FINES *

K.B. Jobson**

Laws are like cobwebs;
the small flies are caught
but the great break through.
SOLON.

Recently, in addressing the graduating class of law students at Dalhousie University, Lord Denning, Master of the Rolls, gave voice to the ideal of equal justice under law, but too often, in the daily operation of the criminal courts, liberty is purchased; if you have cash in your pocket you walk out a free man; if you are poor and without means you go to jail. The following examination of the relative importance of fines as a major sentencing instrument in magistrates' courts in Nova Scotia and assessment of the fairness of the laws relating to fines points up the importance of Bill of Rights guarantees as a protection against imprisonment of the poor.

Legal Framework

Criminal Code provisions [1] governing fines fall into three relatively simple categories. Summary conviction offences under the Code are punishable by six months imprisonment or fine not exceeding five hundred dollars.[1a] Secondly, all indictable offences punishable by five years or less may, in lieu of imprisonment, be punished by fine alone. And thirdly, indictable offences punishable by more than five years imprisonment, are punishable by fine but only as punishment additional to imprisonment.[2] Consequently, it can be seen, that fines have a wide scope under the Code and

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** Associate Professor, Faculty of Law, Dalhousie University.

[1] References throughout this article are to the Criminal Code Sections, as re-numbered in: R.S.C. 1970, c. C-34.

[1a] Criminal Code, section 722(1). Under section 388(2) a court may also order restitution not exceeding fifty dollars in certain summary conviction offences relating to wilfull damage to property.

may be applied alone or in conjunction with other punishments for offences against the person or property or other offences.

Except for summary conviction offences and certain automobile driving offences,[3] no statutory limits are set on the amount of fines. The Magna Carta and the Bill of Rights prohibit excessive fines,[4] but, in general, the lack of statutory guidelines on the amount of fines has left the judges with a wide discretion. It would be unusual, therefore, if noticeable disparity in the use of fines did not show up between one court and another, and, indeed, over a period of time in the same court.[5]

Enforcement provisions for payment of fines have been extensively amended since 1954. At that time when the Code was revised, the Government was urged to introduce provisions designed to reduce imprisonment of poor persons unable to pay fines.[6] Legislative provision for inquiries into ability to pay, time for payment, and supervision of persons in default were urged upon the government to no avail, the Minister of Justice taking the view that the courts already had these powers and merely putting them into writing would make no difference to existing practice. Four years later, however, Mr. Diefenbaker's Government introduced reforms designed to insure that the Code provisions for enforcement of payment of fines could no longer be used as an excuse for imprisonment for debt.[7] In an effort to reduce the possibility of poor persons serving prison terms in default of payment, legislation provided that fines need no longer be made payable forthwith, but in the discretion of the judge might be made payable on such terms and conditions as the court might fix, including payment at a later date. The courts always did have this discretion, but by express legislative enactment the practice of giving time for payment or even payment on installments was now to be encouraged.

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[2] Section 646(1).

[3] Section 234, driving while impaired, provides, in the case of a first offence, for a fine of not more than five hundred dollars and not less than fifty dollars or to imprisonment for three months or both. On subsequent offences imprisonment is the only sanction provided.

[4] Clause 20 of the Magna Carta, 1215, provided: "For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood." Sir Ivor Jennings, *Magna Carta and Its Influence In The World Today*, (London, H.M.S.O., 1965), Appendix.

[5] See, for example, Table IV, *infra*.

[6] *House of Commons Debates*, (Ottawa, 1953-54), Volume III, pp. 2902-2909.

[7] *House of Commons Debates*, (Ottawa, 1959), Volume V, pp. 5561-62.

Three provisions of the Code are designed to achieve this purpose. Unless the Code directs otherwise, no fine shall be made payable forthwith until the court is satisfied that the accused is able to pay; or, upon being asked whether he requires time to pay, the accused does not request time for payment. The third rule provides that should the court deem it expedient not to grant time, the fine shall be paid forthwith. The first of these rules appears to require that the court satisfy itself upon an inquiry, that is, upon a hearing into the accused's means to pay; however, in practice, magistrates' courts are far too busy to spend time on such inquiries, and in the usual case, magistrates direct a routine question to the accused as to whether he requires time to pay; alternatively, the court may shift the burden upon the accused of requesting time for payment by ordering the fine to be payable forthwith. In such cases the fine shall be payable forthwith unless the accused musters up sufficient initiative to request time for payment and to explain why he makes such a request. Where the court does exercise its discretion and allows time for payment, the Code provides that any time allowed shall be not less than fourteen clear days from the date sentence is imposed. This strict language suggests that the court is precluded from granting any less time particularly if the prisoner has requested a longer term for payment.

Other Code rules are designed to limit committals even in cases of default of payment. A special provision directs that before committing a young offender (aged 16-22 years) in default of payment, the court must obtain and consider a report concerning the conduct and means of payment of the accused.[8] Presumably, the court, having informed itself from a reading of the report, might give the defaulter further time or order his committal. No empirical evidence is available to suggest how this rule operates in practice; however, it may well be that the rule should be amended by providing for a hearing, in the presence of the accused, into his failure to pay the fine on time. A further rule designed to limit imprisonment in default of payment applies generally to all offenders including young offenders, and is to the effect that where time has been allowed for payment the court shall not issue the warrant of committal in default of payment of the fine until the expiration of time allowed for payment. Again, no empirical evidence is available to suggest how this rule operates in practice. Generally, once the offender is in default, a warrant of committal is filled out, no

[8] Section 646(10).

report or inquiry being a prerequisite unless the offender is aged sixteen to twenty-two years. The police are under no obligation to inquire why the offender is in default; their instructions are only too clear — to take the body and imprison it. In practice, the police may take note of extenuating circumstances brought to their attention and may ask for further instructions with results that the defaulter may be given additional time or other consideration. Under the Code, fines or other monetary sanctions are recoverable by the Attorney-General in civil proceedings at any time within the two year limitation date,[9] but in practice this procedure is rarely used. Imprisonment is the standard consequence of failure to pay.

Shortcomings and Reform

The seeming simplicity of the Code provisions governing the scope, amount, and enforcement of fines gives rise to several critical observations. First of all, under the Canadian Code the scope of fines could be greatly extended. For example, under the Model Penal Code a fine alone can be imposed for any offence, not merely for those crimes falling within the lower end of the scale of prohibited acts. Uniformity, however, in the exercise of this very wide discretion is promoted by specific legislative criteria. For example, the Court is directed not to sentence the defendant to pay a fine alone when any other disposition is authorized by law, unless having regard to the nature and circumstances of the crime and the character of the defendant, it is of the opinion that a fine suffices for the protection of the public.[10] Canadian judges might well wish they had a similarly wide discretion, for undoubtedly, cases may arise, wounding with intent, for example, or theft over $50, where circumstances may indicate that the offender poses no real risk to the community, yet because the offence is punishable by five years or more, the law prohibits a disposition by fine alone. Significantly, the Model Penal Code uses but one test to determine the suitability of a fine as opposed to imprisonment: is a fine alone sufficient to protect the public. Although no reference is made to the point by the Model Penal Code, it would surely be open to a judge when considering whether to punish by fine alone, to take recognition of the community sense of justice and to ask himself whether fine alone would tend to depreciate the seriousness of

[9] Section 652(1).
[10] Model Penal Code, Proposed Official Draft, (1962), section 7.02.

the offence — a factor the Court is directed to consider when reviewing the possibility of probation under the Model Penal Code.[11]

Other Model Penal Code criteria tend to limit the use of fines. A stand is taken against the routine imposition of a fine as a punishment additional to imprisonment or probation[12] and a further rule would limit the imposition of a fine to cases of pecuniary gain or to cases where the court is of the opinion that a fine is especially adapted to deterrence of the crime or to the correction of the offender.[13]

An unnecessarily restrictive role for fines as recommended by the Advisory Committee on Sentencing of the American Bar Association purports to build on these last recommendations of the Model Penal Code.[14] As proposed in *Standards Relating to Sentencing Alternatives and Procedures,* the Advisory Committee recommends that a legislature should not authorize the imposition of a fine for a felony unless the defendant has gained money or property through the commission of the offence.[15] This view stems from the belief by the Advisory Committee that fines have a limited correctional value. Only where the defendant has used his offence for his own economic gain does the Committee see the fine as a proper response. According to the Committee, the fine would not be an appropriate penalty for offences against the person, and where imprisonment would be too severe and probation not severe enough, restitution or reparation to the victim would be a much more satisfactory disposition.[16] To adopt the restrictive attitude of the Advisory Committee, however, would be a mistake, particularly in a country, such as Canada, where fines in Nova Scotia, for example, as will be shown shortly, constitute a high proportion of dispositions in non-property offences. Even if sentencing policy dictated an acceptance of the Advisory Committee's position, adoption of it would be impractical. For one

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[11] *Ibid.,* section 7.01(1)(c).

[12] *Ibid.,* section 7.01(2).

[13] *Ibid.*

[14] American Bar Association Project on Minimum Standards For Criminal Justice, *Standards Relating to Sentencing Alternatives and Procedures,* Tentative Draft, as recommended by the Advisory Committee on Sentencing and Review, (1967), p. 117, section 2.7, and commentary, at pp. 124-126.

[15] *Ibid.*

[16] *Ibid.,* and commentary at p. 126. The efficacy of fines, generally, is questioned by Robert E. Barrett, *The Role of Fines in the Administration of Justice in Massachusetts,* (1963), 48 Mass. L.R. 435. Mr. Barrett, relying on Massachusetts figures, questions the utility of fines even in crimes based on greed: *ibid.,* p. 442.

reason, execution of the Committee proposals with respect to fines would lead to an overcrowding of the jails. This in turn would lead to more penitentiary terms and a general increase in length of sentence. However, as shown below, fines may have equal or greater utility than imprisonment as a correctional device; consequently, an extension of fines rather than a restriction would be a more appropriate response for Canada today.

Before commenting on the almost total lack of controls over fines levied under the Code, reference should be made to the section of the Code where an exception is drawn to the general lack of rules respecting amounts of fines in cases of corporations. In indictable offences, a corporation may be fined any amount in lieu of imprisonment, and on summary conviction, not exceeding $1,000,[17] a maximum double the amount set in cases of natural persons. Considering the greater wealth of corporations generally, and the relatively high incentive for breaches of various marketing and trading laws, a higher maximum fine for companies may be justified.[18] Even in indictable offences, however, where the amount of the fine is not limited, in practice the courts tend to levy paltry amounts. Indeed, the fine appears to be a rigid and fruitless sanction in curbing modern commercial practices.

A more responsive approach is taken by the Model Penal Code, for example, in their proposal that Courts be given power to forfeit companies' charters.[19] The criteria for dissolution in appropriate cases is not to be found in an isolated instance of criminal activity by the corporation, but in a purposely "persistent course of criminal conduct" and in a finding that for the prevention of further criminal conduct of the same character the public interest requires dissolution of the corporation. In order to insure that proceedings are taken in appropriate cases, the Model Penal Code authorizes the convicting court to direct individual prosecutors to lodge dissolution proceedings in accordance with ordinary corporate law. This type of sanction should have a much greater deterrent effect than the threat of a mere fine, particularly in an industry dominated by a few large corporations. If criminal sanctions are not to be regarded as a mere nuisance tax to corporations, a more effective sanction than a modest fine must be

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[17] Section 647.

[18] Views in support of double or triple fines for corporations were expressed in Parliament during the debates on the revision of the Criminal Code in 1954: *House of Commons Debates*, (Ottawa, 1953-54), Vol. III, pp. 2870-2871.

[19] Model Penal Code, *op. cit.*, n. 10, section 6.04.

found.[20] Even stiff fines, however, may have no deterrent effect on corporate crime and Packer suggests that the sanction of adverse publicity would be more effective in regulating corporate conduct than fines.[21]

While Canada's No-Rule approach to the question of amount of fines leaves the judges with a wide discretion, several factors may operate to impose an upper or lower limit to take care of all but exceptional cases. Manuals for the guidance of magistrates sometimes carry specific suggestions for appropriate fines in particular regions of the country;[22] magistrates may hold regular annual or quarterly meetings to exchange information with respect to sentencing;[23] and, as a matter of habit, a magistrate, or a group of magistrates, soon develop an understood "tariff" or average fine to take care of the ordinary case.[24] Nevertheless, it should not be surprising that in the absence of records or any systematic attempts to maintain an equality in sentencing practices, fines between magistrates, and even fines within a single magistrate's court, may show surprising variances.

The following table[25] gives some indication of the extent to which any so-called tariff may have prevailed among six magistrates' courts in Nova Scotia during a six month survey period

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[20] A list of fines imposed over a recent ten year period under the provisions of the *Combines Act* was tabled in the House of Commons: *House of Commons Debates*, (Ottawa, 1966), Vol. VII, pp. 6857-6864. The amount of the fine ranged from $25,000 to $50. Even a $20,000 fine, however, in the case of the St. Lawrence Sugar Refineries Limited, for example, must be no more than a minor bookkeeping entry.

[21] H.L. Packer, *The Limits of The Criminal Sanction*, Stan. Univ. Press, (Stanford, 1968), at p. 362.

[22] S. Tupper Bigelow, *A Manual For Ontario Magistrates*, Queen's Printer, (Toronto, 1962), pp. 221-228 carried suggestions for appropriate fines in Ontario for motor vehicle offences, and at p. 215 suggested fines for some offences under the Code. A similar move to reduce disparities in fines among English magistrates is found in the Royal Commission on the Penal System in England and Wales, *Written Evidence*, H.M.S.O., (London, 1967), Vol. 1, at pp. 122-123.

[23] In Ontario and New Brunswick a consistent attempt is now being made to keep magistrates informed on sentencing matters through quarterly or semi-annual meetings.

[24] See, for example, Magistrate Bigelow's suggestions at pp. 215-217, *op. cit.*, n. 22.

[25] The figures used in this table were collected from magistrates' files in the cities of Halifax and Sydney, Nova Scotia by Mr. Irwin Nathanson of Dalhousie Law School during the summer of 1967. The survey period covered the months of June to December, 1966: I. Nathanson, "Fines in Magistrates' Courts" (unreported).

in sentencing offenders for assault under section 219 of the Code, or for obstructing a police officer under section 102. These offences are punishable by fine alone; consequently, any fines imposed need not be distorted by additional but concurrent penalties such as imprisonment. Under section 245(1) assault may be punishable on indictment or on summary conviction. Only in the latter case is there a statutory maximum of $500 on the amount of fine. Section 245(2) relates to an aggravated form of assault: assault causing bodily harm, punishable in the same manner as common assault prosecuted on indictment — two years imprisonment, fine, suspended sentence, or probation. Consequently, higher penalties might be expected for aggravated assaults under section 245(2) than for common assault under 245(1)(a). Similarly, a choice to prosecute on summary conviction under section 245(1)(b) rather than on indictment under 245(1)(a) might be an indication of a petty offence, calling for a lighter punishment than would be the case in an indictable offence.

Table I

Minimum and Maximum Fines — Assaults and Obstruction

Magistrate	Common Assault (indictable)		Common Assault (summary conviction)		Assault Causing Bodily Harm (indictable)		Obstructing Police Officer (indictable)	
	High $	Low $	High $	Low $	High $	Low $	High $	Low $
A	—	—	—	—	500	75	56	10
B	35	12	—	—	200	14	55	11
C	100	2	—	—	25	10	100	6
D	50	costs	10	costs	75	25	75	5
E	100	10	150	10	125	5	75	4
F	100	10	100	10	—	—	100	10

These expectations are not entirely borne out by the data. For example, the maximum fine under the summary conviction cases for common assault was $150, whereas the maximum under indictable offences was only $100. The same paradox appears in the minimum fines levied: among assaults prosecuted on indictment $2 was the lowest fine, whereas under summary conviction $10 was the lowest fine. Strictly speaking "Costs" is no fine at all, for the power to award costs is found independently in the Code, and must not be awarded for purposes of punishment.

As expected, the maximum and minimum fines for aggravated assaults were higher than for common assaults, but the variation between magistrates was much greater than in cases of common assault. For example, the maximum fine imposed by Magistrate A was eight times the amount imposed by Magistrate C, and the minimum fine imposed by Magistrate A was 15 times that imposed by Magistrate E. Assuming that all magistrates handled a roughly similar cross-section of cases, do the variations in maxima and minima fines between magistrates suggest the need for legislative criteria governing amounts of fines?

A concern over the variation in fines in magistrates' courts in Ontario resulted in an effort by Magistrate Bigelow to persuade his fellow magistrates to follow a common scale of fines in typical cases. Other means to the same end may be achieved through sentencing councils, or by statistical analysis revealing through computer control average or median fines for any offence in any court. The shortcoming with all of these techniques for controlling undue variations is their reliance upon self-application. Human nature being conservative at the best of times, would it not be more desirable to give magistrates specific guidelines in the interests of uniformity in sentencing rather than to adhere to the no-limit rule presently in operation?

On this point, the Model Penal Code opts for legislative criteria governing amounts of fines. First, the Code suggests a scale of fines related to the scale of offences, ranging from a maximum of $10,000 on conviction of a felony of the first or second degree to a maximum of $1,000 on conviction of a misdemeanor, and $500 for a petty misdemeanor.[26] In determining the amount of fine and method of payment, the Court is directed to take into consideration the financial resources of the defendant.[27] Proceeding on the principle that the prime purpose of a fine is to deprive the offender of his pecuniary gain, the Model Penal Code also would authorize any higher fine than those suggested in the scale, in an amount double that derived by the offender from the offence; thirdly, the Code would permit any higher fine specifically authorized by some other statute.[28]

In this way, the Model Penal Code suggests some specific guidelines for the exercise of judicial discretion in the ordinary case, but, in addition, retains a power in the court to exceed those limits

[26] Model Penal Code, *op. cit.*, n. 10, section 6.03.
[27] *Ibid.*, section 7.02(4).
[28] *Ibid.*, section 6.03(5)(6).

in exceptional cases or in cases of corporations, for example, where a double or even triple penalty may be effective in trading or market offences. Thus, the Model Penal Code affords judges the wide discretion open to Canadian judges under the Canadian Code, but goes one better in attempting to stabilize discretion in the ordinary case.

According to one view, time devoted to promoting uniformity of fines in particular offences is misspent, for the amount of the fine should not depend solely upon the gravity of the offence, but on the ability of the offender to pay. Accordingly, time spent in formulating scales of fines, organizing sentencing councils, or in promoting other uniformity measures are misplaced. Instead, an inquiry into the offender's means, and relating it a scale of day-fines, would have substantial correctional value, and only then would courts ensure that different offenders are punished equally for equal offences.

Under Swedish law, for example, and under the West German Draft Code, day-fines are used. That is to say, fines are expressed in units, the monetary value of each unit varying between a minimum of two kroner, for example, and a maximum of five hundred kroner. The monetary value of the unit is determined by consideration of the wealth of the accused, his income, obligations, and other economic circumstances.[29] For identical offences, then, each deserving the greatest number of units, it would be possible for a fine to vary according to the accused's ability to pay from $150, for example, to $700. A further characteristic of the day-fine as it obtains in Sweden is the procedure of "conversion" to be followed on default. This means that before a convicted person can be imprisoned in default of payment, a court hearing must be held on application by the prosecutor. Judgment is pronounced after the hearing at which the offender must appear personally. Further time to pay may be granted, or the fine may be converted into a prison term related to the amount of the fine. No application for conversion will be held later than three years after the fine was levied.[30] As indicated earlier, the requirement of a formal inquiry into means, before imprisoument for default, is also characteristic of the 1967 amendments in Great Britain and should receive particular attention from all concerned over the needless imprisonment of persons without means to pay.

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[29] Penal Code of Sweden, 1965, Ministry of Justice, Stockholm, (Translation by Thorsten Sellin) c. 25, ss. 1-3.

[30] *Ibid.*, c. 35, s. 7. See also H. Goransson, in Twelfth International Penal and Penitentiary Congress, *Proceedings*, Vol. V, pp. 5-6.

At the heart of the day-fine concept is an enquiry into the means to pay, coupled with concrete legislative criteria for calculating amounts. Under the Criminal Code an inquiry into means is not mandatory, but discretionary. In the light of a developing sensitivity to the unfairness of imposing fines without inquiry into means,[31] amendments to the Code should require such an examination before the fine is fixed. In addition, further study should be made into the efficacy of the day-fine practice and the possibility of adapting it to Canadian conditions.[32]

One further point should be adverted to before going on to examine the actual scope of fines as a sentence in Nova Scotia. To the extent that fines are offered as an alternative to restitution, should there not be an express legislative preference in favour of restitution? If social policy ought to favour reparation to the victim over a paltry fine to the state such a preference should be stated in the Code. The Model Penal Code and the Advisory Committee both favour such a preference.[33] Is it not ironic that fines, accounting for 46% of criminal dispositions in Nova Scotia,[34] go to strengthen the state's coffers while the victim gets nothing? Indeed, the payment of the fine to the state merely serves to reduce the defendant's resources and the possibility of compensation to the victim through tort law.[35]

Typically, law reform bodies have not concerned themselves so much with questions relating to the scope or amount of fines, but with the problems of enforcement of fines. Mention has already been made of the 1959 amendements to the Code, designed to encourage courts to give time for payment and to discourage the issuing of warrants of committal as a matter of course even before default.[36] Whether the amendments have been successful in reducing the numbers of persons imprisoned for failure to pay a

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[31] It is unconstitutional in the United States to fail to make an inquiry into means before imposing imprisonment in default: *Morris* v. *Schoonfield*, 301 F. Supp. 158, 163 (U.S. Dist. Ct. Md. 1969).

[32] New Zealand has been considering ways and means of adapting day-fines to New Zealand conditions: *Annual Report of the Ministry of Justice*, (Auckland, 1968).

[33] Model Penal Code, *op. cit.*, n. 10, section 7.02(3)(b); *Standards Relating to Sentencing Alternatives and Procedures, op. cit.*, n. 14, pp. 125, 126.

[34] *Infra*, Table II.

[35] As to the limited resources of offenders, generally, and the illusion of compensation for criminal injuries through tort law, see M. Allen Linden, *The Report of the Osgoode Hall Study On Compensation For Victims of Crime*, Osgoode Hall Law School, (Toronto, 1968).

[36] *Supra*, n. 7.

fine is not known. Certainly, in some magistrates' courts it is routine practice to impose a fine with "x" number of days in default.[37] In some cases persons are imprisoned for failure to pay, but how many persons had the money and refused to pay and how many did not have the money but were imprisoned as an alternative is not known. As a working hypothesis it can be assumed, however, that persons who have the money do pay their fines; people do not go to jail out of choice. Meanwhile, imprisoument of persons who do not have the means to pay is commonplace for convictions under provincial statutes, and, undoubtedly, as indicated by the Nova Scotia cases, hereafter, imprisoument for failure to pay fines occurs under federal criminal law as well. Whether or not imprisonment in default is rationalized on the ground that the imprisonment is not a punishment of the offence, but merely an enforcement device for collection of fines, until the law prohibits imprisonment as a routine alternative to payment of fines, and bars the use of imprisonment as a routine response to failure to pay, the penal law will continue to be used as an instrument of oppression against the poor.

Concern that this should not be so has moved the Advisory Committee of the American Bar Association, for example, to recommend that fines should never be levied unless the court is satisfied that the accused has the means to pay; moreover, the Committee disapproved of any provision which would permit alternative sentences of fine or imprisonment, for example, "thirty dollars or thirty days".[38] Imprisonment should not be the automatic response to non-payment of fines. Instead, the Committee recommended an inquiry into failure to pay, an inquiry at which the defaulter ought to be called, and only where such a hearing disclosed no excuse for non-payment would jail be considered. Thus, imprisonment is retained as the ultimate sanction, but only for cases showing an inexcusable failure to pay.

The Model Penal Code provisions limiting imprisonment as an enforcement device are somewhat similar.[39] On default, the Court may summon the defendant and require him to show cause why his failure to pay should not be treated as contumacious. The Advisory Committee avoided treating the failure to pay as analogous to contempt, out of fear that the more undesirable aspects

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[37] *Infra,* at n. 91 for imprisonment in default.

[38] *Standards Relating to Sentencing Alternatives and Procedures, op. cit.,* n. 14, section 6.5, and commentary, at pp. 285-293.

[39] Model Penal Code, *op. cit.,* n. 10, section 302.2.

of the contempt sanction might spill over into this new area. Instead, the Advisory Committee recommended authorizing the Court to sentence the defaulter up to one year for failure to pay.[40] Both the Model Penal Code and the Advisory Committee would give the reviewing court power to remit all or a portion of the fine or to modify its terms of payment.

Similar powers are now available to English courts as a result of drastic amendments in the *Criminal Justice Act, 1967*.[41] The clear policy of the amendments is to reduce the number of persons imprisoned in default of payment, and, secondly, to encourage a greater use of fines and a consequent drop in the prison population.[42] The issue of a warrant of committal for default at time of conviction is all but prohibited; even the power to issue a warrant after actual default is greatly restricted, and the working rule requires the court to hold at least one hearing into the reasons for default. After the inquiry at which the accused must be present, the court still may not issue a warrant of committal unless the offender appears to have sufficient means to pay forthwith, or the court has tried all other methods of enforcing payment without success. When the warrant is finally issued, the magistrate must endorse thereon the grounds for issuing the warrant. In addition, the English *Act* provides for civil enforcement of the fine by way of execution or garnishment.

Use of Fines in Magistrates' Courts

The increasing attention paid to fines by law reform reports such as that produced by the American Bar Association[43] reflects an awareness of the growing importance of fines as the number one disposition in criminal courts generally. It has been estimated in the United States that between 75% and 80% of all criminal convictions are disposed of by fine.[44] In England, an analysis of sentences in twelve magistrates courts by Hood[45] revealed that the fine was the single most popular disposition, accounting for more

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[40] *Op. cit.*, n. 38, section 6.5 and commentary at p. 289.

[41] *Criminal Justice Act, 1967*, stats. Eng. 1967, c. 80, ss. 43-44 and 46.

[42] Parliamentary Debates (Hansard), House of Commons, H.M.S.O., (London, 1966-67), 5th series, Vol. 738, at pp. 64 *et seq.*

[43] *Supra*, n. 14.

[44] C.H. Miller, *The Fine, Price Tag or Rehabilitative Force?*, (1956), 2 N.P.P.A. J. 377, at p. 378; United Nations, *Short Term Imprisonment*, (1960), No. 5, at pp. 14-15.

[45] Roger Hood, *Sentencing in Magistrates' Courts*, (London, 1962), Table 35, at p. 99.

than 50% of all dispositions in nine of twelve courts covered in his survey. In 1957 in England and Wales, fines accounted for 84.8% of all dispositions in the criminal courts; the corresponding figure for Scotland was 73.3%.[46] Undoubtedly, a very large proportion of those cases disposed of by fines is made up of traffic offences and summary conviction offences of a regulatory nature rather than indictable offences of a more serious nature. This distinction was observed in a United Nations report indicating that in the United Kingdom in 1954 although 93% of those persons convicted on summary conviction were fined, only one-third of those convicted of indictable offences were dealt with by way of fine.[47] Accordingly, it should be remembered that the above statistics, showing a very high percentage of fines, include such summary conviction offences as being drunk in a public place, for example, or other offences that in Canada would fall under the Liquor Control Acts, or the Highway Traffic Acts of the various provinces. That such offences are included in the statistics relating to the United States, England and Scotland undoubtedly helps to explain the very high proportion of all dispositions in those countries accounted for by fines. The distortion produced by including automobile offences in the proportion of crimes dealt with by fines is shown by Barrett in his survey of fines in Massachusetts.[48] Although fines accounted for 77% of all criminal dispositions in Massachusetts in 1959, exclusion of automobile cases reduced the proportion to 30%.

Predictably, the exclusion of public drunkenness and other provincial offences in Canada should result in a very much reduced role for fines in Canadian criminal courts. Jaffary, in an analysis of Canadian statistics for 1955[49] found that for six selected indictable offences including assaults and theft related offences, fines accounted for only 23% of all dispositions.[50] This very low percentage masks the fact that for assanlt offences in one province fines accounted for over 75% of dispositions, while fines for theft, and false pretences accounted for only 34% of dispositions.[51] The

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[46] Report of the Scottish Advisory Council on the Treatment of Offenders, *Use of Short Sentences of Imprisonment by the Courts*, H.M.S.O., (Edinburgh, 1960), App. D., p. 32.

[47] *Op. cit.*, n. 44.

[48] Robert E. Barrett, *The Role of Fines in the Administration of Criminal Justice in Massachusetts*, (1963), 48 Mass. L.Q. 433, at pp. 440-441.

[49] Stuart King Jaffary, *Sentencing of Adults in Canada*, (Toronto, 1963).

[50] *Ibid.*, p. 36.

[51] *Ibid.*, Table 3, p. 34: Saskatchewan.

third property offence included in Jaffary's survey, break and enter, significantly reduced the proportion of property offences dealt with by fines: in 1955 only 3% of all convictions in Canada for break and enter were disposed of by fine.[52]

Rusche and Kirchheimer[53] have suggested that the incidence of fines as a disposition is related to the general level of affluence. This correlation is difficult to find in Jaffary's survey of the Canadian provinces. Although Nova Scotia with a *per capita* income of approximately 70% of the Canadian average, used fines significently less frequently in assanlt cases than Canada as a whole (Nova Scotia approximately 48%; Canada approximately 59% in 1955),[54] courts in Nova Scotia used fines in property offences even more frequently than was the case for Canada as a whole (Nova Scotia 14%; Canada 12%). At the same time, a rich province such as Ontario used fines in all selected offences at a rate below the national average. To some extent the low use of fines in Ontario may be accounted for by a higher than average resort to suspended sentence and probation particnlarly in property offences, while the higher than average reliance on fines in Nova Scotia may have reflected a relatively small probation service and the lack of appropriate custodial facilities.

Whatever the reason, in 1967, fines continued to be the single most popnlar disposition among Nova Scotia magistrates. A survey[55] of convictions for both indictable and summary conviction offences under the Criminal Code of Canada in magistrates' courts in Nova Scotia in 1967 indicates that fines accomnted for 58.2% of all dispositions and in each of five out of nine offence categories accounted for over 50% of all dispositions.

What is notable is that in five offence categories, including weapons offences, assaults, causing a disturbance, impaired driving, and wilful damage to property, fines accounted for approximately 80% of all dispositions. Even when impaired driving of-

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[52] *Ibid.*, Table 3.

[53] Rusche and Kirchheimer, *Punishment and Social Structure,* (New York, 1939), p. 172.

[54] Jaffary, *op. cit.*, n. 49, p. 34. Further comparative figures are given by Common and Mewett, *The Philosophy of Sentencing and Disparity of Sentences,* The Foundation for Legal Research in Canada, (1969), p. 10.

[55] The writer compiled a record of sentences imposed in all cases under the Criminal Code in magistrates' courts in Nova Scotia and New Brunswick for 1963 and 1967, and is presently engaged in analyzing the data. The results to date, specifically with respect to the use of fines in Nova Scotia in 1967, are presented here in Table II.

Table II

Use of Fines by Offence Category, Nova Scotia, 1967

Offence Categories	Criminal Code Sections	Fine %	Suspended Sentence %	Imprisonment %
Weapons Offences	82- 90	50.9	25.5	23.6
Causing a disturbance	160	83.4	9.6	7.0
Impaired driving	234	94.5	4.9	0.6
Assault and bodily harm	245-246	51.7	31.0	17.3
Sexual offences	144-157	12.5	64.6	22.9
Theft, break and enter, possession	294-306 307-309-312	20.7	41.8	37.5
False pretences	320-322	15.04	27.07	57.9
Property damage	387-388	64.5	20.0	15.5
Forgery	325-326	15.5	33.33	51.51
Average		58.2	22.9	18.8

fences are excluded, for the remaining four categories fines accounted for approximately 67% of all sentences. Four of these five categories of offences were not included in Jaffary's 1955 survey; without them the proportion of cases disposed of by fines by Nova Scotia magistrates in 1967 would drop from 58% to approximately 28%.

A comparison, seen in Table III, of the use of fines in Nova Scotia for Jaffary's six selected offences, shows a trend toward increased use of fines in common assault, theft and false pretences, but a decline in break and enter.

The almost total failure to use fines in cases of break and enter is explained in part by the fact that offences such as break and enter, punishable by five years imprisonment or more, cannot be dealt with by way of fines alone.[56] The same restriction applies to false pretences and theft, except where the value of the goods

[56] Criminal Code, section 646(2).

Table III

Incidence of Fines by Selected Indictable Offences, Nova Scotia, 1967

Offence	Fine %			Suspended Sentence %		
	1955	1963	1967	1955	1963	1967
Common Assault	36	81 53.6	59 51.7	53	56 37.2	40 35.1
Assault causing bodily harm	53	52 50.5	56 46.6	30	37 36.0	30 25.0
Assaulting a Police Officer	69	8 66.6	18 66.6	6	2 16.6	5 18.5
Theft	27	135 24.5	166 30.7	38	260 47.1	206 38.0
False Pretences	11	10 13.5	20 15.04	28	28 37.8	77 57.9
Break and Enter	6	7 02.0	2 0.7	28	125 36.6	153 50.8

obtained is less than fifty dollars. In cases of break and enter, punishable as it is by 14 years or life depending on the circumstances, the major disposition is suspended sentence. It is probable, therefore, that a removal of restrictions on the application of fines would see an easing of the burden now falling on suspended sentences and probation in these cases.

As seen in Table IV, an even larger proportion of theft cases would have been dealt with by fines were it not for the tendency of one magistrate in particular to use suspended sentence or probation rather than a fine as the alternative to imprisonment.

In Table IV, magistrates A, B, and C heard cases in a distinct geographical area having as its locus the metropolitan area of Sydney, Nova Scotia. Similarly, magistrates D, E, and F heard cases in another distinct metropolitan area, Halifax. In the latter area *per capita* incomes are higher, yet the overall use of fines is not significantly different in the two areas; what is noticeable is the great difference in the use of imprisonment: Halifax 31.7%, Cape Breton 50.0%. Quite clearly the Halifax magistrates appear to be using suspended sentence, probation, or peace bond as an alternative to imprisonment, even in indictable cases. Although a more detailed analysis of the cases is warranted, sentencing practices in cases of theft under fifty dollars also show a fairly high

use of imprisonment, particularly in cases of shoplifting. No doubt, extensive "snitching" can be a worrisome economic drain for large department stores, but whether it is necessary in the interests of deterrence to resort to short sentences of imprisonment is a matter that turns on the correctional value of fines or suspended sentence.

Table IV

Use of Fines by Magistrates: Indictable Theft Cases, Nova Scotia, 1967

[Cr. Code Section 294(a)]

Magistrate	Cases **	Convictions	Fine %	Suspended Sentence %	Imprisonment %
A	27	23	6 26.0	11 48.0	6 26.0
B	25	12	0	2 16.6	10 83.4
C	24	15	4 26.6	2 13.4	9 60.0
D	59	41	5 12.1	19 46.0	17 41.9
E	28	19	4 21.0	12 63.7	3 15.7
F	12	9	2 22.2	6 66.7	1 11.1
G	3	3	0	0	3 100
H	14	13	1 0.7	8 62.3	4 30.7
I	29	19	1 5.2	7 36.9	11 57.9
J	11	9	0	2 22.3	7 77.7
K	5	3	0	2 66.6	1 33.3
	237	166	23 13.8	71 42.8	72 43.3
Canada 1955 *			19	29	52

* Jaffary, *op. cit.*, n. 49.

** Convictions were much fewer than the number of cases initiated by charge as a result of acquittals, withdrawal of prosecution, dismissals, etc. A much higher "shrinkage rate" in some courts than in others may be the result of differences in prosecution practices, or the judges' view of what constitutes "reasonable doubt".

Magistrates H and J, holding court in country areas with low *per capita* incomes, both used fines sparingly, but differed markedly in the alternative disposition: Magistrate H using imprisonment in 30% of the cases and Magistrate J using imprisonment in 77% of his cases. Although the number of cases heard by each of these two Magistrates was nearly the same, the actual number of cases was small, and the differences in dispositions may be accounted for by the nature of the offences. Perhaps the most striking thing about Table IV, apart from the differences already noted, is the extraordinarily low incidence of sentences of imprisonment in the court of Magistrates E and F. If it could be shown that the reconviction rate for offenders sentenced by these courts was no worse than the reconviction rates in other Magistrates' courts, there is a lesson to be learned.

Inexplicably, the sharp regional differences between Sydney and Halifax are reversed in cases of assaults as can be seen in Table V. Fines are used much more extensively in Sydney than in Halifax, the difference being made up in Halifax by a greater use of suspended sentence with the consequence that both regions use imprisonment in roughly the same proportion of cases.

Table V

Use of Fines in Assaults, 1967

(Cr. Code Sections 245 and 246)

Magistrate	Cases	Convictions	Fine %	Suspended Sentence %	Imprisonment %
A	68	49	65.2	24.4	10.2
B	78	55	67.2	3.8	29.0
C	89	44	70.4	13.6	15.9
D	145	95	49.4	35.7	14.9
E	28	13	30.7	46.1	23.2
F	29	18	22.2	66.6	11.2
G	31	19	52.6	26.3	21.1
H	26	15	53.6	40.0	6.7
I	85	59	38.8	49.1	12.1
J	32	4	25.0	25.0	50.0
K	39	25	36.0	40.0	24.0

From a comparison of the tables in cases of assault and theft, one can see that magistrates in Sydney treat imprisonment and fines as clear alternatives, whereas Halifax magistrates tend to look upon suspended sentence as a more viable alternative to imprisonment. In offences involving pecuniary gain a sharp fine within the means of the offender to pay may well be more appropriate than suspended sentence as an alternative to imprisonment. Crimes of passion such as assaults, however, may not be amenable to any disposition, in which case utility would demand the least wasteful punishment consistent with the seriousness of the offence.

In his report on *Crimes of Violence*, including assaults, McClintock[57] found that in England 34% of convictions for crimes of violence in Metropolitan London in 1960 were dealt with by fine, and another 25% by probation or discharge.[58] His report showed throughout England and Wales a steady increase in the use of fines in dealing with crimes of violence. For certain classes of assaults, however, it would appear from Tables VI and VII, that fines were used far more frequently in Nova Scotia in 1967 than in England and Wales in 1960.[59] As might be expected, the rather low incidence of fines in England and Wales was offset by a rather heavy use of imprisonment.

Table VI

Indictable Assaults in Nova Scotia, 1967

Offence	Fine %	Suspended Sentence %	Imprisonment %
	59	40	15
Common Assault	51.7	35.1	13.2
Assault causing	56	30	34
bodily harm	46.6	25.0	28.4
Assaulting a	18	5	4
Police Officer	66.6	18.5	14.9

The heavy reliance on fines in Nova Scotia is not carried forward from assaults to sexual offences. Although the very low number of cases dealt with by magistrates' courts make it difficult to draw

[57] F. H. McClintock, *Crimes of Violence*, (London, 1963).
[58] *Ibid.*, at p. 152.
[59] *Ibid.*, at p. 159.

Table VII

Assaults in England and Wales, 1960

Circumstances	Fine	Probation and Discharge	Imprisonment
Attack on police	18	15	64
Domestic dispute	38	40	20
Pub fights	38	13	42
Street fights	42	25	23

firm conclusions, it appears that suspended sentence was used in 64% of the cases, fines in 5% and imprisonment in 32% of the cases. Ten of the 71 cases were committed to trial in higher courts, 8 cases were acquitted and 6 withdrawn. The group does not include rape cases since these would be tried in the higher courts. Six of the twelve cases disposed of by imprisonment resulted from convictions for indecent assault on a female, two for statutory rape, three for gross indecency and one for a homosexual offence.

What stands out in this disposition of sexual offences is the exceptionally low use of fines in contrast with the reliance placed on fines for these offences in Toronto and in England. According to the survey conducted by the Cambridge Department of Criminal Science in England, 43% of all sexual offences were dealt with by fines; [60] the 1957 Toronto figures arrived at in a study by Mohr, Turner and Jerry indicated a 53% use of fines.[61] To the extent that criminal sexual conduct is no more than normal consensual activity that happens to be prohibited under an out-dated Code, as in the case of some intercourse with consent of females under a specified age, or certain cases of consensual homosexual conduct, a high use of fines may be entirely appropriate as a minimal expression of official disapproval. Where, however, the forbidden sexual conduct is the result of immature dependency or other medical factors, suspended sentence with a condition of treatment at psychiatric clinics

[60] A Report of the Cambridge Department of Criminal Science, *Sexual Offences*, (London, 1957), at p. 218.

[61] J. W. Mohr, R. E. Turner and M. B. Jerry, *Pedophelia and Exhibitionism*, (Toronto, 1964), at p. 104. 68% of persons convicted for indecent exposure were fined: *ibid.*, at p. 169; see also Common and Mewett, *op. cit.*, n. 54 indicating a relatively high use of fines for selected sexual offences, but a very limited use in most sexual offences.

was recommended by Mohr, Turner and Jerry.[62] Considering that sexual offenders have one of the lowest reconviction rates of all offenders the court policy of using fines or suspended sentences in the great majority of these cases is well founded.

To summarize the position of magistrates' courts for Criminal Code offences in Nova Scotia in 1967, fines were the single most popular disposition, accounting for approximately 58% of all sentences following conviction. Table VIII shows the proportion of fines used in three major categories. Even when the automobile offences are excluded, fines still constitute the leading disposition, at 42.9%, of all convictions in the offences surveyed. If automobile offences are classed as offences against public order along with causing a disturbance and obstructing a police officer, the predominance of fines is seen to lie in the fact that they are highly utilized in offences against the public order. Even in the chief offences against the person, assaults and sexual offences, fines accounted for almost 50% of the dispositions, but gave way to suspended sentence and imprisonment in property offences. Moreover, fines would not figure as prominently as they do in this last category were it not for the inclusion of cases relating to mischievous and wilful damage to property, approximately two-thirds of which were dealt with by fines. If offences of mischievous damage to property are excluded, use of fines in property cases in Nova Scotia drops to 17%, a rate close to the 16% cited by Barrett as the proportion of property offences in Massachusetts dealt with by fines. Barrett's

Table VIII

Distribution of Fines by Major Categories, Nova Scotia, 1967

Offence Category	Fine %	Suspended Sentence %	Imprisonment %
Public Order	89.4	7.0	3.6
Personal violence	47.4	34.6	18.2
Property	27.3	36.4	36.2

[62] *Ibid.*, pp. 105, 169. Reconviction rates for sexual offenders are low: Mohr *et al.*, *ibid.*, at pp. 98-99; 167-168; *Sexual Offences, op. cit.*, n. 60, at p. 315. Less than thirty per cent of offenders under study were reconvicted during the follow-up period. Recidivist rates for the United Kingdom among persons sentenced to imprisonment approximate 50%: *Short Term Imprisonment, op. cit.*, n. 44, at p. 23.

figures, however, do not appear to include false pretences, robbery or forgery, all of which in Nova Scotia tend to have a major dampening effect on the rate of fining in property offences generally.

Justification for Fines As the Primary Sentence

Whatever reasons magistrates may have for using fines as the primary sentencing tool under the Criminal Code, from a correctional or penological point of view, fines make good sense. The aim of sentencing is to achieve the objects of the criminal law, that is "the punishment of the offender and the prevention of further criminal acts", and to do so in "the most efficient, least expensive and most humane" [63] way.

Until recently, in the absence of empirical evidence, there existed a popular belief in the deterrent or rehabilitative effect of punishment as a means to preventing further criminal acts. Punishment involving imprisonment was thought to act as a strong deterrent, and punishment involving training, treatment and re-education was thought to be effective in reforming and rehabilitating the offender so as to prevent further breaches of the law. Penitentiary and other penal institutions endorsed training, educational, and treatment programs in an attempt to meet these objectives. To be sure, no scientifically controlled studies had demonstrated the success of the deterrent or treatment theories, but common sense and reason pointed the way.

The harsh reality of imprisonment, even under the new theories, brought penal treatment and training programs into question.[64] Difficulties arose in establishing trades training programs and in certifying prisoners as qualified in useful trades; psychiatric and other treatment services were even more difficult to secure; [65]

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[63] W. B. Common and A. W. Mewett, *The Philosophy of Sentencing and Disparity of Sentences*, The Foundation for Legal Research in Canada, (June, 1969), at p. 2. On the limits of prevention, see H. L. Packer, *The Limits of the Criminal Sanction*, Stanford U. Press, (Stanford, 1968), at p. 66.

[64] H. L. Packer, *op. cit.*, n. 63, at p. 55; and Nigel Walker, *Sentencing in a Rational Society*, (London, 1969), at p. 132.

[65] *Proceedings* of the Joint Senate and House of Commons Committee on the Penitentiaries, (Ottawa, 1967) No. 6, Friday, February 17, 1967, at pp. 243-244. Third United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Special Preventive and Treatment Measures for Young Adults*, (1965), at p. 15; *Use of Short Sentences of Imprisonment, op. cit.*, n. 46, at pp. 12-13.

finally, the deleterious effects of imprisonment on the prisoner, his family and the community were not balanced by any visible improvement in recidivist rates.[66]

Hard evidence now suggests that imprisonment is the least effective penal sanction and that fines are the most effective. In a study of reconviction rates for convicted offenders in Metropolitan London [67] it was found that of all sentencing measures for both first offenders and recidivists of almost all age groups, fines had the lowest reconviction rate. The study also showed that heavy fines were followed by fewer reconvictions than light fines of less than 1 pound. Surprisingly, the next most effective penal sanction in terms of reconviction rates was absolute or conditional discharge, sanctions not available under the Canadian Criminal Code. Even more surprising was the fact that probation was shown to have a reconviction rate even worse than imprisonment, although for offenders convicted of breaking and entering, probation was found to be the most effective disposition. Fines were found to be particularly effective in cases of larceny.

This favorable reconviction rate for fines was shown again in a study of 567 female offenders in the London Metropolitan Police District in 1957. Goodman and Price [68] found that for first offenders women put on probation did much worse than expected whereas those who were discharged (absolute or conditional) or fined had lower reconviction rates than expected. The results for women with previous records indicated that imprisonment resulted in the worst reconviction rate, discharge, the best, followed by probation and fines.

Unlike the study conducted by Hammond, the latter study by Goodman and Price did not make allowances for established variables in reconviction rates; namely that other things being equal, females are less likely to be reconvicted than men regardless of what sentence is used, the longer the previous record the more likely is a reconviction, the more time spent in prison the more likely is a reconviction, reconviction rates for certain offences, for example breaking and entering, are likely to be higher than in other offences such as sexual offences.[69] Nevertheless, the study by Goodman and

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[66] See Wilkins, *infra*, n. 69.

[67] *The Sentence of the Court*, H.M.S.O., (London, 1964), Part VI, at pp. 40, 48-49.

[68] N. Goodman and J. Price, *Studies of Female Offenders*, H.M.S.O., (London, 1967), Table 8, at p. 59.

[69] Nigel Walker, *op. cit.*, n. 66, pp. 93-94; Leslie T. Wilkins, "A Survey of the Field from the Standpoint of Facts and Figures", *The Effectiveness of*

Price serves to support the view that fines, particularly in shoplifting and other thefts, are probably the most effective sentencing measure.

Favorable reconviction rates for fines and discharge may be the result of selective sentencing rather than anything else. That is to say, the courts select for discharge or fine those predictably good risks whose offence does not call for any strong deterrent measure. From this point of view, the reconviction rates simply show that judges make good predictions. The difficulty with this attractive explanation is that it does not account for probation having the worst reconviction rate — worse even than imprisonment. Probation officers and magistrates tend to select for probation those offenders whose record indicates some real hope for reform, a man who is likely to mend his ways. Do the results of the studies mean that judges are bad predictors when it comes to probation? Do the studies suggest that probation actually prejudices a man's chances of going straight? At least for some offenders? [70]

The position of fines as a primary sentence in magistrates' courts has been further strengthened by fresh assaults on the reality of deterrence and the foundation on which it rests: Bentham's Calculus of pleasures and pains. Punishment, principally imprisonment, was based on the assumption that man as a logical rational creature would choose courses of conduct likely to produce, on balance, pleasure rather than pain. Hence, conduct prohibited by threats of penal sanction was more likely to be avoided in favor of more pleasurable options. The greater the attractiveness of the prohibited conduct, the greater the threatened punishment was needed to strike the desired balance. A rash of crimes of a particular nature in a particular district, accordingly, would be met with increased deterrent sentences. Official state conduct assumed a correlation between deterrence and threatened pain.

A recent report by the California State Assembly [71] is the latest of a series of challenges to the assumption of special and general deterrence. In a country noted for its extensive use of imprisonment and long prison terms, California was shown to be fifth highest in

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Punishment and Other Measures of Treatment, European Committee on Crime Problems, Council of Europe, (Strasbourg, 1967), pp. 42-48, which involves a general discussion of the direct relation between time spent in jail and the likelihood of reconviction.

[70] Hood, *infra*, n. 74, at pp. 110-112.

[71] *Deterrent Effects of Criminal Sanctions*, Progress Report of the Assembly Committee on Criminal Procedure, (Sacramento, May, 1968).

severity of sentences. Yet, for the twelve largest states of the Union, there was no correlation between severe penalties and lower crime rates.[72] Frequency of crime was lower, for example, in Texas, showing a median of time served in custody of 17 months than in Illinois, a state showing the second highest median time served in custody, namely, 29 months.[73] California, ranking fifth highest in the nation in severity of penalties, had the highest crime rate of the twelve largest states. The policy of severe sentences was unjustified in the face of the evidence.

The report pointed out that the failure of general deterrence was markedly apparent in cases of assault on police and marijuana offences. In both instances the conduct in question had been the subject of continued public debate and legislative action resulting in a substantial escalation of penalties over a five year period. Yet the attacks on police in Los Angeles increased by 90% during that period and the arrest rates for marijuana offences increased six times.

The assumption that the public has an awareness of criminal penalties and governs itself accordingly is not borne out by the evidence. Not only was the public in California generally ignorant about severity of criminal penalties, scoring correctly on only 2.6 out of 11 questions on this matter, but significantly, 50% of the persons queried stated that they had no knowledge respecting recent legislative action increasing penalties for rape, robbery and burgarly with violence.

The California Committee report concluded that not only do threats of severe punishment fail to deter offenders generally, as shown by the crime rates, but punishment actually executed bears little or no correlation to recidivism. Following the *Gideon* decision by the United States Supreme Court, the State of Florida released 1,252 indigent prisoners long before their normal release dates. In a follow-up study it was found that the recidivism rate, 28 months after discharge, was 13.6% for the Gideon group and 25.4% for a full-term release group. Similar results were obtained in California for a group of women offenders released on parole at an accelerated release date.

In the United Kingdom a comparison of the recidivism rates for young persons sentenced to four months imprisonment with a matched group of Borstal boys in custody for eighteen months and over showed that the longer terms of custodial restraint made

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[72] *Ibid.*, "Crime and Its Penalties in California", at pp. 26-27.
[73] *Ibid.*

no observable difference in recidivism rates.[74] In other research, a comparison of reconviction rates of offenders placed on probation by a court using a high rate of probation with reconviction rates of offenders from another court using the normal range of sentences in matched cases showed no difference in the overall reconviction rates.[75]

More recently, in New Brunswick, in order to ease the pressure on the local prisons a selected group of prisoners were released on parole. All but a few completed the parole period without default. Since this was not a controlled study it is not known how many of the men who successfully completed parole committed a subsequent offence.

Respecting offenders under sentence, the conclusion may well be that "success and failure are more related to the offender's personality than to the type and severity of the sentence he receives."[76] Consistent with this conclusion comes the statement based on research conducted by the California Youth and Adult Corrections Agency that "many, perhaps most, offenders can be supervised in the community."[77]

Neither severity of punishment nor type of punishment shows a correlation with crime rates or recidivism rates; what then is left of Bentham's model of a rational man computing his options of pleasure and pain? If rational calculation is not the basis of criminal conduct, particularly in crimes of passion, such as assault or sexual offences, is deterrence as a criterion in sentencing irrelevant? If it is irrelevant then the sentence should be the least expensive and most humane having regard to the demands of retribution. Particularly where crimes are the result of a compulsive determinism or the product of disease, fines or probation orders are more humane and less expensive than imprisonment.

It would be a mistake, however, to say that deterrence, particularly general deterrence, has been disproved; for one thing, the evidence does not disclose what the crime rates would have been had the law not punished offenders at all. For another thing, as

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[74] R. Hood, "Research Into Effectiveness of Punishments and Treatments", *Second European Conference of Directors of Criminological Research Institutes*, Council of Europe, (Strasbourg, 1965), pp. 99, 106.

[75] *Ibid.*, at p. 108. See also: J. Robison and G. Smith, *The Effectiveness of Correctional Programs*, (1971), 17 Crime and Delinq. 67.

[76] *Ibid.*, at p. 109.

[77] *Deterrent Effects of Criminal Sanctions, op. cit.*, n. 71, at p. 34.

Packer points out,[78] while man is probably not to be thought of in terms of Bentham's simple calculus, neither is he an impulse-ridden creature, untouched by rationality. Packer's view is that deterrence is a "complex psychological phenomenon meant primarily to create and reinforce the conscious morality and the unconscious habitual controls of the law abiding." [79] This view takes recognition of the fact that both Bentham and his critics have contributed to the development of a sounder understanding of deterrence, one that accords with experience and with science. People obey the law not so much because of rational decisions to avoid a calculated risk, they are held in check by inner controls developed through socialization processes at home, at school, and at church. Partly through unconscious inhibitions, partly from a conscious contemplation of disgrace men turn aside from crime. "... [W]e automatically and without conscious cognition follow a pattern of learned behaviour that excludes the criminal alternative without even thinking about it." [80]

From this point of view, the criminal law and its processes take on the quality of high drama, reinforcing in men the value-system that disposes them to legitimate conduct. The deterrent aspects of the criminal law are not focused wholly in the sentence, but take their bite from the shame of detection and the disgrace of trial. The sentence, providing it is not so minimal as to weaken faith in the system, can be selected on the criteria of humanity and least wastefulness. By this means the state avoids the costs of imprisonment, and the burdens of welfare payments in support of the offender's family; the offender avoids the destructive impact of prison life, not the least of which is the criminal self-image developed through association with prison inmates. So it is that department store employees convicted of theft, or white collar criminals generally, tend to be sentenced by way of suspended sentence or fine. Nothing more is needed; the trial as a kind of morality play has provided an opportunity for the public vicariously to share in an experience that reinforces inner controls in denouncing wrong and upholding right.

The foregoing affirmation of the claims of general deterrence lends support to the policy of using fines or some other humani-

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[78] H. L. Packer, *The Limits of the Criminal Sanction*, Stan. U. Press, (Stanford, 1968), at p. 41.

[79] *Ibid.*, at p. 65.

[80] *Ibid.*, at p. 43.

tarian and non-wasteful form of punishment in a high proportion of cases in magistrates' courts. At the same time, in spite of the general criticisms raised against it, special deterrence may also be shown to support a policy of fines in these courts. The case against special deterrence was that despite being punished, large numbers of offenders offended again; recidivism rates remained high even in the face of severe penalties. However, it has been suggested, of all punishments, fines appear to result in a lower reconviction rate generally.

This may be interpreted to mean that fines have a greater special deterrent effect than other punishments, or it may simply mean that fines are less likely to lead offenders further along the criminal pathway than probation, for example, or imprisonment. Moreover, it does not necessarily follow from a recidivism rate of 40%, for example, that punishment had no deterrent effect on the other 60%. Those offenders may have been individually deterred, or they may have simply "matured", a phenomenon well-recognized by criminologists. The simple fact is that not enough is known about punishment and deterrence to permit of more than tentative conclusions at this point.

Common sense and experience suggests that punishment does deter some offenders under some circumstances. Chambliss [81] reported a study of violation of automobile parking regulations, indicating that where the severity of punishment was sharply increased along with a substantial increase in risk of apprehension, violations decreased significantly. Hammond [82] also reported that sizeable fines tended to deter while light fines did not.

Reason suggests that exposure to the criminal process and punishment is more likely to act as a deterrent with certain types of offenders than with others. Just as general deterrence is likely to have the greatest impact on stable personalties sharing middle class values and susceptible to the shame and disgrace attending criminal proceedings, so individual offenders caught up in the criminal process are likely to be deterred by the experience to the extent that they share middle class values, have stable personalties and a low commitment to the criminal conduct in question. On the other hand, offenders driven on by inner urges, lacking a well developed set of inner controls, or who reject the values and goals

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[81] W. J. Chambliss, *Crime and the Legal Process,* (New York, 1969), at p. 388.

[82] *The Sentence of the Court,* "A Handbook for Courts on the Treatment of Offenders", H.M.S.O., (London, 1964), at p. 48.

of the system and deliberately engage in criminal conduct as a way of life are not likely to be deterred by the publicity of trial or the pain of the punishment.[83]

It follows that individual or special deterrence would have the greatest effect on offenders described by Chambliss as having a low commitment to crime.[84] Such offenders would not see themselves as criminals or committed to a course of conduct designated as criminal. At the same time, criminal conduct of an impulsive nature, for example, assaults, sexual offences, and some homicides is not likely to be deterred by punishment. It is more probable that special deterrence would be operative where the accused, while having a low commitment to crime, was engaged in a property offence rather than an offence against the person.[85] Where persons convicted of property offences, however, have two or more previous convictions it is not likely that special deterrence will have any effect.

In magistrates' courts, then, the single most important function of the criminal process is its educative effect, its general deterrent effect, on the community generally; the most educative force in the process is the publicity of the trial itself rather than the severity of sentence. Consequently, having due regard to the risk of depreciating the criminality of the conduct in question, sentences should be selected on a principle of humanity and least waste. Except in particular cases calling for strong condemnation, or rehabilitative or treatment services as disclosed by thorough presentence investigation, policy requires the imposition of probation or fines.

On the basis of the above policy a case can be made for a greater use of fines by magistrates in Nova Scotia. Five of the nine offence categories in Table II relate to offences of a more or less minor character: offences against the public order, causing a disturbance, automobile offences, and mischievous damage to property. It is difficult to imagine any but the most severe cases being such a threat to public security as to demand imprisonment. Yet 13% of convictions for causing a disturbance, 21% of convictions for wilful damage to property, and 30% of offences against public order resulted in short jail terms. Does general deterrence require such a heavy toll? At what point does the educative function of

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[83] W. J. Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, [1967] Wisconsin L.R. 703, at p. 713.

[84] *Ibid.*

[85] *Ibid.*

apprehension, trial, conviction and sentence exact too heavy a punishment, resulting in waste and injustice? Neither general deterrence nor specific deterrence requires the imprisonment of vagrants or persons found drunk or swearing in a public place. Suspended sentence and judicious fines already account for 86% of all such convictions; why such dispositions should be any less than 99% as in automobile cases is difficult to imagine. Can it be seriously advanced that under the guise of vagrancy, prostitutes should be picked up and jailed for health or safety reasons, or that drunken or noisy persons should be jailed for their own protection? A more detailed analysis of the convictions in these categories might well reveal an unwarranted reliance on short jail terms for offenders who are not susceptible to deterrence and the circumstances of whose offence do not require a severe penalty in the interests of general deterrence. No pretence should be made that short terms in the old county jails are rehabilitative; detention behind their walls may deter some, but the general view is that the destructive quality of prison life tends to drive the prisoner deeper into crime.[86]

Another category of offences warranting further examination in the light of a policy favoring fines are the expressive crimes of assault and the various sexual offences, excluding rape. In most cases these crimes of passion or compulsion are not deterrable by threats of punishment nor are the individual offenders upon conviction likely to be deterred by severe penalties. In these offences the deterrence arises from the publicity of the trial more than the sentence. Ouly the most serious offences warranting severe community condemnation should result in imprisonment. Cases of exhibitionism, pedophelia, indecent assault, or homosexual acts between consenting males do not greatly harm the public safety. Such conduct may shock some people, it may disgust others, but in most instances the conduct is relatively harmless to the victim, or may even have been invited by the "victim"; generally, such offenders may best be dealt with by probation orders or fines.[87]

In addition, a really siguificant increase in the use of fines might well be made in theft and false pretences. The present statutory prohibition against fines only in cases involving property of $50 or more should be removed and a policy of judicious fining irrespective of the value of the stolen goods should be tried in an

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[86] *Report of the Canadian Committee on Corrections*, Queen's Printer, (Ottawa, 1969), pp. 307, 314-318, 499-501.

[87] Mohr *et al., op. cit.*, n. 61; *Sexual Offences, op. cit.*, n. 60.

attempt to reduce the heavy reliance on prison terms in this area. Both the Model Penal Code [88] and the American Bar Association,[89] it will be recalled, recommended fines as appropriate sentences for property offences; Parliamentary action should not be delayed. What is the advantage to society in jailing shoplifters and petty thieves? In view of the evidence indicating that this group of offenders responds well to sharp fines, humanity and considerations of least waste should be the guiding criteria: retribution is not called for. Yet a consideration of Table VI shows an over-reliance on imprisonment for convictions arising under section 294 of the Criminal Code. In the same geographical region one magistrate used imprisonment for 50% of all thefts and another used it in only 13% of cases of stealing. The highest use of fines or suspended sentence was 96% in magistrate F's court, while a hundred miles away magistrate A used suspended sentence or fines in only 36% of all convictions. The reasonableness of such evident differences in policy between courts depends upon a detailed examination of the cases involved, but there is some reason to think that security, the public safety, and respect for the integrity of the system of justice can be maintained with a low rate of imprisonment for offences arising under section 294. Common sense requires a re-examination of sentences in this area.

Imprisonment in Default

To what extent would a policy of increased use of fines result in increased imprisonment for failure to pay? At the present time the practice of the courts is to impose a fine or a certain number of days in default. In most cases no enquiry is made before sentence into means to pay, although in some courts immediately after sentence, either at the initiative of the offender or the magistrate, time to pay is granted. In one month in one of the Halifax magistrates' courts 151 persons were given time to pay. This figure included a very large proportion of offences arising under provincial statutes, namely, the *Liquor Control Act* and the *Highway Traffic Act*. In the same month in the same court 14 warrants to commit in default of payment were issued, two of these 14 cases arising under the Criminal Code. In another metropolitan court it is estimated that 92% of persons fined pay within the time allotted. Of the defaulting 8% (including again a very high proportion of

[88] Model Penal Code, *op. cit.*, n. 10, section 7.02.

[89] American Bar Association, *Standards Relating to Sentencing Alternatives and Procedures*, (1967), ss. 2.7, 117, 125.

offences under the *Highway Traffic Act* and the *Liquor Control Act*) approximately one-quarter are never located, 69% pay when the police arrive to serve the warrant of committal, and another 6% go to prison for failure to pay. Most of these offenders were convicted under the *Highway Traffic Act* of offences relating to ill-equipped vehicles, but were to pay fines in the $50 range. A random survey of the cases arising under the Criminal Code in magistrates' courts in rural Nova Scotia reveals that even for impaired driving offences or driving while disqualified, for example, in one magistrate's court alone approximately fifteen sentences of "$80 or 30 days", resulted in imprisonment. Another offence resulting in a surprising number of committals in default of payment is under section 373: wilful damage to property. In some cases fines as low as "$10 or 20 days" or "restitution or 1 month" have resulted in persons going to jail instead of paying the fine. Even more surprising are the cases, few in number, of persons convicted of vagrancy and being sentenced to "30 days or $75" or upon being convicted of obstructing a police officer and fined "30 days or $50" are committed in default of payment. Another group of cases resulting in imprisonment in default of payment of fines arise under the theft section 294(b). Under this section fines of "$100 or 2 months", or even "$35 or 1 month" resulted in committals. The clear impression emerges of a correlation between *per capita* income and the number of cases of imprisonment for failure to pay fines. In the Halifax courts, imprisonment in default is confined to a few cases. In the less wealthy areas of the province more poor people go to jail for lack of money.

Whether the poor are committed to prison as a means of enforcing payment of the fine or whether the imprisonment is an alternative punishment is not clear. Historically, fines were a means of raising revenue for the King, and imprisonment was used in an attempt to compel the "making of fine". Since the prisons were self-supporting, imprisonment was the least expensive punishment. By Coke's time, however, the character of the fine had changed somewhat and the modern terminology of "being fined" rather than "making fine" reflected a shift in attitude.[90] Imprisonment was looked upon as an incident of a fine, and the cancellation of a portion of the fine for every day served in jail suggested that imprisonment was not being used as an enforcement measure, but as a substitute punishment. Today, however, it is not necessary

[90] D. A. Westen, *Fines, Imprisonment, and the Poor: "Thirty Dollars or Thirty Days"*, (1969), 57 Calif. L.R. 778, at pp. 783-787.

to use fines as a revenue measure, and from a correctional point of view, the considerations giving rise to a sentence of fine are quite independent of those leading to a sentence of imprisonment. In any event, imprisonment either as a means of enforcing payment of fines or as an alternative punishment in default needs re-examination.

The scant Canadian authority on the legal basis of imprisonment in default of payment of fines suggests that imprisonment is regarded as an alternative punishment.[91] The observation was made without elaboration in the Saskatchewan Court of Appeal on consideration of an appeal from sentence of $100, payable in six months or three years' imprisonment in default, a term well within the statutory maximum of five years. In allowing the appeal and substituting a short term of imprisonment in place of the original sentence, the court pointed out that three years' imprisonment as an alternative punishment was not proportional to the amount of the fine. Since the statutory maximum had not been exceeded, the Court was apparently reading into the Code provisions a standard of fundamental fairness akin to due process or equality before the law.

Support for the theory that imprisonment is conceived of as an alternative sentence can be found in *Paley on Summary Convictions;*[92] in referring to the English practice the author states: "At the time the decision of the court imposing a fine is pronounced the alternative terms of imprisonment in default should be stated for the information of the defendant."[93] Under the *Criminal Justice Administration Act, 1914,*[49] then obtaining in England, a statutory scale limited the term of imprisonment that could be imposed in default. Corresponding statutory limitations under the present Canadian Criminal Code restrict the term in default in summary conviction cases to six months[95] which is also the maximum term where imprisonment is imposed in the first instance, while for indictable offences the Code limits imprisonment to two years for offences punishable by less than five years and five years for offences punishable by five years or more.[96]

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[91] *Rex* v. *Sydorik* and *Zowatski,* [1926] 3 W.W.R. 458.

[92] Ed. B.V. Bateson, 9th ed., (London, 1926).

[93] *Ibid.,* at pp. 404-405.

[94] 4-5 Geo. 5, c. 58.

[95] Section 722(2).

[96] Section 646(3)(b).

In the United States the majority view appears to be that imprisonment in default is a means of enforcing payment[97] and is not part of the penalty for the offence, although there is some authority going the other way.[98] Difficulties arise where poor persons are routinely fined and imprisoned in default; without doubt it is irrational to imprison an offender without means to pay on the theory that imprisonment will force him to pay.

The problem is not solved by adopting imprisonment as an alternative punishment as the basis for committal in default. From a sentencing point of view the whole basis of fines, suspended sentences, probation orders, or conditional and absolute discharge is the fact that they are alternatives to imprisonment. One or other of the dispositions is selected with the clear decision in mind that imprisonment is neither necessary nor desirable in the instant case. Many considerations enter into this initial determination including questions of general and special deterrence, rehabilitation, retribution or incapacitation. Fines are not normally selected where considerations of incapacitation, for security reasons, or substantial rehabilitation programs are necessary; neither are fines generally selected where strong condemnation is called for. That is, fines are selected where for one reason or another imprisonment or treatment programs under probation orders are not necessary. What irrational impulse then directs that a sentence of a fine routinely be imposed along with an alternative sentence of imprisonment?

What a needless burden is thrown upon the taxpayer by this force of habit. Consider the earlier examples given of imprisonment in default, keeping in mind that it costs the taxpayer approximately $20 a day to keep an offender in jail, welfare and family maintenance costs being additional burdens: obstructing a police officer: "$50 or 30 days"; vagrancy: "$75 or 30 days"; theft: "$35 or 30 days". The cost of imprisoning poor people in default under circumstances where the court has already decided that imprisonment is neither necessary nor desirable is a luxury the taxpayer can hardly continue to afford.

From the indigent offender's point of view, imprisonment in default is not an alternative punishment in the sense that he has

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[97] *The People* v. *Saffore*, 18 N.Y.2d 101 (1966); 271 N.Y.S.2d 972; 218 N.E.2d 686 (Court of Appeals of New York), where the use of imprisonment for such a purpose was disallowed.

[98] *Dixon* v. *State*, 2 Tex. 481 (1849); *Chapman* v. *Selover*, 225 N.Y. 417 (1919), 122 N.E. 206. In the latter case it was held, at p. 207, that the punishment was to include the consequences flowing from default on the fine.

any real choice in the matter. Poor people do not default in payment of fines because the jails are an improvement over conditions at home; they are forced into jail through poverty. Routine imposition of sentences of fine with imprisonment in default places the rich man and the poor man on an unequal footing before the law. On its face a fine with imprisonment in default appears equitable; in practice it works an invidious discrimination against the poor man, depriving him of liberty, and adding to his burdens the disgrace of being in jail, the separation of his family, and forcing him to consort with confirmed criminals eager to enlist him into their ranks and to maintain contact with him at the end of his prison term. In contrast, for half a day's pay, at the most a week's pay, a man of greater affluence purchases his liberty and protects his position.

Under the guarantees afforded by a Bill of Rights including the Canadian Bill of Rights the legality of imprisonment of poor people in default of payment of fines is a matter of considerable importance. In the United States litigants have sought the protection of both the due process and equal protection clauses of the Constitution. Both of these clauses have been held to prohibit the arbitrary selection of a class of persons as the target of special burdens.[99] The constitutional guarantees require that governmental action and classification bear a rational relationship to the goals to be achieved. If the goal of the imprisonment is, as stated in the majority of cases, enforcement of payment of the fine, then clearly the action is not rationally related to the objective. Imprisonment of persons known to be without means cannot rationally be expected to be effective in collection of fines. The imprisonment has no capacity to compel payment: it is arbitrary and denies poor people due process and equal protection of the law.[100]

The New York Court of Appeals in *The People* v. *Saffore*[101] considered the question at issue here and concluded that "[s]ince imprisonment for nonpayment of a fine can validly be used only as a method of collection for refusal to pay a fine we should now hold that it is illegal so to imprison a defendant who is financially

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[99] *Loving* v. *Virginia*, 388 U.S. 1, 8-9 (1966), *Kelly* v. *Schoonfield*, 285 F. Supp. 732, 736-737 (1968).

[100] *The People* v. *Collins*, 261 N.Y.S.2d 970 (Orange Co. Ct. 1965); *People* v. *McMillan*, 279 N.Y.S.2d 941 (Orange Co. Ct. 1967); in *State* v. *Allen*, 249 A.2d 70 (1969), at p. 75, Mr. Justice Conford, in a dissenting opinion, said that incarceration for failure to pay a fine was unconstitutional as a deprivation of both due process and equal protection.

[101] *Op. cit.*, n. 97.

unable to pay." [102] The actual holding of the court was confined to the facts of the case where the imprisonment in default exceeded the maximum term of imprisonment to which he could have been sentenced in the first instance:

> [W]hen payment of a fine is impossible and known by the court to be impossible, imprisonment to work out the fine, if it results in a total imprisonment of more than a year for a misdemeanor is unauthorized by the Code of Criminal Procedure and violates the defendant's right to equal protection of the law, and the constitutional ban against excessive fines.[103]

Notwithstanding that the decision could have been reached on a strict interpretation of the New York statute, the court went out of its way to give approval to the constitutional arguments based on due process, equal protection, and excessive fines. The decision was a clear indication of how the courts might deal with future cases, but some subsequent decisions show an unwillingness to extend the reasoning in *Saffore*.[104] Finally, even where imprisonment in default does not exceed the statutory limit, it will be equally ineffective in compelling payment and defendants should be equally entitled to constitutional protections.

Where, as in Canada, imprisonment in default is regarded as an alternative punishment, equal protection and due process as interpreted in the United States would require that it be rational to sentence one class of persons, the poor, to a different punishment than those who are not poor. The United States Supreme Court has held that classifications based upon wealth and affecting fundamental liberties are "suspect". The approach that the United States Supreme Court appears to be taking is to balance the interests involved, and if benefits involved in support of the classifications are not substantial but the injury to other interests is great, then

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[102] *Ibid.*, at p. 974.

[103] *Ibid.*, at p. 975.

[104] In *State* v. *Lavelle*, 255 A.2d 223 (1969), at p. 230, this constitutional point was argued by Proctor, Jacobs, and Schettino, JJ. dissenting (Sup. Ct. N.J.); in *Sawyer* v. *District of Columbia*, 238 A.2d 314 (1967) it was held that imprisonment for default in the paying of a fine would exceed the maximum possible sentence and was accordingly not allowed; in *Morris* v. *Schoonfield*, 301 F. Supp. 158 (U.S. Dist. Ct., S. Md. 1969), such a sentence was held to be unconstitutional, not on its face, but because the prisoner did not have a chance to tell the judge of his indigent status. If he had had the opportunity to so inform the judge, then a sentence to imprisonment for default in paying the fine would not have been found unconstitutional. More recently the California Supreme Court has moved to prohibit the jailing of the accused where failure to pay the fine was due to poverty: *In re Antazo*, 473 P.2d 999 (1970).

the classification will be found to be an invasion of the equal protection and due process clauses. Thus, where the state of Illinois required indigent offenders to pay a fee to get a transcript on appeal, the benefits accruing to Illinois in collecting the revenue were not found to be substantial in the face of the injury to poor persons in being effectively barred from the appeal courts. As a result the Illinois law was found to be an infringement of the defendant's right to due process and equal protection.[105]

An extension of the *Illinois* v. *Griffin* rule to cases of imprisonment for failure to pay fines requires a balancing of the interests. The imprisonment is of no economic benefit to the state. In fact, the imprisonment is particularly costly to the state. At the same time the state has an interest in impressing upon offenders the necessity of obeying the law, and in deterring the offender or other persons in the community from further breaches of the law. On the other hand, these goals can be achieved by less costly means: imprisonment itself was originally rejected in favor of a fine; the ends of punishment then do not demand imprisonment. They could be met by a system of payment of fines by instalments, delayed fines, and other procedures recently enacted into legislation in England [106] and the state of New York.[107] The ends of justice could also be served in appropriate cases by re-sentencing the offender to a term of probation or suspended sentence.

In addition, the balancing process requires a recognition of the costs to the defendant: loss of liberty on the excuse that it is difficult to fine the poor; the shame and disgrace of being a "jail bird"; disruption and weakening of the offender's family structure; and a corruption of the prisoner. As long as the state has alternative options open to it in securing its objectives at relatively low cost, the practical consequences of imprisonment of poor persons as an alternative to a fine may well be regarded as arbitrary and an invasion of equal protection and due process under law.

In *United States ex rel. Privatera* v. *Kross*,[108] the constitutionality of imprisonment as an alternative punishment in default of fine was upheld. The district court for the Southern District of New York rejected the equal protection argument on the ground that modern sentencing theory demanded individualization of sentences and that an offender had no more constitutional right than another

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[105] *Griffin* v. *Illinois*, 351 U.S. 12 (1956).

[106] *Supra*, n. 41.

[107] New York Code of Criminal Procedure, s. 470-d, as amended, N.Y. Sess. Laws 1967, c. 681, s. 61.

[108] 239 F. Supp. 118 (S.D.N.Y. 1965).

offender "no matter what his economic status, rich or poor, to receive the same sentence for the same offence".

Unlike the *Saffore* case, the facts of *Privatera* did not disclose a flagrant abuse. The accused had been sentenced to thirty days imprisonment, a $500 fine or sixty days in default. The accused was without funds although the court had not made any inquiry into his ability to pay. Nevertheless, in principle, since the imprisonment should have been found unconstitutional, the court's judgment may yet be circumvented. The equal protection argument does not turn on a right to receive the same sentence as another, it turns on the requirement that where the state makes distinctions in selecting certain groups for special treatment, the selection and the administration of the special treatment must not be arbitrary either on its face or in its practical operation. As indicated earlier, imprisonment of the poor as an alternative punishment in default of payment is arbitrary in its practical consequences.

Recently, the Supreme Court of Canada breathed life into the Canadian Bill of Rights by holding that section two of the Bill was no mere rule of construction but a statutory declaration of rights and freedoms that must be paramount to conflicting federal laws. The federal Criminal Code permitting imprisonment in default of payment of fines is in conflict with Canadian Bill of Rights guarantees of due process, equality before the law, freedom from arbitrary detention and cruel and unusual punishment.

In *Regina* v. *Drybones*,[109] the Supreme Court of Canada found a conflict between the Bill's guarantee of equality before the law and federal legislation which in its effect, drew a distinction between Indians and white persons not only respecting the places where they might be found drunk, but in the penalties attached to the prohibited drunken conduct. The court held that s. 94(6) of the *Indian Act* in its application infringed on the accused's right to "equality before the law." That term was interpreted to require equality of treatment:

> "[Section] 1(b) means at least that no individual or group of individuals is to be treated more harshly than another under that law, and... an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty."[110]

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[109] (1970), 9 D.L.R. (3d) 473. For a theoretical discussion of the meaning of equality see: J. C. Smith, *Regina* v. *Drybones and Equality Before the Law*, (1971), 49 Can. Bar Rev. 163.

[110] *Ibid.*, p. 484 *per* Ritchie, J.

No doubt the Supreme Court will have other occasions on which to give further content to the guarantees of due process and equality before the law. It is suggested, however, that the constitutional protection does not prohibit the government from drawing any distinctions between groups on the basis of color or sex, for example, providing the distinction is rationally related to its purpose, is not discriminatory on its face, nor discriminatory in its effect. For example, under the *Prisons and Reformatories Act*,[111] a federal Act, female offenders who are Roman Catholic and over the age of sixteen, but not male offenders, in Nova Scotia may be resentenced to an additional term beyond that imposed by the trial judge. The purpose is rehabilitative and, as such, the distinction drawn between men and women may be rational in its basis. Moreover, the women are to be sentenced to a reformatory in order that the rehabilitative purposes may be achieved. Whether the law is invidiously discriminatory in its application so as to deny women equality before the law is a matter to be considered only after an investigation of the realities of the reformatory treatment programs and the success or otherwise of treatment programs generally. Of relevance in this inquiry would be a consideration of alternative ways in which the state's purposes could be achieved without such a gross invasion of individual liberty. In *Drybones* the liquor control laws were found, in their application, to be discriminatory against Indians; an application of the same test may cast doubt upon the validity of section 99 of the *Prisons and Reformatories Act*, no less than the legality of imprisoning indigents in default of payment of fines.

Even as discriminatory distinctions based on race, religion or sex are suspect under the Canadian Bill of Rights, so, too, it is suggested, distinctions based on wealth will also be seen to be suspect under the equality before law clause. While government is entitled to distinguish between rich and poor for the purposes of specific government action and may direct specific burdens to be borne by the poor, it is suggested that unless the selection of the poor as a specific class to bear the additional burdens is shown to have some rational basis, then the distinction is arbitrary and a violation of equality before the law. Similarly, if governmental action is not rationally related to its effect, it is prohibited by the Bill of Rights.

That government may legislate requiring imprisonment as an alternative punishment to a fine is not on its face discriminatory

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[111] R.S.C. 1970, c. P-21, s. 99.

as between rich and poor. Each man is free to pay or not to pay. Yet, to the extent that the purposes of punishment in a particular case permit the substitution of imprisonment for fines, the law ceases to be wholly rational. Once a decision to impose a fine is made, the decision has also been made that the purposes of punishment in the particular case do not require the severe sanctions of imprisonment. To ignore the distinction already made and routinely to impose imprisonment as an alternative pimishment is arbitrary and unjustifiable.

Finally, in its effect and application, imprisonment as an alternative punishment, as has already been noted, imposes harsh and substantial penalties on a man who is shown to be unable to pay, while the benefits to the state are minimal. The state objectives in the sentencing process could be met by following less expensive options. In this instance to treat the poor more harshly than the rich, is without justification under law. Questions of liberty or imprisonment ought not to be determined by the amount of cash in a man's pocket.

Apart from the gnarantees of due process and equality before the law, the Canadian Bill of Rights forbids "arbitrary detention", "imprisonment or exile" as well as "imposition of cruel and unusual treatment or punishment." The foregoing analysis respecting equality before the law has some application to the question of arbitrary imprisonment. Unless the imprisonment can be shown to be rational in its basis and free from gross inequalities in its effect, particularly where the justification is small, it may be found to be an arbitrary deprivation of liberty.

What constitutes "cruel or unusual punishment" remains to be elaborated on by the Supreme Court of Canada, but in the United States the law appears to be well settled that imprisonment as a means of enforcing payment of fines is not cruel punishment in the sense that it is "so excessive... and so disproportionate... as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." [112]

Where, as in Canada, the legal basis for the imprisonment in default of payment is not enforcement, but punishment, the cruel or unusual punishment clause may have application. *Robinson* v. *California* [113] held that it was cruel and unusual punishment to

[112] 16 Corpus Juris 1358. Cited with approval in *People* v. *Magoni*, 73 Cal. App. 78, 80 (1925); 238 P. 112, 113 (District Court of Appeal).

[113] 370 U.S. 660 (1962).

punish a drug addict because of his addiction. More recently in *Powell* v. *Texas*,[114] a divided court held that it was not unconstitutional to punish an alcoholic for being drunk in a public place. Four members of the court dissented on the ground that an alcoholic could not avoid being in a drunk condition and, therefore, to punish him was cruel. Mr. Justice White, who voted with the majority, stated that as the alcoholic did not have to get drunk in a public place, it was not unconstitutional to punish him accordingly.

Accepting Justice White's position, the indigent offender could argue that since he is unable to pay the fine, just as the chronic drunk is unable to refrain from drink, he ought not to be punished. Reason may suggest, however, that the indigent offender is not being punished because he is poor, but he is being imprisoned because he committed an offence. The reality of the situation, however, is one of punishment that would not otherwise have been imposed but for the accused's economic condition.

Magna Carta and the Bill of Rights of 1688, both of which form part of the Canadian constitution, forbid excessive fines.[115] In the *Saffore* case the court held that the $500 fine imposed on an offender without means to pay was excessive:

> There seem to be no controlling decisions on the question of what is an excessive fine... The phrase 'excessive fine' if it is to mean anything, must apply to any fine which notably exceeds in amount that which is reasonable, usual, proper or just. A fine of $500 for common misdemeanor, levied on a man who has no money at all, is necessarily excessive when it means in reality that he must be jailed for a period far longer than the normal period for the crime, since it deprives the defendant of all ability to earn a livelihood for 500 days and since it has the necessary effect of keeping him in the penitentiary far longer than would ordinarily be the case.[116]

What constitutes excessive therefore, depends in part upon the offender's ability to pay. A narrower view is that fines are not excessive unless they "shock the moral sense of the people" or "so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances."[117] It is sub-

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[114] 392 U.S. 514 (1968).

[115] *Op. cit.*, n. 4; 1 Will. & Mar. sess. c. 2 (1688) — "That excessive baile ought not to be required nor excessive fines imposed...".

[116] *Op. cit.*, 97, at p. 975.

[117] *Supra*, n. 112.

mitted that all fines resulting in the imprisonment of people without means to pay are excessive and contrary to constitutional protections.

Litigation of constitutional rights, however, is costly and should be a matter of last resort. The objects to be achieved through constitutional guarantees, fundamental fairness, and due process, and equality before the law can be secured in Canada under existing legislation providing the courts use the powers already at their disposal.

The assumption is that fines should be retained as the primary sentence in magistrates' courts for both rich and poor offenders. As indicated, evidence suggests that fines have a favorable reconviction rate when compared with imprisonment or probation; in addition, particularly with respect to certain categories of offences, the purposes of general and special deterrence may be effectively achieved through fines with a minimum of cost and unnecessary suffering. While inequity arises under present practices, in the use of fines the solution lies not in abandoning fines, but in using them so as to avoid the evils of imprisonment in default of payment.

Already under the Criminal Code provisions are available permitting time for payment, payment by instalments or payment of fines as a condition of a probation order. These provisions should be fully utilized, with the resources of the probation service being used to assist in the collection of fines payable by installments. While the administrative inconvenience is not likely to be welcomed by the magistrates, the extra burden of collecting fines could be mitigated by assisting the courts with additional clerical staff. The practice of using the probation service in collecting payments under restitution orders appears to be working out satisfactorily and should be extended to the case of fines payable by installments.

At the present time the Criminal Code does not prohibit the imposition of imprisonment as a primary punishment in cases fit for fines but where the offender is without means to pay. Legislative amendments to the Code should prohibit imprisonment in such cases thus saving the need for court challenges on constitutional grounds. As indicated, the state has other options; namely, fine payable on installments, probation orders with a condition of money payments, or delayed payments. Such reasonable alternatives to imprisonment are now available and equal protection and due process demand that they be utilized.