

1565

VERA INSTITUTE
LIBRARY

THE USE OF FINES AS AN INTERMEDIATE SANCTION¹

by

Sally T. Hillsman
and
Judith A. Greene

INTRODUCTION

Intermediate sanctions are not new in American sentencing, and fines in particular are a very ancient and widely used penalty in our courts. What is new is the surge of enthusiasm for the systematic incorporation of nonincarcerative sanctions into emerging sentencing systems. This development is in direct response to the pressing fiscal and justice concerns that have arisen from the uniquely American reliance on imprisonment as the primary means of punishing criminal behavior.

Despite more than a decade of unprecedented jail and prison building across the United States, few inroads have been made in improving the conditions in our crowded and deteriorating correctional institutions. Although prison expansion has been accompanied by an explosion of experimental alternative sanctions -- community service orders, house arrest, electronic monitoring, intensive probation, boot camps and more, the intermediate penalties movement has yet to engage in any significant way the problems raised by our broad use of imprisonment. This is partly

¹ Forthcoming, Smart Sentencing? An Examination of the Emergence of Intermediate Sanctions, edited by James M. Byrne and Arthur Lurigio, Sage Publications.

because the new sanctions have been developed piecemeal, and partly because they are typically used in combination with traditional imprisonment and probation rather than imposed as stand-alone sentences.

Yet continued concern about our financial capacity to use incarceration to deliver fair and just punishment has spurred interest in creating a graduated progression of intermediate penalties, permitting imprisonment to be reserved imprisonment for violent, predatory crimes. What has emerged over the last decade is a range of nonincarcerative sentencing options that have the potential to be broadly applied and systematically scaled to provide appropriate levels of punishment across offenses of varying severity. This development has now begun to foster efforts to integrate intermediate penalties into existing or reconfigured sentencing schemes (Morris and Tonry, 1990; von Hirsch, Wasik and Greene, 1989; Knapp, 1988; Tonry, 1988; Morris, 1987).

The design of systems of graduated nonincarcerative sanctions can be encouraged by emphasizing penalties that meet the long-standing requirements of American jurisprudence: clear purposes; proportionate punishment calibrated in relation to the gravity of the offense; wide applicability across the spectrum of criminal behavior; effective enforcement; and relatively simple, inexpensive administration. In this context, among the non-incarcerative sanctions already in place in most jurisdictions, the criminal fine is a particularly attractive option.

THE FINE AS A CRIMINAL PENALTY

Fines have many characteristics that lead them to be used more widely as a criminal penalty in American courts, as well as across northern Europe and elsewhere, than is commonly recognized (Hillsman, 1990). These same characteristics make fines especially well suited to systematic application as an intermediate penalty.

The fine is unmistakably punitive and deterrent in its aim, fitting well into current trends toward retribution and deterrence in sentencing philosophy.² It stresses offender accountability by demanding the offender pay his or her debt to society, and permits the size of that debt to be scaled to reflect the severity of a particular offense across an almost unlimited range of criminal behavior.³ This flexibility also extends to adjusting the size of the offender's fine to his or her income so that equal punishment can be administered across offenders with

² "It is not difficult to find reasons for the attractiveness of fines for sentencers....Fines are unequivocally punitive, designed to deter, a significant attraction now that the treatment/rehabilitative ideal has fallen from grace. The meaning of fines is clear. Unlike community service, probation, or even custody, it is doubtful whether sentencers, defendants, victims, and public at large disagree about what a fine represents though...different sentencing purposes may result in considerable disagreement as to the appropriate size of a fine in any particular case" (Morgan and Bowles, 1981, p. 203).

³ This is not to say that some offenses might be inappropriate for a fine, although Morris and Tonry suggest that "there can in principle be no reason why the fine cannot serve as a credible punishment for nontrivial, indeed serious crimes. And no one can doubt that financial penalties can be devised that are draconic to a point where they ultimately constitute financial capital punishment" (1990, p. 112; see also, 119-122).

vastly different financial circumstances who are convicted of the same crime. Fines can also be enforced relatively easily and inexpensively even though the offender is in the community. Despite the widespread belief in American courts that fines cannot be collected (Cole, Mahoney, Thornton and Hansen, 1987), research on courts' actual track records provides significant support for viewing the criminal fine as enforceable (Hillsman and Mahoney, 1988; Wick, 1988; Tait, 1988).

Finally, the fine is already part of the sentencing repertoire of most American courts, large and small, urban and rural, and the structures to administer it effectively are generally in place (Hillsman, 1988). In addition, unlike other intermediate penalties, fines generate revenue. They can, therefore, be financially self-sustaining and possibly even provide revenue for other related purposes such as victim compensation.

Despite these obvious advantages, the fine has not yet been systematically developed as an intermediate penalty in the United States, although this situation is rapidly changing as we shall indicate below. Research on the use of fines across courts of limited and general jurisdiction in this country indicates that fine use is highly variable (Hillsman, Sichel, Mahoney, 1984), and that fines, like newer intermediate penalties, are often combined with other sanctions rather than allowed to stand on their own as the sole punishment (Cole et al., 1987, p. 8).⁴

⁴ Fines do not, however, tend to be combined with imprisonment in the United States (unless the term is suspended); rather they are most often combined with other monetary penalties (such as court costs, restitution, and fees of various types) and with

This American pattern is in stark contrast to the use of fines in much of Western Europe where they are imposed, as sole sanctions, as the sentence of choice in most criminal cases (Casale, 1981). In West Germany, for example, 81 percent of all adult-crimes and 73 percent of all crimes of violence are punished by fines as the sole penalty (Strafverfolgungsstatistik, 1986). In England, 38 percent of all offenses equivalent to our felonies and 39 percent of all violent offenses result in fines (Home Office, 1988). The use of the fine as the primary sanctioning device in Western Europe is not recent. It stems from a long-standing tradition of jurisprudence committed to retribution and deterrence as the primary purposes of sentencing that was never weakened by the treatment/rehabilitation model of imprisonment embraced by Americans in the nineteenth century (Hillsman, 1990, p. 52f).

SETTING FINE AMOUNTS: THE KEY TO MAKING FINES A USEFUL INTERMEDIATE SANCTION

Why has the fine not come into similar prominence in the United States as we have moved toward greater emphasis on punishment and deterrence in sentencing? Among American criminal justice practitioners, there lingers a deep skepticism about the usefulness of fine sentences that focuses on the absolute size of

probation. When combined with probation, it is not always clear whether probation was intended to be the primary sanction, with the fine an added punishment, or whether the fine is the primary punishment, with probation imposed as the vehicle for its collection (Hillsman, 1990, p. 61f.).

the fine: Don't fines need to be large in order to be punitive and to deter? This emphasis on large fines leads further to issues about the fairness of fine sentences: If fines are large enough to punish and deter, how can they be collected from the majority of offenders who come before American courts? And, if only those who can pay sizable amounts are fined, are not these more affluent offenders buying their way out of the more punitive sentences to imprisonment?⁵

These concerns are voiced often in the United States. They help explain why criminal justice practitioners, in a country that relies heavily on financial incentives and disincentives in many areas of social and economic life, are cautious about the effectiveness of fines to punish and deter criminal behavior.

By contrast, European discussions of the fine's usefulness emphasize the variability of fine amounts and thus the flexibility of this sanction to deliver punishment and deterrence in both a fair and effective manner (Morgan and Bowles, 1981; Albrecht, 1980; Thornstedt, 1975). Because the fine is numerical, Euro-

⁵ There is some irony that this skepticism has not discouraged American legislators and judges from imposing often large restitution payments and multiple, often mandatory, reimbursements and fees on many offenders in addition to their primary sentences. This proliferation of fees and "taxes" has been viewed less in terms of sentencing jurisprudence than as a way of transferring the social costs of crime to the offender population. A 1987 National Institute of Corrections monograph, for example, lists 23 different types of service fees and five special assessments that are being imposed in courts around the country in addition to fines, court costs, restitution and reparations (Mullaney). Even this list is not exhaustive; New York State's penalty assessment and Arizona's anti-racketeering assessment are not included.

peans note, its size (and therefore its punitiveness) can be varied to reflect simultaneously the severity of the offense and the affluence of the offender. Fines of variable amounts, therefore, if they are systematically set, are regarded as imposing a fair and equitable level of punishment as well as being collectible. Since a collected fine delivers the intended punishment, it is viewed as an effective deterrent.⁶

Fixed-fine tariff systems. Research on fining practices in the United States helps explain why American judges' focus on the absolute size of the fine and its troubling justice consequences. Despite their broad discretion in setting fine amounts, American judges generally impose fines well below statutory limits even though legislatures have recently begun to expand the fine's potential punitive range by raising fine ceilings (Hillsman et al., 1984). This pattern occurs because, in determining what penalty to impose in a particular case, the retributive trend in sentencing leads judges to emphasize the severity of the offense. When considering whether a fine would be an appropriate punishment, however, American judges generally have only "tariff" or

⁶ The research literature from both sides of the Atlantic is somewhat encouraging with regard to the deterrent value of fines, although most deterrence research is methodologically weak. Comparative re-offense rates for German offenders sentenced either to imprisonment or to day fines, for example, controlling for offense type and severity, prior record, age, and social class, suggest an advantage for fines (Albrecht and Johnson, 1980). Similar findings for the United States have been reported for Los Angeles by Glaser and Gordon (1988), and for England (McCord, 1985; Softley, 1977; Davies, 1970; and McClintock, 1963).

fixed-fine systems to guide their decision as to what would constitute an appropriate amount.

As in setting the "size" of other sentences (days of imprisonment, hours of community service, years of probation supervision), American judges tend to apply "going rates" for fines that are based upon (usually informal) understandings that the same or similar amounts will be imposed on all defendants coming before the court convicted of a particular offense. Such tariff systems have evolved in courts to meet judicial concerns about equity and consistency in sentencing.⁷ It is the extension of these traditional tariff or "going rate" systems of sentencing to setting fine amounts, however, that has limited the usefulness of fines as an intermediate sanction in the United States.

In developing tariffs for fines, American courts tend to set the going rates with an eye to the lowest common economic denominator of offenders coming before the court. This is in order to address another central judicial concern, namely that sentences be credible (i.e., that the fines they impose be collectible). As a result, fixed-fine tariff systems tend to depress fine amounts, causing them to cluster near the bottom of the statutorily permissible range. This outcome constricts the range of offenses for which judges will view a fine as an appropriate sole

⁷ Indeed, the tariff systems operating in particular courts are one of the reasons why research tends to find greater consistency in sentencing patterns within jurisdictions than across them. While tariff systems do not eliminate disparity, they do tend to reduce it.

sanction to those at the lower end of the severity spectrum, thus restricting the fine's usefulness a penalty.

In addition, insofar as the tariff systems common to American courts encourage judges to define consistency in sentencing as requiring the same fine amount for all offenders sentenced for the same crime, the punitive impact of fine sentences will be comparatively less for more affluent offenders. This clear lack of fairness distorts the principles of equity and proportionality and contributes to American judges' "ambivalence and confusion about fining" (Cole et al., 1987:19).

Variable fine systems. Research on fining practices in several Northern European countries reveals a quite different process for determining the amount of a fine (Hillsman, 1990; Casale, 1981; Albrecht and Johnson, 1980). Fining systems in West Germany, Sweden, Finland, Denmark, France, Portugal and Greece (and, more recently in Austria, Hungary and, on an experimental basis, in England) initially separate the judge's assessment about the gravity of the offense entirely from an examination of the offender's ability to pay a fine.⁸ Although both factors are crucial in setting a fine amount that is appropriate as well as just, they are only linked at the very end of the sentencing process when, taken together, they permit the judge to set a financial penalty that is proportionate to the severity of

⁸ Similar day-fine systems are also found in the penal laws of Cuba, Peru, Brazil, Costa Rica, and Bolivia, and efforts to establish such systems are progressing in Spain and Switzerland.

the crime and that produces an equal economic burden on offenders with unequal means.

First, judges in these countries determine the number of fine units to which an offender will be sentenced by selecting a number that reflects the degree of punishment appropriate for the specific criminal behavior. These units of punishment are expressed numerically (e.g., 10, 50 125), without reference to any monetary value. To ensure uniformity in setting the number of units, courts have developed (often informal) guidelines or benchmarks that indicate what range of fine units is appropriate for crimes of differing severity.

After the number of fine units is determined, the judge then reviews the offender's financial circumstances in order to set a monetary value for each fine unit. Again, European courts have typically develop rough but standardized methods for calculating these unit values. Generally, unit values are based on some proportion of a defendant's daily income that is considered a "fair share" for the purposes of fining. It is this use of daily income for valuing the fine units that has led the resulting fine sentences to be called "day fines" everywhere except England where they are called unit fines.

Using information routinely available from police, probation, or more often directly from the defendant and his or her counsel, the judge using a day-fine system estimates the defendant's daily income, calculates the unit value at some proportion of that amount, and multiplies it by the number of units to which the offender has been sentenced. The resulting "day fine",

therefore, is an amount that is in direct proportion to the seriousness of the specific criminal behavior but should also impose an equivalent economic burden on offenders convicted of the same crime who have vastly different financial circumstances.⁹

The potential of the day fine for American practice. While fines currently play a less central role in American sentencing than in Western Europe, this outcome appears to flow more from the "ambivalence and confusion about fining" that characterizes judicial attitudes than from explicit sentencing preferences. Indeed, the enormous variability in fine use revealed by research on American courts over the last decade suggests there is room for expanding the usefulness of this sentencing tool in the United States if the rigidities and resulting inequities of the tariff system can be overcome.

In many American courts, individual judges struggle to free themselves from the limitations of fixed-fine systems. Sometimes they adjust the "going rate" by reviewing whatever they can learn about an individual's circumstances at sentencing (Sichel, 1982; Hillsman et al., 1984, pp. 64-65, 182). At other times, judges modify the amounts originally imposed, either by formally excusing the outstanding balance at some point post-sentence, or by letting court supervision expire without enforcing the fine

⁹ For a more detailed discussion of the most prominent of these day fine systems, those in West Germany and Sweden, see Hillsman (1990).

order. Judges acknowledge, however, that such case-by-case decisions may not always conform to the requirements of due process or be demonstrably fair (Hillsman et al., p. 60; Casale and Hillsman, 1986).

When asked about the desirability and feasibility of experimenting with the systematic imposition of variable-amount fines, such as the European day fine, over half a national sample of American trial judges interviewed in 1985 said such a system could work in their courts (Mahoney and Thornton, 1988, p. 59f). And, as we have found since then, the judges are right; it can work. In August 1988, the first day fine in the United States was imposed by a judge of the Richmond County Criminal Court in Staten Island, New York, a borough of New York City, as part of a pilot project run jointly by the court and the Vera Institute, funded by the National Institute of Justice and the City of New York.

DAY FINES IN NEW YORK: THE STATEN ISLAND
ECONOMIC SANCTIONS PROJECT

The first systematic effort to substitute day fines for fixed fines in an American court was the product of an eighteen month planning process. It involved the Staten Island Criminal Court bench, prosecutors, public and private defense attorneys, court administrators, and planners and researchers from the Vera Institute of Justice in New York City (Hillsman and Greene, 1987).

During the previous decade, Vera researchers and colleagues from the Institute for Court Management of the National Center for State Courts had been studying American and European courts' use and administration of fines.¹⁰ From that investigation of courts' actual fining experiences emerged a belief that the European day-fine technique could provide the flexible tool needed by American courts to make the criminal fine a more useful intermediate penalty in the United States.¹¹ The initial obstacle that

¹⁰ Prior to the 1980s, little was known about the use of criminal fines in the United States, or about their collection and enforcement. The National Institute of Justice was interesting in filling this gap with policy-relevant empirical research; therefore, it funded four studies between 1980 and 1988 (Hillsman et al., 1984; Casale and Hillsman, 1986; Cole et al., 1987; and Glaser and Gordon, 1988). NIJ also funded the Staten Island day-fine demonstration project (Hillsman and Greene, 1987; Greene, 1990), and is working with the Bureau of Justice Assistance on a national day-fine demonstration (1991).

¹¹ West Germany's experience using day fines to replace fixed fines was particularly instructive. The well-documented results of this major sentencing reform were strong evidence that this systematic approach to ensuring greater equity and efficiency could facilitate the expansion of fines as a nonincarcerative option. While the policy shift was more dramatic in West Germany than would ever occur in the United States, it was nonetheless encouraging.

In response to exceedingly over-crowded conditions in West German prisons and to a high court decision that triple-celling was unconstitutional, the legislature revised the Federal Republic's penal code in 1969. The principle established by the legislature was that short terms of imprisonment (six months or less) should be replaced by a fine in all but exceptional cases. To facilitate this transition, the reform statutes required the introduction a day-fine system (based on the Scandinavian model) to ensure fines would be set at levels that were proportionate and equitable, and therefore collectible (Friedman, 1983).

Researchers from the Max Planck Institute studied the reform and concluded: "Ten years after the introduction of the fine on a large scale, our data support the view that the policy has been found politically acceptable, administratively practical and penologically sound" (Albrecht and Johnson, 1980, p. 13). This highly positive but somewhat dry assessment fails to convey the stunning impact of these changes on West Germany's use of

needed to be overcome, however, was to demonstrate that this concept could be adapted to an American context and successfully implemented in a fairly typical American court (Hillsman and Greene, 1988b).¹²

Two years after its beginning, the Staten Island pilot project has demonstrated that the day fine is a workable sentencing option: a scale of benchmarks for fine units can be informally agreed upon and implemented by all the major actors in the sentencing process; a system for valuing those units can be developed and the necessary means information secured in a busy court without disrupting the flow of cases or burdening court staff; collection procedures can be stream-lined and result in high levels of compliance without significant jailing for default; and revenues can rise as a result (Greene, 1990).

imprisonment: while prior to the reform, over 110,000 prison sentences of less than six months were imposed each year in West Germany (20% of all convictions), the number declined to just over 10,000 (1.8%) by 1976 with a corresponding increase in the number of stand-alone fines (Gillespie, 1980).

¹² The Criminal Court in Staten Island is like many other American lower courts which have long been the major users of fine sentences in this country. This court sentences a broad range of criminal offenses, including many felonies disposed as misdemeanors. Its repertoire of sentencing options includes jail sentences of under one year, supervised probation, restitution, and community service as well as fines. Fines were already in heavy use in this court; however, the judges wanted to impose fines that were more "meaningfully tailored to the individual, so that the offender understands that crime does not pay, rather it is the criminal who pays" (McBrien, 1988, p. 42). Similarly, prosecutors wanted to make these sentences more viable: "One of the functions of criminal fines is to make it hurt a little bit. By having some idea of the economic effect, you have an idea whether it's just a slap on the wrist or for real. The way it is now, fines are basically just imposed 'off the hip'" (Hurley, 1988).

Components of the Staten Island day-fine sentence. The court-based planning group began the process of replacing the traditional "going fine rates" by creating sentencing benchmarks that Staten Island judges could use as a guide to impose an appropriate number of day-fine units. Aided by data from samples of recent cases, the planning group classified common criminal behaviors coming before the court according to their seriousness. They then distributed a range of fine units across these offenses.¹³ A "discount" and "premium" number of units was established on either side of the presumptive number for each offense, to provide the judge with flexibility in individual cases. The benchmarks were then distributed in workbook form to the Staten Island bench and bar. (See Illustration I.)

Similarly, the planning group crafted a systematic method for giving a dollar value to the fine units, taking into consideration both what information was readily available to the court and the defendant's privacy rights. The court's pretrial services agency was already providing the bench with a significant amount of relevant information (often verified) for the purposes

¹³ An initial 120 unit range was selected for the Staten Island benchmark scales because it was the bottom third of the 360 unit range used in West Germany to link (at least roughly) day-fine sentences to the number of days of imprisonment they were meant to replace. Because the Staten Island court caseload does not include the full felony range of criminal offenses under New York State statutes, the misdemeanor benchmarks for this court were restricted, leaving the upper two thirds of a 360 unit range for use should day fines be expanded to offenses sentenced in the upper court.

Illustration 1
Broad Classification of Penal Law Offenses into Staten Island Day-Fine Benchmark Severity Levels (Partial List)

| Severity level/ Penal Law Number | Behavior | Offense and Degree | Day-Fine Units |
|---|------------------------|---|----------------|
| Level 1 (95-120 Day-Fine Units): | | | |
| 130.20 AM | Harm persons | Sexual misconduct | 90-120 DF |
| 120.00 AM | Harm persons | Assault 3 | 20- 95 DF |
| Level 2 (65-90 Day-Fine Units): | | | |
| 260.10 AM | Harm persons | Endangerment of child welfare | 20- 90 DF |
| 215.50 AM | Obstruction of justice | Criminal contempt 2 | 75 DF |
| 120.20 AM | Harm persons | Reckless endangerment 2 | 65 DF |
| 110-155.30 AM | Property | Attempted grand larceny 4 | 20- 65 DF |
| Level 3 (45-60 Day-Fine Units): | | | |
| 265.01 AM | Weapons | Possession of weapon 4 | 35- 60 DF |
| 155.25 AM | Property | Petit larceny | 5- 60 DF |
| 165.40 AM | Property | Possession of stolen property 5 | 5- 60 DF |
| 165.05 AM | Property | Unauthorized use of a vehicle | 5- 60 DF |
| 221.40 AM | Drugs | Sale of Marijuana 4 | 50 DF |
| 225.05 AM | Misconduct | Promotion of gambling 2 | 50 DF |
| 220.03 AM | Drugs | Possession of contraband substance 7 | 35- 50 DF |
| 110-120.00 BM | Harm persons | Attempted assault 3 | 10- 45 DF |
| Level 4 (30-40 Day-Fine Units): | | | |
| 170.05 AM | Theft | Forgery 3 | 40 DF |
| 221.15 AM | Drugs | Possession of Marijuana 4 | 35 DF |
| 110-140.15 BM | Property | Attempted criminal trespass 2 | 30 DF |
| 245.00 BM | Sex crime | Public lewdness | 30 DF |
| 110-155.25 BM | Property | Attempted petit larceny | 5- 30 DF |
| 110-165.40 BM | Property | Attempted possession of stolen property 5 | 5- 30 DF |
| Level 5 (15-25 Day-Fine Units): | | | |
| 240.37A AM | Sex crime | Loitering/prostitution | 25 DF |
| 205.30 AM | Obstruction of justice | Resisting arrest | 25 DF |
| 110-221.40 BM | Drugs | Attempted sale of Marijuana 4 | 25 DF |
| 110-265.01 BM | Weapons | Attempted possession of weapon 4 | 5- 25 DF |
| 110-120.20 BM | Harm persons | Attempted reckless endangerment 2 | 20 DF |
| 140.10 BM | Property | Criminal trespass 3 | 20 DF |
| 240.25 VIO | Misconduct | Harassment | 15 DF |
| Level 6 (5-10 Day-Fine Units): | | | |
| 165.09 AM | Property | Auto stripping 2 | 10 DF |
| 221.10 BM | Drugs | Possession of Marijuana 5 | 5 DF |
| 230.00 BM | Sex crime | Prostitution | 5 DF |
| 190.05 BM | Theft | Issuing bad check | 5 DF |
| 240.36 BM | Misconduct | Loitering 1 | 5 DF |
| 140.05 VIO | Property | Trespass | 5 DF |
| 240.20 VIO | Misconduct | Disorderly conduct | 5 DF |

Source: Sally Hillsman, 1990, "Fines and Day Fines," *Crime and Justice: A Review of Research* edited by Michael Tonry and Norval Morris, Vol. 12 (Chicago: University of Chicago Press).
 Note: AM = A-misdemeanor; BM = B-misdemeanor; VIO = violation

of setting release conditions. This included employment, other sources of income (parents, welfare, unemployment), school enrollment, residence and dependents.¹⁴

The Staten Island planning group decided to begin with the offender's daily income net of taxes, discounting that amount according to the number of dependents supported by the offender. (The formula used was based on common approaches to setting child support payments for non-custodial parents.) The initial valuation method was then tested out on a set of real cases sentenced

¹⁴ A survey of judges across the country about their fining practices indicates that judges in many courts view the lack of financial information as a major problem (Cole et al., 1987). It is possible, however, that judges in some courts could have far more information, without major structural reforms, if they asked for it.

European judges using day fines, as well as American judges setting bail, typically ask defendants and their counsel for relevant information. European judges report a high degree of confidence in the self-reported information they receive from typical offenders, and verification efforts in the Staten Island court support the parallel view of its judges. However, European judges are somewhat less confident about the accuracy of reports from higher income offenders. As a result, when such offenders are reluctant to provide verification, judges tend to use the "best guess" method based upon what they do know about the offender or can extract from him, including information about occupation, residence, make of car, etc. Since there are few appeals of these sentences, it would appear that this informal proces works relatively well.

In the United States, similar processes at the bench are common at sentencing. Most state statutes, in fact, permit extensive, virtually unlimited, presentence investigations; this provides judges with a statutory basis for requesting detailed information and documentation from individuals about their financial circumstances. The only significant legal limitation to this inquiry is the inability of American court to get tax or financial information directly from the IRS or financial institutions. In most routine criminal cases, however, this is not much of an impediment to the sentencing judge, including those imposing day fines in Staten Island (Greene, 1990).

previously by the court to see what day-fine amounts would result. In response to the findings, a second discount was added by the planning group to bring the day-fine amounts into closer conformity with the tariff levels prevailing before the reform. However, the planning group wanted to make this adjustment primarily at the lower end of the income spectrum, rather than at the higher end which they felt had been under-fined previously as a result of the "lowest common economic denominator" character of the tariffs. Thus, in the Staten Island day-fine system, net daily income is discounted for dependents and then by one-half if the offender is below the federal poverty line; if the offender's income is above the poverty line, however, it is discounted by one-third.¹⁵

¹⁵ Even with means-based fines, poverty and wealth remain difficult issues in the use of monetary penalties. Presumably a totally destitute person should not be sentenced to such a penalty; however, a person with a steady source of income, even if it is very low -- welfare or other fixed incomes -- can be fined using a means-based system, so long as reasonable installment payments are set as required by both common sense and the U.S. Constitution (Tate v. Short, 401 U.S. 395 [1971]). This logic extends to those "indigent by virtue of age" -- unemployed or in school youth -- or, for that matter, unemployed but employable adults in a household who may be fined, as they are in Staten Island, based on the assumption that they can get a minimum wage job in a fast-food restaurant, or similar establishment.

For the very wealthy, inequities may also remain with a means-based system, although they will be significantly reduced in comparison to fixed-fine systems at least for the routine criminal cases in state courts. For more specialized and rarer cases, however, that are found more frequently in the federal system, further consideration of ways to take account of very high incomes and capital assets would be useful.

The resulting "finable share" of offenders' net incomes were viewed by the Staten Island planning group as appropriate and equitable. A chart similar to a tax table was constructed with net daily income down the vertical axis and number of dependents across the horizontal axis, so that the judge on the bench can quickly locate a specific offender at the intersection of these two dimensions and select the appropriate day-fine unit value from the table. Multiplying this value by the number of fine units the judge has already selected from the benchmark scales, the calculation of the day-fine amount due is simple and routine for the sentencing judge, and predictable for the defendant.¹⁶

Results of the pilot. In practice, day fines are not as complicated as they may appear. Indeed, a participant in the Staten Island planning process tends to quipped: "There's less here than meets the eye." Once the planning group confronted and discussed the conceptual issues underlying construction of the first American day-fine benchmarks and valuation scheme, its members recognized that they were already handling the same issues on a case-by-case basis in their court every day. Crafting the mechanics of the day-fine system, therefore, became a matter of thoughtfully standardizing and systematizing their collective best judgments and making them visible to all participants in the sentencing process.¹⁷

¹⁶ Samples of the benchmarks and valuation tables from the Staten Island workbook can be found, along with illustrations of their use in specific cases, in Hillsman (1990) and in Greene (1990).

¹⁷ One of the key elements in the German day-fine legislative

It is not surprising therefore that implementation of the day fine system in the Staten Island court was relatively smooth and, as we shall discuss below, that the model is currently being adapted for use in other limited and general jurisdiction courts across the country. Although use of the day-fine system was not mandatory for the Staten Island judges, they virtually substituted day fines for fixed fines in penal law cases.¹⁸ Fine use also appears to have remained stable during the pilot year. Thus, while the process of reforming the fining process was not a disincentive to imposing fine sentences, introducing the day fine also does not appear to have encouraged the court to use fines more often, or to have changed the court's pattern of fine use, at least not during the initial trial period.¹⁹

reform was to ensure "truth in sentencing," that is, full disclosure to the defendant and the public of the method by which the amount of the criminal penalty was being determined. In Staten Island, the Day-Fine Workbook was widely circulated to the defense bar, public and private, many of whom participated in the court's pilot project, and the court's pilot activities also received positive attention from the local press as well as from the New York Times (Hurley, 1988; Gerstel, 1988; Brozan, 1988; New York Times, 1988).

¹⁸ The day fines were imposed in 73 percent of all penal law fine sentences imposed during the pilot year; the remaining fixed fine sentences involved cases handled by judges temporarily substituting in the court who had not been trained to use the Day-Fine Workbook or less common offenses that had not yet been incorporated into the benchmark scales. The Staten Island pilot also did not include criminal cases stemming from traffic violations (mostly "driving under the influence"). This exclusion was because New York State statutes provide fixed fines in these specific cases and planners did not want to deal with this legislative issue during the initial trial of an American day-fine system.

¹⁹ More detailed analysis of this issues will be forthcoming in an evaluation of the pilot being conducted by Laura Winterfield of the Vera Institute Research Department under a grant from the

The impact of the day fine is most clear in the increased variability of fine amounts and in their overall size. Under the traditional fixed-fine system, fines clustered at the court's different tariff points; under the day fine, they scattered across the statutorily permissible range (and would have scattered further if state statutes did not limit that range). Furthermore, fine amounts rose, reflecting the larger day-fine amounts levied on more affluent offenders. The total dollar amount of fines ordered using the day-fine method during the pilot year rose approximately eighteen percent compared to the previous year, according to project data.

However, the real impact of this increase in fine amounts was not as large during the pilot year as these data suggest. This is because the Staten Island day-fine pilot had to operate within low statutory fine maxima that the state legislature has not increased since 1965. These statutes effectively "capped" about a quarter of the higher fine amounts arrived at by the Staten Island judges through application of the day-fine system. Without these statutory fine limits (\$1000, \$500, and \$250 for different levels of misdemeanors), the mean day-fine amount in

National Institute of Justice. Using multinomial logit, researchers are modeling the sentencing process in Staten Island before and after introduction of the day fine to see if there are any changes in sentencing patterns; if so, the analysis will address what non-fine sentencing categories (e.g., from probation, imprisonment, or from an unconditional discharge) day fines displaced.

the first year of the pilot would have been 65 percent higher than the mean under the tariff system in the previous year (\$372 compared to \$226). With the caps, however, the mean day fine actually imposed was still higher than before (\$246), but only by eight percent (Greene, 1990).

Despite the somewhat higher fine amounts imposed during the pilot, the court's already good record of collection remained good. Project data indicate that, to date, 70 percent of the offenders sentenced to day fines during the pilot year have paid the full amount and another 1.3 percent had paid a substantial proportion of the amount originally set before the court remitted the balance. An additional 13 percent of the offenders originally sentenced to a day fine have been returned to court for resentencing (generally to community service, "time served" pre-trial, or to a jail term averaging eleven days); two percent are still paying or have their cases under appeal.

In all, therefore, 84 percent of the offenders sentenced to a day fine in Staten Island have had their sentence enforced by the court, most through payment of the original day fine and a few through revocation of the fine and a resentence; enforcement has failed with the remaining 14 percent for whom an arrest warrant is currently outstanding. This is a significant track record for compliance with an intermediate penalty. Furthermore, to achieve this level of compliance, the court needed to resort to the most coercive device, a brief period of imprisonment for default, in relatively few cases (10% of the completed cases).

Given the successful implementation of the day fine pilot, and the justice as well as revenue implications of these program results,²⁰ the New York State Legislature will soon consider a bill to raise the fine maxima as well as to formalize the day fine for application in other jurisdictions within the state.

THE FUTURE OF THE DAY FINE AS AN INTERMEDIATE PENALTY

Continued adaptation of the day-fine concept to the American context, based upon the model developed in Staten Island, is occurring beyond the State of New York. The Maricopa County Superior Court (Phoenix, Arizona) and its Adult Probation Department will soon launch a pilot, with support from the State Justice Institute, that will extend day fines into the felony range. The work of this court will be significant for other reasons as well.

First, the Superior Court would like to test whether day fines can be used as an alternative to supervised probation for individuals, now sentenced to probation for a felony conviction, who do not require the full range of supervision and services typically provided by the Probation Department. The goal is to provide an appropriate punishment for a significant number of felony offenders while, at the same time, conserving the scarce

²⁰ To date, 77 percent of the day-fine dollars actually levied by the Staten Island court have been collected. The project estimates, however, that the dollar value of fine revenues would have been approximately 79 percent higher if the statutory fine maxima had not capped the fines for the most affluent offenders sentenced by the court (Greene, 1990).

resources of the Department so it can expand the efforts of its active Community Programs Division to provide different types of supervised intermediate penalties for cases now being incarcerated. The Probation Department will monitor those sentenced to day fines, but only with regard to their payments, until they have fulfilled the obligation established by the court using the day-fine system.

The second significant dimension of the Maricopa Court day-fine pilot stems from the fact that, by Arizona statute, the judges must impose a full array of mandatory monetary penalties (including several that are fixed amounts as well as full, maximum restitution) on all offenders regardless of their sentence. Planners from the court, probation department and the Vera Institute are addressing this issue, increasingly common around the country, by using the day-fine system to set a total dollar amount available for sentencing that is proportionate to the offense and reflective of the offender's means. This amount will be distributed by the judge to the various monetary penalties required by law and selected by the judge. As indicated above, the offender will then remain under court control on the special fine-monitoring caseload of the Probation Department only so long as it takes to collect the total day-fine amount; if additional mandatory amounts are still owing (i.e., drug fines), civil enforcement mechanisms can be invoked.²¹

²¹ By projecting hypothetical day-fine amounts using actual Superior Court cases, planners estimate that the day fine will cover all mandatory monetary penalties in over eighty percent of the target cases. In most of these cases, the day fine will also

While Phoenix and New York State pursue these new agendas to improve existing day-fine models and extend their application, the Bureau of Justice Assistance will also initiate a national day-fine demonstration involving three additional sites (1991). It is hoped this effort will be evaluated by the National Institute of Justice. It will provide an important test of the capacity of American courts not only to develop day-fine sentences, but also to place them within an array of intermediate penalties that provides an alternative to imprisonment.

Finally, two states that have already moved significantly in the development of structured sentencing schemes (Minnesota and Oregon) are being a process to integrate nonincarcerative penalties into a graded progression of sanctions. In 1990 the Minnesota legislature directed its sentencing guidelines commission to establish a system of day fines as part of this effort, and in Oregon the sentencing guidelines council is moving forward on a parallel path.

It remains to be seen, however, whether these or other American jurisdiction will move in the direction suggested by Morris and Tonry, in their pathbreaking book on intermediate punishments, to make "the fine the basic coin of punishment, ...the

include a non-mandatory amount imposed to cover the monitoring activities of the Probation Department. However, because of the mandatory full damage standard for restitution required by the Arizona statutes, a small proportion of target cases will be excluded from the day-fine experiment because their restitution obligation will exceed the amount calculated under the day-fine system.

preferred sanction in all cases where a prison sentence of two years or less is to be imposed" (1990, pp. 123-124). The pre-conditions for the fine to be such a building block in a rational system of sentencing, according to Morris and Tonry, are "a principled means for adjusting the amount of the fine both to the offender's culpability and to his resources, and ... efficient and reliable systems of enforcement and collection to assure that fines imposed with in fact be paid" (ibid). In the last decade, American courts have come a long way toward meeting this challenge.

REFERENCES

- Albrecht, Hans-Jorg. 1980. Strafzumessung und Vollstreckung bei Geldstrafen. Berlin: Duncker and Humbolt.
- Albrecht, Hans-Jorg, and Elmer H. Johnson. 1980. "Fines and Justice Administration: The Experience of the Federal Republic of Germany." International Journal of Comparative and Applied Criminal Justice 4:3-14.
- Beristani, Antonio. 1976. "Penal and Administrative Fines in Relation to Prison Sentences." International Criminal Justice Review 302:253-261 and 303:282-288.
- Brozan, Nadine. "In S.I. Court, Each Is Fined to Fit Means." New York Times. 17 Sept. 1988.
- Bureau of Justice Assistance, Office of Justice Programs. 1991. "Structured Fines." Edward Byrne Memorial State and Local Law Enforcement Assistance Program. Washington, D.C.: U.S. Department of Justice.
- Casale, Silvia S.G. 1981. "Fines in Europe: A Study of the Use of Fines in Selected European Countries with Empirical Research on the Problems of Fine Enforcement." Working Paper no. 10, Fines in Sentencing. New York: Vera Institute of Justice.
- Casale, Silvia S.G. and Sally T. Hillsman. 1986. The Enforcement of Fines as Criminal Sanctions: The English Experience and Its Relevance to American Practice. Executive Summary. Washington, D.C.: National Institute of Justice.
- Cole, George F., Barry Mahoney, Marlene Thornton, and Roger A. Hanson. 1987. The Practices and Attitudes of Trial Court

- Judges Regarding Fines as a Criminal Sanction. Washington, D.C.: National Institute of Justice.
- Davies, Martin. 1970. Financial Penalties and Probation. Home Office Research Study, no. 5. London: H.M. Stationery Office.
- Friedman, Gary M. 1983. "The West German Day-Fine System: A Possibility for the United States?" University of Chicago Law Review 50:281-304.
- Gerstel, Joan. "Experimental Island Program Fines Rich More." Staten Island Register. 15 Sept. 1988.
- Gillespie, Robert W. 1980. "Fines as an Alternative to Incarceration: The German Experience." Federal Probation 44(4):20-26.
- Glaser, Daniel, and Margaret A. Gordon. 1988. Use and Effectiveness of Fines, Jail, and Probation. Los Angeles: University of Southern California, Social Science Research Institute.
- Greene, Judith A. 1990. The Staten Island Day Fine Experiment. New York: Vera Institute of Justice.
- . 1988. "Structuring the Criminal Fines: Making an 'Intermediate Penalty' More Useful and Equitable." Justice System Journal 13(1):5-16.
- Hillsman, Sally T. 1988. "The Growing Challenge of Fine Administration to Court Managers." Justice System Journal 13(1):5-16.
- . 1990. "Fines and Day Fines." In Crime and Justice: A Review of Research, Volume 12, edited by Michael Tonry and Norval Morris. Chicago: University of Chicago Press.
- Hillsman, Sally T., and Judith A. Greene. 1987. Improving the Use and Administration of Criminal Fines: A Report of the Richmond County, New York, Criminal Court Day-Fine Planning Project. New York: Vera Institute of Justice.

- Hillsman, Sally T., and Barry Mahoney. 1988. "Collecting and Enforcing Criminal Fines: A Review of Court Processes, Practices and Problems." Justice System Journal 13(1):17-36.
- 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.
- Home Office. 1988. Criminal Statistics, England and Wales, 1987. London: H.M. Stationery Office.
- Hurley, John E. 1988. "Island Court Refining Criminal Fine System." Staten Island Sunday Advance (September 11), p. A-1.
- Knapp, Kay. 1988. "Structured Sentencing: Building on Experience." Judicature 72:46.
- McBrien, Rose. 1988. "Tailoring Criminal Fines to the Financial Means of the Offender--a Richmond County Judge's View." Judicature 72(1):42-43.
- McClintock, F.H. 1963. Crimes of Violence. London: Heinemann.
- McCord, Joan. 1985. "Deterrence and the Light Touch of the Law." In Reactions to Crime: The Public, the Police, Courts, and Prisons. New York: Wiley.
- Mahoney, Barry, and Marlene Thornton. 1988. "Means-Based Fining: Views of American Trial Court Judges." Justice System Journal 13(1):51-63.
- Morgan, Rod, and Roger Bowles. 1981. "Fines: The Case for Review." Criminal Law Review (April), pp. 203-14.
- Morris, Norval. 1987. "Alternatives to Imprisonment: Failures and Prospects." Criminal Justice Research Bulletin III(7).
Huntsville, Texas: Sam Houston State University.

- Morris, Norval, and Michael Tonry. 1990. Between Prison and Probation: Intermediate Punishments in a National Sentencing System. New York: Oxford University Press.
- Moxon, David, Mike Sutton and Carole Hedderman. 199_. Unit Fines: Experiments in Four Courts. Research and Planning Unit Paper 59. London, England: Home Office.
- Mullaney, Fahy G. 1987. Economic Sanctions in Community Corrections. Washington, D.C.: National Institute of Corrections.
- New York Times. "Criminal Fines, by the Day." Editorial, August 29, 1988.
- Sichel, Joyce L. 1982. "Report on Visits to Selected State and Local Courts." Working Paper no. 8, Fines in Sentencing. New York: Vera Institute of Justice.
- Softley, Paul. 1977. Fines in Magistrates' Courts. Home Office Research Study no. 43. London: H.M. Stationery Office.
- Strafverfolgungsstatistik 1985. 1986. Wiesbaden: Statistisches Bundesamt.
- Tait, Jan. 1988. "A Court-Based Defendant Notification System for Traffic Defendants." Justice System Journal 13(1):73-79.
- Thornstedt, Hans. 1975. "The Day Fine System in Sweden." Criminal Law Review (June):307-312.
- Tonry, Michael. 1988. "Structured Sentencing." In Crime and Justice: A Review of Research, Volume 10, edited by Michael Tonry and Norval Morris. Chicago: University of Chicago Press.
- von Hirsch, Andrew, Martin Wasik and Judith Greene. 1989. "Punishments in the Community and the Principles of Desert." Rutgers Law Journal (Spring) 20(3):595-618.

Wick, Karen A. 1988. "Evaluating Three Notification Strategies for Collecting Delinquent Traffic Fines." Justice System Journal 13(1):64-72.