Sentencing and the Unlikely Scholar

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Introduction

In his article, 'Reflections of a Sentencing Scholar', Professor Andrew Ashworth observes:

> 'There is evidence that sentencing scholars can have an influence (sometimes direct, sometimes indirect) on the development of law and practice.'[1]

I never imagined that I would become a 'scholar of sentencing', meet and engage with eminent scholars like Ashworth or that I would have any influence – direct or indirect – on the development of sentencing law and practice. I have, I did and I will.

My interest in sentencing precedes my study of the law. It can be dated back to my youth when employed as a clerk in what were then New South Wales Courts of Petty Sessions, working in and keenly observing the machinations of the criminal court process. Witnessing a daily parade of human beings before the courts gave rise to a myriad of questions about sentencing and punishment. These questions endured over a number of years from initially challenging a young, enquiring mind and ultimately providing the basis of significant research for a mature sentencing scholar.

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1 Andrew Ashworth, 'Reflections on the Role of the Sentencing Scholar' in Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform* (1995) 251, 256.

Upon completing my undergraduate studies in law at Macquarie University and my practical legal training at the College of Law, Sydney, the practice of law (specifically, criminal law) beckoned. That was where I had always envisaged my professional path would lead; the fascinating, human world of crime and criminal justice. The academy and legal research were not initially a part of my professional aspirations, although they did always hold a certain appeal for me. It seemed unlikely that I would enter the academy, let alone spend a significant portion of my adult life researching sentencing law, policy and practice.

A Fascination with Sentencing

In 1981, my first year of permanent employment, I vividly recall processing a recognizance[2] for an offender who had just been dealt with by a stipendiary magistrate in the Newcastle Court of Petty Sessions in relation to a relatively minor assault offence. Apart from requiring close supervision from a senior clerk in completing the clerical task for the first time, this encounter was marked by an authenticity gained through interaction with a 'criminal' who had actually been sentenced by the court – something which I had never before experienced. The enormity of this realisation for an adolescent mind took some time to manifest, but therein began a journey for me that, 24 years later, is ongoing and continues to provide more questions than answers.

Working in the court system, my experiences of the sentencing of individuals were many and varied. Although the majority of my time during the ensuing seven years was spent in Courts of Petty Sessions (later Local Courts[3]) and court offices, I developed an enthusiastic interest in the sentencing of more serious and violent crime, particularly murder. Whenever the opportunity arose, I would take some time out to observe criminal proceedings in the Newcastle District and Supreme Courts. These forums seemed to have a solemn formality and stark reality that completely overshadowed my familiarity with the 'triviality'[4] of the Local Courts.

My concurrent undergraduate studies in law opened up opportunities for furthering my interest in sentencing. In my third year, I undertook

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2 This is a sentencing option that was commonly known as a 'good behaviour bond' (a plain English term that is now utilised in contemporary sentencing legislation – see *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9) and was ordered under either section 556A or section 558 *Crimes Act 1900* (NSW) (*'Crimes Act'*) at that time.

3 Courts of Petty Sessions became known as Local Courts with the passage of the *Local Courts Act 1982* (NSW).

4 See Doreen McBarnet on the 'two tiers of justice' and the 'ideology of triviality' that she believes pervades courts of summary jurisdiction in David Brown et al, *Criminal Laws* (3rd ed, 2001) 175–8.

a special interest project in which I critically examined the practice of punishment by imprisonment and considered the utility of the various non-custodial sentencing alternatives. This was a watershed in my studies as I was able to take my pragmatic interest in sentencing to another level. The extent of intellectual energy involved in researching and writing a project of this nature was both novel and exciting. For the first time I immersed myself in the available sentencing literature which, in turn, strengthened my personal fascination with sentencing and sowed the seeds for later endeavours.

Later, in my final year, I undertook a major research project in the elective *Criminology* course and specifically focused on the community service order as a sentencing option. This provided an important opportunity to further develop my rudimentary research interest, exploring in depth both the theoretical framework of sentencing and significant aspects of its practical application. Part of this project involved conducting interviews with a probation officer and an offender serving a community service order. This was invaluable in acquainting me with empirical and investigative aspects of legal research at the same time as continuing to stimulate my enthusiasm for a deeper appreciation of sentencing as a complex decision-making exercise.

With a move to the Office of the Director of Public Prosecutions ('the DPP') following my admission to practice, my day-to-day professional work enhanced my fascination for sentencing in the criminal process. I relished the opportunity to work extensively in the District Court criminal jurisdiction and participate more directly in the process of sentencing for a wide range of indictable offences, including robbery, sexual assault and drug trafficking. During my career at the DPP, sentencing indication hearings were piloted which, although not successful and eventually discontinued, underlined the importance of a thorough knowledge and understanding of sentencing law and practice for both prosecution and defence lawyers. The technicality and complexity of the sentencing process became increasingly apparent to me through my daily experiences as a prosecution advocate in the criminal courts. Later in my career with the DPP, I undertook an instructing role for the prosecution in murder cases in the Supreme Court which brought me directly into contact with the most serious crimes in the criminal calendar, the most learned judges and arguably the most difficult decision-making exercises in sentencing.

Impetus for Later Sentencing Research

The years 1989 and 1990 marked significant legislative reform in the sentencing of convicted criminals in New South Wales. Notably,

these changes included the passage of the *Sentencing Act 1989* (NSW) ('*Sentencing Act*') I distinctly recall the week before the *Sentencing Act* commenced operation;[5] District Court judges along with prosecution and defence lawyers worked late into the night to deal with the increased number of guilty pleas taken so that the prisoners could be sentenced under the existing sentencing system. Numerous cases were brought forward and completed during this week thus allowing those sentenced to imprisonment to maintain an entitlement to the various and significant remissions that were soon to be eliminated as a result of the new legislative scheme. The Friday before the commencement of the *Sentencing Act* was especially memorable for me with unusually long court hours put in to process the caseload. Apart from the work associated in prosecuting these cases, my own vivid recollection was the urgent push to have as many prisoners sentenced as possible so as to avoid the perceived unfair operation of the 'truth in sentencing' legislation. I certainly pondered why was this 'reform' such a terrible thing?

Shortly after this momentous reform in sentencing law and policy, another significant change, (although accompanied by less discernible fanfare)[6] was introduced into the New South Wales sentencing landscape. In January 1990, a maximum sentence of 'natural life' imprisonment was created for the crime of murder,[7] replacing the indeterminate sentence of life imprisonment. The 'release on license' scheme that had existed as an executive mechanism to enable release of those sentenced to life imprisonment since abolition of the death penalty in the 1950s was repealed. Imposition of the natural life sentence denies the convicted murderer any prospect for parole and eventual release back into the community, save for the exercise of the prerogative of mercy by the State Governor. It was described by one academic commentator at the time as 'State-authorised vengeance', which raised the spectre of 'the resurrection of capital punishment.'[8]

This sentencing change, along with the whole 'legislative package' of reforms created by the *Sentencing Act*, was of particular relevance to

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5 The *Sentencing Act* commenced operation on Monday 25 September 1989.

6 When the *Sentencing Act* commenced operation, it was accompanied by a plain language Government advertising campaign heralding, 'WHEN A JUDGE SAYS TEN YEARS, HE'S TELLING THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH' (example of full page advertisement by the New South Wales Government in *The Sydney Morning Herald* (Sydney), 25 September 1989, 7).

7 Section 19A was inserted into the *Crimes Act* by the *Crimes (Life Sentences) Amendment Act 1989* (NSW), which commenced operation on 12 January 1990. It provided, in part:

> (1) A person who commits the crime of murder is liable to penal servitude for life.
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> (2) A person sentenced to penal servitude for life for the crime of murder is to serve that sentence for the term of the person's natural life ...'

8 George Zdenkowski, 'Why life that means life is as bad as death', *The Sydney Morning Herald* (Sydney), 10 October 1989, 13.

me in my work as a solicitor at the DPP. In addition, it provided a new dimension to the continuing personal research interest in sentencing that I had been nurturing for some years. My specific interest in the 'natural life sentence' provision was fuelled when I was redeployed within the DPP to instructing in Supreme Court trials, which were largely 'murder' trials. During my work in the Supreme Court, I was instructing solicitor to the Senior Crown Prosecutor, then Mr Ian Lloyd QC, in the high profile case of *R v Malcolm George Baker.*[9] Baker ultimately pleaded guilty to six counts of murder and I was present at the bar table on 6th August 1993 when Justice Peter Newman uttered the words:

> 'In relation to each of the crimes of murder. . . I sentence the prisoner to penal servitude for life.'

I will never forget the scene in the packed courtroom at Newcastle as all the members of the public gallery rose as one shouting their unanimous approval of the sentence. Although it wasn't the first natural life sentence to be imposed under the new sentencing regime, this unique personal experience had an enormous impact on me. Undoubtedly this was an horrific case; six people, including a heavily pregnant woman, shot dead by Baker in a vengeful and 'bloody odyssey'[10] which took place during approximately one hour on an October evening in 1992. At the same time, however, it seemed the prisoner himself and his future lifetime incarceration was forgotten in the slipstream of celebration by members of the families and friends of the various victims that followed the sentencing. There was even a festive gathering in the hotel opposite the Court House, which I did attend, albeit somewhat reluctantly and briefly. This case was the genesis of my later PhD research examining the life sentence for murder and the impetus grew as more life sentences were imposed by Supreme Court Judges in various murder cases throughout the 1990s.

Shortly after the sentencing of Malcolm Baker, another accused 'Malcolm' pleaded guilty to a charge of murder. The case of *R v Malcolm James Hungerford,*[11] in which I was also a part of the prosecution team, provided an interesting basis for contrast and comparison to *Baker's* case. Sentence was passed on Hungerford by the same judge eleven days after the natural life sentence had been imposed on Baker. The only factor that saved this prisoner from a life sentence, according to Newman J, was his youth.[12] Hungerford was 20 years old when he brutally raped

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9 *R v Malcolm George Baker* (Unreported, Supreme Court of NSW, Newman J, 6 August 1993). This case was popularly known as 'The Terrigal (or Central Coast) Massacre'.

10 Ibid 9.

11 *R v Malcolm James Hungerford* (Unreported, Supreme Court of NSW, Newman J, 17 August 1993).

12 In his sentencing remarks, Newman J clearly stated, 'the fact of his *age alone* saves the

and murdered a 49 year-old woman early one morning when she was on her way to work at a hotel in Singleton. The sentence of imprisonment for 24 years with a minimum term of 18 years was considered, at that time, to be a very lengthy and salutary sentence.[13] For my own part, it raised important issues relating to equity and consistency in sentencing for murder, which approximately three years later, I began to explore in earnest as a postgraduate law student at the University of Newcastle.

An Unlikely Sentencing Scholar

My entry into the academy was somewhat cautious and hesitant. It happened in 1995, about two years after I had been promoted to the position of senior solicitor and advocate within the DPP. As a result of that promotion, I had largely been working in the Hunter, North West and North Coast Local Courts processing paper committals and doing the occasional summary hearing. The time was ripe for me to seek a career change. With a mixture of emotions – fear, excitement and uncertainty – I embarked on an academic career in the Law Faculty at the University of Newcastle. I commenced working as a sessional tutor in law service courses and I did so with an imperfect plan but a resolute determination to undertake postgraduate research into my enduring passion: sentencing.

The following six years were an invigorating mixture of undergraduate law teaching, postgraduate research and family responsibilities. My research on the sentence of life imprisonment for the crime of murder in New South Wales through analyses of cases and sentencing principles developed gradually into a project of such significance that I upgraded from a Masters program to a PhD in 2000. Although such a level of scholarly endeavour had originally seemed unlikely for me, I welcomed the challenge and was assisted by an insightful and encouraging review of my draft work from Associate Professor George Zdenkowski, then at the University of New South Wales Law Faculty. A significant factor in my motivation to undertake this research was the apparent inequity I could discern through my initial analyses of the sentencing decisions in cases where convicted murderers had received natural life sentences compared to those murder cases where lengthy terms of imprisonment had been imposed but the offenders retained eligibility for release to

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prisoner from having a life sentence imposed upon him.' Ibid 9 (emphasis added).

[13] Ultimately Hungerford's appeal against the severity of his sentence was dismissed by the Court of Criminal Appeal, but in that court McInerney J observed that it was 'a very salutary sentence and, in my view, it is certainly at the top of the permissible range that would be available to a sentencing judge in these circumstances' – see *R v Malcolm James Hungerford* (Unreported, Supreme Court of NSW, Court of Criminal Appeal, Carruthers, McInerney and Sully JJ, 15 December 1989) 8.

parole. *Baker* versus *Hungerford* lingered in my memory and various other examples emerged. I forged ahead positively with a clear goal of ultimately formulating a viable option for reform in the complex judicial task of sentencing for murder.

During my research I had the enormous benefit of spending part of my 2000 study leave at the University of Oxford, UK. Here I met Professor Andrew Ashworth at All Souls College and spent many useful hours discussing and reviewing my life sentence research with him, receiving the benefit of his wisdom as a sentencing scholar of renown. In addition to this discussion, the academic atmosphere of Oxford and the wealth of research material available at the Bodleian Law Library contributed to a very productive and enlightening visit. I specifically concentrated my research efforts at Oxford on international comparative analyses of the life sentence for murder and the question whether clear criteria could be identified for determining the most serious cases of murder in some jurisdictions analogous to New South Wales, such as England and Wales. Although no model for accurately determining the offenders who go into the category of the worst murderers without any prospect of release from prison was provided through this comparative analysis, important points of contrast emerged for further reflection in formulating my proposals for reforming the murder sentencing system.

When I completed that part of my journey which culminated in my PhD thesis in 2003, there was an enormous sense of both achievement and relief. This was a substantial piece of work representing innumerable hours of research and writing. My research thesis explored in detail the legal matrix behind the imposition of the ultimate sentence in the contemporary New South Wales criminal justice system. A number of fascinating sentencing issues and arguments were raised in the context of very serious cases of murder through concepts including 'aggravating circumstances', 'discount for guilty plea', 'future dangerousness' and 'truth in sentencing', in addition to the application and interpretation of sentencing principles such as 'proportionality' and 'the category of worst class of case.' Apart from those substantial issues considered, a critical analysis was presented with a focus on the balancing and weighing of various objective and subjective factors in the sentencing process when the life of a convicted murderer is literally placed on the line awaiting sentence by a State-appointed Judge.

My thesis that the natural life sentence is an inhumane punishment that cannot be and has not been consistently and equitably distributed within current judicial sentencing practices was clearly established through this work. Primarily, qualitative empirical evidence of disparate and inequitable treatment of convicted murderers in relation to the distribution of punishment for the most serious or 'worst cases' of murder was starkly demonstrated through detailed case analyses and comparisons. This disparity, caused by a lack of clear guidance to judicial

officers as to the relative importance and weight of relevant sentencing factors, was presented as resulting in failure to apply the important 'equal treatment' sentencing principle, which holds that like cases should be treated alike and different cases differently. The patent consequence argued is that some convicted murderers are serving a sentence of life imprisonment without any prospect of early release and others are serving determinate sentences with at least the opportunity of early release for reasons which elude determination. There are no discriminating criteria or 'litmus test' for one outcome as opposed to another, thus exposing certain individuals to severe inequity. Accordingly, a pressing need for reform was identified.

There have now been approximately 30 sentences of imprisonment for the term of an offender's natural life imposed in this state and the current political reality in a continuing climate of 'law and order' politics in New South Wales is that these wholly indeterminate sentences will continue to be imposed without due regard for the 'equal treatment' principle. It appears that there are no current moves in the political arena to reconsider the natural life sentence. An important contribution of my thesis is to provide options for reform directed at the promotion of equity and consistency in the distribution of the natural life sentence if, as seems likely in the short to medium term, it is to remain the ultimate punishment available in New South Wales.

Recognition of a Sentencing Scholar and the Future

My completed thesis[14] provides a firm foundation for my recognition as a scholar in the academy. A decade ago when I was contemplating the change from legal practice to academia, this seemed an unlikely scenario – at least to me. The intellectual journey was very rewarding, but there is still much to do in seeking to implement my proposed reforms to sentencing for the crime of the murder.

My principal proposal was to repeal of the natural life sentence and replace it with a determinate maximum penalty of 35 years imprisonment to maintain both ordinal and cardinal proportionality in sentencing.[15] These reforms are suggested on the basis that the benefits to flow are

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[14] John Anderson, *The Sentence of Life Imprisonment for the Crime of Murder in New South Wales: A Contemporary Analysis of Case Law and Sentencing Principles* (PhD Thesis, University of Newcastle, 2003).

[15] For further discussion of these aspects of the proportionality principle in sentencing, see Andrew Ashworth, *Sentencing & Criminal Justice* (3rd ed, 2000) 72–4; Andrew von Hirsch, 'Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale' (1983) 74 *Journal of Criminal Law and Criminology* 209; Andrew von Hirsch, 'Proportionate Sentences: a Desert Perspective' in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (2nd ed, 1998) 168, 173–4.

mainly in terms of a more humane and more equitable punishment system for those convicted of the most serious crimes of murder. Base notions of revenge and absolute incapacitation should be replaced with progressive notions of managing life sentence prisoners in the custodial environment with a view to their eventual safe release back into the community after serving a sufficient period of imprisonment to mark the seriousness of their offences commensurate with an overall moderate and parsimonious punishment system. In addition, there must be restricted scope for dealing with the few convicted murderers who will remain a serious danger to the community if ever released from imprisonment. The mechanism provided in this regard must seek both to enhance community safety and to promote the perspicacious observation of fundamental human rights.

The analysis presented in my thesis starkly illustrated the pressing requirement for better quality guidance to judges undertaking the task of sentencing convicted murderers. Judicial guidelines combined with legislative changes geared to expressly prioritising the proportionality rationale for sentencing in addition to providing a workable scheme for advancing consistency and equity in the distribution of punishment at the most serious end of the criminal spectrum is put forward as a model for reform. This scheme would involve the creation of 'judicially reviewable life sentences' and the availability of non-parole periods in all cases of murder.[16] In a contemporary context where it is accepted that regulation or structuring of judicial sentencing discretion will certainly be pursued by one means or another, these proposals are moderate and may appeal to both the legislature and judges concerned with reducing disparity and promoting consistency and equity in sentencing for murder.

I look forward to the challenges of influencing the future developments of law and practice in the sentencing of convicted murderers and the eventual abolition of the natural life sentence. This is one of my principal concerns as a sentencing scholar.

Since completing my doctorate, I have expanded my research interests although the underlying theme still shows a keen and enduring interest in sentencing. In particular, the overarching concept of my research scholarship is related to questions of unfairness and inequity in the criminal justice system, particularly the sentencing of offenders and treating like cases alike. There is significant scope for innovative and important research projects.

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16 This scheme is described in summary in Anderson, above n 14, 1150–5.

Conclusion

Ashworth's observation of the influence of sentencing scholars is uppermost in my current thoughts in relation to implementing proposals for reform from the findings of my research into the sentencing for murder. I am fortified in my path when I read recent inspirational personal reflections like those of Professor William Rubenstein[17] and larger illuminating works specifically directed to my research interest such as that of Professor Frederic Reamer[18] who offers both philosophical and practical perspectives on those who commit heinous crimes, including murder and the pursuit of 'justice' in dealing with these human beings.

Although it may have seemed unlikely that my path in life would take me into a scholarly inquiry and doctoral level study of sentencing, it has done so and I look forward to the challenges of firmly establishing myself as a sentencing scholar with such distinguished international company as Andrew Ashworth, Andrew von Hirsch and Michael Tonry together with prominent Australian sentencing scholars including George Zdenkowski, Arie Frieberg, Richard Fox and Kate Warner.

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[17] William B Rubsenstein, 'My Harvard Law School' (2004) 39 *Harvard Civil Rights – Civil Liberties Law Review* 317.

[18] Frederic G Reamer, *Heinous Crime: Cases, Causes and Consequences* (2005).