Introduction: the Sisyphean task of sentencing courts

There is little public interest in many aspects of the law, but sentencing endures as a popular topic (or, more accurately, a populist topic). The ‘hypothetical man on the Clapham omnibus’ 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.

The accusation that judges are too lenient is not new. Even in 1914, “lenient” judges were a popular target for The Daily Telegraph.

The populist media speaks in an angry voice about “just deserts”, payback and retribution. Lenient judges are urged to express more anger through the imposition of heavier sentences. The associated law and order “debate” claims legitimacy by purporting to speak anger for victims. The anger of the media has been described as a “performative” anger; an empty anger that has no purpose beyond its own display.

When victims themselves speak in the media or in court, they too speak in an angry voice; anger is a natural emotional response to a wrong. But victim anger is usually a different type of anger—a “righteous anger” at a real and personal wrong.

In our justice system, we accord no legitimacy to such victim anger; it has no place in our calm, objective and evidence-based approach to criminal justice.

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

King Sisyphus, the first Corinthian king, was punished for the crime of trickery. He was sentenced to roll a heavy boulder up a steep hill—only for the boulder to re-appear at the base of the hill whenever Sisyphus brought it close to the peak. It was an arduous, endless and unavailing task.

Like Sisyphus, our sentencing courts have never succeeded in reconciling victim anger with the dispassion required by our legal system.

The Angry Gods

In ancient Greece, the role of anger in sentencing was rooted in the divine anger of the gods.
The Olympian Gods were petty, vengeful, and quick to anger. They harboured grudges. Blood feuds were cruelly avenged, often generations down the line. There was no consideration for the mitigating features of an offence, the subjective circumstances of the offender or the offender’s prospects of rehabilitation.

Prometheus, the Titan who survived when the Olympian Gods banished the other Titans to the underworld, created humans from clay. Wishing to advance humanity, Prometheus defied Zeus and gave fire to humanity. Zeus exacted dreadful retribution. Prometheus was chained eternally to a rock in the Caucasus, where an eagle pecked out his liver. The liver was thought to be the seat of human emotions. As Prometheus was immortal, his liver regenerated every night and he was destined to suffer the daily torture for eternity.

In the case of some goddesses and minor deities, their raison d’etre was to be angry. The Erinyes were goddesses of vengeance and retribution. They punished crimes against the natural order, including homicide and offences against the gods. They were gaunt, black creatures of bestial appearance. They pursued their prey like wild dogs. Their anger was a type of sickness; they had looked upon murderers and been infected by the sight.

Nemesis was “an avenging or punishing divinity” who imposed her idea of just deserts. If someone had committed a wrong, she would punish them. To someone blessed with too much luck, Nemesis would bring misfortune.

She cursed the beautiful Narcissus to fall in love with his own reflection and die.

If the increasing incidences of death by selfie are anything to go by, Nemesis appears to have adapted her methods for the modern-day Narcissus.

No doubt, media commentators and politicians who think that judges are too lenient would be delighted for courts to inflict the cruel and angry punishments meted out by the gods. One conservative MP in the UK has even suggested punishing judges themselves for imposing “lenient” sentences.

The Iliad of Homer

The Iliad of Homer was written in about 850 BCE. It has been described as an extended meditation on anger. After Paris abducted Helen of Sparta, King Agamemnon led a coalition of Greek states on a 10 year siege of Troy.

Rarely do the characters master or even moderate their anger. The Olympian gods and minor deities are integral to the tale. They quarrel among themselves as well as participating in and influencing the human warfare.

After Hector (Troy’s foremost warrior) killed Achilles’ close companion, Achilles chased Hector around the walls of Troy. Athena, the goddess of wisdom and military strategy, appeared to Hector, disguised as his brother. She persuaded Hector to hold his ground. Hector threw his spear at Achilles and missed. Hector expected that his brother would hand him another spear, but Athena vanished.
Achilles slayed Hector and then dragged the corpse behind his chariot. The tide of the war had turned against the Trojans.

As in the Iliad, in Ancient Greece the gods more or less lived among the populace. It is no surprise that the emotion of anger—so central to the Iliad—was respected in ancient Greece and was important in the justice system.

**The Oresteia**

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

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

After murdering his mother, Orestes fled to the temple of Apollo in Delphi.

He was pursued by the Erinyes, the terrible sister goddesses. They were urged on by the ghost of Clytemnestra, who sought retribution. As they pursued Orestes, the Erinyes chanted:

> Of justice we are ministers,  
> … if, as yonder man, he hath  
> Blood on the hands he strives to hide,  
> We stand avengers at his side,  
> Decreeing, thou has wronged the dead:  
> …  
> Hard at his side are we!

It transpired that it was Apollo who had persuaded Orestes to murder Clytemnestra, and Apollo continued to facilitate Orestes’ evasion of the Erinyes.

When Orestes arrived in Athens, Athena set up a court of law to settle the dispute rather than leaving the matter to the Erinyes. With some disquiet, the Erinyes submitted to the arrangement.

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

> Let no man live  
> Uncurbed by law nor curbed by tyranny; …  
> Ye who judges,  
> Arise, take each his vote, mete out the right
Your oath revering. Lo, my word is said.

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

The Erinyes were seething. Athena offered them a shrine in the city of Athens if they would forsake vengeful rage and submit to the law. The Erinyes accepted. They were transformed into women rather than beasts, and they adopted the new name of the Eumenides, the Kindly Ones.

The civilising of the Erinyes is commonly understood as the transformation of ‘blind’ and vengeful anger into ‘justice … governed by reason’, organised litigation in which both sides have a right to be heard and a ‘permanent rejection of the “justice” of vendetta.

However, Athena’s act of honouring the Erinyes recognised that a just legal system must also incorporate and honour the darker passions. It must make room for a victim’s righteous anger.

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

**Draco’s laws**

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

In 7th century BCE, Draco drafted ancient Athens’ first written law code; he was the first law giver or legislator.

Draco’s Law preceded Aeschylus’ tragedy, The Oresteia by several centuries. The timing of Draco’s Code explains its immoderate nature and inconsistency with the values of The Oresteia.

Draco’s Code prescribed brutal—‘draconian’—sentences. Death was the default punishment. Plutarch wrote that under Draco’s Code, ‘men convicted of idleness were put to death, and men who stole vegetables or fruit were punished like the plunderers of temples and the murderers’.

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

Draco’s Code was an early example of mandatory sentencing. Like contemporary mandatory sentencing, it seems to have been largely motivated by a “law and order” mentality focussed on retribution.
Democratisation of the sentencing process

The Areopagite Council or Areopagus, was the “oldest and most sacred” of the Athenian homicide courts. It was charged with hearing cases of premeditated murder, and crimes such as “wounding, arson, poisoning and some religious offences”. Its members consisted of about 145 to 175 Areopagites, who were ex-archons (magistrates) and served for life.

Some historians suggest that the emergence of the Areopagus as the pre-eminent Athenian court coincided with a move away from vengeful Draconian laws to a more even-tempered criminal code.

At some point in the early 5th century BCE, membership of the Areopagus changed. The elite Areopagites were replaced by the dikastai—democratically selected jurors who were male citizens and at least 30 years of age.

Cases before the Athenian courts were either public (graphai) or private prosecutions (dikai).

In both private and public trials, the prosecutor was usually the victim or an aggrieved person who had been personally involved in the dispute. The prosecutor would open the proceedings by addressing the jury, explaining not only what had happened, but why the jury should be angry with the accused.

In one speech to the jury, Demosthenes, a public prosecutor, submitted that:

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

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

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

Arriving at a sentence

There were two methods of sentencing offenders.

In some cases, the law prescribed the penalty.

In other cases, the prosecutor and the offender each proposed a penalty and the jury, without discussion, voted on the two options. If the prosecutor proposed an extreme punishment it might be rejected. Conversely, if the accused proposed a punishment that was too lenient, it might be rejected. This process was called “timesis”. After venting their anger, the litigants were obliged to moderate it through the process of timesis.

The range of available penalties included fines, imprisonment, public humiliation in the stocks, limited loss of political rights, total disenfranchisement, exile from the city.
(which could be amplified by the confiscation of property and/or the razing of the offender’s house) and death (which could also be amplified by the confiscation of property and/or the razing of the offender's house and/or the refusal of burial).

While women could not lose political rights (as they had none), they could lose the right to attend religious spaces and participate in religious events. Resident foreigners could be subject to any of the available punishments (except, of course, disenfranchisement). In the case of slaves, masters could be fined and the slaves themselves could be executed, whipped or imprisoned in a "mill house".

Exile

Of the punishments available in ancient Athens, exile was favoured because it removed the wrongdoer from sight, ending the social disruption caused by the crime and restoring communal peace (out of sight, out of mind).

The tragedy of Oedipus Rex vividly illustrates the cleansing function of exile. In the play, the city of Thebes has been ravaged by a plague. When Oedipus, the King of Thebes, discovers that he has unwittingly committed the terrible crimes of killing his father and marrying his own mother, he goes into exile, thereby relieving the city of the plague.

Athenians were very willing to let both accused and convicted persons choose exile over trial and death or imprisonment. Convicted offenders awaiting sentence were expected to make a prison break and flee into exile.

No doubt, like the ACT, most Australian jurisdictions are working towards reducing the number of prisoners—encouraging prison break may be one way of achieving that goal.

Exile was not an easy punishment; the exile might become “a beggar in a strange land, an old man without a city”. Those who were exiled were considered to be unclean until they had returned to their home city and been purified. But at least there was a possibility of starting a new life in another place.

One of the greatest differences between ancient and modern penalties is the prominence of exile in the former context and imprisonment in the latter. Each is a form of incapacitation, although exile is obviously a more permanent and less expensive way of achieving incapacitation. It also allows the exiled person to reinvent themselves “where [they are not] the focus of anger and social conflict”.

Of course, exile was the foundation of white Australia. And, like the exiled of ancient Greece, some Australian convicts rehabilitated and reinvented themselves as good citizens in a distant land.

We still equate rehabilitation with keeping an offender out of prison; we appreciate that, in general, prisons do not provide the opportunity for a new beginning. The Victorian Sentencing Advisory Council has reported that, in Australia, almost half those
who were released from imprisonment in 2014–15 would return to prison within two years.

Like the offenders who were exiled in ancient times, upon their release modern prisoners are at risk of homelessness, have difficulty gaining employment and are at greater risk of suffering mental health problems. It’s a dual punishment: both imprisonment and a type of exile.

**The Role of Anger in Sentencing in Ancient Greece**

The ancient Greeks embraced victim anger. Such anger was measurable. Ancient texts spoke of going to court bearing “three days’ worth of troublesome anger”.

I can only imagine the difficulties that anger-based time estimates created for court listings.

The parties referred to past punishments as a guide to the level of anger that was fitting and what that anger equated to in terms of punishment; the precursor to modern day use of comparable cases in sentencing.

The ancient Greeks saw wrongdoers as toxic, introducing anger like a disease into the community. The sight of wrongdoers transmitted the disease of anger, upsetting the harmony of social relations. This anger needed a community cure.

When a crime was committed, the law itself was angry with the offender. As the law was angry with the accused, it was only right that the prosecutor, the victim and spectators should also be angry at the accused. Anger was necessary to the dispensation of justice.

But the anger of the law was not a raging, immoderate anger. It was not a “performative” anger.

Rather, the anger of the ancient Greeks was what has been called “transitional anger”—a legitimate and appropriate anger, which, through the sentencing process, is transformed into an integral part of the process by which social cohesion is restored.

Aristotle argued that anger directed ‘at the right person, on the right occasion, in the right manner’ was ‘appropriate, virtuous and ethically justified’. Quickness to anger at a wrong could be an admirable quality—and lack of anger was a weakness or ‘slavishness’.

The Athenians acted *out of anger to cure anger*, but this does not mean that they acted in anger. Rather, they interposed an extensive institutional system between the moment when an angry victim pointed to a wrong-doer and the infliction of punishment. The purpose of this system was to allow the citizens to convert a moment of private anger into a public decision crafted with a view to curing the community through a restoration of peace.
A Role for Anger in Contemporary Sentencing?

Few people would argue that our courts should adopt the Greek model of the angry victim commencing proceedings by calling for the court to adopt an anger that is equivalent to their own.

But few would deny the legitimacy and inevitability of an anger that says ‘how outrageous. Something should be done about that!’

But in contemporary legal philosophy it is not the victim’s role to express their anger and call for action; the offence is a wrong against the state rather than the victim.

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

Victim anger can take many forms: anger at the offender; anger at others (including for institutional abuse—where an institution has failed to intervene to prevent the offence or has aggravated the harm); anger at the court system; and anger at themselves. Without control or a voice in the prosecution, the victim’s anger is likely to fester. Victims often harbour anger and a desire for revenge long after the offender has been punished.

As a ritual, restorative justice aims to incorporate victim anger into the reconciliation process and gives it legitimacy.

Typically, in a restorative justice hearing, the victim expresses their hurt, describes the offence from their perspective and says how it has affected them. The victim may explain why the offender ought to feel guilty. Offenders are able to explain why they committed the offence (they are not objectified). When the offender accepts responsibility, the victim feels vindicated. The victim is empowered to grant or withhold forgiveness.

Research on the outcomes of restorative justice indicates that victims who undergo restorative justice are likely to be less angry and less fearful than those who do not. However, in general, serious crimes of violence (including sexual offences) have been considered inappropriate for restorative justice. Consequently, there is little research on the capacity for restorative justice to address the power imbalance that is integral to more serious offences of personal violence.

In ancient Greece the victim was at the centre of proceedings and had a strong voice throughout. Like us, the ancients punished to denounce the offender and to protect the community from the scourge of crime. But there was also another reason: because ‘someone was angry at a wrong and wanted that anger dealt with’.

In contrast, in contemporary sentencing, the victim is deprived of any significant voice, let alone an emotional voice. We recite the sentencing purpose of recognising the
harm done to the victim, but that is no substitute for providing a forum in which the victim has a voice.

**Conclusion**

The populist media suggests that victims are angry because of lenient outcomes and proposes that heavier sentences will satisfy victims. They will not; the naïve response of imposing heavier sentences will simply invite bracket creep. The problem lies in the process, not the outcome.

It is important for courts to distinguish the “performative” anger of populist media from the “righteous anger” of victims. Such victim anger should be addressed.

The distinction between performative anger and righteous anger is not always clear. Consider the “metoo” campaign. To what extent is this the expression of righteous anger by victims who have been empowered? To what extent is it a highly publicised display of performative anger?

We do know that dispassionate sentencing alienates victims, and is unconcerned to assuage their anger. We need to give victims a place somewhere within the justice framework where they can express their righteous anger. In this regard, we can learn much from the ancient Greeks.