

# HELLENIC AUSTRALIAN LAWYERS INTERNATIONAL CONFERENCE

*Rhodes, Greece*

'Balancing Passion and Reason in Sentencing: A Sisyphean Task'

Chief Justice H G Murrell

## **Introduction: the Sisyphean task of the modern day sentencer**

There is little public interest in many aspects of the law, but sentencing endures as a popular topic (or, more accurately, a populist topic). The “hypothetical man on the Clapham omnibus”<sup>1</sup> is rarely concerned with a judge’s ruling on jurisdictional error or equitable estoppel, but when it comes to sentencing, everyone has an opinion. Almost always, populist opinion is that judges are too lenient.

Popular opinion—as expressed through the populist media—often has an angry voice; it is about “just deserts”, payback and retribution. The associated law and order “debate” claims legitimacy by purporting to speak anger for victims.

When victims speak in the media or in court, they too may speak in an angry voice. That is to be expected; anger is a natural emotional response to a wrong. A victim should feel entitled to express “righteous anger” at the wrong they have suffered and the wrongdoer who has caused their suffering.

The angry populist discourse is what Waleed Aly has called “full throated performance anger”; the speaker describes themselves as moral just because they are angry, treating anger as almost a virtue in itself. Associate Professor Adrienne Martin distinguishes “performance anger” from the “righteous anger” of a wronged victim, the denial of which may be complicit in oppression.

However, in our justice system, we accord no legitimacy to any sort of anger because we perceive it to be antagonistic to our calm, objective and evidence-based approach to criminal justice.

Are we inadvertently oppressing victims? Are we fuelling the law and order “debate”? And why characterise the task of balancing passion and reason as a Sisyphean task?

King Sisyphus, the first Corinthian king, betrayed one of Zeus’ secrets. As punishment, Zeus ordered Thanatos, the god of death, to chain Sisyphus in Tartarus. However, Sisyphus tricked Thanatos and chained him instead. Once Thanatos was chained, no one died on earth, which infuriated Ares (the god of war) as no one could be killed in battle. Ares freed Thanatos from his chains. For the crime of trickery, Sisyphus was sentenced to roll a heavy boulder up a steep hill—but whenever Sisyphus brought it close to the peak it would re-appear at the base of the hill.

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<sup>1</sup> *McGuire v Western Morning News Co Ltd* [1903] 2 KB 100 (Collins MR).

It was an endless and unavailing task, not unlike the task of reconciling a victim's passion with the dispassion that is required of today's sentencing court.

In ancient Greece, punishment often involved the intervention of the Gods. Absent divine intervention, will judges remain forever burdened by their Sisyphean task?

### **The Angry Gods**

The punishment imposed by the Greek gods was rooted in the divine anger. The Olympian Gods were petty and vengeful, and they were quick to anger. They harboured grudges. Blood feuds were cruelly avenged, often generations down the line.

From Chaos sprang Darkness (Erebus), Night (Nyx), the Earth (Gaia) and the Depths Below (Tartarus). From Gaia there came the Titans. And from the Titans there came the Olympian Gods.

Following the struggle between the Olympians and the Titans, the Titans were banished to Tartarus. For his treasonous role in the Titanomachy, the Titan, Atlas, was condemned to an eternity with the weight of the sky upon his shoulders.

Prometheus, another Titan, survived when the other Titans were banished to Tartarus. He created humans from clay. Zeus determined that fire should be withheld from humanity but, wishing civilisation to progress, Prometheus defied Zeus and gave fire to humanity. For this crime, Zeus exacted dreadful retribution; Prometheus was punished by being chained eternally to a rock in the Caucasus, where an eagle pecked out his liver. The liver was thought to be the seat of human emotions. As Prometheus was immortal, his liver regenerated every night and he was destined to suffer the daily torture for an eternity.

There were goddesses and minor deities whose *raison d'être* was to be angry. The Erinyes (Furies in Ancient Rome, arguably reborn as the three witches in the opening scene of Macbeth) were goddesses of vengeance and retribution. Their role was to punish crimes against the natural order, including homicide and offences against the gods. They were gaunt, black creatures of bestial appearance. They pursued their prey like wild dogs on the trail of blood. According to Professor Danielle Allen, their anger was seen as a type of sickness. The ancient Greek tragedian, Aeschylus, described their anger as dripping from their eyes. They had looked upon murderers and been polluted by the sight.

Nemesis was a goddess of righteous anger and divine retribution. She was concerned to maintain balance. If someone had committed a wrong, Nemesis would inflict divine punishment. To someone blessed with too much luck, Nemesis would bring misfortune. She cursed the beautiful Narcissus to fall in love with his own reflection and die. Nemesis was "an avenging or punishing divinity"<sup>2</sup> who imposed her idea of just deserts.

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<sup>2</sup> Aaron J Atsma, *Nemesis*, Theoi Project <<http://www.theoi.com/Daimon/Nemesis.html>>.

## **The *Iliad* of Homer**

This epic poem (attributed to Homer and written around 850 BCE) was set during the Trojan War, the 10 year siege of the city of Troy (Ilium) by a coalition of Greek states, led by King Agamemnon, of Mycenae. The siege of Troy had occurred about 400 years before the poem was written, in the early 12<sup>th</sup> century BCE (the Greek Dark Ages).

At a meeting organised by Achilles (son of the divine Thetis), King Agamemnon dishonoured a Trojan priest. An epic quarrel ensued between Agamemnon and his hitherto ally, Achilles. Thetis persuaded Zeus to intervene, favouring the Trojans. However, the tide of the war turned against the Trojans when Achilles sought vengeance for the death of Patroclus (Achilles' close companion), who had been killed by Hector (son of Priam, the aged King of Troy, and Troy's foremost warrior). Achilles chased Hector around the walls of Troy. Athena (who supported the Greek coalition) appeared to Hector disguised as his brother. She persuaded Hector to hold his ground. When Hector threw his spear at Achilles and missed, he expected that his brother would hand him another spear, but Athena vanished. Achilles slayed Hector and then dragged the corpse behind his chariot.

The *Iliad* has been described as an extended meditation on anger.<sup>3</sup> Rarely do the characters master or even moderate their anger. The Olympian gods, goddesses and minor deities are integral to the tale. They fight among themselves as well as participating in and influencing human warfare.

As in the *Iliad*, in ancient Greece the gods more or less lived among the populace. Therefore, it is no surprise that the emotion of anger was central to Greek life and was important in sentencing.

### **Athena moderates Anger: *The Eumenides* and *The Oresteia***

After Agamemnon won the Trojan War and returned to his city of Argos, he was killed by his wife, Clytemnestra. In turn, Clytemnestra was killed by her son, Orestes.

Aeschylus' tragedy, *The Oresteia*, was written in the fifth century BCE. *The Eumenides*, the last of the three plays, tells of what happened to Orestes after he murdered Clytemnestra.

After murdering his mother, Orestes fled to the temple of Apollo in Delphi. Urged on by the ghost of Clytemnestra, the vengeful Erinyes, pursued Orestes. They chanted:

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<sup>3</sup> Michael Potegal and Raymond W Novaco, 'A Brief History of Anger' in Michael Potegal, Gerhard Stemmler and Charles Spielberger (eds), *International Handbook of Anger: Constituent and Concomitant Biological, Psychological, and Social Processes* (Springer, 2010) 13.

Of justice we are ministers,  
And whosoe'er of men may stand  
Lifting a pure unsullied hand,  
That no man no doom of ours incurs,  
And walks thro' all his mortal path  
Untouched by woe, unharmed by wrath.  
But if, as yonder man, he hath  
Blood on the hands he strives to hide,  
We stand avengers at his side,  
Decreeing, thou has wronged the dead:  
We are doom's witness to thee.  
The price of blood his hands have shed,  
We wring from him; in life, in death  
Hard at his side are we!

It transpired that Apollo had persuaded Orestes to murder Clytemnestra, and Apollo continued to assist Orestes' evasion of the Erinyes.

When Orestes arrived in Athens, Athena (the goddess of warfare—but the disciplined, strategic aspect of warfare, not the violent aspect—and who was born fully armed from the forehead of Zeus) set up a court of law to settle the dispute rather than leaving the matter to the Erinyes. With some disquiet, the Erinyes submitted to the arrangement; in their view, there could be no excuse for matricide.

Athena gathered Athens' first jury for the trial. The Erinyes prosecuted. Apollo appeared to defend Orestes. Athena decreed:

O men of Athens, ye who first to judge  
The law of bloodshed, hear now ordain.  
...  
Therefore, O citizens, I bid ye bow  
In awe to this command, Let no man live  
Uncurbed by law nor curbed by tyranny; ...  
Thus I ordain it now, a council—a court  
Pure and swift to vengeance, wakeful ever  
To champion men who sleep, the country's guard  
Thus have I spoken, thus to mine own clan  
Commended it forever. Ye who judges,  
Arise, take each his vote, mete out the right  
Your oath revering. Lo, my word is said.

Ultimately, the jury was divided. Athena casted the deciding vote for the defence.

The Erinyes were seething with anger. Athena placated them by offering them a shrine in the city of Athens if they would forsake vengefulness and submit to the law.<sup>4</sup> The

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<sup>4</sup> Donald W Shriver, *Ethic for Enemies: Forgiveness in Politics* (Oxford University Press, 1986) 16.

Erinyes accepted the offer. They became women rather than beasts and they adopted the new name of the Eumenides, the Kindly Ones.

The civilising of the Erinyes is commonly understood as the transformation of “blind”<sup>5</sup> and angry retribution into “justice, rooted in holiness, *governed by reason*”,<sup>6</sup> a “permanent rejection of the pre-civilised “justice” of the vendetta, and the victorious enthronement in Athens of a new Justice which is both legal and civic”.<sup>7</sup> The basis for determining both guilt and sentence shifted from the primitive emotions of anger and self-interest and towards “cool dispassion, impartiality, legality, [and] reason”.<sup>8</sup>

The play describes the transition in justice from vindictive revenge to organised litigation in which both sides have a right to be heard. However, Athena’s act of honouring the Erinyes recognised that the legal system must incorporate and honour the darker passions.

### **Role of Anger in Sentencing**

As in *The Oresteia*, in ancient Greece the type of anger that underpinned sentencing changed from the vindictive payback of blood feuds to a moderated anger that played a very different but nevertheless central role in sentencing.

The ancient Greeks did not deny their anger. Anger was measurable and dispensable. Ancient texts spoke of going to court bearing “three days’ worth of troublesome anger”.<sup>9</sup> The parties referred to past punishments as a guide to the level of anger that was fitting and what that anger equated to in terms of punishment.

The ancient Greeks conceived of wrongdoers and their acts of wrongdoing as toxic; introducing anger like a disease into the community. The sight of wrongdoers transmitted the disease of anger, upsetting the harmony of social relations. Anger needed a community cure.<sup>10</sup>

When a crime was committed, the law was itself angry with the offender.<sup>11</sup> Anger was not only the source of particular punishments but also at the root of the law itself.<sup>12</sup> As the law was angry with the accused, it was only right that the prosecutor, the victim and

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<sup>5</sup> Danielle S Allen and Danielle S S Allen, *World of Prometheus: The Politics of Punishing in Democratic Athens* (Princeton University Press, 2003) 20.

<sup>6</sup> *ibid* (emphasis added).

<sup>7</sup> Anthony J Podlecki, *The Political Background of Aeschylean Tragedy* (University of Michigan Press, 1966) 80–81.

<sup>8</sup> Allen and Allen, above n 5.

<sup>9</sup> Aristophanes, *The Wasps*.

<sup>10</sup> Danielle S Allen, ‘Punishment in Ancient Athens’ in A Lanni (ed) *Athenian Law in its Democratic Context* (Centre for Hellenic Studies On-Line Discussion Series), 9  
<[http://www.stoa.org/projects/demos/intro\\_legal\\_system.pdf](http://www.stoa.org/projects/demos/intro_legal_system.pdf)>.

<sup>11</sup> Potegal and Novaco, above n 3, 18, citing Danielle Allen, ‘Angry Bees, Wasps and Jurors: The Symbolic Politics of ὀργή in Athens’ in S Braund and G W Most (eds), *Ancient Anger Perspectives from Homer to Galen* (Cambridge University Press, 2003) vol XXXII.

<sup>12</sup> *ibid*.

spectators should also be angry at the accused.<sup>13</sup> Anger was concomitant with the dispensation of justice.<sup>14</sup>

But the anger of the law was not a raging, unreasonable anger. Aristotle contended that anger directed “at the right person, on the right occasion, in the right manner”<sup>15</sup> was ‘appropriate, virtuous and ethically justified’.<sup>16</sup> Rather than being a “bestial passion”, quickness to anger could be an admirable quality—and lack of anger was a deficiency or “slavishness”, in Aristotle’s words.<sup>17</sup> The archetypal virtuous man, or the *megalopsychos*,<sup>18</sup> was one who displayed an “intolerance to insults” and, when insulted, reacted with virtuous anger—as exemplified by the conduct of Achilles and Ajax the Greater in the Trojan War.<sup>19</sup>

In ancient Greece, anger was both fundamental to the law (demanded by the law) and virtuous (quickness to anger being a virtue). Unsurprisingly, anger played a prominent role in sentencing.

According to Allen:

[T]he Athenians acted *out of anger* to *cure anger*, but this does not mean that they acted in anger. Rather, they interposed an extensive institutional system between the moment when an angry victim pointed to a wrong-doer and the infliction of punishment. The purpose of this system was to allow the citizens to convert a moment of private anger into a public decision crafted with a view to curing the community through a restoration of peace.<sup>20</sup>

Allen says that the Athenians:

[E]mployed an idea of punishment that focused primarily on a consistent recognition of the need to restore communal peace in the face of a disruption. Anger led not to retribution but to restoration.<sup>21</sup>

### **Draco’s laws**

In the Dark Ages (about 1200–900 BCE) the ancient Greeks had no official laws or punishments, relying on oral law and blood feud. Murders were settled by the victim’s family killing the alleged murderer.

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<sup>13</sup> *ibid.*

<sup>14</sup> Potegal and Novaco, above n 3, 18.

<sup>15</sup> Aristotle, *Nicomachean Ethics*, Book 4, Chapter 4, 1126b5-10.

<sup>16</sup> Potegal and Novaco, above n 3, 18.

<sup>17</sup> Charles L Griswold, ‘The Nature and Ethics of Vengeful Anger’ in James E Fleming (ed), *Passions and Emotions* (New York University Press, 2013) 78–9.

<sup>18</sup> Aristotle, *Nicomachean Ethics*.

<sup>19</sup> Griswold, above n 17, 96–7.

<sup>20</sup> Allen, ‘Punishment in Ancient Athens’, above n 10.

<sup>21</sup> *ibid* 20–21.

Until the seventh century BCE, laws were oral rather than written. As the aristocratic class declared the oral laws, the laws were problematic for most Athenians. Without the certainty of written law, the accused could question whether, in fact, there was any law such as that claimed by the applicant.

In seventh century BCE (around 621 BCE), Draco was tasked with drafting ancient Athens' first written law code. He was the first law giver or legislator. The task of a lawgiver was to write laws. Most were aristocrats and many had held the position of archon before becoming a lawgiver.

Draco's Law (or Code) preceded Aeschylus' tragedy, *The Oresteia* by several centuries; this explains the immoderate content of the Code and its inconsistency with the values of *The Oresteia*.

The Code prescribed brutal—"draconian"—sentences. Heroditus remarked that the laws were not "those of a man, but of a dragon".<sup>22</sup> The laws were first inscribed on wooden tablets. Much later, Aristotle observed that those tablets must have been inscribed with blood rather than ink.

Draco's Code provided that death was the default criminal punishment. Plutarch wrote that pursuant to Draco's Code:

[M]en convicted of idleness were put to death, and men who stole vegetables or fruit were punished like the plunderers of temples and the murderers.<sup>23</sup>

And that:

[W]hen asked why [Draco] decreed death as the punishment for most crimes, [he] said that he thought the petty crimes worthy of death, and he had no greater punishment for the great ones.<sup>24</sup>

Of course, the punishment for murder was death. However, manslaughter was considered to be a property law and the punishment was exile.

## **Solon's laws**

Solon was appointed as lawgiver in about 594 BCE.

The penalties set by Solon were much modest than those of Draco. Reputedly, the only Draconian penalty that Solon retained was that of death for murder. Under Solon's laws,

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<sup>22</sup> Alfred C Schlesinger, 'Draco in the Hearts of His Countrymen' (1924) 19(4) *Classical Philology* 370, 371.

<sup>23</sup> *ibid.*

<sup>24</sup> *ibid.*

the fine for rape was 100 drachmas. For the offence of owning a dog that bit another person, the penalty was to surrender the dog wearing a three cubit long wooden collar.<sup>25</sup>

In Allen's article, *Imprisonment in Classical Athens*, she refers to the penalty for theft by night as being instant slaughter, or wounding and arrest to be brought before the Eleven, who could order execution. The Eleven was a board of 11 archons (magistrates) which was in charge of the prison, prisoners and executions. Daytime thieves who stole items worth more than 50 drachmas were brought before the Eleven, which could inflict the death penalty. In other cases of theft, if the thief returned the stolen items, the penalty was twice the value of the items. If the thief did not return them, the penalty was 10 times the worth of the items and the Court could add an additional penalty of five days in the stocks if it wished to do so.

As the cost of an adult male's food for a year was about 36 drachma and the daily wage for an unskilled labourer at the end of the fourth century BCE was 1.5 drachma, even a relatively small fine was a significant penalty except for members of the wealthy aristocracy.

### Democratisation of the sentencing process

The Areopagite Council or Areopagus, was the "oldest and most sacred"<sup>26</sup> of the Athenian homicide courts. It was charged with hearing cases of premeditated murder,<sup>27</sup> and crimes such as "wounding, arson, poisoning and some religious offences".<sup>28</sup> Its members consisted of about 145 to 175 Areopagites,<sup>29</sup> who were ex-archons<sup>30</sup> and served for life.<sup>31</sup> Some historians suggest that the emergence of the Areopagus as the pre-eminent Athenian court coincides with a move away from vengeful Draconian laws to a more even-tempered criminal code.<sup>32</sup>

Membership of the Aeropagus changed at some point in the early fifth century BCE.<sup>33</sup> The elite Areopagites were replaced by the *dikastai*—democratically selected jurors who were male citizens and at least 30 years of age.<sup>34</sup>

Cases before the Athenian courts were either public (*graphai*) or private prosecutions (*dikai*). Following the reforms to the membership of the Areopagus, a *graphai* was always heard before a jury. A conviction under this procedure was followed by the erection of an official memorial of the punishment—an inscription in bronze or stone that

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<sup>25</sup> Michael Gagarin, *Early Greek Law* (University of California Press, 1989) 65.

<sup>26</sup> Walter Woodburn Hyde, 'The Homicide Courts of Ancient Athens' (1918) 66(7–8) *The University of Pennsylvania Law Review* 319, 355.

<sup>27</sup> *Ibid* 354.

<sup>28</sup> Adriaan Lanni, 'The Homicide Courts and the *Dikasteria*: A Paradigm not Followed' (2000) 41 *Greek, Roman and Byzantine Studies* 311, 313.

<sup>29</sup> *Ibid* 314.

<sup>30</sup> Hyde, above n 26, 348: 'The Areopagites were appointed from the archons by birth and wealth, and this method of election endured to the beginning of the fifth century, when it was replaced by lot'.

<sup>31</sup> *Ibid*.

<sup>32</sup> See, eg, Edwin Carawan, *Rhetoric and the Law of Draco* (Clarendon Press, 1998) 16.

<sup>33</sup> Hyde, above n 30.

<sup>34</sup> Lanni, above n 28, 316.

was erected in a public place;<sup>35</sup> after all, “*graphe*” meant “written thing” in ancient Greek. The memorial served as a reminder of social norms and rules.<sup>36</sup>

In both private and public trials, the prosecutor was usually the victim or an aggrieved person who was personally involved in the dispute. The prosecutor would open the proceedings by addressing the jury, explaining what happened and also why the Court should be angry with the accused. Examples appear in speeches given by prosecutors.

A young man who alleged that his stepmother had poisoned his father said:

If I show that [my] mother murdered [my] father intentionally and with premeditation, and indeed that she was caught in the act of contriving his death not just once but many times before, then I beg you, gentlemen, *take vengeance*, first for your laws, which you received from the gods and your ancestors, for you convict people by these laws just as they did; *second, avenge the dead man*, and at the same time help me who am left all alone.<sup>37</sup>

Around 360 BCE, Demosthenes spoke as follows (Dem.21.123):

It is not right that Meidias’ behaviour should arouse my indignation alone and slip by, overlooked by the rest of you. Not at all. Really, it’s necessary for everyone to be equally angry!<sup>38</sup>

The more serious the crime, the more angry the jurors ought to be. Demosthenes wrote:

Observe that the laws treat the wrongdoer who acts intentionally and with hubris as deserving greater anger and punishment; this is reasonable because while the injured party everywhere deserves support, the law does not ordain that the anger against the wrongdoer should always be the same.<sup>39</sup>

### **Arriving at a sentence**

There were two methods of sentencing wrongdoers.

In some cases (such as those described above in relation to Solon’s laws), the law prescribed the penalty.

In other cases, the prosecutor and the offender each proposed a penalty and the jury, without discussion, voted on the two options. If the prosecutor proposed an extreme punishment it might be rejected, and if the accused proposed a punishment that was too lenient, it might also be rejected. This process, “*timesis*”, encouraged each litigant towards moderation: “The anger that had inspired punishment would ... be channelled into a more restrained outcome oriented towards securing public peace and satisfying all

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<sup>35</sup> Allen, ‘Punishment in Ancient Athens’, above n 10, 15.

<sup>36</sup> *ibid.*

<sup>37</sup> Michael Gagarin (ed), *Speeches from Athenian Law* (University of Texas Press, 2011) 45.

<sup>38</sup> Allen, ‘Punishment in Ancient Athens’, above n 10, 5.

<sup>39</sup> *ibid.*

parties”.<sup>40</sup> After venting their anger, the litigants were obliged to moderate it by the process of *timesis*.

Socrates made the fatal mistake of failing to propose a moderate penalty.

Allen observes that:

[B]oth *dikai* and *graphai* could be sentenced by either method, but the procedure of *timesis* was the usual method of sentencing in *dikai*. For *graphai*, it was more common to have sentences prescribed by law.<sup>41</sup>

As stated above, some crimes could be punished by private citizens although the matter had not passed through the courts at all. For example, a private citizen could kill a thief or adulterer if the thief or adulterer was caught in their house.<sup>42</sup> In such a circumstance, the sentence could be lawfully determined and—literally—executed by the victim, bypassing a criminal trial.

Allen notes that the “penalties in private suits were smaller than in public cases and the bulk of a financial penalty was paid to the prosecutor (like damages)”.<sup>43</sup>

The range of available penalties included fines, imprisonment, a set time of public humiliation in the stocks, limited loss of political rights, total disenfranchisement, exile from the city (which could be amplified with the confiscation of property and/or the raising of the convict house) and death (which could be amplified with the confiscation of property and/or the raising of the convict house and/or a refusal of burial). While women could not lose political rights (as they had none) they could lose the right to attend religious spaces and participate in religious events. Resident foreigners could be subject of to any of the available punishments (except disenfranchisement). In the case of offending slaves, the masters could be fined and the slaves could be executed, whipped or beaten, or imprisoned in a “mill house”.<sup>44</sup>

The standard means of execution was a form of bloodless crucifixion in which the convict was (probably) fastened to a board with iron collars around wrists, ankles and neck. The neck collar was then tightened to strangle the wrongdoer.<sup>45</sup> Allen proposes that crucifixion was used to avoid unnecessary bloodiness, distinguishing judicial punishment from the bloodletting of the battlefield. It also showed some respect for the human body.<sup>46</sup>

From the end of the fifth century BCE, Athenians were apparently willing to let those sentenced to death use hemlock to commit suicide in advance of the execution,

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<sup>40</sup> *ibid* 14.

<sup>41</sup> *ibid* 14.

<sup>42</sup> Allen and Allen, above n 5, 20–21.

<sup>43</sup> Allen, ‘Punishment in Ancient Athens’, above n 10, 12.

<sup>44</sup> *ibid* 16.

<sup>45</sup> *ibid* 16–17.

<sup>46</sup> *ibid* 17.

provided they could pay for it. Hemlock grew in cold and distant places and was therefore expensive.<sup>47</sup> It is likely that wealthy friends enabled Socrates to avoid crucifixion and consume hemlock instead.

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<sup>47</sup> *ibid.*

## Exile v imprisonment

Exile was a favoured punishment because it removed the wrongdoer from the sight of those who were angry, ending the social disruption caused by the crime and restoring communal peace (out of sight, out of mind).<sup>48</sup> From the fifth century BCE, in Athens an exiled killer could only be pardoned by the family of the victim.

The tragedy of *Oedipus Rex* vividly illustrates the cleansing function of exile. In the play, the city of Thebes has been ravaged by a plague. When Oedipus, the king of Thebes, discovers that he has unwittingly killed his father and married his own mother, he goes into exile, thereby relieving the city of the plague.

Athenians were very willing to let both accused and convicted persons choose exile over trial and death or imprisonment. After the accused made a spirited first speech in his murder trial, he was enabled to leave the city if he wished to do so: Dem 23.69-70.<sup>49</sup> Convicted offenders were expected to make a prison break and flee into exile.<sup>50</sup>

Exile was not an easy punishment; the exile might become “a beggar in a strange land, an old man without a city”.<sup>51</sup> Exile was usually for a long period, 10 years or life. Exiled offenders were thought to be unclean until they had returned to their home city and been purified or cleansed. But at least there was a possibility of starting a new life where the exile would not be the focus of anger and conflict.

Exile was the most severe penalty, short of death. Initially, there was no standalone penalty of imprisonment. Allen says that the penalty of imprisonment for a fixed term was probably introduced in the middle of the fifth century BCE (about 450–460 BCE).<sup>52</sup>

Imprisonment was first used as a means of containing wrongdoers until they paid their fine.<sup>53</sup> One consequence was that impoverished Athenians could be incarcerated indefinitely. This lack of fairness was criticised. Over time, citizens who could not pay a fine were able to propose time limits for their imprisonment.<sup>54</sup>

When Socrates was convicted in 399 BCE, the possibility of imprisonment was raised.<sup>55</sup> Historians have taken this to show that, by 399 BCE, imprisonment was no longer just an ancillary punishment.<sup>56</sup> In his speech, *Against Timocrates* given in 353 BCE, Demosthenes distinguished between the deprivation of liberty and a pecuniary penalty—

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<sup>48</sup> *ibid* 18.

<sup>49</sup> *ibid*.

<sup>50</sup> *ibid* 17.

<sup>51</sup> *ibid* 18.

<sup>52</sup> Allen, ‘Imprisonment in Classical Athens’ (1997) 47(1) *The Classical Quarterly* 121, 130.

<sup>53</sup> Allen, ‘Punishment in Ancient Athens’, above n 10, 18.

<sup>54</sup> *ibid*

<sup>55</sup> Allen, ‘Imprisonment in Classical Athens’, above n 52, 123.

<sup>56</sup> *ibid*.

suggesting that imprisonment was no longer just a means of enforcing the payment of a fine.<sup>57</sup>

Allen says that the power of Athenians to accept an offender's suggestion of imprisonment arose sometime before 400 BCE, the possibility that a magistrate could impose imprisonment arose between 400 and about 350 BCE and, by 350 BCE the jury had acquired the power to punish by imprisonment of its own volition.<sup>58</sup>

Although the imposition of a fixed term of imprisonment (rather than indefinite imprisonment until a fine was paid) removed some of the earlier discrimination between rich and poor, the wealthy were still advantaged when it came to setting a penalty because of their capacity for powerful oratory. In oratory, they could emphasise the desirability of a monetary penalty (which they could afford) rather than imprisonment.

Allen suggests that the city did not provide sufficient food to prisoners. For example, Alexis referred to a prison diet of one clean wheat cake and one cup of water per day.<sup>59</sup> For the wealthy, the position was probably otherwise. It may be that wealthy prisoners could avoid being chained and could even address the Assembly.<sup>60</sup>

Allen says that the single greatest difference between ancient and modern penalties is the prominence of exile in the former context and imprisonment in the latter.<sup>61</sup> Each is a form of incapacitation, although exile is obviously a more permanent and less expensive way of achieving incapacitation. It also allows the exiled person to reinvent themselves "where [they are not] the focus of anger and social conflict".<sup>62</sup>

Of course, exile was the foundation of white Australia. Like the exiled offenders of ancient Greece, many Australian convicts were able to establish themselves as good citizens in a distant land.

We still equate rehabilitation with keeping an offender out of prison; we appreciate that, in general, prisons do not provide the opportunity for a new beginning. The Victorian Sentencing Advisory Council noted that, in Australia, almost half those who were released from imprisonment in 2014–15 would return to prison within two years.<sup>63</sup> Like the offenders who were exiled in ancient times, upon their release modern prisoners are at risk of homelessness, they have difficulty gaining employment and they are at a

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<sup>57</sup> *ibid* 124.

<sup>58</sup> *ibid* 125.

<sup>59</sup> *ibid* 129.

<sup>60</sup> *ibid* 133.

<sup>61</sup> Allen, 'Punishment in Ancient Athens', above n 10, 18.

<sup>62</sup> *ibid*.

<sup>63</sup> The figure is 44.8%. Sentencing Advisory Council, Victoria State Government, *Released Prisoners Returning to Prison* <<https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-statistics/released-prisoners-returning-to-prison>>.

greater risk of suffering mental health problems.<sup>64</sup> But, arguably, they have fewer prospects of redemption.

### **A role for anger in contemporary sentencing?**

Few people would advocate that our courts should adopt the Greek model of the angry victim commencing proceedings by calling for the court to adopt an anger that is equivalent to their own. But few would deny the legitimacy of a victim's righteous anger that calls for redress.

The philosopher, Martha Nussbaum, provides some insight as to why we do not afford anger a legitimate place in our legal system. First, it is a fallacy to think that the suffering of a wrongdoer will correct the wrong that has been done.<sup>65</sup> Second, while the infliction of suffering upon a wrongdoer will reduce his or her status, sentencing is not concerned with changing relative status.<sup>66</sup>

However, Nussbaum does accord value to "transition-anger"; the anger that says 'how outrageous. Something should be done about that!'

Anger may be an appropriate moral response, but only if the anger is teleological; if it is not an end in and of itself but rather serves a purpose.<sup>67</sup> "Performance anger" that is an end in itself denies legitimacy to the wrongdoer (portrays them as "beyond sympathy", a "moral monster"), and denies the possibility of sensible discourse, let alone community reconciliation.

In contemporary legal philosophy<sup>68</sup> it is not the victim's role to express their anger and call for action because the offence is understood to be a wrong against the state rather than the victim.<sup>69</sup>

Where does that leave the victim? What about the victim's desire to call angrily for "something to be done" about the wrong that they have suffered? Putting aside the problematic area of victim impact statements, there is no opportunity to do so. The victim is assigned to the periphery, left feeling powerless and neglected.

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<sup>64</sup> ABC News, 'Most Ex-Prisoners Unemployed or Homeless Six Months After Release, Study Says', *ABC News* (online), 26 June 2014 <<http://www.abc.net.au/news/2014-06-25/australian-study-of-ex-prisoners-finds-high-rates-homelessness/5548430>>.

<sup>65</sup> Martha Nussbaum, *Anger and Forgiveness: Resentment, Generosity, Justice* (Oxford University Press, 2016) 5.

<sup>66</sup> *ibid* 5–6.

<sup>67</sup> ABC Radio National, 'Unfashionable Virtues: Forbearance', *The Minefield*, 30 May 2018 (Waleed Aly, Scott Stephens and Adrienne Martin) <<http://www.abc.net.au/radionational/programs/theminefield/unfashionable-virtues:-forbearance/9812574>>.

<sup>68</sup> See, eg, Grant Lamond, 'What is a Crime?' (2007) 27(4) *Oxford Journal of Legal Studies* 609.

<sup>69</sup> *Ibid*.

Victim anger can be directed at a variety of objects: anger at the offender (for committing the offence against them); anger at third parties or institutions (because they did not do enough to prevent the offence); anger at by-standers (because they managed to avoid the offence); and anger at oneself (because of “one’s own vulnerability or at one’s own behaviour for allowing the [offence] to happen”).<sup>70</sup> Without control or a voice in the prosecution,<sup>71</sup> a victim’s anger is likely to fester. Victims often harbour anger and a desire for revenge long after the offender has been punished.<sup>72</sup>

As a ritual,<sup>73</sup> restorative justice maybe capable of transforming the victim’s negative emotions into more positive ones. Restorative justice “appreciate[s] the role of emotion in legal problems, problem resolution processes and legal outcomes”<sup>74</sup> and “incorporate[s] understanding, feelings and empathy”.<sup>75</sup> For some victims, it is an “emotionally intelligent”<sup>76</sup> approach to processing their angry emotions and enabling acceptance of a past wrong.

Typically, in a restorative justice hearing, the victim expresses their hurt, describes the offence from their perspective of the offence and says how it has affected them.<sup>77</sup> The victim may explain why the offender ought to feel guilty. Offenders are able to explain why the offence was committed (perhaps because of their difficult personal circumstances).<sup>78</sup> When the offender accepts responsibility, the victim feels vindicated. The victim is empowered to grant or withhold forgiveness.<sup>79</sup>

While the process is designed to support victims, it may also assist offenders because conventional sentencing processes shut down the ordinary voices of offenders as well as those of victims. Consequently, restorative justice may provide both the victim and offender with understanding.<sup>80</sup>

Research on the outcomes of restorative justice processes indicates that victims who undergo restorative justice are less likely to be angry and fearful than those who do not.<sup>81</sup>

However, in general, it has been considered that serious crimes of violence (including sexual offences) are inappropriate for restorative justice. Consequently, there is little

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<sup>70</sup> Ulrich Orth and Andreas Maercker, ‘Posttraumatic Anger in Crime Victims: Directed at the Perpetrator and the Self’ (2009) 22(2) *Journal of Traumatic Stress* 158, 158.

<sup>71</sup> Michael S King, ‘Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice’ (2008) 32 *Melbourne University Law Review* 1096, 1103.

<sup>72</sup> *ibid.*

<sup>73</sup> Meredith Rossner, *Just Emotions* (Oxford University Press, 2013) ch 3.

<sup>74</sup> King, above n 71, 1097.

<sup>75</sup> *ibid.*

<sup>76</sup> Rossner, above n 73, ch 2.

<sup>77</sup> King, above n 71, 1108.

<sup>78</sup> Jesse Dorsett, ‘Victims Meet Offenders as Part of Canberra’s Restorative Justice Program’, *ABC News* (online), 20 August 2017, <<http://www.abc.net.au/news/2017-08-20/canberra-restorative-justice-program-sees-victims-meet-offenders/8823562>>.

<sup>79</sup> King, above n 71, 1108.

<sup>80</sup> *ibid.*

<sup>81</sup> See Heather Strang, *Repair of Revenge: Victims and Restorative Justice* (Clarendon Press, 2002).

research on the capacity for restorative justice to address the power imbalance that is integral to many more serious offences.

In ancient Greece the victim was at the centre of proceedings and had a strong voice throughout. Like us, the ancients punished to denounce the offender and to protect the community from the scourge of crime, but another core reason was because “someone was angry at a wrong and wanted that anger dealt with”.<sup>82</sup> In contrast, in contemporary sentencing, the victim is largely deprived of any voice, let alone an emotional voice. We recite the sentencing purpose of recognising the harm done to the victim, but that is a pale substitute for providing a forum in which the victim has a voice.

## **Conclusion**

Usually, the victim of an offence will be angry. In contemporary sentencing, that anger is largely ignored. Dispassionate sentencing may alienate the victim, rather than assuage their righteous anger.

The populist media suggests that victims are justifiably angry because of lenient outcomes and proposes that heavier sentences will satisfy victim anger. There is no evidence that they will do so; the naïve response of imposing heavier sentences will simply invite bracket creep. The problem lies in the process, not the outcome. In this regard, we can learn something from the ancient Greeks. Victims need to express their anger; they want to be heard. Restorative justice is one way in which that can occur.

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<sup>82</sup> Allen, ‘Punishment in Ancient Athens’, above n 10, 4.