce 2014 with G. Rizzelli, *Declamazione e diritto*, in M. Lentano (a c. di), *La declamazione latina. Prospettive a confronto sulla retorica di scuola a Roma antica*, Napoli 2015, 211-270; Id., *Fra giurisprudenza e retorica scolastica. Note sul ius a Sofistopoli*, in *Iura & Legal Systems* 6.4, 2019, 102-114.

[6] Figures of thought (*figurae sententiarum*) and figures of speech (*figurae elocutionis*) were the field *par excellence* to represent 'character'. See Quint. *Inst.* 8.6-9.3. For the most recent treatments of figured speech in Graeco-Roman Antiquity, see P. Chiron, *Les rapports entre persuasion et manipulation dans la théorie rhétorique du discours figuré*, in S. Bonnafous, P. Chiron, D. Ducard, C. Lévy (eds.), *Argumentation et discours politique. Antiquité grecque et latine, Révolution française, monde contemporain*, Rennes 2003, 165-174; D. Till, *Rhetorik des Affekts (Pathos)*, in U. Fix, A. Gardt, J. Knape (eds.), *Halbband 1 Rhetorik und Stilistik / Rhetoric and Stylistics*, Berlin, New York 2008, 646-669; B. Breij, Th. Zinsmaier, *Oratio figurata*, in G. Ueding (ed.), *Historisches Wörterbuch der Rhetorik* 10, Tübingen 2012, 781-787; L. Pernot, *Greek 'Figured Speech' on Imperial Rome*, in *Advances in the History of Rhetoric* 18.2, 2015, 131-146; S. Franchet d'Espèrey, *La controversia figurata chez Quintilien (Inst. 9.2.65-99). Quelle figure pour quel plaisir?*, in M. T. Dinter, Ch. Guérin, M. Martinho (eds.), *Reading Roman Declamation. The Declamations Ascribed to Quintilian*, Berlin, Boston, New York 2016, 51-90.

tions into 'measurable entities' that could count as 'evidence in law' in a strictly legal sense. As we shall see, his innovation is that he developed a theoretical paradigm of the way in which the judge's (and the audience's) emotions were deeply intertwined with those of the orator (and his client) through specific acts of cognition that made appeals to emotion subject to rational argumentation, interpersonal interaction, and judicial interpretation, with a view to achieving a legally sound and ethically flawless expression of justice.

II. *Methodological framework*

Advances on the interdependency of cognition and emotion[7] have gained significant traction in the field of Ancient Studies in the last three decades[8]. Particular emphasis has been placed on the emotions' preeminence in Graeco-Roman rhetoric and oratory, as well as on their impact on ancient political discourse. However, the impact of emotions on judicial decision-making, as described by Quintilian, has not received attention within Ancient Emotion studies, from the

[7] See especially J. Elster, *Alchemies of the Mind. Rationality and the Emotions*, Cambridge 1999; B.D. Robbins, *Enactive cognition and the Neurophenomenology of Emotion*, in S. Gordon (ed.), *Neurophenomenology and its applications to psychology*, Berlin 2013, 1-24 with bibliography.

[8] The seminal study for emotions in ancient Greece is that of D. Konstan, *The emotions of the Ancient Greeks. Studies in Aristotle and Classical Literature*, Toronto 2006. For Rome, R. A. Kaster, *Emotion, Restraint, and Community in Ancient Rome*, Oxford, New York 2005. See also W. V. Harris, *Restraining Rage. The Ideology of Anger Control in Classical Antiquity*, Cambridge MA, London 2001; D. Konstan, *Pity Transformed*, London 2001; Id., *Before Forgiveness: The Origins of a Moral Idea*, Cambridge, New York 2010; S. M. Braund, G. W. Most (eds.), *Ancient Anger: Perspectives from Homer to Galen*, Cambridge 2003; M. Graver, *Stoicism and Emotion,* Chicago 2007; A. Chaniotis (ed.), *Unveiling Emotions. Sources and Methods for the Study of Emotions in the Greek World*, Stuttgart 2012; Id. (ed.), *Unveiling Emotions III. Arousal, Display, and Performance of Emotions in the Greek World*, Stuttgart 2021; L. Griswold, D. Konstan, *Ancient Forgiveness,* Cambridge 2012; L. Fulkerson, *No Regrets: Remorse in Classical Antiquity*, Oxford, New York 2013; A. Chaniotis, P. Ducrey (eds.), *Unveiling Emotions II. Emotions in Greece and Rome: Texts, Images, Material Culture*, Stuttgart 2014; E. Sanders, *Envy and Jealousy in Classical Athens. A Socio-psychological Approach*, Oxford 2014; E. Sanders, M. Johncock (eds.), *Emotion and Persuasion in Classical Antiquity*, Stuttgart 2016; W.V. Harris (ed.), *Pain and Pleasure in Classical Times*, Leiden, Boston 2018; G. Kazantzidis, D. Spatharas (eds.), *Hope in ancient literature, history, and art: Ancient Emotions I*, Berlin, Boston 2018; D. Spatharas, *Emotions, Persuasion, Public Discourse in Classical Athens: Ancient Emotions II*, Berlin, Boston 2019; D. Cairns (ed.), *A Cultural History of the Emotions in Antiquity*, London 2021; M. P. de Bakker, B. van den Berg, J. Klooster (eds.), *Emotions and Narrative in Ancient Literature and Beyond*, Leiden, Boston 2022.

point of view of the relationship of 'body' and 'soul' in *adfectus*. To remedy this, I adopt a heuristic approach and understand *adfectus* as a conceptual tool with which to judge the character of the legal actors, the quality of proof, and the morality of the decision-making process. Quintilian's use of appeals to emotion is hereafter examined as the capacity for simulated (*ficta*) interaction through verbal and non-verbal communication in a controlled environment. Cultivated in the rhetorical classroom by means of discursive devices, such as ἠθοποιία/*sermocinatio* and προσωποποιία/*fictio personae*, which allowed the student to take on different roles (*personas induere*) and assume corresponding emotions (*adfectus adsumere*)[9], this type of interaction was intended to transform the judge's cognitive functions (reasoning capacities, memory, will) in a purposeful way. The dynamic result, which may be described through the 4E cognition paradigm as a variously 'embodied, embedded, enacted, and extended cognition', would explain a variety of phenomena including perception, imaging, memory, and volition[10].

A major methodological caveat when dealing with emotions in the Roman courtroom is that little is known about the duty of the Roman judge (*officium iudicis*)[11]. To this one must add that there are no juristic treatments of emo-

[9] See especially G. Ventrella, *L'etopea nella definizione degli antichi retori*, in E. Amato, J. Schamp (eds.), *Ēthopoiia: la représentation de caractères entre fiction scolaire et réalité vivante à l'époque impériale et tardive*, Salerno 2005, 179-212; K. De Temmerman, *Ancient Rhetoric as a Hermeneutical Tool for the Analysis of Characterization in Narrative Literature*, in *Rhetorica* 28.1, 2010, 23-51; F.R. Nocchi, *Tecniche teatrali e formazione dell'oratore in Quintiliano*, Berlin, Boston, New York 2013, 149-181; D. Mayfield, *Rhetorical Ventriloquism in Application*, in J. Küpper, J. Mosch, E. Penskaya (eds.), *History and Drama: The Pan-European Tradition,* Berlin, Boston 2018, 47-59; 110-119.

[10] 'Embodied' physically and culturally into a human being; 'embedded' causally in an environment; 'enacted' through choices; 'extended' to a cognitive apparatus external to the body. For the 4E cognition paradigm, see J. Carney, *Thinking avant la lettre: A Review of 4E Cognition*, in *Evolutionary studies in imaginative culture* 4.1, 2020, 77-90. It is useful to note that this paradigm is in line with the perspective of biolegal history, according to which legal ordering and social behavior reflect the innate structure of the human mind, as well as shared intuitions of justice and morality. See O. Jones, *Proprioception, non-law, and biolegal history*, in *Florida Law Review* 53, 2001, 831-874.

[11] Aside from the fact that the Roman judge was bound by rules and usage on how to deliberate, various attempts were made from very early on how to deal with judicial corruption, including a provision in the Twelve Tables (9.3) reported by Gellius (20.1.7), an edict on the *iudex qui litem suam fecerit* (dating probably from the middle of the 2nd to the beginning of the 1st century BCE), criminal laws such as the *Lex Iulia de Repetundis* (59 BCE), a municipal law called *Lex Irnitana* (91 CE), imperial senatorial decrees (*senatus consulta*), and juristic interpretation. For a synthesis of these attempts, see J. Plescia, *Judicial Accountability and Immunity in Roman Law*, in *The American Journal of Legal History* 45.1, 2001, 59-67. The *officium iudicis*, which already

tions as something *legally* distinguishable from an ordinary concept of proof that could be admissible for inspection from the court[12]. Investigating whether *adfectus* were legally relevant probative pathways means navigating through ethical, social, and normative restrictions (*quod decet*) to which Roman emotions were subject. And if one accepted the modern distinction of law from all that is not law[13], the judge's *adfectus* would prove irrelevant, if not directly hostile, to Roman legal reasoning. Now ancient rhetorical theory did deal with thought-driven emotions that could be introduced in a specific way in the orator's speech to strengthen factual proof[14]; the Roman jurists did employ the word *adfectus* as a legally relevant mental state[15]; and the Roman judge could be held liable for rendering an incorrect judgement or for accepting improper presentation of proof[16]; but the existence of these practices, albeit conscious or systematic, cannot serve as a premise for any reasonable inference towards assuming that the Roman judge *automatically* accepted emotions as part of a persuasive strategy that *arbitrarily* affected his decision. Rather, the question becomes: which circumstances and for which purposes could the Roman judge accept proofs from emotion?

Given these caveats, the ensuing analysis is neither a psychological study of the deployment of *adfectus* in the ancient courtroom, nor one about affective explanations of criminal behaviour or common emotive strategies in ancient trials. I will not discuss examples of judicially salient emotions or of real judges who passed their judgement in an inappropriate emotive state. I will examine a theoretical understanding of the inevitable impact of emotions as a 'lived' and not simply 'observed' category; one that should be employed in such a way that

appears in Cic. *Inv. rhet.* 2.125, but whose nature remains controversial (it was neither a purely procedural duty nor an exclusively legal one), rests on the following principles: respect of the law (Gell. 14.2.1), of the praetor's formula (Cic. *Verr*. 2.2.12.30), of the juristic *responsa* (Gai 1.7), and of the jurists' *auctoritas* (Cic. *Caec*. 23.65-24.69; *De or.* 1.241-242). Cfr. Quint. *Inst.* 5.2. On the judge's honourability (*pudor iudicis*), see Ps.-Quint. *Dmin* 266.12.

[12] For *inspectio tabulae*, see Quint. *Inst.* 5.5. For the judicial use of *tabulae* as forms of proof, see E. A. Meyer, *Legitimacy and Law in the Roman World. Tabulae in Roman Belief and Practice*, Cambridge 2004, 216-249.

[13] This is Schulz's *Isolierung* principle of Roman law. For the agenda behind the *Isolierung* narrative, as constructed by Schulz in nineteenth-century Germany, see K. Tuori, *Empire of Law. Nazi Germany, Exile Scholars and the Battle for the Future of Europe*, Cambridge 2020, 69-71.

[14] The notion that emotions contained and relied on evaluative thoughts is fundamentally Aristotelian. See M. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions*, Cambridge 2001.

[15] For the standard juristic usages that bring *adfectus* close to 'criminal intent', see D. Cloud, *The Stoic πάθη, Affectus and the Roman jurists*, in *ZSS*. 123.1, 2006, 19-48.

[16] Plescia, *Judicial Accountability* cit. 69.

the judge would feel the right emotions at the right moment to make the right decision. My aim is to show that Quintilian's theory on appeals to emotion advocates the model of a righteously (dis)passionate judge, that is, of a judge who, being appropriately aware of his emotions, directed them at acts of injustice[17]. And since there is no agreed over-arching definition of emotions[18], I will work with those that Quintilian recognises as legally relevant. In what follows, material 'evidence' includes witnesses' testimonies and documents produced for inspection by the court. 'Factual proofs' are arguments from fact. 'Proofs from emotion' are naturally expected or socio-culturally accepted emotive responses to certain facts/mental images and memories that can assume the force of proofs; they are understood as an embodied, embedded, enacted, and extended means of affective persuasion, as opposed to an emotionally evocative type of evidence.

III. *Problems of terminology*

Let us begin with Quintilian's definitional account of *adfectus*. In *Inst.* 6.1-2, the vocabulary used to indicate mental agency on how to move the judge is

[17] Modern scholarship lays stress on the principle that the Graeco-Roman courtroom gave rise to spectacles of electrifying verve. Consider, for instance, E.M. Harris, *How to 'Act' in an Athenian Court: Emotions and Forensic Performance*, in S. Papaioannou, A. Serafim, B. Da Vela (eds.), *The Theatre of Justice: Aspects of Performance in Greco-Roman Oratory and Rhetoric*, Leiden, Boston 2017, 223-242 for Classical Athens; J. Hall, *Roman Judges and Their Participation in the 'Theatre of Justice'*, in Papaioannou, Serafim, Da Vela (eds.), *The Theatre of Justice* cit. 243-262 for Late Republican Rome; L. Bablitz, *Actors and Audience in the Roman Courtroom*, London, New York 2007 for Early Imperial Rome. Seen from this angle, Roman judicial practice contrasts sharply with the modern assumption (in continental legal systems) that judges should render their decision in a rather dispassionate state of mind (Rodríguez Martin, *Moving the Judge* cit. 161). But this does not appear to be a unique characteristic of modern Western societies. B. W. Frier, *The Rise of the Roman Jurists. Studies in Cicero's Pro Caecina*, New Jersey 2016[2], 217 evokes Cicero's practices of emotive oratory in *De or*. 2.187, which could capture (*capere*) the «neutral and unpredisposed» (*integer quietusque*) judge, and which therefore reflected «the passive role traditionally assigned to Roman judges».

[18] P. Singer, *What is a Pathos? Where Medicine Meets Philosophy*, in G. Kazantzidis, D. Spatharas (eds.), *Medical Understandings of Emotions in Antiquity: Theory, Practice, Suffering. Ancient Emotions III*, Berlin, Boston, New York 2022, 17-42 raises the problem of the «core conception» of *pathos*. For issues of definition and translatability between ancient and modern categories of emotions, see G.E.R. Lloyd, *Cognitive Variations: Reflections on the Unity and Diversity of the Human Mind*, Oxford 2007; D. Cairns, *Look Both ways: Studying Emotions in Ancient Greek*, in *Critical Quarterly* 50, 2008, 43-63; D. Cairns, L. Fulkerson, *Introduction*, in *Bulletin of the Institute of Classical Studies* 125: *Emotions Between Greece and Rome*, London 2015, 1-22.

predominantly metaphorical. The most prominent metaphorical patterns are the following:

- *memoriam iudicis reficere* (to refresh the judge's memory);
- *totam causam ponere ante oculos* (to place the whole case before one's eyes);
- *concitare iudices* (to stir up the judges);
- *sensum ac vocem auribus accipere* (to hear the feelings and the voice);
- *lacrimas inarescere* (to dry the tears);
- *dolores mitigare* (to ease the pain);
- *fatigari lacrimis* (to get tired of tears);
- *deficere adfectus* (to abandon an emotion);
- *lacrimas movere* (to produce tears);
- *agere in furorem* (to drive to fury);
- *miserationem commovere aut discutere* (to excite or dispel pity);
- *motos lacrimis iudices ad iustitiam reducere* (to recall judges who have been moved by tears to a sense of justice);
- *iudicem rapere* (to seize the judge);
- *animis iudicum vim adferre* (to bear force on the judge's soul);
- *mentem abducere* (to carry away the mind).

All these patterns relate to connatural mental activity located in the body, which is particularly relevant to the sphere of reasoning, knowing, understanding, and wanting[19]. That Quintilian conceived of reason and emotion as intermingling cognitive areas is particularly apparent in *Inst.* 6.1.29: *ab illo impetu ad rationem redire* (to return from that impulse to reason) is an orientational metaphor that maps the source domain (emotions) into the target domain (reason)[20]. Delivered by the use of the prepositional phrase *ad* + accusative, it accounts for an idea of directionality used to better understand purpose[21]. But in this context, the separation from impulse (*ab impeto*) and the transfer towards

[19] For the role of figurative language in conceptualising emotive reality, see Z. Kövecses, *Metaphor and Emotion: Language, Culture, and Body in Human Feeling*, Cambridge 2000.

[20] Cfr. Quint. *Inst.* 6.2.3-4; 6.2.7 for the same orientational metaphor with violent connotations that imply the intensity of emotions and the difficulty of the task. For conceptual metaphor theory, see G. Lakoff, M. Johnson, *Metaphors We Live By*, Chicago, London 1980.

[21] On conceptual metaphors for expressing purpose in Latin, see L. Brucale, E. Mocciaro, *The embodied sources of purpose expressions in Latin*, in W.L. Short (ed.), *Embodiment in Latin Semantics,* Amsterdam, Philadelphia 2016, 85-114. On those for expressing feelings, see Ch. Fedriani, *Ontological and Orientational Metaphors in Latin. Evidence from the Semantics of Feelings and Emotions*, in Short (ed.), *Embodiment in Latin Semantics* cit. 115-140.

reason (*ad rationem*) is an unwanted one. A reasonable inference is that for Quintilian, *adfectus* could be construed as a movement (de-) structuring rationality depending on how they were used, which suggests that 'emotions' were understood as cognitive processes that involved the orator's volition[22].

In the same chapters, appeals to emotion are pervaded with philosophical, medical, and legal terminology. Along with *mens* (mind), *habitus* (mental state), and *ratio* (reason), Quintilian uses *animus* (soul), *motus animi* (movement of soul), and *impetus* (impulse) to describe good and bad dispositions of self-control amounting to *virtus* (virtue) or *vitium* (vice). He uses the word *adfectus* to mean a specific type of mental attitude (*habitus mentis*)[23]: powerful emotions. This is not an accidental lexical choice, if we consider that *adfectus* occurs contemporaneously in Celsus' *De medicina*, mostly in the pejorative sense of 'pathological affection' (= disease, morbid symptom)[24]. Perhaps Seneca is a relevant source of influence in this regard[25]. That non-rational powers were involved in Quintilian's construction of controllable *adfectus* can be proved by the use of the word *impetus* to render the Stoic ὁρμή. In the technical Chrysippean sense of 'conation', *impetus* denotes a tendency of thought, a movement of the intellect towards or away from something (φορά), commensurate with nature and involving the whole organism (body and soul)[26]. Underlying to this definition is the notion of a particularly strong urge to act that plays a causal role in the production of an action[27]. *Impetus* and *ratio* are generally thought to be antithetical: the assault of strong emotions to reason is regularly called

[22] Cfr. Sen. *Ira* 2.2.2.

[23] In *Inst.* 6.2.8-10, Quintilian tells us that *adfectus* is the technical equivalent of the Greek πάθος and is defined in relation to ἦθος, but he is also prepared to admit that these types of emotions can sometimes be of the same nature (6.2.12: *interim ex eadem natura*) and differ only in degree (6.2.12: *ut illud maius sit, hoc minus*). Argumentation based on ἦθος involves less or none emotion, since there are cases where it can be improper to get excited or even to feel emotions at all (6.2.14: *hic enim tantum concitari, illic etiam adfici dedecet*).

[24] Cels. 1 pr. 41; 1 pr. 58; 1.5.2; 1.9.2; 2.1.11; 2.7.26; 2.15.5; 3.5.11; 3.18.1; 4.23.2; 4.26.5; 4.28.1; 5.23.3B; 6.6.31C. Except for two cases (3.6.6; 7 pr. 4) in which *adfectus* appears in the sense of 'affective response'.

[25] Seneca (*Ira* 2.4.1-2), the first to have popularised the word *adfectus* in Rome in the sense of 'powerful emotions', was an attractive figure in terms of style amongst the young, as is proven by Quintilian's explicit attacks against the philosopher, found in *Inst.* 10.1.125-130. For Senecan emotions, see D. Konstan, *Senecan Emotions*, in S. Bartsch, A. Schiesaro (eds.), *The Cambridge Companion to Seneca*, Cambridge 2015, 174-184.

[26] T. Tieleman, *Chrysippus' On Affections: Reconstruction and Interpretation,* Leiden, Boston 2003, 98.

[27] S. Sauvé Meyer, *Passion, Impulse, and Action in Stoicism*, in *Rhizomata* 6.1, 2018, 111.

impetus[28]. But *adfectus* (full-blown 'emotions') and *impetus* (instinctive initial motions) can be amenable to reason[29]. According to Chrysippus, ὁρμή can be controlled by λόγος, and only when it transgresses the measure of reason (τὴν κατὰ λόγον συμμετρίαν ὑπερβαίνειν), it becomes an excessive, unnatural, irrational movement of the soul (καὶ οὕτως γινομένης πλεονάζουσά τε ὁρμή λέγεται εἶναι καὶ ἄλογος κίνησις ψυχῆς)[30]. It is possible to accept that quintilianic appeals to emotion derive from «the psychological states through which a judge may pass impulsively during the course of a trial»[31], provided that we interpret 'impulsively' in the Chrysippean sense: the judge could be moved in a natural way not disobedient to reason[32], that could be further explained in terms of measure and control.

What is notable here is that we have both a bodily and an intentional account of *adfectus*, which confirms that for Quintilian 'emotions' were embodied events. But what does the terminology employed tell us about their nature? First, that it is not entirely, or exclusively, negative: not all *adfectus* involve mistaken judgements (as the Stoics would have it), since there could be a calibrated usage of 'emotions' in the orator's speech[33] and by extension, an appropriate degree of emotive response on the part of the judge, which could be identified as a kind of rationalised *adfectus*. Secondly, that there is a fundamental distinction in linguistic usage, but a comparison with contemporaneous medico-philosophical texts shows that Quintilian was influenced by dynamic conceptualisations of 'emotions', which betrays a broader intellectual climate conducive to enabling

[28] Quint. *Inst.* 6 pr. 14; Sen. *Ep.* 104.13; Val. Max. 5.9.1. Cicero (*Inv. rhet.* 2.17; *Dom*. 119) seems to have been instrumental in the extension of the use of *impetus* to mental assaults, with the most notable case for loss of self-control (madness) being described as *impetus furoris*. See M. Winterbottom, *On Impulse*, in D. Innes, H. Hine, C. Pelling (eds.), *Ethics and Rhetoric*, Oxford 1995, 313-322 [reedited in A. Stramaglia, F.R. Nocchi, G. Russo (eds.), *Papers on Quintilian and Ancient Declamation*, Oxford 2019, 167-175].

[29] For the relationship between reason and emotion in Seneca, see D. Konstan, *Reason vs. Emotion in Seneca*, in D. Cairns, D. Nelis (eds.), *Emotions in the Classical World. Methods, Approaches, and Directions*, Stuttgart 2017, 231-244.

[30] This is transmitted by Galen in *PHP* 4.2.18. Cfr. Sen. *Ep.* 116.3. I am not trying to credit Quintilian with an intellectualistic theory of emotion reminiscent of Stoicism, but to suggest, if anything, that for the rhetorician, emotions were natural affective responses, which could be underpinned by reason and which should be controlled through moral education.

[31] Katula, *Quintilian on the Art of Emotional Appeal* cit. 9.

[32] How something disobedient to reason could flow from pure reason was an open philosophical issue. For Galen's criticism on Chrysippus' failure to specify the causes of πάθος in these terms, see Tieleman, *Chrysippus' On Affections* cit. 103.

[33] See *infra*. The idea that there may be an appropriate level of πάθος through moderation (μετριοπάθεια) belongs to Aristotelian ethics and shows Quintilian's strong flexibility in elaborating his theoretical model of judicially accepted emotions.

discussions about *adfectus* as a subjective (physiological, psychic) and intersubjective (normative, social) phenomenon.

IV. *The mechanics of appealing to emotions*

In *Inst.* 6.1, Quintilian's student is introduced to the epilogue (*peroratio*), whose function is both factual and emotional, depending on whether the orator emphasises *res* or *adfectus*[34]. Here, he will learn that there are primarily two approaches in constructing an effective epilogue: the first refers to factual proofs, the second to proofs from emotion. This translates into different levels of emotive response in the judge in relation to the extent to which the types of proof mobilised succeed or fail to persuade him. As we shall see, he will also learn that although the orator naturally hopes for the judge's favourable feelings towards his client, it was nevertheless his moral duty to persuade the judge to make a correct decision (e.g., not punishing a culprit with a compassionate sentence). All things considered, it will be a question of establishing whether, why, and how the emotive aspect of the epilogue could operate through 'legally accepted modes'. In other words, how could the orator affectively strengthen rational proof without impairing the decision-making process.

Quintilian begins with the fact-based epilogue. This type of epilogue involved recapitulation of facts (6.1.1-8), which is called ἀνακεφαλαίωσις by the Greeks and *enumeratio* by the Romans, and whose goal is to refresh the memory of the judge by placing the whole case before his eyes[35]. It is stressed (6.1.3) that the factual epilogue is not simply a straightforward repetition of facts (*recta repetitione*), which would suggest a lack of confidence in the judge's memory (*velut memoriae iudicum diffidentis*), but a careful recapitulation involving *sententiae* and *figurae*, *inventio* and *ornatus*. An effective strategy for constructing a factual epilogue is the one where the orator derives an argument from his opponent (6.1.4-5), making the dialogical dimension of the fact-based epilogue palpable (6.1.6): not only must the orator ask his opponent directly to answer some points (*sed postulandum etiam ab adversariis ut ad quaedam*

[34] Quint. *Inst.* 6.2.20 (for anger, hatred, fear, envy, and pity). Cfr. *Rhet. ad Alex*. 36; Arist. *Rhet*. 3.19 (and 2.2., 2.8 on the emotions principally involved, anger and pity); *Rhet. Her*. 2.47; Cic. *Inv. rhet.* 1.98, *Part. or*. 52-60; Ps.-Q. *Dmin* 338.1-3; see also H. Lausberg, *Handbook of Literary Rhetoric: A Foundation for Literary Study*, D.E. Orton, R.D. Anderson (eds.), Leiden, Boston, Köln 1998, §§ 431-442.

[35] Quint. *Inst.* 6.1: *et memoriam iudicis reficit et totam simul causam ponit ante oculos.* Cfr. Cic. *Inv. rhet.* 1.98; *Part. or.* 52, 59-60, 122; *Rhet. Her.* 2.47. For the Aristotelian influence, see *Rhet*. 3.19.

respondeant), if there is still time (*si et actioni supererit locus*), but he must also provoke (*provocare*) a response that is supposed to put the adversary in a weak position; a response that he has anticipated by putting forward irrefutable points (*et ea proposuerimus quae refelli non possint*)[36]. The interaction between the orator and the adversary, or better yet, the emerging of meaning through conflict, thus seems to work through what H.G. Gadamer qualified as 'fore-projection' (*Vorentwurf*). For Quintilian, anticipation of the adversary's potential arguments (and of the judge's potential emotive responses) allows the meaning to be constantly renegotiated, as is particularly evident in the case of *altercatio*[37]. In conjunction with memory (*memoria*), a mechanism taught to the student as being necessary for the performance of complex cognitive activities, such as comprehension, learning, and reasoning[38], anticipation is founded upon an initial seeing or conceiving that comes before the meaning that is debated *hic et nunc*. This dynamic interaction creates the possibility of reshaping the judge's state of mind, in that it brings forward a renewed group of ideas, representations, and emotions about the debated case[39].

The analysis of the factual epilogue ends *ex comparatione* with Athenian legal practice (6.1.7). To the Attic orators and philosophers who discussed rhetoric in their writings, recapitulatory epilogue is the only valid form of epilogue, for the emotive perturbation of the jury was forbidden at the Areopagos by law[40]. Although Quintilian understands the (Stoic) philosophers' devaluation of emotions in favour of logic and rationality, he seems to be refining the maximal position of Stoic ethics that «emotion is a vice», and that it seems «immoral for a judge to be distracted from the truth, and inappropriate for a good man to take advantage of vices» (trans. Russell)[41]: even they will nevertheless admit

[36] Cfr. Quint. *Inst.* 12.1.35.

[37] For a dialogical (bakhtinian) reading of the quintilianic *altercatio*, see N. Papakonstantinou, *Figurae in interrogando et in respondendo: dialogisme et débat judiciaire selon la théorie de Quintilien*, in *The Journal of Greco-Roman Studies* 58.3, 2019, 79-93.

[38] Quint. *Inst.* 11.2.

[39] This is not to suggest that anticipating the judge's emotions led to a loss of objectivity, nor is it to say that Roman court practice was not protected against judicial arbitrariness. As I have tried to show elsewhere (N. Papakonstantinou, *Praeiudiciorum vis: Legal Precedent and Analogical Reasoning in Roman Rhetorical Education under the Early Empire*, in *RhM*. 166 (in press), Roman forensic rhetoric emphasised rationality in court practice, *i.e.*, the conscious ability to abstract general ideas from existing norms to apply the gained cognitions to other cases by means of analogy and syllogism.

[40] Cfr. Quint. *Inst.* 2.16.4; 10.1.107; 12.10.26. See also Leigh, *Quintilian on the Emotions* cit. 126-127.

[41] Quint. *Inst.* 6.1.7: *Philosophos minus miror, apud quos vitii loco est adfici, nec boni moris videtur sic a vero iudicem averti, nec convenire bono viro vitiis uti.* Cfr. *Inst.* 5 pr. 1-2 for the same *topos* given by distinguished authorities (*clari auctores*).

that appeals to emotion are necessary to promote truth, justice, and the common good, if these ideals cannot be otherwise obtained[42]. This correction is certainly not innocuous: Quintilian reminds his students the importance of cultivating the aptitude for moral instruction, the implication being that appeals to emotion in the context of Roman legal practice were a question of moral propriety assured by the virtuous disposition of the *vir bonus*[43] and linked to fundamental values and ideals. These allowed for the development of law in society, through the capacity of the orator and the judge to reconcile reason and emotion, when differentiating between right and wrong.

In the ensuing chapters follows a long development on emotion-based epilogue, which involves amplification of facts through appeals to specific emotions. Quintilian deals with the frequency and intensity of appeals to emotion as per the needs of the prosecution (1.12-20) and those of the defence (1.21-30), thus developing a role-specific concept of appeals to emotion. The student must remember, via what appears to be a *sententia*, that the prosecution has to stir up (*concitare*) the judges, while the defence has to make them sympathetic

[42] Quint. *Inst.* 6.1.7-8: *si aliter optineri vera et iusta et in commune profutura non possint.* Cfr. Quint. *Inst.* 12.3.12 where Quintilian's argument is that philosophy can be counterfeited, but eloquence cannot.

[43] Quint. *Inst.* 12.1-9. Cfr. Quint. *Inst.* 12.2.6 for the idea that the *Romanus sapiens* has to be a man of action. Quintilian's *vir bonus* may or may not correspond to the Stoic wise man. Leigh, *Quintilian on the Emotions* cit. 132-133 observes that Quintilian omits the fundamental stipulation of the virtuous disposition, which would suggest that the *Institutio* is not grounded in the orthodox Stoic position (Cic. *Tusc*. 5.28, cfr. Sen. *Constant*. 7.2) that only the *sapiens* is a *vir bonus*. A.E. Walzer, *Quintilian's Vir Bonus and the Stoic Wise Man*, in *Rhetoric Society Quarterly* 33.4, 2003, 25-41 has argued that Quintilian's ideal orator is the Stoic *sapiens* with the difference that he is trained in Ciceronian eloquence. Taking into account the intellectual climate among the orators of Quintilian's age, as described by M. Winterbottom, *Quintilian and the Vir Bonus*, in *JRS* 54.1-2, 1964, 90-97 [reedited in Stramaglia, Nocchi, Russo (eds.), *Papers on Quintilian and Ancient Declamation* cit. 3-15], Leigh, *Quintilian on the Emotions* cit. *ibid*. is right in thinking that Quintilian's project «aspires to render practical the impossibilist character of Stoic ethics». Quintilian's educational project involved restoring to rhetoric some typically philosophical tasks, such as imparting good morals, by devaluing philosophy; this was consistent with Domitian's political censure and the broader Flavian cultural policy. For a global description of which, see K. Coleman, *The Emperor Domitian and Literature*, in *ANRW*. II.32.5, Berlin, Boston 1986, 3087-3115; S. Franchet d'Espèrey, *Vespasien, Titus et la littérature*, in *ANRW*. II.32.5, Berlin, Boston 1986, 3048-3086. For the interplay between morality, expediency, and power in Quintilian's theory of the *vir bonus*, see V. Scarano Ussani, *Romanus sapiens and civilis vir. Quintilian's Theory of the Orator acting for the Benefit of the Imperial Power*, in Tellegen-Couperus (ed.), *Quintilian and the Law* cit. 287-301 (trans. from Id., *Romanus sapiens and civilis vir. L'oratore al servizio del potere nella teoria di Quintiliano*, in *Ostraka* 10, 2001, 147-156); A.E. Walzer, *Moral Philosophy and Rhetoric in the Institutes: Quintilian on Honor and Expediency*, in *Rhetoric Society Quarterly* 36.3, 2006, 263-280.

(*flectere*)[44]. However this point must be nuanced, since there are no emotions that are exclusively appropriate to the role (*officium*) of the prosecutor or that of the defendant.

Quintilian gives two pieces of advice (*praecepta*) to illustrate this point. The first is about a general set of circumstances encountered at every trial (6.1.10): in contrast with the Prooemium, where we ingratiate ourselves with the judges in a more restrained manner (*inclinatio enim iudicum ad nos petitur initio parcius*), the emotive epilogue determines the state of mind on which the judge will deliberate (*in epilogo vero est qualem animum iudex in consilium ferat*), which implies the common task for the opposing parties to win the judge's good will (*conciliare sibi*), to alienate him from the adversary (*avertere ab adversario*), and to excite and assuage his emotions (*concitare adfectus et componere*). The second concerns a particular set of possibilities flowing from speech performance (6.1.11): the orator should be able to visualise the full strength of his case (*ut totas causae suae vires orator ponat ante oculos*), and, when he has seen what elements of the legal facts give grounds or seem to give grounds (*aut sit in rebus aut videri possit*) for emotions, such as envy, good will, dislike, or pity (*invidiosum favorabile invisum miserabile*), he should choose to dwell on those by which he would be moved, were he in the judge's position (*si iudex esset*). The emotion-driven epilogue must provide ample opportunities for influencing the judge through emotions, which are to be aroused, says Quintilian, not only by actions and words, but also by facial expression, bodily attitude, and appearance[45]. The transition from general to particular is one of degree: going beyond what is expected from both parties, the orator's strategy should be designed in a way that brings together the reason and the emotions of both himself and the judge. It seems that Quintilian's orator can only relate to the judge (as well as his client, the audience, the world) by virtue of a range of conditions that allow for a cognitive experience involving reason, emotion, and embodied performance. By linking these three aspects, Quintilian seems to have been concerned with the externalisation and internalisation of emotions from the orator's to the judge's mind, as well as with their becoming amenable to further interpretation of factual proof.

The performance in question becomes particularly poignant when the orator brings into play pity (*miseratio*). Depending on the point of view adopted, appeals to pity are mobilised through different means and for different purposes. (I) When acting as a prosecutor, the orator may target the judge's emotions di-

[44] Quint. *Inst.* 6.1.9: *nam huic concitare iudices, illi flectere convenit.*

[45] Quint. *Inst.* 6.1.14: *quae non ex facto modo dictove aliquo sed vultu habitu aspectu moveri solent.*

rectly (6.1.19) or through the adversary (6.1.20). Other than complaining of the misfortune of the victim whom he seeks to avenge or of the desolation of his family, he may evoke a visual representation of the future consequences (*futuri temporis imagine iudices movet*), and also incite the judge to reject any possible appeals to pity on the part of the defendant, by anticipating what he thinks his adversary will say or do (c*uius loci est etiam occupare quae dicturum facturumve adversarium putes*). In a dialogical manner, this strategy both strengthens the judges' scruples about observing their oath (*cautiores ad custodiam suae religionis iudices facit*) and weakens the adversary's defence; it also shows that the orator is 'reading' the judge's state of mind with particular expectations and in regard to a certain meaning, which he is trying to anticipate. This is all the more important when combined with Quintilian's claim that judges sometimes have to be *instructed* on how to respond to particular questions[46]. (II) Viewed from the defendant's perspective (6.1.22-23), appeals to pity may put at stake entire moral, social, and legal institutions: the public interest (*utilitas rei publicae*), the reputation of the judges (*gloria iudicum*), the power of legal precedent (*exemplum*), the collective memory of posterity (*memoria posteritatis*). Implicit in this proposition is that the judge never has an unobstructed view of the facts: he understands a legal case on the basis of whatever proof is available[47], and in the creative way in which the orator chooses to present it, but also, in the more limited way in which he is socially (pre-) determined to look at the world, as a man of a particular social standing with a specific public authority. Persuading the judge through emotions that flow from rational argument is consequently all about understanding the judge's deepest preconceptions and acting on them. If successfully implemented in an emotive epilogue, says Quintilian, appeals to pity double the final effect, by obliging the judge to be moved, and furthermore, to reveal his own emotions through his tears[48].

The rhetorician proceeds to discuss *fictio personae* (*ficta alienarum personarum oratio*, προσωποποιία). This is a highly emotive figure of thought produced through exaggeration of mental creativity[49] and a particularly appropriate one to emotion-driven epilogue, as shown from the following passage (*Inst.* 6.1.25-27):

[46] Cfr. Quint. *Inst.* 6.1.20: *Docendi quoque interim iudices quid rogantibus respondere debeant, quod est unum repetitionis genus.*

[47] In *Inst.* 6.2.4, Quintilian states somewhat ironically that rational arguments which derive from the facts of a case, are generally found on the stronger side, so that he who wins knows that he did not lack an advocate (*ut qui per haec vicit tantum non defuisse sibi advocatum sciat*).

[48] Quint. *Inst.* 6.1.23: *Plurimum tamen valet miseratio, quae iudicem non flecti tantum cogit, sed motum quoque animi sui lacrimis confiteri.*

[49] The *fictio personae* is *stricto sensu* a personifying metaphor: a fictitious speech of non-personal entities, introduced as persons capable of personified behavior. See Quint. *Inst.* 9.2.31: *Quin deducere deos in hoc genere dicendi et inferos excitare concessum est*. See also H. Lausberg, *Handbook of Literary Rhetoric* cit. §§ 826-829.

> *His praecipue locis utiles sunt prosopopoeiae, id est fictae alienarum personarum orationes. Quando enim <pro> litigatore dicit patronus, nudae tantum res movent: at cum ipsos loqui* [26] *fingimus, ex personis quoque trahitur adfectus. Non enim audire iudex videtur aliena mala deflentis, sed sensum ac vocem auribus accipere miserorum, quorum etiam mutus aspectus lacrimas movet: quantoque essent miserabiliora si ea dicerent ipsi, tanto sunt quadam portione ad adficiendum potentiora cum velut ipsorum ore dicuntur, ut scaenicis actoribus eadem vox eademque pronuntiatio* [27] *plus ad movendos adfectus sub persona valet.*
>
> It is in these passages particularly that good service is done by Prosopopoeiae, that is to say fictitious speeches of other persons. When an advocate speaks for a client, the bare facts produce the effect; but when we pretend that the victims themselves are speaking, the emotional effect is also drawn from the persons. The judge no longer thinks that he is listening to a lament for somebody else's troubles, but that he is hearing the feelings and the voice of the afflicted, whose silent appearance alone moves him to tears; and, as their pleas would be more pitiful if only they could make them themselves, so to a certain extent the pleas become more effective by being as it were put into their mouths, just as the same voice and delivery of the stage actor produce a greater emotional impact because he speaks behind a mask. (trans. Russell)

R.A. Katula observes that Quintilian «advocates the use of theatrics»[50], which as it stands, may be taken to refer to an exaggerated, artificial, and potentially immoral oratorical performance. The reference to the stage actor is better understood when put in context. It is true that in *Inst.* 6.1.26-27, Quintilian acknowledges the impact of the stage actor's *pronuntiatio sub persona*, but the point is about successful impersonation *ad movendos adfectus*, not about approving the use of histrionics and theatrical tricks in the courtroom[51]. We can see this in a more vivid form in *Inst.* 6.1.32-35, where Quintilian discusses the limits of using words and actions to arouse the judge's tears, as posed by the very nature of the forensic context, which shows that an emotionally exaggerated style, tending to become artificial, if not tragic, was not a valid strategy for his orator. In *Inst.* 6.1.37-52, the rhetorician further criticises problematic ways in which a client might adapt his emotions to his advocate's delivery, or those in which an orator might badly handle appeals to emotion, and which in any case had the potential of damaging

[50] Katula, *Emotion in the Courtroom* cit. 146.

[51] For exacerbation of emotions generated in the audience, cfr. Cic. *De or*. 3.104. On oratorical *pronuntiatio*, see T. Schirren, *Rhetorik des Körpers (Actio I)*, in U. Fix, A. Gardt, J. Knape (eds.), *Halbband 1 Rhetorik und Stilistik / Rhetoric and Stylistics*, Berlin, New York 2008, 669-679; R. Meyer-Kalkus, *Rhetorik der Stimme (Actio II: Pronuntiatio)*, in Fix, Gardt, Knape (eds.), *Halbband 1 Rhetorik und Stilistik / Rhetoric and Stylistics* cit. 679-688.

the desired emotive effect on the judges. Governed by technical terms taken from comedy and the pantomime, the text questions the limits between laughter (*risum*) and witty humour (*urbane*), while revolving around the idea that it is precisely when appeals to emotion are done for dramatic effect (*scaenice*) that they fail, and seem ridiculous (*ludibrio, ridiculus*) or even farcical (*mimica*) to the judges. Such theatrical effect (*eius modi scaenae*), says Quintilian, should be destroyed by oratorical discourse (*discutiendae oratione*): we truly engage the audience, when our performance is crowned with applause as in the theatre, but the judges' soul is captured (*iudicum animos possidebimus*) through eloquence (*si bene diximus*).

Let us return to προσωποποιία. Technically speaking, there is a subtle difference between 'speaking for a litigant' (*pro litigatore dicit patronus*) and 'pretending that the litigants themselves are speaking' (*ipsos loqui fingimus*). The difference lies in the gap that divides the act of fabricating and referring utterances or unexpressed mental reflections for the account of someone else, and that of becoming someone else through impersonation. In the first case, bare facts speak for themselves (*nudae res movent*); in the second case, the emotive effect is drawn from character (*ex personis quoque trahitur adfectus*), *i.e.*, from the speaker's interpretation of the facts as 'lived' by a specific *persona*. Both formulations – events that 'move' someone and emotions that are 'extracted' from someone – are metaphorical extensions of an almost tangible bodily scenario to a more abstract situation that becomes easier to 'grasp'[52]. This seems to be the case in *Inst.* 9.2.30-31, where Quintilian explains that προσωποποιίαι are used in a dialogical manner to animate (*excitare*) the speech in synergy with the opponent and with the others (witnesses, the judge, the audience):

> *His et adversariorum cogitationes velut secum loquentium protrahimus (qui tamen ita demum a fide non abhorrent si ea locutos finxerimus quae cogitasse eos non sit absurdum), et nostros cum aliis sermones et aliorum inter se credibiliter introducimus, et suadendo, obiurgando, querendo, laudando, miserando personas idoneas damus.*
>
> We use them (1) to display the inner thoughts of our opponents as though they were talking to themselves, (2) to introduce conversations between ourselves and others, or of others among themselves, in a credible manner, and (3) to provide

[52] If we were to extend Quintilian's metaphor, we could conceive of factual proofs as W. Iser's 'empty spaces' (*Leerstellen*), in which case, the orator's task would be to 'fill the gap' by making facts adaptable to the judge's and to the audience's comprehension, so that they could participate in the meaning-making process. P. Lampe, *Quintilian's Psychological Insights in his Institutio oratoria*, in J.P. Sampley, P. Lampe (eds.), *Paul and Rhetoric*, New York 2010, 190 makes the connection between Quintilian and modern readers' response criticism quoting *Inst.* 8.2.21; 8.2.23-24; 9.1-2.

> appropriate characters for words of advice, reproach, complaint, praise, or pity. (trans. Russell)

Emotions are effectively kindled through this type of figure, which is not used merely to influence the listener, but to create a link between factual proofs, proofs from emotion, and different *personae* to influence for the better the quality of the ensuing judgement. Its first function would correspond to 'embodied cognition' (the orator puts himself in the position of the listener, and adapts his style as if reading the listener's mind), the second to 'embedded cognition' (the orator interacts with the environment), the third to 'enacted cognition' (the orator chooses to impersonate the listener in a specific way), and the fourth to 'extended cognition' (the orator might bring into play external 'bodies', objects or a discursive apparatus that would make his performance more vivid). From a pragmatic perspective, these functions could also be pedagogically activated: the physically and culturally embodied schoolmaster and student would interact in a way embedded in context, with a view to negotiating their respective positions and to shaping their cognitions through new heuristic tools. If appeals to emotion were, to Quintilian's mind, a visually oriented activity imprinted into the brain's mnemonic areas of the orator and the judge, it is safe to say that they fostered a holistic conception of the legal actor's self and that served as a unifying bridge between different activities of cognition (comprehension, reasoning, memory), which could inform the final verdict.

V. *The emotive basis of the administration of justice*

Quintilian's discussion of *adfectus* in *Inst.* 6.2 focuses on the impact of emotions on legal judgement: we pass from what ought to be done in the epilogue to the manner in which emotions could be mobilised to produce a specific decision[53]. According to Quintilian (*Inst.* 6.2.1-2), the greatest challenge and the pinnacle of the orator's art is measured from his capacity for affecting the judges' mind and soul (*movendi iudicum animos*), for shaping them as per his wishes (*in eum quem volumus habitum formandi*), and for transfiguring them, so to speak (*velut transfigurandi*). This affirmation may quickly be misconstrued, if we do not turn to the 'consequentialism' that governed the whole process[54].

[53] Cfr. Cic. *De or*. 2.178-216.

[54] Chr. Tornau has suggested to me the term 'consequentialism' as an adequate category for describing Quintilian's 'professional' attitude with regard to a philosophical matter – the socially acceptable lies put in service of the higher good –, which at the same time was a legal one – when and why undertake the defence of the guilty etc. –, and of which Quintilian was very aware, as is evident from *Inst.* 2.17.27-28; 12.1.36-39.

As it has already been said, underlying all uses of appeals to emotion is a deep understanding of the orator as a *vir bonus*, which ensured the moral education of the student. This is why emotions are not treated as (un)ethical *per se*[55] and why an emotion-driven persuasive strategy is not charged with negative connotations. Quintilian accepted a limited, calibrated, and calculated range of appeals to emotion from a well-prepared skilled orator to elicit specific responses from a well-prepared skilled judge[56]. For instance, in outrageous or pitiable events, he approved of proofs from emotion as justifiably (*recte*) combined with factual proofs[57]. And he was quite specific about their use (*Inst.* 6.2.24): the orator would guide the judge towards the conclusion to which he would naturally be led by the facts, either by arousing emotion which was not there or by making an existing emotion more intense through δείνωσις. The goal was not to diverge the judge from the truth (*auferre iudici veritatem*), or to incite purely emotive decision-making, but to stir the judge up and to fill him with πάθος (*commovere*), in order to inspire in him the correct decision (*e.g.*, acquit a man who is about to be wrongly condemned, protect the public interest). Having to hide the truth from the judge would be acceptable, only in ambiguous cases where the limits between 'right' and 'wrong' were blurry, and even then, the orator's strategy would have to constitute the last recourse: his intentions would have to remain honourable and socially responsible[58]. The distinction between *auferre* and *commovere* is informative: the judge could contemplate in his mind the truth of the facts, if the orator added excitement (*impetus*) to a rational frame of mind (*ratio*), by speaking, moving, and performing in a way that made a vivid impression to the judge, confronting his mind directly with the facts of which he was to be reminded[59], before dispelling such powerful emotions, and recalling the judge who has been swept away to a sense of justice[60]. Implicit in this dialogue is the idea of an ideal measure, *mediocritas* ('moderateness',

[55] Katula, *Quintilian on the Art of Emotional Appeal* cit. 14 speaks of a «neutrality standard».

[56] Albeit without omitting the problems arising otherwise. On *imperiti* judges, see Quint. *Inst.* 2.17.28-29.

[57] Quint. *Inst.* 6.1.53-54: *nam neque exponi sine hoc res atroces et miserabiles debent, <et> cum de qualitate alicuius rei quaestio est [et] probationibus unius cuiusque rei recte subiungitur*. In this context, to appeal to emotions would mean to remind the judges of the *atrocitas*/*miseria* of a fact (*res*).

[58] Quint. *Inst.* 12.1.36-44. For the ethical values towards which the orator should direct all his activities, see Quint. *Inst.* 12.2.17; 12.2.30; 12.3.7; 12.5.2; 12.9.12. For the central role of public interest (*communis utilitas*) in the orator's performance, for its philosophical background, and ideological importance, see Scarano Ussani, *Romanus sapiens and civilis vir* cit. 295-301.

[59] Quint. *Inst.* 6.1.31: *Quarum rerum ingens plerumque vis est velut in rem praesentem animos hominum ducentium* [...].

[60] Quint. *Inst.* 6.1.46: *quae motos lacrimis iudices ad iustitiam reducat.*

'avoidance of extremes'): to know when, where, and to what extent deploy *adfectus* is not to undermine legal argument, but to reinforce it in the eyes of the judge, in order to pursue a noble purpose.

The rules that govern this process must be assessed from the perspective of the judge[61]. The pressures that the Roman judge could feel during the course of a trial were predominantly socio-political. During the Late Republic, it might be thought that there was little opportunity for favouritism to defendants[62], but subsequently, preferential treatment of status groups could be shown either through an unjustified acquittal or through the non-execution of a sentence on a defendant found guilty[63]. The imperial usage of taking into consideration social distinctions in reaching a verdict ensured according to Pliny that juridical equality (*aequalitas*) was unattainable among Roman senatorial attitudes at his time[64]. Significantly, the types of influences to which the Roman judicial system was subjected were seen as improper, except when not used for corrupt purposes by someone having social respectability (*dignitas*), in which case they became significant advantages in competition. Thus for example, excessive favour (*gratia*), power (*potentia*), and bribery (*pecunia*) were not socially approved by Cicero (*Caec*. 73), but there is plenty of evidence suggesting that he strategically used his social and political influence on behalf of clients and friends before a trial[65].

Quintilian situates his reader within an accusatorial system, where the judge (especially in criminal jurisdictions) had to evaluate case by case and 'in all conscience' the intrinsic gravity of the offence and the precise culpability of its perpetrator. He had thus to scrutinise all the relevant elements: not only the facts, and their objective circumstances of time and place, but also the *persona* of the offender and the various reasons for exoneration, mitigation or aggravation of the applicable sanction. With the dawn of the Principate, the progressive emergence of *cognitiones extra ordinem* complemented the republican *ordines*

[61] Although this perspective is not attested in written sources, Quintilian's *Inst.* accommodates different levels of reading.

[62] Cfr. Cic. *Mil.* 17.

[63] Garnsey, *Social Status and Legal Privilege* cit. 4.

[64] Plin. *Ep.* 2.12.5.

[65] See Garnsey, *Social Status and Legal Privilege* cit. 207-209. Cfr. D. 5.1.15.1 where Ulpian (21 *ad ed*.) describes liability for judicial malice (*litem suam facere*), which consisted in producing a decision to the detriment of the party who was right, by circumventing the law. As it has been recently highlighted by R. Fercia, *Litem suam facere da Adriano ai Severi*, in L. Garofalo (a c. di), *Il giudice privato nel processo civile romano. Omaggio ad Alberto Burdese* III, Padova 2015, 915-959, the reconduction of *litem suam facere* to judicial malice represents the dawn of a new cultural climate in which the judge's responsibility tended to expand to the point of determining an osmosis between public duties of office and private duties of conduct towards the parties.

(in which litigants chose a private judge, *iudex unus*) with a more bureaucratic procedure in which a government official, instituted by the emperor, had the administrative duty to conduct investigation and pass judgement, over which the litigants had markedly less control[66]. Immense interpretive power (*liberum arbitrium statuendi*) was left to the judge in passing sentence[67], while the emperor trusted his delegated judges and somewhat encouraged judicial appreciation (*arbitrium*) through mandates or rescripts[68]. Regardless of this newly founded flexibility, the judge was expected to decide with discernment, free from improper external influence, and within the limits fixed by reason and imperial law, so that his impartiality could not be questioned.

A passage collected by the jurist Callistratus in Book 4 of *De cognitionibus* (D. 22.5.3.2) illustrates this principle well. It is about a case heard by a provincial governor under the prerogative of the emperor Hadrian, with regard to the crucial stage of the trial where the reliability of witnesses was tested (*de excutienda fide testium*)[69]. The emperor addresses a rescript to Valerius Verus (presumably the provincial governor) advising him to decide 'from his own conviction' (*ex sententia animi tui*) what to believe to have been proved or what to consider to be insufficiently established (*quid aut credas aut parum probatum tibi opinaris*), without relying on merely one type of evidence (*non utique ad unam probationis speciem cognitionem statim alligari debere*). There is a procedural stake here, over which the emperor has control: how should the provincial governor establish legal facts? Which form of proof should he accept? The orientational metaphor *ex sententia animi tui* is of special interest: since no formalities are laid out regarding what proof will be sufficient and in what way (*quae argumenta ad quem modum probandae cuique rei sufficiant, nullo certo modo satis definiri potest*), the subjective dimension represented by the judge's *animus* can be accepted, 'in all honesty'.

What does this entail in concrete terms? The freedom with which the Roman judge could interpret the cases he heard is exemplified in Gellius' *Noctes Atticae*

[66] I. Buti, *La cognitio extra ordinem: da Augusto a Diocleziano*, in *ANRW*. II.14, 1982, 29-59. W. Turpin, *Formula, Cognitio And Proceedings Extra Ordinem,* in *RIDA*. 46.3, 1999, 522 observes that «there is, in theory, a fundamental difference between a judge assigned to a lawsuit with the consent of the litigant, and one who is chosen by the presiding magistrate», but that «the Romans were remarkably casual about the terms they used to describe various sorts of judges».

[67] D. 47.18.1.1 (Ulp. 8 *de off. procons*.).

[68] See for example D. 47.17.1 (Ulp. 8 *de off. procons*.).

[69] A recurring theme in Hadrianic rescripts (Call. 4 *de cogn*. in D. 22.5.3.1-4) is the emphasis put on the witnesses' good stance, as shown by their *dignitas*, *existimatio*, or *auctoritas*. Cfr. Quint. *Inst.* 5.7.24.

14.2[70]. When he was appointed a judge in a private lawsuit (*actio certae creditae pecuniae*), Gellius was confronted with a legal problem revolving around the moral appreciation of character and its admissibility in court[71]. A man of impeccable integrity (*fidelis*), but lacking documentary evidence (14.2.7-8), claimed repayment of debt from a notorious scoundrel who denied the presumed loan. The defence demands that the suit be dismissed for want of evidence and that the plaintiff be condemned for bringing a suit he knew to be groundless (*calumnia*)[72], with the argument that a disputed loan is a matter of claiming money before a private judge (*de petenda pecunia apud iudicem privatum*), not a trial of morality tried before the censors (*non apud censores de moribus*)[73]. We can infer from *numerata* that the money has been paid down and that a loan contract

[70] This passage provides an important insight into the evolution of the law of evidence in Roman classical law, with regard to the rule that the *onus probandi* rests with the claimant. Although we will not find proofs from emotion that are best effective in criminal cases according to Quintilian (*Inst.* 6.1.21-22), we will be able to recognise to the judge a certain room for manoeuvre based on the admissibility of arguments from character in a pecuniary case. An analogy between these and proofs from emotion can be drawn to the extent that admissibility of proof from the Roman courts was governed by very abstract principles that differ greatly from our own. A.M. Riggsby, *The Rhetoric of Character in the Roman Courts*, in J.F.G. Powell, J. Paterson (eds.), *Cicero the Advocate*, Oxford 2004, 179 notes that the notion of burden of proof, if developed at all by the Romans, was a matter of civil, not criminal law, and that «Roman defendants were not protected by a high standard of proof. Thus if character arguments were construed as being even fairly accurate, they would have been an attractive source of proof». In modern terms, the 'burden of proof' would in principle be placed on the plaintiff, and the 'standard of proof' required of him would be that he proves the case against the defendant 'on a balance of probabilities'. It seems that for the Roman jurists, the principle of the burden of proof was primarily placed on the plaintiff. See D. 22.3.21 (Marcian. 6 *Inst.*). Cfr. D. 22.3.2 (Paul. 69 *ad ed.*). For different analyses of Gellius' passage, see Frier, *The Rise of the Roman Jurists* cit. 213-218; L. Holford-Strevens, *Aulus Gellius. An Antonine Scholar and his Achievement*, New York 2003², 294-298; E. Gunderson, *Nox Philologiae. Aulus Gellius and the Fantasy of the Roman Library*, Wisconsin 2009, 69-72; T.A.J. McGinn, *Communication and the Capability Problem in Roman Law: Aulus Gellius as Iudex and the Jurists on Child-Custody*, in *RIDA.* 57.3, 2010, 269-279 with useful bibliography on the legal problems arising from Gellius' judicial performance; A. Ruelle, *Aulu-Gelle sur les bancs des juges et la sponsio ni vir melior esset de Caton: enquête sur un silence,* in *Fundamina* 16.1, 2010, 366-376.

[71] The character-based line of inquiring was already established in Cic. *Inv. rhet.* 2.32-37. Cfr. Quint. *Inst.* 5.10.23-31.

[72] Gai 4.178. Cfr. D. 22.3.19 pr. in relation to 22.3.19.3 where Ulpian (7 *disp*.) says that in cases in which money is claimed and it is said to have been paid, the defendant must act as plaintiff and prove the defence like a claim. Read: If he relies on the defence of the transaction, he must prove that the money has been paid. Also, D. 22.3.25 pr. in relation to 22.3.25.3 where Paul (3 *quaest*.) says that when money not owed is disputed, and the payer proves that the payment was made, the party who denies the payment must prove that the money was owing, perhaps by taking an oath so that the judge can decide according to the oath which is subject to the opponent's right to refer it back.

[73] A rhetorical *topos*: Gellius is paraphrasing *Rhet. Her.* 2.5.

(*mutuum*) has been concluded[74]. The problem is that the praetor did not prescribe specific requirements of 'rules of evidence' in his formula for litigation over *certa pecunia* nor the manner in which the judge was to reach his verdict[75]. The orator is left with potential ways of proving the case.

Gellius' *amici*, well acquainted with the law, advise him to agree with the defendant: it could be shown in a customary way (*solemne*) that the latter received the money (14.2.10)[76]. But Gellius could not bring himself to abide by this standard practice (14.2.11) and disregard the issue of reliability (= unsubstantiated evidence): he was not able to find for the man of stainless reputation in good faith, even though he was ethically inclined towards him. So he postponed his decision and asked Favorinus, a philosopher, for advice[77]. Praising Gellius' «scrupulous hesitation and conscientiousness» (*religio cunctationis et sollicitudinis*, trans. Rolfe), Favorinus discusses some general challenges about the responsibilities of a judge in a private lawsuit and his active stance (14.2.14-19): when deciding about questions of fact, should a judge make his decision based on foreknowledge of the case? Should he postpone the trial temporarily and attempt reconciliation between the parties? Should he raise questions in favour of a litigant if his advocate fails to do so? Should he reveal his way of seeing things

[74] In Book 28 of his commentary at the praetor's edict (D. 12.1.2.3), the jurist Paul tells us that a *mutuum* cannot exist unless the money is paid down (*mutuum non potest esse, nisi proficiscatur pecunia*).

[75] Cfr. D. 13.3.1 pr. (Ulp. 27 *ad ed*.): *Qui certam pecuniam numeratam petit, illa actione utitur* '*si certum petetur*' […]. For such cases, there were two legal remedies: the *legis actio per condictionem* that created a thirty-day period of reflexion between the defendant's denial and the trial, and an oath (*ius iurandum*) used to put an end to litigation. See E. Metzger, *Obligations in Classical Procedure*, in Th.A.J. McGinn (ed.), *Roman Law. Past, Present, and Future*, Ann Arbor 2012, 165-168. An important (but mildly anachronistic) distinction stems from this tension: the question of whether X has a valid claim against Y pertains to 'substantive law', while the question of how can X bring his claim in court (*i.e.*, according to which rules and through what proof) regards 'procedural law'. A clear separation of 'substantive law' and 'procedural law' is alien to Roman civil procedure. Although the Roman jurists were aware of a difference between substantive law and its enforcement in the process, as it is shown in Gaius (2.43), there was no separate designation for procedural law in their legal system (that was largely conceived, however, in terms of process and individual legal actions), while in the edict, provisions that a modern jurist would assign partly to substantive law and partly to procedural law stand side by side without distinction. See M. Kaser, R. Knütel, S. Lohsse, *Römisches Privatrecht*, München 2021[22], 48.

[76] Gellius' advisers are people that Cicero used to call *legulei* and that Quintilian (*Inst.* 12.3.11-12) associated with «false philosophers, in looking for a refuge for their sluggishness». See Scarano Ussani, *Romanus sapiens and civilis vir* cit. 293.

[77] It is very interesting, and not at all accidental, that Gellius the judge asks the advice of a philosopher, not of a jurist. This may suggests that the *officium iudicis* was, also in the eyes of the philosophers, the object of a moral education.

(*suos sensus aperiat*) through signs and indicators of thoughts and emotions before making his final decision?[78] Favorinus' speech confirms the broad scope of discretion that the Roman judge was thought to enjoy within the adversarial trial with regard to the evidentiary difficulties to which the procedure could stumble; it also reveals the existence of an ever-evolving philosophical debate around different styles of appreciation of proof and decision-making[79]. Not many generations ago, Quintilian asked the same question about the judge's emotive composure, although in a different manner and scope. I will discuss this issue later.

Favorinus establishes a comparison with a similar case taken from Cato the Elder's *Pro Turio*, from which he deduces the following *sententia*: since it was traditional for ancient Romans to judge by character in cases where there were no witnesses (*uti testes non interessent*), and assuming that the opposing parties were equally good or bad (*si ambo pares essent, sive boni sive mali essent*), the defendant should be absolved[80]. Favorinus invokes an informal judicial precedent, according to which character could be accepted as having an impact on the final verdict, if evidence was lacking (14.2.21) and as soon as *dignitas* came into play (14.2.22)[81]. The mere fact that lack of evidence was not sufficient to absolve the defendant appears as a legal criterion in the eyes of Cato and later, of Favorinus; its technical value lies not only in the probative force recognised to the moral conduct of the litigants[82], but also in the concern to grant the defendant right if the plaintiff, who did not produce evidence against him,

[78] Gell. 14.2.17-18: *proinde ut quoquo in loco ac tempore movetur, signa et indicia faciat motus atque sensus sui*. In his Loeb edition, Rolfe translates *motus atque sensus* as «emotions and feelings». It is possible to understand the first as an activity of the mind, and the second as one of sensory perception (αἴσθησις), but *sensus* can also take on a generally cognitive meaning. See *OLD s.v. motus; sensus*.

[79] See Cic. *Off*. 3.43-44. Under the Early Empire, the judge's intervention in *iudicia privata* became a real issue, as can be observed from Tacitus' (*Dial*. 19.5-20.2; 39.3) and Pliny's (*Ep.* 6.33.9) remarks. B. Cortese, *L'onere della prova nella giurisprudenza romana*, in L. Garofalo (a c. di), *Il giudice privato nel processo civile romano. Omaggio ad Alberto Burdese* I, Padova 2012, 403 considers the affair presented by Gellius as a «testimonianza evidente della presenza di 'regole', che prevedevano la distribuzione dei doveri processuali, e non una testimonianza della totale discrezionalità del *iudex privatus*».

[80] Cato's speech is delivered by Favorinus through an ἠθοποιία that brings together centuries of judicial usage based on *exempla* to the rank of which Gellius the judge is (expected to be) raised. On this dynamic, see Gunderson, *Nox Philologiae* cit. 71.

[81] Cfr. Cic. *Rep.* 1.59 where Laelius remarks that the *bonus iudex* ought to be swayed more by force of argument than by evidence of witnesses (*argumenta plus quam testes valent*).

[82] A rhetorical *topos*: Cic. *part. or*. 10.34-35; Quint. *Inst.* 5.10.23-31. Cfr. D. 4.3.11.1 (Ulp. 11 *ad ed*.) where the jurist Labeo is said to have claimed that an action *de dolo* would not be given to a vile man against an irreproachable man.

was not morally superior[83]. Insufficient evidence would necessarily cloud legal issues contained in the praetor's formula, thus creating factual doubts[84]. But in the case judged by Gellius, to absolve the morally inferior defendant would imply that the *vir melior* would not receive repayment, that the bad man would be freed from his obligation, and that the plaintiff would risk to be condemned in return through a *iudicium contrarium*. To avoid all this, the argument from character could be accepted as objective proof to convict the defendant. In an effort to reconcile types of proof admitted by usage in *iudicia privata* with equity, Gellius withdraws from the trial (*iudicatu illo solutus*) on the grounds that the facts of the case were not clear to him (*sibi non liquere*) to allow for legal interpretation (14.2.25). By this, he shows that the Roman judge could be torn between respecting factual proof – a value that should prevail upon arbitrariness to preserve reliability (*fides*) – and a personal code of ethics – here refers to the desire to protect equity and his own scrupulousness (*religio*) –[85]. This dilemma has been enacted through the *iurare sibi non liquere*[86], which refers to *mediocritas*[87], as well as to complex legal questions: when the available evidence is not sufficient to construct factual proof, and arguments from character risk to override rational argumentation (*rationes*), how can the judge's duty still be performed in an honourable way? How extensively can he approach law and

[83] Ruelle, *Aulu-Gelle* cit. 369 observes that the principle favorable to the absolution of the defendant (*ille unde petitur, ei potius credendum esse*) emerges through the prism of equality, such as it will prevail in classical law (Paul. 69 *ad ed*. in D. 22.3.2: *ei incumbit probatio qui dicit*), where it will be applied without regard to this sharing.

[84] This is not a doubt *de iure*, on which the judge could be instructed, but one *de facto* that he should remove 'in good conscience' by himself; otherwise, any attempt to influence him in the examination of the facts would be a distortion of justice, conducive to favouritism and personal ambition. See D. 5.1.79.1 (Ulp. 5 *de off. procons*.).

[85] On *fides* and *religio*, cfr. D. 22.5.13 (Papinian. 1 *de adult*.).

[86] It is debated whether the *non liquet* was for the Romans an actual verdict or the failure to reach one, and in the latter case, a mere deferment of a decision pending further information or the personal non-participation of the judge in the decision; which raises the issue of whether the judge's free scope of action could sometimes border upon what we call today 'denial of justice'. The idea first appears in M. Lemosse, *Cognitio. Étude sur le rôle du juge dans l'instruction du procès civil antique*, Paris 1944. More generally on the judge's capacity to declare the *non liquet*, see L. Manna, *La facoltà del giudice di* '*iurare rem sibi non liquere*', in Garofalo (a c. di), *Il giudice privato nel processo civile romano* I cit. 493-618.

[87] *Mediocritas* is here understood as an ideal middle state for the judge's conscience, who chooses not to bias the process despite an obvious ethical 'reality'. For Gunderson, *Nox Philologiae* cit. 72 *mediocritas* is to be interpreted as the medium «between authoritative extremes». McGinn, *Communication and the Capability Problem in Roman Law* cit. 273 nt. 28 understands *mediocritas* as «surely at minimum a self-deprecating reference to Gellius' social position (which was anything but humble), given his qualifications to be a *iudex*».

procedure for ethical reasons? These questions remain unanswerable, because Gellius decides not to close the matter in the way Cato, Favorinus or his advisers advocated. In declaring the *non liquet*, he is not bound by fixed rules regarding the admissibility of proof, which means that he is not acting in breach of the law. What is more, he chooses to do so by possessing the conceptual tools offered by rhetorical education to assess available proof, to ask these kinds of questions, and to reveal the difficulties in the way the Romans managed the law in court practice, between ancient usage and subsequent evolution of the *ius civile*[88].

Some of the most confident statements about judicial objectivity appear in legal and literary sources of the 2nd and the 3rd centuries CE that are philosophically grounded in moral notions. Gaius tells us that in ambiguous cases (*in dubiis*), the law should be interpreted in the least severe, and most equitable, sense – an idea which will be echoed in Hermogenian and Paul[89]. According to Ulpian (1 *de appellat*. in D. 48.19.13), it is permitted to the judge who hears a crime *extra ordinem* to pronounce the verdict he wants, provided that he does not exceed the measure. Marcian (2 *de publ. iudic*., D. 48.19.11 pr.) agrees that the judge must be careful not to decide anything that is too severe or too lenient in relation to the facts of the case, thus displaying *mediocritas*, which echoes the Aristotelian μεσότης[90]. Interestingly enough, the classical jurists seem to have conceived of the judge's duty as a flexible rational reflection that should embrace virtues, such as kindness and generosity, deriving from positive emotions, such as compassion. But for Callistratus (1 *de cogn*. in D. 1.18.19.1), judicial objectivity was clearly related to the issue of emotions: a firm (*constans*) and right-minded (*rectus*) judge should not reveal the movement of his soul through facial expressions (*animi motum vultus detegit*), whether angry (*neque excandescere adversus eos, quos malos putat*) or pitiful (*neque precibus calamitosorum inlacrimari*), for he reinforced the authority of his office (*auctoritatem dignitatis*) by his natural capacity for intelligence (*ingenio suo*). The Roman judge was traditionally expected to display a certain distance from the opposing parties, remaining neutral with regard to the facts and without showing excessive severity or leniency, except for the cases in which ambiguity

[88] Gellius was no legal expert, but an inexperienced judge trained in poetic myths and oratorical perorations, as he says himself (14.2.1). But the rhetorical expertise needed in judicial interpretation is an aspect that the traditional view – the Roman judge who was not trained in technical legal matters, felt socially responsible in seeking and in following expert legal advice – somehow fails to render explicit.

[89] D. 50.17.56 (Gai. 3 *de legatis ad ed. urb*.): *Semper in dubiis benigniora praeferenda sunt.* Cfr. D. 48.19.42 (Hermog. 1 *epit*.); 50.17.155.2 (Paul. 65 *ad ed*.).

[90] Cfr. *Rhet. Her.* 3.26; Cic. *off.* 1.89.

should be interpreted as favourable to equity. This gave ample space to *qualitative* judicial interpretation: the judge decided the most appropriate sanction to the circumstances of each case, *because* affective evaluations of facts were at stake. If few rules framed the judge's *officium*, it may well be because the Roman legal system relied early on the judge's consciousness – his intellectual and moral power stemming from his rational and affective faculties (*animus*) – to correctly evaluate factual proof, which says a lot about the emphasis placed on rhetorical education especially under the Empire, as well as about the political and civic importance of this institution.

With this background in mind, we can better understand why Quintilian's discussion in *Inst.* 6.2.5-6 turns to the admissibility of proof from emotion. The orator's task lies where force has to be brought to bear on the judges' consciousness (*ubi vero animis iudicum vis adferenda est*) and to seize their minds from attention to the truth (*et ab ipsa veri contemplatione abducenda mens*)[91]. This is an emotionally loaded orientational metaphor – hence the use of violence (*vis*, *adferre*, *abducere*) –, which suggests that the judge is momentarily caught up in the profound process of transformation of his emotions and 'transported' from a specific conception of truth towards another. The impulse (φορά) that urges him to move from a specific state of mind to another may imply that in every judicial debate, truth is a two-sided matter, whose contemplation is an act of conflict between old and new meanings[92] and at the same time, an act of resistance on the part of the judge who will not allow himself to fall readily for whatever emotion may be aroused in him. Quintilian draws attention to the fact that the deployment of πάθος is not something on which the litigant instructs (*docet*) the orator or which is contained in the *libelli causarum*; rather, it is a question of creativity, if not of innate talent (*ingenium*). For factual proofs (*probationes*) may lead the judges to think (*ut putent*) a case is better than the other, but proofs from emotion (*adfectus*) will make them want it to be so (*ut velint*); and what they want, says Quintilian, is also what they believe (*sed id quod volunt credunt quoque*). It is important to highlight the role of assent (*voluntas*) in this context for two reasons: (i) the juristic usage of the word *adfectus* contains a marked intentional component and is inextricably linked to judgement[93]; (ii) by virtue of the rational

[91] The idea is that facts will always provide the good orator with good arguments, but this not sufficient to persuade the judge. On this meaning of *verum*, I follow Bons, Lane, *Quintilian VI.2: On emotion* cit. 136 nt. 6.

[92] See Quint. *Inst.* 4.2.75-77 with Q. Skinner, *Vision of Politics, vol. I: Regarding Method*, Cambridge 2002, 183 for paradiastole.

[93] Stoic language is believed to have influenced the juristic usage of *adfectus*. For instance, the *adfectus iniuriandi* in the adult is the knowledge that a particular wrongful act is a case of *iniuria*, which seems to approximate the Zenonian position that a πάθος derives from a false judgement. See Cloud, *The Stoic πάθη* cit. 36-37.

reflection that underwrote the decision-making process, the judge did not accept the externally prompted impression automatically, but had the power to choose whether to accept or reject it. Rational assent thus appears as a cognitive precondition for 'feeling', which helps control the impulse.

A similar pattern involving external impression (*species*, φαντασία), impulse (*impetus*, ὁρμή), assent (*adsensus*, συγκατάθεσις), understanding (*comprehensio*, κατάληψις) occurs in Seneca (*Ep.* 113.17-18)[94]:

> *Nullum non animal per se agit. Virtus autem per se nihil agit, sed cum homine. Omnia animalia aut rationalia sunt, ut homines, ut di, aut inrationalia, ut ferae, ut pecora. Virtutes utique rationales* [18] *sunt; atqui nec homines sunt nec di; ergo non sunt animalia. Omne rationale animal nihil agit, nisi primum specie alicuius rei inritatum est, deinde impetum cepit, deinde adsensio confirmavit hunc impetum. Quid sit adsensio, dicam. Oportet me ambulare: tunc demum ambulo, cum hoc mihi dixi et adprobavi hanc opinionem meam. Oportet me sedere: tunc demum sedeo.*
>
> Every living thing acts of itself; but virtue does nothing of itself; it must act in conjunction with man. All living things either are gifted, with reason, like men and gods, or else are irrational, like beasts and cattle. Virtues, in any case, are rational; and yet they are neither men nor gods; therefore they are not living things. Every living thing possessed of reason is inactive if it is not first stirred by some external impression; then the impulse comes, and finally assent confirms the impulse. Now what *assent* is, I shall explain. Suppose that I ought to take a walk: I *do* walk, but only after uttering the command to myself and approving this opinion of mine. Or suppose that I ought to seat myself; I *do* seat myself, but only after the same process. (trans. Gummere)

Seneca's neo-Stoic assent adds important detail to the quintilianic diptych *ut putent - ut velint* which may well be an allusion to, and exploration of, the thesis that, when prompted by an impression, a rational creature proceeds to action, only after having entertained an impulse and confirmed it by its assent. It is tempting to think that the implications of Quintilian's formulation – how inextricably intertwined were reason, vision, emotion, and persuasion in the Roman courtroom – may be interpreted as a part of a larger rhetorical programme pertaining to the place of reason and emotions in court practice. One is thus inclined to subscribe to the view that «all ancient orators understood how primal and connected was emotion to reason and to persuasion»[95]. 'Primal' is an interesting lexical choice that could open up new perspectives about unconscious

[94] Cfr. Sen. *Ep.* 113.2.

[95] Katula, *Emotion in the Courtroom* cit. 145.

processes in ancient legal reasoning. It seems as though it refers to what Fr. Carl von Savigny described as the capacity to 'organically' differentiate between 'right' and 'wrong', and to what the German Historical School of Law constituted as *Rechtsgefühl*: a notoriously enigmatic concept, which has been linked to the Greek and Roman notions of ἐπιείκεια and *aequitas*, and whose semantic content ranges from an innate moral sense of justice to an educated feeling for the legal right, similar to 'legal intuition', and closest to what we would call today 'legal sentiment'[96]. From the point of view of the judge's cognitive capacity, this would imply a two-stage process: he would be expected to reach his final, official decision through adequate deliberation; a decision which would be affected beforehand by informal, instantaneous micro-decisions or choices, associated with emotive responses at the present moment or retrieved from memory. Quintilian seems to grasp the notion of a near-equivalent of this two-stage process, that comes close to what we would call today 'intuitive' and 'deliberate' judgement (*Inst.* 6.2.6-7):

> *Nam cum irasci favere odisse misereri coeperunt, agi iam rem suam existimant, et, sicut amantes de forma iudicare non possunt quia sensum oculorum praecipit animus, ita omnem veritatis inquirendae rationem iudex omittit occupatus adfectibus : aestu fertur et velut rapido* [7] *flumini obsequitur. Ita argumenta ac testes quid egerint pronuntiatio ostendit, commotus autem ab oratore iudex quid sentiat sedens adhuc atque audiens confitetur. An cum ille qui plerisque perorationibus petitur fletus erupit, non palam dicta sententia est?*
>
> For as soon as they begin to be angry or to feel favourably disposed, to hate or to pity, they fancy that it is now their own case that is being pleaded, and just as lovers cannot judge beauty because their feelings anticipate the perception of their eyes, so also a judge who is overcome by his emotions gives up any idea of inquiring into truth; he is swept along by the tide, as it were, and yields to the swift current. Thus it is only the final verdict that reveals how effective the Arguments and witnesses have been; but the judge confesses the impact made by the orator on his emotions while he is still sitting in court and listening. When the tears, which are the aim of most perorations, start from his eyes, is not the decision given for all to see? (trans. Russell)

This passage strikes the reader as an ode to the orator's powers over the judge's mind, with *adfectus* being the absolute means for achieving rhetorical success. Here, the orientational metaphor of the judge being overcome by

[96] See S. Schnädelbach, *The jurist as a manager of emotions. German debates on Rechtsgefühl in the late 19th and early 20th century as sites of negotiating the juristic treatment of emotions*, in *InterDisciplines* 2, 2015, 49-53.

emotions and transported away from any rational investigation of the truth is sublimated. Appeals to emotion are most effective when they activate the reminiscence and impression of something personal in the judge, a feeling or a past experience arising from the case, with which he might identify. If this is the Roman conception of 'knowing the judge', Quintilian would seem to endorse a legal system in which the latter was expected to form his judgements in accordance with emotions naturally linked to his character and background (which brings us back to social and political stakes). When this happens, the linearity that characterises impression – impulse – understanding is broken: the emotion becomes a (negative) cognitive precondition for perception (*quia sensum oculorum praecipit animus*)[97]. The moral implications are glossed over (Quintilian does not signal any moral problem in this passage), unless *omnem veritatis inquirendae rationem iudex omittit occupatus adfectibus* is combined with the love metaphor and is interpreted as an irony, which reveals more by what it implies than by what it actually says. In that case, there would be two possibilities: (i) a true *vir bonu*s may succeed in holding sway on the judge who would unexpectedly show his emotions in an instantaneous micro-decision before reaching a rule-based, conscious, and effortful final verdict; (ii) it would be wrong to assume that emotions only have a positive effect on the decision-making process, motivating the orator and the judge to search for better solutions to encountered problems, for *adfectus* deployed by a bad orator could significantly disrupt the process of thinking towards the higher good in situations in which powerful emotive responses prevented the judge from 'thinking clearly'. The underlying idea is that powerful emotions momentarily 'blind' the judge's mind[98]: if they were aroused honourably, he was prevented from making specific choices, because he could not perceive appearances in a specific way; but if they were aroused badly, he was prevented from making *obvious* choices, because he did not perceive obvious appearances as such. Both interpretive possibilities stress Quintilian's pragmatism, as well as his fascination with the power of speech.

Later (*Inst.* 6.2.26-29), Quintilian is concerned with what the orator should

[97] Cfr. Cic. *Rep*. 1.59 where Laelius and Scipio debate over the validity of a judgment based on arguments that derive from negative sensus.

[98] From a socio-historical perspective, this idea could take on a whole new dimension, assuming the existence of the «mondo sommerso dei giudici» postulated by L. Gagliardi, *La figura del giudice privato del processo civile romano. Per un'analisi storico-sociologica sulla base delle fonti letterarie (da Plauto a Macrobio)*, in E. Cantarella, L. Gagliardi (a c. di), *Diritto e Teatro in Grecia e a Roma*, Milano 2007, 199-217. Cfr. Cic. *De or*. 2.178 where he suggests that persuasive appeals to emotions (*utique ipse sic moveatur*) occur mainly through impulse (*impetus*) and emotion (*perturbatione*) (= emotive confusion), rather than through judgement (*iudicium*) and deliberation (*consilium*).

make of powerful emotive responses. It appears once again, but much more emphatically, that the deployment of *adfectus* boils down to being self-moved (*ut moveamur ipsi*). This mental activity goes beyond the mere imitation (*imitatio*) of others' emotions to subjecting one's feelings (*animum accommodarimus*) and assimilating oneself to those who truly suffer (*simus ipsi similes eorum qui vere patiuntur adfectibus*) through verbal and non-verbal communication (*verba vultumque*), to project this very attitude to the judge (*et a tali animo proficiscatur oratio qualem facere iudici volet*). The possibility for the judge to be 'swept' is intrinsic to the orator's embodied mind: rightly prompted powerful emotions inspire the judge in a constructive manner (*ut apud nos valeant ea quae valere apud iudicem volumus*), because the orator is self-moved beforehand (*adficiamurque antequam adficere conemur*). This analogical interaction is intended by Quintilian to be *veri similis*, which suggests that there is no real physiological alteration: *adfectus* were not framed through bodily symptomatology, but voluntarily to maintain self-control[99].

The discussion closes with a reflection on self-control. How is it possible for the orator to arrive at experiencing others' powerful emotions if such movements of the soul are not under his control?[100] To respond to the question, Quintilian advances a fuller description of self-affectation (*Inst.* 6.2.30-36), which conforms to the requirements of plausibility and which focuses on awareness of sensory stimulation: to be able to feel as if being someone else, one has to use what the Greeks call φαντασίαι and the Romans *visiones*, that is, one's innate capacity for imagining and visualising situations, in such a way that they seem to physically unfold before one's eyes (*ut eas cernere oculis ac praesentes habere videamur*). The resulting quality will be ἐνάργεια, from which powerful emotions will ensue just as if one were present at the event itself[101]. To project

[99] Cfr. Cic. *Tusc*. 4.55: *Oratorem vero irasci minime decet, simulare non dedecet* (so also Sen. *dial*. 4.17.1). But *Orat.* 130-2; *De or.* 2.189-90. On the contrary, Stoic emotions necessarily had their own physiological underpinnings. See Graver, *Stoicism* cit. 2007, 3-4.

[100] Quint. *Inst.* 6.2.29: *Neque enim sunt motus in nostra potestate.* Cfr. Cic. *Fat*. 40-41 where an opponent to the Stoic thesis of fate (that everything happens by antecedent causes) infers that impulse is not «in our power, and neither do those things which are brought about by impulse depend on us. So, neither assenting nor actions are in our power». In his reply, as reported by Cicero, Chrysippus agrees that the impression is the antecedent cause *of the assent*, rejects as invalid the inference to the conclusion that the *assent* is not up to us. The causal relation is between the impression and the assent. On the notion of control, cfr. Sen. *Ep.* 116.7-8.

[101] The deployment of *adfectus* in rhetorical theory and practice involved imagination (ἐνάργεια, φαντασία, *evidentia, illustratio, demonstratio, imaginatio*), a vital aspect to the task of all ancient orators, which impacted on speech performance (ὑπόκρισις, *pronuntiatio*, *actio*). At the level of *elocutio*, this translated into 'vivid illustrations' and mental pictures (*imagines*, *visiones*) that made the audience 'see' (*cerni*) situations in their minds (*oculis mentis*) as if happening at the

desired emotions in a calculated and controlled manner[102], the orator should persuade himself at first (*animo nostro persuadeamus*), identify with the person concerned (*nec agamus rem quasi alienam*), and assume its pain (*sed adsumamus parumper illum dolorem*). The student is instructed how to imagine and feel emotions authentically, how to recognise and strategically arrange those that emerge naturally from the case, how to inspire the judge. By completely eschewing engagement with uncontrolled irrational aspects, Quintilian conceived of powerful emotions in an ethical and intra-personal sense, as factors deeply interlaced with rational reflection and sensory experience[103], that could call into question self-control when aroused badly, but in which case they have to be reshaped through moral education.

Appeals to emotion involved great emotional intelligence on the part of Quintilian's orator: to understand the nature of different types of emotions, to imagine and be affected by them, to attenuate and amplify them, to envision another person's emotions and to be able to transmit them as if being that person, finally, to situate this whole cognitive experience at the centre of the persuasion and decision-making process is something that should be naturally connected with justice issues. The quintilianic conception of appeals to emotion supposes an understanding of all the subtlety and complexity of human emotions, in order to be able to insert them at the right time into one's argument without excess, inconsistency or malice. This kind of understanding is applied to the judge, who would be able to manage his emotions in his tacit thoughts (*cogitationes tacitae*) and 'foresee' potential (un)disguised drama, precisely because he received the same rhetorical training as the orator. By demonstrating authority over his

present moment, incorporate them into emotional scenarios (*in adfectus recipienda*), and respond accordingly. See Quint. *Inst.* 4.2.123; 6.2.29-32; 8.3.61-62; 8.3.64; 8.3.88; 9.1.27; 9.1.45; 9.2.49; 10.7.14-15; 11.3.62; 12.10.43 with Lausberg, *Handbook of Literary Rhetoric* cit. §§ 810-819. On ἐνάργεια and φαντασία in ancient rhetorical theory, see especially R. Webb, *Imagination and the arousal of the emotions in Greco-Roman rhetoric*, in S. Braund, C. Gill (eds.), *The Passions in Roman Thought and Literature*, Cambridge 1997, 112-127; Ead., *Mémoire et imagination: les limites de l'enargeia dans la théorie rhétorique grecque*, in C. Lévy, L. Pernot (eds.), *Dire l'évidence (Philosophie et rhétorique antiques),* Paris 1997, 229-248; A. Garcea, *Tamquam videntes demonstrare: la phantasia et les passions dans les théories rhétoriques sur la pitié*, in *Pallas* 69, 2005, 73-83; R. Webb, *Ekphrasis, Imagination and Persuasion in Ancient Rhetorical Theory and Practice*, Farnham 2009, 88 sqq. for Quintilian; F. Berardi, *La dottrina dell'evidenza nella tradizione retorica greca e latina*, Perugia 2012.

[102] These reveries, a vice of the soul (*vitium animi*), must be employed *ad utilitatem*. See Quint. *Inst*. 6.2.30-31.

[103] As opposed to external forces, unruly and hostile to reason, that compel the orator to 'manipulate' the judge. The term 'manipulation' involves negative undertones and is therefore ill-adapted to Quintilian's conception of the orator as *vir bonus*.

emotions, the ideal judge would not ignore emotions that naturally arose from a case, but would control them to make a better judgement. In this way, he would bring into play notions of 'professionalism', honour, and masculinity, that embedded law and emotions into broader concerns about sociocultural hierarchies; which renders Quintilian's theory of *adfectus* practically indispensable for the social workings of the law in the Roman courtroom.

VI. *Conclusion*

I hope to have shown that there was a particular intellectual context in the Roman Empire, where discussions about the importance and the practical use of emotions for preparing the judge's decision intensified on a strong theoretical basis. Quintilian's theory of appeals to emotion is not coterminous with the modern 'ethics of emotional appeal' (= if it is proper to introduce emotion to a judicial debate that should run on an entirely dispassionate state of mind), but does somehow cut through it: it provides good evidence for an alternative conception of the use of *adfectus* in the Roman courtroom, as a purposive activity underpinned with rational reflection in the context within which legal norms developed; an activity which should not be construed as referring to strategies of deceiving the judge, or of subverting the law, or of acting freely from legal formalities to drive personal/political agendas forward.

The quintilianic *adfectus* is almost always acceptable (albeit with possibilities for misuse), provided that it is responsive to reason. Because it relies on a strongly propositional element of cognitive and volitive modes to reach a value judgement, it can be understood as an emotion-involving-rational-judgement. Quintilian seems to defend a positive view of the rational assessment of the judge's emotive responses as an important factor in judicial deliberation. His aim was not to extirpate, but to moderate and orient them towards better judgement. By discussing judicial performance under the category of 'emotions', Quintilian gave to *adfectus* an epistemological function: in his view, justice was 'felt' and 'lived' through embodied representations of character and status that influenced perceptions and expectations of the mind/soul interaction.

Quintilian's theory on emotional appeal proves to be a privileged locus where strategies of shaping the judge's emotions were negotiated in such a way as to achieve greater justice and equity; a locus according to which reflecting upon the judge's state of mind questioned the sociocultural conditions in which the judgement was rendered. Indeed, the task of the Roman judge was not merely mechanical: the relationship with the office they represented

was put to question in every trial[104], precisely because it was embodied in their *persona*, enacted through the respectful conduct to a fair trial, embedded in a specific type of communication (the judicial debate), and extended to the engagement with other legal actors. If Quintilian's theory of emotional appeal was instrumental in establishing an institutional paradigm for thinking about the role of emotions in the administration of Roman justice, as my reading suggests, judicial interpretation as a normative activity, adjudication under an autocratic monarchy, and the figure of the emperor judge would take on a different dimension in the intellectual history of the Roman Empire.

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[104] In real-life court practice, all socio-cultural concepts or institutions were malleable while on trial: the character, the past life, the social status, the authoritative stance of the legal actors, the morality with which they refuted or defended acts, the political ideology that this process served and fostered. Cfr. Quint. *Inst*. 6.1.12-13; 6.1.15-16.