THE ABOLITION OF MANDATORY LIFE IMPRISONMENT FOR MURDER: SOME JURISPRUDENTIAL ISSUES

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THIS PAPER CONCERNS SOME JURISPRUDENTIAL ISSUES RAISED BY THE abolition of the mandatory life sentence for murder, a step undertaken in New South Wales in 1982—*Crimes (Homicide) Amendment Act 1982*, *Crimes (Life Sentences) Amendment Act 1989*—and Victoria in 1986—*Crimes (Amendment) Act 1986*. It starts, however, with more general issues of sentencing philosophy.

The first main section of this paper examines the fundamental principle of sentencing in Australia—that of proportionality—together with an approach to sentencing which sees it as a matter of reaching an 'intuitive' or 'instinctive' synthesis of a number of elements. This approach has considerable support in some courts, in particular the Victorian Supreme Court. The paper rejects this approach and argues that the principle of proportionality requires clarification. It draws a distinction between two interpretations of proportionality—strict and broad. This paper examines the leading case in

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Australia on proportionality, namely *Veen vs. The Queen (No. 2)* (1987) 164 CLR 465, and argues that the majority confused the two interpretations and, furthermore, that this confusion was integral to its dismissing Veen's appeal while endorsing proportionality. Only broad proportionality, which on examination turns out to be quite vacuous, is consistent with upholding Veen's sentence of life imprisonment.

The following section examines the consequences of these relatively abstract considerations for the new area of sentencing discretion created by the abolition of mandatory life imprisonment for murder. It examines the issue of grading or ranking murders according to their relative moral seriousness. It argues that the task of morally grading murders is unavoidable. However, it is not as daunting as it is often portrayed as being. Even if we do not have a fully-developed moral theory for ranking the seriousness of crimes, we have the necessary moral intuitions to enable the task to be undertaken in a way which is not overly subjective or controversial.

The final section argues that the discretionary life sentence should be abolished along with the mandatory life sentence. As an indeterminate sentence, the life sentence—whether mandatory or discretionary—is inconsistent with the principle of proportionality. Also, the interpretation of the proportionality principle in *Veen (No. 2)* creates the danger that life sentences will continue to be used for protective purposes, as it was in the Veen cases. A further reason for abolishing indeterminate life sentences is that *lifers* almost invariably serve something less than life. For instance, in Victoria the average is thirteen or fourteen years and in New South Wales approximately fifteen years (Law Reform Commission of Victoria 1991), thus making the sentence inconsistent with the philosophy of *truth in sentencing*.

Sentencing Principles

Although there have been substantial developments in recent years, it is still a justifiable lament that sentencing is a seriously underdeveloped area of law. Given that it is in the realm of punishment that the power of the state over the individual is at its greatest, and given that it is to law above all that we look to control and guide this power, one would expect sentencing law to constitute one of our richest and best developed areas of law. On the contrary, however, sentencing law is still in a comparatively rudimentary state.

Various factors have contributed to this regrettable state of affairs. Sentencing has suffered the fate of falling between not just two, but three stools. Sentencing has traditionally been treated as an executive and legislative matter, rather than a judicial matter. Most felonies carried the death penalty at common law, and in the eighteenth century it was standard to attach the death sentence to new statutory property offences (Radzinowicz 1948). The judicial role consisted of nothing more—and nothing less—than the ritual of imposing this penalty. It was for the executive to exercise the prerogative of mercy.

Even with the nineteenth century development of statutory maximum sentences generally being reduced to penal servitude for life, sentencing was still treated by judges as a disagreeable and essentially non-legal task. Sentencing suffered, as it still does, from the general distaste of the legal

profession for criminal law. If accused persons were low on the legal agenda, convicted persons were even lower. As Nigel Walker aptly put it:

> if the criminal law as a whole is the Cinderella of jurisprudence, then the law of sentencing is Cinderella's illegitimate baby (Walker 1969, p. 15)

The introduction of sentencing appeals early in the twentieth century (for example, Criminal Appeal Act 1907 [UK], *Criminal Appeals Act* 1914 [Vic.]) made only a marginal difference. The reluctance of appeal courts to grant leave to appeal, and generally to interfere with the exercise by trial judges of their sentencing discretion was clear from the start (Fox & Freiberg 1985). Sentencing was treated as a practical matter rather than one of legal principle, as something best left to the trial judge, who was in possession of the relevant information, and had the convicted person before him.

Such historical and attitudinal considerations largely explain the single most important factor—the failure at the philosophical level to develop a sound body of sentencing principle. As Fox and Freiberg point out:

> Despite the voluminous philosophical, criminological, and jurisprudential literature on the purposes of punishment or the justifications for imposing criminal sanctions, the courts treat sentencing as essentially a pragmatic exercise (Fox & Freiberg 1985, p. 444).

There is no consensus on sentencing aims, standard lists including retribution, reduction, rehabilitation, denunciation, and education. Neither is there consensus on their interpretation, or how they are best pursued. For instance, in the case of crime reduction, consider specific deterrence, general deterrence, and incapacitation, as well as rehabilitation, denunciation and education as means to this end rather than ends in themselves. Furthermore, there is no agreement on the relative importance of these aims, and how conflict between them should be resolved.

The task for sentencing theory is to develop a coherent, workable and acceptable body of principle out of these disparate elements. This task is necessitated by the demands of what Ronald Dworkin (1978 p. 87, cf. 92–93, 105, 160, 162) calls *the doctrine of political responsibility*. This doctrine requires political officials, in particular judges:

> to make only such political decisions as they can justify within a political theory that also justifies the other decisions they propose to make (Dworkin 1978, p. 87).

The doctrine rules out decision making that might pejoratively be described as 'intuitionistic' (Dworkin 1978, p. 87; cf. Rawls 1972; Feinberg 1975) That is, it rules out:

> the practice of making decisions that seem right in isolation, but cannot be brought within some comprehensive theory of general principles and policies that is consistent with other decisions also thought right (Dworkin 1978, p. 87).

The doctrine of political responsibility requires that judges, and political officials generally, 'act on principle rather than on faith' (Dworkin 1978, p. 87). It:

> demands that decisions taken in the name of justice must never outstrip an official's ability to account for these decisions in a theory of justice, even when such a theory must compromise some of his intuitions (Dworkin 1978, p. 162).

However, in the realm of sentencing, courts have generally not only ignored this task but sometimes explicitly rejected it, declaring that any attempt to mould the various sentencing aims into a general theory appears contrived and artificial, an exercise in 'mechanical' jurisprudence which tends to yield counter-intuitive results (for example, *R v. Young* [1991] VR 951 960).

In the courts' defence, it might be claimed that this is quite consistent with the common law approach which is, after all, to deal with individual cases rather than to develop general principles. Theory building is more part of the civil law than the common law tradition. However, given the immense experience in sentencing which the courts have developed over a very long period, this excuse looks thin to say the least. We can properly expect more progress than we have got. In any case, the contrast between individual cases and general principles is spurious. Deciding any case requires at least implicit appeal to general standards. What Dworkin's doctrine of political responsibility requires is that judges articulate the principles they appeal to, that they be made explicit, and be open to public examination.

Some judges have sought to evade their responsibilities to develop a body of sentencing principle by seeking haven in an idea of an 'intuitive' or 'instinctive synthesis', offering such pithy but scarcely helpful maxims as 'the only golden rule is that there is no golden rule' (*R v. Geddes* [1936] 36 SR NSW 554, per Jordan CJ.).

The *locus classicus* of this view, in Victoria as least, is *Williscroft's Case*, in which the majority stated that:

> ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process (*R v. Williscroft, Weston, Woodley and Robinson* [1975] VR 292, p. 300).

Fox and Freiberg refer to the Victorian Supreme Court's:

> emphatic statement and re-statement of its view that the process of sentencing cannot be dissected into its component parts (Supra, 444–5).

However, by the standards of Dworkin's doctrine of political responsibility, the intuitive or instinctive synthesis approach is grossly inadequate. Sentencing is not a matter private to the internal workings of the minds of judicial officials. On the contrary, it must be treated as governed by public principles, and subject to standards of public accountability. The responsibility of articulating those principles and resolving tensions and conflicts between them cannot be evaded. As Sallmann and Willis note:

> The adoption of an eclectic approach . . . does not solve the basic problem of spelling out the philosophies and principles which the overall system [of criminal justice], and particularly the sentencing component, is seeking to implement (Sallmann & Willis 1984, p. 100).

Contrary to what the term suggests, the myth of an 'intuitive synthesis' cannot be used to hide the fact that the various factors and elements in the sentencing question often pull in different directions, and that resolving the conflict in anything like a satisfactory way requires developing a theory of sentencing.

All factors are, in principle, capable of conflicting. The current topical issue is that between retribution and incapacitation—between those who hold that a sentence greater than one proportionate to the gravity of the crime can never be justified, and those who hold that such a sentence can be justified on the grounds of community protection.

The latter view is held in England, where the discretionary life sentence exists for a wide range of serious offences. This view, however, has found little support in Australia (at least, at common law) where the High Court in Veen (No. 2) (Supra. cf. *Veen vs The Queen (No. 1)* (1979) 143 CLR 458, 469; *Sentencing Act 1991* [Vic.] s. 5[3]–[7]) has recently reaffirmed the principle of proportionality (even if it has scarcely clarified it).

The question for present purposes is what the principle of proportionality requires of sentencing in murder cases. It will be argued below that this principle renders the moral grading or ranking of murders unavoidable. But to start with, it is necessary to consider the principle of proportionality in general.

The main issue concerns the assessment of crime seriousness. What factors are relevant, and more importantly, what factors are irrelevant? How is the comparative weight of relevant factors to be determined? How is the principle to be applied? In particular, how is it to be applied in contexts where community protection appears to require a disproportionate sentence? (*see*, generally, Ashworth 1991).

In *Veen (No. 2)*, however, the very case in which the High Court sought definitively to lay down the principle of proportionality as the fundamental common law principle of sentencing in Australia, it failed to offer any guidance regarding these questions. Indeed, it will be argued that the Court introduced a new interpretation of the proportionality principle. While it is going too far to say that it substituted this interpretation for the standard interpretation, it certainly vacillated between the two. On the new interpretation, instead of proportionality requiring that the severity of the sentence be proportionate to the gravity of the crime (or, at least, no greater than warranted by the gravity of the crime), the principle requires that the severity be 'appropriate' to the circumstances of the case, (143 CLR 483, per Jacobs J.) these circumstances including the offender's 'propensity to commit violent crimes' and 'the need to protect the community' (143 CLR 469, per Mason J.; 164 CLR 475, per Mason CJ., Brennan, Dawson and Toohey JJ.).

To provide the necessary background, in 1975, Robert Veen, a 20-year-old Aboriginal, homosexual prostitute killed his victim after he had refused payment for sexual services which had taken place in the victim's flat.

Following a verbal interchange in the kitchen, Veen took a knife and stabbed the victim over fifty times (164 CLR 466). Veen was charged with murder, but convicted of manslaughter, probably on grounds of diminished responsibility, but possibly on grounds of provocation, this question also being put to the jury (143 CLR 488, per Jacobs J.)

The trial judge, Rath J., sentenced Veen to life imprisonment on the basis of evidence regarding Veen's dangerousness. Rath J. concluded that, if released whilst suffering from what he accepted to be brain damage, Veen was 'likely sooner or later to kill or seriously injure one or more other human beings' (143 CLR 487). Furthermore, 'there is no suggestion that his condition is curable, or in any way responsive to treatment' (143 CLR 487).

Rath J. held that, in consequence, the ordinary principles of punishment (that is, proportionality) did not apply:

> the only principle of sentencing that I can apply is that the community is entitled to be protected from violence . . . [Veen had] to be imprisoned for the protection of the community from his own uncontrollable urges (143 CLR 487).

The sentence of life imprisonment was confirmed by the New South Wales Court of Criminal Appeal, and Veen sought leave to appeal to the High Court. A five-member bench unanimously granted leave to appeal and upheld the appeal. However, whereas Jacobs, Stephen and Murphy JJ. held that the life sentence should be reduced to one of twelve-years' imprisonment without parole eligibility, Mason and Aickin JJ. were of the view that the case should be remitted for resentencing.

The trial judge's view that the principle of proportionality did not apply in such a case was firmly rejected by the High Court. Jacobs J. referred to:

> the fundamental principle that a man must be given the sentence appropriate to his crime and no more . . . It needs to be emphasised that the protection of the public does not alone justify an increase in the length of sentence (143 CLR 478).

Stephen J. objected that the trial judge's:

> almost exclusive attention . . . to the notion of protection of the community against future danger from the applicant . . . sacrifices the important factor of proportionality in favour of this notion of protection (143 CLR 467).

According to Murphy J.:

> [i]t is a distortion of the criminal law to sentence people to longer terms because they are sick or have diminished responsibility . . .
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> It is wrong for the courts to impose punishment or greater punishment than is merited because of the lack of non-punitive preventive detention . . . If the protection of society requires the applicant to be confined when his imprisonment ends, because he is dangerous, it should only be done (if it can be done lawfully) by methods outside the criminal justice system (143 CLR 495–496).

Mason J., however, denied any sharp conflict between proportionality and protection. He held that a life sentence specifically imposed for reasons of community protection is not necessarily disproportionate, that there need be:

> no opposition between the imposition of a sentence of life imprisonment with the object of protecting the community and the proportionality principle (143 CLR 469; 164 CLR 475).

Earlier he had observed:

> If it should appear that the propensities or predilections of the person convicted are such that the imposition of life imprisonment is necessary to protect the community from violent harm, then the court should impose that penalty (143 CLR 468).

Mason J., however, was not convinced on the evidence that Veen's was such a serious case, which is why he—together with Aickin J.—would have remitted it for resentencing.

Mason J.'s view on the relation between proportionality and protection cannot be ignored. Despite being in the minority, his judgment was accepted as the leading judgment by the New South Wales Court of Criminal Appeal in the second Veen case before that court, and Mason CJ. (as he by then was) was a member of the majority in *Veen (No. 2)*. However, this view is scarcely convincing. It can hardly be claimed that, coincidence aside, a sentence of life imprisonment for manslaughter explicitly imposed for reasons of community protection is not disproportionate to the gravity of the offence. To impose a protective life sentence for manslaughter, it must be conceded that the principle of proportionality is not a universal principle, that it is rather only a general principle to which exceptions can be made. But this was Rath J.'s position, which the majority in *Veen (No. 2)* was at pains to reject.

To turn to this case, the sequel to the High Court's decision in *Veen (No. 1)* was highly embarrassing. Veen was released on licence in January 1983 (admittedly contrary to the High Court's recommendation), and in October that year stabbed another client to death. Like Veen's earlier victim, he was killed after inviting Veen into his flat for the purpose of homosexual activity. As the trial judge, Hunt J. (164 CLR 469) observed the similarity between the two killings was 'a chilling one'.

Neither does the similarity end there. Again, Veen was charged with murder, and again convicted of manslaughter. The main difference between the two cases was that this time there was no question of provocation. Again, Veen was sentenced to life imprisonment, the trial judge Hunt J., using words reminiscent of Rath J.:

> I am satisfied that the prisoner is potentially or indeed, certainly, a continuing danger to society when released, in that he is likely to kill again or to inflict serious injury upon his release by reason of his brain damage should he be under the influence of alcohol and find himself in any situation of stress. I therefore feel unable to mitigate the severity of a life sentence by reason of the prisoner's abnormal mental condition (164 CLR 470).

Again, Veen appealed to the New South Wales Court of Criminal Appeal, and again his appeal was unsuccessful. Again, he sought special leave to appeal to the High Court. This time the application was heard by all seven members of the High Court.

The case certainly put the High Court into a quandary. Was it to maintain the principle of proportionality as a universal, exceptionless principle, or was it to acknowledge that Rath J. was right, and that proportionality is at most a general principle, to which exceptions can be made, that sometimes it must give way to protection?

In individual judgments, Wilson, Deane, and Gaudron JJ. took the former option. They granted special leave to appeal and would have upheld the appeal. However, in a joint judgment the majority of Mason CJ. and Brennan, Dawson and Toohey JJ. took neither of the above two options, but appeared to adopt a third—that suggested by Mason J. in *Veen (No. 1)*. They held that the apparently conflicting claims of protection and proportionality could be reconciled. They granted special leave to appeal but dismissed the appeal.

It seems that the majority were resolved that Veen's appeal should be dismissed. Presumably, the possibility of his killing a third time was too much for them. But they were equally convinced that the principle of proportionality should be upheld. How, then, were they to square the circle, and reconcile protection and proportionality?

The author suggests that they did so by in effect proposing a new notion of proportionality, even if they did not go so far as to expressly adopt this notion to the exclusion of the standard notion. Instead of sentences being proportionate to the gravity of the crime, as the notion is commonly understood, they were to be proportionate, in Jacobs J.'s phrase from *Veen (No. 1)* to 'the whole of the circumstances of the case',[2] including, as noted by Mason J. above, the offender's 'propensity to commit violent crimes' and 'the need to protect the community' (143 CLR 469, per Mason J.; 164 CLR 475, per Mason CJ., Brennan, Dawson and Toohey JJ.)

The majority in *Veen (No. 2)* declared that:

> [t]he principle of proportionality is now firmly established in this country (164 CLR 472).

They stated that the principle was endorsed by both the majority and minority in *Veen (No. 1)* (164 CLR 472). Disagreement in that case was over the meaning or interpretation of the principle. Or as they put it:

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[2] The question Jacobs J. sought to answer in *Veen (No. 1)* was whether `the sentence of life imprisonment was the proper punishment appropriate to the whole of the circumstances of the case' (143 CLR 483; cf. 164 CLR 472, *R v. Young, supra*, at 956). The vacillation between strict and broad proportionality in the majority's judgment in *Veen (No. 2)* is also evident in Jacob J.'s judgment in *Veen (No. 1)*, although Jacobs J. was a member of the majority in that case.

> [t]he basic difference between the majority and minority in *Veen (No. 1)* lay in the differing assessments of what was the appropriate proportionate sentence (164 CLR 474).

Two possible sources of disagreement could be distinguished. The first concerned the application of the principle, whether it was a universal principle, to be applied without exception, or whether it was only a general principle, to which exceptions could be made. The second source of disagreement concerned the content of the principle, whether sentences were to be proportionate to the gravity of the offence, or more broadly to 'the whole of the circumstances of the case', including the offender's 'propensity to commit violent crimes' and 'the need to protect the community'. These will be referred to as the 'strict' and 'broad' interpretations of the principle of proportionality respectively, or 'strict' and 'broad' proportionality for short.

The majority in *Veen (No. 2)* reconciled the conflict between proportionality and protection by holding that the principle was universal (in contrast with Rath J.), but conceding the broad interpretation of the principle.

> It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible (164 CLR 473).

With respect, this supposedly clear distinction is highly confusing. It is only clear if community protection is to function merely to cancel out mitigating factors, to rule out reductions to proportionate sentences. This is presumably what is 'permissible', extensions in proportionate sentences being 'impermissible'. Certainly, this is the interpretation which Professor Richard Fox advances. He also found this passage ambiguous (Fox 1988, p. 348), but tried to resolve the ambiguity by holding that what the majority intended was to endorse the 'limiting' notion of proportionality, according to which protective considerations could only operate within a ceiling set by proportionality, as opposed to 'broad' proportionality, according to which protection is a factor in determining the proportionate sentence:

> What the High Court has now done in *Veen (No. 2)*, is to allow the mitigating effect of disorder to be negatived by evidence of future dangerousness. Though denying that either disorder or future dangerousness is being promoted into a general aggravating factor, sufficient to carry the sentence beyond proportionate limits, the majority in that case were willing to permit the sentence to be brought back up to the limit in the interest of protecting the community from the offender's predicted future crimes. The existence of the disorder is not being denied in the way that proof of previous convictions nullifies alleged prior good character. The mitigating effect of the disorder is simply disallowed and the convicted person is precluded from enjoying any reduction of the full sentence which is proportionate to the facts of the crime (Fox 1988, p. 362).

Fox concludes that in *Veen (No. 2)*:

> The High Court has reaffirmed proportionality as a limiting principle in punishment. No sentencing measure may exceed the boundaries set by this principle. Community protection is relevant to, but cannot overshadow gravity (Fox 1988, p. 365).

However, it is not clear that this interpretation or conclusion can be accepted. To suggest that protective considerations only cancel out mitigating factors does not square with the decision of the majority, which was, after all, to dismiss Veen's appeal. Such a decision can only be justified if protection has a far greater role. When all is said and done, it cannot be denied that Veen's sentence was protective, and disproportionately so. With all due respect to Jacobs J., who held in *Veen (No. 1)* that there are 'many a case' of manslaughter serious enough to warrant life imprisonment, I suggest that the mere fact that Veen was acquitted of murder was sufficient to establish that his life sentence was disproportionate (143 CLR 493). In *Veen (No. 2)*, Deane J. similarly rejected Jacobs J.'s view, but still granted that there may be 'quite extraordinary' circumstances in which a life sentence for manslaughter is warranted (164 CLR 493).

Though there may be some manslaughters which are morally more serious than some murders, it is quite another matter to suppose that the proportionate sentence for even the most serious manslaughter can be identical with the proportionate sentence for the most serious murder. That in New South Wales murder and manslaughter carry the same maximum sentence is certainly incompatible with strict proportionality, and represents a breakdown in the structure of sentences. It is only if the life sentence for manslaughter is taken to be a protective sentence, and disproportionately so, that the anomaly is removed. It is this anomaly that the majority in *Veen (No. 2)* was able to exploit to let it off the hook, and to impose what was in fact a disproportionate protective sentence under the guise of imposing a proportionate protective sentence.

A further consideration is whether, limiting attention to the proportionality as measured against the existing scale, Veen's killing can be regarded as the most serious type of manslaughter—one which warrants the most severe penalty, whatever it is. The majority had no doubt that this was a manslaughter in the worst category (164 CLR 478). Wilson J. (164 CLR 489) was more circumspect, going no further than saying that the gravity of Veen's crime 'may' be sufficient 'to place it in the most serious category of manslaughter'. However, Deane and Gaudron JJ. thought otherwise. Deane J. (164 CLR 494) noted various mitigating facts: the lack of control which flowed from Veen's mental abnormality; he carried no knife or other weapon; he acted alone and not in concert; the crime was not premeditated, and it was not motivated by pecuniary gain.

Gaudron J. (164 CLR 499) held that Veen's killing could not count as a manslaughter of the most serious type because manslaughter on the grounds of diminished responsibility is an intrinsically less culpable form of manslaughter. Since the majority appeared to ignore these facts, one is led to ask whether it was not just convenient for them to hold that Veen's manslaughter was of the most serious type, in order to avail themselves of the

anomaly that manslaughter carried the same maximum penalty as murder. Note further that:

> in normal sentencing practice, unless the penalty is mandatory, the maximum is almost never awarded (Fox *supra*, 355; *Ibbs v. Queen*, 1987, 74 ALR 1, 5, *R v. Tait and Bartley* [1979] 24 ALR 473, 484.)

Indeed, in imposing a life sentence on Veen, Hunt J. recognised that such a sentence for manslaughter:

> is these days exceptionally rare and . . . in recent years . . . has been unknown (164 CLR 493, per Deane J.).

The majority stated that the life sentence in *Veen (No. 2)* was not disproportionate, that it did not amount to an 'impermissible' extension of proportionate sentence (164 CLR 473). They approved Mason J.'s claim in *Veen (No. 1)*, cited above, that there can be cases in which there is:

> no opposition between a sentence of life imprisonment with the object of protecting the community and the proportionality principle (164 CLR 474).

However, as also pointed out above—coincidences aside—this claim is simply not tenable. If anything is disproportionate, it is a life sentence imposed explicitly for protective purposes. It is mere happenstance that such a sentence would not have been lower if based on retributive grounds.

The broad interpretation of the proportionality principle makes it vacuous. To say that the sentence must be proportionate in all the circumstances of the case is to say nothing unless some ranking or weighting of those circumstances is provided. It is just to declare that the sentence is a function of those circumstances, without stating what the function is. Nothing more is asserted than that all the circumstances relevant to sentencing are relevant to sentencing.

No sentence is excluded by proportionality on this broad interpretation, no sentence rendered 'impermissible'. (After all, if any sentence were to be excluded, it would be life imprisonment.) The majority's distinction between what is permissible and impermissible is a distinction without a difference. In principle, any sentence of imprisonment—no matter how long—could be reconciled with the principle of proportionality on this interpretation.

In fact, to adopt this interpretation is to retreat to an 'intuitive synthesis' approach. Where one would expect some assistance in the application of the principle in the context of the need for community protection, all the majority in *Veen (No. 2)* advise is that:

> It must be acknowledged, however, that the practical observance of a distinction between extending a sentence merely to protect society and properly looking to society's protection in determining the sentence calls for a judgment of experience and discernment (164 CLR 474).

This seems to amount to tacit acceptance by the High Court that its supposedly clear distinction above is far from clear. It certainly does not

endorse Fox's interpretation of the majority's view on the relation between proportionality and protection, according to which protective considerations are restricted to cancelling out mitigating factors.

Further evidence of a retreat to an 'intuitive synthesis' approach is gained from the following passage:

> . . . 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 of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions (164 CLR 476).

Indeed, a more typical statement of the 'intuitive synthesis' philosophy would be hard to find. To be advised, once more, that 'sentencing is not a purely logical exercise' is hardly any more instructive than to be informed that 'the only golden rule is that there is no golden rule'.

What does Proportionality Mean in Murder Cases?

The previous section was concerned with proportionality in general. This section examines proportionality in relation to murder. Following the criticisms of broad proportionality, it will restrict attention to strict proportionality, even though, as argued above, the majority of the High Court appeared to vacillate between broad and strict proportionality. A further reason for confining ourselves to strict proportionality is that this is how *Veen (No. 2)* is generally interpreted, even if, according to the argument above, mistakenly so.

This section will, therefore, be restricted to the question of how the moral seriousness of murders is to be assessed and will not be concerned with the question of how considerations relevant to strict proportionality are to be balanced against considerations not so relevant, such as the likelihood of rehabilitation and the need for community protection.

The two major issues are what could be referred to respectively as the problems of internal and external ranking.

The internal problem concerns the ranking of murders against each other. In particular, the question arises of how to distinguish between murders which warrant a sentence of life imprisonment from those for which a fixed term is sufficient. (As will be seen in the following section, the inability to satisfactorily answer this question is a good reason for abandoning the life sentence altogether.)

The external problem concerns the ranking of murder as against other serious crimes—such as robbery, rape, and manslaughter. Given that murderers, on average, spend somewhere between thirteen and fifteen years behind bars (Law Reform Commission of Victoria 1991), the question arises of the appropriate sentence for a particularly brutal or appalling robbery, rape, or killing which falls short of murder. Conservative commentators, in particular, object to what they

regard as a severely contracted sentencing range resulting from sentences for murder which they consider far too lenient.

It will be argued in this section that the problem of the limited sentencing range is not the problem it may at first appear to be. The sentencing range for each crime type is much greater than might be thought, because there is considerable 'overlap' in the moral seriousness of different crimes.

It is widely recognised in criminological circles, even if not always by the general public, that crimes come in widely differing degrees of moral seriousness. This is no less the case with murder, than with other serious crimes against the person. The British Royal Commission on Capital Punishment observed nearly forty years ago that:

> . . . there is perhaps no single class of offences that varies so widely both in character and in culpability as the class comprising those which may fall within the comprehensive common law definition of murder (Great Britain 1953, p. 6).

It will be argued in this section that, counter-intuitive though it may at first appear, the range in the moral seriousness of murders is such that there is no reason in principle why sentences for other serious crimes—such as robbery, rape and manslaughter—should not 'overlap' with murder sentences. There are good grounds for holding that, for instance, a particularly brutal rape or assault should not warrant a higher sentence than a murder which, by the moral standards of murder, is not a particularly serious one. Consider, for instance, mercy killings and battered wife syndrome killings. Furthermore—as will be argued in the following section—this reasoning supports the abolition of the discretionary life sentence for murder in favour of fixed terms.

It might be suggested that the task of morally grading murders is unnecessary because the relevant distinctions have been made at the level of the substantive criminal law, and so do not need to be made at the sentencing stage. A crude attempt to morally grade homicides is contained in the distinction between murder and manslaughter (and perhaps even more so in the distinction between manslaughter and fatal driving offences). Jurisdictions which distinguish between degrees of murder attempt slightly more sophisticated analyses.

There are, however, great dangers in trying to comprehensively move moral assessment back to the stage of the substantive criminal law. The substantive criminal law is an inappropriate instrument to undertake the fine tuning which is possible under a discretionary system of sentencing. There is the danger that cases will be misclassified with resulting injustice. Difficult moral judgments still have to be made, and judgments do not always point in the same direction. This is not altered by the fact that they are made at the level of the substantive criminal law, rather than the sentencing stage. Indeed, the consequences of making these judgments incorrectly is much greater, as they concern whole classes of cases and not just individual instances.

Indeed, some systematic distortion at the level of the substantive criminal law is only to be expected. Crimes are largely distinguished and defined at the level of their physical element. But as will become apparent later in this paper, in distinguishing and identifying a number of dimensions of moral

appraisal for the ranking or grading of crimes, the physical element accounts for only one such dimension.

It is only by permitting considerable discretion at the sentencing stage that sufficient flexibility can be provided to do justice to the other moral dimensions. Indeed, this is a major reason for retaining sentencing discretion and being wary of proposals for guideline or presumptive sentencing. They simply do not have the necessary flexibility to account for the moral complexity of most crimes.

The task of moral evaluation cannot, then, be shifted to the level of the substantive criminal law. But this is not a conclusion necessarily to be feared. This task is not as difficult as often thought. We have the necessary moral intuitions to assess murders along a variety of moral dimensions, even if they are not worked out into a fully-developed moral theory capable of resolving conflicts between dimensions.

Consider some of our reasonably established dimensions of moral assessment. First, starting with the dimension most easily accounted for at the level of the substantive criminal law, we distinguish between crimes on the grounds of the amount of harm or damage caused. Many of the judgments we make about the relative seriousness of different types of personal injury and different types of property damage are reasonably uncontroversial, and meet with a high degree of consensus. Personal injury is generally treated as more serious than property damage, and death as generally more serious than personal injury. Different ways in which a crime was committed can be distinguished and these can be ranked morally according to the amount of pain, suffering, fear, and physical and psychological harm they cause. Likewise, multiple killings—crimes with numerous victims—are treated as more serious than single killings—crimes with only one victim.

Secondly, crimes are distinguished between according to the moral status of the victim. Some victims are thought of as being relatively more morally (if not legally) innocent than others. The 'most' innocent victims are children, and, more generally, those who are unable to defend themselves, such as the sick and elderly. Crimes against such persons are seen to be particularly abhorrent.

The moral status of the victim also explains the general attitude towards gangland killings. However, the attitude 'they can do what they like to each other, so long as third parties do not get hurt' is short-sighted, as it ignores the social costs of their criminal activity. Changes in evaluations over time of the moral status of women in the home help to explain more realistic attitudes towards men who kill their wives. Consider conversely growing recognition of the 'battered-wife syndrome' and the increasingly sympathetic attitude towards women who kill their husbands following a history of violence and threats.

Thirdly, crimes are distinguished morally on the grounds of whether they are planned—premeditated—or instantaneous—committed in the heat of the moment. Furthermore, crimes are distinguished between on grounds of motive. Consider the following non-exhaustive lists. There are crimes perpetrated out of concern for material self-interest. There are crimes committed for altruistic reasons (for instance, the relief of pain or suffering in the case of the mercy killing) or, more generally, crimes which involve some element of social justification. In marked contrast, there are crimes undertaken for sadistic

reasons—out of the desire to cause pain and suffering for their own sake, or at least out of indifference to the pain and suffering it causes. There are crimes committed for a variety of motives, and finally there are apparently senseless crimes—crimes committed for no discernible reason at all.

A fourth dimension of moral evaluation is the degree of an individual's involvement in the crime. It is morally relevant whether a person committed the crime alone or in conjunction with others. In the latter case, the question arises of the relative role of the individual concerned, whether he or she was the main perpetrator, or the 'brains' behind the crime, or just a minor participant. It is similarly relevant whether the offender was coerced, or subjected to any undue pressure, or whether he or she was particularly weak-willed and unable to resist temptation. A further consideration is whether there is any breach of trust involved (Ashworth 1991, pp. 43–4).

This list of moral dimensions is not necessarily complete, but it is sufficient for the purposes of this paper. It is suggested that, within these moral dimensions, important moral assessments can be made reasonably soundly and with some degree of certainty. It is also suggested that these dimensions would explain and justify why different types of murder are reacted to so differently, and why murders at one extreme are quite abominable, and at the other extreme almost excusable.

It is beyond the scope of this paper to offer a detailed analysis of prominent types of murder along these dimensions. But a crude first attempt might go somewhat as follows. Take first the (perhaps atypical) domestic murder in which the killing is unpremeditated, occurring on the spur of the moment, in the heat of argument. There is no wish to kill, as may be evidenced by genuine remorse. The killing is not undertaken for personal gain, for instance, in order to benefit from the victim's life insurance policy. There may be provocation in the moral sense, rendering the victim less than totally morally innocent, even if not sufficient at law to reduce murder to manslaughter.

Consider next the battered-wife syndrome murder. A woman kills her husband following a long history of violence and threats—including death threats—either against the woman or members of her family. Even though premeditated, the killing may rank not particularly high on the moral scale, on the grounds that it amounts to self-defence in a moral sense, even if not according to the strict legal definition. The victim may be regarded as largely responsible for bringing on his own death. A further factor could be indifference and inaction on the part of the police and social welfare agencies, leaving the woman with little choice but to take the law into her own hands.

Consider, thirdly, the typical gangland retaliatory or revenge killing. The moral assessment of such a killing hinges largely on the moral status of the victim. We distinguish sharply between the case where the victim is a gang leader—responsible for numerous deaths—and where he is a minor figure—a junior member. In the former case, there is some justification in the retaliation and possibly an element of poetic justice about it. In the latter, there is not.

Take, fourthly, an abduction followed by rape and murder. Going through each dimension in turn explains why this type of crime (or sequence of crimes) is regarded as among the most abhorrent. The killing is

accompanied by pain, terror, and degradation. The victim is wholly innocent and the killing is motivated by the worst possible desires—to hurt and humiliate for its own sake.

This list is certainly not exhaustive. But it is not too modest to suggest that trying to classify or categorise murders according to prominent or relevant moral dimensions should, on the whole, assist in explaining why we morally assess different types of murders the way we do. We have the necessary moral intuitions to compare cases, even if not to provide universal ranking. There is the problem of cross-dimensional ranking. We need to develop a full moral theory. Indeed, we have a duty to confront and examine our moral intuitions (consider Dworkin's duty of political responsibility), to see how we can best build them into a coherent moral theory. It is possible to go much further than some vague intuitive synthesis, and we have a responsibility not to lapse into such a synthesis.

However, the intuitions themselves constitute a firm start. It is on their basis that new defences are argued for (for example, battered-wife syndrome), or it is argued that some forms of murder should be reclassified as manslaughter. (Consider the issue of whether intention to cause grievous bodily harm should be sufficient *mens rea* for murder.) The above dimensions can be used to ground guidelines for assessing crime seriousness, and hence for applying the principle of strict proportionality. These dimensions are relied upon equally in criticising the substantive law as it stands, and in recommending changes.

Indeed, taking them into account at the sentencing stage can be a forerunner to reforming the substantive law. Considerations which are thought at first only important enough to feature at the sentencing stage can later be deemed important enough to justify changes to the substantive law. There are, however, as pointed out above, dangers in this. Concepts which are interpreted narrowly at the level of substantive law can be used much more broadly at the sentencing stage. (A good case in point is provocation.) It is doubtful whether the substantive law can ever be detailed enough to take all the necessary moral distinctions into account, and furthermore, the 'overlap' problem can only be solved at the level of sentencing. These constitute two major reasons for not restricting sentencing discretion.

Fixed Term Sentences for Murder?

This section argues that the next logical step in the reform of sentencing for murder is to abolish life sentences altogether and to replace them with fixed-term sentences. Abolition of the life sentence is the natural conclusion to the process of reforming sentencing for murder which started with the abolition of the mandatory death penalty, and continued with the abolition of the death penalty altogether, and then of mandatory life imprisonment.

A number of arguments support this proposition. First, life sentences have been generally rejected in fact if not by law (*see* references in Brown, Farrier, Neal & Weisbrot 1990). The introduction in New South Wales of 'natural life' sentences—*Crimes Act 1900* s. 19A(2)—can only be regarded as a retrograde step. The idea that a person should be literally incarcerated for life and that he should

never be released is properly regarded as totally inhumane. It is a *truth in sentencing* requirement that the fact that life sentences are never served in full be reflected in law by abolishing life sentences.

Secondly, life sentences are indeterminate sentences and, as such, cannot be reconciled with any genuine notion of proportionality—of the punishment matching the gravity of the crime. There is no satisfactory way of fitting life sentences on a sentencing severity scale. In reply, it may be contended that this is irrelevant, because murder, being qualitatively different from other crimes, similarly cannot be fitted on a scale of crime seriousness. However, there is no qualitative difference between murder and other serious crimes sufficient to support the qualitative difference between life sentences and terms of years. As argued previously, murders, just like other crimes, come in varying degrees of moral seriousness.

This point also tells against any claim that, even if not served in full, life sentences still play an important symbolic role in that they represent the seriousness of the crime of murder. However, if there is no qualitative difference between murder and other serious crimes to justify the life sentence for murder, there is no relevant symbolic point to be made. Furthermore, even if there were, to maintain the penalty of life imprisonment for symbolic reasons runs counter to the philosophy of *truth in sentencing*. One cannot both have such symbolism and sentences that mean what they say.

A third point is that life sentences by nature are protective rather than retributive. This, for instance, is how they have generally been used in the United Kingdom. Life sentences have their natural home in jurisdictions which reject proportionality as a universal principle, which grant that community protection can justify disproportionate sentences.

This leads to the final point. Given, as argued previously, the High Court's confusion regarding the notion of proportionality, the danger exists of protective life sentences that are in fact disproportionate being imposed under the guise of proportionality. Indeed, according to the above argument, the Veen cases were graphic instances of this. Even if this happens only infrequently, it is still preferable to eliminate the possibility by abolishing life sentences altogether.

Conclusion

This paper has canvassed a number of issues. The first main section examined the principle of proportionality as laid down by the High Court. It distinguished between two versions of this principle—the strict and the broad—and argued that in *Veen (No 2.)* the Court vacillated between the two. It contended that the broad interpretation is vacuous, and represents a retreat to an 'intuitive synthesis' approach to sentencing.

There is, however, no excuse for such a retreat. It was argued in the next section that we have the necessary moral intuitions to determine the relative moral seriousness of offences. There are a number of reasonably well-established, clear dimensions of moral assessment—even if we do not have a fully-worked-out moral theory to resolve issues of conflict between different dimensions. There is no need to retreat into the false haven of intuitive synthesis.

The final section presented a brief case, drawing upon a number of considerations, for the abolition of the life sentence for murder.

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