

David Konstan

PITY AND THE LAW IN GREEK THEORY AND PRACTICE

One of the more conspicuous differences between ancient and modern trial procedure is the admissibility, in the courts of classical Greece as well as Rome, of appeals to pity – the so-called *argumentum ad misericordiam*. Efforts to arouse the pity of judges or jurors were not only permitted, they were a regular and practically obligatory feature of defense speeches, and sometimes employed by the accusers as well. Rhetorical handbooks, which generally speaking were designed for forensic oratory, went into great detail concerning the methods and tropes for inciting the jury to pity. Much the greater part of what survives of a treatise composed (it appears) by one Apsines¹, in or about the third century A.D., is devoted to this subject, and while Apsines' elaborate subdivisions are almost absurdly minute, Cicero himself, in his youthful manual *De inventione* (1.107-109), did not hesitate to list, and pedantically enumerate, no fewer than sixteen different modes or *loci* for eliciting pity. One should emphasize, he says, (1) the contrast between present evils and past goods, (2) the duration of evils, (3) the many kinds of loss incurred, (4) their squalid and ignoble character; above all, (5) one must make them visible, as though one were at the scene itself, and not just hearing about it. It is good also (6) to note that the reversal of for-

¹ M. Heath, *Apsines and Pseudo-Apsines*, «AJP» 119 (1998), pp. 89-111, argues that the treatise attributed to Apsines «is the work of a pupil of a pupil of Apsines named Aspasius (perhaps Aspasius of Tyre)» (p. 109), while Apsines is the author of the *De inventione* attributed to Hermogenes.

tune was unexpected, (7) to remind the jurors that they too have children, etc., (8) to mention the offices, such as proper burial, that one was prevented from performing, (9) to apostrophize inanimate items, (10) remark on one's weakness or isolation, (11) commend one's burial to the jurors, (12) deplore the loss of dear ones, (13) note the ingratitude of those who did the harm, (14) assume a suitably humble demeanor, (15) show that one's complaint is more for the fate of others than one's own, and finally (16) indicate that one has pitied others, and is bearing one's own misfortune nobly. «For often», Cicero concludes, «courage and high-mindedness, which bespeak seriousness and authority, avail more in arousing pity than humbleness and pleading». One ought not, in any case, to dwell too long on stirring up the jurors' emotions, for «nothing dries more quickly than a tear» (the line is attributed to the rhetor Apollonius).

Aristotle, of course, had already treated the techniques for rousing pity in the second book of his *Rhetoric*, where he takes up the topic of the emotions, and Aristotle reports further that the subject had long since been a favorite with writers on rhetoric (one may compare the so-called *Eleoi*, or «Pities», attributed to Thrasymachus, which was very likely a collection of practical examples).

In the modern courtroom, on the contrary, such appeals to emotion are not only suspect, they are normally prohibited. Rule 403 in the Federal Rules of Evidence, which falls under Article IV: *Relevancy and its Limits*, concerns the *Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time*. In their commentary on this rule, Stephen A. Salzburg, Daniel J. Capra, and Michael M. Martin explain: «Evidence is not “prejudicial” merely because it is harmful to the adversary. After all, if it didn't harm the adversary, it wouldn't be relevant in the first place. Rather, the Rule refers to the negative consequence of “unfair” prejudice. Unfair prejudice is that which could lead the jury to make an emotional or irrational decision, or to use the evidence in a manner not permitted by the rules of evidence». The assumption is that an emotional judgment is inadmissible in a trial because it inhibits jurors from arriving at impartial conclusions concerning fact on the basis of the evidence itself ².

² Cf. J.W. Moore *et al.* (eds.), *Moore's Manual: Federal Practice and Procedure*, I, New York 1997, § 4.04 (commentary on Rule 403): «Unfair prejudice is caused by evi-

Even relevant evidence may induce an emotional response in jurors, and may, for this reason, be excluded under Rule 403. To be sure, the exclusion of evidence that is germane is a measure of last resort, and in order to overcome the presumption in favor of its admission, «the negative countervailing factors must be demonstrably greater than the probative value of the evidence».

The emotions in general, and pity in particular, have long been assumed to serve only as a distraction from rational argument, and to dispose the jury to draw erroneous conclusions from the evidence³. As Douglas Walton writes in his book devoted to this kind of argument: «The *argumentum ad misericordiam*, or appeal to pity, is standardly listed as one of the fallacies in twentieth-century logic textbooks»⁴. Walton illustrates this practice by quoting, among other sources, from a textbook by David J. Crossley and Peter A. Wilson entitled *How to Argue: An Introduction to Logical Thinking*, where the appeal to pity or, as they parse it, «playing on your feelings», is described as «a technique for bypassing one's thinking abilities»⁵. Insofar as the *argumentum ad misericordiam* names a specific logical fallacy, its salient feature, according to Walton (p. 2), is generally reducible to lack of relevance.

Scholars have explained the apparent difference between ancient and modern legal practice in regard to appeals to pity in two ways. On the one hand, Greek and Roman jurisprudence is charged with exhibiting a far more generous attitude toward irrelevancy and outright fallacy in argument than is tolerated in the modern courtroom⁶. On the other hand, the rejection of emotional appeals in

dence that suggests decision on an improper basis, as by arousing horror, sympathy, instinct to punish, or impulses other than the issues in the case.

³ For a concise review of modern theories of the emotions in relation to legal practice, see A. Reilly, *The Heart of the Matter: Emotion in Criminal Defences*, «Ottawa Law Review» 29 (1997/1998), pp. 120-151. Modern theorists customarily distinguish justice from revenge on the grounds that justice is dispassionate and disinterested, whereas revenge is motivated by anger or resentment; see D. Allen, *The World of Prometheus: The Politics of Punishing in Democratic Athens*, Princeton 2000, pp. 18-24.

⁴ D. Walton, *Appeal to Pity: Argumentum ad Misericordiam*, Albany 1997, p. 1.

⁵ D.J. Crossley - P.A. Wilson, *How to Argue: An Introduction to Logical Thinking*, New York 1979, p. 40.

⁶ E.g.: «Though rules of time were stringently observed, rules of evidence were few, and defendants themselves were not discouraged from speechifying about their past services to the polis or from parading their vulnerable children before the jury»;

modern legal practice is criticized as unduly restrictive: some scholars have defended the emotions as having an important and respectable role in the formation of judgments. As a result, ancient styles of argument are deemed either to be closer to those demanded by modern strictures or else downright superior, insofar as they enable a better appreciation of all the circumstances relating to a specific case. The recent victims' rights movement in the United States, for example, has supported a constitutional amendment that «would give such victims the right to notice and to attendance at all public proceedings “relating to the crime” and: (1) to be heard and to submit written statements at proceedings involving release from custody, acceptance of a plea bargain, or sentencing», among other entitlements⁷. Others have argued for «reconstructing the role of the judge as an empathic, contextually sensitive, and compassionate individual who immerses [himself] in the stories of others»⁸.

In what follows, I shall take a different approach to understanding the role that appeals to pity played in ancient forensic oratory. Before comparisons are drawn between classical and modern views, it is wise to determine the extent to which the central terms under discussion are in fact analogous. An examination of the meaning of the Greek term *eleos* and its Latin equivalent, *miser cordia*, suggests that while they may in many instances reasonably be translated as «pity», they have a penumbra of associations that are missed by the modern English word, and which, when taken into account, alter the picture we might otherwise form of appeals to this emotion in the

S.B. Pomeroy - S.M. Burstein - W. Donlan - J.T. Roberts, *Ancient Greece: A Political, Social, and Cultural History*, Oxford 1999, p. 345.

⁷ L. Henderson, *Criminal Law Symposium Commentary: Co-Opting Compassion: The Federal Victim's Rights Amendment*, «St. Thomas Law Review» 10 (spring 1998), p. 588.

⁸ M. Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, «New England Review of Law» 32 (summer 1998), p. 975, summarizing the argument developed by R. West, *Caring for Justice*, New York 1997, pp. 205-206. A related approach emphasizes face-to-face mediation and reconciliation between victim and offender; this ideal, which goes under the name of «restorative justice», has gained support internationally. In such sessions, feelings of guilt and remorse are commonly elicited in the offender, and these may elicit in turn understanding and forgiveness. See M.S. Umbreit - R.B. Coates - B. Kalanj, *Victim Meets Offender: The Impact of Restorative Justice and Mediation*, Monsey (NY) 1994; B. Galaway - J. Hudson (eds.), *Restorative Justice: International Perspectives*, Monsey (NY) 1996; M. Wright, *Justice for Victims and Offenders: A Restorative Response to Crime*, 2nd edn, Winchester 1996.

Greek and Roman contexts. In this connection, I shall also consider the significance of a group of related terms, including *sungnome*, which is commonly rendered as «pardon» or «forgiveness», although expressions such as «indulgence» are also found in cases where «pardon» is manifestly inappropriate, and *metameleia*, which is translated variously as «regret», «repentance», and «remorse», as though all these expressions signified much the same thing. I hope, in the process, to raise some questions about classical moral categories in general, and our way of understanding moral arguments in antiquity.

When, in modern treatments, the arousal of pity is regarded as an inappropriate form of argument at law, it is because it is assumed that judgments based on pity are in principle indifferent to the issue of guilt or innocence. A jury may be moved to acquit a person who, on a rational review of the evidence, would be deemed guilty, if it is induced to dwell, for example, on the unfortunate childhood of the defendant, or to take into account other pitiable or mitigating conditions. Contrariwise, pity for a plaintiff who has been the victim of a particularly violent assault may dispose a jury to convict the accused, even where the evidence might have appeared insufficient on a rigorously logical examination. But classical notions of pity invariably treated the question of desert as being of central importance: it was taken for granted that pity is elicited only by unmerited suffering. How, then, does pity influence a judge or jury to come to a verdict that is independent of the rights and wrongs of the case?

We may perceive the different status of appeals to pity or emotion then and now by considering the place accorded to them in the judicial process. In the United States, guilt or innocence in a wide variety of criminal cases is decided by a jury; the penalty, however, is assigned by the judge, in accord with sentencing guidelines that were generally quite flexible, although since 1986, when federal sentencing guidelines were drawn up, maximum and minimum penalties have been prescribed which judges are obliged to respect except for special reasons⁹. For some crimes, which historically have included capital crimes, a mandatory sentence is or at one time was prescribed by law. As Jefferey L. Kirchmeier explains, however, «One problem with the mandatory death penalty was that juries, fearful

⁹ For a critical appraisal and history of U.S. sentencing guidelines, see K. Stith - J.A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts*, Chicago 1998.

that guilty but sympathetic defendants would be put to death, often would ignore the law and find such defendants not guilty»¹⁰. As a result, as early as 1838, the legislature of the State of Tennessee gave juries «discretion in capital cases once they found a defendant guilty of murder». Other states followed suit, and in 1897 the United States Congress passed an act allowing juries in capital cases to qualify a guilty verdict by the phrase, «without capital punishment». By the year 1963, all states in which a death penalty could be imposed by a jury «also gave the juries discretion to give mercy to a defendant convicted of a capital crime».

When, a little over twenty years ago, the death penalty was re-introduced in the United States, a post-verdict phase in capital crimes, in which a jury decided on the nature of the penalty, became a regular part of capital trials¹¹. Naturally, procedures for the penalty phase of a trial differ from those of the liability phase. During the liability phase, the defendant is presumed innocent, and only that evidence which is materially relevant to the question of culpability can be presented to the jury. As we have seen, even such evidence, if it is deemed likely to arouse unfair prejudice in the minds of the jurors, may be disallowed in federal courts under Rule 403. After a defendant has been convicted, however, he or she is now legally guilty, and the rules of evidence are accordingly different. To take one example, Theodore Eisenberg, Stephen P. Garvey, and Martin T. Wells write: «South Carolina's capital-sentencing scheme is like that of many other states. The capital trial is bifurcated into a guilt phase and a penalty phase. If the jury finds the presence of at least one statutory aggravating circumstance, the defendant becomes "death eligible". Having made the finding, the jury can sentence the defendant to death or life imprisonment. Finally, South Carolina law, like the law of most other states, provides the jury with a list of aggravating and mitigating circumstances to guide its sentencing decision»¹².

¹⁰ J.L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, «William and Mary Bill of Rights Journal» 6 (spring 1998), p. 350.

¹¹ For an argument in favor of extending the jury's responsibility for sentencing, see A. Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, «Yale Law Journal» 109 (1999), pp. 101-129.

¹² Th. Eisenberg - S.P. Garvey - M.T. Wells, *But Was He Sorry? The Role of Remorse in Capital Sentencing*, «Cornell Law Review» 83 (September 1998), p. 1603.

Mitigating circumstances relate exclusively to the sentencing phase. Some of the conditions stipulated by the South Carolina statute are that the defendant «has no significant history of prior criminal conviction» for violent offenses, the defendant committed the crime when suffering from «mental or emotional disturbance», and the defendant «was provoked by the victim into committing murder»¹³. The code of the state of Virginia provides that «Evidence which may be admissible [in the sentencing phase] ... may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense»¹⁴. The Virginia Supreme Court has taken a very liberal view of the jury's latitude in recognizing mitigating circumstances. In 1899, it declared: «How far considerations of age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency ... should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone»¹⁵.

At this stage of the proceedings the question of the defendant's, or rather, the criminal's expression of remorse takes on particular salience. As Eisenberg, Garvey and Wells remark: «Although South Carolina law does not list remorse as a mitigating circumstance, a capital defendant nonetheless enjoys a constitutional right to proffer in mitigation "any aspect of [his] character or record and any circumstances of the offense". Along with most, if not all, other jurisdictions, South Carolina accordingly appears to treat remorse as a mitigating factor in capital-sentencing proceedings». As various studies have demonstrated, the appearance of remorse is a crucial factor in sentencing. Scott E. Sundby, in an article entitled *The Intersection of Trial Strategy, Remorse, and the Death Penalty*, in which he made use of the data for California drawn from the Capital Jury Project, described as «a nationwide study of the factors that influence the decision of capital jurors on whether to impose the death penalty», notes that «The interviews of jurors who served on a jury that imposed a

¹³ *Ibid.*, p. 1604.

¹⁴ Virginia Code sec. 19.2-264.4(B), cit. U.S. Briefs 8400 October Term, 1996 (August 15, 1997), Brief of Respondent.

¹⁵ *Ibidem.*

sentence of death ... strongly corroborated earlier findings that the defendant's degree of remorse significantly influences a jury's decision to impose the death penalty»¹⁶. Scott found further that «the earlier the defendant personally expresses some type of acceptance of responsibility for the killing, the greater the likelihood that the jury will be receptive to later claims of regret»¹⁷. This latter factor puts at a disadvantage those defendants who insist from the beginning of the trial – that is, in the liability phase – upon their innocence, and therefore refuse to express remorse. If they are intent upon appealing the verdict, it will not be in their interest to display remorse even in the penalty phase. The situation has a certain Catch-22 quality, although that issue is beyond the scope of our concerns here. What I wish to emphasize is that remorse is relevant in the penalty phase of a trial, when it may inspire the compassion or mercy of the jury. Indeed, mercy would not be relevant before the verdict. As Malla Pollack observes in a subtle paper on the incompatibility of mercy with a rights-based system of justice: «One can only be merciful to the guilty. If guilt ends all consideration, mercy is dead»¹⁸.

I wish to introduce one last point of modern law, before returning to the role of pity in the ancient forensic context. This concerns the role of pardon or clemency. Juries may exhibit compassion or mercy in the sentencing phase of a capital trial, as we have seen. Even in coming to a verdict of guilty or innocent, juries cannot be prevented from ignoring precedent and deciding in favor of a defendant, if, for example, they deem that the law in question is inappropriate, or that the action in question is intrinsically good or beneficial. In the United States, such a judgment is described as jury nullification¹⁹. Douglas Cairns, with whom I have been in regular correspondence concerning these matters, informs me of a British parallel

¹⁶ S.E. Sundby, *The Intersection of Trial Strategy, Remorse, and the Death Penalty*, «Cornell Law Review» 83 (September 1998), p. 1560.

¹⁷ *Ibid.*, p. 1586.

¹⁸ M. Pollack, *The Underfunded Death Penalty: Mercy as Discrimination in a Rights-Based System of Justice*, «University of Missouri at Kansas City Law Review» 66 (spring 1998), p. 551.

¹⁹ For an excellent summary of the history of jury nullification in English and American law, and a comparison with ancient Athenian practice, see Allen, *The World of Prometheus* (above, n. 3), pp. 5-8.

in the «recent case concerning the civil servant, Clive Ponting, who was the source of the information that Margaret Thatcher had lied to parliament on the sinking of the Argentinian warship, the *Belgrano*, during the Falklands war. Ponting did not dispute the facts, but claimed a higher duty to conscience; the judge directed the jury to convict, but they decided to acquit. In such cases, though, the prosecution retains the right to appeal»²⁰. But such an act does not constitute a pardon. Pardoning, or clemency, is exclusively in the domain of the executive rather than the judiciary branch of government. The framers of the United States Constitution regarded clemency as a prerogative, with its origins in the capacity enjoyed by the English king to «extend his mercy on what terms he pleases»²¹. Thus, due process is not held to apply to executive clemency.

The above considerations concerning relevance of evidence, remorse, and pardon, are of course not automatically transferable to the conditions of ancient legal procedure, which was in many respects «desperately foreign»²². As we have seen, it was customary to appeal to the pity of the jurors in the peroration of a defense speech, and rhetoricians developed a whole array of devices by which to enhance the effect of such an appeal²³. Is petitioning for pity the same thing as a request for mercy? If it is, can one say, with Malla Pollock, that «One can only be merciful to the guilty»? In this case, would not a defendant in a Greek or Roman court have effectively proclaimed his guilt in advance of the jury's verdict? Something is obviously amiss in this line of reasoning.

In seeking to arouse the jurors' pity, Greeks and Romans did not imagine that they were conceding guilt. In fact, as I mentioned earlier, the opposite is the case: pity, it was generally supposed, was aroused not by the spectacle of misfortune as such, but rather by that of undeserved misfortune. To cite but a single instance of a

²⁰ D. Cairns, e-mail communication dated 19 February 1999.

²¹ Cited from a brief of amici curiae in support of the Ohio Adult Parole Authority, 1996 U.S. Briefs 1769 (October Term, 1997) August 21, 1997, in Ohio Adult Parole Authority *et al.* vs. Eugene Woodard.

²² The phrase is cited from P.J. Rhodes, *Enmity in Fourth-Century Athens*, in P. Cartledge - P. Millett - S. von Reden (eds.), *Kosmos: Essays in Order, Conflict and Community in Classical Athens*, Cambridge 1998, p. 161.

²³ On the restriction of appeals to pity to the peroration, cf. also Quintilian, *Institutio Oratoria*, 4.1.28-29.

formula that is repeated in one form or another throughout classical antiquity, Aristotle's definition of pity in the *Rhetoric* runs: «Let pity, then, be a kind of pain in the case of an apparent fatal or painful harm in one not deserving to encounter it, which one might expect oneself, or one of one's own, to suffer, and this when it seems near» (2.8.2). Correspondingly, defendants did not seek the jury's pardon, at least not in the modern legal sense of that term; an act can be pardoned only after it is deemed a crime by a guilty verdict, not before. It is for this reason too, I believe, that there is virtually no reference to remorse in the speeches of the Greek orators. As Douglas Cairns defines the concept, «Remorse ... is a species of regret over actions for which one considers oneself responsible, which one wishes one had not performed, and whose damage one would undo if one could»²⁴. There can be no question but that the Greeks were familiar with the idea. But, as Cairns observes, «it is perhaps surprising that the topic is so scarce in the functioning legal system of Athenian democracy» (p. 176). Cairns goes on to suggest some reasons why this should have been the case, among which he mentions the amateurish and adversarial nature of judicial proceedings, and the role of a large popular jury, «which received no legal guidance» before coming to a decision. As a result, Cairns says, there was «little incentive (indeed little opportunity) for a defendant to plead guilty, hoping that his remorse will secure a more lenient sentence» (*ibidem*).

Cairns is broadly right about the peculiar characteristics of the classical Athenian system of justice, which was often more like a public wrangling for status than an impartial attempt to secure justice²⁵. A guilty plea, however, would not normally require a defense speech, and so it is perhaps not surprising that we do not possess transcripts of cases in which the defendant failed to contest the charge against him. Where the accused sought to affirm his innocence, it cannot have been good strategy to express remorse and

²⁴ D. Cairns, *Representations of Remorse and Reparation in Classical Greece*, in M. Cox (ed.), *Remorse and Reparation*, London 1999, pp. 171-172.

²⁵ But see S. Johnstone, *Disputes and Democracy: The Consequence of Litigation in Ancient Athens*, Austin 1999, pp. 40-42 for the importance of justice, fairness and respect for the law in Athenian trials. Johnstone argues (pp. 47-54) that judicial narratives conform to certain rules which distinguish them from non-legal stories, whether in ancient Athenian or in modern American courtrooms.

thereby accept responsibility for the offense. In one respect, however, Athenian trial procedure did bear a curious resemblance to modern procedure in the United States in relation to capital crimes. That is, in a broad variety of situations, not restricted to those in which the death penalty was an option, Athenian trials were divided into two parts: a liability phase, in which the question of guilt or innocence was decided, and which resulted either in conviction or acquittal; and a penalty phase or *antitimesis*, in which the convicted party might recommend a counter-penalty or *antitimema* to that demanded by the prosecution, and it was up to the jury to decide between the two²⁶. Surely, the latter stage is that in which one might expect to encounter expressions of remorse, and a request for the mercy of the court.

Unfortunately, there survives only a single example of an Athenian penalty-phase discourse, and that one is both a free rendition, rather than a verbatim report, of the speech in question, and has the peculiar feature that the condemned party continued to insist on his innocence, and made little effort to win the favor of the jury even at this stage of the proceedings. I am referring, of course, to Socrates' *Apology*, as transmitted to us by Plato. According to Plato, Socrates first suggested that he be rewarded for his allegedly criminal behavior by being feted as a state hero, and only afterward proposed a small fine in answer to the death penalty sought by his accusers; when Plato and others offered to stand surety for a larger amount, Socrates consented. Xenophon, in his *Apology* (23), denied that Socrates either consented to propose a counter-penalty or allowed his friends to offer one, «but actually said that to propose a counter-penalty was the part of a man who conceded that he committed an injustice». I am not concerned here to adjudicate between the two accounts, so much as to indicate that Socrates is the last person one might expect to have demonstrated signs of remorse for his behavior, since he persisted to the end in a posture of open defiance of the verdict. This cannot have been the response of all, or even most defendants in the penalty phase.

²⁶ On the *antitimesis*, see A.R.W. Harrison, *The Law of Athens*, 2nd edn, ed. D.M. MacDowell, II, London 1998 (orig. 1971), pp. 80-82; Cicero, *De oratore*, 1.54.232 notes that in Athenian courts capital crimes (that is, those involving homicide) were just those in which there was no penalty phase.

Remorse, then, if it was expressed at all in classical Greek and Roman trials, may have been largely confined to arguments concerning sentencing, rather than the verdict proper. In this respect, ancient practice will have conformed to modern. The difference between the two is that ancient pleaders enjoyed far greater freedom to bring up in the liability phase matters of character, service to the community, and other extenuating (or aggravating) circumstances that are excluded in courts today as irrelevant to the determination of guilt, although they are allowed in the sentencing part of capital trials. The appeal to pity comes under this heading as well, of course; however, given the close connection between pity and desert in ancient thought, this liberty ought not to be construed merely as a device to circumvent the factual question of guilt and innocence. Rather, it was another means by which a defendant insisted on his innocence, and asked that it be recognized.

We thus return, after a longish detour, to the question of logical fallacy: if an appeal to pity was a way of summoning attention to the defendant's innocence, in what respect did it depart from the kinds of reasoning that ought to enter into a judgment based on the merits of the case? Without going into the matter very deeply on this occasion, it should be noted that the radical opposition between reason and emotion, on the basis of which pity and other feelings are commonly treated as inimical to rational evaluation, is far more characteristic of modern than of classical thought. In the past decade or two, philosophers have once again come to recognize the essential cognitive dimension of the emotions, and in this respect have returned to the kind of analysis developed by Aristotle and the Stoics, for example²⁷. When Aristotle identified the object of pity as an «ap-

²⁷ On the cognitive nature of the emotions, see W.W. Fortenbaugh, *Aristotle on Emotion*, London 1975; W. Lyons, *Emotion*, Cambridge 1980, pp. 70-91; R.M. Gordon, *The Structure of Emotions: Investigations in Cognitive Philosophy*, Cambridge 1987; R. de Sousa, *The Rationality of Emotion*, Cambridge (Mass.) 1987; concise summary in P.E. Griffiths, *What Emotions Really Are: The Problem of Psychological Categories*, Chicago 1997, pp. 21-43. The best defense of the *argumentum ad misericordiam* with which I am familiar is by A. Brinton, *A Plea for the «Argumentum ad Misericordiam»*, «Philosophia» 23 (1994), pp. 25-44; cf. also Idem, *Pathos and the «Appeal to Emotion»: An Aristotelian Analysis*, «History of Philosophy Quarterly» 5 (1988), pp. 207-219; G. Striker, *Emotions in Context: Aristotle's Treatment of the Passions in the «Rhetoric» and His Moral Psychology*, in A. Oksenberg Rorty (ed.), *Essays on Aristotle's «Rhetoric»*, Berkeley 1996, pp. 286-302, esp. 297-298; Walton, *Appeal to Pity* (above, n. 4).

parent fatal or painful harm in one not deserving to encounter it», he was manifestly incorporating into the definition of the emotion both values and judgments, on the basis of which one decided that the circumstances of another were miserable and unearned. Pity did not, for Aristotle or, I think, for the Greeks and Romans generally, consist in an instinctive identification with the suffering of another, irrespective of desert (for this, they had other terms, such as *sunalgein* and *philanthropia*); rather, it required a certain measure of detachment or distance from the pitied, which opened up a space for discrimination²⁸.

Let us turn now to the consideration of some actual cases, beginning with a peroration in which there is not an explicit attempt to evoke pity in the jurors. Lysias, 21 is a defense speech written for the son of one Eucrates, who was accused of malfeasance in office, including the charge of having taken bribes. What survives is the concluding oration, in which the young man expatiates upon his civic-mindedness and generosity toward the city; the detailed rebuttal of the specific charges will have been made earlier, very likely by more experienced *sunegoroi*²⁹. The defendant explains that he has never shrunk from personal hardship in the city's behalf, nor did he take pity on his own family when risking his life for his country in war. In return (*anth'bon*), he demands *kharis* (25) of the jury, that is, grateful recognition of his services, which he insists he deserves (*axio*), as opposed to being condemned on such charges (*toiautais aitiais* presumably means such absurd or spurious charges), which would deprive him of his property and civic rights, and send him and his children wandering penniless in foreign lands. The speaker's intention is to contrast as sharply as possible what his character and history of service to the state ought to earn him with the harsh conse-

²⁸ In the *Rhetoric* (1386a.18-23), Aristotle affirms that pity is not inspired by the sufferings of close kin, who are a part of oneself, but rather by those of more remote acquaintances (*gnorimoi*). Appeals to pity in Greek tragedy tend, I think, to corroborate Aristotle's view; I discuss several examples in my paper, *Pity and Two Tragedies*, forthcoming in G. Vogt-Spira - E. Stärk (eds.), *Dramatische Wäldchen: Beiträge zum antiken Theater und seiner Rezeption*, Festschrift für Eckard Lefèvre, 2000.

²⁹ On the role of *sunegoroi*, that is, co-defendants and co-prosecutors, see L. Rubinstein, *Synegoroi in the People's Court in Classical Athens*, dissertation, Cambridge University, 1997; forthcoming in revised form under the title, *Litigation and Co-operation: Supporting Speakers in the Courts of Classical Athens*, Stuttgart (= «Historia Einzelschriften», 145).

quences of a negative verdict. He is not for a moment suggesting that he be spared on the basis of his good deeds or character, *in spite of* the wrongs he may have committed while holding public office. Rather, he is making vivid to the jury what losing his case would mean for himself and his family, precisely on the assumption that he is innocent. His object is not to ask for mercy, in the sense in which mercy presupposes guilt; it is to make sure that no irrelevant motive, such as personal hostility, political partisanship, or favor toward his accuser, may induce the jury to convict him, by making clear what is at stake if they do so. It is a way of charging the jury to take seriously the power at their disposal, and be certain that they do not do grave harm, as they can, on the basis of insufficient evidence, when the charges involving bribery are all the more implausible in light of his history of selfless service to the city.

Because Eucrates' son does not ask specifically for pity, his argument may seem more compatible with our ideas of relevant argument: he may appear simply to be reminding the jurors of their sworn duty. Let us take a glance, then, at the conclusion to another partially preserved defense speech in the Lysiac corpus (4), delivered in response to a charge of a premeditated attack on a fellow-citizen. Here again, the speaker ends the presentation of his case by pointing to his previous behavior, which, he claims, offers no reason to suppose that he would have acted violently in the instance under consideration. «Thus I supplicate and beseech you, by your children and wives and the gods who protect this place, pity me ...; for I do not deserve [*ou gar axios*] to be exiled from my city, nor does he deserve to exact so great a penalty from me for wrongs he says he suffered, but did not» (20). Once again, there is the strongest possible affirmation of innocence, combined with a plea for pity, which is as it should be: pity is only for undeserved misfortune, not for misfortune as such. The appeal to pity is not a means of distracting the jurors from the evidence relevant to the case, but rather of enjoining them to judge in accordance with the facts and with justice, and not heedlessly impose a penalty that will cause an innocent man to suffer gravely, and thus in truth be pitiable.

Analogously, when a defendant asks the jurors for *sungnome*, it is not mercy, or undeserved pardon, that he is seeking, but rather a favorable disposition toward a just case. The connection with the root sense of *sungignosko*, that is, to have the same opinion or

gnome as another, was not, I think, wholly lost in the classical period. Lysias, 31 is an accusation, brought before the *boule*, against the election of a man named Philon to the council; the speech was delivered a short time after the restoration of the democracy in 403 B.C. Among the charges is that Philon failed to participate in the struggle against the Thirty Tyrants. Those who were prevented from doing so because of some private misfortune (*sumphoras idias*, 10), the speaker says, deserve to meet with a certain *sungnome*; but those who acted in this way *gnosei*, that is, intentionally, are not worthy of any *sungnome* at all, because they did what they did deliberately. *Sungnome*, the speaker continues (11), is due only to those who, if they behave wrongly, do so involuntarily. Here, *sungnome* is not pardon or acquittal; it is more like a shared attitude. One who acts badly from deliberate judgment, that is, *gnose*, cannot expect to encounter a comparable disposition or *sungnome* among upright jurors; however, in a case in which someone acts, or fails to act, for reasons such as ill health or extreme poverty, his *gnose* may still be presumed to be correct, and one can with justice share it. To be sure, in many contexts it is preferable to render *sungnome* as «indulgence», or even as «forgiveness», perhaps, but in legal arguments, and in particular when a defendant appeals for the *sungnome* of the jury, one must understand that such a plea does not entail admission of culpability. Like pity, it depends rather on the assumption of innocence.

If pity in classical antiquity was in fact closely associated with just deserts, and not conceived of as a raw emotion evoked only to disarm reason and circumvent legitimate evidence, what of the suspicions that the appeal to pity aroused among the Greeks themselves? For they too, and not just modern commentators, entertained doubts about the validity or admissibility of such pleas in court. For example, in the defense speech in behalf of Polystratus (20), attributed to Lysias but written, it appears, around 410 and thus before the beginning of Lysias' career as a logographer, Polystratus' son, defending his father against the charge of collusion with the regime of the Four Hundred, points to his own and his brother's services to the democracy, for which he demands the recompense he deserves (*exaitoumenoi par humon ten axian kharin*, 31; cf. 33: *autoi de prothumoi ontes eis humas axioumen heuriskesthai kharin*). «But», the speaker adds, «we see you, gentlemen of the jury, when someone puts his

children on the stand and weeps and laments, both pitying his children, should they lose their civic rights on his account, and dismissing the crimes of the fathers on the children's account, though you do not yet know whether they will turn out good or bad when they grow up» (34). This looks like the standard argument against the role of pity in the courtroom: that some extraneous concern, such as that for the welfare of innocent children, should have such weight with the jury that it acquits someone who is manifestly guilty. But the case is not so straightforward. First of all, the speaker's design is to draw a contrast between regard for young children, who may, despite their vulnerability and innocence, yet prove to be unworthy of the city's concern, and that for a man of established worth such as the speaker's own father. Thus, he has no hesitation in saying in practically the next breath, «but rather pity both my father, who is aged, and ourselves» (35), and summing up resoundingly: «we beg you by whatever goods you may each possess, that those with sons pity us for these, and those too who are our agemates or our father's, pity and acquit us» (36). But if the speaker is so free in beseeching pity of the jury for himself, it is not just because his father has proved his mettle, as opposed to still infant children, but that it is just his father's commitment to the democracy, and that of the family as a whole, that is at stake in the trial. Thus, pity for both father and sons is justified, according to the speaker, precisely because they are innocent of the charges brought against them. Since this makes all the difference, the speaker sees no inconsistency in asking for it in his own behalf, right after denouncing such an appeal on the part of one who has committed an injustice.

In his attack upon the younger Alcibiades (son of the famous general) for desertion of his post, Lysias sums up the treacherous history, as he perceives it, of the entire clan and declares: «Deem him a hereditary enemy of the city and condemn him, and do not count pity or *sungnome* or favor (*kbaris*) more than the established laws and the oaths you swore» (14.40). The point, once again, I think, is that just as the entire family, and the accused in particular, deserve no gratitude from the people because they have done them nothing but harm, so too they are not worthy that the jurors should entertain their point of view or feel pity, because of their criminal characters and deeds. It is not that emotion of pity is being condemned as in principle irrelevant, but rather that it is, in this in-

stance, the wrong emotion, or is misplaced. Thus, in the next speech, possibly written for delivery by a *sunegoros* in the same trial, the plaintiff asserts: «And if any one of you, gentlemen of the jury, thinks that the penalty is great and the law too harsh, you must recall that you have not come here as lawmakers on these matters, but rather to vote according to the established laws, nor to pity those who do wrong, but rather to be angry with them and to come to the aid of the entire city» (15.9). The speaker is evidently warning against the possibility of what today is called jury nullification – that is, setting the law aside because it seems excessive or otherwise inappropriate, given the overall circumstances of the case. But in admonishing the jurors to reject pity, he specifies that this is the wrong sentiment to entertain toward those who have committed an offense, for they deserve not pity but rather anger. The speaker is not requesting a dispassionate judgment, but rather one in which the jurors' emotions are the right ones in respect to the deserts of the accused.

Some readers may be thinking of the well-known passage in Plato's *Apology* in which Socrates, toward the end of his first speech, that is, in the liability phase of the trial, explains why he has decided not to bring in his children and family and plead for the pity of the court, as most other defendants do even in cases of less consequence (34b-c). Socrates professes to fear that his behavior may be construed as a sign of arrogance, and that the jurors may as a result cast their votes in anger (*met'orges*). Socrates recognizes here that an appeal to pity may neutralize the jurors' anger, though he suggests that any anger they feel is due not to their response to the crimes for which he has been charged, but simply to his refusal to humble himself before them. Socrates' first reason for not resorting to the pity argument is that it is a sign of effeminacy and cowardice: since no one is immortal, death is hardly so dreadful a thing to suffer (35a). If the punishment does not constitute a misfortune, then to be sure the jury has no reason to feel pity, whether or not the defendant is ultimately innocent or guilty³⁰. But Socrates then adds that it is not

³⁰ See Flavius Philostratus' comment on Apollonius of Tyana's apologia before the emperor Domitian (8.6): «When a wise man pleads in his own defense ..., he requires a different character in comparison to men practiced in the courts ... Let pity be gone when he speaks: for what would someone who does not consent to supplicate say in

just to beg for acquittal, but one ought rather to teach and persuade the jury – persuade rationally, that is to say (35b-c). Socrates may well have believed that an innocent defendant should not dramatize in court the pitiableness of an unjust condemnation, since any departure from a discussion of the abstract principles of justice must inevitably mislead the jury. But he had a different idea of what constitutes a rational argument from that of his fellow Athenians.

Before concluding with a brief examination of a well-known problem in Aristotle's treatment of appeals to emotion in the *Rhetoric*, I wish to indicate the limits of the claims I am making here. I do not doubt that defendants who humbled themselves before the jurors and begged for pity might have sought to flatter their pride, and to dispose them favorably to themselves on these grounds. Nor do I think that defendants who were guilty as sin could not and did not avail themselves of the appeal to pity, and thereby secure a favorable verdict. I am merely arguing that if they did succeed in doing so, the underlying strategy was not to induce the jurors to lay aside their judgment concerning guilt or innocence and exonerate the defendant solely on sentimental grounds, but rather to reinforce the idea that the defendant was innocent, and just for that reason was to be pitied in the event of a vote to condemn rather than acquit. The difference is subtle, perhaps, but I believe it is a material one.

At the beginning of his *Rhetoric*, Aristotle remarks that those who have previously composed manuals or *tekhnaí* for speeches (*ton logon*) have treated only a small part of the subject. Only proofs (*pisteis*), Aristotle holds, are properly a technical (*entekhnon*) part of rhetoric, and these consist principally of enthymemes, or arguments based on probable or plausible premises. But other writers, Aristotle complains, have nothing to say about these forms of deduction, but discuss rather topics that are outside the issue (*exo tou pragmatos*): «for slander and pity and anger and such affects of the soul are not about the issue, but rather are directed at the juror» (1354a16-18). Aristotle adds that «one ought not to warp a juror by leading him to anger or envy or pity» (1354a24-25), for this is like bending the ruler with which you wish to measure something. Aristotle claims further

regard to pity?». Philostratus' point is that the sage does not deign to beg for anything, and hence has no need to appeal for pity.

that «the part of one who is litigating is nothing other than demonstrating that the thing [*pragma*] exists or does not exist or happened or did not happen» (1354a27-28).

Given this preface, which seems to conform nicely to modern standards of evidential relevance, it comes as something of a shock to recall that Aristotle devotes the better part of the second book of the *Rhetoric* to the means of rousing the emotions of jurors. But one need not wait so long in the treatise to encounter a positive assessment of appeals to passion in the art of persuasion. In the second chapter of Book I, Aristotle explains that «of proofs, some are non-technical and others are technical [*entekhnōi*]» (1355b35-36). In the non-technical category, that is, those kinds of proofs that do not depend on rhetoric as an art, are such things as witnesses and evidence produced by torture. «Of proofs provided by speeches, in turn, there are three kinds: some are in the character of the speaker, some in how the listener is disposed, and some in the speech itself» (1356a1-4), by which Aristotle means the techniques of demonstration. As far as the listeners are concerned, the object, Aristotle says, is to move them to emotion by one's speech or *logos*, «since we render judgments differently when we feel pain or joy or affection or hatred» (1356a15-16). This line of argument appears openly to contradict the strictures on what is proper to the art of persuasion laid down in the opening chapter, and Jonathan Barnes, in the new *Cambridge Companion to Aristotle*, flatly describes the opening chapters as incoherent³¹.

Aristotle was justifiably proud of his work in logic, including the sub-class of syllogisms he called enthymemes, and it is no wonder that he wished to give pride of place to this branch of technical knowledge at the beginning of his *Rhetoric*. He goes on to affirm that laws ought to be so precisely defined as to leave as little as possible to the discretion of those who sit in judgment (1354a31-34): nothing more, that is, than to ascertain the facts of the case, or rather, as Aristotle puts it, «what has or has not been, will or will not be, is or is not» (1354b13-14). The inclusion of «what will or will not be» in this list should be a bit alarming for those who want to recruit Aristo-

³¹ J. Barnes, *Rhetoric and Poetics*, in Idem (ed.), *The Cambridge Companion to Aristotle*, Cambridge 1995, p. 263; Barnes inclines to believe (262) that the two chapters were doublets, that is, one was written to replace the other.

tle in support of modern conceptions of evidentiary relevance on the basis of the first chapter of the *Rhetoric*: it would appear that Aristotle has in view arguments about the likely future behavior of the defendant. Besides, his concern here seems to be as much with the separation of legislative and judicial powers as with forms of pleading. However that may be, having celebrated briefly the importance of the enthymeme – his own particular discovery – for establishing the truth of a matter, or, more precisely, «the truth and what is similar to the truth» (1355a14), as Aristotle puts it (since enthymemes are based on merely plausible premises), Aristotle proceeds directly to the broader conception of persuasion that includes disposing the jury favorably by working on its emotions. What we perceive as a radical tension between demonstration of fact and eliciting emotion evidently did not have the same salience for Aristotle³².

I have been arguing that pity, in the classical conception, like anger for that matter, was not something separate and apart from judgments concerning justice and desert, but rather presupposed the innocence (or, in the case of anger, the guilt) of the accused party. For this reason, an appeal to pity was not accompanied by expressions of remorse, nor a request for pardon or forgiveness; it was designed rather to make vivid to the jury the consequences of condemning an innocent person. Thus, the Greeks and Romans did not attempt to arouse pity by dwelling on their unfortunate childhood, for example; they were not explaining how they acquired criminal tendencies – quite the contrary. Nor were they seeking to alter the description of the events themselves: in their narratives, Greek and Roman pleaders exploit logical probabilities with Aristotelian acuity. The ancient view of pity as involving an appreciation of merit rendered the forensic appeal to pity something distinct from what it appears to be in the modern courtroom, since it was taken for granted that one should be pitiless toward those who deliberately committed an unjust act. It is not merely the judicial systems that are incomparable, but the notion of pity, as well.

³² On the coherence of Aristotle's account of the emotions in the *Rhetoric*, in particular with respect to Aristotle's remarks in the opening chapter, see D. Frede, *Mixed Feelings in Aristotle's «Rhetoric»*, in Oksenberg Rorty (ed.), *Essays on Aristotle's «Rhetoric»* (above, n. 27), pp. 258-285, esp. 264-265.

Things changed after the Stoics came on the scene, with their radical attack on the passions as incompatible with impartial judgment. Not that orators ceased to employ and defend the appeal to pity in the courtroom; but henceforward the practice was intellectually problematic, and discussions of the *argumentum ad misericordiam*, for example by Cicero (e.g. *De oratore*, 1.52.225-54.233) or Quintilian (*Institutio oratoria*, preface to Book 5), were obliged to take into account deep-seated suspicions of its legitimacy³³. The question comes to a head in Seneca's treatise *De clementia*; but that is the subject for another paper.

³³ Cf. the remarkable discussion of Egyptian justice in Diodorus Siculus, who affirms that the Egyptians banned speeches in favor of written pleas in order to guarantee that judges attend only to the truth and not be deceived, seduced, or carried away by pity (1.76.1-2).