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## *A Sentencing Problem: How Far Is a Fall From Grace?*

H. H. A. Cooper\*

IT IS NOW ALMOST UNIVERSALLY ACCEPTED that there are three possible bases underlying sentences imposed by the Courts, following some breach of the criminal law. These are generally described as retribution, deterrence and reformation. Occasionally these qualities are considered in combination under some such title as the "aims of penal measures."<sup>1</sup> Another factor, ever present in a vague though influential form, now seems to be emerging from the shadows to assume more definite shape. Yet to materialize is its relationship to the other established, uncontroverted aims. The emergent element may conveniently be termed "public disapproval," under which may be subsumed all those social sentiments, tacit or express, which reflect in the view taken of the offender's conduct. It is increasingly evident that imprecision in regard to the understanding of this factor and its relationship to the accepted sentencing criteria constitutes a great obstacle to the rationalization of penal policy and is at the root of many of the inconsistencies into which Courts are forced from time to time. A recent English criminal appeal<sup>2</sup> serves to highlight these problems.

In England, crimes of considerable gravity, or those in which the trial is considered to present some feature of complexity, are generally reserved for trial by the Assize Courts. Trials are held within the territorial circuits into which the country is divided for jurisdictional purposes, the Court comprising a single High Court Judge, or Commissioner of Assize, with equivalent powers, and a jury. Appeals lie from this Court, on questions of law or fact or mixed questions involving both, to the Court of Criminal Appeal in London.<sup>3</sup> Some appeals require leave of the trial Court, or the Appeal Court itself, if such leave is refused, while

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<sup>1</sup> For example, Dr. Nigel Walker, *Crime and Punishment in Britain*, Edinburgh University Press, 126 et seq. (1965).

<sup>2</sup> *Regina v. McConnach*, *The Times Law Report*, 21st March 1966.

<sup>3</sup> *Court of Criminal Appeal Act, 1907*, as modified by the *Court of Criminal Appeal Act, 1964*.

others are of right. A convicted person may appeal either against conviction or sentence and much of the Court's work lies in hearing appeals of this latter category. Although a further appeal on a point of law lies, theoretically, to the House of Lords, such appeals in practice are rare. The importance of the judgments of the Court of Criminal Appeal, which is composed of three or more High Court judges, will be readily seen. It is true to say that the views of this tribunal, more than any other, must be taken to represent those principles of sentencing policy which are presently valid and followed throughout the English penal system.

The application for leave to appeal in the case of *Regina v. McConnach*<sup>3a</sup> was heard by two High Court judges together with the Lord Chief Justice, who by reason of his position enjoys additional administrative responsibility for ensuring the uniformity of sentencing,<sup>4</sup> the latter delivering the judgment of the Court. These facts while relating nothing unusual in the disposal of criminal appeals nevertheless indicate the high standing of the judgment and its orthodoxy. William Alexander McConnach, formerly Chief Constable of Southend on Sea, had applied for leave to appeal against concurrent sentences of two years imprisonment imposed after he had been found guilty on eight counts of causing money to be delivered by false pretences; eight corresponding counts of fraudulently applying money; and one count of causing a valuable security to be delivered by false pretences. The appellant had been convicted at the Central Criminal Court (The Old Bailey), which serves as Assize Court for London and the Home Counties, after a trial lasting 28 days, an unusually lengthy period by modern English standards. The original notice of appeal had been against conviction, but this aspect was not pursued, the proceeding before the court being only on the issue of sentence. The question, then, was whether there existed grounds on which sentence might have been reduced. It is in the Court's examination of this possibility, in reaching the conclusion that the appeal was groundless, that the penological interest lies.

The facts of the case are of some importance to a consideration of the penological issues involved. The appellant had been

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<sup>3a</sup> *Supra*, note 2.

<sup>4</sup> Periodic conferences on sentencing practices have been inaugurated by the present Lord Chief Justice, in the last few years.

Chief Officer of Police in an important residential resort in South Eastern England. The English police are organized almost exclusively on a local basis, the Chief Constable being responsible to the police authority, which in this instance was the Watch Committee of the County Borough of Southend.<sup>5</sup> Subject to the approval of the Home Secretary, a minister of the central government, it is the police authority which appoints the Chief Constable and this authority in addition has considerable, continuing, administrative powers in relation to the force under his command. McConnach was appointed to his position in 1953 and held office until 1964. It is perhaps of importance to state that appointments to Chief Constable are non-political and appointees are generally career policemen, who have attained considerable distinction and successive promotion within the police service. McConnach had entered the police service in 1931 and had just such a record of attainment. It was, at his trial, an accepted fact that he improved the morale of the police force under his command "out of all recognition" so that it became in the opinion of many, "the finest police force in the country." A few words from the Lord Chief Justice are not inappropriate at this point: "There was no doubt that he showed there exceptional gifts of organization and leadership . . . He also improved the relationship between the police and the public. He inspired all those who served under him, and commanded their loyalty and devotion." This, then, was the man who on 22nd November 1965 found himself convicted of dishonesty.

The events leading to this tragic end to a distinguished career were that the Chief Constable had at his disposal a fund of £200 administered by the finance officer of the Southend Watch Committee. Among payments to be made from that fund were reimbursements to members of the criminal investigation department in respect of payments to informants, or, for hospitality to them or for other legitimate police purposes. Detailed application of this fund was under the exclusive and secret control of the Chief Constable, who alone maintained an explanatory record of payments. Between 1954 and 1964 expenditures from the fund rose from £470 to £1500 a year, and this no doubt caused enquiries to be made as to the manner of its application. It is unnecessary here to consider in detail the results of the investiga-

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<sup>5</sup> On the organization of the English police generally see J. M. Hart, *The British Police* (Allen & Unwin, 1951).

tion that followed or how far the conduct of the Chief Constable, at this stage, may have led to his downfall. It suffices to state that it was shown that a substantial part of the increase was attributable to the expenditures of the Chief Constable himself, who had utilized monies to disburse hospitality and promote police purposes. The trial turned primarily upon the legitimacy of these practices; in the words of the Appeal Court, "the real issue before the jury was whether what was done was done in the honest belief that he could use that money. The jury, by their verdict, had clearly said 'No'." Conviction had obviously to follow such a conclusion, and as the validity of this was not disputed on appeal, the matter can be put to one side so far as it relates to that. The facts outlined have, however, their own materiality as concerns the sentence.

The practical importance of the appeal to the applicant is clearly exposed by his counsel, whose argument ran, "He would have been entitled at 60 years of age, (he was then 56 years of age) to retire on a pension of £2,300 a year, which would have survived to his wife if she had lived longer than he. The commuted value of that pension was something in excess of £25,000—which was a monetary penalty heavier than any court could dream of imposing. Unless some exceptional factor intervened, that pension would be lost to him—there was power to withdraw even a granted pension if the pensioner was sentenced to imprisonment for more than 12 months."<sup>6</sup> This clearly constitutes an important fact in any evaluation of the consequences of the sentence imposed upon the appellant; it accordingly received due consideration in the judgment of the Court. One further matter is important, for evaluative purposes, before proceeding to consider what may have motivated the Court's decision. In the opening words of the judgment, "The offences of which the applicant was convicted represented 17 out of a total of 85 alleged cases of fraudulent dealing with public funds carried on by him over a period of 21 months between April 1963 and January 1965. The amount involved in the 85 cases was said to be between £1,100 and £1,200 and in the 17 counts some £160." It seems of considerable relevance, therefore, that whatever may have been suspected, the penalty imposed can only be weighed against proven defalcations in the sum of £160.

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<sup>6</sup> An interesting case in which the pension right was also an issue was *Reg. v. Baldwin*. 1964 A. C. 40: see note in 80 *Law Quarterly Rev.* 105 (1964).

The Court considered that the appellant's counsel had put forward three points to which it was said the trial judge had given insufficient weight in sentencing the appellant to two years imprisonment. The first referred to the appellant's own belief as to the rectitude of his conduct. As the argument was paraphrased by the Court, "While it could be said that this money, broadly speaking, was expended in lavish and unreasonable hospitality, it was done under the self-induced delusion, one might call it, that good will promoted by such hospitality would advance the efficiency of the police force." The second was the exceptional character hitherto enjoyed by the appellant, while the third is of such importance that it deserves to be couched in the language chosen by the Court: "Thirdly, that no deterrent sentence was necessary in this case, since it was unlikely in the highest degree that any Chief Constable would be tempted to do the like—nor, from the applicant's own point of view, was a sentence designed to reform in any way necessary." The Court itself added, "There could be others said in his favour: perhaps, in particular, it could not be said that he had in any way corrupted, if that was the proper word, any member of the force of which he was a member." The Court considered all these points, but concluded it "was quite clear a sentence of imprisonment was called for." Two other portions of the judgment must be cited in full in order that the Court's view may be clearly displayed.

"In the opinion of this Court, anyone in the applicant's position as head of a local police force and having authority over the expenditure of public funds, inevitably held a position of high trust and a correspondingly high duty." "Further, a public servant, whether he was a postman or a police constable on the beat, who committed an offence of dishonesty in the course of his employment—still more if it involved public funds under his control—was almost invariably sent to prison. How then, one asked oneself, could anything less be imposed if that person was a Chief Constable of a local police force? And, if a sentence of imprisonment was called for, again one asked oneself, how could it be said that a sentence of two years was in any way excessive?" As the Court can be taken to have said nothing else revealing as to its motivation in the matter of sentence, it is the final passage that is perhaps the most important in the whole judgment.

The Court thus decided a sentence of two years imprisonment was appropriate in this case; from the point of view of

theoretical penology it is of the utmost importance to decide why it did so. The answer to this is far from clear because, it is respectfully submitted, the Court itself was far from clear on the real issue. Reverting to the classic bases for punishment of a criminal act, it is interesting to fit the Court's assumptions, tacit or otherwise, to the factors of deterrence and reformation. It seems that deterrence, particular or general, can be ruled out as having influenced the Court. Even were McConnach ever again elevated to a position of like responsibility, in itself a most improbable event, the eventuality of his being deterred by this experience rather than by the promptings of his otherwise innate good character (as evinced by his record) is one which scarcely warrants serious consideration. England is indeed fortunate in the administration of her police services, and corruption in high places is rare; the language of the Court in considering the deterrent quality of the sentence as it might affect others in similar position to McConnach is, therefore, in no way exaggerated. More relevantly, perhaps, can it be said, either as a scientific or a commonsense matter, that this sentence has any reformatory quality about it?

The shame of this distinguished former police officer is no doubt considerable at the plight in which he finds himself. It seems unlikely, on the evidence alone of the grounds on which the appeal was prosecuted, that as a result of the sentence there has been any fundamental change in what the Lord Chief Justice described as "the self-induced delusion." If there has, then, been no reform of view, what is the measure of this sentencing aim in more conventional terms? The best description of the reformatory aim of the prison sentence is to be found in the words of the Gladstone Committee on Prisons, 1895: "Prison treatment should be effectually designed to maintain, stimulate, or awaken the higher susceptibilities of prisoners and turn them out of prison better men and women, both physically and morally, than when they came in."<sup>7</sup> This article of faith, as it has been described, has received present day affirmation.<sup>8</sup> Is this process necessary or desirable in the present case, by reference to the known character and personality of the offender? Is it not rather like putting a brand new shirt in a washing machine full of dirty clothes in the hope that it might thereby come out improved?

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<sup>7</sup> Cited in *Crime and Punishment in Britain*, *op. cit. supra* note 1, at p. 133.

<sup>8</sup> *Ibid.*

We are left with the alternative basis of retribution, or something else.

Enlightened criminologists and others have thundered heartily against simple retribution, that is, action against the offender which has no other object than inflicting upon him some degree of damage or suffering on account of his offence. The battle has raged most fiercely in the field of capital punishment, where, whether or not the retributive element may be considered exceptionally high, the other two elements must certainly be considered on a lower plain. The official view before the Royal Commission on Capital Punishment 1949-1953, was expressed thus: "There is no longer in our regard of the criminal law any recognition of such primitive conception as . . . retribution . . . There is a school of thought in this country which would still regard vengeance and vindication of the law as a feature of our system. It is not a principle which animates any proposal which comes from the Home Office."<sup>9</sup> Expressing the Christian view, Dr. Temple, then Archbishop of Canterbury, pointed out that "all punishment should contain the remedial or reformatory element, for, as has been said, this element is at its minimum in the death penalty."<sup>10</sup> The United States Supreme Court has said: "Retribution is no longer the dominant purpose of the criminal law: reformation and rehabilitation of offenders have become important goals of criminal jurisprudence,"<sup>11</sup> and it has been urged in consequence "that retribution can no longer be morally justified in a modern Judaeo-Christian society, and that therefore this may be ignored as a basis for sentencing."<sup>12</sup> The weight of evidence justifies this conclusion. If deterrence and reform did not motivate the *McCann* sentence, was it retribution that did so? The Court itself did not specifically tell us.

The judgment, practically, did two things. It justified the sentence of imprisonment and approved its duration as appropriate. The justification is essentially very simple: dishonest public servants are always sent to prison. The very charm of this justification lies in its simplicity, so the Court, wisely, did not spoil matters by indicating why this should be so. Interesting

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<sup>9</sup> Royal Commission Evidence, Day 1, page 39, cited "Capital Punishment as a Deterrent and the Alternative," Gerald Gardiner (now Lord Gardiner, Lord Chancellor) Gollancz (1956) p. 83.

<sup>10</sup> *Id.* at page 35.

<sup>11</sup> *Williams v. New York*, 337 U. S. 241, 69 S. Ct. 1079, 1084 (1949).

<sup>12</sup> See Charles W. Webster, *Jury Sentencing—Grab-bag Justice*, 14 *South Western Law Journal* 229 (1960).

though the criminological argument thus opened up might have been, the omission could hardly have been accounted a fault in relation to the Court's immediate purpose. The Court did not consider it proper to pronounce upon what was essentially a piece of social jurisprudence, which is what this primary question really is, that is to say, "Why do we invariably send errant public servants to prison?" The Court contented itself with the observation of the undoubted fact. But the second part of the problem, that is to say, "for how long," was made to depend in this case directly upon the first. The Court, although it posed itself a most attractive question in the concluding passage cited, did not provide the answer at all. The Court's judgment comes very near to being a flat assertion of correctness and is far from being a model of the reasoned sentence called for, amongst others, by Professor Cross.<sup>13</sup> It is suggested that the justification factor, in whatever it may consist, cannot provide a standard of measurement for the sentence itself; it can only provide a theoretical basis for awarding some kind of punishment. It is of importance, for further clarification, to see exactly what this justification factor really was.

Is this factor really retribution, perhaps in another guise? A modern writer has recently posed the interesting view that: "The *lex talionis* dies hard. If the price of an eye is not precisely an eye, there are still many to whom justice requires a fair equivalent. No one, it is true, would express it so crudely today. It would be put on a loftier level. Civilized society, it would be said, can only survive if it can maintain discipline. No discipline can be maintained if breaches are tolerated. Society is therefore obliged, in the interests of self-preservation, to vindicate its authority by the ruthless suppression of indiscipline."<sup>14</sup> Later the same author posits that, "Metaphors apart, there are certain classes of offence, the social implications of which do mark out a broad and barely flexible line, beyond which considerations for the personal problems of the offender must give way to the protest of the public against what he has done."<sup>15</sup> In his evidence to the Royal Commission on Capital Punishment, Lord Denning, the present Master of the Rolls and a most progressive minded

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<sup>13</sup> See Dr. Rupert Cross, *Paradoxes in Prison Sentences* (inaugural lecture, Vinerian Chair, Oxford), 81 *Law Quarterly Rev.* 212-215 (1965).

<sup>14</sup> See Walter Raeburn, *The Bespoke Sentence*, 5 *British J. of Criminology* 266-267 (1965).

<sup>15</sup> *Id.* at page 267.

judge<sup>16</sup> wrote: "Punishment is the way in which society expresses its denunciation of wrong doing and in order to maintain respect for law it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them."<sup>17</sup> Yet another writer has put it: "Society punishes the offender in order to make certain that the act may be considered abhorrent to the minds of men. This preserves the moral ideal, for without punishment no man would know whether an act were 'good or bad'."<sup>18</sup> It seems inescapable that as motivation in the present case there was either retribution, by whatever other attractive name it might choose to be known, or that this principle of "social defence,"<sup>19</sup> "social security" or "social disapprobation"<sup>20</sup> enjoys a separate existence and must be added to the traditional three aims upon which punishment is said to be based. Whatever part it may play in justifying some sort of punishment, it is submitted, however, that it has a very different role to play in the selection and measurement of that punishment itself. Until this is firmly appreciated in theory and practice there will exist the danger of punishment being meted out according to wholly inappropriate criteria.

It has been sagely observed, "In spite of its common acceptance, the view that the vindication of law and order and the deterrence of a repetition of the offence are both constituent elements of punishment is not an accurate one. They are in fact simply occasions for punishment on objective grounds of policy. But punishment itself is subjective. It is visited upon an individual in respect of his personal offence."<sup>21</sup> Sentencing should be a purposeful activity. One can show disgust, revulsion, disapproval in a variety of ways, both positive and negative. The exercise is, however, very restricted in purpose, if all it serves to do is to exhibit these feelings. A sentence that does nothing more than mark out society's "disapproval of the breaking of its

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<sup>16</sup> Hilary, *The Importance of Denning*, *The Lawyer*, Vol. 7, No. 1, pp. 15-19 (1964).

<sup>17</sup> Cited in *Crime and Punishment in Britain*, *op. cit. supra*, note 1, at p. 140.

<sup>18</sup> Walter A. Lunden, *The Theory of Crime Prevention*, 2 *British J. of Criminology* 217 (1961-62).

<sup>19</sup> The term is not used here in the rather special sense generally reserved for it; see "Crime and Punishment in Britain," *op. cit. supra*, note 1.

<sup>20</sup> The Law Society, the professional body of the solicitors' branch of the legal profession, in a memorandum to the current Royal Commission on the penal system, refers to this as the 'D' factor and considers it an appropriate factor for a court to take into consideration in imposing sentence.

<sup>21</sup> *The Bespoke Sentence*, *op. cit. supra*, note 14, at p. 216.

laws”<sup>22</sup> can give very little return for the effort expended. Does the sentence on McConnach really do any more than indicate the assumed extent of society’s disapproval of errant policemen? By no conceivable criterion can it be said to do so. The harm done to the offender is enormous and no element in the sentence he has received can mitigate this. Has not, however, society harmed itself by this show of disapproval rather more than is compensated by any foreseeable advantage? Who can rejoice in this fall from grace, whose inward conformist state is fortified by it?<sup>23</sup> Is it enough to say, “But we always send errant policemen to prison and two years is hardly too long?”

Whatever may have been the opportunities for the commission of these particular crimes, they do not technically constitute offences which are the special prerogative of Chief Officers of Police or the like. There is no special category of “white collar crime” here, though many of the particular problems inherent in that much-controverted topic have an interesting bearing upon the present case.<sup>24</sup> Unquestionably an ordinary first offender who had committed a crime like this, having similar testimony as to character as that advanced and accepted on behalf of McConnach, would not have incurred higher liability than supervision under a Probation Order. The Court has, in effect, created a special class of offenders, public officials and the like, who must suffer greater penalties if they transgress. This is a distinct move away from individualization, but so long as the judge has the responsibility for sentencing by reference to an open-ended scale this type of judicial legislation is likely to persist. The real questions here are: “Did the offender necessarily have to go to prison?” and if so, “Did he necessarily have to go for two years?” The Court’s affirmative was based, it is suggested, upon a mistaken view of what was demanded by “social disapproval.” It has been rightly said of the objectives of sentencing that: “First, is the overriding necessity of a sentence which, taken together with the judgment of the conviction itself, adequately expresses the community’s view of the gravity of the defendant’s misconduct. Second, is the necessity of a sentence which will be as favourable as possible, consistently with the first objective, to the de-

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<sup>22</sup> Paradoxes in Prison Sentences, *op. cit. supra*, note 13, at p. 216.

<sup>23</sup> See Dr. Jackson Toby, Is Punishment Necessary?, 55 *J. of Criminology, Crim. Law and Police Science*, 334-335 (1964).

<sup>24</sup> See Dr. Donald J. Newman, White Collar Crime, 23 *Law and Contemp. Problems*, 735 et seq. (1958).

fendant's rehabilitation as a responsible and functioning member of his community."<sup>25</sup> It goes on to stress that, ". . . The community is interested in the defendant's realization of his potentialities as a human being and the contributions he can make to the community life."<sup>26</sup> The onus of showing that the community's interests have been better served in the present case by a destructive act of imprisonment, rather than some other mark of disapproval, is a heavy one indeed. There is nothing in the judgment to show that the Court felt in any way oppressed by its burden, and this must sadden many who have consistently hoped for a more enlightened attitude. The prevalence of the more retributive attitude which lingers should not be underestimated. It has been observed, "Most modern writers discussing the policy goals of criminal law, tend to deny the current importance of retribution. It is summarily dismissed as being no longer an appropriate goal for the law, and ipso facto, it no longer exists. A cursory examination of a few criminal trial records makes it all too clear, however, that, even if not widely acknowledged, it is still a potent factor in the process of criminal adjudication. Those judges whose public statements leave little doubt of their retributive intentions towards certain types of offenders are by no means exceptional in relation to ultimate results."<sup>27</sup>

It is suggested that the sending of errant public servants to prison is not a self-evident necessity, although their conviction is. Social disapproval has relevance in determining the aims of the criminal law, not the sentencing policies of the judges or whatever agency might in the future be entrusted with the task. Where it is adopted as a sentencing factor it is no more than thinly veiled retribution and as such should be limited as far as practicable and eliminated if possible. The aim which should replace it is "social interest," which comprehends the interest of the community as a whole and that of the individual transgressor as a member of it. The Judges' duty is to strike a balance, by reference to the facts of each case, between the various detailed, competing requirements of society in general and those of the offender. Society gains no benefit from empty retributive gestures and may well, as would seem likely in the present case, be the loser thereby.

<sup>25</sup> See Dr. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *Law and Contemp. Problems* 437 (1958).

<sup>26</sup> *Ibid.*

<sup>27</sup> Dr. Andrew S. Watson, *Critique of the Legal Approach to Crime and Correction*, 23 *Law and Contemp. Problems*, 615 (1958).