Fines, Risks and Damages: Money Sanctions and Justice in Control Societies

Pat O'Malley*

Abstract

Fines and damages are the principal sanctions of criminal, civil and regulatory law. Yet in law it does not matter who pays money sanctions. Damages overwhelmingly are paid by insurers and the cost of insurance premiums loaded into commodity prices and thus dispersed among consumers. Fines are paid anonymously, increasingly are set by a fixed tariff (especially traffic fines that are the vast bulk of all fines), and are merging with fees, licences, taxes and premiums. Fines and damages thus work literally as prices, and serve to modulate and regulate distributions of harmful or unwanted actions. In this sense justice is far more about the governance of risk than about individual justice.

Introduction

Currently it is the case in most criminal jurisdictions outside the US that about 70% of court dispositions, and almost all sanctions against corporations, are made through the fine (ALRC 2005). In the world of regulation and by-laws, fines not only account for the bulk of sanctions delivered, but in simple terms fines are delivered in such numbers — for example with respect to traffic violations and infringements — that they dwarf all other legal sanctions combined. In Australia Fox (1996) calculated over a decade ago that in the Magistrates Courts for every criminal case disposed of, more than seven were disposed through the rapidly expanding form of on-the-spot fines. In 2007 more than 360 000 monetary orders were imposed in Australian lower courts. Moreover, some 123 other agencies outside the criminal justice system issued such fine notices. Massive sums are involved. In NSW alone the total value of fines imposed in 2007 was over $225 million (NSW Government 2007). In civil law, the remedy of right has been monetary damages for nearly two hundred years. In addition, damages may be linked to criminal sanctions, as in US Federal law where treble damages may be imposed against corporations for egregious and harmful activity. While damages may thus be awarded for many millions of dollars, the total volume of damages is a vast underestimate of the work done by money in this area of law, given that very many actions — and almost all traffic accident matters — are settled by insurers out of court. The imposition of legal costs and court fees is yet another issue. Unlike liberty, money is a sanction that spans almost all domains of law and regulation — including private sector domains. Despite this, the subject of money as a form of legal sanction has been surprisingly little discussed by the social sciences.

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* Professor, Faculty of Law, University of Sydney.

However, once attention is directed to the money form, several important features of justice emerge. To begin with, as Simmel remarks, money is undifferentiated (Simmel 1990:292). It is very difficult to establish to whom any particular wad of currency belongs.

With respect to criminal justice, we now take for granted that the court does not have to establish whose money is paying a fine. While this has been attempted in Britain (Home Office 1988:133) the sheer difficulty of ensuring that the money belonged to the guilty party meant the scheme was stillborn. The result is that the fine is the one criminal penalty that need not by paid by the offender. The court pays no attention to who pays the fine, as long as it paid — yet outside the USA the fine is usually the principal sanction of criminal justice.[1] Indeed, were the courts required to establish the source of all fine payments (assuming this were possible) it would add enormously to the court workload. Put another way, the continued functioning of criminal justice as a system dealing with large numbers of offenders in countries such as Britain, Canada and Australia depends upon the fact that the court does not have to establish who pays the penalty. This is even more so in the case of the much greater volume of regulatory fines, and especially the traffic fines and infringement penalties that make up the bulk of these.

In civil law, monetary damages share in common with fines the fact that the court does not concern itself with who pays. Over 95% of damages are in fact paid by insurers (Cane 1993). Indeed, as will later be argued, it is largely because of the existence of liability insurance that tort damages have become primarily compensatory in purpose, placing still less emphasis on who pays. Thus, as with the fine and criminal justice, it can be argued not only that the primary sanction in civil law does not require the wrongdoer to pay the penalty, but were this a requirement civil justice would look very different and would be a very much smaller affair.

In this light, it is already clear that in a substantial degree the legal system does not per se punish or correct wrongdoers, even though punishment and correction are thought to be major aims of justice. Were this critical, then some effort would be put into the task of ensuring sanctions are paid by offenders whereas in practice no effort is made.[2] As Rusche and Kirchheimer (1939:176) noted long ago, fines are levied where the activity is unwanted, but where there is no moral imperative to extirpate it, rather than merely contain its frequency. And as will become clear, damages effectively redistribute the cost of harms through mechanisms of insurance. As this already suggests, money sanctions are not so much about individuals than about distributions, or about past moral wrongs of individuals — or even the future conformity of specific individuals. Rather, they work through punishing individuals in order to shape risk distributions.

A second key feature of money is that, unlike liberty and the body, the two other key sites of legal sanctioning, money is always transferred rather than destroyed. Money damages compensate harmed parties by transferring money, fines are understood to do much

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1 The decision not to deploy fines routinely in criminal justice — as has been the case in the United States — is one of the key but largely unexplored factors underlying that country's exceptionally high rates of imprisonment. This is further discussed in n 5, below.

2 Of course we may assume that most fines will be paid by offenders — although the truth is that we have no idea what proportion are paid in part or entirely by parents, employers, spouses, friends and so on. This very fact indicates what a matter of little importance to criminal justice and criminology is the question of who pays! Indeed this paper is less concerned with the issue of what happens in such essentially private relations, than the fact that they remain essentially private and anonymous. It could be added that the entire operation of payment of fines through the mail or (increasingly) electronic transfers is premised on the fact that the identity of the payee is irrelevant.

the same except that the state is the harmed party — a view that reaches from Jeremy Bentham to the Law and Economy movement (Bentham 1789/1962; Becker 1974). As well, unlike other state sanctions, fines produce net revenue rather than consume resources. Regulation through monetary sanctions is thus almost infinitely expandable. Even the idea that the scale of money sanctions is limited by the capacity of individuals to pay confronts problems. Insurance already spreads the cost of damages across very large numbers of organisations and individuals. Companies often pay fines for their employees, recouping the cost through commodity pricing. Corporations normally pass on the costs of their fines and damages to consumers.

A third vital characteristic of money in this respect is its meaning. While for Simmel (1990) money is 'meaningless', more precisely its positive meaning is that money buys commodities. It is for this reason that money is used to compensate the injured in body, mind or reputation (O'Malley 2009), and why it is rarely used to punish sexually violent offences (Young 1989; Marinos 2005). It is also why money bears little of the political significance of the loss of liberty. Money thus may be wielded as a sanction on a very large scale — for example compared to imprisonment — while attracting little attention. As well, especially where disconnected from the likelihood of imprisonment in default of payment, money sanctions are associated with the stripping-away of administratively complex and expensive procedures of justice. Coupled with its undifferentiated character, and its transferability, money's potential for regulating vast masses of activity is clear.

Despite this, I will suggest that money sanctions were a rather small-scale affair in the 19th century, and that this was associated with the disciplinary-punitive character of legal sanctions at that time. Conversely, the expansion of money sanctions in scale and frequency has been associated with the decline of an assemblage of punishment and discipline — notwithstanding the record numbers imprisoned — and the ascendancy of a risk-based approach to government that aims to shape and direct distributions. In one of the stunningly few theoretical analyses of fines, Anthony Bottoms (1983) made much the same point in the 1980s, when commenting on the currently fashionable idea that community sanctions were dispersing discipline across the 'punitive city'. He pointed out that this missed the point, for the fine was the principal sanction of this sort, yet was not disciplinary. Disciplinary sanctions punish and correct individuals. Fines, he suggested were an example of what Foucault called 'regulatory power' — that seeks to govern volumes and distributions of offending. Individual identity and moral condemnation are of secondary importance in this process. Even though the punitive fine is delivered in court, the majority of those fined do not attend nor are required to (Fox 1996). With respect to the mass of traffic regulatory fines, the 'system' is almost totally anonymous – with offences being recorded, issued and often paid electronically. Many infringement notices are directed at what Deleuze (1995) calls 'dividuals', fragments of individuals frequently identified by binary codes for the purposes of control — the 'owner', the 'driver', the 'proprietor' and so on. Unlike disciplinary sanctions, fines do not lay hold of the body and subject it to a microphysics of power, nor do they concern themselves with the 'soul' of the offender.

In the case of money damages, it will be seen that the identity of the wrongdoer becomes increasingly irrelevant as compensation becomes paramount. During the course of the 20th century, fault became less important than the capacity to pay, so much so that tort law came to resemble a no-fault insurance system. A moral and disciplinary imperative came to be marginalised at the same moment that the scale of monetary justice grew dramatically, and for much the same reason: the availability of liability insurance. If — as in Jeremy Bentham's (1982) famous homily — fines are 'licences paid in arrears', this is as much true for damages, albeit through different circuits of capital flows. As John Coffee

(1992:1886) noted more recently, 'when society wants not to proscribe the activity, but only to reduce its level, it should use prices'. Increasingly this is exactly what fines and damages are. What matters is not who pays, but that money changes hands. In turn, prices govern aggregate demand. Fines and damages act as monetary prices in much the same fashion as taxes, licences, fees, premiums, liens and so on. In such ways the idea of the 'price' of wrongdoing ceases to be a metaphor and becomes a literal description. In this way, it will be suggested, the expansion of money as the currency of justice has already turned 'justice' into a market in harms, and more specifically into a monetised risk-management system.

The marginality of money sanctions in the 19th century

Damages

In the 19th century monetary damages were primarily regarded as punitive. Damages were part of a liberal project to shape and foster the responsible liberal subject (O'Malley 2000). The critical issue, especially in tort and contract was foresight: subjects were to be made responsible for not governing the risks of life as they foreseeably affected themselves and others. Thus the courts would award damages where an event that led to the breach of contract was foreseeable — or 'in the contemplation' of the contractors at the time of the agreement — but normally not otherwise (*Hadley and Baxendale* (1854) 156 ER 145). In this way — as Atiyah (1979) has argued — contract law assigned risks and made for an environment that rendered the calculation of risks more stable. But at the same time it established a regime of financial punishment for those who had failed to act with reasonable foresight. Likewise, in tort law, an array of developments in the 19th century restricted the right of recovery to those who were the victims of some other party's negligence — that is, the other party's failure to calculate foreseeable harmful risks. Conversely, where harm befell people as a result of their own negligence, then they would have no right of recovery.[3]

For example, the 'fellow servant rule' protected the owner of a manufacturing establishment from liability for injury to a worker whose harm was the effect of a fellow worker's negligence. In the prevailing view, as the person 'on-the-spot' the fellow worker had greater control over the risk than the owner, and should thus be liable. Likewise, if the injured worker's own negligence contributed to the harm, then for the same reason there could be no right of recovery. Even whether neither of these forms of negligence existed, workers could not recover if the court believed that the plaintiff had contracted to work in an environment where the risks were known to him or her. It was assumed that, acting with proper foresight, the worker would have voluntarily ascertained the risk. Accordingly workers would have negotiated better pay in light of this, and thus already had been compensated for the voluntary assumption of risk — the so called 'volenti' principle (O'Malley 2000). Certainly damages in such instances were about compensation in degree, but as White (2003) stresses the primacy of punishment of the wrongdoer was indexed by the fact that the development of negligence as a condition of recovery meant that compensation became far harder to get than had previously been the case. While the Marxist historian Horwitz (1977) rightly regarded this as an enormous subsidy to capital, the point of 19th century law was primarily on enforcing foreseeability, of introducing a new disciplinary regime, rather than compensating the injured. It is for such reasons that negligence was not

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3 The classic definition of negligence in tort law is 'that sum of money which will put the part who has been injured in the same position that he would have been in had he not sustained the wrong for which he is now getting his compensation or reparation': *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25.

understood for many years as producing injustices. As Bentham (1962) recognised at the time, the 19th century law of damages thus had much in common with the penal fine — as far as he was concerned, the difference between the two was merely procedural. Damages like fines were sheeted home to the individuals responsible for creating harms: what differentiated fines and damages was merely to whom the money was paid.

Crucially, however, in most of the 19th century there was no insurance available to spread the financial burden of these harms. It is worth stressing that the insurance industry was well developed by the 1850s, and perhaps the absence of liability insurance reflects compensation's low profile. Perhaps too, this reflected a sense that insuring against wrongdoing was problematic. Whatever the reason, this restricted the 'system' of damages to a very small scale affair. Damages could not be large, few could pay them and thus be worthy of suing, many of those harmed would not recover compensation unless free of fault themselves, and even then would have to demonstrate that they were victims of negligence. As the 19th century drew to a close, these characteristics — based on an individual and disciplinary-punitive vision of justice — increasingly came under assault from trade unions, 'social liberals', and those institutions that supported the poor and injured. By and large, these were the same groups who struggled to establish social insurance across the board as a distributive apparatus for assigning risks in place of the individual and contractually based order of the 19th century. However, until these changes, the system of monetary damages operated as a small scale, individualised and disciplinary apparatus.

Fines

Compared with today 'penal' fines (that is, criminal justice fines delivered in courts) also were a rather marginal sanction through most of the 19th century. According to Rusche and Kirchheimer's (1939) classic account, the reason for this was simply that the bulk of the population, and especially of that sector of the populace likely to appear in court, simply could not afford to pay fines. They show convincingly that fines were well supported by classical criminologists of the late 18th century such as Bentham and Beccaria, who regarded them as ideal sanctions: infinitely gradable, not laying hands on the body of the offender, and undoable in the event of miscarriage of justice. Yet into the 1870s, fines made up only about 10% of criminal justice sentences. This figure began to climb after about 1870 reaching about 50% by 1930. Consistent with their Marxist focus on the production system, Rusche and Kirchheimer suggest that there were material causes underlying this. 'The decline in unemployment and the rising living standard in the second half of the century, however, introduced a fundamental change. Many of the difficulties lying in the way of a fine system lost their force (Rusche and Kirchheimer 1939:168).

Put as a general proposition, they argued that 'the poorer the population of the country, the less frequent is the use of fines for offences characteristic of the great mass of the people' (1939:172–3). Yet they present only the crudest of correlations in support of their case, and there is little indication that the deep depressions of the 1890s and the 1930s had more than a marginal impact on the rate of fining. Fines dipped only 3% in the latter period. However problematic, this is not the principal difficulty confronting their account. Rather, it is that in the two centuries preceding the 1800s, the fine was probably the predominant sanction of criminal justice. King's (1996) detailed analysis of assault cases in England in the 18th century and Sharpe's (1990) analysis of the 17th century show that about 80% of convictions resulted in fines being levied. In both cases, however, the average size of fines was quite small — a few pence to a few shillings. In short, the poverty of the population was not a barrier to the fine, it merely placed a limit on the size of the fine. But as King shows (1996), between 1760 and 1820 the proportion of offenders fined dropped from about 80% to only 25%, and continued to decline thereafter.

This raises the question of why fines declined so markedly between the late 18th and the late 19th centuries — periods of considerable industrial growth. The principal answer appears to be that detected by Foucault — the rise of the disciplinary prison. In this same period, imprisonment as a proportion of all sentences grew from less than 4% to over 50%. Prior to this time, prisons had been holding pens for those awaiting disposition of their cases usually by corporal punishment or fine. But in the last quarter of the 18th century there was both an increase in punitivism, and the development of the idea of the correctional prison. By the early 1780s a 'new climate of reform … was affecting not only decisions about prison construction and prison systems, but also more general attitudes toward offenders. Magistrates and county benches were considering the possibility that minor offenders could be reformed by stricter imprisonment policies (King 1996:64).

In short, fines were a minor part of 19th century criminal justice, not because of the poverty of the masses, but because of changing penological visions. On the one hand, this makes clear that overall, insofar as money was the currency of criminal as well as civil justice it was a very small economy indeed. On the other, it suggests that money was largely dispensed with as the sanction of criminal justice because it did nothing to reform offenders. This is borne out by the fact that the return of the fine to a position of dominance was not brought about by the prosperity of the 'criminal classes'. In part this is indexed precisely by the fact that when they were being reintroduced it was necessary to invent all manner of techniques — such as payment by instalments and time to pay — in order to render fines a viable sanction. Even then, fine defaults were to remain a major issue. But of greater significance was the growing tide of criminological and judicial evidence that short periods of imprisonment were either correctionally ineffectual or even counterproductive (Grebing 1982:8–9).

The fine in criminal justice grows to dominance, in other words, as an index of the limits to disciplinary corrections. Because it became the replacement sanction for short periods of imprisonment, the quantum of each fine could no longer diminish to the small sums of a century before. For this reason, the non-payment of fines not only appeared as a major issue — for many now could not afford to pay these larger fines — but non-payment of such fines was backed up in default by the threat of imprisonment.

Imprisonment in default was thus an invention of the time. But another new meaning had emerged. The fine was now a 'non-disciplinary' sanction — a status not carried by the fine in previous times when disciplinary sanctions did not proved an Other. At the turn of the 20th century, this was still a relatively unimportant feature of fines. Most of those fined appeared in court to be denounced, and the full protection of criminal procedure was available to them. But as the fine became more readily available as a sanction, it was associated with a shift in court procedure. As Stephen Garton (1982) points out the fact that liberty was less likely to be at stake allowed a streamlined 'summary justice' to be applied to an ever increasing array of offences. Conversely, through the same mechanism, the increase in summary justice promoted the use of fines (Freiberg and Ross 1999). What Simmel (1990) refers to as the 'everyday meaninglessness' of money legitimated the stripping away of slow and expensive justice procedures. In turn, this reduced police and court workloads, and increased both the volume and throughput of cases.

The justice system not only expanded, for dealing with increasing caseloads it came to rely on a stripped-down procedure intimately linked to the monetisation of justice. Fewer individuals even appeared in court for many of the minor offences. A bridge had been created to a different future in which the individual offender, the moral wrongfulness of the action, the panoply of rights and obligations — the ceremonial of justice that marked crime with its special status — was fraying at the edges. Even by the early 20th century fines had already begun to reduce a considerable volume of criminal justice to a form of bureaucratic or even administrative procedure (Kamenka 1975). The emergence of the automobile and the enormous expansion of its ownership and use with the rise of consumer society was to take this bridge into a rather different realm of 'justice'.

Modern damages

After the end of the 19th century monetary damages were to become a matter of far greater importance than before, not only because of their rapid growth in number and scale — although this did occur — but because of the way in which they were articulated with insurance. Insurance and damages both turn harms and risks into amounts of money (Ewald 1991) and provide money compensation for loss. Unlike damages insurance spreads risks across time and space through the instrument of insurance premiums, and deploys actuarial techniques to calculate predicted losses. Unlike damages it thus renders risk calculable and governable on a large scale. By articulating the 'incalculable' domain of damages with the calculable domain of insurance, a financial assemblage was created whereby damages could shift from being marginal and uncertain — an erratic bombshell occasionally lobbed into the business arena — to being a normally calculable part of the principal circuits of financial governance. However, in order for this assemblage to be brought into being, tort had to undergo a significant transformation, and insurance imaginaries and technologies played no small role in this.

Damages and the order of production

Probably the critical development in this respect was the emergence of social insurance generally, and workers' compensation in particular. These redefined security, not as a matter of disciplined prudence that was the responsibility of individuals exercising reasonable foresight, but as an effect of social forces that could be governed better through regulatory techniques. These social forces included the characteristics of industries and the characteristics of the social classes that gave them constant rates of injury, sickness and exposure to accidents. The discovery that industries experienced constant rates of injury over many years, suggested to many that the issue of workplace injury was not one of discipline after all. In this view, negligence merely determined which particular individuals suffered injury. In turn, this was argued to show the 'social injustice' and the 'inefficiency' of a system in which power differentials made individual workers bear risks rather than the industries that employed them. At the same time, data collected by philanthropic institutes showed that industrial injuries were concentrated year after year among particular classes and age groups, and that these patterns reflected distributions also characteristic of the health of the population at large (O'Malley 2009a).

As with the broader politics affecting social insurance and social welfare, questions of 'social justice' were never far from the centre. In particular the injustices of tort law came under the spotlight. If tort law punished those who were negligent, and if the negligent included many people who could not pay damages because they were too poor, then where was the justice for the injured? If rates of injury appeared not to be products of negligence, than what was the justification for denying compensation in the name of a discipline imposed by negligence doctrines? If certain industries had high rates of injury, and rates of pay did not reflect this, then didn't volenti produce another injustice for the injured? Moreover, didn't it also indicate that employers were externalising the costs of their enterprises onto the working class and the taxpayer?

As private insurance emerged as an industry capable of handling large volumes of claims for accidental injury, and especially as it was being deployed to govern other areas of life such health, unemployment and old age on a national scale, so the necessity for such a flawed system came into question. As well, if the disciplinary-punitive system of damages working through the law of torts and contract did not make any difference to the overall rates of accidents then any justification for tort law as punitive was eroded. Workers' compensation thus not only stripped away a good deal of tort law's empire. It also meant that matters such as voluntary assumption of risk, the fellow servant rule and contributory negligence were substantially wound back in contemporary tort law and accident risk thereby further shifted onto the shoulders of industries. Compensation rapidly became the dominant ethos or function of tort law relating to production.

Parallel changes were already beginning with respect the domain of consumption, but already it was clear to commentators of the time that a new model was at work, perhaps most clearly articulated in Australia — for example in the *Workers' Compensation Act 1914* (Vic). Here, legislation largely displaced fault-based principles in tort with a scheme legally requiring employers to take out insurance to cover such risks with one of a number of private insurance companies. The implications were immediately clear to commentators at the time:

> the object is to make the trade, business or industry in which accidents happen bear the burden of responsibility of providing for those injured or for the dependents of those killed in the course of working operations; [but it is also] that the employer will necessarily add the cost of such compensation or the insurance to provide for it to the expense of the trade, business or industry and pass it on to his customers and thereby to the community generally (Quick, 1915: 23).

By transferring the risk of injury to compulsory insurance, and by transferring the cost of this insurance indirectly but wholly onto the end consumer as a component of prices, a form of indirect 'privatised' social insurance was established, grounded in the circuits of consumption (O'Malley 2004). In the process, the identity and fault of the subjects of this monetised justice became markedly less important. Overwhelmingly a distributive system of risk management — the timing and precise contours varying across jurisdictions — had been instituted across much of the 'west' before the beginning of the Second World War.

Damages and the order of consumption

About the same time, in the domain of consumption, a parallel but distinct process in tort law was set in motion. If power differentials were seen to have slanted damages in favour of employers, much the same was being envisaged with respect to the relationship between consumers and manufacturers. In slightly different fashion on each side of the Atlantic, compensation to those injured by the manufacturers and distributors of commodities was made much more central to tort and much more widely available, again in ways directly articulated with insurance.

In Britain, probably the most visible shift was produced by the decision in *Donoghue v Stevenson* [1932] AC 580 in which the court ruled that tort liability should not be restricted to those in direct contractual relations. In a case that seemingly reinforced the old system of negligence, the new requirement was that manufacturers and retailers especially should have in mind all those foreseeably affected by their actions. For a manufacturer, this now meant all those who could reasonably be imagined as coming into contact with their products or services: virtually all direct and even indirect consumers. Thereby, the duty of care was made so encompassing that lack of negligence became a more uncertain defence in tort actions. Be that as it may, the principal impact was to make it essential for enterprises to take out liability insurance against tort damages. As these businesses also passed on to consumers the cost of liability insurance, as part of their pricing structure, effectively another parallel social insurance system was established, but working entirely through the market for commodities. The massive scale of this assemblage is partially concealed by the fact that most tort actions in this domains are settled before ever going to court, and many of those that do end in court are settled before an award is made. Even so, Cane (1993:193) is no doubt right to argue that tort damages should be put into a broader perspective of risk-based governance, for 'it is more accurate to view insurance as the primary medium for the payment of compensation, and tort law as a subsidiary part of the process'.

In the United States, perhaps to compensate for the relatively late and partial development of the welfare state (Priest 1985), this process of tort reform went farthest. From the early 1900s through to the 1970s, manufacturers and suppliers increasingly had the burden of risk placed upon their shoulders through strict liability and (later) enterprise liability doctrines. In *Macpherson v Buick Motor Co* 217 NY 382 (1916) the narrowly contractual duty of care had been widened by arguing that the ubiquity of 'imminently dangerous' products, such as motor vehicles, required that their manufacturers take on a much greater degree of liability for harms produced. In 1944, the incipient socialisation of tort law that had been implemented in *Macpherson* was pushed one step further when *Escola v Coca Cola Bottling* 150 P 2d 436 (1944) eroded the negligence requirement and began a move toward strict liability by centring the consumer. It was argued that 'consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or trade mark … The manufacturer's obligation to the consumer must keep pace with the changing relationship between them' (quoted by Simon, 1987:71). In *Greenman v Yuba* 59 Cal 2d 900 (1963) pushed this further still with respect to product defects. The court viewed strict liability as applying to manufacturer 'when an article he places on the market, knowing that it is to be used without inspection for defect, proves to have a defect that causes injuries to a human being'. And later 'that the aim of this is to insure that the costs of injuries resulting from defective products are born by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves'.

In short, this changing relationship was a reconfiguration of the imagery of contract, for no longer are the two parties regarded as equals. In the three decades that followed *Escola*, both statutory regulation and tort law further registered the impact of a view that consumers needed protection (Cane 1993, O'Malley 2004). The concept of 'enterprise liability' with which this was associated in the US assumed that industries were in a much better position to know about the harmful potential of their products than consumers. It no longer mattered whether a product was inherently dangerous (as in *Buick*), nor whether the manufacturer was at fault — the burden of risk was to be shifted categorically (Simon 1999). As compensation became the focus, and insurance the model technique, then distributions became all. Fault receded to the margins as key questions instead became who was best placed to bear or spread risks. Compensatory damages had become regulatory and risk distributive. Especially with no-fault tort doctrines such as enterprise liability, and no-fault liability insurance, the identity of the tortfeasor was almost incidental except for the administrative purpose of assigning a conduit to the distributive circuits of insurance (O'Malley 2009b).

In related ways, therefore, monetary damages were transformed during the 20th century though the convergence of three developments. First, the development of (third party) insurance as a technique for rendering risk and thus money damages calculable. Second, the rise of a consumer economy which provided the means of spreading the costs of insured damages throughout price mechanisms. And finally the emergence of a social welfare state in which harms were understood to be socially rather than individually generated. In this milieu the conditions were created whereby compensation and risk-spreading displaced punishment and discipline as the primary purpose of money damages. By the 1970s, monetary damages constituted a system of social insurance that operated through prices in a commodity society.

Indeed, as this occurred, new criticisms emerged pointing out that — in a compensatory framework of 'social justice'` — insurance could replace individualistic tort law altogether. If the system of tort damages operated like an insurance system in key respects, then why not take the further step and go down the route of formalising social insurance followed by workers' compensation a half century before? This would ensure that all injured people could have access to a rational and predictable system of risk management in which relief could be provided speedily, at far less administrative cost, and with less of the intimidating legal procedure and financial risk that deterred so many injured people from seeking redress (Stapleton 1995). It was a model that New Zealand adopted, and to which both Australia and Britain gave very serious attention, while in the United States a plethora of critics called for something rather similar (O'Malley 2009b).

Fines and the consumer society: the 'modern' fine

The rise of summary justice had illustrated the process whereby sanctioning through money fines allowed for criminal procedure to be simplified, and for the throughput of cases to be increased dramatically. But it was an unanticipated development integral to the rise of consumer society that was to prove crucial to further innovation. The rise of automotive transport rapidly created new pressures on justice. To begin with, traffic offences associated with speeding were associated with a new 'criminal' class, the wealthy. In both Britain and the United States, courts proved reluctant to convict 'gentlemen' on what many considered a 'technical' offence — since offences such as 'furious driving' in Britain and 'dangerous driving' in the US, for example, took account of public safety, while the risk-based concept of the 'road toll' as a function of speed had yet to be discovered (Plowden 1971).

An unforeseen consequence of the class and 'technical' basis of emerging non-dangerous traffic offences was that imprisonment appeared out of the question, while the problem of what to with fine defaulters was irrelevant. These technical offences were thus met with a fine that was disconnected from the possibility of imprisonment. As well, the 'technical' nature of the offences led to further streamlining of procedures — even before the sheer volume of traffic offenders and infringements accelerated this process. By the First World War, it was already possible to have routine motoring offences dealt with *in toto* without any form of hearing. As the volume of vehicles increased, the 'parking problem' emerged. The invention of the parking meter in 1935, and its rapid take-up in many cities, magnified the capacity of police and by-law officers to generate work for the courts. This was not without difficulties, for many regarded the parking meters as a tax on motorists or as a rent charged for public property (Fogelson 2001:251–5).[4] Fines for overstaying thus appeared to many as a surcharge rather than, in any sense, a punishment. Further streamlining innovations rapidly followed, ranging from bureaucratic 'traffic courts' to the widening of 'opting out' techniques that encouraged automatic payment of fines. In the 1970s, the process took a quantum leap forward with the invention of on-the-spot fines, complete with reverse-onus provisions, an 'opting out' assumption with respect to formal hearings and disincentives to 'opt in' — notably administration fees and higher penalties (Fox 1996).

In this way, what Bottoms (1983) calls the 'modern fine' — a fine divorced from the possibility of imprisonment in default — came into being and became a normal part of everyday life. Yet for Bottoms — as for Rusche and Kirchheimer — this was to be understood as the effect of changes in the production system. In Bottoms' view, discipline was being evacuated from the factory, where Fordism and Taylorised automated mass production rendered it superfluous. In the public sphere, likewise, regulation of behaviours was increasing, and the modern fine was part of this apparatus, not so much disciplining individuals and enforcing morality, but working through punishment in order to manipulate patterns of behaviour. The modern fine was thus regulatory. Working through the governance of distributions, it was, as he perceived, part of an expanding apparatus for governance through risk — through the regulation of distributions of harmful and unwanted activity.

> In the road-traffic sphere, the primary mode of social control is environmental … the 'preventative channelling' of traffic lights, stop signs, parking restrictions, adequate road design and street lighting and so forth. In these areas of 'modern crime' therefore we have preventative social control systems backed up by the fine (and other juridical penalties such as disqualification). Disciplinary punishment is not necessary to achieve control. (Bottoms 1983:187, emphasis in original)

There are many problems with Bottom's account. For example, while the modern fine was seen by him to be growing most rapidly during the 1980s, this was a period in which mass production was being superseded and exported to the Third World, giving way to post-Fordist production. Likewise, he saw the post war expansion of the welfare state as linked to the expansion of regulatory power and thus consistent with the modern fine. Yet even as he was writing, the welfare state was already being transmogrified and downsized by the New Right. Perhaps the legacy of Marxist production-oriented thinking was still too difficult to break away from. However, while he was aware that the automobile was at the heart of the expansion of modern fines, it did appear to him that the key to understanding the emergence and growth of modern fines therefore was might be the development of consumer society.

This stress on consumption is not merely a nicety of theoretical argument. Its importance is that, as with monetary damages, the modern fine begins to work through circuits of control that are modulated through commodity prices. At first this is not obvious. However, from an economic standpoint fines work in the same way as prices (Becker 1974). Prices can be seen as mechanisms for governing the flow of goods and activities: increases

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4 Indeed, the introduction of speeding fines in Britain as early as 1903 was widely regarded as a tax. Where there was little evidence that speeding caused dangers, much of the opposition to speeding came from residents whose lives were polluted by dust, and from local councils whose road maintenance expenses were increased. Tellingly, much of the political struggle over speeding fines was alleviated by creating taxes for road improvement, including asphalting roads (Plowden 1971).

in prices tend to slow the volumes of activities flowing through certain circuits. Increases in fines are aimed at exactly this. Price increases render certain courses of action less attractive for consumers and increase the attraction of other courses of action. Prices are not geared to specific individuals but to abstract rational choice individuals, and through these to volumes and distributions of sales. Prices normally are not varied according to the means of the consumer or in light of mitigating circumstances. Each of these points applies exactly to the modern fine. Modern fines generally work as fixed prices designed to govern volumes of behaviour or as Foucault (2006) would say, to govern 'good circulations' and 'bad circulations' through probabilities. So much money for fifteen kilometres an hour over the speed limit, so much for fifteen minutes overstaying at a parking meter: the amounts calculated to produce the pragmatically desired shape of the distribution rather than to extirpate the unwanted activity.

Furthermore, the distinction between modern fines and other prices has become increasingly blurred. Parking fines appear as a 'premium' paid for staying longer than permitted at a meter which itself 'rents' the parking space. Fines are now offered at a discount rate is paid early, and at a penalty rate (or 'fee') if paid late. An additional fee is charged if the offender demands a hearing, and penalties may increase in the event of failure. Such marginal extras, and indeed the fines themselves, may become indistinguishable from other prices. Thus where a tollway is used without prior purchase this becomes subject to an additional administrative fee — but this can equally be regarded as a premium price for the motorists' convenience, or a fine for non-compliance. Over the past decade, many jurisdictions not only have come to rely on the revenue generated by fines, but have begun to build fees into fines and vice versa. As Dubber (2005) has pointed out this has come to be the case in criminal justice, where court fees, compulsory contributions to victim compensation funds, fine notification, collection costs, and so on are routinely incorporated into fines. As a result, the separation of the amount of money paid into these distinct categories is an accounting exercise rather than a sentence. This has reached its apogee in states such as Virginia, where speeding fines are now renamed 'fees'. Boosted into the thousands of dollars, they are explicitly justified as a tax: speeding drivers generate the need for expensive risk-reducing technologies — including the devices that trap them, and these costs too are sheeted home literally as the prices of speeding (O'Malley 2009b).

What is more, all of these variations on a theme are now increasingly paid in the same fashion. Like many speeding fines and parking fines these are recorded and issued electronically, often addressed to what Deleuze (1997) calls a 'dividual', an impersonal, electronically identified fragment of an individual such as the owner, occupier, driver, operator, licensee. Significantly, it is exactly the form of impersonal fragmentary relationship that Simmel (1990) regards as emergent through monetised, market relations. Money becomes the medium whereby relations between dividuals are effected, whether it be in the virtual market, through the purchase price, or on the internet via payment of the fine. Last, but by no means least, like prices and like almost no other sanction except for damages (and other monetary sanctions such as payments in equity) fines are a transfer of value. Fines, licences, fees, penalties, premiums, costs, insurance, and thus even damages — especially when settled or simply transferred between insurers are increasingly divorced from the system of 'justice' and become overlapping circuits in which flows of harms and behaviours are being governed through pricing.

If this appears much like the vision of the world promoted by the law and economics movement, the irony is that they have played little or no role in developing it. Indeed, while this movement has pressed for the universal application of fines as the ideal sanction, echoing their progenitor Jeremy Bentham, the US remains the one country in which the penal fines — except with respect to corporations, and of course modern fines — has been least developed.[5] It has appeared, rather, through the growth of the consumer society, its characteristic rationalities and its characteristic, monetised, techniques of governance.

Of course it could be argued that as America does not fine criminal offences yet is the consumer society par excellence, this blows a hole in the thesis linking fines and consumption — although of course the same argument could be applied to Bottoms' production-oriented thesis. But we need to be clear that this issue relates only to relatively small field. In practice, the US, of course, fines as extensively as anywhere else with respect to traffic, and virtually invented fining corporations. This is the core issue with respect to this paper's argument. Traffic alone generates about 90% of all fines even in countries that fine with respect to 'traditional' offences, and thus even in the US the bulk of fines links directly to that consumer commodity par excellence, the automobile.

Risk and the limits of money

In this account, fines and damages appear as elements in monetised circuits of governance, overlapping and merging with other elements such as licensing, taxation, fees, insurance premiums and so on. They operate as do all risk-based systems, through the shaping of distributions. As fines they are intended to reduce harmful risks such as are associated with dangerous driving and speeding. As damages they redistribute the costs of harms, as with the consumer-centred system of damages, which itself flows together with the fiscal risk-managing circuits of the insurance industry. This vast circuitry can be identified with the diagram of governance identified by Deleuze (1995) as that of 'control societies'. For Deleuze, in fashion akin to Bottoms, life is governed increasingly through regulatory apparatuses immanent in everyday life. The credit card, as a prime example, acts as passport governing the access of credit-risky identities into certain sites, ranging from hotels to websites. These identities are not individuals, the subjects of discipline, but 'dividuals', components of individuals identified by binary codes. The operation of 'on-the-spot' fines already maps very closely onto this diagram, most explicitly with electronically registered, issued and paid speeding fines. Perhaps, in a consumer-oriented society, such a system operating through money to reduce access to pleasure is more attractive and — perhaps more important — less noticeable than rigid disciplinary governance and its micropolitics. As prices are simply a ubiquitous part of our lives, almost taken for granted, so too are those prices and components of prices that are fines and damages.

But there are limits to this monetised governance of late modernity's pleasure machine. What happens when, for example, government determines that the risks created by drivers willing to pay a premium to speed are too great to tolerate? The principal answer came soon after the discovery of the 'road toll' and statistical correlations linking speed with the risk of death and injury (O'Malley 2009b). This was the invention of demerit points cumulating to cancellation of a drivers license, or instant cancellation in the case of serious

5 The reasons for this are too complex to rehearse here. Broadly, two hypotheses are offered. First, it is claimed (Hillsman et al 1984) that Europe retains the fine because it is more punitive than the US, which is more devoted to correctionalism. Apart from being jaw-dropping in its inaccuracy, it overlooks the fact that fines were introduced in Europe because short terms of imprisonment were found to run counter to correctionalism. The second principal proposal is that the Fourteenth Amendment prohibits unequal punishment, whereas fines discriminate against the poor. Certainly there is case law to support this claim (O'Malley 2009b). But it fails to answer the question of why the US has scarcely entertained the day-fine system which evens out money fines in this respect. A third by untried hypothesis is that liberty is such a political obsession in that country that imprisonment appears as the most appropriate punishment for all who disobey the democratically ordained laws. Put another — but not social scientific — way, America has a love affair with prison.

offences. The same is true for drink driving. A linked model is seen with tow-away zones and parking clamps or 'boots'. These were invented when it was recognised that the risk of drivers being willing to pay a premium in the form of a parking fine could not be tolerated, for example because of the traffic hazard created, or the need to ensure the circulation of traffic at peak load times. These models are applied, with variations, to other regulations. The restaurateur who is fined continually but continues to be in breach of hygiene regulations, the owner of the factory that likewise continues to pay fines but remains in breach of health and safety regulations, are both likely to have their licences to operate revoked. In such circumstances the high magnitude or probability of the risk overrides the 'soft' control of monetised sanctions. Even so, loss of liberty is rarely the response (absent dangerous driving charges, injuries resulting from culpable negligence, etc). Rather, cancellation of license, confiscation of vehicle, compulsory closure of business, these become essentially risk-based responses, incapacitating the risk-creator. But for the most part it is not liberty that is at stake. It is not the generalised freedom of the liberal subject, but a specific incapacitation of the *licensed dividual* that creates the risk.

Such licences are species of a conditional freedom, often themselves purchased, never constituted as inalienable rights. Their revocation thus generates little or none of the political angst that is associated with the liberal shibboleth of liberty. It accords perfectly with Bentham's view on the exact interchangeability of fines and licences. But of course, the driver may still continue to drive, the trader may continue to trade after license cancellation. At this point, perhaps, loss of liberty becomes the sanction, as the only remaining way of incapacitating the risk-creator. At this point, almost seamlessly, the modern fine slips into the territory occupied by the punitive fine, where defaulting behaviour is met with the threat of imprisonment.

The punitive fine now re-emerges — partly by accident, partly by design — as a transitional zone. It too is a form of risk-management technology, linking government through prices and the market to government through liberty. Those who can pay the price of these fines purchase their liberty. They demonstrate that they are still in and of the consumer society and can be governed through its financial circuits — even if for many this is only by virtue of the myriad of 'time to pay', payment by instalments' and other 'credit' devices that law has invented. Their debts are most frequently the focus of a debt recovery agency, where — as in New South Wales, all fines — judicial or regulatory — are treated in the same fashion by the State Debt Recovery Office. In some jurisdictions — such as Victoria and New South Wales — imprisonment for non-payment is rare, and more likely liens and confiscation of assets are the response. But elsewhere, in Canada, the USA and Great Britain for example, those who cannot pay, who are failed consumers, who can no longer be governed through the market, join the ranks of those who are incapacitated in prisons that themselves have increasingly taken on a risk-managerial function (Feeley and Simon 1994).

None of this should be taken as implying that the disciplinary world of the 19th century has passed, nor that the future is mapped out as a necessary progression into control society. At best, such developments are uneven. Recent resurgence of tort law reform has partially restored negligence in the name of creating 'responsible consumers' who take more care to avoid unnecessary risks when using the commodities they purchase. Thus the recent Commonwealth Government *Review of the Law of Negligence* has promoted the idea that 'the task is to restore an appropriate balance between personal responsibility for one's own conduct and the expectations of proper compensation and care' (quoted by Stewart and Stuhmcke 2005:19). Law and economics theorists have pressed hard (without notable success) for the abandonment of third party insurance for tort damages, and its replacement by a system of first party insurance that will, in their eyes, make individuals more responsible for their actions and more careful about creating risks (Atiyah 1999). Such manoeuvres have been associated with attempts also to restore a law and economics telos in which tort law's 'economic function is not compensation but the deterrence of inefficient accidents' (Posner 1986:187). In the same neo-liberal political climate, influenced by the 'culture of control', punitive fines have retreated in prominence, at least with respect to serious offending, although this represent a drop in the ocean when the ever increasing volume of modern fines is considered. The question now for consideration is not so much whether risk will continue to be governed through monetary circuits. If the arguments considered in this paper are correct, it is difficult to imagine how overall the system of governing civil, criminal and regulatory law could retreat very far in this respect, even in a global recession. What is undoubtedly open to politics, of course, are the ways in which such risk-based monetised justice is dispensed.

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