

## CRIMINAL FINES AS AN ALTERNATIVE SANCTION\*

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Sentencing policy in the United States has undergone major alteration in recent years with the introduction of sentencing guidelines, mandatory minimum sentences, and determinate sentencing schemes. With these changes, mainstream sentencing theory and legislative activity have shifted toward an emphasis on incapacitation, deterrence, and retribution as primary sentencing goals. However, this shift has taken place within the context of a view, widely held by American policymakers as well as by the general public, that imprisonment is both the best means for effectively punishing or controlling offenders and virtually the only means. Thus, even when incapacitation is not the goal of a sentence, decisionmakers have tended to feel compelled to choose imprisonment (often for relatively short terms) as the only reliable means of punishing (and thereby potentially deterring) offenders; "alternative" sentences have generally come to be viewed as no punishment at all and are overlooked when the purpose is to achieve some modicum of control.

Increasing discomfort with sentencing schemas that rely heavily on imprisonment because of dissatisfaction with present

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alternatives, coupled with concern about the growing strain this has placed on the society's correctional resources, has focused recent policy attention on alternative sanctions that are relatively new, especially restitution and community service and, even more recently, enhanced probation and electronic surveillance. However, in the last several years there has also been renewed attention to what is one of the oldest, and certainly the most widely used, ways of punishing people without relying on incarceration--the criminal fine.

In 1973 the Task Force on Corrections of the National Advisory Commission on Criminal Justice Standards and Goals found that "properly employed, the fine is less drastic, far less costly to the public, and perhaps more effective than imprisonment or community services." Until recently, this observation went largely unheeded by the policy community primarily because of insufficient documentation and discussion of what constitutes the "proper" administration of fines. Within the last five years, however, researchers have undertaken to describe courts' experiences with fine sentences in both the United States and in Western Europe, where fines are the sentence of choice in most criminal cases and where fines have become the primary alternative to imprisonment. Most of this policy research has been done by myself and my colleagues at the Vera Institute, in both New York and London, and at the Institute for Court Management in Denver.

While fine sentences are somewhat less common in the United States than in Western Europe, they are nonetheless more

widely used than has been generally recognized. By conservative estimate, fines are big business in our country's criminal courts with well over a billion dollars collected annually. In recent years, almost a third of the sentences imposed in U.S. District Courts have involved a fine, either as the sole sanction or in combination with probation (and occasionally with prison). This pattern finds a parallel in state and local trial courts across the entire country. Indeed, in American trial courts of limited jurisdictions, fines are the predominate form of punishment, and in state general jurisdiction trial courts, they appear to be used more frequently than is generally recognized, both alone and in combination with other non-custodial sanctions. Thus, fines are, and have been for some time, an important sentencing tool in American criminal courts.

#### The Fine Sentence

The advantages of the fine as a criminal sanction are well recognized: it is unmistakably punitive in its aim and can deprive offenders of ill-gotten gain; it can be adjusted to a level that is both appropriate to the offender's resources and to the seriousness of the offense; it can be coupled with other non-custodial sanctions when multiple sentencing goals are sought; it does not further destroy the offender's ties to family and community; it is relatively inexpensive to administer, relying primarily on existing administrative agencies and procedures; and it can be financially self-sustaining and provide revenue for related social purposes such as victim compensation.

It is the perception of important disadvantages to a fine

sentence that gives pause to some policymakers. The degree of punishment imposed by a fine is thought to be limited because fine amounts tend to be low; thus fines are also not always considered a deterrent to future crimes. For the same reason -- low amounts -- fines are sometimes considered unfair because they advantage the more affluent offender who is perceived as having "bought his way out" of a more punitive sanction. If fines are high enough to avoid these problems, they are thought to be uncollectable, difficult and expensive to enforce, or to result in imprisonment for default. While there is undoubtedly some merit to each of these concerns, the increased availability over the last five years of research on courts' experiences imposing and enforcing criminal fine sentences both here and abroad offers an empirical challenge to most of them.

While at the present time, fine sentences are common in many different types of American courts, their use is highly variable. Limited jurisdiction courts are consistently more likely to include the fine as part (or all) of the sentence than are general jurisdiction courts. The fine as a sole sanction generally appears to be less common than the fine in combination; it is more prevalent in limited than in general jurisdiction courts and most often used for less serious offenses. Few judges currently seem to use the fine alone as a sentence if the offender has a prior record and the offense is moderately serious. In short, fines are not now being used in American courts as an alternative to incarceration; if fines are used at all in cases at risk of imprisonment, they tend to be an add-on to other sanctions.

This contrasts sharply with sentencing practices in at least

some Western European criminal justice systems where the fine as a sole penalty is widely used to sentence recidivist offenders and where, as a policy matter, fines are viewed as an alternative to short term imprisonment. In West Germany, for example, after judges were encouraged by changes in legislation to reduce their use of sentences to six month or less of imprisonment, the number of such sentences decreased from over 113,000 (20% of the total) to under 11,000 (1.8%) without any increase in the frequency of longer sentences of imprisonment. Instead, the proportion of fine-alone sentences increased from 63 percent of the total to over 80 percent.

One of the major impediments to improving the fine's usefulness as a sanction in American courts seems to lie in the way in which the fine's amount is typically determined in this country. Despite the fact that, in many states, legislatures are increasing statutory fine maxima (anticipating judicial need in cases of better-off offenders for whom fines would be inadequate punishment under existing law), judges still tend to impose fines well below statutory limits. The reason for this is that the retributive trend in American sentencing philosophy tends to focus judges primarily on the severity of the crime and the culpability of the offender. In considering whether to use a fine, American judges commonly find themselves with "tariff" systems as their only guide to what the appropriate amount of a fine sentence should be. It is the structural limitations inherent in these fixed-sum (or tariff) systems that have tended to keep the fine-alone penalty contained within the bottom ranks of the criminal sentencing framework.

Tariff systems are based upon informal understandings that fixed fine amounts will be imposed on all defendants convicted of a particular offense; these amounts are generally set with an eye to the lowest common economic denominator of offenders coming before a court. Lacking guidance on other ways to set fine amounts, judges tend to limit their use of fine sentences--at least as sole penalties--because fixed-sum systems restrict their ability to adjust fine amounts to offenders' means as well as to crime severity. In many jurisdictions we have studied, individual judges have tried to modify tariff systems to take means into account so as to make broader use of fine sentences, but they have received little or no guidance on how to do this systematically and consistently.

The well-documented experiences of courts in several Western European countries, however, provide tested sentencing methods--particularly in the form of day-fine systems--that could enable American judges to tailor fine amounts with more precision to variations in the means of offenders as well as to the severity of their offenses and their culpability. When this was done in Europe, fine amounts rose significantly, to reflect just punishment for more affluent offenders, thereby broadening the fine's usefulness as a criminal sanction, without imposing costly demands on the enforcement system. By accomplishing this, day fines can address directly the problems American judges and other key policymakers, including prosecutors, identify as the main limitations to the fine's broader usefulness as a sanction in cases where punishment (with whatever deterences it provides), but not incapacitation, is the major sentencing goal: the belief

that poor offenders cannot pay fine amounts that reflect the seriousness of non-trivial or repeated offenses, and that fines allow more affluent offenders to buy their way out of more severe punishment.

### The Day Fine

The day-fine system of sentencing is a Scandinavian innovation that has been adapted for use in West German courts. It is designed to enable a sentencing judges to impose a monetary punishment commensurate with the seriousness of the offense and the culpability of the offender, while at the same time taking account of offenders' differing economic circumstances. The basic notion--reflecting accepted principles of sentencing in American jurisprudence--is that the punishment represented by a fine sentence should be proportionate to the severity of the offense and consistent or uniform within severity classifications, but that it should also be equal across individuals with differing financial resources.

To accomplish this, the amount of the fine is established by a two-stage process. First, the number of "units of punishment" is determined, taking account of the seriousness of the offense and such things as the offender's prior record. Thus, crimes of equivalent gravity may be assigned the same number of units as a sentence. Second, the monetary value of each unit of punishment is determined in light of information about the offender's financial circumstances. Thus the total penalty--the degree of punishment--should cause an equivalent level of economic burden across offenders of differing means who are convicted of similar offenses.

To illustrate, although two offenders with similar criminal histories may be sentenced to the same number of day-fine units as the sentence for a given offense, the one who is more affluent would be fined a total dollar amount that is greater than the amount to which the poorer offender is fined. In the event of default, however, the sanctions imposed (e.g., jail time) would be the same for both offenders, because they would be based upon the number of units of punishment, not the dollar amount of the fine.

I would like to briefly discuss how day-fine systems work in practice in several key European systems, before turning--also briefly--to describe an on-going planning process being carried out by the Vera Institute in which we are adapting the day-fine model to an American court.

#### Setting the Number of Day-Fine Units

The German Tagebussensystem (day-fine system) is probably the most useful comparison for American courts. Relatively recently adopted (1975), its legal and social context is more analogous to the American system than is the more commonly described, but more idiosyncratic, Swedish day-fine system.

The German system for setting the number of fine units for different categories of offenses is organized around informal guidelines or benchmarks: the minimum fine sentence is five day-fine units, and the maximum is 360 for a single offense. Although there is no direct correspondence between the number of day-fine units and terms of imprisonment established by law for the same or similar offenses, the 360 maximum is logically linked



to the idea of a one year prison term; indeed, in the German sentencing system, fines are typically seen as alternatives to short-term prison sentences. Thus while assessment of the gravity of the offense for fining purposes is not strictly or solely determined by a comparison to the permissible prison sentence, statutory prison maxima for certain offenses as well as general sentencing practices in imposing prison sentences for those offenses, do seem to play a part in defining the relative seriousness of offenses for the purposes of selecting the number of day-fine units imposed.

Calculation of the number of day-fine units corresponding to the offense is not narrowly prescribed under German law. Courts, therefore, have themselves evolved guidelines for this decision which vary from region to region. The judges in the area most thoroughly studied in Germany have produced guidelines for ranges of day-fine units corresponding to broad offense groups. However, the range is so great for particular offense categories (e.g., from 10 to 50 units for theft) as to render the guidelines virtually meaningless. Given this latitude, it is possible for judges to tinker with the figures in such a way as to assign a number of day-fine units within the range based not exclusively on the degree of gravity or culpability involved, but also on a calculation of what the resulting total fine amount would be given the monetary value of each day-unit for the particular defendant. This puts the cart before the horse and can reduce the day-fine system in practice to a post-hoc rationalization for a decision based upon more traditional tariff-based sentencing notions. For this reason, there has been discussion in Germany

of reforming the system either to narrow the ranges or to separate the two stages of decision making so that judges do not know the monetary value of the day-fine unit for defendants at sentencing, or both.

The notion that courts in the United States might adopt fairly narrow-range presumptive systems of benchmarks for setting the number of day-fine units -- systems that would be designed by individual jurisdictions for their own use but drawing upon guidelines established by state statutes or sentencing commissions -- would be in keeping with much of the current sentencing guidelines thinking in this country. Since Germany has also capped the maximum monetary value of any day-fine unit at a fairly high level (10,000 Deutschmarks, or about \$4,000), fines for wealthier offenders convicted of the most serious offense for which a fine would be considered appropriate in Germany can be quite substantial even if, theoretically, they are only linked to a year's imprisonment: 3.6 million D.M. (or about \$1.5 million) for a single offense and multiples for consecutive offenses.

There are potential variations to this fairly pure day-fine model that might be used in the United States, for example, one that would cap the total fine amount permissible (in dollars) for each level of offense seriousness. But this seems cumbersome and antithetical to the notion of trying to maximize the balance between equity and consistency, because caps limit the range of punishment that can be imposed upon more affluent defendants. Such variations in the basic day-fine system are movements away from the retributive base of the model with its emphasis on the crime rather than the offender.

Furthermore, a purer day-fine method of setting guidelines would also permit greater ease in the imposition of restitution penalties. If the calculation of the number of suitable day-fine units for a particular crime is determined and has no monetary cap (other than, perhaps an overall high maximum such as in Germany) then the ultimate dollar amount of the fine that results, once the value of the day-fine unit is established, could be viewed by the court as the maximum total monetary penalty permissible for this defendant on this offense. If restitution is then included in the sentence, its amount could be set separately according to recognized principles of assessing damage, harm or injury; that amount would be paid to the victim up to, but not in excess of, the maximum monetary amount established by the day-fine process. Capping the fine amount for different offense levels would not make this process as easy to accomplish, and restitution would probably have to be considered separately. However, research evidence from England strongly suggests that such separate sentencing assessments often leads to imposing total monetary obligations that are far in excess of the offender's ability to pay; this in turn is highly related to non-payment and default.

#### Assessing Means and Setting the Value of the Day-Fine Unit

Under most state statutes, courts must generally rely upon information obtained from defendants, validated when possible, to assess an offender's means and ability to pay. However, it would appear from the experience of European court systems that already fine extensively and in high amounts that exclusive reliance upon

voluntary cooperation should not be considered a priori a barrier to the use of fines, and the use of day fines in particular.

The Federal Republic of Germany relies largely on easily available information which generally can be verified if necessary (as do American courts in setting bail amounts). As a practical matter, data on employment, public assistance, grants and scholarships are the major sources used by the German courts to establish ability to pay. Only rarely, and only in cases of the gravest offenses fined at the highest levels, do courts seek other data, including information from banks which are obliged, under German law, to assist them. The more typical informal information sources for assessing means do not seem to trouble German judges who report wide satisfaction with the system, substantially greater use of fines, and much higher fine amounts. In addition, research has revealed high collection rates in Germany, including collection of very large fines paid by installments over long periods of time.

In England, as in Germany, the source of information on the offender's resources is largely from self-reports or from counsel or police, and it is limited to relatively easily verified items. However, both research and practical experience has indicated to the British that their courts are not taking means into sufficient consideration in setting fine amounts. As a result, the Home Office is attempting to get magistrates to assess means more thoroughly by encouraging use of a new procedure that would provide the court with more financial information on a regular basis. In some courts around England, defendants facing conviction are asked to voluntarily complete a means enquiry form that

contains information about their income, assets and expenditures. In the breadth of the new information requested--taking expenditures as well as resources into account--this form has more in common with day-fine practices in Sweden than with either German day-fine or previous English sentencing practices. Initial reports on this procedure suggest that, among the limited number of courts using the forms, voluntary compliance varies widely but that overall about a third of the defendants are cooperating. Obviously, much more needs to be known about how the English courts are implementing these procedures and what accounts for the variation in voluntary compliance, but the preliminary evidence is not discouraging.

#### Fine Collection and Enforcement

Before turning to Vera's current efforts to adapt the day-fine system to an American jurisdiction, I would like to offer a brief comment on post-sentencing enforcement issues. Research indicates that properly setting the amount is also the key to successful collection. Fining must be viewed as a process in which the imposition and the enforcement of the sanction are inextricably linked. If the court cannot assume the fine will be collected, its attractiveness as a flexible punitive device is eroded; but enforcing fines without uncomfortable and costly levels of coercion (including imprisonment for default) appears to depend on the fine's amount in relation to an offender's means.

The research evidence from studies of American as well as European courts is strongly suggests that fines which are set

properly, even when they are large and are to be collected in installments, are enforceable, generally without much additional cost or the use of undesirable coercive techniques. The conditions that must be met for this to occur routinely are largely administrative. The court must signify at the time of sentencing that it views the fine obligation seriously and unequivocally expects payment or specific coercive means (especially seizure of property) will be employed to ensure the integrity of the sentence. The offender's payments must be closely monitored by people who take their responsibility for fine collection seriously and who are held professionally accountable for failure. When an offender does not meet the terms for payment set by the court, the enforcement reaction should be immediate and personal, with a steady progression of responses characterized by mounting pressure and increased threat of greater coercion.

If these administrative activities occur systematically, there is little reason for concern that large numbers of defendants will face imprisonment for default. Research evidence suggests that the majority of nonpayment cases result from improperly set fines, administrative ineptitude, and the failure of enforcement agencies to credibly threaten delinquent offenders in a timely fashion.

#### Adapting the Day Fine to an American Court

The day-fine concept is attracting increased attention by American criminal justice planners and practitioners as their dissatisfaction with present sentencing alternatives increases and as they struggle with the problem of over-crowded jails and

prisons. In this context, it is important that a disciplined adaptation of this concept to American courts be undertaken with collaborative planning and careful implementation of pilot efforts.

In 1986 the Vera Institute began planning a Day-Fine Experiment in Richmond County (Staten Island, New York) with the cooperation of the Richmond Criminal Court and the District Attorney, and with initial funding from the National Institute of Justice. Richmond was chosen as the site for this effort because of its proximity to the Vera Institute, its highly receptive court and District Attorney, and a sound economic and social base which makes it not unlike many moderate-sized American communities. The fundamental idea is to apply to the administration of fines the action-research model Vera has employed over the last 25 years in many areas of criminal justice reform. It is a two-stage process.

First, Vera has initiated a collaborative planning effort which brings all the relevant parties to the fining process together with experienced criminal justice planners from the Institute, knowledgeable policy researchers, academics, and also with European practitioners familiar with operational day-fine systems. From working sessions and the efforts of the Institute planners, increasingly specified systems are now being developed by which the new fining and enforcement mechanisms will be implemented. It would be unwise to test the feasibility of a day-fine practice in a particular court without first establishing consensus about how to adapt the concept to local conditions.

The project recognizes the importance of having a broad

range of participants in this planning process. Prosecutors are important allies in any attempt to increase the use of fines. Because they tend to establish a single policy in a jurisdiction with respect to sentence recommendations made to all judges, they exercise considerable influence on the consistency of decisions made within the court. The prosecutor's involvement is also desirable in any effort to encourage judges to use fines as an alternative to short terms of imprisonment. Other participants in the planning process are valuable too because, for a court to implement fine sentences credibly, it must coordinate or oversee the actions of many different criminal justice and civilian agencies, some of which act as the court's agents in fine collection and enforcement but which are not ultimately responsible for the outcome of the sentence.

The work of the planning group, during the first stage of the Richmond Day-Fine Experiment, is directed toward four major objectives: (1) development of a system of benchmarks to help guide judges determine the number of day-fine units to be imposed for offenses of varying severity; (2) development of procedures to ensure that necessary means information is available in a timely fashion, so that judges are able to systematically assess an offender's "ability to pay" (to be expressed in the dollar value of a day-fine unit in a particular offender's sentence); (3) development of an information system to efficiently track the payment history of fined offenders, so that non-payment can be identified quickly; the system should also facilitate the use of improved enforcement procedures, give judges better information on fine payments in individual cases, and provide court ad-



ministrators with more useful management information on the success of collection efforts; and, finally, (4) design of a research strategy to permit assessment of the day-fine plan once it is implemented.

When the planning stage of the action-research project is completed this summer, Vera expects to secure the necessary funding to implement the second stage -- a one-year pilot test of the day-fine plan developed by the Richmond planning group, accompanied by research to assess the results of implementation.

The pilot phase of the Day-Fine Experiment will involve systematic introduction of day-fines, in lieu of fixed fine amounts, into the Richmond Criminal Court's sentencing practice, and the improvement of post-sentence enforcement procedures. To accomplish this, continued technical assistance from the Vera staff will be provided over a twelve-month pilot period.

Vera's research activities during the pilot phase of the Day-Fine Experiment will center upon two sets of activities. First, researchers will develop detailed descriptive information on the planning and implementation process in Richmond. The purpose of this is to provide a model, in the tradition of "technology transfer," that would be useful to other jurisdictions interested in developing their own day-fine project. Researchers will document the sentencing and enforcement plans which emerge from the planning process and describe how they are implemented, in order to understand the problems encountered and to recommend ways in which other jurisdictions might go about smoothly adapting the day-fine concept to their own criminal justice systems. Researchers will also measure the outcomes--intended and

unintended--that occur once the court begins to use day fines. The outcomes of interest to the research will include changes in sentencing patterns, in fine amounts, and in collection and enforcement success.

Second, the researchers will measure whether the use of day fines by the court has any displacement effect on sentences to incarceration. This requires examining cases sentenced prior to the implementation of day-fines in order to determine the factors that predict the type of sentence received (especially whether it is custodial or non-custodial), and then applying those factors to the cases of offenders sentenced during the day-fine pilot period. By comparing the sentences actually received during the pilot period with what would have been expected in the previous period, researchers will be able to determine whether displacement, or other types of sentencing shifts, occur as day fines become integrated into the sentencing structure.

Meanwhile, in response to interest expressed by several elected district attorneys who are members of the Prosecuting Attorneys' Research Council (PARC), Vera staff have begun to develop simultaneous day-fine pilots in Minneapolis and in two West Coast jurisdictions, of which one will in due course be selected to round out a three-city set of day-fine pilots.

We are confident about the importance, feasibility and timeliness of the Day-Fine Experiment we are carrying out in Richmond County and its potential usefulness to other jurisdictions that seek new ways to expand their repertoire of enforceable, community-based sanctions. Indeed, in a recent survey of judges around the country conducted by the Institute for Court

Management, over half the general and the limited jurisdiction judges surveyed felt that day-fines could work in their own courts, and many said that they were willing to try the concept out. This suggests the time is ripe for developing ways to assist judges, prosecutors, and other criminal justice decision-makers examine more systematically the place of criminal fines in their sentencing practices.

References

Hillsman, Sally T., Joyce L. Sichel, and Barry Mahoney (1984) Fines in Sentencing: A Study of the Use of the Fine as a Criminal Sanction. Washington, D.C.: National Institute of Justice.

Casale, Silvia S.G. and Sally T. Hillsman (1986) The Enforcement of Fines as Criminal Sanctions: The English Experience and Its Relation to American Practice. Washington, D.C.: National Institute of Justice.

Cole, George F., Barry Mahoney, Marlene Thornton, and Roger A. Hanson (1987 forthcoming) The Practices and Attitudes of Trial Court Judges Regarding Fines as a Criminal Sanction. Washington, D.C.: National Institute of Justice.