

something, or when the dispute is eliminated by offering written commitments, or when reason dictates to the parties what is right. But when an assessment of someone's state of mind has to be made, when the only matter at issue is one on which only wisdom can decide, then you cannot pick a judge for these matters from the standard roster—some man whose wealth and equestrian inheritance put him on the list. So it is not the case that this matter is inappropriate for referral to a judge. It is just that no one has been discovered who is a fit judge for this issue. This won't surprise you if you consider the difficulty that anyone would have who is to take action against a man charged in such a matter.

After outlining the range of complicated assessments that would need to be made, Seneca continues:

Who will weigh up these factors? It is a hard verdict, and calls for investigation not into the thing itself but into its significance. For though the things be identical, they have different weight if they are given in different ways. This man gave me a favour, but not willingly; rather he *complained* that he had done so, or looked at me with more arrogance than he used to, or gave so slowly that he would have done me more service if he had said a rapid 'no'. How will a judge go about appraising these things, when one's words or hesitation or expression can destroy the gratitude in a service?

Ordinary human judges would not be capable of the fair-minded and complex assessments which a 'trial' for ingratitude would demand. Yet these are matters which an ideal judge, the sage, could decide on,¹³ and although Seneca rather hyperbol-

¹³ Contrast the view of Bellincioni, who thinks that for Seneca judging *per se* is a bad model for moral behaviour and assessment. At '*Clementia*', 117, a propos of this passage, she overstates the opposition of the *arbiter* to that of the *iudex*, holding that the former is bound by 'nessuno schema giuridico' (whereas there were in fact some procedural guidelines for *arbitri*, though they were, of course, free of the *formula* of a *praetor*). On p. 118 she envisages Seneca propounding as a norm a 'judgement' free of *all* constraints not just of procedure but also of fact. Rather, Seneca merely acknowledges in this text that non-sages cannot be counted on to assess the facts; he is far from urging the positive value of operating without constraint from the facts, guided only by *humanitas* and *misericordia*. Similarly on p. 119 she opposes the constraints of any judicial procedure to an unlimited 'libertà di perdonare', and on pp. 120-1 she opposes the *arbiter* to the *iudex* in a similarly absolute manner. Two texts of which she needed to take more careful account are *Ben.* 3.8.1, cited above: 'it is not the case that this matter is inappropriate for referral to a judge. It is just that

ically contrasts the freedom from constraint of the *arbiter* from the restrictions imposed on a judge (even saying in 3.7.5 that he follows *humanitas* and *misericordia* rather than *lex* or *iustitia*), it emerges from the whole context that the moral judge is expected to weigh facts and assess merit by principles of fairness and justice. The various forms of fallibility which impair the rest of us lead, in such cases, not to more cautious judgements but to none at all. The question of whether a realization of one's personal limitations should induce us non-sages to temper or to avoid passing moral judgements returns in one of Seneca's letters.

Letter 81 introduces one more kind of judge to deal with in outlining Seneca's model of moral judgement. Here he addresses a detailed problem about the assessment of favours. In sections 4-6, Seneca uses the model of judgement to discuss another difficult evaluation (which involves balancing prior good deeds against more recent injuries). But the way he sets out his approach to the decision is important for present purposes. He asks what the verdict of a *rigidus iudex* might be—and it turns out that such a judge would make the difficult assessments which are required to come to a firm assessment of the relative values of benefit and injury, including the detailed assessment of the state of mind of the agents involved. As he says in 81.6: 'a good man (*vir bonus*) makes his calculation in such a way as to limit himself:¹⁴ he adds to the benefit and subtracts from the injury. But that other *remissior iudex*, whom I prefer to be, will order the parties to forget the injury and remember the service.'¹⁵

no one has been discovered who is a fit judge for this issue'; and *Clem.* 2.7.3, cited above, which does not oppose the activity of judging to that of the *arbiter*, but notes that mercy judges with *liberum arbitrium*. Hence the opposition of the *iudex* to the *arbiter* cannot be supported by this passage. It is safer, I think, to take the activity of the *arbiter* as a form of judging (one which has a freedom and sensitivity which the *formula* denies) rather than an activity opposed to the rational activity of judging *per se*.

¹⁴ This is the interpretation of *circumscribere* also arrived at by Bellincioni, '*Clementia*', 116. The rejected possibility is that *circumscribere* means 'cheat'.

¹⁵ Compare *rigidus* vs. *remissus* in *Ep.* 1.10.