

SENTENCING IN THE GARDEN OF EDEN

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The Biblical story of Adam and Eve is symbolic of the first breach of the law; the first criminal prosecution; the first sentencing decision; and of the earliest known act of clemency. The death penalty threatened for the offence in question was not imposed – another penalty was substituted. It involved lifelong banishment under harsh conditions. This paper explores whether the sanctions imposed on Adam and Eve would be considered free of error by a modern Court of Appeal applying the sentencing principles which have evolved in this jurisdiction since that classic case. By examining the adequacy of the procedural steps taken in arriving at the sentence, the paper uses the case to illustrate present day disputes regarding the appropriate methodology of sentencing. The substantive sentences imposed on the parties are then examined to test whether they are proportional to the wrongdoing and satisfy the principle of parsimony, namely that a sentence should not be ‘more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed’. On this test, the sentences are found wanting as being excessive, both in their duration and in the inclusion of conditions, particularly in respect of Eve, that are unrelated to the original offence, cruel in their scope and unusual in their reach to third parties.

I INTRODUCTION

This is a story about a story. About a very old story. One about our ancestors. About creation and uncreation; about justice and apparent injustice. But ours is not the only mythically-based story about origins and ancient history.¹ It is proper that it commence by acknowledging the Wurundjeri people as the original custodians of the land on which our meeting places are built. We would be wise to remember that they have even more ancient, but equally legitimate, tales to tell about origins and justice. The justification of the topic is found in the paradoxical lines of T S Eliot that, ‘in my beginning is my end. ... In my end is my beginning’.² As this is a valedictory lecture, the end is the occasion to revisit the beginning.

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¹ For material comparing the early biblical texts with the mythologies of the ancient Near Eastern world, see David Tsumura, ‘Genesis and Ancient Near Eastern Stories of Creation and Flood: An Introduction’ in Richard Hess and David Tsumura, *I Studied Inscriptions from Before the Flood: Ancient Near Eastern Literary and Linguistic Approaches to Genesis 1-11* (1994) 27. The ‘creationist’ position regarding the literal truth of Genesis is best represented by the writings of Henry Morris (1918-2006) who coined the term ‘creation science’ and founded the California based Institute for Creation Research in 1970: eg, Henry Morris, *The Genesis Record: A Scientific and Devotional Commentary on the Book of Beginnings* (1976).

² Thomas Stearns Eliot, *Four Quartets* (1959) ‘East Coker’, lines 1 and 209.

II GENERALLY

The case of Adam and Eve, which concerns a famous couple who predated surnames,³ is engraved in Judaic/Christian and Moslem memory as the first breach of the law; as the first criminal prosecution; the first sentencing decision; and as the earliest known act of clemency. The antiquity of the events may have diminished its status as a legal precedent, but the report of this leading case is still in circulation and continues to be widely read.⁴ Indeed, the book in which it appears has acquired sacred status as a guide to human conduct yet, ironically, it begins with an act of wilful human rule-breaking which is not visited with the punishment ordained for such misconduct by the legal authority. As the popular limerick explains:

God's plan made a hopeful beginning
But man spoiled his chances by sinning.
We trust that the story
Will end in God's glory
But at present the other side's winning.⁵

It was not merely the inaugural character of the event which made it newsworthy. The physical location of the crime was unique; as were the instigator, the two accused, and the victim whose garden had been despoiled. Despite a claim to omniscience and omnipotence, the victim seemed unable to foresee or forestall the wrongdoing.

The conduct of the defendants raised, for the first time, the moral, legal and psychological tensions between the duty of obedience to authority and the encouragement in individuals of autonomy and self-determination which may challenge the dictates of authority and to that extent, risk being considered subversive.⁶ It raised issues of trust and its breach;⁷ ignorance versus knowledge; self-awareness and its relationship to shame as a sanction; the effects of manipulation and corruption; the origins of sin; the concepts of individual and

³ Actually they predate first names as well. 'Adam' is a common noun in Hebrew meaning 'man' or 'mankind': it is not a personal noun. Adam is so named because he is created from the dust (*adamah*) to which he will ultimately return (Genesis, 3:19). The man named his wife 'Eve' because 'she was the mother of all the living' (Genesis, 3:20), but in the Hebrew the word is *hawah*, which is similar to the verbal root *hayah* – to live: Robert Alter, *Genesis Translation and Commentary* (1996) 15.

⁴ See the first book of the Bible, *Genesis* (date and authors unknown). John Milton has provided a later, more poetic, account in *Paradise Lost* (1667) reprinted in *The Penguin Poetry Library* (1953) 99. For discussion of legal aspects, see George Anastaplo, 'On Trial: Explorations' (1991) 22 *Loyola University of Chicago Law Journal* 765, 765-84; Sheldon Nahmod, 'Adam and Eve and the First Amendment: Some Thoughts on the Obscene as Sacred' (1992) 68 *Chicago-Kent Law Review* 377; Joel Cohen and Michele Pahmer, 'American Law in the Garden of Eden: A Legal Whimsy' (1996) 32 *Criminal Law Bulletin* 244; Milner Ball, *Called by Stories: Biblical Sagas and Their Challenge for Law* (2000); Alan Dershowitz, *The Genesis of Justice* (2000) ch 1.

⁵ William Baring-Gould, *The Lure of the Limerick: An Uninhibited History* (1967) 122.

⁶ Stanley Milgram, *Obedience to Authority: An Experimental View* (1969); Richard Fox, 'The Salisbury Affair: Special Branches, Security and Subversion' (1979) 5 *Monash University Law Review* 251.

⁷ Arie Freiberg, 'Trust and Betrayal in Criminal Justice' in Hugh Selby (ed), *Tomorrow's Law* (1995) 86.

collective guilt; the diverse objectives of punishment; and the prediction and control of future dangerousness. The case confronted death as the ultimate penal measure and revealed the tempering quality of mercy. It highlighted the problem of discrimination on account of gender, species, or status (the status, for instance, of being a wife). It made assumptions about the relationship between men and women that have since been questioned.⁸ It raised issues about the victim's participation in criminal proceedings, and the need to set and observe some minimum due process standards in the accusatorial and sanctioning process.

The initial social control arrangements in the Garden of Eden seemed to have been very informal in nature and depended largely on trust and self-regulation. The known weakness in this approach to ensuring compliance with normative standards, and the need to explore other regulatory models,⁹ is one that Monash University is seeking to address by its recent establishment, at the instigation of this Law School's Dean, of an interdisciplinary Centre for Regulatory Studies. In Eden there was no such Centre, but the failure of self-regulation led to more formal policing arrangements under a new model, one that required the deployment of armed officers — Cherubim with a fiery ever-turning sword. It was because our forebears failed to stand the test of their freedom that this first protective service evolved, over the millennia,¹⁰ into our modern policing and public security agencies. The paradigm shift that occurred in Eden was from one of localised trust to generalised distrust of humans because of their propensity to sin. This became a foundation stone in a criminal justice edifice that still relies more on deterrence through retribution than through reformation.

The Adam and Eve story is also significant as the first occasion on which new species were artificially created. It demonstrated the social dangers of unregulated genetic engineering and of creating new life forms by novel or unconventional means. Humankind now has the power, though genetic modification, to configure plants and animals to serve different purposes, and is in the process of rediscovering the lost method of cloning human beings.

⁸ See, eg, Shira Halevi, *The Life Story of Adam and Havah: A New Targum of Genesis* (1997).

⁹ The burgeoning literature on compliance includes: Martin Friedland (ed), *Securing Compliance: Seven Case Studies* (1990); Toni Makkai and John Braithwaite, 'Praise, Pride and Corporate Compliance' (1993) 21 *International Journal of the Sociology of Law* 73; Anthony Ogus, *Regulation: Legal Form and Economic Theory* (1994); Toni Makkai and John Braithwaite, 'Reintegrative Shaming and Compliance with Regulatory Standards' (1994) 32 *Criminology* 361; John Braithwaite, 'The New Regulatory State and the Transformation of Criminology' (2000) 40 *British Journal of Criminology* 222; Anthony Bottoms, 'Compliance and Community Penalties' in Anthony Bottoms, Loraine Gelsthorpe and Sue Rex (eds), *Community Penalties: Change and Challenges* (2001) 87; Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2002); Richard Johnstone and Rick Sarre, *Regulation: Enforcement and Compliance* (2004) (proceedings of Australian Institute of Criminology conference, *Current Issues in Regulation: Enforcement and Compliance*, Melbourne, 2-3 September 2002), available at <<http://www.aic.gov.au/publications/rpp/57/RPP57.pdf>> at 3 September 2006. Richard Fox, Chris Humphreys, Mark Thomas, Michael Bourke and Inez Dussuyer, *On-The-Spot Fines and Civic Compliance* (2003) vol 2, appendix E, 31.

¹⁰ Or more precisely six millennia, if the calculation by Bishop James Ussher (1581-1656; Archbishop of Armagh, Ireland) of the date of creation at 4004 BC (on Sunday 23 October!) is correct; James Ussher, *Annales Veteris Et Novi Testamenti* (1650) iv.

Of course, Eve was not a true clone of Adam. If the second human being had been a clone of the first, the gender would have been male. Two Adams in Eden might well have been paradise for the gay movement, but it would have produced a very different outcome in terms of the perpetuation of the human species, or the storyline of the rest of the Bible. But, in the Garden of Eden, bio-diversity was encouraged and, no doubt, allowed for different forms of sexual expression. The fact that those who were first accused of crime were heterosexual in orientation, did not lead to them being singled out on account of their sexual preferences.

God's initial assessment was that everything that He had made was good,¹¹ but the Almighty later temporarily repented of his creative impulses when faced with the spread of wickedness.¹² Ten generations after Adam, He brought down the flood in a spectacular act of uncreation.¹³ The world in which order had been created from a primeval watery expanse¹⁴ was again reduced to a watery chaos. All living creatures were annihilated, so the *Genesis* story goes,¹⁵ except for Noah, his family and the animals safely in the Ark. It is not clear why the unicorns did not survive. It seems that they were mistakenly assigned to deck three in shared quarters with the carnivores! God's promise, after the flood subsided, never again to take such drastic action against humanity,¹⁶ is eloquently represented by the rainbow¹⁷ as source of awe and beauty for young and old alike.

It can also be pointed out that there were economic consequences of this celebrated case. It marked the end of the original welfare state in the protected environment of Eden, and the beginning of private enterprise in the land to the east. Agricultural enterprises can be dated from that time (Adam was removed from his clerical job of naming all the beasts and the birds¹⁸ and was banished 'to till the soil from which he was taken').¹⁹ Similarly the sewing of fig leaves and the making of loincloths²⁰ also signalled the start of the clothing industry in which many of their successors flourished.²¹

More importantly, the primal story of our ancestry also poses the question that if those who were created in God's own image²² were imperfect; Perhaps the

¹¹ *Genesis* 1:31. The English translations of *Genesis* relied on in this paper are derived from The Jewish Publication Society of America, *The Torah: The five books of Moses* (1967).

¹² *Genesis* 6:5.

¹³ *Genesis* 6.

¹⁴ *Genesis* 1:6-10.

¹⁵ *Genesis* 6:6-7 (Noah and the flood). For coverage of the many other stories of a deluge and a flood in ancient narratives, see Franz Delitzsch, *A New Commentary on Genesis* (1888) vol 1, 235-9.

¹⁶ *Genesis* 8:21, 9:11.

¹⁷ *Genesis* 9:12-17.

¹⁸ *Genesis* 2:19.

¹⁹ *Genesis* 3:23.

²⁰ *Genesis* 3:7.

²¹ Later, God made 'garments of skin' for them: *Genesis* 3:21. An early fashion statement was the 'ornamented tunic', or 'coat of many colours' given by Jacob to his son Joseph: *Genesis* 37:3. The theological significance of God clothing Adam and Eve is discussed by Gary Anderson, 'Garments of Skin in Apocryphal Narrative and Biblical Commentary' in James Kugel (ed), *Studies in Ancient Midrash* (2001) 101.

²² *Genesis* 1:26-7.

godhead was as well?²³ The earliest history section of *Genesis* (chapters 1-11) claims a universal perspective on the origins and character of human kind, but it also reveals how the Almighty expressed care for the human inhabitants of the planet Earth in a vacillating manner. Robert Adler, in his modern translation of and commentary on *Genesis*, summarises the storyline as describing:

A divine experiment with the quirky and unpredictable stuff of human freedom, an experiment plagued by repeated failure and dedicated to renewed attempts: first Adam and Eve, then the generations of Noah, then the builders of the Tower of Babel, and finally Abraham and his seed.²⁴

In similar vein, the failure of the Almighty to give effect to the full import of the justice system in the very first case that called for a decision has been interpreted by the Harvard academic and activist, Alan Dershowitz, as a case in which the divine rules of justice were themselves still being developed.²⁵

Of the many profound issues raised by the story of Adam and Eve, the apparent shortcomings in procedural and dispositional justice in the prosecution of the case against them persists as a troublesome reflection on the character of the entity regarded by many as the ultimate source of wisdom and justice.

Nonetheless, credit should be given where credit is due. In that opening story, the basic building blocks of our justice system are recognisable: prohibition, accusation, a right to make defence, discretionary punishment, mitigation or mercy, and the execution of sentence. What is missing is the modern political concept of separation of powers whereby authority is deliberately split between legislative, judicial, and executive bodies in order to ensure that checks and balances are in place in an effort to guarantee that absolute power is not invested in, or asserted by, any single individual or sovereign entity.²⁶ And even though, by the time of the New Testament, the godhead was interpreted by many to be the union of three entities (Father, Son and Holy Ghost), the doctrine of the 'Holy Trinity' does not contemplate that the function of each manifestation of the trinity is to act as a check or balance on the actions of the others.

Another missing element, but one to be welcomed, is that Eden was not divided into multiple political jurisdictions. So far as planet Earth was concerned, at that time the creator presided over a unitary legal system. Contrast this with the

²³ Marin Gardner, *Did Adam and Eve Have Navels?: Discourses on Reflexology, Numerology, Urine Therapy and Other Dubious Subjects* (2000), which explores a chestnut for fundamentalists: did God create the first humans with navels? If they had them, that would have been a basic misrepresentation by the divine, since navels imply an earlier existence inside a womb. If they lacked them, God had created humankind 'in his own image' with a physical as well as a moral imperfection. The latter is probably the correct conclusion since unlike their creator, they were also not immortal.

²⁴ Alter, above n 3, xliv.

²⁵ Dershowitz, above n 4, 40.

²⁶ For a recent discussion on the erosion of the position of the judiciary in this tripartite separation of powers, see Chief Justice Marilyn Warren, 'What separation of powers?' (2005) 31 *Monash University Law Review* 1. See also Andrew Ashworth, *Sentencing and Criminal Justice* (4th ed, 2005) 50-4.

current Australian situation. Federation has resulted in constitutional authority for policing, criminal law, criminal procedure and sentencing being distributed between nine jurisdictions (the Commonwealth, six States and two Territories) because of the refusal by the founding fathers of our Constitution to grant plenary power to the Commonwealth over all these areas. The Australian Law Reform Commission, in its second major reference on sentencing of federal offenders,²⁷ is presently struggling with the task of bringing discipline to federal sentencing law and integrating it with the structures, terminology and concepts found in State and Territorial sentencing legislation.

The anger of the Almighty, recorded in *Genesis* 11, at the impudence of humankind in building a skyscraper ('a tower with its top in the sky')²⁸ in the city of Babel (Babylon) led to the demise of the universal jurisdiction as it existed in the time of Adam and Eve. At that time all the inhabitants of earth used the same language, but the divinity was again troubled by the challenge to authority represented by their cooperative initiative in high-rise developments. He feared that they would storm the heavens. His response was innovative:

If, as one people with one language for all, this is how they have begun to act, then nothing that they may propose to do will be out of their reach. Let us then, go down and confound their speech there, so that they shall not understand each other's speech.²⁹

And this was done, and in addition, the people were scattered over the face of the earth to prevent them from continuing to build the city and the tower of Babel.

It is a pity that the divine reaction was so unforgiving in relation to this further challenge to authority. Retention of a common language would have facilitated the evolution of international legal standards and would have been of benefit in all areas of human discourse in future generations.

In the sphere of criminal law and sanction systems, we are struggling to recover some of that lost ground. We are enunciating international standards on civil and political rights; and formulating and becoming parties to numerous treaties backing cooperative international arrangements for law enforcement. We have supported the establishment of the International Criminal Court. And we are engaged in international comparative scholarship in sentencing law.³⁰

²⁷ Australian Law Reform Commission, *Sentencing*, Report No 44 (1988); Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 70 (2005).

²⁸ *Genesis* 11:4.

²⁹ *Genesis* 11:6.

³⁰ See, eg, Allison Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing' (2001) 87 *Virginia Law Review* 415; Ralph Henham, 'The Philosophical Foundations of International Sentencing' (2003) 1 *Journal of International Criminal Justice* 64; Andrea Carcano, 'Sentencing and the Gravity of the Offence in International Criminal Law' (2002) 51 *International and Comparative Law Quarterly* 583; Ralph Henham, 'The Internationalisation of Sentencing: Reality or Myth?' (2002) 30 *International Journal of the Sociology of Law* 265; Ralph Henham, 'Some Issues for Sentencing in the International Criminal Court' (2003) 52 *International and Comparative Law Quarterly* 81; Ralph Henham, 'Theorizing the Penalty of Sentencing in International Criminal Trials' (2004) 8 *Theoretical Criminology* 429; Adrian Hoel, 'The Sentencing Provisions of the International Criminal Court' (2005) 1 *International Journal of Punishment and Sentencing* 37; Ralph Henham, *Punishment and Process in International Criminal Trials* (2005).

Already within Australia, dispersed sovereignty over criminal matters is being visibly undermined by a variety of forces. These include: the impact on contemporary life of globalisation and instantaneous world-wide communications;³¹ changing conceptions of what constitutes serious crime, arising out of the growth in cybercrime,³² international environmental crime³³ and terrorism;³⁴ and greater awareness of the cross-jurisdictional nature many major crimes, including sexual ones.³⁵ If renewed discussion of the prospect of an Australian republic is also accompanied by consideration of larger questions of constitutional reform, it will be timely to ask whether the Commonwealth should have, as was given to the federal government of Canada, plenary power with respect to the criminal law. It will then be able to prescribe uniform criminal laws and sanctions for the nation and be better able to deliver international cooperation in the investigation and prosecution of cross-border crime.

In lamenting the loss of the original universal jurisdiction that existed in the halcyon days of Eden, perhaps insufficient respect is being paid to God's wisdom in scattering our forebears and fragmenting their language. Diversity is essential in order to gain the benefits of political as well as biological evolution and the modern formulation of international legal, political and human rights standards has profited from the various approaches discernable in the world's political systems.

III THE TASK

Despite all the captivating collateral issues raised by the story of Adam and Eve, the primary question posed in this valedictory lecture is whether the sentences imposed on Adam and Eve would be considered free of appealable error by a modern Court of Appeal applying the sentencing principles which have evolved (or have been the product of 'intelligent design') in this jurisdiction since that classic foray into crime and punishment.

The ruminations will not be about our ancestors' general criminal liability, or that of the serpent. Nor will this paper take up other matters which might be raised in an appeal against conviction, such as whether the investigatory procedures had met the requirements of the *Crimes Act 1958* (Vic),³⁶ or whether substantive defences, such as marital coercion,³⁷ had been adequately dealt with. The discussion will be about applicable sentencing procedures and principles.

³¹ Saskia Sassen, *Losing Control: Sovereignty in an Age of Globalisation* (1996).

³² Simon Bronitt and Miriam Gani, 'Shifting Boundaries of Cybercrime: From Computer Hacking to Cyber-terrorism' (2003) 27 *Criminal Law Journal* 303; Joint Committee on the Australian Crime Commission, Parliament of Australia, *Cybercrime* (2004); Roderic Broadhurst and Peter Grabosky (eds), *Cyber-Crime: The Challenge in Asia* (2005).

³³ Rob White, 'Environmental Crime in Global Context: Exploring the Theoretical and Empirical Complexities' (2005) 16 *Current Issues in Criminal Justice* 271.

³⁴ Christian Walter (ed), *Terrorism as a Challenge for National and International Law: Security v Liberty?* (2004).

³⁵ David Lanham, *Cross-Border Criminal Law* (1997).

³⁶ *Crimes Act 1958* (Vic) ss 464, 464AH.

³⁷ *Crimes Act 1958* (Vic) s 336.

However, an important lesson about the efficacy of criminal punishment will always be in background. Though after the expulsion from Eden, Adam and Eve had sons and daughters before Adam died aged 930,³⁸ it is known that one of their sons, Cain, was subsequently found guilty of murder. Moreover, Cain's later begetting of Enoch by an unnamed woman is suggestive of incest.³⁹ The criminal justice system has always been a very crude and overrated means of dealing with dysfunctional families.

IV GROUNDS OF APPEAL

Grounds of appeal have to be identified. The traditional analysis of the statutory power of an appellate court to vary a sentence requires that the appellants establish that the sentencer made an error vitiating the exercise of the original sentencing discretion.⁴⁰ However, apart from any specific errors that can be identified, if the total sentence appears to be manifestly excessive, unreasonable or unjust, the inference can be drawn that the sentencer must have made such an error.

The errors that might be alleged could include:

- (1) Procedural errors which denied the defendants an appropriate forum and/or due process at sentencing. This could be elaborated by reference to lack of impartiality in the tribunal; lack of representation and/or an adequate opportunity to be heard on sentence; and failure of the sentencer to give reasons, or sufficient reasons, for sentence.
- (2) Various failures to meet the technical requirements of the *Sentencing Act 1991* (Vic) in relation to mandatory pre-sentence reports in respect of certain forms of disposition, particularly the imposition of what appears to have been some type of indefinite sentence.
- (3) Breach of the prohibition on cruel and unusual punishment now contained in the *Bill of Rights 1688*.⁴¹
- (4) The manifestly excessive nature of the sentences.

³⁸ *Genesis* 5:5.

³⁹ Delitzsch, above n 15, 189-90.

⁴⁰ *Griffiths v The Queen* (1977) 137 CLR 293; *Dinsdale v The Queen* (2000) 202 CLR 321.

⁴¹ The *Bill of Rights* is part of Victorian law: see *Imperial Acts Application Act 1980* (Vic) pt II div 3.

V PROCEDURAL JUSTICE

A An Appropriate Forum

By present day standards, the original judicial examination and imposition of sentence seems to have lacked a proper forum. In criminal matters, what is an appropriate forum often depends on the age of the offender. That may determine whether sentencing should have been in accordance with the informal procedures and the welfare and rehabilitative principles of the juvenile justice system with its attenuated penalties,⁴² rather than the more formal, accountable and punitive environment of courts for adults.

Trying to ascertain the age of Adam and Eve at the time of sentence directs us to the more fundamental dilemma of the age of these prototypes when they were formed. Though Adam and Eve were created in an adult guise, these proto-adults are certain to have had a much younger intellectual age. What possible store of human experiences and memories could have accompanied their creation as the first humans in such a young and unpopulated world? Adam is clearly older than Eve, but they did not have knowledge of good and bad until they ate the forbidden fruit, and they were not mature enough to procreate until they were expelled from the sanctuary of Eden.⁴³ It may well be that they were under 18 (chronologically or mentally) and entitled to be dealt with by a tribunal for juveniles. Of course such a tribunal did not exist. But that is of no moment, because the factors of youthfulness, inexperience and prior good character are relevant to sentence in any forum as mitigating factors.⁴⁴

Another problem with the forum was whether it was impartial. Adam and Eve were actually dealt with by an entity that had a conflict of interest by virtue of being both their creator and their victim. This violates the natural justice requirement of a fair and unbiased tribunal.⁴⁵ It would have set a better example for posterity if the divinity had regarded itself as disqualified and assigned the task to an Archangel.

Furthermore, the god of the story who was sitting in judgment was also their accuser, a witness to their behaviour, a trier of fact, and their sentencer. Interestingly enough, the latter procedure is similar to that still available to judges of superior courts in dealing with contempt in the face of the court.⁴⁶ In such cases the judge is indeed accuser, witness, trier of fact, and sentencer. Nonetheless it is submitted that the conflicts in the relationship between the parties and in the competing functions of the sentencer that are obvious in the biblical account would nowadays support an application for an order for a stay of

⁴² Arie Freiberg, Richard Fox and Michael Hogan, *Sentencing Young Offenders* (1988).

⁴³ *Genesis* 4:1.

⁴⁴ Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (2005) ch 3.

⁴⁵ Stefan Trechsel, *Human Rights in Criminal Proceedings* (2005); Denis Galligan, *Due Process and Fair Procedures* (1996).

⁴⁶ Richard Fox, *Victorian Criminal Procedure: State and Federal Law* (12th ed, 2005) [3.7.3].

the proceedings on the basis that to continue would amount to an abuse of process.⁴⁷ To persist despite such an order would render the sentences a nullity. Even without an order of that nature, the sentences would be void because of other procedural defects, such as the absence of representation in relation to serious charges,⁴⁸ the lack of an opportunity to make submissions in respect of the nature and duration of the proposed sanctions,⁴⁹ and the failure of the sentencer to give reasons for them.⁵⁰

Relief by way of *certiorari* could be obtained to quash the convictions and sentencing orders, particularly as there was no original right of appeal or review.⁵¹ The case law indicates that neither delay, nor the execution of the sentences is necessarily fatal to such a remedy.⁵² However, there are difficulties with the parties. The applicants are now dead and the respondent, though immortal and within the jurisdiction, is difficult to serve with process.

B Reasons for Sentence

When confronted with the allegation of delinquency: ‘Did you eat of the tree from which I had forbidden you to eat?’ Adam offered the explanation: ‘The woman you put at my side – she gave me of the tree, and I ate.’ Eve responded with the excuse: ‘The serpent duped me, and I ate.’⁵³

Having heard those pleas in mitigation,⁵⁴ the Almighty went straight to sentence. However, the penalty was not what He had warned Adam it would be – namely death. It was to be banishment from Eden for life,⁵⁵ reinforced with additional punitive conditions that were not only applicable to him and his wife, but also, impliedly, to their progeny.⁵⁶

For the woman the conditions were that:

I will make most severe
Your pangs in childbearing;
In pain shall you bear children.
Yet your urge shall be for your husband,
And he shall rule over you.⁵⁷

⁴⁷ Andrew Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (1993).

⁴⁸ *Dietrich v R* (1992) 177 CLR 292.

⁴⁹ Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999) [2.212].

⁵⁰ *O'Connor v The Queen* [1987] 2 VR 496 (*O'Connor*).

⁵¹ *Craig v South Australia* (1995) 184 CLR 163.

⁵² *R v Muirhead; Ex parte A-G (SA)* [1942] SASR 226; *R v Tillett; Ex parte Newton* (1969) 14 FLR 101; *Ex parte Thomas; Re Arnold* [1966] 2 NSW 197.

⁵³ *Genesis* 3:13.

⁵⁴ The significance of Adam and Eve being able to make their defence has been acknowledged in later case law: ‘the laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he called to make his defence. “Adam” (says God), “where art thou? Hast though not eaten of the tree whereof I commanded thee that shouldest not eat?” And the same question was put to Eve also’: *Dr Bentley’s Case* (1723) 1 Strange 557, 567 (Fortescue J). Fortescue’s remarks were quoted by Byles J in *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180, 195.

⁵⁵ *Genesis* 3:23.

⁵⁶ *Genesis* 3:14-17.

⁵⁷ *Genesis* 3:16.

And for Adam the banishment was to be accompanied by a lifetime of hard labour:

Cursed be the ground because of you;
 By toil shall you eat of it all the days of your life:
 Thorns and thistles shall it sprout for you.
 But your food shall be the grasses of the field;
 By the sweat of your brow shall you get bread to eat,
 Until you return to the ground —
 For from it you were taken.⁵⁸

It is unclear whether the decision not to impose the maximum penalty of death was a response to the explanations proffered, or was an independent act of mercy. However, not insisting on the maximum penalty does not exempt a sentencer from explaining why the alternative was selected, and from giving the offenders the opportunity to challenge the relevance and validity of the conditions attached. For instance, that they constituted a cruel and unusual punishment, that they were directed in part against innocent third parties, and that they were excessive.

Under current legal standards, a sentencer is duty bound to set out the facts involved in the commission of each offence and the principal reasoning which underpins the choice of sanction.⁵⁹ The obligation to give reasons is one which arises at common law⁶⁰ and, in respect of particular sentencing orders, under statute.⁶¹ The High Court of Australia has recently said in *Markarian*: '[a]ccessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public'.⁶²

Since the turn of the last century, offenders before the superior courts have had a right to know on what basis they received a particular sentence, and may apply for leave to appeal against its severity. The countervailing public interest in avoiding excessively lenient sentences is represented in the right of appeal against sentence vested in the Director of Public Prosecutions.⁶³

A sentencer does not have to account for every single issue raised at the sentencing plea, nor reveal every single step taken in determining the punishment, but something must be offered.⁶⁴ The aim is to promote consistency through transparency in the process and accountability in the adjudicator. These

⁵⁸ *Genesis* 3:17-19.

⁵⁹ Fox and Freiberg, above n 49, [2.601].

⁶⁰ *O'Connor* [1987] 2 VR 496.

⁶¹ See, eg, *Sentencing Act 1991* (Vic) ss 9(3)(a) (reason to be given for use of aggregate sentence of imprisonment), 18G (indefinite sentence), 18W(7) (action on breach of combined custody and treatment order), 26(3C) (action on breach of intensive correction order), 31(5B) (action on breach of order suspending sentence).

⁶² *Markarian v The Queen* [2005] HCA 25 (Unreported, Gleeson CJ, Gummo, Hayne and Callinan JJ) ('*Markarian*') [39].

⁶³ Appeals by an offender against sentence were first permitted in this State by *Criminal Appeal Act 1914* (Vic) (now *Crimes Act 1958* (Vic) s 567) and by the Crown in 1970 (now *Crimes Act 1958* (Vic) s 567A).

⁶⁴ *Giakas v The Queen* [1988] VR 973.

were missing in the Garden of Eden. What occurred there was an example, to use an expression of Justice Michael Kirby, of the exercise of ‘unexplainable and unreviewable power... the breath of a bygone legal age’.⁶⁵

C The Methodology of Sentencing

In fairness to the Almighty, humankind itself has yet to perfect the methodology of sentencing. Those occupying judgment seats in the ages long after the expulsion from Eden have denied that they can mechanically apply a set of sentencing rules to the facts of particular cases to arrive at invariably correct and consistent decisions.

It had long been a common judicial attitude that ‘sentencing is an art not a science’.⁶⁶ The proposition that it was an ‘art’ carried with it the implication that it was an instinctive or intuitive skill, rather than a learned one. And even if capable of being learnt, it was an ability acquired only by years of experience at the criminal bar and on the Bench.

The High Court itself has commented on the idiosyncratic and difficult nature of the task:

sentencing 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 overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence, but sometimes they point in different directions.⁶⁷

On a number of occasions the Victorian Full Supreme Court⁶⁸ has taken the opportunity to emphatically and repeatedly deny that the process of sentencing can be dissected into its component parts.⁶⁹ It is an exercise in ‘instinctive synthesis’ which allows the trial judge to produce a global result without identifying the weight to be given to the various considerations before the court.⁷⁰ The Victorian position was first articulated in the case of *R v Williscroft*⁷¹ in 1975.

⁶⁵ *Markarian* [2005] HCA 25, [129].

⁶⁶ *Wise v The Queen* [1965] Tas SR 196, 197.

⁶⁷ *Veen (No 2)* (1988) 164 CLR 465, 476.

⁶⁸ Now the Court of Appeal.

⁶⁹ The lack of transparency in sentencing decision-making is compounded by the judicial view that the omission of any mention of particular factors in arriving at a sentence does not mean that there has been a failure to consider them: *R v Dole* [1975] VR 754, 767.

⁷⁰ The role of the sentencer (as apposed to that of the jury) in determining factual matters relevant to sentence, eg, the quantity and character of an illicit drug in federal drug prosecutions is discussed in Ian Leader-Elliott, ‘Instinctive Synthesisers in the High Court’ (2002) 26 *Criminal Law Journal* 6.

⁷¹ ‘[U]ltimately every sentence imposed represents the sentencing judge’s instinctive synthesis of all the various aspects involved in the punitive process. Moreover, in our view, it is profitless ... to attempt to allot to the various considerations their proper part in the assessment of the particular punishments presently under examination. ... We are aware that such a conclusion rests upon what is essentially a subjective judgment largely intuitively reached by an appellate judge as to what punishment is appropriate’: *R v Williscroft* [1975] VR 292, 300 (Adam and Crockett JJ).

The opaqueness produced by this 'instinctive synthesis' technique of arriving at a sentence was intended to deter the bringing of sentencing appeals by those who sought to attack the penalty by unravelling the individual threads of reasoning which supported it and challenging the weight applied to particular factors.⁷²

This instinctive approach has been challenged in recent times by proponents of some form of 'staged', or 'step by step', or 'two tiered' dissection of the sentencing task. For instance, one which would require sentencers to *first* determine and openly state what they considered to be a *proportionate* sentence,⁷³ having regard only to the objective circumstances of the crime (eg, eating fruit from a forbidden tree in defiance of God's express command, warrants death) and, *second*, to identify a sentence appropriate to the particular accused after indicating what account has been taken of any personal mitigating factors present in their favour (eg, seduction by a serpent, prior good character, youthfulness, remorse, cooperation with authorities, etc, that justifies a lesser sentence of banishment).⁷⁴

Time does not permit an exploration of the ongoing history of this tension between the instinctive and staged approaches to sentencing.⁷⁵ It is sufficient to say that for a long time the High Court of Australia refused to be drawn into the methodological debate. But last year, in *Markarian*,⁷⁶ the Court was expressly invited to rule that the instinctive synthesis approach was the correct and only one for sentencers to use.⁷⁷ Though all six judges sitting declined to accept it as a universal rule,⁷⁸ five supported it. They were, however, prepared to permit some limited calculation and explanation, in numerical terms, of the weight to be given to mitigating factors in relatively simple cases.⁷⁹

Of the five, McHugh J was most critical of any shift to a calculus approach to sentencing. He was adamant that:

The circumstances of criminal cases are so various that they cannot be the subject of mathematical equations. Sociological variables do not easily lend themselves to mathematization ... Analysing the process involved in two-tier sentencing reveals that the appearance of objectivity and unfolding reason is illusory.⁸⁰

He argued that at each stage, in any attempt at a more systematic scientific

⁷² *R v Young* [1990] VR 951, 960.

⁷³ Richard Fox, 'The Killings of Bobby Veen: the High Court on Proportion in Sentencing' (1988) 12 *Criminal Law Journal* 339; Richard Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19 *Melbourne University Law Review* 489.

⁷⁴ This two-stage approach is derived from *Veen (No 1)* (1979) 143 CLR 458, 490 and *Veen (No 2)* (1988) 164 CLR 465, 472.

⁷⁵ See the coverage by Kirby J in *Markarian* [2005] HCA 25, [109]-[135].

⁷⁶ *Markarian* [2005] HCA 25. See generally discussion by Kate Warner, 'Sentencing Review 2004 2005' (2005) 29 *Criminal Law Journal* 355, 355-9.

⁷⁷ *Markarian* [2005] HCA 25.

⁷⁸ *Ibid* [36], [72], [74].

⁷⁹ *Ibid* [35]-[39].

⁸⁰ *Ibid* [52], [56].

approach to controlling for particular sentencing variables, intuitive processes would be still operating. He was brutal in his criticism, suggesting that ‘if two-tier sentencing is science, its results ... suggest it is junk science’.⁸¹ But even he acknowledged that the instinct of the sentencer about what the correct sentence should be cannot be simply ‘plucked out of the air’. He accepted that nowadays ‘[the] judicial air is thick with trends, statistics, appellate guidance and, often enough these days, statutory guidance’.⁸²

It is submitted that the provision of such guidance is the proper way to go. The sentencing information provided to New South Wales judges for their guidance by the Judicial Commission of New South Wales⁸³ and to Victorian judges by the Victorian Sentencing Advisory Council⁸⁴ and the Judicial College of Victoria⁸⁵ is evidence of improvements in the knowledge base. There is now an interdisciplinary literature on the psychology of judicial sentencing,⁸⁶ and on the benefits of guideline judgments.⁸⁷ The latter have already made their appearance in New South Wales,⁸⁸ and a legislative framework for doing so is in place in Victoria.⁸⁹ The aim is not to usurp the role of judges as sentencers, nor to deny the subjective elements in their decision-making, but to assist them in their difficult and thankless task.⁹⁰

However, it is evident that ‘instinctive synthesis’ was the preferred approach of the creator, at least at the beginning of time. The Almighty had nothing to go on by way of earlier earthly precedents or policy guidance when confronted by the waywardness of his new creations. He may be forgiven for acting intuitively in

⁸¹ Ibid [71].

⁸² Ibid [76].

⁸³ *Judicial Officers Act 1986* (NSW) pts 3, 4. See Judicial Commission of New South Wales, *Research and Sentencing* (2005) <<http://www.judcom.nsw.gov.au/sentencing/sentencing.php>> at 4 July 2006.

⁸⁴ *Sentencing Act 1991* (Vic) pt 9A. In December 2005, the Sentencing Advisory Council launched its Online Sentencing Monitoring resource that examines Victorian trends in sentencing. This resource, which is available at the Council’s website, draws together data from numerous sources to provide a comprehensive overview of sentencing trends across the courts, prisons and correction regimes, and to place these in a historical, national and international context where possible: Sentencing Advisory Council, *Sentencing Advisory Council* (2006) <<http://www.sentencingcouncil.vic.gov.au>> at 4 July 2006.

⁸⁵ Judicial College of Victoria, *Victorian Sentencing Manual 2005* (2005)

<<http://www.judicialcollege.vic.edu.au/emanuals/VSM2006HTM/>> at 4 July 2006.

⁸⁶ See Catherine Fitzmaurice and Ken Pease, *The Psychology of Judicial Sentencing* (1986); Donald Pennington and Sally Lloyd-Bostock (eds), *The Psychology of Judicial Sentencing: Approaches to Consistency and Disparity* (1987).

⁸⁷ See, eg, Andrew von Hirsch, ‘Guidance by Numbers or Words? Numerical versus narrative guidelines for sentencing’ in Ken Pease and Martin Wasik, *Sentencing Reform: Guidance or Guidelines?* (1987); Justice James Spigelman, ‘Sentencing Guideline Judgments’ (1999) 73 *Australian Law Journal* 876; Kate Warner, ‘The Role of Guideline Judgments in the Law and Order Debate in Australia’ (2003) 27 *Criminal Law Journal* 8. For other approaches to guideline judgments, see Austin Lovegrove, ‘Intuition, Structure and Sentencing: An Evaluation of Guideline Judgments’ (2002) 14 *Current Issues in Criminal Justice* 182.

⁸⁸ *R v Juristic* (1998) 45 NSWLR 209 was the first.

⁸⁹ *Sentencing Act 1991* (Vic) pt 2AA (added in 2003); Beth Crilly, ‘Guideline Judgments in Victoria’, (2005) 31 *Monash University Law Review* 37.

⁹⁰ For a discussion of various methods of guiding judicial discretion, see generally Richard Fox, ‘Controlling Sentencers’ (1987) 20 *Australian and New Zealand Journal of Criminology* 218; New South Wales Law Reform Commission, *Sentencing*, Report No 79 (1996) 12; Australian Law Reform Commission, *Sentencing of Federal Offenders*, above n 27, ch 21.

arriving at a sentence. He still has sufficient support from the High Court of Australia not to be unduly concerned about a challenge to his method of arriving at sentence.

But there is no need to continue in that fashion. Recall the view of Dershowitz, presented earlier in this paper, that Adam and Eve was a case in which the divine rules of justice were themselves still evolving.⁹¹ And that is true here. Intelligent design can and has been applied to improve the framework of sentencing in this country and elsewhere.⁹² Justice Kirby was right, as the sixth judge in *Markarian*, to warn against the continued use of the phrase 'instinctive synthesis' in discussing the methodology of sentencing because it was sending the wrong signals to sentencers. It discouraged examination of the rationality and logic of the decisions made by those with legal power over the lives of others and impeded transparency and accountability in judicial decision making.⁹³ As a former Chief Justice of South Australia, John Bray, said in another context (dealing with judgments on whether publications were obscene)⁹⁴

where a choice has to be made between the dangers of ignorance and the dangers of knowledge there should be no doubt about the answer in a literate and egalitarian community.⁹⁵

VI THE NATURE OF THE CHARGE

To evaluate whether the actual sentences imposed on Adam and Eve were erroneous as excessive or unreasonable, a judgment about the gravity of the class of crime has to be made. This is central to the sentencing process – the more serious the type of offence, the less weight needs to be given to personal mitigating factors. The prescribed maximum penalty, death, certainly provides a guide to the severity with which the law maker requires the sentencer to view the crime.⁹⁷ It was framed in this way:

The Lord God took the man and placed him in the garden of Eden, to till it and tend it. And the Lord God commanded the man, saying, 'Of every tree of the garden you are free to eat; but as for the tree of knowledge of good and bad, you must not eat of it; for as soon as you eat of it, you shall die'.⁹⁸

The serpent's view was different. He said to the woman:

⁹¹ Dershowitz, above n 4, 40.

⁹² See summary by Anthony Bottoms, 'The Philosophy and Politics of Punishment and Sentencing' in Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform* (1995) ch 2.

⁹³ *Markarian* [2005] HCA 25, [129]-[132].

⁹⁴ Richard Fox, 'Depravity, Corruption and Community Standards' (1980-1) 7 *Adelaide Law Review* 66, 78.

⁹⁵ John Bray, 'Censorship' (1964) 13 *Australian Library Journal* 60, 69.

⁹⁶ *Greenburg v The Queen* (1993) 68 A Crim R 392, 400.

⁹⁷ *Hansford v His Honour Judge Neesham* [1995] 2 VR 233, 236.

⁹⁸ *Genesis* 2:15-17.

You are not going to die, but God knows that as soon as you eat of it your eyes will be opened and you will be like divine beings who know good and bad.⁹⁹

There is some dispute about the character of the threatened death penalty. The wording, ‘for as soon as you eat from it, you shall die’,¹⁰⁰ might suggest that consumption of the fruit would lead to immediate death – that it was poisonous. But the text has consistently been understood to indicate that that result would come by way of sentence. Another reading is that the sentence would not entail immediate death, but rather the loss of immortality. But that too does not hold up, because even though Adam was permitted to live for 930 years, neither he, nor Eve, nor any other species were ever created immortal.¹⁰¹

Though the punishment was set at death, the highest level in the sentencing scale, it was not mandatory. That is consistent with modern criminal justice systems that normally set maximum penalties much higher than those ordinarily applied in practice. That is to allow sufficient punitive scope for the worst examples of the type of offence in question.¹⁰² The evil in a mandatory penalty is that it prevents the sentencer making allowance for differences in the degree of culpability of offenders in different circumstances and denies their access to alternative forms of severe punishment. Moreover, with the death penalty, if a mistake has been made in the finding of guilt, the injustice cannot be remedied once the sentence has been carried out.

The Almighty was acting correctly when He treated his announced penalty as incorporating discretion, rather specifying a mandatory penalty.¹⁰³ He took the same view in the punishment meted out to Cain, who committed murder, the second crime in the book. Cain does not forfeit his life despite God’s rule, later communicated to Moses, that the appropriate response should be a life for a life.¹⁰⁴ A prescribed penalty, unless expressly declared to be mandatory, is never as strict as it appears. The availability of the inbuilt discretion can open the door to alternative measures depending on how grave the sentencer regards the form of the wrongdoing.

Look at the charges that Adam and Eve might have been facing in terms of equivalent modern crimes. Adam and Eve were trusted and they breached that trust by an act of disobedience.

One of the earliest reported law cases, decided in 1410, stands for the common law proposition *nullum crimen majus est inobedientia* (‘there is no greater crime than disobedience’).¹⁰⁵ But disobedience per se does not translate readily into a recognisable criminal offence. John Milton, in his epic poem *Paradise Lost*, sought to identify the nature of ‘original sin’ and the fall of man. He attributed it to:

⁹⁹ *Genesis* 3:4-5.

¹⁰⁰ *Genesis* 2:17.

¹⁰¹ James Barr, *The Garden of Eden and the Hope of Immortality* (1993).

¹⁰² *Bensegger v The Queen* [1979] WAR 65, 68.

¹⁰³ *Sillery v The Queen* (1981) 180 CLR 353.

¹⁰⁴ *Exodus* 21:23.

¹⁰⁵ Case XLVIII (1410) Jenkins 77.

Man's first disobedience, and the fruit
 Of that forbidden tree, whose mortal taste
 Brought Death into the world, and all our woe,
 With loss of Eden ...¹⁰⁶

The death to which Milton was referring as the harm was not Adam's loss of immortality (as previously indicated, he never was immortal), but the first murder – the one later committed by Adam and Eve's first-born child, in killing his brother Abel.¹⁰⁷ A modern sentencer would be obliged to reject the possible behaviour of later generations as too remote to be taken into account in evaluating the nature and gravity of the crime with which Adam and Eve were immediately charged. Neither Cain nor Abel had yet been born, and the murder was not foreseeable when the parents were being sentenced for their disobedience in eating the fruit.

The most serious characterisation of their behaviour is that it amounted to rebellion against lawful authority and acting in concert with the sovereign's enemies. Milton treats the capacity of the serpent to speak as indicating that the animal was Satan acting in disguise. He posits an ongoing war between good and evil with God and Satan comprising the opposing sides.¹⁰⁸

If the disobedience was accompanied by action that directly assisted an 'enemy' or aimed at harming the body politic it might allow for a charge of treason either under State or Commonwealth law punishable by a maximum of life imprisonment,¹⁰⁹ or of sedition carrying a seven year maximum.¹¹⁰ Again, eating the forbidden fruit directly assisted the enemy raises causation and remoteness issues.

At a lower level, their misbehaviour might be characterised as essentially a property offence. Both Adam and Eve could have been charged with theft of fruit from the garden of the Almighty under *Crimes Act 1958* (Vic) s 74; (and Adam with the alternative of handling stolen goods under s 88). Adam's liability for theft arises under *Crimes Act 1958* (Vic) s 323 relating to abettors liable as principals. Under this legislation, the maximum penalty for theft is 10 years imprisonment and handling stolen goods is 15 years, which makes banishment for life appear grossly excessive, but it must be remembered that horticultural crimes such as stealing from crops were once capital under English law.¹¹¹

By a stretch of the imagination, the wrongdoing could also be viewed as possession and use of a quantity of an illicit psychotropic substance, given the

¹⁰⁶ John Milton, *Paradise Lost* (1667) book 1, lines 1-4.

¹⁰⁷ Martin Evans, *Paradise Lost and the Genesis Traditions* (1968).

¹⁰⁸ For a commentary on *Genesis* that explores the theme of serpent as Satan, see Delitzsch, above n 15, 149-52. For a modern view of role of Satan in relation to humankind's inherited guilt, see Henry Kelly, *Satan: A Biography* (2006).

¹⁰⁹ *Crimes Act 1958* (Vic) s 9A, or *Criminal Code* (Cth) s 80.1.

¹¹⁰ *Criminal Code* (Cth) s 80.2 (as amended by the *Anti-terrorism Act (No 2) 2005* (Cth)).

¹¹¹ Eg, the 'Black Act' (1723) 9 Geo 1, c 22; John Beattie, *Crime and the Courts in England* (1988) ch 4. Larceny of goods, including produce or crops, worth one shilling or more was a capital felony.

consciousness-raising effect the fruit had on the minds of the offenders.¹¹² That last fanciful suggestion is closer to the truth than it appears. The prohibition was directed to barring their access to a new mental experience – an enhanced consciousness of good and bad. This benefit seriously compromises the gravity of the wrongdoing.

Was the god in the story seriously saying that it was wrong to obtain knowledge of good and bad? Is not cultivating consciousness of the moral dimension of conduct an essential element in raising the young and transmitting values to succeeding generations? Is that not what a caring god would wish all humans to know so that they can make informed choices, preferably in favour of good in light of the later commandments given to Moses on Mount Sinai?¹¹³

Dershowitz asks:

Could an omniscient God really have expected humans created in His image to be satisfied with less knowledge than they were capable of obtaining? Were Adam and Eve not justified in engaging in religious disobedience of God's command? Is not greater knowledge with mortality more valuable than ignorant immortality?¹¹⁴

Certainly, the first result of the disobedience was that the promise of the serpent was actually fulfilled: the eyes of Adam and Eve were, figuratively, opened. They could now see things differently. Surely, that is what schools, and universities and the good teachers in them, strive to achieve with their pupils.

The knowledge that was gained by Adam and Eve by breaching the prohibition was that, first, they were mortal. To this day knowledge that one's life is finite places the stamp of value upon it. Second, they learned, as every generation must, that human life cannot be lived in a sheltered paradise. It will involve work and pain as well as pleasure. Third, they learned that freedom of choice entails responsibility for the consequences of that choice which may include personal shame and guilt as well as harm to others. It is that which compels human kind to consider whether the choice is in favour of good or bad.

It is probably disrespectful to attack God for passing a bad law, one intended to deny human kind essential knowledge. But His position is not wholly inscrutable. There is a reason why the Almighty thought it was a good idea at the time. At that stage of the experiment with the newly created humans, His fear was of their future dangerousness. It was His awareness that, as we already know so well, knowledge can be applied to good or evil ends. It was the risk of their misuse of knowledge, coupled with their possible attainment of immortality that so agitated the Almighty. That was because there were *two* significant trees in the Garden of Eden: the tree of 'knowledge of good and bad', about which Adam had

¹¹² *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ss 73(1), 75(1), sch 11.

¹¹³ *Exodus* 20:1-14.

¹¹⁴ Dershowitz, above n 4, 39.

been specifically warned,¹¹⁵ and the tree of 'life' located elsewhere in the centre of the garden, to which the serpent makes express reference in his corruption of Eve.¹¹⁶

God's fear was expressed thus:

Now that the man has become like one of us, knowing good and bad, what if he should stretch out his hand and take also from the tree of life and eat, and live forever?¹¹⁷

That rhetorical question explains why the maximum penalty attached to the act of disobedience involving the tree of 'knowledge of good and bad' was so high. It provides the incapacitative rationale for the sentence. God was not prepared to give them further opportunities in Eden to even more dramatically challenge His authority by a similar act that would gain them immortality and thus a competitive God-like status. A rehabilitative foundation for some form of restorative Eden-based sanction seemed far too risky.

VII THE NATURE OF THE SANCTIONS IMPOSED

Included in the new knowledge that Adam and Eve acquired was that they were naked and that what they had done was wrong. In their shame and fear, they hid from God. Shaming could have been a deliberate part of the punishment, but it is not specified as a component of the sentence. The old practice of publicly humiliating offenders in the stocks intentionally sought to utilise shame as a sanction its own right. It is still done with court ordered publicity as a penalty.¹¹⁸ Modern forms of restorative justice see the acknowledgement by an offender of guilt and shame as a step towards forgiveness, reparation and the restoration of trust.¹¹⁹ On that basis Adam and Eve were already revealing a potential for repentance and reformation. But that did not wash with their creator. He wanted them well and truly out of the way and so the primary sanction ordered was banishment from Eden for life. There was a superadded condition of hard labour for Adam and one for Eve which condemned her to future pain during childbirth and a lifelong dependency on her husband.

As to the banishment, exile was once used at common law, primarily as an alternative to the death penalty, but has since been rejected as inconsistent with the rights of citizenship and protection of the law. In Anglo-Saxon times, and later, offenders who absconded or were exiled could be declared to be outlaws

¹¹⁵ *Genesis* 2:16-17.

¹¹⁶ *Genesis* 3:1-5.

¹¹⁷ *Genesis* 3:22-23.

¹¹⁸ Fox and Freiberg, above n 49, [10.301]-[10.303].

¹¹⁹ John Braithwaite, 'Shame and Modernity' (1993) 33 *British Journal of Criminology* 1; David Karp, 'The Judicial and the Judicious Use of Shame Penalties' (1998) 44 *Crime and Delinquency* 277; Eliza Ahmed, Nathan Harris, John Braithwaite and Valerie Braithwaite (eds), *Shame Management Through Reintegration* (2001); George Fletcher, 'Punishment Guilt and Shame in Biblical Thought' (2004) 18 *Notre Dame Journal of Law, Ethics and Public Policy* 343, 354-6.

and liable to be captured by bounty hunters or killed at will. This was precisely what Cain feared when he was banned from working the soil on which his brother's blood had been spilt and he was condemned to be a ceaseless wanderer on earth.¹²⁰ God, who once more was declining to apply the death penalty, put a mark on Cain, lest anyone who met him should be inclined to kill him. It was a protective mark, placed as an act of mercy to prevent vigilante action, not, as commonly assumed, a stigmatic one added as a symbol of outlawry and divine wrath.¹²¹ Even today, Australian law does not permit a court, as part of a criminal sentence, to order the withdrawal of Australian citizenship, or the exile of its nationals.¹²² Nor can the deportation of a non-national be part of a sentence; that is a matter for the Executive of the Commonwealth.¹²³

God feared that Adam and Eve were permanently flawed and could not be redeemed by shame, repentance, or the effluxion of time. However, the lifelong duration of the penalties He imposed upon the two would give our Court of Appeal cause to pause. Crushing sentences,¹²⁴ that is to say, ones that hold out no hope of reform tend not to survive an appeal against their severity. Our current system, perhaps reflecting the teaching of the New Testament, is open to being more forgiving. For instance, the concept of parole is used to lessen the burden of punishment on offenders by allowing their conditional return to the community after a sufficient punitive period has passed. The time on parole provides the opportunity for rehabilitation under supervision. There is a strong presumption that the possibility of parole should always be a component of any lengthy sanction.¹²⁵ Sentencers must give reasons if they decline to permit it. Similarly, the Victorian indefinite sentence includes a mechanism for a court to review the sanction during its continuance so that an offender can be released from its conditions if he or she is regarded as a reduced risk.¹²⁷

One might have thought that Adam would have reached that state at some time during his 930 years of life!¹²⁸ The same might be said of Eve, although her life span is not known. A lesser determinate period of banishment, with a parole or review condition, could have allowed for the prospect of rehabilitation, at least by Adam's 500th birthday. By the time that huge birthday cake was brought out, the tree of life would have been better guarded and probably too tall to climb, even if it was still bearing fruit.

When a sentence is subject to conditions, those conditions must bear some reasonable relationship to the offence being punished. If an unusual condition is to be attached then, as a matter of procedural justice, the defendant or the defendant's counsel should be given the opportunity of making submissions

¹²⁰ *Genesis* 4:11-12.

¹²¹ Cf Shlomo Shoham, *The Mark of Cain: The Stigma Theory of Crime and Social deviation* (1970) 1.

¹²² *Smithers; Ex parte Benson* (1912) 16 CLR 99.

¹²³ Fox and Freiberg, above n 49, [6.522].

¹²⁴ Fox and Freiberg, above n 49, [9.620].

¹²⁵ *Deakin v The Queen* (1984) 58 ALJR 367.

¹²⁶ *Sentencing Act 1991* (Vic) s 11(1).

¹²⁷ *Sentencing Act 1991* (Vic) ss 18A(2), 18A(3), 18H.

¹²⁸ God later re-set the biblical lifespan to 120 years: *Genesis* 6:3.

regarding it.¹²⁹ It is arguable that a condition that expelled Adam from his comfortable pastoral environment in Eden and ordered him to work the harsh pastures east of Eden was one reasonably aimed at driving home the consequences of him disobeying an express prohibition on the cropping of unique trees. However, as indicated, the proper duration of that order is open to dispute.

The conditions attached to Eve's expulsion simply do not pass muster. They are repugnant to the fundamental policy according to which she was formed; they bear no relationship to the offences charged; and they are harsh and oppressive in their operation. The fundamental principle in her creation was that of equality. *Genesis* contains two versions of the creation of humankind. Both make the same point. In *Genesis* 1:27 male and female humans were created together *equally* in God's image on the sixth day. In *Genesis* 2:22 Eve was created after the seventh day to be a helpmate, a wife and 'one flesh' with man, again, arguably implying equality of the sexes. The condition in the sentencing order that she is now to be subordinate to her husband is inconsistent with the overarching principle of equality that applied to her formation. So too is the implication that her relationship with him is henceforth to be marred by incomplete sexual fulfilment. Too great a weight has been placed on punishing her for leading her man astray, and too little on his personal responsibility for succumbing to her cajolery while fully aware it was contrary to God's express instructions.

As to the condition that she should suffer pain in childbearing, a Court of Appeal would regard it as wholly irrelevant to the offence; cruel in its character; and both unusual and unjust in its indiscriminate reach to successive generations.

Feminist interpretations of *Genesis*, which seek to contextualise the Garden of Eden in the agrarian world of early Israel, translate God's judgment on Eve as requiring toil and the bearing of children, rather than specifically pain in childbirth.¹³⁰ God's decision is then seen as assigning to women a different, but not an unequal, role in the life of the family. But the biblical wording is clear, the special conditions of the sanction were harsh, and the accused was given no opportunity to challenge them. It is therefore submitted that a modern Court of Appeal would declare these conditions invalid and would order them to be severed from the order for banishment.

VIII MITIGATING FACTORS

Reference has already been made to the fact that Adam and Eve should have been seen as immature with little life experience on which to base moral judgments or practice impulse control. Having been created, they have not benefited from the experiences of childhood and adolescence in the company of parents and others that teaches the consequences of breaching moral and behavioural norms.

¹²⁹ *Temby v Schulze* (1991) 57 A Crim R 284.

¹³⁰ Carol Meyers, *Discovering Eve: Ancient Israelite Women in Context* (1988); Athalya Brenner (ed), *A Feminist Companion to Genesis* (1993).

Neither was street-wise to the risks of being manipulated by others for evil purposes. Prior good character is a mitigating factor at sentencing, even for serious offences.¹³¹ Each appellant is apparently of good character. Neither has any prior convictions, nor is anything adverse known about them.

To the contrary, Adam's emerging awareness of his social responsibilities is revealed in his apparent willingness to donate a rib in the course of submitting, as an experimental subject, to the new sciences of anaesthesia and surgery. By contributing to the production of a new human being of a different gender he also managed to illuminate the concept of multiplication, a core element of pure mathematics, and set the foundation for applied mathematics though the concept of exponential growth, particularly in the field of population studies.

Both Adam and Eve also admitted their offending on being interrogated,¹³² their shame can be accepted as an indication of remorse, and they appear to have cooperated with officialdom in acceptance of the banishment. These factors should have warranted a discount for both remorse and the early plea in relation to the sentence.¹³³ However, since the maximum penalty of death was not exacted, it does appear that these various considerations did have a significant mitigatory impact on the sentencing judgment.

IX MERCY

It might also be thought that God was being merciful. Mercy is an equity factor operating outside conventional principles of mitigation to justify sentence reduction.¹³⁴ It is based on compassion, but it is also an important demonstration of power. Unlike mitigation, which can be claimed as of right if a proper factual basis for it is established, mercy is wholly discretionary. It reflects as much upon the character of the person granting it as upon the characteristics of the recipient. Even to this day, when mercy is exercised by judges, it is modelled on the attributes of God. Such qualities, wrote Shakespeare in the *Merchant of Venice*:

becomes the thrownd monarch better than his crown ... It is an attribute to God himself; and earthly power doth then show likest God's when mercy seasons justice.¹³⁵

The earliest example in the Bible is not the refusal to impose the death penalty on Adam and Eve. As has been demonstrated, they had ample mitigating factors in their favour. It was the withholding of capital punishment from Cain for his

¹³¹ Richard Fox, 'Ryan v *The Queen* – Paradox and Principle in Sentencing a Paedophilic Priest' (2002) 26 *Melbourne University Law Review* 178.

¹³² *Genesis* 3:9-13.

¹³³ *Sentencing Act 1991*(Vic) s 5(2)(e).

¹³⁴ Richard Fox, 'When Justice Sheds A Tear: The Place of Mercy in Sentencing' (1999) 25 *Monash University Law Review* 1; Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (2005) Appendix 1.

¹³⁵ William Shakespeare, *The Merchant of Venice*, Act IV, Scene I (Portia).

indefensible fratricidal behaviour towards his brother Abel. The substituted sanction of outlawry was a pure act of mercy which was further extended when God placed the protective mark upon Cain to warn off those who might kill him.¹³⁶

Mercy is often regarded as an emotional and unprincipled residual safety valve for sentencers, when their sense of justice moves them to shed a tear, but it is possible to enunciate principles of mercy for the guidance of sentencers.¹³⁷ This helps to better separate executive clemency from judicial mercy and to clarify the relationship of the latter to mitigation in crafting a sentencing order.

X THE SUBSTITUTED SENTENCE

If key elements of the sentences imposed on Adam and Eve are now seen to be too punitive, what sentence should be substituted? In canvassing the options, a fundamental consideration is that of parsimony, namely that a sentence should not be 'more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed'.¹³⁸ The severity can be reduced by both removing the special conditions accompanying the banishment and reducing the term of the banishment. Since the purpose is to prevent a repetition of the stealing of prohibited fruit, account has to be taken of the fact that the couple now have the requisite knowledge of good and bad as the result of their initial transgression.

If the order for banishment is treated as sufficiently discharged and re-entry to Eden is to be permitted, the Court of Appeal could substitute an intensive correction order,¹³⁹ or a community-based order.¹⁴⁰ The supervision required under measures of that type could be undertaken by the Cherubim. They could enforce conditions in the order, including daily work activities and possibly a night curfew. The work could include building fences or barriers around the protected species of tree and, with the cooperation of management, seconding lions and tigers to the task of guarding the areas within the fences.

After all, the Almighty did owe a duty of care to Adam, when He employed him to till and tend the garden and name the beasts and the birds. The duty to provide a safe work environment was not properly discharged by the earlier simple verbal warning that some of the fruit in the garden was dangerous. More efficient target hardening than simply having armed Cherubim stationed on the eastern perimeter of Eden will be called for if further offences of this nature by Adam and Eve, or their successors, are to be prevented and if the management itself is to avoid prosecution for breach of occupational health and safety standards.

¹³⁶ *Genesis* 4:10-16.

¹³⁷ Fox, above n 134.

¹³⁸ *Sentencing Act 1991* (Vic) s 5(3).

¹³⁹ *Sentencing Act 1991* (Vic) ss 19-26.

¹⁴⁰ *Sentencing Act 1991* (Vic) ss 36-48.

XI CONCLUSION

If the ruling is that the original sentence was a nullity (because of due process and procedural flaws), or if key conditions were invalid and produced sentences that were manifestly excessive and thus should be quashed as erroneous, our forebears might have an arguable case for seeking readmission to the Garden of Eden. Civil litigation might have been required to declare and enforce any contractual or proprietary rights they had in relation to this. Adam's responsibilities for the care of the garden and the naming of God's creatures in it, as set out in *Genesis*, and Eve's role as his helpmate, might still support an entitlement in the nature of some form of employment, or pastoral right.

Better still, Adam's position and that of Eve as the original human inhabitants of Eden and of Earth should be capable of establishing some form of native title to it as indigenous people.¹⁴¹ However in relation to this possibility, one must pay respect to the observation of Aden Ridgeway, a former Senator for New South Wales in the Australian Federal Parliament, himself an indigenous Australian, that:

One thing we know for sure is that Adam and Eve certainly weren't Aboriginal, because if they had been they would have eaten the snake instead of the fruit of knowledge, and we would all be living in paradise.¹⁴²

A claim to native title could, in any event, be defeated if God had extinguished their right by granting Eden to some third party on their expulsion. However, third parties were scarce in Adam and Eve's time and there is no record of any having been created, or of the Garden being reallocated to others. Eden seems to have been left vacant. Recognition of native title also depends on continued acknowledgement of traditional laws and observance of traditional customs. It is not clear whether, in the context of the Garden of Eden, this includes customary nakedness. It is submitted that enough members of religious orthodoxy have adhered to the received word of God over the centuries to satisfy the requirement of continued observance of traditional laws and customs, even though not in possession of Eden and hesitant about the public observance of the nakedness custom.

That being the case, we the successors in title of Adam and Eve, might still have some hope of access to paradise on earth – if we can find it; or if we are not already there.

¹⁴¹ *Mabo v Queensland* (1992) 175 CLR 1.

¹⁴² Remark made in the course of an address to the UN Human Rights Commission, Geneva, 26 March 2001: Matt Peacock, Interview with Adel Ridgeway (ABC Radio, 27 March 2001).