FINES IN SENTENCING

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Review of United States
Fines Literature

by

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INTRODUCTION

The sentencing literature of the United States is replete with work on prison and probation but scanty in the areas of fines and various types of discharges following conviction. The latter two sentences are often treated as alternatives to prison rather than sanctions in their own right. This omission of fines from the literature is curious in light of the fine being a very frequently imposed sentence in United States courts.

This report reviews the limited American literature published to date concerning fines. A few foreign pieces have been included because they contain especially interesting material, but European work has been excluded, to be covered in a separate report on theory and practice of fines use in Britain, Sweden, and West Germany.

The major topics of this review are: fines history, sentencing goals, volume of fines use, types of cases, white-collar crime, fine amounts, deferred and installment payments, preventing and handling default, alternatives for indigents, and a few administrative issues. Researchers have found no published material citing fine collection rates--and no reports of experiments to increase collection. This void is noticeable inasmuch as production of revenue is a frequently cited advantage of the fine, while default is a frequently noted problem. Model sentencing codes and pertinent landmark cases have been excluded; their importance merits their treatment in separate reports.

As far as the authors are aware, this is the first formal comprehensive literature review of fines use that focuses on the United States.

HISTORY OF FINES

Monetary penalties were widely used throughout the ancient world. In the Hindu "Laws of Manu," fines (paid to a King) were very popular penalties, and could be set at many times the gain from an offense (for example, eight times the amount of customs duty that one had evaded). For doing physical injury to another person, fines could be set in proportion to the amount of pain or damage caused. The fine was viewed as a more severe penalty than "harsh reproof," but less severe then "corporal chastisement." Fines were apparently considered appropriate for punishing many religious deficiencies as well as crimes; lust, wrath, ignorance, and childishness were all punishable by fines (Kocourek and Wigmore, 1915).

In biblical times, monetary penalties for wrong-doing were more often in the form of restitution paid to the victim--thus averting a blood feud between families. In Old Testament law, fines were not as prominent as restitution payments. For example, robbers were not penalized--they merely had to make restitution to the victim (Leviticus V, 21-26). Similarly, for assault or "wounding" offenses, the offender made "full and ample indemnity to the person hurt" (Benny, 1880). Theft was also most commonly sanctioned by requiring restitution, often set at double, quadruple or more the amount stolen (Jung, 1929). Those who could not make restitution for theft were sentenced to penal servitude (Mendelsohn, 1891).

This stands in contrast to Ancient Babylonia, Greece, and early England where theft was often a capital offense (Goldin, 1952). In these societies, fines were sometimes used interchangeably with a far more severe penalty. According to Mendelsohn, "Among the Athenians, Draco made theft capital, but Solon changed the penalty to a pecuniary mulct."

The ancient Saxon law nominally punished theft with death, if the stolen thing was valued above twelve pence, which theft was denominated grand larceny; but the criminal was permitted to redeem his life by a pecuniary ransom.

In medieval Anglo-Saxon law, "wergeld" was paid to the family of someone killed. The amount was based on the victim's sex, age, rank, and influence. The "bot" amounted to damages paid to an injured party based on the harm done. These payments were civil in nature Those who could not pay were mutilated or killed as retribution.

After the Norman Conquest, monetary penalties were paid to the crown, first as payment for the state providing the trial and later to enrich the King's coffers. The "wite" was a discretionary payment to the King as compensation for failing to keep his peace, and the "amercement" was an amount levied for minor offenses. Davidson explains that thirteenth century Anglo-Saxon law distinguished between felonies and misdemeanors. The former were punishable by death or forfeiture of one's estate and the latter by amercement. Prison was used to compel payment. The offender who could not pay these levies became an outlaw, was ostracized, and could be killed by anyone. Miller, Rubin, Sutherland and Cressey, Davidson, and Schafer all present fairly complete descriptoins of this period. A California Law Review comment notes that it was in 1383 that the expression "to pay a fine" was first incorporated into the law. This completed the transition of monetary payment from compensation to punishment.

Rusche and Kirchheimer present the thesis that choice of sanctioning depended on the social environment. Increasing population and the rise of capitalism led to a large class of poor people who were blamed for the great number of property crimes. This situation resulted in government intervention in the form of harsher laws and enforcement. By the end of the seventeenth century, throughout Europe, the fine had evolved to its present form including monetary maxima and minima, and the concept of a jail term as an alternative to fine payment.

By the time the New World was being colonized, fines were used extensively. Goebel and Naughton studied records from misdemeanor and felony courts in New York in the eighteenth century. Fines were frequently used because they were cheaper than prison. Fines were lower than in England for the same offenses due to a spirit of "moderation" said to pervade America, limited financial resources here, greater sensitivity to possible financial hardship, and settlements often made privately with the complainant. Jail could be used to compel compliance, but there was a fee for this. New York was thus developmentally behind Europe, where jail could substitute for fine payment. Greenberg relates that early American trials caused the defendants such great inconvenience that there is reason to believe many preferred to plead guilty in less serious cases and be given a small fine.

In India during the nineteenth century, British law was adopted somewhat differently (Phillips, 1889). Indian magistrates were said to often impose fines far above an offender's means despite a statutory prohibition against excessive fines. Imprisonment was used as a punishment for default in fine payment, but a limit was set on the nature of the imprisonment (no hard labor) and the extent (one quarter of maximum term fixed for offense, or six months if offense carried no prison term). Fines were to be applied to the costs of prosecution and to victim compensation (far ahead of contemporary interest in this use for fine revenue).

Back in Europe, according to Rusche and Kirchheimer, fines were infrequently used until around 1850 due to widespread poverty. But the prosperity through World War I put money in more people's hands and reformers prevailed in promoting the avoidance of jail in favor of fines and probation.

In periods when fines were not popular, Rusche and Kirchheimer note a double standard for rich and poor. "In countries where broad strata of the population still live outside the sphere of capitalist relationships and do not command money or commodities, the fine tends to be a punishment for specific crimes of the middle and upper classes, as in the Middle Ages." Thus, for minor offenses, the poor were administered corporal punishment while the rich not only paid fines, but were covered by immunity for certain activities.

SENTENCING GOALS

There is controversy about the value of fines and about their potential if set in higher amounts. Theoretical writings suggest that the sentence be set with a specific intention. These aims are any one or a combination of the following:

-rehabilitation or reformation,
-individual deterrence,
-general deterrence,
-incapacitation,
-retribution (restoring a balance with society), and
-punishment or just desserts.

Modern thinkers agree that utilitarian sentences are preferred to nonutilitarian ones. Mueller and van den Haag itemize rehabilitation, deterrence, and incapacitation as utilitarian. Retribution and punishment are not useful in a constructive sense to either the offender or society, but instead are statements that the offending behavior is unacceptable. Fines tend to be seen as more utilitarian than not. Best and Birzon see fines and costs as a way to make the offender aware of a responsibility to society, which suggests reformation. Mueller presents a variation of this idea: by fining and giving a portion to the victim, the offender is made aware of the victim's suffering. It should be noted that this seems to differ from restitution and reparation in that it relates to emotional or mental suffering rather than pecuniary loss. Miller also sees a rehabilitative aspect to fines in that the offender is allowed to remain in the community carrying out normal obligations and must report to an administrative official to make payments.

Davidson agrees that drawing out the payment period is rehabilitative because it is a steady reminder, not a one-time payment, which can be forgotten easily.

Miller and Galvin et al see fines as individual deterrents for crimes of greed in that the offender is deprived of his or her gain. Zimring and Hawkins see individual deterrence fostered by the unpleasantness of economic deprivation. Newton carries Zimring and Hawkins's point a step further by explaining that economic deprivation works well as a deterrent in a materialistic society. Miller and the Columbia Law Review warn that the amount must not be too low to act as a deterrent; the offender must be deprived of criminal gain. Miller feels that the retributive aspect of fines is avoided if amounts are based on offenders' means, with a graduated scale for recidivism. Otherwise, a fixed fine for certain behavior becomes a "price tag" for such behavior. Davidson and van den Haag see fines as they are currently used being too low to deter. The former categorizes the fine as a business expense and nuisance. Others, such as the Columbia Law Review, label very low fines "licenses." Yet they do not unequivocally discount the fine's potential.

Other writers see fines as having limited utility, that is, under certain circumstances. Daunton-Fear, an Australian, sees the fine as a deterrent for nuisance offenses such as drunk driving and as retributive for property offenses (although she appears to use the concept of retribution interchangeably with restitution).

She also states, "It may be that courts are often driven to use the fine, not with any special purpose in mind, but simply because of the lack of suitable alternatives." Davidson shares this view. Stein, too, is ambivalent about utilitarian goals of fines, limiting deterrent value "to situations where greed was a primary motive." Otherwise Stein feels that fines are narrowly retributive.

Most discussion on deterrence relates to the individual. There is widespread pessimism about whether general deterrence is an attainable goal for any sentence. No sanction prevents crimes of passion. Uncertainty of even being caught is another aspect. Mueller makes the point that not everyone is a potential offender of each law. And even for the individual who has the ability to make a rational decision, as Challeen points out, people still smoke despite the warnings on cigarette packages.

Barrett, Packer, and Rusche and Kirchheimer reject the fine on the basis of its not serving a useful function. Barrett says it satisfies revenge motives, but also notes that fines could conceivably deter or reform criminal conduct through better publicity--so that people would know the "price" for each crime. Rusche and Kirchheimer see the fine as an indication that the state dislikes an activity, but is not seriously prepared to stop it. Thus, it is a licensing system. To Packer, fines are so trivial that offenses that are commonly fined should come under civil regulation. Packer says the state should be willing to jail for conduct defined as criminal; fines are not a "real criminal sanction."

At best, then, fines are viewed able to rehabilitate and deter individuals from repeating offending behavior. At worst, they are seen as a mild punishment, a nuisance, a license to conduct illegitimate business.

SENTENCING DISPARITY

Fines use is not only a function of laws; it is a function of individual judges. Indeed, all the laws of the various states provide broad frameworks permitting or prohibiting fines for certain offenses and stipulating maximum and sometimes minimum fine amounts. (Of course, laws also regulate time to pay, default options, where the revenue goes, and so on, but these have no direct bearing on the sentencing decision.) Given such a range of discretion, there is bound to be disparity.

Frankel is often cited for his observation that judges are not trained to sentence. Gaylin writes that geographical disparity reflects community norms and that variations among judges within one area reflect biases based on such things as race, political party affiliation, and aesthetics. Even before Frankel and Gaylin, Gaudet noted in 1949 that judges' training is not geared toward sentencing and that personality may enter into the decision. He cites a New York City Magistrates Court study by Everson around 1930 in which it was found that of two judges with similar caseloads, one gave eighty-four percent fines while the other gave thirty-four percent in the same period.

In his Ohio court study, Ryan found that the judge is an important variable determining the sentence. The Prison Research

Education Action Project concurs that judges' biases are reflected in their exercise of discretion.

This is not only a modern issue. Two centuries ago, Beccaria (1764) proposed that there should be a set punishment for each crime. His orientation, however, was less to limit disparity than to let people know the consequences of certain behavior in order to deter crime. Yet almost contemporaneously, Bentham recognized that the same punishment may affect two people differently, and he specifically referred to monetary sentences.

The debate on broad or limited discretion (and specificity in the law) still rages.

EXTENT OF FINES USE

There are little published data on fines use. A figure of seventy-five percent was published in 1953 by the University of Pennsylvania Law Review and was passed along by Rubin in 1963 and again in 1973, Davidson in 1966, and the Rutgers Law Review in 1975. Miller used a very similar figure in 1956 without noting a source. It is fascinating that the University of Pennsylvania cites a 1932 article for this figure, and researchers desperate for some measurement have kept this seventy-five percent alive for over forty years, apparently without confirmation that it reflects current fines use.

Barrett analyzed data from Massachusetts in 1959, finding that seventy-seven percent of sentences were fines; but, after removing motor-vehicle offenses, only one-quarter to one-third of the sentences

were fines. (About ninety percent of motor-vehicle offenses result in fines and these carry a disproportionate weight when aggregated with other offenses.)

A Columbia Law Review article contains the observation that fine use may have increased because of the "recent addition [to law] of a plethora of minor offenses and technical violations." When the authors of an article in the University of Pennsylvania Law Review cite 1950 statistics for the New York City Magistrates Court showing that ninety-three percent of sentences were fines, they fail to mention that a large proportion of fines were for traffic and spitting offenses.

Feeley cites a figure of forty-five percent fine sentences in the New Haven Circuit Court. Ryan's finding that eighty-seven percent paid some fine in the Franklin County, Ohio, Municipal Court does not confirm Feeley's figure for misdemeanor cases, but this is probably explained by the Ohio court's preference for fines in combination with other sentences.

Other than for white-collar crime (which will be covered shortly), the literature does not describe or prescribe fines use for felonies.

PREFERENCE FOR FINES

Most of the writings on the subject of fines prescribe them for the offenses they are currently used to punish: minor offenses, property offenses, crimes of gain, and traffic offenses. Goldfarb and Singer observe that fines are used routinely for minor offenses

regardless of the offender's pecuniary gain. Zimring and Hawkins see fines being widely used for minor offenses and van den Haag adds financial offenses. Regarding what should be done, Miller and the University of Pennsylvania article authors feel that fines are appropriate for crimes of greed because the offender is deprived of gain. Galvin et al like fines for minor property loss, but Newman states that fines should not be limited to cases of financial gain. Newman suggests that fines could be used for violation of probation, failure to make restitution as long as it was not due to inability, and even some violent crimes because "violent offenders as a total class reveal a lower recidivism rate than do other offenders." For these people, even a "do nothing approach" would be effective. The University of Pennsylvania article proposes fining sex offenders, whom prison authorities do not want. It also states that fines could be used with "gamblers and other offenders whose acts are not regarded by community mores as sufficiently evil to merit prison sentences, despite the contrary pronouncement of the legislature." Newman would like to see the New York State Penal Law revised to allow fines for felony drug sales, and he generally likes fines for felonies entailing financial gain.

The trend appears to be to encourage wider fines use; few restrictions are noted other than the common avoidance for violent offenders. Rubin relates that one judge in a 1949 survey in New Jersey excluded habitual offenders such as drunks and prostitutes. The Columbia Law Review suggest that fines be chosen for offenders who are rational and do not need therapy. The University of

Pennsylvania and Kraus (New South Wales) note frequent use of fines for first offenders. Goldfarb and Singer note that many states use jail for offenders who are not good payment prospects, but they find this unjustified, suggesting instead flexible payment methods or alternatives to work off the fine. Rochford and Espey, Larsen, and a Columbia Law Review article note the inappropriateness of imposing a fine if it would cause great hardship to the offender or his or her family.

There is disagreement about the desirability of someone else paying an offender's fine. The possibility of this arises particularly for juveniles, who tend to be unemployed. Barrett's attitude is that if someone else pays, the offender is not punished and not deterred. Daunton-Fear is likewise critical of this, but notes that some courts in Australia find it appropriate for the family or employer to pay. A California Law Review article, on the other hand, presents the argument that those who pay will keep offenders under pressure to refrain from this sort of criminal activity.

WHITE-COLLAR CRIME

White-collar crime, one type of offense for which the fine is usually preferred, has been isolated for this discussion because it is special. It often involves large gain for an offender who, when caught and convicted, may be given a commensurately high fine. Characterized by deceit rather than violence, several types of theft are under this heading. Defendants include corporations or individuals. Individuals may have acted on behalf of their companies or against them. Computer crime, major tax evasion (not the middle-

class person trying to save a few hundred dollars), and securities frauds are examples of white-collar crime. Sometimes small businesses that systematically defraud consumers, for instance by doing unnecessary repairs, are also included.

A few miscellaneous points should be made to further distinquish these cases from the general criminal caseload. First, often Federal laws have been violated, taking cases out of the local or state court mainstream. Second, defense is most often provided by private rather than public counsel. Third, publicity and notoriety may accompany these cases because they are considered interesting or involve well known defendants. It is worth noting that economists like to write about this type of crime. In fact, Becker, and Block and Lind developed complicated econometric models to describe the potential offender's decision-making process.

Galvin et al note that fines are easily paid and the offender does not suffer much. Forer, a respected judge, prefers fines at triple the gain plus forfeiture of all illegally acquired gain. "The risk of loss must outweigh the likelihood of gain." The Prison Research Education Action Project is concerned that the cost of corporate fines is borne ultimately by the consumer in higher prices and poor quality merchandise.

Coffee presents a theoretical argument favoring prison for the person who commits a crime on behalf of his or her organization. The offender has carefully planned the crime, weighing costs, benefits, and risks. Coffee's objections to fines are that the maxima are too low, having been eroded by inflation; the organization lays out the money to pay the fine, and the cost get passed along to

customers and creditors. Coffee sees the offender as trying to evade payment by seeking a reduction and delaying payment. Even if a fine is used, there are too many unknowns to calculate the optimal amount because it is easy for the offender to hide assets and the court cannot know future earnings. The offender values his or her bottom dollar more than the top dollar, and because the court will not know how much of a fine will bring the offender down to the bottom dollar, it is more feasible to deprive of one hundred percent of his or her liberty. The underlying assumption is that the potential offender must consider receiving the maximum sentence--not an average sentence--in the decision to commit the crime. Coffee implies that the court will be willing to meet that expectation.

Posner takes a more practical approach. In rejecting the idea that prison is more punitive than a fine, Posner suggests that there is some fine amount equivalent to every possible term of imprisonment for an individual, although one may not be able to calculate it. He notes that the average federal term imposed rarely exceeds two years, and the time actually served will be less due to parole and good behavior. A fine can be set high enough to impose disutility on the offender. Furthermore, a severe sentence is unnecessary because the stigma is from the conviction.

Orland is concerned that the corporation pays legal fees and fines for individuals who commit crimes on its behalf. These are businesses expenses. To discourage recidivism, fine amounts should be incremental for repeat convictions.

The subtlest points are made in an article by Mann, Wheeler, and Sarat. Like Posner, they look at the stigma of the criminal process and cite Feeley's notion of the process being the punishment. The average white-collar criminal's resources are depleted by the sentence date due to job loss, debts, and counsel fees. They quote one judge describing these people as "mortgaged to the hilt," and loss of income has an immediate disruptive effect. Furthermore, the offender may suffer rejection by family and friends. He or she may be ruined even before trial. A fine is ineffective for this bankrupt offender. And if conviction has caused loss of professional licenses, future earnings will be sharply curtailed. On the other hand, a fine is also ineffective for the extremely wealthy offender because the amount that would be truly depriving far exceeds the maximum authorized by statute. Despite the problems, Mann, Wheeler, and Sarat prefer fines to prison for white-collar offenders.

OTHER PECUNIARY SENTENCES

Restitution and reparation are appealing sentences. Galvin et al has concisely summed up the purposes as redressing the victim, rehabilitating the offender, presenting the criminal justice system as not being soft on crime, and reducing the need people feel for vengeance. They list among problems with restitution: difficulty establishing value of items that were not recovered, getting the victim's participation, offender's incapacity to pay, finding substitute services for cash payments, and monitoring installments.

Restitution and reparation appear to have more advantages than fines, but are necessarily limited to crimes of property loss and damage and personal injury. The major issues in common with fines are ability to pay and enforcement, which were noted by Forer, Mueller, and van den Haag as well as Galvin et al. Mueller and the Prison Research Education Action Project like the idea of the victim being compensated out of a fund into which the offender's restitution payment goes. This is a possible resolution of inability of the individual offender to completely compensate the victim. The Prison Research group recommends that there be a reparation schedule of allowances for various types of injuries, like workers' compensation funds. Van den Haag prefers the restitution amount to be fixed at the amount of the loss, but the payment rate to be adjusted to ability to pay. If the amount claimed exceeds the maximum authorized fine for petit larceny, the victim should have to substantiate it.

Although the system views them as distinct, Miller's opinion is that the offender regards restitution and reparation the same as a fine. Since restitution and reparation are usually part of probation, willful failure to pay may be a violation and result in imprisonment. (Sometimes restitution is made before adjudication as a private agreement or with the assistance of a neighborhood mediation center. This is not a sentence and does not present the issues of the court's setting an amount and imposing sanctions for default.)

Assessment of court costs is the other major area of pecuniary sentencing. According to Best and Birzon, the amount levied is usually less than the total costs borne by the criminal justice

system. Van den Haag's approach is that anyone convicted should bear the cost of defense and anyone acquitted should be reimbursed for the cost of defense. (This presents some obvious problems, however. If the defendant was poor enough to qualify for public defense at the start, how could he or she afford this? Should the court or state be expected to pay for even the most expensive defense?)

Lastly, there is an odd quasi-sentence category called bond forfeiture. As described by Feeley, for failure to appear, the bail bond is forfeited and the case is closed. While bail forfeiture is the usual consequence for nonappearance throughout the country, in New Haven it also becomes--as a practical matter--a guilty plea and sentence rolled together.

Feeley includes attorney costs, bond fees, lost wages, and job loss for conviction or even coming to court as other types of financial loss to the defendant.

COMBINATION SENTENCES

The fine may be used with probation, conditional discharge, or imprisonment, depending on state statutory provisions. Just as no one knows how often fines are used separately, the extent of using fines in combination is unknown. Although nothing has been published, it is likely that a few jurisdictions maintain such statistics for their own use.

Some writers have commented on the appropriateness of fines in combination. Stein says that fines should not be added to

imprisonment because the additional punitive effect is insignificant. Miller believes that if the fine is regarded as punitive, it is not theoretically compatible with probation. Daunton-Fear sees the fine as adding deterrent value to the rehabilitative value of probation, thus strengthening the whole sentence.

A distinction between the fine in addition to probation and fine as a condition of probation is made by Best and Birzon; when the fine is introduced in its own right, default cannot constitute violation of probation. A possible problem is the use of jail for default; an offender cannot be on probation while in jail. The only way it can work is to make payment precedent to the commencement of probation supervision. This is common for income-tax evasion. Fine as a condition of probation could result in a probation violation for default. Even when the fine is paid, probation could be revoked for violation of another condition. If resentenced to jail, the offender has lost the fine money.

The Columbia Law Review, Larsen, and Galvin et al discuss the use of fines with restitution. When a payment conflict arises for the less affluent offender, restitution should be paid first, in consideration of the victim.

FINE AMOUNTS

Dollar maxima, and in some states also minima, are set by statutes as limitations for fines imposed for crimes and many offenses.[1] These amounts relate to seriousness and are usually

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[1] Some offenses carry fixed fines. These tend to be of a regulatory nature, such as illegal parking.

structured by felony and misdemeanor classes. Thus, judges have broad ranges from which to set an amount for each case. There is near unanimous agreement that once the seriousness of the conviction charge is accounted for, the offender's means should be a key factor in deciding on the amount to be levied. The California Law Review, Columbia Law Review, Daunton-Fear Herlihy, Larsen, Miller, Newton, President's Commission on Corrections, von Hirsch, and Williams all address the issue of ability to pay and hardship to offenders' dependants from the point of view of indigency. Barrett believes fines should be proportional to wealth, and agrees the fine should not exceed capacity to pay, but he also makes the argument that maxima are too low. (His orientation may be a function of the period in which he wrote this article--the early 1960s. It preceded the widespread awareness of the plight of the underprivileged to which the spotlight was turned in the mid-1960s.) Rochford and Espey object to tailoring fine sentences to offenders' means, in an article relating to federal law. Their objection to individualized sentences (not just fines) is that deterrent value is diminished because offenders know they will probably be accorded leniency. Similarly, Davidson favors a relatively fixed amount to increase deterrence. He suggests that legislatures should establish a table of amounts for offenses "under a normal set of circumstances" and deviate if there are aggravating or mitigating circumstances.

The Columbia Law Review notes that the Constitution provides no description of what is an excessive fine, and Rubin points out that it is difficult for an offender to prove that a fine is excessive--most appeals have been unsuccessful. The day-fine system has not been introduced here. The California Law Review, Miller, and Williams discuss difficulties in getting offenders' financial information, and each proposes a solution. The California Law Review cites the success of the Vera Institute's bail project regarding feasibility of collecting employment information. Miller said the court could require that the offender show cause why he or she should not be fined the maximum. Thus the offender would introduce income tax records if it were deemed to be in his or her best interest. Williams goes further, recommending that restrictions concerning use of federal income tax returns be amended to give the courts access to them.

The current state of affairs is that judges themselves have the burden of determining who is indigent. In their books on public defender systems, Krantz, and Hermann, Single, and Boston explore the problems of guidelines to define indigency for eligibility for public defense. Here, too, there is great variation in standards that specify financial qualifications and the methods of information gathering. This point is not intended to suggest that eligibility for a public defender should be the same criteria for a low fine, but it is to highlight that there are no widely accepted measurements for indigency.

On Navajo reservations where poverty is endemic and where minor offenses, such as drunkenness, are commonly fined, cash bail deposits are an important feature of fine payments and maximum fine amounts are kept low (for example, fifty dollar fine maximum or five days in jail for drunkenness, five dollar fine maximum plus damages to injured party for "trespasses" (Navajo Tribal Code, 1970).

Several other writers have considered the issue of appropriate fine amounts. Forer wrote that the only limitation for white-collar crimes should be three times the value of property or money illegally acquired or harm done. Rochford and Espey set the ideal fine at double the offender's gain or victim's loss. Miller, Rubin, and the University of Pennsylvania Law Review article favor increments for recidivism.

Barrett, Davidson, Newton, and the University of Pennsylvania Law Review article all discuss the erosion of statutory maxima due to inflation. The answer is to periodically update the amounts. This point seems to be more theoretical than practical as we turn to two references that present actual figures, for the average fines are well below the maxima authorized. According to Feeley, in the New Haven Circuit Court fines rarely exceeded fifty dollars in the late 1970s, although for some offenses, they could have been higher than one thousand dollars. Ryan found that the Municipal Court in Columbus, Ohio, was more severe, although it handled the same kinds of cases as the New Haven Court. Fines were high, but judges often suspended part of the fine. After suspension the mean fine was $111 in 1978. Fines ranged from $5 to $1,750, with three-fourths exceeding $50, compared with four percent exceeding that amount in New Haven.

TIME TO PAY

No authors objected to allowing time to offenders in paying off fines. Sometimes an installment payment plan is mentioned, or it may be a deferment for lump-sum payment. The term "installment" is sometimes used loosely, seeming to include deferred payments and really meaning "time to pay."

Rubin sees time to pay as a way to avoid jail for default by an offender for whom the court previously found jail inappropriate. Miller and Larsen also regard it as a way to avoid imprisonment. Goldfarb and Singer, Larsen, and the President's Commission on Corrections expect an increased collection rate. Allowing time to pay is advocated by Goldfarb and Singer, Galvin et al, Prison Research Education Action Project, and others to help keep indigents out of jail for inability to raise the money at once, but the idea should really not be restricted to indigents. As Larsen relates, the New York State forty-eight hour rule arose out of a 1962 case involving a professional man who did not have enough money with him to pay a traffic fine on the spot. His imprisonment was given wide publicity, which led to reform.

Larsen warns that the payment plan should not be too convenient, lest the sentence lose its punitive value. He prefers a short deferment in order to avoid forgetfulness and foster deterrence and rehabilitation, which can occur only if an offender is not given a long period without punishment. The California Law Review is also concerned that the offender not go without immediate punishment. Its proposal is a hybrid of deferment and installments: give all offenders forty-eight hours if needed; if unable to pay, then allow installments, reduce the amount, or do both.

In the 1950s, the Wilmington Municipal Court found that installments presented several problems: a great deal of bookkeeping, longer to audit financial records, work for police in the event of default, and encouraging irresponsibility by offenders (based on the fact that many were rearrested before the fine was paid off). As related by Herlihy, the court switched to deferred payments. Extensions were used, but set within limits so the offender knew that payment could not be postponed indefinitely. This is similar to the California Law Review proposal, although preceding it by over a decade.

While Galvin et al like installments for "less affluent offenders," they note that high payments over a long period may be demoralizing for a low earner and subvert rehabilitation.

Van den Haag proposes an administrative procedure to encourage compliance with the payment plan. The offender should agree in writing to the terms on a form that states that prison is the alternative.

ENFORCEMENT

If practices are as reasonable as the modern wave of reform-minded researchers and philosophers propose, we now have an offender who has been accorded a rather lenient sentence at an affordable amount with time to pay it. The offender has been extended great consideration. What should be done to enforce compliance? This discussion of enforcement sanctions will be limited to contumacious nonpayment. Default due to lack of means and alternative sentences for indigents will be covered in the subsequent section.

Imprisonment has been the traditional response to willful default. There is controvery about whether it should be used at all, and if used, how it should be applied. Connolly and van den Haag advocate imprisonment as necessary to elicit compliance, fearing that without this threat, an offender would not pay. Larsen and the President's Commission on Courts approve of jail, but it is due to the absence of what they perceive as other feasible and available sanctions.

The majority espouse jail only as a last resort. The reasons for avoiding jail at this stage are the same as those to avoid it as the original sentence. Daunton-Fear, and Goldfarb and Singer, prefer public work projects and civil measures. Larsen, Miller, Newton, the President's Commission on Courts, and the Rutgers Law Review go along with civil measures. Seizure of property to sell is specified by Daunton-Fear, Miller, and the Rutgers Law Review. Daunton-Fear recommends that the offender's land be confiscated and sold if goods are not sufficient to cover the fine. Attachments of earnings is named as a possibility by the President's Commission on Courts, but Daunton-Fear believes it is most useful where the margin between disposable income and unemployment benefits is great, so the offender will not have an incentive to quit his or her job to avoid the fine. Some who favor civil action have not specified the nature of it, but presumably one option is to sue for the unpaid fine as in any tort. Larsen and Heath mention the costliness of civil collection--it may exceed the revenue produced.

Directly or indirectly, several authors touch on the court making the determination of whether the default was willful. For example, Miller would like an additional court appearance prior to commitment, at which time it would be determined if there is any chance of payment, and Larsen feels the offender should be required to show cause why he or she should not be punished for default. This is tied to the issue of whether contempt becomes an added charge--the charge for which the offender will now be sentenced.

Before addressing the length of incarceration, the purpose of imprisonment for default must be explored--it will shed some light on the jail time strategy. The California and Columbia Law Reviews and Stein make the point that jail may be intended to compel fine payment or it may be used as an alternative sentence. If intended as the former, the fine would still be outstanding upon release, and subject to civil collection. All three sources note, however, that in practice jail acts to relieve the liability or is interpreted as the punishment even in states where statutes are written in terms of compelling payment. Only where some portion of the fine is discharged by each day in jail is it really an alternative. Larsen makes the point that whether an exchange rate is used or a statutory maximum is applied irrespective of the dollar value depends on whether the aim of jail is to foster collection or to punish for willfulness. The number of days imposed for default may not exceed the maximum time authorized for the charge, and in some states it is limited to a proportion of that maximum for each charge or a fixed amount that is below the maximum.

Alternatively, jail for contempt is limited by the authorized sentence for the contempt charge.

Miller prefers an exchange rate, with a maximum of three months jail. Larsen would hold defaulters in contempt and suggests that they be punishable by an increased fine (if the offender is able to pay it), jail, or a state labor camp. Likewise, the California Law Review, and Hickey and Rubin specify a contempt charge, and the Columbia Law Review implies it in the statement that the duration of jail should relate to the offender's culpability in refusing to pay.

Newton, Rubin, and the Prison Research Education Action Project direct attention to Delaware as the only state to prohibit imprisonment for fine default, but Newton cites Delaware's use of contempt, punishable by up to thirty days in jail, for not complying with the public work order to work off the fine. Circuitously and ultimately, we return to jail: those who reject imprisonment for default add in the new charge of contempt for which they find jail acceptable. Of course, it is regarded as the very last resort--deserved only by the offender who has been blatantly recalcitrant.

FINE ENFORCEMENT AND SENTENCE ALTERNATIVES FOR INDIGENTS

Enforcement for indigents is usually treated as a default prevention problem. The key elements are to set affordable amounts and realistic installment plans, or to not use a fine at all. The reasoning is that if the amount and terms have been set correctly,

that is, at an affordable rate, if default occurs it would be willful and should be treated as such. Nonwillful default caused by an incorrect estimation should result in a modification of the fine or in resentence if the offender's financial circumstances have changed. The California and Columbia Law Reviews, Daunton-Fear, Goldfarb and Singer, Larsen, and others recommend that the amount be reduced, payment plan extended, or both, in order to allow the offender to comply with the sentence.

There have been estimates of the number of jail inmates there for fine default. The California Law Review relates that according to the United States census in 1956, sixty-eight percent of all prisoners had defaulted, although it was down to half by 1968. Hickey and Rubin also use the latter figure. The President's Commission on Courts cites a sixty percent figure for the Philadelphia County jail about twenty years ago. Heath relates that half of Canadian jail admissions in the early 1970s were for default. The Columbia Law Review cites a 1966 study in Washington, D.C. that yielded data from another angle: 105 out of 222 fined offenders ended up in jail. The assumption is that these are all people too poor to pay the fine that was set, that no one would go to jail if he or she could possibly avoid it. Futhermore, it is pointed out by the California Law Review that jail cannot compel payment by the offender who simply has no money. Beyond the landmark cases that place various limitations on jail for inability to pay, there is a pervasive attitude that jailing is an extreme, detrimental, and unfair response. The appeal of the day-fine system as a

way for indigents to avoid jail is repeated in numerous pieces, including those by Goldfarb and Singer, California and Rutgers Law Reviews, Prison Research Education Action Project, Larsen, and Newton.

For the person who just cannot pay the fine, public work projects provide a way to work off the fine without incarceration. Some exchange rate of fine dollars is to be credited for each day or hour of work. Hickey and Rubin, Daunton-Fear, Goldfarb and Singer, Larsen, Heath, and the Rutgers Law Review view public work as a sanction--the offender should be aware that he or she cannot entirely escape the sentence. A job bank that would refer offenders to potential employers is seen by the Rutgers Law Review as a method to help offenders help themselves by earning the money to pay the fine. The Columbia Law Review recommends probation or suspended sentence with a warning of incarceration for recidivism as responses to default.

Larsen states that offenders who cannot pay a fine should not be sentenced to it, but he suggests no alternatives. The President's Commission on Courts notes the need for more alternatives. While everyone rejects brief jailing for the poor person who would otherwise be fined, only Galvin et al make a specific alternative recommendation: that community work should be the original sentence (as opposed to a fine sanction). The void in this area suggests an area for development by sentence reformers.

EFFECTIVENESS

A most difficult question is whether fines are able to prevent recidivism. Very little research has been directed to this question in the United States. (Fortunately, there are some British studies, which will be covered in a separate European document complementing this review) We have located four published American studies, and a fifth from New South Wales. Each is so limited in scope that there is nothing of a generally definitive nature, and only one controls for the differing characteristics of fined and nonfined offenders. The studies are described briefly below.

Lovald and Stub studied the rearrest rates of skid-row males arrested in Minneapolis in 1957 for public intoxication. It took longer until rearrest for those who were fined than those jailed or given suspended sentences.

In 1956, policies and practices regarding parking violations on a midwestern campus changed. Fine amounts for faculty increased and sanctions for nonpayment were instituted. This provided Chambliss with an opportunity to evaluate the effect of increased penalty and enforcement. His finding was that the new system "reduced the number of transgressions."

A controlled study in the mid-1960s of different sentences for juvenile traffic violators in Salt Lake City was evaluated by Mecham. The four randomly assigned groups were sentenced to a fine, restrained from driving, made to attend traffic school, and made to write a paper on traffic safety. There was a one-year follow-up in terms of the number of additional violations and time elapsed until subsequent violation. A fine was found to be the least effective treatment, while the safety paper was the most effective.

Owens's study also dealt with traffic violators and also found fines relatively ineffective, although the sentence options were different. The sample consisted of adults convicted in California in 1963, with a two-year follow-up. Convicted offenders were systematically sentenced to a fine; fine and probation; fine and drivers' improvement school; or fine, probation, and school. "... the first year after conviction, fine and probation, and fine and school were most effective for reducing subsequent convictions.. The fine alone was less effective, as was the combination of all three levied as one sentence. In the second year, the school group had fewest convictions. It is speculated that the discontinued threat of revocation affected the probation group.

A study by Kraus compared the effectiveness of fines and probation on male juveniles in New South Wales. He selected matched samples of youths who had received one of these two sentences in 1962-63 and followed them up for five years. Recidivism for each sentence varied by charge and first offender status. His general conclusion was that there is not a significant difference between the effects of fine and probation. Therefore Kraus suggests that fines be used because they are cheaper than probation and produce revenue.

Given the prevalence of fines use, the existence of so few studies underscores that they are meted out with little thought.

This is not intended as an indictment of our judges, but it may be an indication of the fine's character.

CONCLUSION

Many writers have discussed the advantages and disadvantages of the fine sentence. It is intriguing that while there is general agreement over advantages, there is controversy over the fine's value as a sentence and perceptions about the cost and ease/difficulty of administration. The list below is a comprehensive summary of advantages and disadvantages as perceived by authors covered in this review.

Advantages

- -Avoids stigma of prison (Columbia Law Review, Galvin et al, Newton)
- -Spares offender brutality and crime-inducing experience of prison (Forer, Davidson)
- -Reduces number of prisoners (Miller)
- -Saves cost of prison or probation; cheaper than jail (Forer, Prison Research Education Action Project, Davidson)
- -Good when incapacitation not needed (van den Haag)
- -Offender remains in community as self-supporting citizen and has normal life; easier to reform out of jail (Prison Research Education Action Project, van den Haag)
- -Reduces hardship to family by keeping offender out of jail; saves cost of dependents going on welfare (Miller, Prison Research Education Action Project)
- -Revenue (Barrett, Daunton-Fear, Newton, Newman, Rutgers)
- -Cheap (Forer, Goldfarb and Singer, Galvin et al, Newman, Newton, van den Haag)
- -Cheap to impose (Daunton-Fear)
- -Requires little decision-making (Davidson)
- -Saves trouble (Davidson, Goldfarb and Singer)

Disadvantages

-May cause hardship to dependents (Daunton-Fear)
-Wide judicial discretion in setting amounts (Prison Research Education Action Project)
-Laws do not keep up with changing economy (Rubin)
-Difficulty getting financial information about offender (Miller)
-Not good if default is common (Daunton-Fear)
-Often uncollected (Galvin et al, Rutgers)
-Likely that there will be no follow-up if not paid (Rutgers)
-Cost to collect fine may exceed revenue (Larsen)
-Installments require a lot of bookkeeping (Herlihy)
-Use of imprisonment for default is costly (Larsen, Miller)
-Use of imprisonment for default may add dependents to welfare rolls (Larsen)
-Extra work for police (or other agency) who must apprehend defaulter (Herlihy)
-No protection to community (Galvin, et al)
-Perpetuates materialism (Prison Research Education Action Project)

Two administrative issues emerge. First, cost is a frequent consideration in fining and is introduced from various perspectives in the literature; for example, fines are perceived as cheaper than jail, but the expense of administering fines has not been subjected to cost-effectiveness evaluation. Second, there are problems in follow-up and collection of fines, and much dissatisfaction with the traditional use of imprisonment to compel payment or as an alternative sentence.

The above list repeats many of the issues raised in the body of this review, which included various recommendations for more reasonable use of the fine. Considering the nature of recommendations and the perceived disadvantages in current fining practice, it is startling that we have not come across any pieces on administrative innovations. If any jurisdictions are experimenting

with such things as payment by credit card or weekend hours for people to come in to pay, the results are not being published so that other courts may learn from these experiences.

One of the purposes of this literature review is to suggest areas for fines experimentation and research. The salient focal points to emerge are development of guidelines for uniformity of amounts, incorporating flexibility based on means, development of alternative sentences for indigents, determination of payment rates, and development of methods to improve payments rates if it is found that they are unsatisfactory.

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