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Graham Parker
Osgoode Hall Law School of York University

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CRIMINAL LAW—SENTENCING—WHITE COLLAR CRIME—FACTORS TO BE TAKEN INTO ACCOUNT—THE RELEVANCE OF RETRIBUTION.—Once or twice per year, a Canadian court hands down a decision in which there is an extensive discussion of the problem of sentencing. The annual case is no mere ten line dismissal of the appeal saying "We do not feel that the sentence is out of proportion to those imposed for similar offences . . .". In the past there have been cases[1] in which some provincial court of appeal pontificates on punishment, delivers homilies on the aims of the criminal law and expounds conventional wisdom on the vices of criminals and the virtues of prisons.

Regina v. *Hinch and Salanski*[2] is the most interesting sentencing case reported since the plight of Toronto's arsonist Robert Roberts received considerable public and professional attention. The de-

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ceedings (1966-1967), vol. 2, pp. 2761-2762. This member suggested that the courts be given a general power upon application to enlarge limitation periods in cases of hardship; such a provision would overcome the present situation in which the composition of the Legislature from time to time and possibly the political power of the sponsor of the bill can be determinative.

[30] Recently, the Second Session of the 28th Legislature gave an inkling of its present disposition to such petitions in the treatment it gave to An Act for the Relief of Jacob A. Johnson and Donelda M. Johnson (1968, bill 64); presumably due to solicitor's error, the statement of claim in connexion with a particular action on the part of the petitioners, which had been commenced in time, had not been served within the time specified therefor under the governing Rules made pursuant to The Queen's Bench Act, R.S.M., 1954, c. 52. Generally speaking, the object of the bill was to attempt to obtain an enlargement of the time for serving the statement of claim. The bill received second reading after a very brief debate consisting of three speakers, who expressed opposition, but were willing to allow the bill to go to committee where more complete explanations could be made in support of or in opposition to it by the parties involved (see Debates and Proceedings (1968), pp. 1876-1877); the bill was allowed to die in committee and was not reported.

*Cameron Harvey, of the Faculty of Law, University of Manitoba, Winnipeg, Manitoba.

[1] *E.g. Regina* v. *Roberts* (1963), 39 C.R. 1 (Ont.); *Regina* v. *Holden* (1962), 40 W.W.R. 571 (B.C.C.A.); *Regina* v. *Heck* (1963), 41 W.W.R. 629 (B.C.C.A.); *Regina* v. *Jones* (1956), 115 C.C.C. 273 (Ont. C.A.); *Regina* v. *Allen* (1954), 108 C.C.C. 102 (Sask. C.A.); *Regina* v. *Willaert* (1953), 105 C.C.C. 172 (Ont. C.A.).

[2] (1968), 62 W.W.R. 205 (B.C.C.A.).

bate in *Roberts*[3] concerned the struggle between law and psychiatry; the protection of the public from a dangerous pyromaniac *versus* the therapeutic need to release him when cured even if this cure was achieved in a relatively short time. The result was, at best, a stalemate. In *Hinch and Salanski*, the struggle is much more complicated. The case can be examined on many levels; it shows the peculiar qualities of white collar crime, the fate of middle-class criminals, the "politics" of small-town justice and the predilections of Court of Appeal judges faced with deciding an appeal against sentence.

Hinch and Salanski were convicted of conspiring to obtain money by false pretences. The evidence shows that it is very likely that they could also have been convicted of the completed crime of obtaining money by false pretences; the report does not state whether such a charge was laid or withdrawn. The Crown appealed the sentence imposed.

The respondents were businessmen. They were principals in a limited company and were associated in three partnerships. All of these enterprises were connected with the construction industry. A third party played a crucial role in the circumstances of the case. Mead was an employee of the British Columbia Hydro and Power Authority. His official title was assistant land supervisor and in that capacity, he was responsible for letting out contracts and checking invoices presented by contractors. Mead told Hinch that contracts with British Columbia Hydro would be available and, in due course, such contracts were let to the respondents. At this stage there is no evidence that either Mead or the respondents had done anything illegal. Mead then informed the respondents, however, that, if Hinch and Salanski wanted more contracts, Mead "wanted to be paid or receive a kick-back".[4] This British Columbia Hydro employee described to the respondents a system whereby his "reward" could be bestowed without expense to the contractors. Hinch and Salanski agreed and the plan was put into operation. Along with legitimate bills for work actually done, the respondents submitted on their own bill-heads spurious accounts for work which had never been done, for work already paid for and by simply submitting inflated accounts. In his official capacity, Mead approved payment of these fake bills. When the respondents received the British Columbia Hydro cheques, they forwarded the proceeds of the falsifications to Mead's bank account in Alberta. The frauds continued for eight months before being discovered and

[3] *Supra*, footnote 1. [4] *Supra*, footnote 2, at p. 214.

amounted to $21,937.00. On being discovered, Mead committed suicide, the respondents were charged with conspiracy and British Columbia Hydro instituted a civil suit against Hinch and Salanski for the recovery of the money wrongfully obtained.

The reader is asked to consider two questions: What sentence would the courts be likely to give in those circumstances and, secondly, what sentence should have been imposed? To make this guessing game appear fairer (and closer to the data available to the sentencing magistrate) some background information should be provided. Neither man had any previous convictions. Hinch was fifty years of age. Salanski was forty. Although neither was described as a "pillar" of their particular religious organisations, both were described by that classic term "a family man". In addition, Salanski was a member of a service club. What is the mystique of being a "family man"? Would a bachelor or a divorcee be less trustworthy, more capable of wickedness, less susceptible to reformation or more likely to have criminal tendencies? These pieces of folk-lore or conventional wisdom which appear so regularly in pre-sentence reports and the remarks of sentencing magistrates have no intrinsic value in assessing punishment but they seem to have a Pavlovian effect on sentencers. More nonsense is talked by lawyers speaking to mitigation of punishment than at most other times. At least many remarks made by lawyers appear to be nonsensical but frequently they seem to have some effect. References to church attendance, good "clean" habits (whatever they might be) and love of parents or wife and children (or *vice versa*) seem to have magical effects on magistrates. Conventions appear to have been established in this sentencing and mitigation process although these criteria have no discernible legal or sociological validity. In addition to the references to parenthood, religious and living habits, is it true that a man represented by a lawyer will be dealt with more leniently than an unrepresented man who remains silent on the *allocatur*? In Toronto, there used to be lawyers who were well known in the magistrates' courts for applying for adjournments or speaking to sentence for a fee of approximately fifty dollars. On one occasion such a lawyer, who had been paid this sum of money, was at a loss to say anything in his client's favour, so he simply announced to the judge that "My client has lived in Toronto all his life". That was the end of the plea in mitigation. Did the magistrate take that factor into account when handing out sentence? Did the magistrate automatically adjust sentence when he realised that the accused had paid for his lawyer's services and therefore the financial outlay should be taken into account? (Perhaps it was wise of the founders of the Ontario legal aid scheme to attempt to conceal the status of the scheme's clients from the trial judges.)

The respondents, who had many prominent citizens of their hometown supporting them by letters to the court, were each sentenced to one month in jail and a $2,000.00 fine. Is this a proper sentence? The question is not whether it is an adequate sentence because that suggests that the time spent in jail should be longer and that is not necessarily true.

The Crown appealed on the basis that the sentence was inadequate because of the seriousness of the offence and the "magnitude of the amounts received and the period of time that the accused was (*sic*) involved in the conspiracy".[5]

With respect, there are few instances of remarks on sentence which seem as one-sided as those made by the magistrate. Although criticism of sentencing is, of course, much easier than administering that delicate part of the administration of justice, the remarks of the magistrate do not appear to reflect that judicial quality one expects from the bench. Admittedly, a mere law report does not allow the critic to make a completely accurate evaluation; for instance, we do not know the emotional climate of the community where the offence was committed or the compassion felt for the accused persons. Moreover a two to one majority of the British Columbia Court of Appeal, agreed with the magistrate and saw little to quarrel with in his remarks. This attitude seems strange in a court which has taken such a stringent view of the habitual criminal laws in recent years.[6]

The magistrate's remarks are worth quoting at some length. He said:[7]

> This is certainly different from the usual type of case that I have, where there is a definite knowledgeable wrong-doing that can be attributed to the accused person without hestitation.

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[5] *Ibid.*, at p. 215.

[6] It might be more accurate to say that the administration of criminal justice in British Columbia is preoccupied with Part XXI of the Criminal Code, S.C., 1953-54, c. 51 as am. *E.g., Regina* v. *Buckingham*, [1965] 2 C.C.C. 229 (B.C.C.A.);*Regina* v. *Swontek*, [1965] 1. C.C.C. 242 (B.C.C.A.); *Regina* v. *Ball* (1965), 56 W.W.R. 313 (B.C.C.A.); *Regina* v. *MacNeill* (1965), 53 W.W.R. 244 (B.C.C.A.); *Regina* v. *Jones*, [1966] 2 C.C.C. 370 (B.C.C.A.); *Regina* v. *Morgan*, [1966] 2 C.C.C. 390 (B.C.C.A.); *Regina* v. *Smith*, [1967] 3 C.C.C. 265 (B.C.C.A.); *Paton* v. *Regina* (1968), 63 W.W.R. 713 (S.C.C.). But compare *Regina* v. *Jeffries*, [1965] 1 C.C.C. 247 (B.C.C.A.); *Regina* v. *Sparrow*, [1966] 4 C.C.C. 137 (B.C.C.A.); *Regina* v. *Channing* (1965), 52 W.W.R. 99 (B.C.C.A.).

[7] *Supra*, footnote 2, at p. 207.

This statement is remarkable when the respondents had pleaded guilty and stood before the magistrate for sentence on an offence to which *mens rea* is applied and which carried a maximum penalty of ten years' imprisonment. The statement is clearly wrong both in fact and law. A good argument could be made for degrees of "blameworthiness" or "guilt" but our present Criminal Code is not sufficiently sophisticated to embrace such notions. In any event, the facts of this case hardly leave the impression that we are here dealing with two criminals who were the innocent dupes of a rogue who totally hoodwinked them. Yet this is the impression which the magistrate gives of the case because he continued by saying:[8]

> I see two men of the age of these two, of previously unblemished record, married, families, with no gain except the right to work.

Of course, we could suggest to the magistrate that when bank robbers start out in their trade, they have exactly the same outlook as he attributes to Hinch and Salanski, if, by "right to work", he means the natural desire to support their wives and families.

The magistrate went on to say that the respondents are "faced with a civil suit, and are the victims of a most unprecedented skill in deception and daring".[9]

This rather weighted version of the facts continued:

> I must keep in mind the terrific loss of pride that each of these previously unblemished charactered people have suffered already, at the hands of somebody who was unconscionable and in a position of great trust, wielding a great club.[10]

There is, of course, some truth in this statement. The unvarnished facts suggest that the respondents would have had little chance of receiving the contracts if Mead had not decided in their favour. On the other hand, they share a common trait with other criminals in that they yielded to the temptation to take an easy way out rather than find other work or, perhaps, expose the dishonesty of Mead. One would imagine that Mr. Salanski's service club may have instilled some such civic duty in his mind.

Finally, the magistrate concluded his remarks in mitigation by saying:[11]

> I wonder much—how much they have lost through their weaknesses in not being able to, and not having the immediate strength to see what is right.

These compassionate statements contain worthy sentiments in a criminal process which now purports to be dedicated to the re-

[8] *Ibid.* [9] *Ibid.* [10] *Ibid.* [11] *Ibid.*

habilitative ideal but the "losses" referred to by the magistrate appear a trifle intangible when one remembers that Messrs. Hinch and Salanski presumably made a profit from their contracting operations. The size of their profits is not mentioned in any of the judgments; this is a curious omission to which further reference will be made.

The British Columbia Court of Appeal, per Norris J.A. considered that the magistrate's remarks, which have been quoted at length were "unfortunately (and too broadly) worded"[12] but that there was no error in law or fact. The majority of the Court of Appeal found little difficulty in understanding the magistrate's point of view. Norris J.A. believed that in the reference to "without hestitation" (in the first paragraph quoted) which seemed to refer to a surprising lack of *mens rea*, the magistrate meant that the case was an unusual one. This explanation is, with respect, mystifying. In another paragraph, not quoted above, the magistrate had made reference to "no personal gain" but Norris J.A., in his role as judicial interpreter, believed that this should "undoubtedly" be read in the light of the earlier refence to "no gain except the right to work".[13]

The illogicality of the magistrate's remarks is best illustrated by a paragraph which appears to have been added as an afterthought. This paragraph contradicts everything which the magistrate seemed to have said about lack of *mens rea*, the victimised position of Hinch and Salanski and the need for a light penalty which was in fact imposed. In this passage, the magistrate had said:[14]

> On the other hand, was not what unquestionably occurred a serious crime against all of the people of this country? They entered into a common design, an agreement, to do something unlawful, and unlawful to their knowledge, as to call for a penalty up to fourteen years.

This qualifying statement by the magistrate is so inconsistent as to make nonsence of what went before.

Therefore, Norris J.A. (with Branca J.A. concurring), after considering the various facets of punishment, decided that the Crown appeal should fail. In making this decision, the learned appellate judge said:[15]

> Any conviction and sentence of imprisonment, apart from the fines imposed, would be almost totally destructive of these respondents in

[12] *Ibid.*, at p. 208. [13] *Ibid.*

[14] *Ibid.*, at p. 207. The reference to fourteen years was erroneous; the maximum is ten years.

[15] *Ibid.*, at p. 212.

> the small community. It is likely that the learned magistrate had under consideration what might be called the side effects of the conviction and sentence such as restrictions on travel and emigration to another country and the limitation on future employment. The conviction and sentence are on the records of the respondents for life. All these matters the learned magistrate doubtless had in mind, and, . . . it cannot be said that the learned magistrate imposed an inordinately low sentence and was clearly wrong.

There would be much to recommend this statement if it reflected a consistently lenient policy of the trial and appellate courts of Canada. Norris J.A. also struck a realistic note when he suggested that a month in jail and a $2,000.00 fine may appear inadequate in a large urban centre while the same sentence in a rural community may have a very different effect because, in the latter, "associations are close, and community, social and religious status is judged more severely".[16]

Another reason stated for dismissing the appeal has less validity. Norris J.A. observed "in passing" that the respondents had each served their month in jail and were "endeavouring to rehabilitate themselves for some months".[17] To re-arrest them and return them to jail because of an alleged mistake of the magistrate "would add unduly to their punishment and would savour of harassment, a result which, with respect, we should not bring about unless we are under compulsion to do because of particularly outrageous circumstances resulting in a clear miscarriage of justice, which I do not think is the case here".[18]

Norris J.A. also discussed the irrelevancy of retribution (which will be examined more fully below) and this is certainly a salutary attitude toward sentencing.

Looking at the majority judgment as a whole, there are very few tangible criticisms which one could make except to impugn the rather superficial examination of the simplistic and inconsistent statements of the magistrate. An argument can be made that any comment on sentencing policy is irrelevant because it is so individualized that precedents and policy are of very limited use. Such an attitude is debatable and certainly is so in cases where an appeal court lays down such fundamental principles as the British Columbia Court of Appeal set forth in *Regina* v. *Hinch and Salanski*. There seems to be no jurisprudence on the advisability (or ethics) of applying rules of *stare decisis* to sentencing cases. Why should the rule of precedent not apply in these circumstances? At least loose rules of precedent seem to apply to cases under

[16] *Ibid.* [17] *Ibid.* [18] *Ibid.*, at pp. 212-213.

sections 695 (dangerous sexual offender) and 661 (habitual criminal) of the Criminal Code. If it can be applied to such crucial cases involving permanent incarceration, (or loss of freedom) then it should apply to the no less important decisions relating to first offenders, and other identifiable types of offences or offenders. This should certainly be the case if we are seeking, however vainly, a viable rationale for the criminal process. Of course, sentencing has always been described as a very special, exacting and emotionally demanding task which judges approach with great trepidation and some misgiving. The problem of sentencing is aggravated by the individualisation of the rehabilitative ideal which places a premium on the more positive qualities of the individual offender so that justice can be done while attempting to salvage an asocial citizen. Judges may feel confined by binding precedent when the essence of sentencing is not equality of treatment, but uniformity in approaching the problems. Perhaps there is another dimension to this problem. Court decisions may not have a lasting and binding role because penal practices change. No one suggests that penal administrators and criminologists should dictate to the courts but, in practice, penologists may resent a system which takes no account of new knowledge or changes in penal policy. A jurisprudence of decisions has developed in cases relating to habitual criminals and sexual psychopaths. Anyone who has made even a cursory examination of these decisions would be struck by the analytical quality of the interpretation of sections 659 and 661 of the Criminal Code. This black letter approach has not resulted in a cohesive legal policy and, moreover, there is almost a total disdain for penal or criminological considerations. Perhaps the interpretation of these sections (particularly by the British Columbia Court of Appeal) does not offer much encouragement to those who would like to avoid decisions such as in *Hinch and Salanski* by establishing some coherent policy.

The decision in *Hinch and Salanski* is disquieting. First, this dissatisfaction is due to the inconsistency of the courts which is implicit in the present judgment. This is not to suggest that there should be uniformity of sentences; it does imply, however, that the court in the case under review has applied criteria (which may be most worthwhile) which it is not willing to apply to all cases. If we take into account the strong familial connexions of our two building contractors (who also happen to be cheats), then why not listen to the pleas of a tearful wife who legitimately claims that the judge, in sending her husband to jail for months or years, is robbing her of a loving husband, her children of a devoted and dutiful parent and her home of an efficient breadwinner? If a pre-sentence report attempts to show that a convicted person is most contrite and has been punished enough by the mere formalistic appearance in court, then why incarcerate him for a number of years? If a priest, as character witness, tells the sentencing judge, that a term in a reformatory would do his eighteen year old parishioner more harm than good and that the church will watch over him, why persist in sentencing him to prison? If a prisoner is as much a victim as a participant in a crime, why should the court refuse to take notice of this fact and made pious and self-defeating statements about the need to set an example and to deter the weak-willed criminal from accepting the advice of rogues on future occasions? If judges persist (as they frequently do) in applying a quantitative measure to punishment so that a $20,000.00 theft is at least five times as bad as a $2,000.00 defalcation, then how can the sentence in *Hinch and Salanski* be justified?

None of these illustrations and rhetorical questions is exaggerated. If one could be assured that the decision in the present case was the first faint glimmer of a new light on crime and its punishment, then one could have hope but the simple fact is that the hope is unjustified. Since the British Columbia Court of Appeal decided *Hinch and Salanski*, they have no doubt dismissed appeals against much stiffer sentences and have upheld findings of habitual criminality on technical legal grounds. A random glance at any Toronto newspaper shows, for instance, that accused persons, with previously unblemished characters, have been sentenced to much more than one month in jail for liquor, drug and sexual offences.

An alternative explanation must be sought. One of the most obvious is that the decision in *Hinch and Salanski* is based largely on socio-economic grounds. This explanation, even if without merit, hardly needed to be expressed in the crude language of the sentencing magistrate.

On this basis, among others, it is therefore rather ludicrous for Norris J.A. to suggest that retribution is not a factor in sentencing and "not in accord with the present day concept of the purposes of the criminal law".[19] The judge's statement takes on added irony when he suggests that applying vengeance "involves a loss of that

[19] *Ibid.*, at p. 210.

objectivity which is essential to the exercise of the judicial process".[20]

This is not to suggest that retribution should be a factor or that the dissenting appellate judge was correct in suggesting a sentence of eighteen months. As much as one may be inclined to believe that white collar crime by "respectable" businessmen may be as much (if not more) of a danger to our society as bank robbery, imprisonment is probably no solution. Secondly, the categorization of the rationale of punishment (into deterrence, reformation, protection of society and retribution) is not useful and largely meaningless. Thirdly, punishment in the form of imprisonment serves very little purpose in any event and would serve no good in the case of these middle aged, middle class entrepreneurs. It would make much more sense if, regardless of its direct punitive effect, the Crown demanded, and obtained an order which fined our two criminals $100,000.00 each or debarred them from any future government contracts (although this may be an automatic effect in any event). Perhaps the practice adopted in the United States in anti-trust cases could be applied to the criminal process so that our dishonest businessman was forced to pay "triple damages" in effect—say, three times the bribe paid or three times the profit made through the illegal transaction. These suggestions are attempts to break down the present artificial line beween civil and criminal legal matters. Although such a breakdown may not be satisfactory in some areas, such as murder or rape, it may be the best solution in those where the major damage is economic. This may be the solution for two reasons. If we are serious in our belief that retribution has no part to play in the criminal law, then we should make the obvious obeisance to the new penal enlightenment. Secondly, economic "punishment" may have the greatest deterrent effect. Thirdly, there seems to be some confusion in our free enterprise society because we cannot decide what is (or should be) criminal in the economic field. We need some effective means of expressing community disapproval if, indeed, that is our intention. Perhaps it would be better to fight financial problems with a monetary weapon. This notion of compensation rather than punishment could spread to such "crimes" as those involving criminal negligence or "unlawful act"—involuntary homicide. Many of the defendants to these charges are able to pay and should be forced to do so. Most of them do not have "guilty" minds. In fact, many of our businessmen, and tax-

[20] *Ibid.*, at p. 209.

payers, are unable to draw a distinction between what is merely sharp practice on expert advice and what is a fraudulent act or scheme.

Obviously, the lack of clarity in the aims of the criminal law is well illustrated by this grey area of illegal economic acts and asocial activity. Perhaps it would be an ideal place in which to implement a plan for erasing criminal records when the convicted person has lived an honest, law-abiding life for five years or more. This scheme, which has been gaining popularity recently, would minimise retribution and de-accentuate the differences between torts and crimes.

These references to "guilt" or differentiations between various frames of mind have a curious propensity to lead us back to the "hardcore" guilt-ridden, blameworthy types of behaviour which are the basic crimes. If these acts continue to be crimes, are we not suggesting that most of them are punished by death (rarely now) or long terms of imprisonment for reasons which are based on thinly disguised retribution?

As stated above, the categorization of the rationales of punishment are unreal and misleading, and by singling out retribution, one must not fall into the same error. To suggest however that these terms of imprisonment are anything other than vengeance is gilding the lily.

Norris J.A. in *Hinch and Salanski* pointed out that one of the objects of the criminal law is "to maintain a standard of behaviour necessary for the welfare of the community (which includes the welfare of the offender)".[21] He went on to say that, in sentencing, the public welfare encompassed the "safety of the public", "the deterrent effect of a sentence", punishment,[22] and reformation of the offender. Most of the above is question-begging or, alternatively, imponderable. To suggest that the aim of the criminal law is to maintain proper standards of community behaviour and to state that the public welfare aims, *inter alia*, at the safety of the public certainly does not tell us very much. Norris J.A. also said that the sentence of the court seeks to have a deterrent effect. What do we know of deterrence? Admittedly, deterrence may be the most important consideration in criminal law and involves the whole notion of criminal law—we are hoping to stop citizens from doing acts of which we disapprove at the present time and we are hoping that they will not repeat them. But this definition of deterrence tells us nothing because we can deter by

[21] *Ibid.* [22] *Ibid.*

choosing the most dangerous criminals and incarcerating them for the remainder of their natural lives, we may deter by imposing long sentences whether for revenge or for purposes of rehabilitation. Finally we may deter by suspending sentence or placing on probation. Therefore, Norris J.A.'s categories have very little meaning because we have so little knowledge of the effects of the penal dispositions made. If we wish to protect society then anti-social behaviour must be stopped and that requires a formula of which we know little at the present time. We must make the best economic use of our resources;[23] the truly dangerous, in a physical sense, must undoubtedly be kept in such security that they cannot repeat their depredations. This should be a relatively small group who will increasingly be dealt with in a psychiatric way. What of the others? We must ensure that we are not retributive but this hardly coincides with Norris J.A.'s concept of that term. This much is obvious from the passages he quoted in support of his thesis that retribution is irrelevant. He cited Middleton J.A. in *Rex* v. *Childs*[24] who conceived of the *lex talionis* as being "torture, whipping and solitary confinement". Everyone knows that the modern vengeful society is not that unsubtle. Similarly the British Columbia Court of Appeal cited Roach J.A. in *Rex* v. *Warner, Urquart, Martin and Mullen*[25] where it was said that there must be "a right proportion between the punishment imposed and the gravity of the offence". "It is in that sense", said Roach J.A. "that certain crimes 'deserve' certain punishments and not on any theory of retribution".[26] This statement, on the other hand, seems too subtle for the average mind. Yet it contains the essence of the problem in the present case and the uneasiness which it created. The value system under which the court operated has a rather twisted notion of desert. A court which can jail union officials for a year (admittedly in the *name* of deterrence) for a quasi-criminal contempt of court will have some problem convincing many people that they are not being vengeful.[27] Similarly appellate courts which can permanently incarcerate a homosexual (who had no pedophilic or violent tendencies) as a "dangerous sexual offender" when it was proved that he was nothing of the sort is hardly convincing in protestations that they are not vengeful.[28]

[23] See Outerbridge, The Tyranny of Treatment (1968), 10 Can. J. of Corr. 378.

[24] (1939), 71 C.C.C. 70 (Ont. C.A.), cited at p. 209, *supra*, footnote 2.

[25] (1946), 87 C.C.C. 13 (Ont. C.A.). [26] *Supra*, footnote 2, at p. 210.

[27] See *Regina* v. *Neale, Clarke, O'Keeffe and Power*, [1967] 2 C.C.C. 175 (B.C.C.A.).

[28] *Klippert* v. *The Queen* (1967), 2 C.R.N.S. 319 (S.C.C.).

What of the dissent of Robertson J.A. in *Hinch and Salanski?* Does that offer any light or encouragement? Robertson J.A. considered that the magistrate had misdirected himself and found the suggestion that the respondents were victims erroneous and misleading. (For instance, the magistrate made reference to Mead who was "armed with a terrific authority which created this horrible opportunity" and that Mead "wielded tremendous power, tremendous influence, and was, in fact, able to create an empire for himself".[29]) Robertson J.A. found these statements exaggerated at best and pointed out, as stated earlier, that the respondents could have declined all further contracts instead of entering into new ventures and preparing false documents. Similarly, the learned judge believed that the magistrate was wrong to accept defence counsel's submissions that the respondents had "not received, in these circumstances, an illicit penny".[30] Robertson J.A. pointed out that Hinch and Salanski entered into the agreements for the profit motive and had looked upon the payments to Mead as "an expense of carrying on a profitable business".[31]

Finally, in considering sentence, Robertson J.A. stated that, in his opinion, a sentence of five years would not have been disturbed on appeal. He decided, however, that he would substitute a term of eighteen months, taking into account the lack of previous record, their standing in the community, their repentance, and that "men whose environments have been such as those of the respondents will probably find it harder to bear any given term of imprisonment than a man who has once been incarcerated and chooses to risk imprisonment again by committing a subsequent offence".[32] He also believed that a very long sentence was not necessary as the respondents had "probably learned their lesson by now". He refused to take into account the fact that a successful civil suit had been instituted against them and that one had mortgaged his house to pay the judgment. He called this "merely bowing to the inevitable".[33]

One could agree with all the following except the type of sentence. The judge believed that deterrence was the key factor. (He dismissed the notion of retribution because any sentence that satisfied the principle of deterrence would in this case satisfy that of retribution.) In relation to deterrence, he said:[34]

> With respect, I think that the learned magistrate completely overlooked the principle of deterrence. Considering the amount of construction

[29] *Supra*, footnote 2, at p. 216.
[30] *Ibid.*, at p. 217. [31] *Ibid.* [32] *Ibid.*, at p. 218.
[33] *Ibid.* [34] *Ibid.*, at pp. 217-218.

work that goes on in British Columbia, the vast sums involved in many projects, and the opportunities that can arise to perpetrate profitable frauds, the imposition here of a sentence of imprisonment of one month —a fine of $2,000 means next to nothing to a man who is playing for such high stakes—is well nigh an invitation to other men with good reputations (which can be cited if need arises) low resistance to temptation and a desire to make large gains to run the risk of being found out in a scheme to defraud those with whom they do business.

As stated earlier, we know very little about deterrence but the above statement seems to make more common sense than any previous comment from the case under review.

These comments have been lengthy and the patient reader might well ask what use they serve. A mere comment on a single case is both too short and too long because it cannot do justice to the whole subject matter of criminal law, sentencing policy, criminology and corrections. Similarly, these problems cannot be properly exemplified by an isolated case decided by a magistrate who has neither the time nor the expertise to take all these matters into consideration. Furthermore, he is hardly in the proper forum to take such a broad view of the criminal process.

The case of *Regina* v. *Hinch and Salanski* is simply the most recent illustration of the problem facing the criminal law and those who administer it. We must be prepared to rethink our attitudes toward all criminal offenders and our methods of punishing, treating and rehabilitating them—not just some of them.

GRAHAM PARKER*

*Graham Parker, of Osgoode Hall Law School of York University, Toronto.