

THE FINE AS A CRIMINAL SANCTION

1. Introduction

In view of the frequent imposition of fines by criminal courts, it is surprising that so little criminological attention has been paid to the effectiveness of the sanction. The fine is by no means a new measure¹, but there are indications that in the last half century there has been a steep rise in its use. Rosenzweig refers to statistics from England, Germany, France and the United States² which suggest that the increase in the use of the fine is associated with growing uneasiness about short-term prison sentences. Provisional English statistics for 1969 indicate that fines were imposed on 95 per cent of offenders who were found guilty of non-indictable offences. As many as 98 per cent of offenders who were found guilty of non-indictable motoring offences and 89 per cent of those found guilty of other non-indictable offences were fined. Of those found guilty of indictable offences by Magistrates' courts, the fine was used in 49 per cent of the cases³. The present paper reports the results of a recent study which was made of 2,000⁴ files relating to matters before the Adelaide Magistrates' Court in early 1970. 1,385 files concerned defendants upon whom fines were imposed. Some of the defendants had multiple fines imposed on them. In all, 1,491 fines were imposed on defendants whose files were studied.

Some types of offence are closely associated with the fine and this is especially true of motoring and property offences⁵. Bradbury claims that English courts commonly fine offenders who have been convicted of unlawful sexual intercourse⁶. In South Australia, it appears that the offences of being drunk in a public place and drinking methylated spirits rank high amongst the summary ones which lead to the imposition of fines, as shown on *Table A*.

Commonly it is claimed that the wide use of the fine is amply justified. It is alleged to provide an alternative to imprisonment which is capable of adjustment according to the offender's means and the gravity of his offence. The fine is easily remissible in that it can be repaid in the event of injustice. It is economical: initially it costs the State very little to impose, and in the majority

* Of the Faculty of Law, The University of Adelaide. I wish to express my gratitude to all who enabled me to present in this article some South Australian statistics. In particular, I should like to thank Mr. V. C. Matison, C.S.M., and members of the Administrative staff at the Adelaide Magistrates' Court. My special appreciation is due to Mrs. W. H. Eyre, and Miss B. A. Green, Research Assistants, who have extracted most of the statistical information from court files.

1. For a brief commentary on the origin of the fine, see S. Rosenzweig, "Fine" from *The Law of Criminal Correction*, (Sol. Rubin Ed., 1963) 221, at 222.
2. S. Rosenzweig, *op. cit.* 229.
3. Report of the Advisory Council on the Penal System, *Non-Custodial and Semi-Custodial Penalties* (H.M.S.O. 1970) at 5.
4. The files included some cases in which no charge was laid against the defendant and some in which a charge was laid but the defendant was found not guilty. The files were the first 2,000 which were indexed under the year 1970 in the Adelaide Magistrates' Court records.
5. Alec Samuels, "The Fine: The Principles" [1970], *Crim.L.R.* 201 at 202.
6. P. L. Bradbury, "Fines—Are they a Deterrent?" (1969), 119 *New L.J.* Vol. 1, 466.

TABLE A

| OFFENCE | No. of Fines | Range of Fines | Modal Fine ⁷ |
|---|-----------------|-------------------|--|
| Being drunk in a public place or drinking methylated spirits - - | 254 | \$2- \$20 | \$10.00 |
| Driving under the influence of liquor | 26 | \$60-\$160 | No single modal fine Average fine: \$120.00 |
| Driving with excess alcohol in the blood and similar offences - - | 8 | \$30- \$60 | \$60.00 |
| Disorderly behaviour - - - - | 25 | \$2-\$100 | No single modal fine Average fine: \$31.70 |
| Urinating in a public place - - | 10 | \$2- \$15 | \$10.00 |
| Using indecent language - - - | 28 | \$10- \$25 | \$10.00 |
| <i>Road Traffic Act Offences</i> | | | |
| Speeding—ordinary vehicles - - | 99 | \$10- \$50 | \$15.00 |
| Speeding—commercial vehicles - | 79 | \$20- \$80 | \$30.00 |
| Excess load and similar offences—commercial vehicles - - - - | 25 | \$6-\$326 | \$15.00 |
| Disobeying traffic signs or lights - | 61 | \$5- \$40 | \$10.00 |
| Parking offences - - - - - | 18 | \$5- \$20 | \$10.00 |
| Pedestrian offences - - - - - | 7 | \$1- \$10 | \$10.00 |
| Failure to stand and similar offences - - - - - | 43 | \$10- \$40 | \$35.00 |
| Driving without due care - - | 44 | \$5- \$40 | \$15.00 |
| Driving in a manner dangerous - | 7 | \$25-\$100 | \$100.00 |
| Failure to stop, failure to report accident - - - - - | 10 | \$10-\$100 | \$40.00 |
| Vehicle defects - - - - - | 78 | \$1- \$30 | \$10.00 |
| Other general safety offences under Road Traffic Act or Motor Vehicle Act - - - - - | 49 | \$4- \$30 | \$10.00 |
| Offences under Motor Vehicles Act | 67 | \$2- \$60 | \$10.00 |
| Infringements of Adelaide City Council's by-laws as to parking - | 100 | \$1- \$10 | \$2.00** |
| Offences under Road Maintenance Act - - - - - | 90 | \$5-\$200 | \$50.00 |
| Offences under Income Tax Assessment Act - - - - - | 41 | \$10-\$250 | \$50.00 |
| <i>Offences under Broadcasting and Television Act</i> | | | |
| Failure to obtain radio licence - | 67 | \$4- \$35 | \$10.00 |
| Failure to obtain television licence | 63 | \$5- \$75 | \$10.00 |
| Offences under Licensing Act - - | 30 | \$10-\$125 | \$50.00 |
| <i>Offences Against the Person</i> | | | |
| Sexual - - - - - | 5 | \$50-\$100 | No single modal fine Average fine: \$76.00 |
| Non Sexual - - - - - | 10 | \$5- \$75 | \$10.00* |
| Offences against the police - - - | 17 | \$8- \$90 | No single modal fine Average fine: \$26.86 |
| Offences of dishonesty - - - - | 75 | \$2-\$100 | Too misleading to include |
| Unlawfully on premises, wilful damage to property - - - - | 12 | \$10- \$40 | \$10.00 |
| Miscellaneous, including 16 offences under Lottery and Gaming Act, 4 taxicab offences, 3 drug offences, 4 offences under Building Act, 2 offences relating to prostitution, 1 insufficient means of support - | 43 | \$1-\$100 | Too misleading to include |

* One of the included fines was imposed by the Supreme Court on appeal.

** Average court costs in these cases amounted to \$10.55.

7. Most frequently imposed fine.

of cases, of course, it produces revenue. Further, there is some information which suggests that the fine, particularly if it is heavy, may be relatively efficient in curbing recidivism. It has been claimed that fines, as opposed to other penalties, have been followed in England by the fewest reconvictions compared with expected numbers and that this holds for first offenders and recidivists of almost all age groups⁸. For dealing with those convicted of larceny (and presumably similar offences) fines seem to be especially useful⁹. Gibbens and Prince have reported particularly effective results where fines have been imposed for shoplifting¹⁰.

Some of the arguments in favour of the fine are clearly open to question. It is unrealistic to emphasise the advantage which the fine affords as an alternative to imprisonment if default in payment is common and is bound, or even likely, to lead to a gaol sentence. It is misleading to suggest the fine can be adapted to the circumstances of the defendant if little effort is made at the time of sentence to consider his disposable income. Even information about relative rates of recidivism is unconvincing in the absence of clear evidence that relevant variables have been controlled before comparisons are made with offenders who have suffered other penalties. If controls have not been used the apparent effectiveness of the fine might be due to the skill of sentencers in selecting those who are unlikely to offend again anyway¹¹. One problem which is rarely considered by those who advocate the wide use of the fine is that of ensuring that it is paid by the defendant himself without causing unwarranted hardship to his dependants.

2. The purpose of the fine as a criminal sanction

The fine on its own can hardly be described as reformatory in a positive way. In one sense, however, it can be retributive and it may be deterrent.

If it is considered that retribution involves "payment" for a criminal offence and this is accepted as a valid purpose of punishment, the fine can bear a direct relation to a known financial advantage made by the defendant from his offence or a measurable financial loss caused by him. In this sense, it may well be that when courts impose fines in respect of property offences that the sanction is intended to be wholly or in part retributive. As there is no measurable gain or loss, it is less likely that retribution is an aim of the sanction when it is imposed on defendants who have committed offences which constitute a public nuisance, such as being drunk in a public place, drinking methylated spirits, using indecent language or urinating in public. With regard to defendants convicted of these offences and most of the others referred to on *Table A*¹², it is far more likely that deterrence (special, general or both) was an explicit or implicit purpose of the sanction. If this is so, it is important that courts recognise that little is yet known of the circumstances

8. *The Sentence of the Court: A Handbook for Courts on the Treatment of Offenders*, (H.M.S.O., 1969), 71. The expected number of reconvictions was calculated mainly on the basis of age, the current offence and previous convictions

9. *Id.*, 70.

10. Cited by Samuels, *op. cit.* at 206.

11. Keith Devlin, *Sentencing Offenders in Magistrates' Courts* (1970) at 65. Rupert Cross, *The English Sentencing System* (1971) at 21.

under which deterrence operates. Almost certainly it depends on a multiplicity of factors the most prominent of which is the ability of the individual to calculate the relative advantages and disadvantages of committing a particular offence. In Bentham's terms, he must weigh up the pleasure of committing the offence against the pain of punishment. Not only must the individual be able to make the necessary calculation, but if he is to be deterred, he must be satisfied that the pain of punishment exceeds the pleasure of committing the offence and that there is a sufficient likelihood of detection and conviction¹³. If deterrence is a purpose of imposing the fine, it is clear that the purpose is not achieved amongst those defendants who return to the courts with disturbing frequency, particularly the drunks.

It may be that courts are often driven to use the fine, not with any special purpose in mind, but simply because of the lack of suitable alternatives. In some of these cases perhaps probation would be a suitable alternative, but the apparent triviality of the offence and the heavy case loads carried both by courts and probation officers probably discourage adjournment for the purpose of making pre-sentence enquiries which, if made, might lead to a probation order.

3. When is a fine an appropriate penalty?

It is significant that the draftsmen of the American Law Institute's Model Penal Code suggest that the fine should not be used when any other disposition is authorised by law "unless having regard to the nature and circumstances of the crime and to the history and character of the defendant, it is of the opinion that the fine suffices for the protection of the public"¹⁴. The Study Draft of the new American Federal Criminal Code includes a provision in terms which are substantially similar¹⁵. Both Codes contain even greater discouragement with regard to the imposition of a fine in conjunction with another sanction. The provision in the Federal Criminal Code, which is slightly broader than that of the Model Penal Code, is as follows:

"The court shall not sentence an individual to pay a fine in addition to any other sentence authorised by section 3301 unless—

- (a) he has derived a pecuniary gain from the offence;
- (b) he has caused an economic loss to the victim; or
- (c) the court is of the opinion that a fine is uniquely adapted to deterrence of the type of offence involved or the correction of the defendant"¹⁶.

The commentary on the Federal Criminal Code explains that imposition of fines is discouraged because they do not have "affirmative rehabilitative value

12. See *ante*.

13. See Note, "Fines and Fining—an Evaluation" (1953) 101 *Uni. of Pa. L.R.* No. 2, 1013 at 1017.

14. Model Penal Code s.7.02(1).

15. New Study Draft of the Federal Criminal Code s.3302(2).

16. New Study Draft of the Federal Criminal Code s.3302(3) and see American Bar Association's Minimum Standards for Criminal Justice s.2.7(a) which provides "Except in the case of the offences committed by a corporation, the legislature should not authorise the imposition of a fine for a felony unless the defendant has gained money or property through the commission of the offence".

and because the impact of the imposition of a fine is uncertain, e.g., it may hurt an offender's dependants more than the offender himself."

Although both Codes generally discourage the imposition of fines, neither restricts the use of the fine to particular offences. To the present writer, this freedom from restriction seems highly desirable. It is acknowledged in the working papers which led to the new Study Draft of the Federal Criminal Code¹⁷ that fines are most valuable as a correctional measure in cases where the defendant has gained economically from his offence or where he has caused some measurable loss to the victim. It is believed, on the other hand, that murder, rape, assault and similar crimes are not generally suitable offences for the use of the fine.

Both Codes and the American Bar Association's Minimum Standards for Criminal Justice attach special weight to three factors in determining whether a fine is the appropriate penalty, and if so, the amount of it and the terms of payment. These factors are the ability of the defendant to pay, the person or persons on whom the major impact of the fine would fall and the effect of the imposition of a fine on possible reparation to the victim. In the terms of the Model Penal Code:

"S.7.02 . . .

- (3) The Court shall not sentence a defendant to pay a fine unless:
 - (a) the defendant is or will be able to pay the fine; and
 - (b) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime.
- (4) In determining the amount and method of payment of the fine, the Court shall take into account the financial resources of the defendant and the nature of the burden that it will impose"¹⁸.

It is now proposed to consider in turn each of these factors.

(a) *The ability of the defendant to pay the fine*

The need seems obvious to impose a fine which the defendant has the ability to meet and yet it is clear from the substantial variations which are made from time to time on appeal that ability to pay is not always investigated adequately. In *R. v. Churchill and Others*¹⁹, the English Court of Criminal Appeal reduced a fine of £2,000 to £100 on the grounds that the defendant was sick, he was unable to pay the sum of £2,000 and his sons were unable or unwilling to help him. In *R. v. Lewis*²⁰ a £10,000 fine was reduced to £5,000 on the grounds that the fine must be within the defendant's own capacity to pay, though not necessarily his present capacity. How far the defendant's anticipated capacity will be taken into account is at present unclear. In *R. v. Wallace*²¹, the sentencing court did not take into account the probability that the defendant would receive a large capital sum in the near future.

17. Vol. II at 1325.

18. See also New Study Draft of the Federal Criminal Code s.3302(1) and the American Bar Association's Minimum Standards for Criminal Justice s.2.7(c).

19. [1966] 2 W.L.R. 1116.

20. [1965] Crim. L.R. 121.

21. [1969] Crim. L.R. 211.

Merely to assert that the defendant must have the ability to pay the fine does not imply, according to the English Court of Criminal Appeal, that there is one law for the rich and another for the poor²². The desire to avoid discrimination on this basis led the Court of Criminal Appeal in *R. v. Markwick*²³ to the remarkable conclusion that the proper penalty for larceny of half a crown from the changing room of a golf club was not the fine of £500 which had been imposed by the court below, but, rather, a term of two months' imprisonment! The Lord Chief Justice, giving the judgment of the court, expressed the view that the case was not one in which a fine should be imposed at all. He said the gravamen of the offence was "not only its essential meanness, but also the aura of suspicion which must have been thrown over the servants and the other members of the club"²⁴. Unfortunately, the report of the case does not indicate whether pre-sentence enquiries were made. It seems improbable to the present writer that an obviously wealthy defendant would steal half a crown solely out of meanness. It seems more likely that the defendant required help of a supportive kind, such as psychiatric care or probation, and that neither a fine nor a gaol sentence was appropriate. Whilst the fine imposed by the lower court indicates a desperate effort to adjust the penalty to the means of the defendant, the gaol term imposed by the Court of Criminal Appeal seems to discriminate against the wealthy in the very sense that was deplored by that court. It is suggested that although a fine must be adjusted according to the means of the defendant, there should be a maximum according to the gravity of the offence. Without such maximum, the amount of the fine may bear an absurd relationship to the offence involved. Total disproportion between the gravity of the offence and the amount of the fine would probably stimulate such resentment on the part of the defendant and the public that the law would be exposed to ridicule, which in turn would militate against the effectiveness of the sanction.

While it is necessary to avoid discrimination against the wealthy defendant, it is also necessary to ensure there is no discrimination against the defendant without ability to pay a fine. Paradoxically, the two types of defendant who are more likely than others to be sentenced to imprisonment are the defendant with no means and the defendant with such substantial means that a fine would pass unnoticed. Where a fine would otherwise be the appropriate penalty, it is submitted that the defendant with no means should not be sentenced to imprisonment. Rather it would be appropriate to require some form of community service to be performed by the defendant. The type of service would depend upon his skills and his state of health.

To summarise, it is recommended that a sentencing court should investigate as thoroughly as possible the defendant's ability, present and shortly anticipated, to pay a fine. Within the limitation of a prescribed maximum, the

22. See also Notes, "Fining the Indigent" (1971) 71 Columbia L.R. 1281 at 1282; Derek A Westen, "Fines, Imprisonment, and the Poor: 'Thirty dollars or Thirty Days'" (1969) 57 California L.R., 778; Note, "The Equal Protection Clause and the Imprisonment of the Indigent for Non-payment of Fines". (1965-6) 64 Michigan L.R., No. 2, 938; Note, "On Protecting the Poor through the Fourteenth Amendment" (1969) 83 Harvard L.R., No. 1, 7; Note, "Developments in the Law—Equal Protection", (1969) 82 Harvard L.R., No. 5, 1065.

23. (1953) 37 Crim. App.R. 125.

24. (1953) 37 Crim. App.R. 125 at 126.

amount of the fine should be adjusted to the means of the defendant. If a fine would otherwise be appropriate but the defendant has no means, imprisonment should not be inflicted. Consideration should be given in such cases to other forms of penalty especially to the possibility that the offender be required to enter into some form of community service.

(b) *The impact of the fine*

A criminal court is not justified in imposing a fine unless there is at least a reasonable likelihood that the defendant will bear the major impact of it. Remarkably there have been instances in which courts have revealed a desire to penalise a third party through a fine imposed upon a defendant²⁵. *R. v. Churchill and Others*²⁶ was one such case in which the English Court of Criminal Appeal took into consideration the fact that the defendant's relatives were unable or unwilling to help him meet the penalty. The implication was that if the court had been able to touch the relatives' pockets, it would have done so. In *R. v. Dodd*²⁷, the same court went so far as to impose a penalty on the assumption that someone other than the defendant would pay. The defendant, a cripple with no resources was convicted of using premises for the purpose of gaming. He had eight previous convictions in respect of similar offences. The trial judge imposed a fine of £100 with £50 costs with an alternative of six months' imprisonment. The Court of Criminal Appeal refused to vary the sentence, stating that the trial judge had clearly imposed the penalty on the assumption that the defendant's employer would pay it. The court even said there was no reason why one person should not pay another's fine. Fortunately at least one recent decision of the English Court of Criminal Appeal indicates a departure from this view. Thomas cites the unreported case of *R. v. Niel*²⁸ in which the court said the trial judge had adopted "entirely the wrong approach" when he imposed a fine of £75 on the defendant on the assumption that his employers, on whose instructions the defendant had acted, would pay. It is submitted that a court is abusing its authority if it attempts to penalise a third party through a fine. The practice is especially undesirable if there is insufficient provision for the third party to defend himself.

Whereas it is improper to use a fine to penalise a third party, it is highly desirable that a sentencing court considers the interests of those who are dependent on the defendant. Of course, it is impossible to safeguard entirely against prejudice to the dependants, or indeed against a third party bearing a fine indirectly if not directly. Some measures, however, might reduce the risk of undue hardship on the part of the dependants. If the amount and instalments of the fine are calculated in relation to the defendant's daily or weekly wages after allowing for his commitments, there is some encouragement to him to bear all or most of the fine himself. Where the fine is substantial it may be that a short period of supervision, either by a probation officer or by a

25. The present writer is confining her comments to defendants who are individuals as opposed to corporate defendants.

26. [1966] 2 W.L.R. 1116 at 1125.

27. [1959] Crim. L.R. 159.

28. 25.10.65, 1561/65 cited by D. A. Thomas, *Principles of Sentencing*, (1970) at 222.

budget adviser, could be helpful. A more negative suggestion has been made by Samuels that some sort of injunction process may be needed to prevent a third party from paying a fine, subject to his being heard²⁹. An injunction would only be appropriate, of course, in cases where the identity of the third party is known. Often the defendant's infant children are in danger of suffering the major impact of a fine yet an injunction would not be appropriate against them.

(c) *Reparation in favour of the victim*

If the victim of a crime has suffered loss, ideally there should always be reparation by the defendant. All too often the resources of the defendants are meagre and this fact has, of course, led to the gradual introduction of governmental schemes for compensation to victims of crimes. If the defendant has financial resources, compensation to the victim should rank above the State's claim to recoup expenses by the imposition of a fine. Indeed, it has been suggested that the legislature might consider the diversion of fines into a fund for the compensation for victims of crime³⁰.

(d) *Summary*

Assuming a fine is one of the penalties authorised by statute, it is submitted that (a) if the defendant has the present or shortly anticipated ability to pay the fine (b) there is at least a reasonable likelihood that the major impact of it will fall upon him and (c) prior consideration is given to the possibility of reparation to the victim, a fine may be the appropriate penalty. Whether a fine should be imposed will depend upon other factors such as the gravity of the offence, the record of the defendant, his age, his health, his employment record, his associates and his family situation.

While the present writer accepts the proposition that a fine may be particularly suited to cases in which the defendant has obtained a known financial advantage from his offence or has caused a measurable financial loss, she does not wish to restrict the use of the fine to those cases. Rather, it is suggested that the fine should be available in respect of the full range of criminal offences, but that its application should depend upon the factors referred to above. It is anticipated that the fine will remain an effective method of dealing with many summary offences, particularly minor infringements of road traffic rules. Here, at least, the fine may act as a deterrent.

Although it is conceivable that the fine deters some people from becoming intoxicated, this is clearly not the case with the army of drunks and vagrants who have been fined and imprisoned with appalling frequency. The present writer would prefer that drunkenness in a public place and drinking methylated spirits were not criminal offences at all. She agrees with Morris and Hawkins who argue that "all that the system appears to accomplish is the temporary removal from view of an unseemly public spectacle"³¹. Instead

29. Samuels, *op. cit.* at 209.

30. See working papers which led to the new Study Draft of the Federal Criminal Code Vol. II at 1327.

31. Morris and Hawkins, *The Honest Politician's Guide to Crime Control*, (1970) at 7. See also President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: Drunkenness*, (1967) 4.

of police lockups, courts and gaols, Morris and Hawkins would substitute community-owned overnight houses for insensible and exhausted drunks. Instead of police and paddy waggons, they would substitute minibuses to tour skid-row and pick up the fallen and near-to-falling drunks. If there is resistance by the drunk, the minibus team should withdraw. If there are assaults or other crimes, the police should be notified. If there is unconsciousness or drunken consent, the minibus would deliver the individual to the overnight house which, in effect, would be a detoxification centre. When sobriety returns, comprehensive advice should be given as to available social and medical help, but coercion should not be used. Finally, Morris and Hawkins argue that the cost to the criminal justice system of dealing with drunks grossly exceeds the cost of providing community houses and treatment facilities for those who would wish to use them.

4. The fine in conjunction with another penalty

In the foregoing discussion, it has been assumed generally that the issue before the court is whether a fine alone should be imposed on the defendant. It may be, however, that the court wishes to impose another penalty in addition to the fine. Most lower courts have at least some authority to impose other penalties in conjunction with a fine.³² According to the recent study, the penalty which is imposed most frequently by the Adelaide Magistrates' Court in conjunction with the fine is disqualification from holding a driving licence. The power to impose this sanction is a useful one and is commonly conferred on lower courts by legislation creating road traffic and motor vehicle offences. Higher courts generally have wide discretion to impose fines in conjunction with other penalties³³. It is now proposed to consider the arguments in favour of imposing the fine in conjunction with two of the most commonly used penalties, imprisonment and probation.

(a) Fine with Imprisonment

It has already been noted³⁴ that the draftsmen of the Model Penal Code and the new Study Draft of the Federal Criminal Code discourage the use of the fine in conjunction with imprisonment and indeed, this view seems generally accepted. In 1940, the United States' Attorney General said in his report that "in cases in which a defendant is sentenced to imprisonment the added penalty of a fine ordinarily does not serve any useful social purpose except in cases in which the defendant derived from his crime a direct financial benefit which he should be made to disgorge"³⁵. Samuels has noted that "the principal case for imposing a fine as well as prison would appear to be where the crime was committed for a direct financial benefit and the proceeds of the crime, especially if they are substantial, have not been recovered"³⁶. Devlin cites the unreported decision of *R. v. Edgar McKenzie*³⁷

32. See, for example, Justices Act 1921-1969 ss.70ab and 75 (S.A.) and Offenders Probation Act 1913-1971 s.4(1) and (3) (S.A.).

33. See, for example, Criminal Law Consolidation Act 1935-1971 s.313 (S.A.).

34. See *ante* Section 3.

35. Cited by Rosenzweig, *op. cit.* at 244.

36. Samuels, *op. cit.* at 268.

37. Decision of the Court of Appeal on 23/4/1968, cited by Devlin, *op. cit.* at 66.

in which the English Court of Appeal quashed a fine of £350 which had been imposed upon a defendant who also received a sentence of nine months' imprisonment for being in possession of a dangerous drug. The sentence had been imposed at Quarter Sessions and there was a direction that the sum of £350 had to be paid within six months of the defendant's release, and in default, he should serve a further six months in gaol. The Court of Appeal described the sentence imposed at Quarter Sessions as most undesirable and a kind of "cat and mouse torture".

Certain Australian statutes³⁸ authorise the imposition of a fine and imprisonment in respect of the same offence but it seems unlikely that courts often invoke this power. It is submitted that as a general rule it is only desirable to impose both penalties if the defendant is known to have made a substantial gain from the offence and that the subject matter of the charge is in his possession or under his control at the time of sentence. If the profit has been dissipated by the time of conviction and sentence, there seems little object in imposing a fine in addition to imprisonment and to do so may invite the defendant to commit a further offence.

In the foregoing discussion, it has been assumed that imprisonment involves total detention. If the detention is only partial, such as week-end imprisonment or periodic detention, the practice of imposing a fine and a gaol sentence in respect of the same offence is not necessarily objectionable, particularly if the defendant retains his employment. Indeed, there may well be cases in which a superintendent in charge of such a scheme could offer budgetary advice to a defendant who has been fined.

(b) *Fine with probation*

It is sometimes argued that fines and probation are incompatible with each other³⁹. It is contended that the purpose of a fine is retributive or deterrent whereas the purpose of probation is generally rehabilitative. If the two are imposed together, it is claimed that neither purpose can be achieved. It is also argued that the practice of imposing the two penalties together would add to the present heavy duties of probation officers by turning them into debt collectors as well.

In favour of imposing the two sanctions together, it can be said that probation is not exclusively rehabilitative. On many occasions, probation is intended to be educational and sometimes it may be intended to be deterrent. If a fine is imposed in addition to probation it may even assist the probation officer to carry out his responsibilities effectively. Further, if a substantial fine has been imposed, probation may be one way of safeguarding the interests of the dependants of the defendant.

It is submitted that the arguments in favour of the combined use of fines and probation are weightier than those against, and in jurisdictions where courts have not authority to impose the two sanctions together, the necessary legislation should be passed to enable them to do so.

38. See, for example, Criminal Law Consolidation Act 1935-1971 s.313(1)(a) (S.A.).

39. See Samuels, *op. cit.* at 209 and Rosenzweig, *op. cit.* at 259.

5. The amount of the fine

In spite of the fact that prescribed amounts appear in many statutes, most courts have discretion to vary the amount of fines. In South Australia, flexibility on the part of the lower courts flows from a number of provisions in the Justices Act 1921-1969 which authorise the reduction of the amount in certain cases⁴⁰ and even total avoidance of a fine⁴¹. In practice, it seems from the recent study of files at the Adelaide Magistrates' Court, that fines are frequently reduced below the prescribed amount or below the maximum⁴² and this is probably due to an understandable effort to tailor the fine to the circumstances of the case. One of the notable features of *Table A* is the high proportion of offences for which the modal fine is \$10.00.

It has been suggested that more careful tailoring might be possible if an index were used which is more flexible than the dollar⁴³. Robert Williams suggests that economic inequities between defendants might be reduced substantially if fines were assessed according to a graduated scale similar to the rate scale used for income tax purposes. In such a structured system, fines might be expressed in units rather than dollars and the fine for each offence would range between a statutorily prescribed maximum and minimum, depending upon the nature and the gravity of the offence. The monetary value of the unit would depend upon the defendant's financial status, taking into account his income and commitments. Williams recognises the problem of determining the defendant's financial status and he goes so far as to observe that the best source of this information would be his income tax return for the previous year. Williams suggests that there is no good reason why tax regulations should not be amended to permit courts to inspect tax returns⁴⁴. It may well be that the defendant's financial circumstances have altered since the previous year and under Williams' scheme, the defendant would be able to file an affidavit in court concerning such change. Williams suggests that offenders who do not pay tax should have the option of "working off" the amount of a fine through a prescribed community project.

It is submitted that certain aspects of Williams' proposed scheme (which is substantially similar to that recommended by Devlin⁴⁵) have considerable merit. In particular, the unit system would have two advantages. It would probably reduce the inequality of hardship between different defendants and it would avoid the need for constant review by the legislature of statutes imposing fines every time there is a change in the cost of living. The rate scale could be reviewed annually and necessary alterations could be made

40. S.75(5) but see comments on this provision by Napier J. (as he then was) in *Verran v. Roberts* [1938] S.A.S.R. 256, 260 and *Jackson v. Kimber* [1934] S.A.S.R. 315.

41. S.75(2) and see also s.70ab and Offenders Probation Act 1913-1971 s.4(1) (S.A.).

42. See *Table A*.

43. Note, "Equal Protection and the Use of Fines as Penalties for Criminal Offences" [1966] *Uni. of Ill. Law Forum* 460; American Bar Association's Minimum Standards for Criminal Justice s.2.7(f) and commentary thereon at 127. See also Devlin, *op. cit.* at 71. In Sweden, a more flexible index has been used since 1932. For a description of the Swedish system of day-fines, see Report of the English Advisory Council on the Penal System *op. cit.* at 74.

44. See also "Fines and Fining—an Evaluation", *op. cit.* at 1026.

45. Devlin, *op. cit.* at 71.

by a single piece of legislation. A much more controversial aspect of Williams' scheme is his suggestion that courts should be entitled to inspect income tax returns. Forceful objections are likely to be raised on the grounds that tax returns are highly confidential documents, and in any case that inspection by the courts would be far too costly and cumbersome particularly in countries with a federal structure of government and in which income tax is the subject of Commonwealth legislation and the criminal law the subject of State legislation. Further problems would arise if the defendant had not filed a tax return for the previous year or had filed it in another state or country.

While it is conceded that income tax returns would probably provide the most reliable information as to means, the difficulties associated with inspection are overwhelming. In the circumstances, it is suggested that the defendant's financial status should be determined by an enquiry into his means for all but the most minor offences⁴⁶ or where it is absolutely clear that even the maximum fine for the particular offence is well within the defendant's means. Although a means enquiry seems an extreme measure if it is likely that only a low fine will be imposed, *Table C*⁴⁷ suggests that even relatively low amounts are beyond the means of at least some sections of the community. It is submitted that if the defendant is present at the proceedings, and the court, subject to information as to his means, considers a fine is the appropriate penalty, the court should enquire into his taxable income, capital and commitments. The statement would be subject to the right of challenge by the prosecution. It is the defendant's taxable income which would in most cases determine the exact monetary value of the unit although it is suggested that the court should have the discretion to fix a higher penalty if the defendant has substantial capital assets from which the fine could be met, in whole or in part. If, on the other hand, the defendant has heavy commitments, the court should have discretion to take them into account.

It is appreciated that the defendant is not always present in court when a fine is imposed upon him. In particular, if the defendant pleads guilty, many minor infringements of road traffic regulations can now be dealt with in his absence. Obviously this device saves much time on the part of the courts and on the part of defendants. It is not suggested that the proposed scheme should necessitate appearance of all defendants in court. Rather, it is recommended that if the court now has the power to impose a sentence in the absence of the defendant, that power should remain, but a defendant in respect of whom a fine may be imposed should be required to make a declaration as to his taxable income, capital and commitments. Attendance of the defendant in court would only be required if the defendant fails to make a declaration or if the court is in substantial doubt as to the truth of the matters referred to in the declaration.

It is realised that the proposal for a means enquiry is controversial and several weighty objections can be advanced. First, it is clear that the scheme will add to the burden of the courts, both judicially and administratively. Secondly, some will argue that the commission of a criminal offence does not justify an examination of the defendant's means, at least unless the circum-

46. For instance, parking offences would be too minor to demand a means test.

47. See *post* Section 7.

stances are exceptional. Thirdly, there is always the possibility that a defendant may prefer even imprisonment to the compulsory disclosure of his financial position. In spite of all these difficulties, it is submitted that a means enquiry is less objectionable than a system which inevitably discriminates against the poor. Pressure on the courts should be met by the appointment of additional officers. The means enquiry itself should be viewed as a vehicle of equality between those convicted of similar offences. Further penalties, such as the imposition of community service orders or periodic detention orders should be available against those who refuse to disclose their means. In favour of the means inquiry, it is possible that its mere existence may deter some would-be offenders from the commission of crimes.

6. Time to pay

Statutory provisions are common which permit a sentencing court to allow time for payment or to direct the payment of a fine by instalments⁴⁸. These provisions are in keeping with the desirable policy of adjusting the burden of the fine in accordance with the defendant's ability to pay. The study of files at the Adelaide Magistrates' Court suggests that time is generally granted by that court for the payment of fines. In only 52 of the 1,491 fines which were imposed were orders made for payment forthwith. Payment was in fact made in 37 of these cases and warrants were issued in respect of the remaining 15. The longest period which was granted for the payment of a fine was six months. That period was given to a juvenile offender. The study also revealed that in all but very rare cases, defendants who are granted time to pay fines are given several weeks of grace before enforcement proceedings are commenced. Perhaps because of the small size of the sample it was difficult to see any obvious relationship between the weeks of grace and the gravity of the offences. Indeed, weeks of grace afforded to those convicted of offences under the Road Maintenance Act varied between two and 40. Weeks of grace afforded to those convicted of speeding in commercial vehicles varied between two and ten. It may be that longer periods were allowed in response to individual requests by the respective defendants or promises by them to pay at a later date. On the other hand, there may be some other explanation for the disparities, such as doubt as to the whereabouts of the defendant or excessive burdens on the administrative staff at the court.

It will be recommended later⁴⁹ that the initiative in taking enforcement proceedings should rest on the Crown or police prosecutor who should act in much the same way as a civil creditor. Whether this recommendation be adopted or not, it is suggested that there should be a consistent practice as to the weeks of grace, at least within categories based on types of offence. Substantial disparities may be discriminatory and lengthy delay could lull the defendant into a false sense of security and lead him to assume additional financial commitments which he cannot afford.

48. See, for example, Criminal Law Consolidation Act 1935-1971 s.300a (S.A.); Justices Act 1921-1969 s.76 (S.A.).

49. See *post text* following n.58.

7. Default

The incidence of default of payment of fines has not received much criminological attention, except where default has led to imprisonment⁵⁰. A recent English study, however, reveals that of 253 fines which were imposed by a busy Magistrates' Court, 75 per cent. were paid during the time allowed or shortly thereafter and a further 7.9 per cent. were paid, or were being paid by regular instalments. The total default rate, albeit after 13 months, was 17.1 per cent⁵¹.

In the South Australian study, warrants were issued in 523 cases or 35 per cent of the 1,491 cases. 516 of these were warrants for commitment to prison and seven (all of which related to corporate bodies) were distress warrants. The overall percentage is misleading because it conceals substantial variations between different offences.

Table B indicates the width of the disparity:

TABLE B

| <i>Offence</i> | <i>No. of Fines Imposed</i> | <i>No. of Warrants Issued</i> | <i>Percentage of Warrants Issued</i> |
|---|-------------------------------------|---------------------------------------|--|
| 1. Using indecent language | 28 | 21 | 75.0% |
| 2. Drunk in a public place or drinking methylated spirits | 254 | 155 | 61.0% |
| 3. Offences under the Road Maintenance Act | 90 | 53 | 58.8% |
| 4. Offences under Income Tax Assessment Act | 41 | 24 | 58.5% |
| 5. Speeding of commercial vehicles | 79 | 42 | 53.2% |
| 6. Vehicle defects (Road Traffic Act) | 78 | 15 | 19.2% |
| 7. Failure to pay for television licence | 63 | 11 | 17.5% |
| 8. Speeding of ordinary vehicles | 99 | 15 | 15.1% |
| 9. Failure to drive with due care | 44 | 5 | 11.4% |
| 10. Failure to pay for radio licence | 67 | 7 | 10.4% |
| 11. Disobey traffic signs | 61 | 6 | 9.9% |
| 12. Failure to stand (Road Traffic Act) | 43 | 1 | 2.3% |

It will be seen from *Table B* that the offences in respect of which a disproportionately high percentage of warrants were issued were using indecent language, being drunk in a public place or drinking methylated spirits, offences under the Road Maintenance Act, offences under the Income Tax Assessment Act and speeding of commercial vehicles. On the other hand, relatively few warrants were issued in respect of vehicle defects under the Road Traffic Act, failure to pay for radio and television licences, speeding of ordinary vehicles, failure to drive with due care, disobeying traffic signs and failure to stand, under the Road Traffic Act.

50. See *post* Section 7.

51. Editorial Comment, (1969) 133 J.P. and Loc. Govt. Rev. No. 27 at 434. Contrast with startling statistics produced by the District of Columbia Crime Commission which revealed that of 222 offenders fined for various crimes, 105 were eventually imprisoned for failure to pay. Further, a study in the Baltimore Municipal Court showed that 60% of those fined were committed in default and that those committed represented 80% of the total number of offenders who were imprisoned by that court. Statistics cited in Note, "Fining the Indigent", (1971) 71 Columbia L.R. 1281 at 1288. The author comments that the cause of most imprisonment for non-payment is probably the defendant's inability to discharge fines which are imposed on a lump sum basis.

The default rate amongst drunks generally increased with the amount of the fine as shown on *Table C*.

TABLE C

| <i>Amount of Fine</i> | <i>No. of Cases in which Fine Imposed</i> | <i>No. of Warrants Issued</i> | <i>Percentage of Warrants Issued</i> |
|-------------------------|---|---------------------------------------|--|
| \$2.00 | 40 | 9 | 22.5% |
| \$3.00 — \$4.00 | 35 | 12 | 34.3% |
| \$5.00 — \$6.00 | 32 | 12 | 37.5% |
| \$7.00 — \$8.00 | 25 | 16 | 64.0% |
| \$9.00 — \$10.00 | 56 | 43 | 76.7% |
| \$11.00 — \$12.00 | 25 | 24 | 96.0% |
| \$13.00 — \$15.00 | 19 | 18 | 94.7% |
| \$16.00 — \$20.00 | 22 | 21 | 95.5% |

Although none of the fines imposed on drunks exceeded \$20.00, undoubtedly the defendants were generally low income earners and many of the fines were beyond their means. The same is probably true of those convicted of using indecent language because in practice, the offence is often associated with a charge of being drunk in a public place or drinking methylated spirits.

The high incidence of default amongst those convicted of offences under the Road Maintenance Act and speeding of commercial vehicles may be due to the frequent movements interstate of these defendants. Of the 81 interstate warrants which were issued, at least 73 appear to have related to drivers of commercial vehicles.

There is no obvious explanation for the high default rate amongst those convicted of offences under the Income Tax Assessment Act, particularly as service of a term of imprisonment does not relieve these offenders of the obligation to pay the fine⁵². It may be, however, that fines for non-payment of income tax are especially hard to meet in addition to the arrears of tax itself.

It will be noted that the offences in respect of which the default rate was low fall broadly into two categories, minor traffic offences by private motorists and failure to obtain licences for radio and television. Of all the offences which were committed by defendants in the sample, these are probably committed by the widest range of citizens, including those who are affluent and otherwise law-abiding⁵³. If so, it is likely that a relatively high proportion of fines are within the defendants' means. Further, if the threat of imprisonment acts as a deterrent at all, it seems reasonable to suggest it does so for defendants who are usually law-abiding.

As efforts have increased in various parts of the world to find suitable means of enforcement, there has been a welcome drop in the number of fine defaulters who are admitted to prison. Perhaps the most notable decrease has been in Sweden where the Schlyter scheme, which introduced day-fines, has

52. Income Tax Assessment Act 1936-1971 s.251 (Cth.).

53. It is appreciated that there is evidence that of those who commit serious motoring offences, a disproportionately high number have convictions for non-motoring offences. See T. C. Willett, *Criminal on the Road*, (1964) at 208.

been credited with reducing imprisonment rates from 12,000 or 13,000 per annum to a few hundred⁵⁴. The general policy of the Schlyter scheme is that once a court has decided to punish by imposing a fine, that fine should be collected. Imprisonment remains, however, the ultimate sanction if an offender is able to pay and wilfully refuses.

In the recent South Australian study, of the 2,000 files which were examined, 1,385 revealed the imposition of single or multiple fines by the Adelaide Magistrates' Court. Warrants were issued in 472 out of the 1,385 files. Enquiry revealed that by March 1972, the position with regard to those warrants was as shown on *Table D*:

TABLE D

| <i>Outcome of the issue of Warrants in Relation to 472 Files</i> | <i>No. of Fines</i> |
|--|---------------------|
| Fines paid or distress warrants satisfied | 210 |
| Imprisonment imposed in South Australia | 129 |
| Outstanding warrants | 45 |
| Outcome unknown because: | |
| (a) Interstate warrants issued | 81 |
| (b) No record traced | 6 |
| | 87 |
| Distress warrant returned because no effects | 1 |
| TOTAL: | 472 |

Some of the 129 files which indicated the defendant had been committed to prison related to multiple fines. The total number of fines which led to imprisonment was 149. The offences in respect of which these fines were imposed are as shown on *Table E*:

TABLE E

| <i>Offences in respect of which fine imposed</i> | <i>No. of Offences</i> |
|--|------------------------|
| Drunk in a public place or drinking methylated spirits | 103 |
| Fighting | 1 |
| Urinating in public | 1 |
| Resisting arrest | 1 |
| Indecent language | 10 |
| Disorderly behaviour | 1 |
| Insufficient means | 1 |
| Unlawfully on premises | 3 |
| Minor obtaining liquor | 5 |
| Aiding and abetting unlawful sale of liquor | 1 |
| Undue noise | 1 |
| Larceny | 4 |
| Wilful damage to property | 1 |
| Driving without registration | 1 |
| Failure to deliver transfer (Motor Vehicles Act) | 1 |
| Drink near dance hall | 1 |
| Illegal user | 5 |
| Driving under the influence of alcohol | 2 |
| Excess blood alcohol | 1 |
| Speeding | 1 |
| Driving without due care | 1 |
| Unlawful possession | 2 |
| Assault | 1 |
| TOTAL: | 149 |

54. Sutherland and Cressey, *Principles of Criminology*, (6th Ed., 1960) at 277.

The most significant feature of *Table E* is the high incidence of imprisonment amongst those fined for being drunk in a public place or drinking methylated spirits. Of the 254 fines which were originally imposed for these offences, 155 or 61 per cent. led to the issue of warrants. Of the 155 warrants which were issued, 103 or 40.6 per cent. of the original number led to imprisonment. The average fine which led to imprisonment in these cases was approximately \$11.00. 36 per cent. of the fines which were imposed in relation to the use of indecent language led to imprisonment. With respect to the other offences in the sample, the known rate of imprisonment is relatively low or the number in the sample is too small to justify comment. It is interesting that although *Table B* reveals a high incidence of warrants amongst those convicted of speeding of commercial vehicles and of offences under the Road Maintenance Act and the Income Tax Assessment Act, none of these warrants are known to have resulted in imprisonment. In fact, there may well have been a relatively high incidence of imprisonment amongst those convicted of speeding of commercial vehicles and offences under the Road Maintenance Act but the study does not justify confidence on this point because the outcome of the issue of interstate warrants is unknown.

According to the study, the common practice in the Adelaide Magistrates' Court is for the default penalty to be fixed at the time the fine is imposed. In all Australian states, courts of summary jurisdiction may or must, at the time of imposing the fine, also prescribe a penalty in default of payment⁵⁵. In Tasmania alone, a court of summary jurisdiction generally has no power to order that a term of imprisonment be served in default of payment unless, on an occasion after his conviction, the court has inquired as to the defendant's means and is satisfied that he has wilfully or negligently made default⁵⁶. The Tasmanian provision bears resemblance to s.44 of the English Criminal Justice Act 1967 which restricts to a narrow area the power of courts to fix at the time a fine is imposed, a term of imprisonment as a default penalty.

Both the English and the Tasmanian provisions are in keeping with the spirit of the new Study Draft of the Federal Criminal Code and the American Bar Association's Minimum Standards for Criminal Justice. The working paper which led to the provision in the Federal Criminal Code claims that a sentencing court is not in a position to guess the reason for possible default or what it should do if default occurs. Surely, it is argued, it is sound for the court to wait until it knows why payment was not made before it forms a judgment about the appropriate response.

In favour of fixing the default penalty at the time the fine is imposed, it is sometimes argued that the defendant is given considerable incentive to pay if he knows the consequence of default⁵⁷. This amounts to a claim, of course, that he is deterred from avoidance. It is also contended that if the default

55. See Justices Act 1921-1969 s.85 (S.A.); Summary Offences Act 1966-1970 s.63 (Vic.) and Vagrancy Act 1966 s.21 (Vic.); Justices Act 1902-1971 s.82(1) (N.S.W.); Justices Act 1902-1967 s.158 (W.A.); Justices Act 1886-1968 s.174 (Qld.).

56. Justices Act 1959 s.78(3) (Tas.).

57. See comments of Samuels, *op. cit.* 269 and Editorial Comment (1969) 133 J.P. and Loc. Govt. Rev. No. 27 at 435.

penalty were fixed after non-payment, there would be extra pressure on the police force and courts, both of which are already overworked. Such added pressure is thought unjustified, particularly if the defendant's means have been investigated at the time the fine was imposed and default occurs shortly thereafter. Another argument in favour of fixing the default penalty when the fine is imposed is that a very cumbersome system will make courts disinclined to use the fine even when it is particularly appropriate.

Against fixing the default penalty when the fine is imposed it can be argued that little is known of the circumstances under which deterrence operates and a policy which assumes its effectiveness is open to criticism. Even if it is conceded that there would be extra pressure on the police force and courts if the defendant has to reappear in court after default, it could be contended that there would be at least some corresponding relief of pressure on the prison authorities. The strongest argument is that the defendant should have the opportunity of showing the court that the default was not due to his wilful refusal to obey the court's order or his failure to make a bona fide effort to pay⁵⁸.

The present writer recognises the force of the last argument but is also conscious of the need to avoid placing excessive pressure on judges, magistrates and justices of the peace. Bearing the competing arguments in mind, it is recommended that a court, when imposing a fine, should advise the defendant that in the event of non-payment at the appropriate time, certain default proceedings may be taken automatically by the prosecutor unless the defendant lodges at the court a declaration that default has not occurred through his wilful refusal or neglect. If the defendant does lodge such a declaration, the appropriate step would be for the prosecutor to have the matter set down for hearing. Ideally, the matter should be heard by the same judge, magistrate or justices who originally imposed the fine. At the hearing, it is suggested that the burden should rest on the defendant to show on the balance of probabilities that the statement contained in his declaration was true. If the court finds that it was, the fine could be reduced or rescinded, according to the circumstances. If rescinded, the court should impose another penalty in respect of the original offence. If the court finds the declaration was false, enforcement proceedings could commence and costs could be awarded against the defendant. If the defendant has made no declaration or has made a false declaration, the prosecutor should then be entitled to request the clerk of the court to issue a distress warrant. Such warrant would entitle the bailiff to make successive levies against the goods and chattels of the defendant until the amount of the fine and costs are satisfied. If the bailiff finds that the defendant has no goods or chattels within the state, but owns land in the state, the clerk of the court should be able to authorise the sale of that land, following advertisement of his proposed action. The prosecutor should also, on default, be able to make an *ex parte* application to a judge or magistrate for the attachment of debts (including earnings) due to the defendant from a third party. Such order should remain in force until satisfaction of the fine and costs or satisfaction of the debt, whichever shall occur first.

58. See New Study Draft of the Federal Criminal Code s.3304(2); Model Penal Code s.302.2(1) and Minimum Standards for Criminal Justice s.6.5.

If the defendant's assets appear inadequate to satisfy the fine and costs, the prosecutor should be entitled to have a summons issued to the defendant to show cause why he should not be committed to prison. In the event of the defendant failing to appear, the court should have power to issue a warrant for his commitment to prison. If the defendant does appear but fails to satisfy the court on the balance of probabilities that default was not due to his wilful refusal or neglect, the court should be able to impose a prison sentence or to order the defendant to "work off" the amount of the fine and costs by engaging in some community project⁵⁷. If, on the other hand, the defendant satisfies the court that default was not due to his wilful refusal or neglect, the court should have power to reduce the fine or the terms of its payment. Perhaps the court might order payment over a longer period of time, with or without supervision. The court should also have power to rescind the fine and to impose a penalty, other than imprisonment, in respect of the original offence. If the defendant is sentenced to prison for non-payment, it is recommended that the fine should be extinguished.

The measures which have been recommended above include *inter alia* the attachment of earnings, the use of money payment supervision orders and the use of community service orders. These measures give rise to some further comment.

(a) *Attachment of earnings*

Section 46 of the English Criminal Justice Act 1967 contains authority for courts to make attachment orders in respect of earnings. The provision has probably attracted more attention than any of the other methods of enforcement which are now available to the English courts⁶⁰. Samuels observes that the scheme has merit and considers the threat of attachment may induce payment for fear of incurring displeasure of the employer. Devlin seems to agree with this point but says that experience in connection with matrimonial orders suggests that the procedure will probably be successful amongst those who would be most likely to pay anyway. All commentators point to an inherent weakness in the scheme, namely that the defendant's incentive to remain employed, or at least to remain in his present employment, may be considerably undermined. This weakness leads Samuels to suggest there should be a legal duty both on the defaulter and on the employer to notify the court of any change in employment⁶¹. He recommends also that notice of the order should be stamped on tax and security documents. To the present writer, it seems that the creation of such an obligation would only increase on the part of the defendant the desire to become and remain unemployed. Even so, it is submitted that the attachment scheme is not rendered impotent by its weakness. Presumably it is most useful in cases where there is at least a reasonable employment record and there is a

59. S.34.

60. Devlin, *op. cit.* at 75; Samuels, *op. cit.* at 269; Editorial Comment (1969) 133 J.P. and Loc. Govt. Rev. No. 27, 434 at 435; Bradbury, *op. cit.* at 467.

61. See also Bradbury, *op. cit.* who makes a similar recommendation following the findings of the Payne Committee [1969] New L.J. 165 and 185.

sufficient margin between the defendant's disposable income and unemployment benefits.

(b) *Money payment supervision orders*

In England fines imposed on offenders under the age of 21 may not be enforced by usual methods unless a money payment supervision order has been made or has been considered undesirable or impracticable. It is recommended that in the event of default by a young offender, courts should be enabled to make supervision orders. The introduction of such a system would obviously create a demand for supervisors and attention might well be paid to the budget advisory system which is already established in New Zealand⁶².

(c) *Community Service orders*

Section 34 of the English Criminal Justice Bill 1971 represents a move to implement the recommendation of the Advisory Council on the Penal System for the introduction of community service orders⁶³. The Council did not specify the exact projects it considered appropriate for offenders but some of the possibilities mentioned are constructing playgrounds, clearing beaches, helping with reclamation projects and canals, landscaping hospital grounds, planting trees, repairing railways, helping in hospital wards and kitchens, helping the elderly and needy, and maintaining meals on wheels services at the weekends. It was suggested that the administration of the scheme should be the responsibility of the probation and after-care service and reliance should be placed on voluntary community service agencies for the supply of tasks. The Council sees the community service order primarily as an alternative to short term imprisonment which could be combined with probation, but not with a fine⁶⁴. It was envisaged, however, that the order might be available in certain cases of fine default. It is recommended that the power to make community service orders could be a useful addition to the existing methods of enforcing payments of fines. Attention will have to be paid, however, to ways of ensuring co-operation by trade unions.

It has been recommended in the foregoing discussion that imprisonment should remain the ultimate penalty for default of payment of a fine⁶⁵. Whether imprisonment should be the ultimate penalty is highly controversial and it is significant that the Advisory Council on the Penal System was unable to reach a unanimous decision on the point. The minority (including Baroness Wootton) favoured the abolition of imprisonment for non-payment on the

62. The practical administration of the scheme is described by Alan Wilson, *Human Problems of the Convicted Offender Returning to the Community*, a paper read at the 1970 Conference of the International Prisoners' Aid Association, Kyoto, Japan.

63. *Non-Custodial and Semi-Custodial Penalties*, Chapter 3. Tasmania has already introduced a somewhat similar scheme under Part IV of the Probation of Offenders Act 1971 whereby courts can make work orders instead of imposing prison sentences.

64. No reason was offered by the Council. It was simply stated that community service and fines should be alternatives.

65. See *ante text* at n.57.

ground that there will always be confusion between the recalcitrant and the impoverished defaulter⁶⁶. Instead, the minority recommended the introduction of a new criminal offence of persistent and unjustified refusal or neglect to pay a fine. The members proposed that the offence would be the subject of a formal charge and would have to be proved in the same way as other criminal charges. A social inquiry report was recommended before the imposition of imprisonment. In this way, it was considered that the fine would be what it is designed to be, a genuinely non-custodial penalty. The majority expressed concern that the fine would be weakened as a sanction if imprisonment did not remain as the ultimate penalty in default. Members also doubted the wisdom of creating a new offence which would make a great deal of work for law enforcement agencies. In the present writer's view, it is illusory to argue that by the introduction of a new offence the fine would become genuinely non-custodial. Under the minority's scheme the ultimate penalty for persistent and unjustified refusal or neglect to pay a fine would be precisely the same as under the present system.

Although it is here recommended that imprisonment should remain the ultimate default penalty, it is urged strongly that the term of imprisonment should not depend upon the amount of the fine. Provisions which link the amount of the fine and the gaol term appear in the English Magistrates' Courts Act 1952⁶⁷ and in all the relevant Australian statutes⁶⁸. It is difficult to read these provisions without gaining the impression that the ratio between the amount of the fine and the length of the gaol term is entirely arbitrary. A defendant who fails to pay a \$2.00 fine in South Australia, Tasmania or Queensland cannot be ordered to serve more than seven days in gaol. A defendant in Western Australia who fails to pay a \$2.00 fine will have to serve a three days' imprisonment, in New South Wales the default term is not more than 24 hours whereas in Victoria, it is not more than one month!

It may be that the legislation reflects a desire to grade both the fine and the term of imprisonment to the gravity of the offence. It is significant, however, that the draftsmen of the American Bar Association's Minimum Standards for Criminal Justice and the new Study Draft of the Federal Criminal Code rejected the idea that the amount of the fine and the length of imprisonment should be interrelated. The Federal Criminal Code provides that the maximum term of imprisonment following default in payment of a fine should be six months if the offence committed was a felony, or 30 days if the offence was a misdemeanour or a minor infraction⁶⁹. The American Bar Association recommends that courts should be authorised to impose a gaol term or sentence of partial confinement within a range fixed by the legislature, but such term should in no event exceed one year⁷⁰. In the commentary on the Association's Standards, it

66. Report of the Advisory Council on the Penal System, *op. cit.* para. 28.

67. Third Schedule.

68. Justices Act 1959. Second Schedule (Tas.); Summary Courts Act 1966-1970 s.63 (Vic.) and Vagrancy Act 1966 s.21 (Vic.); Justices Act 1902-1971 s.82(2) (N.S.W.); Justices Act 1902-1967 s.167 (W.A.); Justices Act 1886-1968 s.174 (Qld.); Justices Act 1921-1969 s.81 (S.A.). A bill is, at the time of writing, before the South Australian House of Assembly which will bring s.81 of the Justices Act in line with the current cost of living. (See Bill 126 of 1972 (S.A.).)

69. S.3304(2).

70. S.6.5(b).

is explained that the exclusive use of the dollar-day ratio is rejected on the ground that it presents the possibility of a brutally long sentence and it provides as a measure an arbitrary figure which makes no economic sense and bears no relation to the factors which ought to govern the length of sentence⁷¹.

It is submitted that the term of imprisonment following non-payment of a fine should depend only upon the nature of the offence of which the defendant was convicted and his own personal circumstances.

Summary of recommendations

1. A fine should not be an appropriate sanction for a criminal offence unless:

- (a) the defendant has the present or shortly anticipated ability to pay it,
- (b) there is at least a reasonable likelihood that the major impact of it will fall upon him, and
- (c) prior consideration has been given to the possibility of reparation to the victim.

2. Subject to (1) *ante* and (3) *post*, the fine should be available in respect of the full range of criminal offences but is likely to be of special value in dealing with minor infringements of the road traffic regulations and cases in which the defendant has gained a known financial advantage from his offence or has caused a known financial loss.

3. Being drunk in a public place and drinking methylated spirits should cease to be criminal offences.

4. Fines should only be combined with total imprisonment if the requirements of (1) *ante* are satisfied and the defendant has made and retains possession or control over a substantial profit from his offence.

5. Fines can be combined usefully with probation, especially if it is necessary to safeguard the interests of the dependants of the offender.

6. The amount of fines should be expressed in units rather than dollars:

- (a) so that the amount can be tailored carefully to the defendant's means, and
- (b) to avoid the need for constant piecemeal legislative amendment to match changes in the cost of living.

Each offence should carry a maximum and minimum and the value of the unit within that range would depend on the defendant's means which in most cases should be determined by an enquiry.

7. A consistent practice should be adopted, at least within categories based upon types of offence, with regard to weeks of grace before proceedings are commenced.

71. See Commentary at 292, and see also President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: The Courts* (1967), 18.

8. If default occurs, initiative to commence enforcement proceedings should rest with the Crown or police prosecutor who should select the appropriate means.

9. The means for recovery should include all the usual methods for the collection of civil debts, including attachment of earnings. Consideration should be given to the introduction of money payment supervision and community service schemes.

10. Imprisonment should remain available as the ultimate penalty for default.

11. If imprisonment be ordered, the term should not be related directly to the amount of the fine but rather to

- (a) the gravity of the offence, and
- (b) the personal circumstances of the defendant.