

Tailoring criminal fines to the financial means of the offender

VERA INSTITUTE
LIBRARY
1555

American judges lack experience with taking financial means into account when imposing monetary sanctions. The "day-fine" system, which is used in several Western European countries, can serve as a useful model and will soon be tested in the United States.

by Sally T. Hillsman and Judith A. Greene

Because dissatisfaction with present sentencing options is widespread, and jail and prison overcrowding is acute, the use of fines as criminal sanctions is once again attracting the attention of American judges and other policymakers. Recent surveys in state trial courts show that American judges who handle criminal cases generally view fining positively and use fines more frequently than is commonly recognized.¹ But they, and other criminal justice practitioners, identify two major impediments to improving the usefulness of the fine as a sanction: the assumption that poor offenders cannot pay fines and the belief that fines allow more affluent offenders to buy their way out of punitive sentences. However, nearly a decade of empirical research on courts' experiences with fines indicates that problems in their administration and collection are not inevitable. Because they are very closely tied to the principles (or lack of principles) guiding fine use by American courts, these problems can often be remedied by changes in court policy and procedure.²

Since 1980, researchers at the Vera Institute of Justice, in conjunction with colleagues at the Institute for Court Management of the National Center for State Courts and the University of Connecticut, have been examining courts' experiences with criminal fine sentences in both the United States and Western Europe.³ These studies have documented the little-explored phenomenon that fines are—and have been for some time—an important sentencing tool in American criminal courts. But they also have shown that fine use is highly variable across

American courts and that few judges in this country use the fine as a sole sentence if the offender has a prior record and the offense is moderately serious. This is in sharp contrast to sentencing practices in some Western European criminal justice systems where the fine is widely used as a sole penalty for recidivist offenders and where, as a matter of policy, fines are imposed as the major alternative to short terms of imprisonment.⁴

Making fines more useful

To make fines usable as punishment in more criminal cases, American judges, prosecutors and other policymakers indicate they need better ways to set fine amounts. Those ways should provide amounts that are not only proportionate

Day-fine systems were initially proposed by Scandinavian criminologists; the first system was implemented in Finland in 1921, followed by Sweden, Denmark, West Germany and Austria.



1. Hillsman, Sichel, Mahoney, *FINES IN SENTENCING: A STUDY OF THE USE OF THE FINE AS A CRIMINAL SANCTION* (Washington, D.C.: National Institute of Justice, 1984); Cole, Mahoney, Thornton, Hanson, *THE PRACTICES AND ATTITUDES OF TRIAL COURT JUDGES REGARDING FINES AS A CRIMINAL SANCTION* (Washington, D.C.: National Institute of Justice, 1987); Cole, Mahoney, Thornton, Hanson, *The Use of Fines by Trial Court Judges*, 71 *JUDICATURE* 325 (April-May, 1988).

2. Casale & Hillsman, *THE ENFORCEMENT OF*

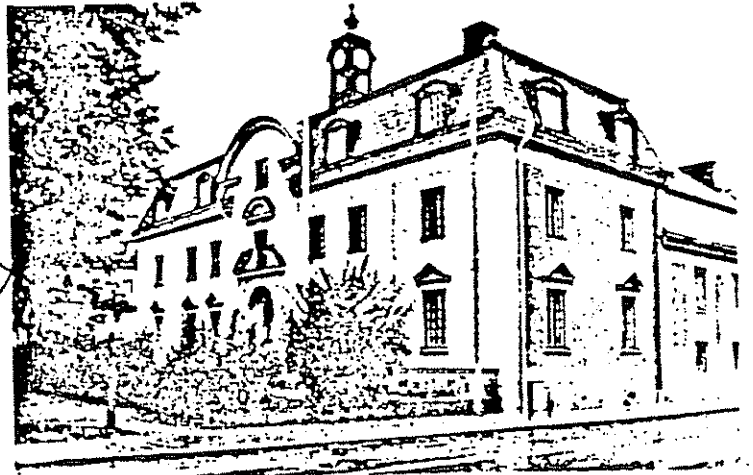
FINES AS CRIMINAL SANCTIONS: THE ENGLISH EXPERIENCE AND ITS RELEVANCE TO AMERICAN PRACTICE (Washington, D.C.: National Institute of Justice, 1986).

3. Hillsman, et al., *supra* n. 1; Casale & Hillsman, *supra* n. 2; Cole, et al., *supra* n. 1; Hillsman, Mahoney, Cole, Auchter, *Fines as Criminal Sanctions, RESEARCH IN BRIEF*, National Institute of Justice (1987).

4. Casale & Hillsman, *supra* n. 2.

The District Law Courts at Norrköping, Sweden.

PHOTO FROM SWEDISH ARCHITECTURE DRAWINGS 1640-1970.
COMPLIMENTS OF SWEDISH TOURIST BOARD IN CHICAGO



to the gravity of the offense and consistent across offenders convicted of similar crimes, but are also financially equitable. Currently, courts throughout the United States tend to impose fine amounts that are well below statutory limits. This is despite the efforts of many state legislatures to increase statutory fine maxima in order to make punitive fines available to judges seeking ways to impose sanctions against better-off offenders. The narrow range of actual fine amounts comes about because the retributive trend in American sentencing policy focuses judges primarily on the severity of the crime in determining the sentence. In considering whether to impose fines, judges find their choices as to fine amounts constrained by a tendency for American courts to settle for "tariff" systems (fixed amounts set for specific offenses). These systems tend to depress fine amounts, causing them to cluster near the bottom of the permissible range and limiting the fine's usefulness as a punishment.

The tariff systems common to many American courts are based upon informal understandings that fixed fine amounts will be imposed on all defendants convicted of a particular crime. Because American judges generally appear to equate equity with consistency, our research indicates that they typically set fine amounts with an eye to the lowest common economic denominator of offenders coming before the court. Fixed-fine systems, there-

fore, limit the sentencer's ability to adjust the fine amount to an individual offender's means as well as to crime severity. As a result, the range of cases in which fines are used as a sole sanction is restricted in most American courts to the less serious crimes or to first offenders.

American judges acknowledge a lack of experience with taking means into account so as to impose monetary sanctions that systematically provide both proportionality and equity in sentencing. Western European criminal justice systems, however, provide important and increasingly well-studied experiences with different approaches to fining that are highly relevant to improving the usefulness of fines in American criminal courts. As a matter of public policy, courts in Sweden, West Germany and England (among others) have moved toward fines as the sentence of choice in most criminal cases (including non-trivial ones) and as their major alternative to imprisonment.⁵ In West Germany, for example, after judges were encouraged by changes in legislation to limit their use of short-term imprisonment (six months or less), the number of such sentences decreased from over 113,000 (20 per cent of the total) to under 11,000 (1.8 per cent) without any increase in the frequency of longer sentences of imprisonment. Instead, the proportion of fine-alone sentences increased from 63 per cent of the total to over 80 per cent with no increase in collection problems.⁶ To implement sentencing policies that rely heavily on monetary penalties, several Western European criminal justice systems have developed principles and practices for imposing means-based fines with

5. Hillsman, et al., *supra* n. 1; Greene, REPORT TO THE GERMAN MARSHALL FUND OF THE UNITED STATES ON DAY-FINE STUDY TOUR AND RICHMOND CRIMINAL COURT DAY-FINE PLANNING CONFERENCE (New York: Vera Institute of Justice, 1987); Casale, FINES IN EUROPE: A STUDY OF THE USE OF FINES IN SELECTED EUROPEAN COUNTRIES WITH EMPIRICAL

RESEARCH ON THE PROBLEMS OF FINE ENFORCEMENT (New York: Vera Institute of Justice, Working Paper #10, 1981).

6. Gillespie, *Fines as an Alternative to Incarceration: The German Experience*, 44 FEDERAL PROBATION 20 (1980).

a success that has attracted the attention of American judges and legal scholars.

Day-fine systems

Most notable are the experiences of some European courts with what are referred to as "day-fine systems" because the fine amount is linked to an offender's daily income. Day-fine systems were initially proposed by Scandinavian criminologists; the first system was implemented in Finland in 1921, followed by Sweden, Denmark, West Germany and Austria. Despite procedural variation, all day-fine systems are designed to produce monetary punishments that are proportionate to the gravity of the offenses, but equivalent in punitive impact for offenders with different financial resources.

In practice, the judge using a day-fine approach first sentences an offender to a certain number of fine units (e.g., 10, 50, 125 units) which reflects the degree of punishment the judge deems appropriate for the offense. To help ensure that decisions as to the number of fine units are systematic and consistent (within a judge's own sentencing activities and across a given court), the judges using day fines have tended to develop flexible, written guidelines. After determining the appropriate number of fine units, the judge calculates the monetary value of each unit according to the means of the particular offender being sentenced. To do so, the judge uses information routinely available from the police, the court, probation or the defendant (often the latter). In Sweden, for example, the process is guided by a uniform method of calculating ability to pay which has been promulgated by the Prosecutor General's Office. Through this two-step sentencing process, the total monetary penalty the judge imposes—the degree of punishment—is in proportion to the offense's seriousness but, at the same time, should cause an equivalent level of economic burden across offenders who have different means.⁷

When European courts began using day-fine systems, fine amounts rose significantly, to reflect just punishment for more affluent offenders, and the fine's usefulness as a sanction was broadened. This took place, however, without increasing default rates, imposing costly demands on enforcement systems and without increasing re-offending.⁸

Adapting day-fines to U.S. courts

In response to increasing interest from American judges and other policymakers about approaches to means-based fining and about the day-fine in particular, Vera Institute researchers and criminal justice planners began to focus on the need for a thoughtful adaptation of the European day-fine model to an American court. In 1986, the Richmond County Criminal Court (Staten Island, New York) and the Richmond County District Attorney's Office agreed to design a day-fine system for the court with the assistance of the Vera Institute. The goal was to replace the court's current fixed-fine system with a method of setting fine amounts, tailored to the court, that would permit means, as well as offense severity, to be taken into account.⁹

The planning process, supported by the National Institute of Justice and the German Marshall Fund of the United States, began in the fall of 1986; an operational design to introduce day fines into this first American court was completed at the end of 1987. It involved all the judges and other key practitioners in the Richmond jurisdiction, experienced Vera Institute planners, European judges and prosecutors who were experts in operational day-fine systems and American legal scholars. As it progressed, it drew the attention of a variety of policymakers, criminal justice practitioners and researchers from around the country who were interested in expanding the repertoire of flexible, enforceable sanctions available in American courts.¹⁰ In mid-1988, the Richmond judges and District Attorney's Office will begin substituting day fines for virtually all the fixed fines now used by the court for penal law offenses, and potentially as a substitute for other sanctions as well.

Reform purposes

Introducing a sentencing system that tailors the fine amount to an offender's means, as well as to the offense, should increase the efficiency of collection and enforcement efforts, thereby enhancing the credibility of the sentence and widening its usefulness as a criminal sanction. There is substantial research evidence supporting the notion that fines set more closely to the means of the offender are also more collectable.¹¹ The opportunity afforded by the experiment in the Rich-

mond Criminal Court to test the effects of such a reform on existing sentencing practices in a typical American court has broad implications for a national audience of criminal justice practitioners and policymakers who are interested in developing effective sentencing options, including those that might serve as alternatives to some sentences of imprisonment.

Building appropriate sentencing options. The trend in sentencing policy in the United States in recent years has been toward increased emphasis on incapacitation, deterrence and punishment. Mandatory sentencing schemes, along with other limitations on the discretion of judges, have contributed to a growing strain on our correctional resources. This is especially so because both the public and policymakers in the United States have tended to view imprisonment not only as the paramount means for the effective punishment and deterrence of crime, but also as virtually the only means. While the heavy use of jail sentences in many American lower courts reflects this general trend, it is also driven by a perceived scarcity of appropriate alternative punishments.

Probation resources, for example, tend to be very scarce in lower courts and, when they do exist, they are often over-taxed so that the probation sentence loses all credibility. Conditional discharges are nearly impossible for most courts to monitor and, in addition, are perceived as failing to deliver any punitive sting. Newer sentencing options which have emerged in recent years under the banner of "alternatives"—

7. Casale, *supra* n. 5; Hillsman, et al., *supra* n. 1; Greene, *supra* n. 5.

8. Albrecht & Johnson, *Fines and Justice Administration: The Experience of the Federal Republic of Germany*, 4 INT. J. OF COMP. AND APPLIED CRIM. JUST. 3 (1980).

9. It was determined that statutory changes were not required in New York State for day fines to be introduced as a sentence. However, current statutory fine maxima will undoubtedly limit the size of the day fines imposed in some cases; it is likely this will encourage future efforts for legislative reform of this aspect of the sentencing statutes if the day-fine experiment proves successful.

10. Hillsman, "Fines as Criminal Sanctions," Statement before the United States Sentencing Commission (Washington, D.C.: July 15, 1986); Hillsman, "Criminal Fines as an Alternative Sanction," paper presented at the National Criminal Justice Association (Wrightsville Beach, North Carolina: May 28, 1987); Hillsman, "Day Fines: The Adaptation of a European Innovation to the American Context," paper presented at the American Society of Criminology (Montreal: November 14, 1987).

11. Casale & Hillsman, *supra* n. 5.

restitution, community service, enhanced probation and electronic monitoring—are often difficult and/or expensive for courts to supervise. Moreover, to ensure program success, they often target narrow groups of offenders.

In this context, the fine emerges as a traditional sentencing device with the potential to become a major punishment option. Its advantages as a criminal sanction are well recognized:

- it is unmistakably punitive in its aim;
- it can deprive offenders of ill-gotten gain;
- it is sufficiently flexible in its structure to permit adjustment to a level that is both appropriate to the offender's resources and to the seriousness of the offense;
- it is relatively inexpensive to administer, relying primarily on existing administrative agencies and procedures;
- it can be financially self-sustaining and provide revenue for related social purposes such as victim compensation;
- it does not further destroy the offender's ties to family and community; and
- it prevents the potentially criminalizing effects of removing offenders from jobs and/or other conventional activities in the community and confining them in idleness and the intimate criminal companionship of today's overcrowded jails and prisons.

For the potential of the fine to be realized, however, the structural limitations of the typical American fixed-fine system must be overcome. The European day fine is a device intended to do just this by breaking the decision process into two separate stages: one takes the offense into account (but not the offender's means); the other takes means into account (but not the offense). By doing this, the day fine can address directly the major impediments to the fine's usefulness as a *sole* sanction in many American courts. The poverty of some offenders can be taken into account even if the offense is serious, and the affluence of other offenders can likewise be acknowl-

edged even if the offense is not serious. A primary purpose of the Richmond day-fine project, therefore, is to test how broadly judges will use the fine when they are freed from the constraints of a fixed-fine system.

Reducing reliance on jail sentences. Legislative initiatives at both the state and federal levels to raise statutory fine maxima are succeeding. This invites still wider application of the fine to some types of crimes, which now commonly draw jail terms, and to offenders, who now receive fines that are less punitive than might be appropriate because courts' tariff systems make it difficult for judges to increase the amount of their fines without violating the principle of consistency (or uniformity) in sentencing.

European day-fine systems provide several useful models for American courts to explore new applications of the fine sentence. The ballooning problem of jail overcrowding in the United States has put considerable pressure on criminal justice policymakers to search for viable sentencing alternatives. This is especially true for those petty offenders who typically receive short terms of incarceration for repeat criminal behavior which, though presenting no great danger to public safety, requires some measure of credible punishment. The European day-fine experience suggests that with the introduction of a structure that can ensure both equity and efficiency, judges could expand the role of the fine as an alternative penalty.

One approach to day-fines—as found in West Germany—views substantial fines as a replacement or “ransom” for terms of incarceration. This model creates a somewhat different (though potentially overlapping) set of implications from an alternative view of the fine sentence as “economic jail,” as found in Sweden. In the first model, for example, the fine would be felt as a substantial sting in order to approach balance with the tangible punitive weight of jail; in the second approach, however, a relatively milder measure of economic deprivation might suffice, but it would have to be sustained for a period of time determined at sentencing.¹²

A central purpose of the Richmond project is to develop a day-fine structure that is suited to this American court, but which helps judges position fines in

relation to offense severity in a way that enables them to use fine sentences as an alternative to some current jail sentences.

The Richmond Criminal Court

The Criminal Court of Richmond County is a fairly typical limited jurisdiction trial court in a county whose economic and social base makes it similar to many moderate-sized, suburban American communities. As such, it is an excellent court to experiment with innovation in fining. Traditionally, lower courts in the United States are the primary users of fine sentences, both alone and in combination with other penalties. “Hybrid” general jurisdiction trial courts—those that handle a wide variety of misdemeanor and felony cases—also tend to use fines fairly extensively. Among American courts it is only those general jurisdiction courts that deal exclusively with felonies which tend to use fines sparingly and rarely as a sole sanction.¹³

In addition, the short-term imprisonment sentences increasingly used as punishment by lower courts in this country play at least some role in driving the overall sentencing system. Therefore, insofar as fines can be structured to substitute for terms of imprisonment, it is likely to be initially easier to accomplish this at the less severe end of the spectrum of cases that now receive custodial sentences. For example, in a given community, judges may hesitate to give (and prosecutors to recommend) non-imprisonment sentences for more serious cases, when cases of lower severity are receiving jail sentences. It is probable, therefore, that until there are effective alternatives in use at lower levels of the offense spectrum, alternatives at higher levels will have less credibility.

The caseload of Richmond Criminal Court makes it a desirable location for the day-fine innovation because it includes a variety of cases with a wide range of offenses, including many that prosecutors charge as felonies but later reduce to misdemeanors.¹⁴ Judges in this court already use fines extensively as sole sanctions and have access to a repertoire of existing sentencing options including supervised restitution and community service, as well as the more traditional probation sentences, unconditional discharges and terms of imprisonment up to one year.

12. Greene, SUGGESTIONS FOR A PROPOSED DAY FINE PLAN FOR RICHMOND COUNTY (New York: Vera Institute of Justice, 1986).

13. Hillsman et al., *supra* n. 2, at 28; Cole et al., *supra* n. 1.

14. These include, for example, assault, reckless endangerment, robbery, grand larceny, criminal possession of stolen property, possession of a controlled substance, forgery and fraud.

The single most important characteristic of this court, however, is the interest in fine innovation exhibited by its judges and by the jurisdiction's district attorney and his chief lower court supervisor. They are enthusiastic about introducing the day fine into the court and have committed their scarce time and resources to its planning and implementation.

Components of the day fine

To address the challenge of developing an American day-fine model adapted to the Richmond court context, the judges needed a common starting point to facilitate conversion from fixed-sum fines to day fines. The basic structure of the day fine as a sentence suggests that informal, flexible benchmarks can be helpful in setting the number of day-fine units for a particular offense in relation to its gravity, and that a systematic method for valuing those day-fine units in relation to a specific offender's ability to pay is also useful.

Establishing benchmarks to set the number of day-fine units. Vera Institute planners and Richmond County judges, prosecutors and defense attorneys have developed an informal, but comprehensive, framework of standards to be used in determining the number of day-fine units to be imposed in individual cases. In Sweden, such guidance is provided by circulars promulgated by the regional public prosecutor's offices for use in routine cases which can be resolved by prosecutor's penal orders. The practice of the courts is generally to follow these benchmarks. In a somewhat different manner, courts in many West German jurisdictions have developed informal guidelines for setting the number of day-fine units.

Beginning with the 70 most common offenses for which sentences are imposed in the Richmond Criminal Court, all penal law misdemeanors and violations were sorted according to the relative

degree of seriousness of the specific criminal behaviors typically involved. These rankings were adjusted where necessary to reflect the current sentencing norms of the court.

This process resulted in a classification framework of six severity levels, representing an upper and lower band for each of three offense groups (high, medium and low severity). The classification system includes lesser victimizing crimes, drug and contraband offenses, offenses involving obstruction of legal process, offenses involving breaches of public decorum and community standards of behavior, as well as the more serious victimizing offenses that are frequently charged by prosecutors as felonies, but disposed as misdemeanors. This six-level structure allows for a more refined grading system than the three general classes of offenses found in the New York State Penal Law (A Misdemeanors, B Misdemeanors, Violations).

Tailoring criminal fines to the financial means of the offender— a Richmond County judge's view

by Rose McBrien

As a judge of the New York City Criminal Court currently sitting in Richmond County, I will be presiding when a systematic procedure for sentencing with day fines, rather than fixed fines, is introduced into an American court for the first time. Despite a fairly comprehensive range of traditional sanctions available to a sentencing judge in my jurisdiction, there are weaknesses in these options that we believe can be remedied by the introduction of day fines. What is needed in our overall sentencing framework is an opportunity to impose a fine that is meaningfully tailored to the individual, so that the offender understands that crime does not pay, rather it is the criminal who pays. We anticipate that the overlay of the day fine on the present sentencing patterns of the Criminal Court will provide this potential.

Richmond County in Staten Island, New York, is essentially a middle and working class bedroom suburb of New York City (though formally part of the City itself). It is predominately white, with a minority population of about 11 per cent which is relatively well inte-

grated into the larger community. Staten Island is a community of families with an abundance of teenagers and young adults, many of whom live at home. The average family income, as recorded by the 1980 census, was \$25,800. Furthermore, there is an adequate supply of jobs at the minimum wage through which the youthful and young adult population can obtain spending money. Indeed, the local newspaper, the *Staten Island Advance*, estimated that older teenagers in the county who live at home have an average of \$60 a week in discretionary income. Nevertheless, there is a welfare population which, while small (7 per cent on public assistance), reminds us that "average" income figures tend to mask the sizable number of families who live below the mid-point.

The New York City Criminal Court in Richmond County, as in the rest of the city, arraigns all criminal charges brought in the city, whether misdemeanors or felonies. While most felony arrests which proceed to indictment are convicted at the felony level in the City's Supreme Court, a very large number of cases

initially charged as felonies remain in the Criminal Court for disposition after their reduction to a misdemeanor. In 1986, the Richmond Criminal Court calendared about 7,000 cases, of which more than 2,000 were felonies; two-thirds of these remained in the lower court.

My colleagues on the Richmond Criminal Court bench, Michael Brennan, Alan Meyer and I, sentenced over 2,700 offenders in 1986, a number that continues to rise substantially every year. It is a very busy court with overflowing calendars and a swiftly paced process of negotiated pleas in all but a few cases. Because of this, we take an active role in negotiating the final disposition of each case. In planning and implementing the introduction of a new day-fine sentence into the Richmond Criminal Court, therefore, the judges have had an active role to play with the Vera Institute of Justice planners. We have also worked in close cooperation with members of the District Attorney's Office, the private bar and the Legal Aid Society (which provides defense services to indigents in New York City).

Thus, the rank order of each offense can more accurately reflect the actual criminal behavior involved.

Using analytic principles suggested by Andrew von Hirsch in his recent book on the jurisprudence of sentencing,¹⁵ and filtering them through the actual sentencing activities of the judges in Richmond's court, this classification scheme relates violation and misdemeanor offenses to one another following three general ranking principles:

- Among the victimizing crimes, those involving physical harm generally should be considered more serious than property and theft offenses;

- Those non-victimizing crimes which present a clear potential for tangible harm should be considered only slightly less serious than property crimes, while

15. von Hirsch, *PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS* (New Brunswick, New Jersey: Rutgers University Press, 1985).

those presenting no risk of harm should be ranked in the lowest ranges of severity; and

- "Breach of duty" crimes should range from medium to low severity, according to the degree of interference with proper governmental operations presented.

While establishing a sound rank ordering of offenses was the first necessary step, it had to be accompanied by a rationale for setting the overall range of day-fine units across which the number of day-fine units for each offense would be spread. Practices in the West German courts provided a model for such a scale. Introduced in 1975, the West German day-fine system operates with a range of from 1 to 360 units, reflecting roughly up to one year's imprisonment. Assuming that in Richmond County, as in West Germany, a full scale of 360 day-fine units would offer sufficient flexibility for the complete range of offense charges appearing in the New York State crimi-

nal code, a scale for misdemeanors and violations was established which ranges from 5 to 120 day-fine units. Setting a floor at five day-fine units guards against trivializing offenses at the low end of the scale; setting the ceiling at 120 reflects the less serious nature of the cases disposed in the Criminal Court. It also reserves the upper two-thirds of the full day-fine scale for felony offenses, should the use of day fines be extended to felony convictions in the Richmond County Supreme Court.

The resulting range of 115 day-fine units was then distributed across the six severity levels encompassing misdemeanors and violations. Each offense was assigned a specific day-fine unit value within the range assigned to its severity level. However, because circumstances other than those considered in determining the rank order of each offense may be important to judges when they assess the gravity of an individual criminal case, a

Ultimately, however, it is the criminal court judges who must actually impose the day fines. The sentences currently available to the court include a jail term of up to one year, which is now imposed in approximately 20 per cent of the cases. The question for me is how much good a sentence of a few months does to rehabilitate an offender convicted of a misdemeanor, particularly when we recognize that this offender is going to serve his time in a New York City jail, housing a large proportion of more serious and hardened inmates. For some of the many young adults who get involved with the criminal court, imprisonment in the city's jails rapidly makes them increasingly more street-wise.

Probation is an excellent resource. However, our probation department is overburdened; the caseloads are too high, and the probation officers cannot do what they set out to do—help offenders adjust their lifestyles.

Restitution is also a very useful sentence. The New York City Victim Services Agency does an excellent job collecting restitution payments on Staten Island.

Community service is also an important sentencing option because it imposes on the time of the offender and encourages him to reflect upon the curtailment of his freedom. Both, however, are limited to a relatively narrow range of cases.

And then there are fines. Fines are a widely used and very realistic sentence for offenders in the Richmond Criminal Court. However, fine sentences are weakened by our inability to calibrate them more precisely to the nature of the crime than the broad penal law categories of A and B Misdemeanors and Violations and to the specific means and financial obligations of each offender. The new fining structure provided by the day fine should help us enormously as we attempt to tailor our sentences to the offender and to his crime.

I see no reason why most misdemeanors in the criminal court cannot be handled with a day fine by itself or, when appropriate, combined with drug or alcohol rehabilitation programs, family counseling or psychological and psychiatric counseling. There may also be some cases in which a community ser-

vice or even a jail sentence might be appropriately combined with a day fine. Jail, however, is regarded as a revolving door; it can be replaced by the day fine and, in appropriate cases, this may be of more rehabilitative value than is incarceration. I anticipate that by the end of 1988 we will have demonstrated that the introduction of day fines into the Richmond Criminal Court as a misdemeanor sentence has worked out well. At that point, because of the high number of felony arrests in Richmond County that are charged as felonies but prosecuted at the more serious end of the misdemeanor range, I think there will be further potential for us to study the possibility of moving day fines into the felony court, especially targeting cases convicted at the lower end of the felony range. □

ROSE McBRIEN is a judge of the New York City Criminal Court.

further refinement was added to reflect such factors in the fine sentence. The suggested benchmark for each offense along the day-fine unit scale incorporates a discount of 15 per cent off the assigned number of day-fine units to account for those factors that could mitigate the normal level of seriousness. Likewise, a premium of 15 per cent is provided to allow for consideration of factors that could aggravate seriousness above the norm. Although it is presumed that an offender's prior criminal record will have already been weighed by the judge in determining the type of sentence (jail, probation, day fine, etc.), it is likely that the absence of prior convictions would warrant a discount, while a record of exceptional length might trigger a move to the premium number.

The following two examples (see Figure 1) are excerpted from the full benchmark scales developed for use in the Richmond Criminal Court.¹⁶ The first is Assault 3rd degree, reflecting an offense which, as defined in the penal law, was found in discussion with judges and prosecutors to span widely dissimilar conduct on a broad range of harms in terms of real-life criminal behavior. As a result, the day-fine benchmarks distinguish assaults by the gravity of the injury—substantial or minor—and then further categorize them according to the type of victim involved. The second example is Petit Larceny, in which the day-fine units are distributed into several benchmarks to reflect the amount or value of the property stolen. In both cases, the center figure (e.g., 95) is the normal number of day-fine units for the offense, while the numbers to either side (e.g., 81 and 109) are the 15 per cent discount and premium to be used if circumstances warrant.

Valuing day-fine units

The conceptual basis for designing a routine method of placing a dollar value on the day-fine units to which a specific offender is sentenced will largely determine how punitive the day-fine system is and, therefore, how it will be regarded with respect to other sentencing options. As noted above, the West German system, for example, is more punitive than the Swedish system, reflecting its purpose of being a direct exchange for days in custody.

Figure 1 Day-fine benchmarks (partial)

| | Discount number | Benchmark number | Premium number |
|---|-----------------|------------------|----------------|
| Offenses involving harm to persons | | | |
| Assault 3rd degree | | | |
| Range of 20-95 day-fine units | | | |
| Substantial injury | 81 | 95 | 109 |
| Stranger to stranger; or where victim is known to assailant, he/she is weaker, vulnerable. | | | |
| Minor injury | 59 | 70 | 81 |
| Stranger to stranger; or where victim is known to assailant, he/she is weaker, vulnerable; or altercations involving use of weapon. | | | |
| Substantial injury | 38 | 45 | 52 |
| Altercations among acquaintances; brawls. | | | |
| Minor injury | 17 | 20 | 23 |
| Altercations among acquaintances; brawls. | | | |
| Property and theft offenses | | | |
| Petit Larceny | | | |
| Range of 5-60 day-fine units | | | |
| \$1,000 or more | 51 | 60 | 69 |
| \$700-999 | 42 | 50 | 58 |
| \$500-699 | 34 | 40 | 48 |
| \$300-499 | 25 | 30 | 35 |
| \$150-299 | 17 | 20 | 23 |
| \$50-149 | 8 | 10 | 12 |
| \$1-49 | 4 | 5 | 6 |

The Swedish system values the units in a very precise manner which results in an amount that is about one-third the offender's daily discretionary income, adjusted for significant expenditures. Because the maximum number of day-fine units that can be imposed under the Swedish system is 120, the highest fine amount which can be imposed is 120,000 Kr (or about \$20,000). This amount may be viewed as properly reflecting the original intent of the Swedish parliament in authorizing the day fine as the normal sanction for lesser criminal cases, although it permits day fines to be used in practice as a sanction across a broader range of crimes.

In contrast, the West German system establishes the day-fine unit's value as the offender's net daily income (which is more roughly calculated and generally not discounted). To substitute the day fine for imprisonment, West Germany uses a scale with a maximum of 360 units. By statute the highest value for a single unit is 10,000 DM (about \$6000); day-fine sentences, therefore, can total over \$2 million. Following this statutory lead, West German courts generally use a day's-wage-for-a-jail-day exchange system by valuing the day-fine unit at or near an offender's daily net take-home pay. The resulting fine amounts are very high in comparison, for example, to Sweden.

The method for valuing the day fine to be used in adapting the system to the Richmond Criminal Court steers a middle course. As indicated above, the day-fine unit scale designed for Richmond

echoes the West German model of a 360-unit range, but caps the lower court range at 120 units (thus making it similar to the Swedish model). Similarly, the value of a single day-fine unit for Richmond is based on net daily income (as in West Germany); but it is adjusted by a simple formula to account for personal and family responsibilities.¹⁷ It is then reduced again by a discount rate (as in Sweden). However, in keeping with the goal of having Richmond's day fines substitute for some current sentences to jail terms, as well as for current fixed-fine sentences, the discount rate is closer to one-third, rather than the more lenient two-thirds rate used in Sweden.

In devising this valuation system, however, concern arose among the Richmond planners because flat discount rates fall more harshly on low-income offenders than on the affluent. Those with savings and access to credit can more easily absorb the bite of their "fair share" fine than those for whom a fine, though income-adjusted, could cause hardship in meeting basic expenses. Therefore, instead of a flat one-third discount rate, the adjustment in the Rich-

16. Hillsman & Greene. 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, 1987) at Appendix B.

17. The method is derived from practices now commonly used in American courts to assess child support payments to be paid by a non-custodial parent. Net income is adjusted downward by a factor of 15 per cent for the offender's self-support, 15 per cent for the needs of a dependent spouse, 15 per cent for the first dependent child, 10 per cent for each of the next two dependent children, and 5 per cent for each additional dependent child.

Figure 2 Richmond day-fine valuation: hypothetical cases

| Household status | Income | | | Family support discount | Total day fine value (two-tiered discount of 1/3 or 1/2) |
|-------------------------------|--------------|------------|-----------|-------------------------|--|
| | Annual gross | Annual net | Daily net | | |
| Welfare mother, 3 children | \$ 6,178 | \$ 6,178 | \$18 | 50% | \$ 5 |
| Single man | 9,000 | 7,150 | 20 | 15% | 11 |
| Single father, 3 children | 12,500 | 10,218 | 28 | 50% | 7 |
| Single woman | 13,000 | 9,932 | 27 | 15% | 15 |
| Single father, 1 child | 15,000 | 11,822 | 32 | 30% | 15 |
| Married man, wife, 3 children | 15,000 | 12,974 | 38 | 85% | 7 |
| Married man, wife, 1 child | 18,000 | 13,520 | 37 | 45% | 13 |
| Single woman | 28,500 | 18,928 | 52 | 15% | 29 |
| Single woman | 35,000 | 21,502 | 59 | 15% | 33 |
| Single father, 1 child | 37,500 | 23,764 | 65 | 30% | 31 |

mond day-fine value is variable: one-third for those with incomes above the federal poverty line, and one-half for those below.

Figure 2 provides some examples of hypothetical offenders whose income ranges are typical for Richmond County. The third column shows the net daily income upon which the day-fine value rests; the fourth column indicates the percentage discount for dependants as described in footnote 17, and the last column shows the final day-fine value after the discount of either one-third or one-half has been made. Although this valuation process may seem complicated, it is actually quite simple to use because the sentencing judges will be provided with tables that calculate the day-fine unit values for them.

Applying this model to hypothetical cases paralleling real cases found in the Richmond Criminal Court, the resulting discounted range of day-fine amounts would run from a low of \$25 (for a welfare recipient with three children convicted of the lowest severity crime and receiving the five day-fine minimum) to a high of \$4,000 (for a single offender with a gross annual income of \$35,000

and no dependents, convicted of the most serious crime in the court's jurisdiction and sentenced to the 120-unit cap). An offender whose crime fell into the 30 day-fine level on the scale (a typical offense involving property valued at about \$400) would have to pay—assuming a modest gross annual income of \$18,000 and no dependents—a day fine amounting to \$450.

These day-fine scales, therefore, preserve the current low fine amounts at the very bottom of the Richmond court's offense range (disorderly conduct and other very minor offenses are typically fined about \$25). However, the scales for the middle-to-upper range of offenses which build on this base are increasingly high when compared with the current fine amounts in the court. This reflects one purpose of the day-fine scaling structure, which is to provide a monetary penalty that judges can use to substitute for jail sentences in some cases. A recent sample of fined cases in Richmond reveals that the median fine amount for penal law convictions is currently only \$100, and relatively few fines approach the statutory maximum of \$1000. While restitution awards by this court are somewhat higher than typical fine amounts, day fines are likely to increase the court's monetary penalties, reflecting the relative affluence of the jurisdiction's population.¹⁸

Conclusion

Many American judges currently seek a broader range of sentencing options than is typically available in order to reflect the complexity of criminal behavior and the different sentencing purposes such behaviors evoke. Criminal fines represent a widely used, but nonetheless underutilized, sentencing opportunity in our courts. While there are structural

reasons for this, these reasons relate not to the nature of fines *per se*—which are undeniably a highly flexible sentencing device—but to the principles that guide their current method of imposition by American courts. Hampered by traditional, inflexible fixed-fine systems for setting fine amounts, and lacking alternative models, American judges tend to limit their use of fines, particularly as sole sanctions in cases where the offending behavior is repetitive and not trivial. While many individual judges in jurisdictions we have visited attempt to modify these tariff systems to take the offender's ability to pay into account, they acknowledge a lack of experience with ways to do this that are systematic and consistent, but that also reflect the important, but seemingly conflicting, principles of proportionality and equity.

By undertaking a fairly complex but important effort at sentencing innovation, the judges in the Richmond Criminal Court and their colleagues are providing a unique opportunity for American courts to explore one type of alternative to fixed fines. It is likely that this adaptation of the European day fine to an American court is not the only strategy available for courts to develop systems of means-based fining; it is, however, the one which has the most substantial record of jurisprudence and judicial practice. The research to be conducted by the Vera Institute in conjunction with the introduction of day fines into the Richmond County Criminal Court in 1988 will document both the implementation process and the outcomes of this unique effort.¹⁹ The empirical evidence generated by this research will enhance the likelihood that the Richmond Criminal Court's experiences with this sentencing innovation can be of use to other courts that are interested in exploring more effective ways to use criminal fines. □

SALLY T. HILLSMAN, Ph.D. is director of research at the Vera Institute of Justice in New York City.

JUDITH A. GREENE is director of court programs at Vera.

18. Day-fine amounts during the test period will be capped, of course, by New York State's current statutory maxima: \$1000 for A Misdemeanors, \$500 for B Misdemeanors and \$250 for violations. Evidence about the number of offenders who have been "underlined" in relation to their means will be gathered during the research and can be used to design a legislative reform proposal seeking to raise these maxima.

19. In conjunction with the introduction of day fines, the Richmond court will also implement several improved methods of collecting fine payments in order to ensure that higher day-fine amounts or the broader use of day fines do not negatively affect their enforcement. While the European literature noted above does not raise concern about day-fine collection rates, the Richmond day-fine experiment was also considered an opportunity to test the effectiveness of new collection and enforcement strategies in an American court. Hillsman & Greene, *supra* n. 16 at 89.