Ancient Greece, Australia and Criminal Justice

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Chief Justice, your Excellency the Greek Ambassador to Australia, fellow Judges, distinguished guests, Hellenes and Philhellenes all. Thank you Chief Justice and Mr Tsirimokos for your very kind words of introduction. I am reminded of a quote said to be from Benjamin Disraeli, and sometimes attributed to Napoleon, that 'the flatterer is seldom interrupted'.

I would like to begin by acknowledging the Ngunnawal people, the traditional custodians of the land on which we meet, and pay my respects to their elders, past, present, and emerging.

This ACT Hellenic Australian Lawyers oration is named for Theophilos (Tom) Efkarpidis. Tom Efkarpidis was a major figure in the Canberra Community. I am grateful to Jack Pappas, present here this evening, for referring me to Professor Anastasios Myrodis Tamis' book on Tom, or as he was also known, the Megas Pontios.[1]

Tom was born in modern day Georgia, then part of the USSR. According to Tamis:

> During the *Grecheskaya Operatsiysa* (Greek Operation) launched on Stalin's orders in December 1937, there were mass arrests of Greeks, especially but not only, wealthy and self-employed, affecting some 50,000 Greeks out of an overall community of 450,000. Pontic Greeks, as well as other 'ethnic minorities' suffered inhuman persecution and terror, as a result of the Stalinist policy of Russification. For those resisting compliance, the answer was 'deport

* Justice of the Supreme Court of the Australian Capital Territory. This is an edited version of the Hellenic Australian Lawyers ACT Chapter Theophilos Efkarpidis Oration, given on 16 November 2018 at Meyer Vandenberg Lawyers in Canberra. Thank you to Peta Leigh and Ryan Graham for their invaluable research assistance.

[1] Anastasios M Tamis, *A trilogy of Greek voices in Australia: Theophilos Efkarpidis: The Megas Pontios* (Ellikon Publishing, 2012).

> or perish'. Subsequent persecution brought about the death of 50,000 victims, and the decline of Greek culture and abolition of the autonomous Greek regions.[2]

Tom returned with his family to Greece and then arrived in Australia in 1962. Tom began life in Australia working in Greek cafés in NSW, including in Albury, Leeton, Forbes, and finally Canberra in 1964, where he was joined by his bride Sophia in 1965.

Tom and his brother Anastasio, later nicknamed 'Tim' in the Australian way, were by this stage creating the groundwork of their business empire at their shop in the new suburb of Curtin. From there, Tom's empire grew, as he purchased and developed supermarkets in a number of Canberra suburbs. Tom then expanded into real estate and property development.

Tom's business achievements stand alongside his inspirational contribution to the Canberra community. Tom served terms as the President of the Greek Community. He was also involved in the Hellenic Club, and played a pivotal role in establishing the Australian Hellenic War Memorial and the Hellenic sub-branch of the RSL. In recognition of his service to the Greek Australian Community, Tom was awarded a Medal of the Order of Australia in 1984.

Tom was also known for his philanthropic work. This work is continued by the Theophilos Efkarpidis Foundation. On Tom's passing, John Stanhope, the ACT Chief Minister at the time, noted during a speech to the ACT Legislative Assembly that Tom was "known as a generous benefactor, responsible for numerous bequests to universities, schools, hospitals, community organisations and philanthropic initiatives".[3]

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[2] Ibid 7-8.

[3] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 15 August 2006, 2100-1 (Jon Stanhope, Chief Minister).

I pause to reflect that my parents' story is a similar Greek-Australian migrant story. My father was part of the Greek contingent of the United Nations Corps in Korea in the 1950s and made the decision while there to emigrate to Australia rather than the United States. I'm glad he made the right decision. My father arrived in Australia alone and with limited English and commenced working in the outback, laying down train tracks. He saved up enough money to bring my mother to Australia. My mother had wanted to go to high school and university and become a teacher, but those opportunities were denied to her as a girl. It was a burning ambition on the part of my parents, both early feminists in their way, that my sisters and I, born in Australia, would receive the education they themselves were denied through the accidents of history and birth.

My parents, like Tom, ran a café in central Queensland in Rockhampton. I must say, I was not very pleased as a child and as a teenager about having to work at my parents' restaurant on school holidays while my friends were at the beach. Nevertheless, as we all know, one must turn disadvantage into advantage. At least it has prepared me for life as a judge. It has prepared me for a life of writing reserve judgments while on leave, and calling it "holidays" or "court vacation".

Leaving aside the fraught topic of writing reserved judgments on "holidays", it is fitting that I direct this oration towards a topic that combines Tom's passion for Hellenic studies as well as my own particular interest in the criminal law field of the sentencing discretion.

Our own Chief Justice Helen Murrell recently reflected on the "Sisyphean task of sentencing courts" at the Hellenic Australian Lawyers conference in Greece.[4] You will recall that Sisyphus

[4] Chief Justice Helen Murrell, 'Balancing Passion and Reason in Sentencing: A Sisyphean Task' (Paper presented at the Hellenic Australian Lawyers International Legal Conference, Rhodes, 9-12 July 2018).

was condemned by Hades to the task of rolling a huge stone up a hill, only to have it roll down again as he had brought it to the summit, repeating this task for eternity, rather it might be observed, like the constant thrill of writing reserved judgments. Her Honour noted that:

> There is little public interest in many aspects of the law, but sentencing endures as a popular topic...The 'hypothetical man on the Clapham omnibus' 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.[5]

Criminal Law in Ancient Greece

Our modern legal system and its democratic foundations owe much to the classical Athenians. Nonetheless, much distinguishes criminal justice in modern Australia from Ancient Greece. Our system would be virtually unrecognisable to that known by Aristotle and Socrates.

In particular, the impassioned and dramatic process of being accused, prosecuted, and sentenced in Ancient Athens is a far cry from the procedurally contained courtrooms over which my colleagues and I now preside.

Victims of crime and the community were positioned at the heart of the Athenian criminal justice system.

There was no professional class of judges. Nor were those carrying out judicial functions necessarily independent to the parties and their interests. As underlined by Justice Patrick Keane of the High Court, in classical Athens "the litigant had to speak for himself or herself directly to the jury composed of [ ] fellow citizens".[6]

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[5] Ibid 1.

[6] Justice Patrick Keane AC, 'The Jury on Trial: From Socrates to Modern Times' (Speech delivered at the Clayton Utz Alexander Freeleagus Oration, Brisbane, 1 September 2017) 3.

In the same way that the executive and legislative functions of the Athenian polis were performed by the participation of the populace, with executive offices filled by lot through the machine known as the "kleroterion", the role of “judge” was performed by a jury of the public.[7]

A kleroterion was an ancient Athenian device to select citizens in a random process for parliament and for juries. The courts were jury courts. The size of a jury could be numbered in the hundreds or the thousands.

These juries played a much broader role in criminal procedure in Athens than the restricted role of modern Australian juries. Athenian juries were not only tasked with determining whether the factual elements of a criminal charge had been made out, but were asked to provide a resolution that considered the broader context of the dispute, a sense of fairness, and considerations of sentence.[8]

In modern Australia, trial and sentence are firmly separated. Juries are the fact-finders at trial, and sentencing is left to the professional judge. Adriaan Lanni, Professor of Law at Harvard, notes that the Athenians did not clearly distinguish the guilt and sentencing phases - instead, Athenian jurors regularly considered both guilt and sentencing issues together at the trial phase.[9] In reaching their verdict, Athenian juries were encouraged not just to find the truth or determine the rights and responsibilities of the parties under the law, but also to consider the broader implications a given verdict would have on the parties and the community at large.

[7] Ibid.
[8] Adriaan Lanni, ‘Fairness and Justice in Ancient and Modern Criminal Justice’ (Paper presented at the Hellenic Australian Lawyers International Legal Conference, Rhodes, 9-12 July 2018) 6.
[9] Ibid.

Though rare, it has not been unknown for Australian juries to take on a similar role. Justice Stephen Gageler of the High Court at the recent Hellenic Australian Lawyers oration in Sydney retold the story of a trial in Queensland for sheep stealing. His Honour recalled that:

> At the conclusion of the trial, the judge asked the jury the customary question "how do you find the accused: guilty or not guilty?" The response of the jury, delivered through its foreman, was "not guilty your Honour – provided he gives back the sheep".[10]

Unlike modern crime victims, the victim in Ancient Athens acted as prosecutor and exercised complete control over their case: they could choose the charges and procedure, and once in court they were free to tell their story as they wished. The prosecutor would open their case by explaining not only what had happened, but why the jury should be angry with the accused.[11] Defendants also enjoyed wide latitude to tell their story and to make arguments beyond mere refutation of the charges, including appeals to pity, challenging the underpinnings of the criminal law or proposed sentence, and discussing the effect a guilty verdict would have on the community at large. [12]

Of course, procedural fairness was not absent, but was concerned with practical matters such as preventing bribes and corruption, and ensuring parties had equal time to speak.

As Justice Kyrou suggests, it is not difficult to see why this system did not survive in our modern world in its entirety:

> Few people have the skill or training or objectivity to argue their own cause against their fellow citizens, especially where they are members of an unpopular minority. Unpopular parties tend

[10] Justice Stephen Gageler AC, 'Truth and Justice and Sheep' (Speech delivered at the Hellenic Australian Lawyers Inaugural New South Wales Chapter Oration, Sydney, 20 August 2018) 2.
[11] Murrell CJ, above n 4, 5.
[12] Ibid 6.

> to lose because they are unpopular, regardless of the merits of the dispute viewed objectively. As proof of this, one might say: "Just think of Socrates."[13]

Nonetheless, this approach, in spite of its faults, produced a criminal justice process that "enjoyed widespread legitimacy and a society in which violence and criminal disorder seem to have been relatively infrequent by both ancient and modern standards".[14]

The Athenian system enjoyed a strong sense of legitimacy born out, in part it seems, of community and victim involvement.

Australia

On the other hand, there can be no denying that sentencing courts in Australia are in a different position compared to courts in Ancient Athens. The legitimacy of sentencing decisions have been called into question by certain elements of the media and politics.

In 2012, New South Wales Chief Justice Bathurst stated:

> Community trust in the criminal justice system is eroding. Much of this distrust is fuelled by misinformation that is propagated by sections of the media who prefer to inflame rather than inform, and by politics that encourages fear mongering rather than educated debate.[15]

His Honour also went on to state that former Chief Justice Spigelman had cautioned him that "complaining about media bias…will achieve about as much as complaining about the weather".[16]

[13]Keane J, above n 6, 3.
[14] Lanni, above n 8, 6.
[15] Chief Justice Tom Bathurst, 'Community Participation in Criminal Justice' (Speech delivered at the Opening of Law Term Dinner, Sydney, 30 January 2012).
[16] Ibid.

Fortunately, in the ACT the media are more civilised. In the ACT, the media prefer to inform, rather than inflame. It is about providing an educated public with facts.

Public dissatisfaction is demonstrated by a recent study by academics from the University of Tasmania and the University of South Australia, which revealed that survey participants in Australia, the UK and the US feel that sentences were too lenient and judges out of touch.[17]

Indeed, a 2009 Australia-wide survey returned a finding that 58 percent of people disagreed with the statement "judges are in touch with what ordinary people think".[18]

The authors of the study noted that "surveys that report perceptions that judges are out of touch cause concern, 'not just for the sake of the frail judicial ego', but also because such reports have an impact on public confidence in the criminal justice system".[19]

Putting my own 'frail judicial ego' to one side for a moment, it is clear that modern sentencing judges are confronted with significant difficulty when seeking to uphold the rule of law in sentencing and balance community expectations. This tension was considered by former Chief Justice of the High Court Sir Anthony Mason in the following way.

On the one hand, his Honour stated, "the law is the law is the law". It is for judges to interpret and apply the law in their discretion within the bounds of legislation, even if that application does not hold popular favour. On the other hand, judges are well aware that the success of the rule of law depends on the existence of public confidence in the courts and judicial process. [20]

[17] Karen Gelb, 'Myths and misconceptions: public opinion versus public judgment about sentencing' in Arie Freiberg and Karen Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (Hawkins Press, 2008) 68, 73.
[18] Kate Warner, Julia Davis, Maggie Walter and Caroline Spiranovic, 'Are Judges Out of Touch?' (2014) 25(3) *Current Issues in Criminal Justice* 729, 730.
[19] Ibid 738.
[20] Hon Sir Anthony Mason AC KBE, 'The Courts and Public Opinion' (2002) 11 *New South Wales Bar Association News* 30, 30.

His Honour stated:

> Absence of public confidence in the administration of justice would bring unwanted and untold consequences in its train. It would result in non-compliance with the court orders and greater difficulty in enforcing them. It would lead us down a path away from the peaceful settlement of legal disputes into a world in which people would be inclined to take the law into their own hands. It would take us back to an earlier stage in the development of civilised society when disputes were resolved by brute force.[21]

What leads to a public perception that judges are out of touch?

First, studies have shown that survey respondents who assert that sentences are too lenient are also more likely to believe, incorrectly, that crime rates are rising.[22]

We also know that jurors who have had contact with the criminal justice system have more confidence in sentencing judges to perform their roles appropriately than the general public.[23] One relevant study was the 2010 Tasmanian Jury Sentencing Study. That study was detailed by Justice Bell of the High Court in a 2011 lecture,[24] where she referred to the genesis of the study being a suggestion made in 2004 by former Chief Justice Murray Gleeson.[25] Her Honour stated:

> …Murray Gleeson suggested that one method of testing informed public opinion about sentencing would be to survey the views of jurors as to the justness of the sentence imposed in the case that they had tried. Professor Warner and her colleagues have undertaken such a study. Jurors who had served on 138 trials were the subject of the survey. The general

[21] Ibid.
[22] Warner et al, above n 18, 730.
[23] Ibid.
[24] Justice Virginia Bell AC, 'Sentencing and Judicial Discretion' (Speech delivered at the Blackburn Lecture, Canberra, 17 May 2011).
[25] Hon Murray Gleeson AC, 'Out of Touch or Out of Reach?' (Speech delivered at the Judicial Conference of Australia Colloquium, Adelaide, 20 October 2004) 4.

> knowledge of this group of crime trends and of sentencing patterns was low. The majority of respondents considered sentences to be too lenient. Such views were most pronounced with respect to sexual offences and offences of violence. [26]

Importantly, there was a difference that Justice Bell underlined with respect to the cases that the respondents had actually tried, and in those cases there was a very high level of satisfaction with the sentence imposed:

> Ninety percent of respondents considered that the sentence was either very, or fairly, appropriate. More than half (52 percent) proposed a more lenient sentence than that imposed by the judge. The jurors who had served on cases involving offences of violence, sexual offences and drug offences were evenly split between those who recommended more severe and those who favoured less severe sentences. [27]

Professor Warner's research results are consistent with other studies in this area and as Justice Bell concluded:

> They do not suggest that there is reason for concern that sentences imposed by the courts do not "fit the crime". Needless to say the results of the survey have not received widespread publicity in the popular press.[28]

This bears repeating: 90 percent of the respondents, that is, people who had actually served on the jury considered the sentence was either very or fairly appropriate. Her Honour referred to the survey again in a speech in 2015.[29] Chief Justice Bathurst of the Supreme Court of NSW referred to the study in 2012.[30] On that occasion, his Honour concluded that "the study shows

[26] Bell J, above n 24, 36.
[27] Ibid, 36.
[28] Ibid, 37.
[29] Justice Virginia Bell AC, 'The Role of a Judicial Officer – Sentencing, Victims and the Media' (Speech delivered at the Magistrates' Court of Victoria Professional Development Conference, Melbourne, 22 July 2015).
[30] Bathurst CJ, above n 15.

that when people are given the facts, most think judges get it right"; and, that "public perceptions are wrong…[o]r at least, they change dramatically when ignorance is replaced with information".[31]

Professor Lanni, in a talk given in 2018 at the Hellenic Australian Lawyers Rhodes Conference, considered a different study of a similar nature in the US. Professor Lanni summarised the American study as follows:

> [I]n 2010, three federal district judges published a small study that revealed a marked disparity between the Federal Sentencing Guidelines and jurors' recommended sentences. Following convictions in twenty jury trials, the judges gave each juror a sheet listing the defendants' past criminal convictions and asked the jurors to recommend a sentence. The low-end punishment provided for in the Guidelines was in each case almost five times higher than the median jurors' recommendation. Ninety-two percent of jurors recommended a sentence below the Guidelines' minimum.[32]

It appears that the greater a person's involvement in, and awareness of, the criminal justice system, the greater the confidence that exists in the system.

Relevantly, there was a recent study in Victoria in which almost 1000 jurors in 124 County Court trials were asked whether they thought they should play a role in sentencing offenders.[33] Jurors were asked whether they should be called upon to recommend a sentence and the factors a judge should consider when sentencing.

[31] Ibid 3.
[32] Lanni, above n 8, 8-9.
[33] Arie Freiberg, Kate Warner, Caroline Spiranovic and Julia Davis, 'You be the judge: No thanks!' (2018) 43(3) *Alternative Law Journal* 154.

Less than one third of the jurors surveyed expressed a desire to suggest the length or type of sentence that an offender should receive.[34] A narrow majority of the jurors surveyed, only 52 percent, said that they would like to play a role, and that role would be limited to helping to decide the factors a judge should take into account when sentencing an offender.[35]

Professor Freiberg interviewed a smaller group of 50 of these jurors after offenders had been sentenced by a judge, in an effort to gain an insight into their views.

Some echoed the view that the professional status of judges might hinder their ability to make sentencing decisions. One juror stated, "you know, this judge has seen cases like this all the time…how can you remove all that knowledge that you have to look at things afresh. So you get this fresh bunch of people, they've never been involved before, that says 'this is what disturbs us the most, this is what is really bad, and this is what we think'".[36]

However, many others doubted their ability as one of a collective twelve people drawn from the community to reach a reasonable agreement in relation to sentencing. One stated, "I mean, it was hard enough to get a decision…there were [jurors] who were red-necked and would have put him away for life. And there were others that would have just given a slap on the wrist".[37]

Another doubted that they, as a lay person, would be in a position to reason fairly in relation to sentence, stating, "I can say pretty confidently that I wasn't…emotionally the best person to

[34] Ibid 157.
[35] Ibid.
[36] Ibid.
[37] Ibid.

make a decision at the time it happened…I feel like a jury, and more so for different people in the jury, would be too emotionally affected".[38]

Modern involvement of victims and the community

The importance placed on our modern values of procedural fairness and respect for the onus and burden of proof render the fluid and emotional processes of Ancient Greek justice entirely untenable in the modern age.

There are though important initiatives in this jurisdiction that reflect the Athenian values of community and victim involvement.

The Australian Capital Territory commenced an innovative restorative justice scheme in 2004, which was expanded significantly in 2016. The scheme was further expanded this year to encompass victims of family violence and sexual offences.

In line with the Ancient Greek tradition, formal restorative justice programs are designed "to address unresolved issues and emotions experienced by victims, offenders and their families which cannot be addressed by the court because of the objective nature of the court's role".[39] Restoring confidence to victims and the community is a significant part of restorative justice.

[38] Ibid 158.
[39] Explanatory Statement, Crimes (Restorative Justice) Bill 2004 (ACT) 2.

Victims may regain confidence "by experiencing the offender in a context where the offender is unable to hold power over the victim".[40]

For the offender, it provides "an opportunity to re-engage with the community through redemptive action with the victim, public administration and people closely associated with the victim and the offender".[41]

There is strong evidence that victims have consistently high levels of satisfaction with the process of restorative justice.[42] Research has also shown that a victim's desire for "revenge" decreases after taking part in the restorative justice process.[43] There is also research which notes reduced feelings of victimisation and anger, as well as increased sympathy for offenders amongst victims who participated in restorative justice.[44]

It is also a process which provides a sense of legitimacy to the criminal justice system. Research suggests that there is significant public support for restorative justice processes.[45] It is often suggested that the restoration of human relationships broken by crime benefits whole communities.[46]

At the moment, restorative justice operates only on the margins of the criminal justice system, rather than as a core focus. However, this is not evidence that the benefits of restorative justice programs are limited. The continued expansion of the restorative justice regime is a worthwhile endeavour.

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[40] Ibid 3.
[41] Ibid 3.
[42] Michael King, Arie Freiberg, Becky Batagol and Ross Hyams, *Non-adversarial Justice* (The Federation Press, 2nd ed, 2014) 64.
[43] Ibid.
[44] Ibid 65.
[45] Ibid 64.
[46] Ibid 50.

Another valuable forum for fostering community involvement is Aboriginal circle sentencing courts. In the ACT, the specialist Aboriginal and Torres Strait Islander Galambany Circle Sentencing Court has been in effect since 2004. It is an example of a circle sentencing court and draws its roots from efforts to involve elders in the Yukon Territory in Canada in sentencing processes.[47] Its purpose is to provide a culturally relevant sentencing option in the ACT Magistrates Court jurisdiction through involvement of the local Aboriginal and Torres Strait Islander community in the sentencing process. The word "Galambany" means "we all, including you".[48]

Circle courts, such as the Galambany, are notable in that it is not the "power to sentence" that is transferred to a community dialogue, but it is the "sentencing process" itself that is shared.[49] It achieves, overall, enhanced Aboriginal community participation in court processes.[50] For these offenders, and victims, circle courts provide a way to ensure that judges are in touch with important cultural issues.

By receiving better quality information about Aboriginal offenders through the involvement of the Aboriginal community, the Courts may begin to foster legitimacy by incorporating culturally relevant sentencing options. An encouraging indicator of this is the increased attendance of offenders at courts which are specifically for the Aboriginal community, as compared with attendance at mainstream courts.[51]

Another mechanism which draws on Ancient Greek ideas is the modern Victim Impact Statement. Whilst victim impact was at the core of the Athenian model, victim impact is today

[47] Paul Bennett, *Specialist Courts for Sentencing Aboriginal Offenders* (The Federation Press, 2016) 20.
[48] Explanatory Statement, Courts Legislation Amendment Bill 2010 (ACT), 2-3.
[49] Bennett, above n 47, 100.
[50] Ibid 101.
[51] Ibid 102.

brought into the courtroom by way of Victim Impact Statements which must adhere to strict requirements and may be tendered on behalf of the victim at sentence. This stems from the different role of the victim in our system; where the victim once played prosecutor, the state is now positioned as the adversary to the accused, and the victim is not at the centre of proceedings as the adversary to the accused.[52] The victim's role in the trial is limited to responding to questions put to them. The statement is intended to serve a dual purpose: inform the judge, and allow a channel for the victim to express themselves to the court and the offender.

The difficulty of introducing the Ancient Greek tradition of emotional expression into the modern sentencing process is aptly demonstrated by the controversy which surrounds their uptake. Some legal professionals regard their use as "something of an anathema to the objectivity and rationality of law".[53] Courts are, of course, no strangers to managing intense emotions, and the strict procedures around Victim Impact Statements to some extent act as a 'cooling out' structure to manage emotions.[54] However, they are not perfect, as Susan Bandes, a Professor from DePaul University's College of Law, made clear in an article published in the Atlantic:

> The Courtroom is not well suited to assist with the healing process, particularly compared with victim-offender mediation, in which mediators are trained to deal with the emotions involved and carefully screen and prepare the participants.[55]

[52] Sarah Moynihan, "The Voiceless Victim: A critical analysis of the impact of enhanced victim participation in the criminal justice process" (2015) 3(1) *IALS Student Law Review* 25, 25.
[53] Tracey Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (The Federation Press, 2016) 99.
[54] Ibid 107.
[55] Susan Bandes, 'What are Victim-Impact Statements For?' *The Atlantic*, 23 July 2016 <https://www.theatlantic.com/politics/archive/2016/07/what-are-victim-impact-statements-for/492443/>

Additionally, identical offending might reasonably affect victims differently, and the personal circumstances of victims might render different victims more or less able to articulate the impacts of offending upon them in a way that is meaningful for a judge. Chief Judge at Common Law Hunt, when considering this possibility in the case of *R v Previtera* (1997) 94 A Crim R 76, stated:

> It would be wholly inappropriate to impose a harsher sentence upon an offender because the value of the life lost is perceived to be greater in one case than it is in the other.[56]

His Honour also noted that:

> [a] reason why the victim and the others affected by the crime are sometimes not satisfied by the sentence imposed by the criminal courts is that they do not always realise – or perhaps, do not accept – that sentences are expected to serve many different purposes, some of them inconsistent with the others. Those purposes are the protection of society, personal and public deterrence, denunciation of the crime, retribution for the injury caused and the reform of the offender. Retribution (or the taking of vengeance for the injury done) is but one of those purposes, and care must be taken that vengeance for the injury is never equated to justice.[57]

Justice Hamill in *R v Hines (No 3)* [2014] NSWSC 1273 elaborated further on this observation that it is "offensive to fundamental concepts of equality and justice for criminal courts to value one life as greater than another".[58] His Honour quoted from a number of famous sources in support of the principle that "all human life is precious".[59] His Honour also quoted from the Bible and Pope Francis, stating "there is no human life more sacred than another".[60]

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[56] *R v Previtera* (1997) 94 A Crim R 76, 87.
[57] Ibid 86.
[58] *R v Hines (No 3)* [2014] NSWSC 1273, [78], quoting *R v Previtera* (1997) 94 A Crim R 76, 88 (CJ at CL Hunt).
[59] Ibid [79].
[60] Ibid [80].

His Honour went on to state:

> All civilised societies treat all life and all people as equal. As Thomas Jefferson put it in drafting the United States' Declaration of Independence:
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> > "We hold these truths to be self-evident that all men are created equal ... and endowed with certain inalienable rights: that among these are life, liberty and the pursuit of happiness."
>
> This became the cornerstone of Dr King's "I have a dream" speech in 1963.[61]

His Honour concluded that the idea that the law should regard "a homeless, unloved person's life as less valuable than another's" because of the absence of a Victim Impact Statement as being "philosophically offensive".[62]

A survey of South Australian judges following the introduction of Victim Impact Statements in that jurisdiction revealed that most did not believe that the statements led to sentencing disparity.[63]

The majority of Victim Impact Statements are given by primary victims of crime, rather than by family members, as is of course necessary in homicide cases. While many primary victims report that the opportunity to be heard is therapeutic, some observers have considered that a court may not be the ideal forum for this expression. Research conducted in South Australia showed that only 40 percent of victims who provided a Victim Impact Statement perceived that it had affected the sentence, which lead to unfulfilled expectations and overall

[61] Ibid [81]-[82].
[62] Ibid [84].
[63] Edna Erez, Leigh Roeger and Frank Morgan 'Victim Impact Statements in South Australia: An Evaluation' (Series C No 6, Office of Crime Statistics, South Australian Attorney-General's Department, August 1994), 27.

dissatisfaction with the criminal justice system for many of the participants in the study.[64] In a study conducted in Minnesota, USA, many judges admitted that they "didn't know how to react to victim impact statements".[65] The therapeutic benefits are therefore often dependant on how the sentencing judge manages the legal processes attached to Victim Impact Statements. Sentencing judges are tasked with the difficult balancing act of conducting a fair hearing and maintaining the integrity of the process, along with affording dignity and respect to victims.[66]

For offenders, however, the statements may have a positive long term impact. When Victim Impact Statements are read in court, they directly confront the offender with the effects of the crime on the victim, particularly in circumstances where the statement is presented to the court orally. This is an opportunity to meaningfully understand the "wrongfulness of the crime and its human consequences", which "may lead to repentance and more readily promote accountability and responsibility on the part of the offender".[67]

It is clear that the limited way that victims may share the detrimental impact that offending has had upon them, and express their hurt and anger, is in stark contrast with the Ancient Greek tradition, which encouraged an outpouring of anger and hurt in a public forum.

It is well at this juncture to restate that vengeance is not justice. Justice must serve many purposes. The nature of the sentencing discretion has been best expressed in *Veen v The Queen (No 2)* (1988) 164 CLR 465 by their honours Chief Justice Mason and Justices Brennan, Dawson and Toohey:

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[64] Ibid 53.
[65] Bandes, above n 55; see also Mary Lay Schuster and Amy Propen, 'Degrees of Emotion: Judicial Responses to Victim Impact Statements' (2010) 6(1) *Law, Culture and the Humanities* 75.
[66] See Tracey Booth, 'Victim Impact Statements, Sentencing and Contemporary Standards of fairness in the Court Room' [2015] *University of Technology Sydney Law Research Series* 26.
[67] Tracey Booth, 'Restoring Victims' Voices: Victim Impact Statements in the Sentencing Process' (2005) 86 *Australian Law Reform Commission Reform Journal* 59.

> [S]entencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what an appropriate sentence is in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.[68]

Sentencing Advisory Councils

In an effort to resolve the vast difficulties regarding community involvement in sentencing, some Australian jurisdictions have established 'Sentencing Advisory Councils'. These bodies are tasked with developing sentencing guidelines, and also with involving a "wider range of parties in the development of sentencing policy".[69] For example, the statutory mandate of the Victorian Sentencing Advisory Council requires it to "gauge public opinion on sentencing matters".[70] It does so by engaging with victims' groups and "with professional groups in order to obtain feedback on a range of general and specific issues".[71] It also provides to the community information about sentencing, including publicly availably statistics, as well as an online program known as "You Be The Judge", which allows participants to learn about the sentencing process through an interactive audio-visual experience.

[68] *Veen v The Queen (No 2)* (1988) 164 CLR 465, 477 (Mason CJ, Brennan, Dawson and Toohey JJ).
[69] Freiberg and Gelb, above n 17, 2.
[70] *Sentencing Act 1991* (Vic) s 108C(1)(d).
[71] Arie Freiberg, 'The Victorian Sentencing Advisory Council: incorporating community views into the sentencing process' in Freiberg and Gelb, above n 17, 159.

Conclusion

The Ancient Greek perspective demonstrates that community involvement fosters legitimacy, which is critical to the effective rule of law. Further, we know that juror participation in the criminal justice system spurs greater acceptance of the justness of sentencing decisions and therefore legitimacy. We also know from jury studies in Australia and around the world that when people are actually given the facts, most people think that judges get it right. Additionally, we know that correct public information, not fake news, is important. Informing rather than inflaming.

Perhaps the ACT, a city state in its own way, is the place in Australia that most closely resembles the Athenian city state ideal. The ACT population is approximately 400,000, while the population of Ancient Athens in its peak in the fourth and fifth century BCE was 300,000.

There are important initiatives for community and victim involvement in the ACT such as restorative justice and the Galambany Circle Sentencing Court which foster a greater sense of community involvement and therefore legitimacy in criminal justice.

Finally, it must be said in conclusion, the ACT "city state" is an improvement on the Ancient Athenian city state, as everybody gets to vote, not just the men, there are no slaves, and drinking hemlock is not part of the available sentencing repertoire.

In honour of my parents Aphrodite and Ilias, I will leave you with a quote from *All Too Human,* a book written by an American of Greek origin, George Stephanopoulos. Stephanopoulos was an adviser to United States President Bill Clinton.[72] In the book Stephanopoulos discusses what it meant to be an immigrant:

[72] George Stephanopoulos, *All Too Human* (Back Bay Books, 2000).

Greeks came to America from dozens of islands and hundreds of villages but here they formed a single clan, united by heritage, language, and a need to achieve. Those of us in the second generation understood that honouring the sacrifices of our parents and grandparents - the labourers, cobblers, waiters and cooks - meant getting a good education, and putting it to good use - as doctors, lawyers, professors and politicians. Assimilation for Greeks didn't mean blending in; it required standing out. The rules were so clear they didn't need to be said. Make your name, and don't change it. Make us proud and don't forget where you come from.[73]

[73] Ibid 13.