Annex F to Aimé Kilolo Musamba's Sentencing Submission on Remand

BOOK OF AUTHORITIES

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Sentencing Matters

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SENTENCING MATTERS

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Sentencing Matters

Sentencing matters in the 1990s more than ever before. This is not because the values and interests at stake have changed. The state's interest in enforcing its laws, the defendant's interest in preserving his liberty, and the judge's responsibility justly to reconcile them are as they have always been. So is the mix of considerations that judges think important—the importance of the behavioral norms that were violated, the effects of the crime on the victim, and the amalgam of aggravating and mitigating circumstances that make a defendant more or less culpable and make one sentence more appropriate than another.

What has changed is the political salience of sentencing. Until twenty-five years ago, the word "sentencing" generally signified a slightly mysterious process which, it was all but universally agreed, involved individualized decisions that judges were uniquely competent to make. Sentencing laws were crafted to allow judges latitude to fashion penalties tailored to the circumstances of individual cases. In our time, both the need for individualized consideration and the special competence of judges have been contested.

Sentencing, as a result, has been radically refashioned in two ways. First, sentencing has become a recurrent subject of ideological conflict, partisan politics, and legislative action. Many elected officials are no longer willing to enact general laws on sentencing and defer to judges to apply them wisely. Modern laws often tell judges what sentence to impose rather than set boundaries within which sentencing choices are to be made. Election campaigns regularly feature candidates' promises to be "tough on crime" and to support harsher punishments. Every state since 1980 has enacted laws mandating minimum prison sentences based on the premises that harsher penalties will reduce crime rates and that judges cannot otherwise be trusted to impose them. Following Washington State voters' adoption in 1993 of a "three strikes and you're out" ref-

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FINES *

K.B. Jobson**

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

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

Legal Framework

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

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

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

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

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

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

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[2] Section 646(1).

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

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

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

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

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

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

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

[8] Section 646(10).

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

Shortcomings and Reform

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

[9] Section 652(1).

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

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

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

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

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

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

[13] *Ibid.*

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

[15] *Ibid.*

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

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

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

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

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[17] Section 647.

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

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

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

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

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

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

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

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

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

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

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

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

Table I

Minimum and Maximum Fines — Assaults and Obstruction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[34] *Infra*, Table II.

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

[36] *Supra*, n. 7.

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

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

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

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

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

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

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

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

Use of Fines in Magistrates' Courts

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

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

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

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

[43] *Supra*, n. 14.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[52] *Ibid.*, Table 3.

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

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

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

Table II

Use of Fines by Offence Category, Nova Scotia, 1967

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

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

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

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

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

Table III

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

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

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

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

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

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

Table IV

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

[Cr. Code Section 294(a)]

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

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

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

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

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

Table V

Use of Fines in Assaults, 1967

(Cr. Code Sections 245 and 246)

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

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

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

Table VI

Indictable Assaults in Nova Scotia, 1967

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

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

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

Table VII

Assaults in England and Wales, 1960

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

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

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

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

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

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

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

Table VIII

Distribution of Fines by Major Categories, Nova Scotia, 1967

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

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

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

Justification for Fines As the Primary Sentence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[84] *Ibid.*

[85] *Ibid.*

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

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

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

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

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

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

Imprisonment in Default

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

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

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

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

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

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

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

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

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

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

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

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

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

[95] Section 722(2).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[106] *Supra*, n. 41.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[117] *Supra*, n. 112.

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

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

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

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

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

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A fine is a more effective financial deterrent when framed retributively and extracted publicly

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HIGHLIGHTS

- We examine factors influencing the effectiveness of financial deterrents.
- We compare public vs. private and compensatory vs. retributive fines.
- Public fines are a more effective deterrent than private fines.
- Retributive framings are more effective than compensatory framings.
- Compensatory, but not retributive, fines undermine moral judgment of defection.

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ABSTRACT

Introducing monetary fines to decrease an undesired behavior can sometimes have the counterintuitive effect of increasing the prevalence of the behavior being targeted. Such findings raise important social psychological questions in relation to both the way in which financial penalties are framed and the social contexts in which they are administered. In a field experiment (Study 1), we informed participants who had signed up for an experiment that they would be fined if they arrived late. This fine was presented as either compensatory or retributive in nature and as being administered either privately or publicly. We then observed participants' subsequent arrival time. In accordance with our hypotheses, participants' punctuality was only improved (relative to a no-fine control) in response to retributive rather than compensatory fines and when told that fines would be administered publicly rather than privately. In Study 2 we used a scenario method to demonstrate that the greater efficacy of retributively framed fines can be attributed to their presence being less likely to undermine the perceived immorality of transgression than is the case for compensatory fines. We propose a material promotion-moral prevention (MPMP) theory to account for our findings and consider its practical implications for the use of financial disincentives to encourage cooperative behavior through public policy in domains such as climate change.

Introduction

Fines are a part of everyday life. Policy makers routinely employ financial penalties and other deterrents to discourage undesirable actions (such as speeding, littering, or tax evasion) under the assumption that the association of behavior with a punishment will render the targeted behavior less attractive (Becker, 1968; Cooter, 1998). Beginning with Skinner (1945) and Thorndike's (1913) seminal work on operant conditioning, a wealth of experimental evidence has accumulated demonstrating that punishments can successfully decrease undesired behavior (Benabou & Tirole, 2006; Eek, Loukopoulos, Fujii, & Garling, 2002; Fehr & Gächter, 2002; McCusker & Carnevale, 1995; Ostrom, Walker, & Gardner, 1992; van Vugt & De Cremer, 1999; Wit & Wilke, 1990; Yamagishi, 1986). However, as was famously highlighted by Gneezy and Rustichini's (2000) now widely-cited field experiment, introducing fines can sometimes produce counterintuitive effects. In their experiment, they had a group of day care centers in an Israeli city impose a fine on parents every time they picked up their child late. Startlingly, the centers that introduced this fine actually experienced a subsequent increase in the number of parents arriving late relative to those who introduced no such fine. Similar findings have also been obtained in other field contexts as well as in the social psychological laboratory (Benabou & Tirole, 2003; Fehr & Falk, 2002; Holmås, Kjerstad, Lurås, & Straume, 2010; Mulder, van Dijk, De Cremer, & Wilke, 2006).

The theoretical account provided by Gneezy and Rustichini (2000) for this highly counter-intuitive finding was that parents simply viewed the fine as a 'price' paid to perform a desirable and convenient behavior (arriving later) rather than as a punishment for wrong-doing. Along

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similar lines, but from a more social psychological perspective, Mulder (2008, 2009) has suggested that psychological and behavioral responses to deterrents may be strongly determined by whether the deterrent in question is perceived as retributive or compensatory in nature. Deterrents are perceived to be compensatory when they are seen as a means by which one compensates (pays) for the negative consequences of one's transgression (e.g., required overtime pay for childcare staff). On the other hand, they are perceived to be retributive when they are seen as a means by which one is punished because one has transgressed a moral norm, such as the norm to avoid inconveniencing others (also see Darley & Pittman, 2003). As Mulder (2009) notes, it is only when a deterrent is interpreted as retributive that it is likely to frame the undesired behavior in terms of shared moral standards. Thus, she suggests, the threat of retributive punishment is more likely to produce the desired effect on behavior, particularly if the material cost of the fine is not especially high. When the deterrent is interpreted in a more compensatory way, however, a social actor is more likely to see fines as simply providing an opportunity to compensate the victims of the social actor's behavioral choice (e.g., the child care workers), thereby actually making transgression seem (paradoxically) more attractive under such a system.

Studies examining the more general effects of situational construal on economic behavior have suggested that the extent to which a decision-making context is framed in moral terms can have a marked impact on the decisions that people make. For example, Liberman, Samuels, and Ross (2004) showed that simply introducing a Prisoner's Dilemma paradigm to participants as 'The Community Game' generated twice as much cooperation than when it was introduced as 'The Wall Street Game'. Although these findings demonstrate the potential impact of different 'mindset' frames on decisions within the context of social traps, they do not directly address the capacity for such effects to be elicited in the context of implementing different forms of sanctions. The empirical work that comes closest to such an insight is that of Tenbrunsel and Messick (1999), in which business students imagined themselves in a hypothetical scenario whereby they were a company production manager tasked with making a decision that was conceptually akin to a two-player Prisoner's Dilemma. Participants were told that they should make their hypothetical decisions regarding whether to cooperate or defect in light of either a) an inspection/sanction regime with low probability of detecting defection and a relatively inconsequential fine for defection (weak sanction), b) a regime that had high detection probability and a substantial fine (strong sanction) or c) no inspection regime. The findings showed that although cooperation rates were highest under strong sanctions, levels of cooperation under weak sanctions were actually lower than when no sanction was present. Tenbrunsel and Messick (1999) suggest that sanctions led to participants adopting a 'business' frame rather than an 'ethical' decision frame — a claim supported by the recorded post-hoc self-reports of participants, in which those in both sanction conditions were more likely to report having adopted a 'business' frame relative to those participants in the no-sanction condition.

Tenbrunsel and Messick's (1999) findings therefore speak to the possibility of different mindsets being invoked by sanctions of different magnitude (also see Mulder, Verboon, & De Cremer, 2009) and/or differing levels of detection probability. The primary implication of Tenbrunsel and Messick's model is that if an authority is going to fine at all, then they must fine big or risk undermining cooperation via the removal of a moral motive. However there are many situations in which the implementation of harsh sanctions is not politically palatable for an authority, especially in response to less serious incursions. As a result, what becomes both theoretically and practically crucial is developing an understanding of whether exactly the same type or strength of sanction can lead to greatly different levels of co-operation simply by virtue of it being framed in ways that invoke different mindsets or interpretations of the social meaning of the sanction. The theoretical distinction drawn by various authors between retributive and compensatory frames in terms of the levels of morality that they convey regarding the target behavior (Gneezy & Rustichini, 2000; Mulder, 2009) offers one such potential theoretical handle. However, as yet, there is no direct empirical evidence to support this model. The current studies aim to provide such evidence.

We also seek in the current work to address a second, previously overlooked, social aspect of Gneezy and Rustichini's (2000) methodology — the public or private administration of fines. Specifically, the notice that was posted on the day care center bulletin boards to communicate the fine's introduction to parents included the following statement: "The fine will be calculated monthly, and it is to be paid together with the regular monthly payment" (Gneezy & Rustichini, 2000, p. 27). The strictly private nature of this transaction thus meant the payment of lateness fines did not involve late-coming parents having to face (or anticipate facing) the individuals they had inconvenienced (i.e., the day care workers).

The legal literature is replete with theoretical and philosophical debate regarding the potential efficacy and ethics of the use of public sanctions in the criminal justice system (for examples, see Flanders, 2006; Kahan, 1996; Massaro, 1997; Shemtob, 2013; Whitman, 1998). However this discussion has been predominantly focused on the more extreme end of the spectrum in terms of both the behaviors in question and the sanctions imposed (i.e. public shaming as an alternative to prison for criminal offenses). By contrast, our focus here lies in empirically examining the potential for the threat of more mild forms of social pressure or disapproval (what Massaro (1997) might instead define as 'guilt'-inducing) to increase pro-social behavior. Moreover, as Flanders (2006) points out, one of the potential problems with using fines as a deterrent is their potential 'fail[ure]…along the expressive dimension', suggesting that fines convey 'the message that crime is merely costly behavior, rather than something that society unequivocally condemns' (p. 614). Public sanctions have thus usually been suggested as an alternative, more value-expressive, response to crime that has the additional benefit of also causing less harm to offenders and being less costly than imprisonment. However one might question whether public sanctions need necessarily be thought of only as a more value-expressive alternative to financial deterrents when the possibility also exists to give financial deterrents themselves a more public flavor.

There is, as yet, relatively little direct experimental evidence for the efficacy of publicly extracted financial deterrents. Xiao and Houser (2011) have demonstrated in a laboratory context that the public implementation of weak financial disincentives in public goods games are more effective in increasing cooperation than the same disincentives implemented privately. Consequently, it is possible that Gneezy and Rustichini's (2000) field results may have also resulted, in part, from the private nature with which the imposed fine was advertised as being extracted. However direct evidence for such effects in field settings is currently lacking. In the current work we empirically explore whether the potential value-expressive failures of financial deterrents might be overcome, at least in the context of encouraging more pro-social behavior, by making the process of their extraction more public in nature.

The current studies

We investigated across two studies whether the amount of behavioral change produced by materially identical financial deterrents can depend upon how such fines are framed and administered, and also the psychological mechanisms by which such effects might be produced. In our first study we conducted a field experiment that investigated the effects on real, observed behavior of fines framed as either retribution or compensation that were expected to be administered either publicly or privately. In our second study we employed a scenario methodology to explore whether, as we suggest above, the effects of fine framing on behavior might be driven by the differing levels of morality ascribed to a behavior when fine announcements are worded in either retributive or compensatory ways.

Study 1

To empirically test the effects on behavior of the compensatory versus retributive framing and public versus private extraction of fines, our first study involved a field experiment in which we measured individuals' punctuality in response to the threat of a fine imposed for late arrival at an experiment. We hypothesized that individuals would be more punctual in their arrival when the fine was framed as retribution (rather than compensation) and when participants believed that the deterrent would be administered publicly (rather than privately).

Method

Participants and design. Participants were 205 undergraduate students at the University of Exeter who were randomly allocated to one of six conditions within a 2×2 experimental design in which Frame (compensatory vs. retributive) and Context (public vs. private) of fine were both manipulated between participants. In addition, we included two no-fine control groups[1] (one using retributive wording and one using compensatory wording — as outlined below). Of those who initially signed up to participate, 57 (28%) failed to attend their session, leaving a total sample of 148, 96 of whom were female, with a mean age of 20.27 years ($SD = 2.67$). The number of no-shows did not differ across compensatory and retributive fine frames, $c^2\ (1, N = 125) = .01$, $p = .92$, or private and public contexts of fine administration, $c^2\ (1, N = 125) = 1.30$, $p = .25$. Rates of no-show also did not differ between those in the conditions involving a fine and those in the no fine control, $c^2\ (1, N = 204) = .95$, $p = .33$. Participants received £5 (~7.75 USD), on average, for their involvement in the experiment.

Materials and procedure. An initial recruitment email was sent to a number of undergraduate student research participation lists advertising that participants were sought for an 'economic psychology game' study that would take approximately 30 min and inviting those interested to sign up online. Would-be participants were also informed that they would be remunerated with a £2 attendance fee for showing up and would be given the opportunity to earn up to an additional £6 (£3 on average) during the study, dependent upon decisions made in the experimental game by both themselves and the other participants in their session.

All sessions presented to participants started at 9 am on weekdays (with day of session being counter-balanced across experimental conditions). Upon signing up for their choice of session, participants received an email confirmation. This email highlighted the importance of arriving in time for the start of the session at 9 am and stipulated, for those in the fine conditions, that participants who were more than 15 min late would be fined their £2 attendance fee as a result. The reason for this fine was manipulated to be either compensatory or retributive within the text of the email. Those in the compensatory fine condition were informed that "lab space is in high demand in the department at this time of year" and thus it was important that participants arrive on time because "arriving late may hamper our ability to complete the session, which will have financial implications for the research project" and that "as a means to compensate for this, latecomers will forfeit their £2 show up fee if more than 15 mins late". This constructed the fine as partly offsetting the negative implications of participants' wrongdoing. Those in the retributive fine condition were informed that it was important that they arrive on time simply because "latecomers will cause large inconveniences" and that 'for this reason, latecomers will forfeit their £2 show up fee if more than 15 mins late'. This version of the email thus highlighted why late attendance was 'wrong' — with the fine being justified solely in terms of it being reflective of the wrongness of arriving late.

To test for the possibility that differences in the wording of these two frames (other than just the ability of the fine to compensate for wrongdoing) might affect participants' perceptions of the seriousness of late coming, we pilot tested the email wordings on a sample of undergraduate students from the same university. These 60 participants (32 female, $M_{age} = 21.17$, $SD_{age} = 3.60$) were approached on campus and told that we were looking for students to participate in a short study to help us decide how best to communicate the importance of turning up on time to experiments in our lab. Participants who agreed to participate were provided with a screen shot of either the email sent to participants in the compensatory condition or the email sent to those in the retributive condition, but without the actual possibility of a fine being mentioned in either email. Thus, those in the retributive pilot condition simply read that it was important that they arrive on time because latecomers will cause large inconveniences, whereas those in the compensatory pilot condition simply read that that lab space is in high demand in the department at this time of year and thus it was important that participants arrive on time because arriving late may hamper our ability to complete the session, which will have financial implications for the research project. Removing the actual fine from the email allowed us to pilot test whether basic differences in the wording of the two emails might be responsible for different perceptions of the importance of arriving on time, as opposed to the specific framing of the fine itself as compensatory or retributive. Participants in both conditions were then asked to rate their level of agreement on a 7-point Likert scale with 3 items ($\alpha = .72$) measuring the level of harm they felt would be caused by coming late to such an experiment (e.g., 'If I arrived late to this experiment it would result in negative consequences for others'; 'It wouldn't be a major problem if I arrived late to this experiment' [reversed]).

Results of this pilot indicated no significant difference in perceived harm caused between retributive and compensatory wordings ($t(58) = 1.56$, $p = .12$), and in fact showed that the harm caused by lateness was, if anything, perceived to be higher in the compensatory wording condition ($M = 5.66$, $SD = 1.02$) than in the retributive wording condition ($M = 5.21$, $SE = 1.23$). Thus, we can be reasonably confident that any superior punctuality by those in the retributive fine condition cannot simply be attributed to higher perceptions of the seriousness of lateness driven by basic differences in the wording of the two emails.

The social context of the fine's administration was also manipulated within this same email. Those in the private fine condition were told that "Late fines will be privately deducted from participants' payments", whereas those in the public condition were told that "Due to the nature of the experiment, late fines will be publicly deducted from participants' payment in front of other players".

For participants in the no fine control condition, half received an email with exactly the same retributive wording outlined above regarding the importance of being on time, except that there was no possibility of a fine mentioned. The other half of the control participants received the same wording as those in the compensatory condition, except that there was again no mention of a possible fine.

Participants in all conditions were requested to reply to the email they received to confirm that they had read and understood the message. All participants complied with this request. In order to maximize the salience of the manipulations prior to arrival at the experiment, a final reminder email was sent to participants 24 h before their scheduled session, which repeated this same manipulation of the independent variables. This also had the benefit of reducing potential noise in the data produced by any small and randomly distributed differences across participants in the time lag between the initial confirmatory email and the date of their particular session.

[1] The no-fine control groups were collected exactly 12 months after the treatment conditions in the same weeks of the academic year using entirely equivalent mailing lists (with a new first year student cohort). The no-fine and treatment conditions were found to be equivalent on all measured demographics (Gender: fine = 63% female, control = 68% female; Mean age: fine = 20.26, control = 20.30; Political orientation measured on a 7-point scale from right to left wing: fine = 4.00, control = 3.91; Ethnicity: fine = 68% White British, control = 62% White British).

The exact amount of time before or after 9 am that each participant arrived at the experimental session was recorded to the nearest 10 s. No participants in the fine conditions arrived after 9.15 am, removing the need to actually fine any participants their attendance fee. After arrival, participants took part in an economic psychology game (the specific procedure of which is not outlined here because it constitutes a separate study). Upon completion of the game, participants were given their monetary reward, which depended on their performance in the game in addition to their £2 attendance fee. Participants were thanked for their contribution and fully debriefed regarding the study's aims.

Results

Across the sample of participants who showed up to the study, 34% arrived after the requested time of 9 am, with a mean arrival time overall of 1.64 min before 9 am ($SD = 4.77$). Due to there being no significant differences between the two no-fine control conditions in either number of participants arriving after 9 am, c^2 $(1, N = 54) = .78$, $p = .38$, or mean arrival time, $F(1,53) = .29$, $p = .64$, these two conditions were collapsed into one single no fine control condition.[2]

To assess our hypotheses we first tested if the dichotomous measure of whether participants arrived before or after the requested time was affected by the framing of the message and the social context in which the fine would be (putatively) administered. As shown in Fig. 1, and in support of our hypothesis, participants were half as likely to arrive late in the retributive fine condition (20%) compared to both the compensatory fine condition (40%, Fisher's exact test $(1, N = 93)$, $p = .02$), and the no fine control (41%, Fisher's exact test $(1, N = 100)$, $p = .02$). Furthermore, participants were also almost half as likely to arrive late in the public condition (21%) than they were in either the private condition (39%, Fisher's exact test $(1, N = 93)$, $p = .049$), or the no fine control (41%, Fisher's exact test $(1, N = 101)$, $p = .03$). The cumulative effect of these two independent variables represented the difference between only 9% of participants in the public-retributive condition transgressing and arriving late compared to 48% of participants arriving late in the private-compensatory condition (see Table 1).

We also conducted a two-way ANOVA[3] to test whether framing and context of administration affected participants' exact arrival time, given that arriving well before the start time represents a different behavioral response to a participant taking the risk of being late by choosing to arrive just before 9 am. Moreover, arriving substantially late is clearly quite a different response to arriving only a matter of seconds late. As shown in Fig. 1, and in accordance with our initial hypotheses, we observed a significant main effect of frame, $F(1,143) = 3.79$, $p = .05$, $\eta^2 = .03$, with pairwise comparisons indicating that arrival times for those in the retributive condition ($M = 2.95$ min before 9 am, $SD = 4.24$) were significantly earlier ($p = .04$) than those in the no fine control ($M = .99$ min before 9 am, $SD = 5.33$) and also marginally significantly earlier ($p = .056$) than those in the compensatory condition ($M = 1.08$ min before 9 am, $SD = 4.37$). There was no significant difference between compensatory and control conditions ($p = .91$).

Similarly, we observed a significant main effect of context of administration, $F(1,143) = 6.96$, $p = .01$, $\eta^2 = .05$, with pairwise comparisons again revealing that those in the public condition arriving significantly earlier ($M = 3.28$ min before 9 am, $SD = 3.68$) than those in both the private condition ($M = .75$ min before 9 am, $SD = 471$, $p = .01$) and those in the no fine condition ($M = .99$ min before 9 am, $SD = 5.33$, $p = .02$). There was no significant difference in arrival time between the private condition and the no fine control ($p = .79$). There was also no significant interaction between fine frame and context of fine administration on exact arrival time ($F(1,143) = .40$, $p = .53$). However, again, the cumulative effect of these two independent variables represented the difference between participants arriving over 4.5 min early (on average) in the public-retributive condition compared to arriving (on average) only 6 s before the agreed start time in the private-compensatory condition (see Table 2).

Discussion

The results of Study 1 provide empirical evidence to support the theoretical claim made in past literature (e.g., Fehr & Falk, 2002; Gneezy & Rustichini, 2000; Mulder, 2009) regarding the potential for financial deterrents to be ineffectual when framed and interpreted in a compensatory, rather than retributive, fashion. The study also provides field evidence for the greater behavioral effect of fines threatened to be extracted publicly, rather than privately. However a key element of the theoretical model that we outlined in our introduction was that retributively framed fines should be more effective because they are more likely to lead people to conceive the undesired behavior in terms of shared moral standards. Our second study set out to provide empirical evidence for this proposed psychological process mechanism.

The typical way to demonstrate that a particular psychological process is driving the effect of a manipulation on a behavioral outcome measure is to measure that process as a mediator variable within the behavioral study itself. This was not an option in the context of the current field paradigm, however, due to our behavioral measure (arrival time at the session) having to be performed by participants prior to us having an opportunity to measure anything else (such as how morally wrong lateness was seen to be). As a result, any extent to which a participant's measured perceived immorality of late arrival might correlate with their own actual arrival time would risk being completely confounded by potential cognitive dissonance effects (Festinger, 1957). In essence, if a participant had just arrived very late to our study and we then asked them how immoral it is to arrive late, cognitive dissonance theory tells us that this participant would be motivated to reduce their state of cognitive dissonance by deciding that it is not so bad after all to be late. Obviously, the opposite would potentially be true for participants who had arrived early. Thus, any observed 'mediation' within such a paradigm would be theoretically muddy at best and completely spurious at worst. As a result, in our second study we developed a slightly less direct way to demonstrate that the differential effects of retributive and compensatory framings of financial deterrents might be driven by their relative abilities to construe the targeted behavior in moral terms.

Study 2

In this study, participants read a scenario about another student research participant, Robin, who had turned up late to a study for which he had been told late attendance would result in a similar fine to those threatened to our real participants in Study 1, with this fine again being framed in either a retributive or compensatory way. We subsequently measured the extent to which participants who read this scenario perceived the target individual's lateness to constitute a moral transgression. We hypothesized that the target's lateness would be seen as less of a moral transgression when performed in response to a fine with a compensatory frame relative to when the fine was retributively framed.

Method

Participants and design. Participants were 90 undergraduate students at the University of Exeter who were randomly allocated to one of three conditions: a retributive fine, a compensatory fine or a no fine control. Of these 90 participants, half (45) were female. The mean age of

[2] It should be noted, however, that (as would be predicted on the basis of our pilot data reported in the method) participants were actually slightly more likely to arrive after 9 am when the no fine condition contained the retributive wording (46%) than when it contained the compensatory wording (35%) and exact mean arrival time was also slightly later in the retributively-worded, no fine condition (0.67 min before 9 am) relative to when the compensatory wording was used (1.36 min before 9 am).

[3] One extreme outlier (>3 standard deviations earlier than the mean) was removed prior to analysis.

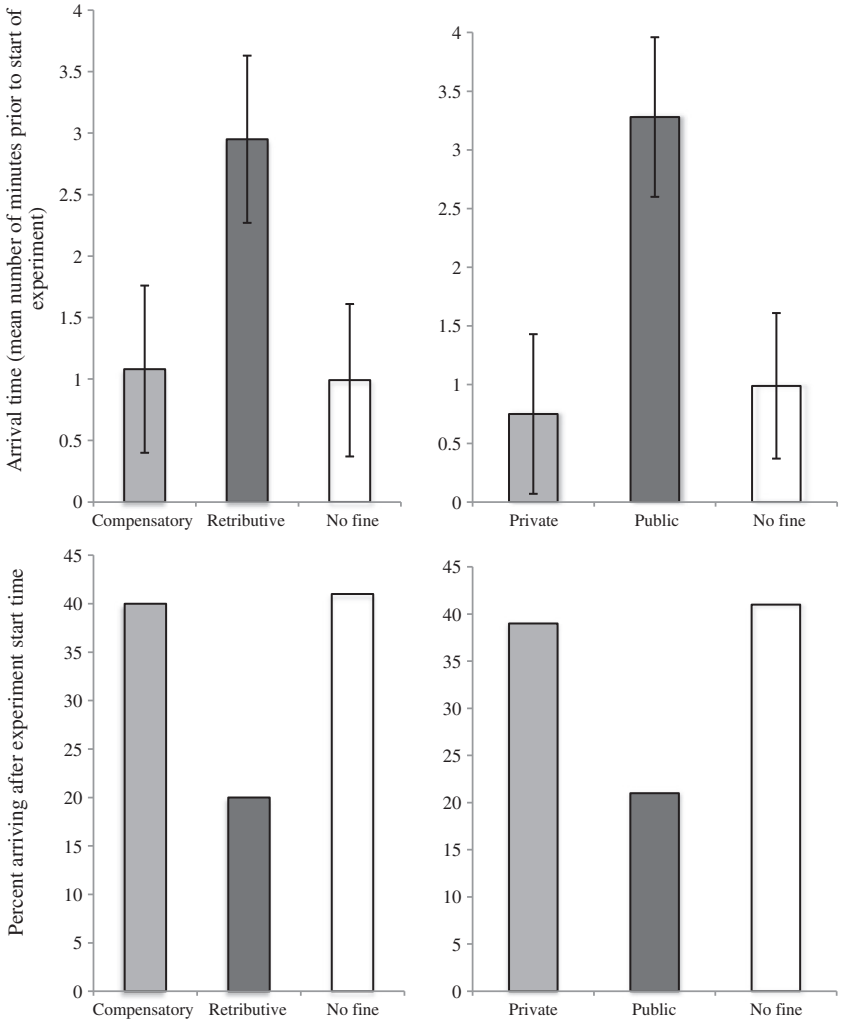

Fig. 1. The effect of the fine frame (compensatory vs. retributive) and the setting of the fine (private vs. public) on both mean arrival time and the percentage of participants who arrived late, relative to the no fine control (error bars represent 1 SE above/below mean).

participants was 20.67 years old ($SD = 2.62$) and 75% identified their ethnicity as 'White British'.

Materials and procedure. Participants were approached on campus by a research assistant who asked if they would be willing to complete a very short survey study examining 'how people perceived the conduct of others'. Those who agreed to participate were then asked to read a written scenario about another undergraduate student (Robin) from the same university. It was explained that Robin had signed up to participate in an experiment in the psychology department that would involve him and a group of other students arriving at the lab at the same time to play an economic decision making task.

It was then explained that, upon signing up for the study, Robin had been sent an email by the researcher running the study (Jason Bell) providing more details regarding Robin's participation. Below this explanatory text was inserted a screen shot of an email from Jason Bell to Robin, which appeared (visually) just as it would in a standard Outlook email platform. Participants in the retributive condition were presented with exactly the same email that was received by participants in the retributive condition of our field experiment (Study 1) and those in the compensatory condition viewed the same email as that received by those in the compensatory condition of the field experiment. For those in control condition, half received the email from the no fine control in the field experiment that used the retributive wording but with no mention of a fine and half received the equivalent no fine control email from the field experiment that used the compensatory wording but with no mention of a fine. These were combined into a singular no fine control condition (as was the case in the field experiment). Underneath the screen shot of the email it was explained (in text) that, two days after receiving the email in question, Robin turned up late for the group experiment.

Having read this scenario, participants were then asked to answer a series of questions about 'their perception of Robin's conduct'. This involved a 5-item scale ($\alpha = .78$), which we used to measure the extent to which they perceived Robin's lateness to represent a moral transgression (e.g., "It was morally irresponsible of Robin to arrive late"; "Robin's lateness seemed very socially irresponsible to me"; "I wouldn't judge Robin for being late" [reversed]). Participants indicated their level of agreement with each statement on a 7-point scale from 1 (strongly disagree) to 7 (strongly agree).

In addition, we also presented participants with 3 items ($\alpha = .81$) measuring the extent to which they thought that late arrival to the

Table 1
Percentage of participants arriving late as a function of fine frame and context of administration.

	Retributive frame	Compensatory frame
Public administration	8.7%	33.3%
Private administration	30.4%	47.8%

Table 2
Mean arrival time in number of minutes prior to the requested 9 am start, as a function of fine frame and context of administration (SDs in parentheses).

	Retributive frame	Compensatory frame
Public administration	4.52 (3.24)	2.04 (3.74)
Private administration	1.38 (4.60)	0.11 (4.83)

experiment in question would have been common (i.e. normative) among all the students who signed up (e.g. "I think that most other students probably also showed up late for Jason's experimental session"). This measure was included to ascertain whether the effect of fine frame in our field experiment might, alternatively, have been attributable to participants having had a perception that late arrival would be more normative when the fine was framed in a compensatory (verses retributive) way, rather than the more specific mechanism of moral construal of the target behavior. Upon completion of the questionnaire participants were fully debriefed as to the aims of the study and were given a small confectionary item to thank them for their time.

Results

We conducted two one-way ANOVAs with fine frame as the independent variable in both cases and perceived moral transgression and perceived norm of lateness as the dependent variables in respective cases. In both ANOVAs we controlled for the effects of age, gender and ethnicity (White British vs. other) by including them as covariates in the analyses.

Perceptions of moral transgression. We observed a significant main effect of fine frame on participants' perception of Robin having performed a moral transgression, $F(2,83) = 5.67$, $p = .005$, $\eta^2 = .12$, which is depicted in Fig. 2. Participants were actually most likely to perceive Robin's lateness as a moral transgression when no fine was attached to late coming ($M = 4.64$, $SD = .89$), a point to which we will return in our discussion. Although perceptions of moral transgression in the retributive condition were slightly lower ($M = 4.28$, $SD = 1.13$) than in the no fine control, pairwise comparisons revealed this difference to be non-significant ($p = .20$). In line with our hypotheses, however, perceptions of moral transgression in the compensatory condition ($M = 3.69$, $SD = 1.28$) were, significantly lower than both the no fine control ($p = .001$), and the retributive condition ($p = .04$).

Perceived norms of lateness. In general, participants indicated that they would not expect lateness to the experiment in question to be particularly normative, with overall mean scores being 2.77 ($SD = 1.24$) on the 7-point scale. These perceptions were almost completely unaffected by the fine frame, with virtually no effect at all of fine frame being observed on perceived norms of lateness, $F(2,83) = .02$, $p = .97$, $\eta^2 = .001$.

Discussion

The findings of this scenario study support our theoretical claim that retributively-framed financial deterrents encouraged cooperative behavior more effectively in Study 1 because they frame defection behavior as more of a moral transgression. In line with our theoretical predictions, participants in this study were less likely to perceive the target individual's late arrival to the hypothetical experiment as a moral transgression when a fine was framed in a compensatory way, than when that same fine was framed retributively, or when no fine was present. Conversely, perceptions of moral transgression in the face of a retributively-worded fine did not differ significantly from the no-fine control. Furthermore, these effects of fine frame did not extend to more general perceptions of how likely people in general would be to cooperate in the face of the fine. Rather, the compensatory frame seemed to more specifically undermine the extent to which defection was seen as a moral transgression.

General discussion

The question of when and why the introduction of a financial deterrent might lead to either positive or negative effects on the targeted behavior has been a topic of theoretical debate within both social psychology and behavioral economics. Our field experiment (Study 1) provides the first direct empirical demonstration that materially-identical deterrents can have markedly different effects on real, observed, behavior as a function of whether the deterrent is framed in terms of it compensating for the offenders' wrong-doing or retributively punishing their violation of social or moral standards. Our findings show that participants who were presented with a late fine framed in retributive terms were twice as likely to arrive on time, and arrived significantly earlier than those who were not threatened with any form of fine. However, when exactly the same £2 fine was presented to participants in a way that suggested its payment might serve to compensate for the wrong-doing, this fine led to virtually no impact on participants' behavior whatsoever. In fact, levels of punctuality in response to this fine were indistinguishable from the no fine control. In our second study we provided evidence (via a scenario methodology) that this difference in effect of the compensatory and retributively worded fines was indeed potentially attributable to their differential capacity to construe the behavior in question in moral terms. We showed in Study 2 that when participants were presented with a scenario in which a target arrived late in the face of a either a compensatory fine, a retributive fine or no fine at all they were less likely to morally judge this lateness when the fine was framed as compensation (relative to both a retributive fine and no fine).

A material promotion-moral prevention (MPMP) theory of financial deterrents

The one sense in which the results of our scenario study might initially appear to differ slightly from those observed in the field study relates to the positioning of the moral judgment results for the no fine control relative to the two fine frame conditions. To recap, in our field experiment we observed an enhancement of punctuality in the retributive condition relative to the no fine control, rather than an undermining of punctuality (relative to control) in the compensatory condition. In our scenario study, in contrast, the compensatory condition did appear to

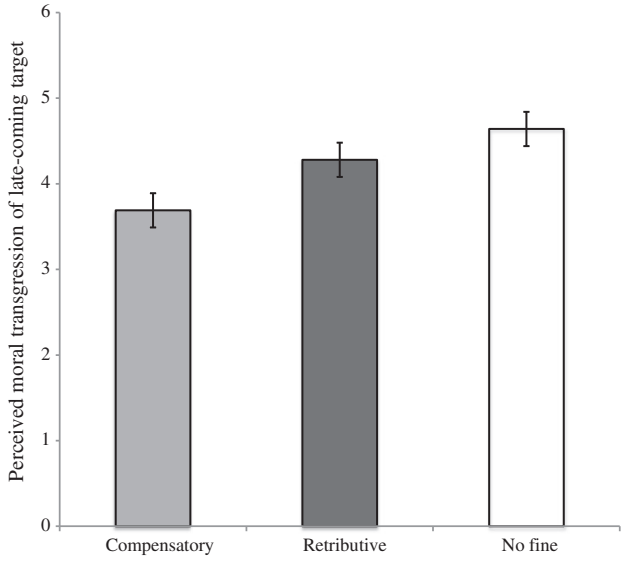

Fig. 2. The effect of the fine frame (compensatory vs. retributive) on participants' perception that the target's lateness represented a moral transgression, relative to the no fine control (error bars represent 1 SE above/below mean).

undermine ascribed morality (relative to control), with the retributive frame being similar to the control in this case. Indeed the scenario condition in which there appeared the most ascription of moral transgression to the target for being late was when lateness came with no potential fine attached to it. Although these observations of retributive frames enhancing co-operation in Study 1 and compensatory frames undermining morality in Study 2 may at first glance seem slightly discordant, upon further theoretical reflection this is perhaps less the case. It actually makes sense that participants might morally judge a target more for being late when this lateness came with no potential punishment attached that might help 'make up for' for transgression. In a sense, Robin was seen as doing something bad and 'getting away with it', hence our participants in the no fine condition subsequently judged him maximally harshly on the moral dimension. What this suggests is that all fines may perhaps be perceived to be at least slightly compensatory in terms of how we subsequently morally judge those who transgress (including ourselves), with judgment being dealt out in particularly sharp measure when one (as the saying goes) 'gets away with murder'. However, in relation to the behavioral decisions of those choosing to cooperate or defect in the face of such fines, there is obviously a counter-veiling, materially driven, effect that motivates people to avoid the material cost of having to pay the fine. In short, fines potentially provide a material incentive that promotes cooperation, but a moral disincentive (or license to defect) that can prevent the fine from increasing cooperation.

When conceptualizing fines in this way, the results of our two studies are actually rendered highly theoretically concordant. Participants in our field study had a material incentive to plan to be punctual (i.e. not risking the loss of £2). When this fine was framed retributively, the counter-veiling moral disincentive (license) that the presence of such a fine presented was drastically reduced because there was little sense in which paying the fine was construed as making up for this lateness. Thus, the retributive condition led to a promotion of punctuality relative to when no fine was used. In the compensatory condition, the same material incentive to be punctual was still present; however the moral licensing of lateness provided by the compensatory fine offset this in a way that prevented an increase in co-operation. Thus, these two counter-veiling forces canceled one another out such that the effect of the compensatory fine was indistinguishable from the no-fine control. In the scenario study, however, no material incentives were present for our research participants in any of our conditions. In effect, that study was only tapping into the morality side of our proposed material promotion-moral prevention (MPMP) model. It therefore makes sense that, in this case, we would simply see an undermining of the level of moral judgment applied to the act of defection (i.e. lateness) in the compensatory condition relative to a no fine control, with this being far less the case when the fine was framed retributively.

Our proposed MPMP model also offers a potential explanation for the discrepancy in direction of effects relative to the control group for our field experiment in comparison to the classic Gneezy and Rustichini (2000) childcare center field study. In that original study, a (potentially compensatory) fine was shown to actively undermine cooperative behavior relative to no fine. A potential explanation posited by our model is that the material incentive for our (largely unwaged) undergraduate student research participants of ensuring they did not lose their £2 show-up fee may simply have been greater than was the 10-shekel disincentive to avoid lateness provided by Gneezy and Rustichini to the (potentially time poor but materially affluent) parents in their field study. Thus, the moral license provided by Gneezy and Rustichini's fine may simply not have been as highly offset by a counter-veiling material incentive as was the case in our study. This would explain the actual reduction of co-operation when the (potentially compensatory) fine was present in their study as compared to the mere failure of our compensatory fine to produce any increase in co-operation.

In addition to demonstrating the importance of how financial deterrents are framed, our findings also empirically demonstrate, for the first time in a field setting, the greater impacts of financial disincentives implemented in a public rather than private context. We show that only the threat of a publicly-administered fine brought about the desired change in behavior of our participants relative to the no fine control condition, further strengthening similar claims recently made on the basis of behavior observed in public goods games conducted in the laboratory (Xiao & Houser, 2011). Thus, it would appear that the threat of a more publicly extracted fine might act as a more powerful incentive for cooperative behavior. Although there exists a range of arguments to be had about whether it is ethically appropriate to incorporate more public sanctions into the judicial system for more serious offenses (Flanders, 2006; Kahan, 1996; Massaro, 1997; Shemtob, 2013; Whitman, 1998), the current findings do at least provide evidence that even making the payment of financial disincentives relating to minor incursions more public can be effective in amplifying behavioral change.

The 48% versus 8% difference in rates of late arrival between the private-compensatory and public-retributive conditions in our field experiment highlights starkly the practical importance for policy makers of considering both a) the extent to which a financial disincentive is likely to be perceived as signaling a moral standard rather than as simply a price that one can pay for the convenience of defection, and b) the extent to which the context of a financial disincentive's delivery is public or private in nature. A real world policy context that may be informed by these findings is the attempt to tackle global climate change by using financial disincentives to discourage people from engaging in activities involving a large carbon footprint. An important question becomes whether the effectiveness of simply placing a 'price' on carbon may be somewhat limited (or even potentially undermined) by the extent to which consumers may interpret such measures in a more compensatory way (i.e., "I don't have to feel bad about my high energy consumption because I've made up for it by paying the tax"). Moreover, one should also consider the extent to which such price-based systems do not make individuals or organizations in any way publicly accountable for their carbon-producing actions.

This study provides an overdue piece of empirical evidence supporting the theoretical suggestion (e.g., Fehr & Falk, 2002; Gneezy & Rustichini, 2000; Mulder, 2009) that behavioral responses to financial disincentives may depend on whether such policies are interpreted as signaling moral standards rather than the opportunity to 'pay for' negative communal effects of one's actions. These findings, we argue, support our proposed material promotion-moral prevention (MPMP) theory of the effect of financial disincentives on cooperation. Moreover, our findings highlight the benefits of financial disincentives administered in a more public fashion. Both sets of findings present important practical considerations for any policy maker seeking to implement a system of financial disincentives to encourage more communally beneficial behavior among members of a collective.

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Assessing the Control-Theory

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Assessing the Control-Theory

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Abstract
As the first cases before the ICC proceed to the Appeals Chamber, the judges ought to critically evaluate the merits and demerits of the control-theory of perpetratorship and its related doctrines. The request for a possible recharacterization of the form of responsibility in the case of *Katanga* and the recent acquittal of Ngudjolo can be taken as indications that the control-theory is problematic as a theory of liability. The authors, in a spirit of constructive criticism, invite the ICC Appeals Chamber to take this unique opportunity to reconsider or improve the control-theory as developed by the Pre-Trial Chambers in the *Lubanga* and *Katanga* cases.

Key words
ICC; *Lubanga* case; *Katanga* case; control-theory; joint perpetration; indirect co-perpetration; hierarchy of blameworthiness

1. Introduction

The conviction of Thomas Lubanga Dyilo of 14 March 2012 marked an important moment in the ICC's history.[1] It was the first judgment by an ICC Trial Chamber. Lubanga was found guilty of having committed the war crime of enlisting and conscripting child soldiers and sentenced to 14 years' imprisonment.[2]

On 18 December 2012, the ICC issued its second judgment, this time an acquittal. Mathieu Ngudjolo Chui was acquitted of charges for crimes against humanity and war crimes committed during an attack on Bogoro village in the DRC.[3] Both the *Lubanga* conviction and the *Ngudjolo* acquittal came with vigorous dissents with regard to the 'control theory' of liability for perpetration.[4] This theory, developed by the Pre-Trial Chambers in *Lubanga* and *Katanga and Ngudjolo* centres upon the concept of 'control' as marking a distinction between principal liability and accessorial liability and is based on the assertion that Article 25(3) of the ICC Statute provides

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1 *Prosecutor v. Thomas Lubanga Dyilo*, Judgment, Trial Chamber I, ICC-01/04–01/06, 14 March 2012 (hereinafter *Lubanga* judgment).

2 *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence pursuant to Article 76 of the Statute, Trial Chamber I, ICC-01/04-01/06, 10 July 2012.

3 *Prosecutor v. Mathieu Ngudjolo Chui*, Jugement rendu en application de l'article 74 du Statut, Trial Chamber II, ICC-01/04-02/12, 18 December 2012 (hereinafter *Ngudjolo* judgment/acquittal).

4 Separate Opinion of Judge Adrian Fulford to *Prosecutor v. Thomas Lubanga Dyilo*, Judgment, Trial Chamber I, ICC-01/04-01/06, 14 March 2012 (hereinafter Separate and Dissenting Opinion Judge Fulford); Concurring Opinion of Judge Christine van den Wyngaert to *Prosecutor v. Mathieu Ngudjolo Chui*, Jugement rendu en application de l'article 74 du Statut, Trial Chamber II, ICC-01/04-02/12, 18 December 2012 (hereinafter Concurring Opinion Judge Van den Wyngaert).

for a hierarchical structure of the modes of participation. According to the Pre-Trial Chamber in *Lubanga*, this hierarchical structure implies that co-perpetration, as principal liability, requires proof of an *essential* contribution to the common plan that resulted in the commission of the crime.[5]

The control-theory has its source in the writings of criminal-law scholar Claus Roxin, who attempted to devise a theory for holding Nazi leaders such as *Adolf Eichmann* responsible as perpetrators of the atrocities committed under their regime.[6] At the ICC and beyond, the control-theory has remained controversial. The control-theory can, however, be credited for promoting fair labelling.[7] But Judge Fulford, in his separate opinion in *Lubanga*, opines that the control-theory (i) is unsupported by the text of the Statute, (ii) does not create a hierarchy of liability, and (iii) that joint perpetration does not require an essential contribution of each co-perpetrator. The latter requirement, in his view, would set too high a threshold for liability. He argues in favour of a plain-text reading of Article 25(3)(a) of the ICC Statute and, with regard to joint perpetration, proposes that a contribution to the crime is '[d]irect or indirect, provided either way there is a causal link between the individual's contribution and the crime'.[8]

Judge Van den Wyngaert, in her opinion in the *Ngudjolo* decision of acquittal, agrees with Fulford that the control-theory is not consistent with the ordinary meaning of Article 25(3)(a) of the ICC Statute and that Article 25(3) does not create a hierarchy of blameworthiness. With regard to the requirement of an essential contribution, she is of the view that:

> [f]or joint perpetration, there must, in my view, be a direct contribution to the realisation of the material elements of the crime. This follows from the very concept of joint perpetration. Under Article 25(3)(a), only persons who have committed a crime together can be held responsible. The essence of committing a crime is bringing about its material elements.[9]

Van den Wyngaert is further critical of the combination of joint perpetration and indirect perpetration into 'indirect co-perpetration'. This combined form of liability has been developed by the Pre-Trial Chamber in *Katanga and Ngudjolo* with the purpose of capturing complex forms of collective violence. To Van den Wyngaert's mind, this theory, which presupposes an organized structure of power that uses ('controls') individuals as tools to commit crimes, conflicts with the text of Article 25(3) of the ICC Statute and Article 22 of the ICC Statute.

Contrary to the approach favoured by Judges Fulford and Van den Wyngaert, judicial practice at the ICC, at least so far, has demonstrated a penchant for judicial

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5 *Lubanga* judgment, para. 999.

6 C. Roxin, 'Straftaten im Rahmen organisatorischer Machtsapparate', *Goltdammer's Archiv für Strafrech*t (GA) (1963), translated to English: C. Roxin, 'Crimes as Part of Organized Power Structures', (2011) 9 JICJ, 193–205. See also C. Roxin, *Täterschaft und Tatherrschaft* (2006), at 242–52, 704–17; C. Roxin, *Strafrecht Allgemeiner Teil*, Vol. 2 (2003), 46 et seq.

7 See D. Guilfoyle, 'Responsibility for Collective Atrocities: Fair Labelling and Approaches to Commission in International Criminal Law, (2011) 64 *Current Legal Problems* 1, at 6. See E. van Sliedregt, 'The Curious Case of International Criminal Liability', (2012) 10 JICJ 1171,at 1182–85.

8 Separate and Dissenting Opinion Judge Fulford, para. 16.

9 Concurring Opinion Judge Van den Wyngaert, para. 44.

activism and creativity. This stands in contrast to the textual approach one would expect, given the fact the ICC Statute contains elaborate statutory definitions, a general part, and extensive Elements of Crimes. Article 21 of the Statute primarily refers the judges to these sources rather than to general rules that may be found in domestic laws.

In this paper, we will not discuss the question whether there exists a sufficient legal basis for the control-theory; this has been done elsewhere.[10] We instead wish to appraise the substance of control-theory. We will focus primarily on two of its manifestations: joint perpetration and indirect co-perpetration. Third, we discuss the alleged hierarchy in Article 25(3) of the ICC Statute, on which some aspects of control-theory have been based.

2. Joint perpetration and the 'essential contribution'

2.1. Control-theory and joint perpetration

With respect to joint perpetration, the Pre-Trial Chamber in *Lubanga* defined 'control' as 'joint control over the crime by reason of the *essential* nature of the various contributions to the commission of the crime'.[11] The Chamber recognized that in cases of joint perpetration none of the perpetrators normally 'controls' the commission of the offence by himself, because the defining feature of co-perpetration is a division of labour.[12] But

> when the objective elements of an offence are carried out by a plurality of persons acting within the framework of a common plan, only those to whom essential tasks have been assigned – and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks – can be said to have joint control over the crime.[13]

The defining feature of joint perpetration, according to the Chamber's definition, is a hypothetical power, namely 'the power to frustrate the commission of the crime by not performing their tasks'.[14] Because this decisive criterion is framed in negative terms ('frustrating' by 'not performing'), there exists no particular affirmative act that a person must perform in order to become a joint perpetrator. The *Lubanga* Trial Chamber indeed emphasized that a person can be a co-perpetrator even where he does not physically perpetrate any of the elements of the crime in question and

10 S. Manacorda and C. Meloni, 'Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?', (2011) 9 JICJ 159. See also T. Weigend, 'Perpetration through an Organization: The Unexpected Career of a German Legal Concept', (2011) 9 JICJ 91. E. van Sliedregt, *Individual Criminal Responsibility in International Law* (2012), 83–8.

11 *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, Pre-Trial Chamber, ICC-01/04-01/06, 29 January 2007, para. 341 (emphasis added) (hereinafter *Lubanga* Conformation Decision). See Lubanga Judgment, para. 1000.

12 *Lubanga* Confirmation Decision, para. 342. The Chamber concluded: 'Hence, although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task.'

13 Ibid., para. 347.

14 *Katanga and Ngudjolo Chui*, Decision on the Confirmation of Charges, Pre-Trial Chamber, ICC-01/04-01/07, 30 September 2008, para. 525 (hereinafter *Katanga and Ngudjolo* Confirmation Decision).

where he is not even present at the scene of the crime.[15] It can be sufficient, for example, for the actor to be a 'mastermind' who decides 'whether and how the offence will be committed'.[16]

The effect of the control-theory, as devised by the *Lubanga* Pre-Trial and Trial Chambers, is ambivalent. The theory *limits* the concept of (joint) perpetration to those participants in a criminal enterprise whose contribution is a condition without which the criminal plan could not have come to fruition. But on the other hand, the theory *expands* the scope of perpetratorship to persons who are far removed from the scene of the crime and do not personally perform any of the acts required by the offence definition.

2.2. Criticism of Judge Fulford

Judge Fulford, in his separate opinion in *Lubanga*, agrees with the expansive element of the definition given by the majority of the Trial Chamber. But he regards that definition as too narrow where it demands an 'essential', indispensable contribution. Judge Fulford proposes instead a very simple test for joint perpetration, namely whether there exists 'an operative link between the individual's contribution and the commission of the crime'.[17] By applying this test, a court would be able to avoid 'a hypothetical investigation as to how events might have unfolded without the accused's involvement'.[18] Yet, Judge Fulford seems to equate the required 'operative link' with causation, because in the following paragraph of his opinion he demands for co-perpetration that there exist 'a causal link between the individual's contribution and the crime'.[19] That phrase raises the question what exactly Judge Fulford understands by a 'causal link'. If an act (say, the furnishing of a weapon to a murderer) is 'operative' in the commission of the offence (because the murderer uses that weapon), does that create a causal link between the furnishing of the weapon and the killing? If so, how would Judge Fulford distinguish between a (joint) perpetrator and a mere aider and abettor? Can there be different (stronger or weaker) types of 'causal link'? Can there be a 'causal link' that is not essential? Does causation not necessarily imply that without the existence of the factor in question the consequence would not have occurred? And if not, why would a marginal, easily replaceable contribution be sufficient to turn a mere helper into a co-perpetrator? How about a man who provides not the weapon used in the offence but a bicycle which the killer rides to the site of the crime? Would furnishing the bicycle also have an 'operative' or 'causal' link to the killing? Would the answer to that question depend on whether the bicycle was, under the circumstances, the only means by which the killer could arrive at the relevant site in time to kill the victim? If so, does Judge Fulford's analysis not also have to take into account whether the means provided was 'essential'?[20]

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15 *Lubanga* Judgment, para. 1004.
16 *Lubanga* Confirmation Decision, para. 330; *Lubanga* Judgment, para. 1003.
17 Separate and Dissenting Opinion Judge Fulford, para. 15.
18 Ibid., para. 17.
19 Ibid., para. 16.
20 Probably Judge Fulford's 'operative link' would, upon closer inspection, end up looking very much like the *Lubanga* majority's 'essential contribution'.

There may well be convincing answers to all these questions, but Judge Fulford unfortunately does not provide them. The test of perpetratorship which he suggests therefore remains vague and leaves the judges very much to their intuition rather than providing them with standards by which to make the difficult distinction between perpetration and mere accessorial liability. Judge Fulford is correct, of course, in pointing out that many legal systems, including the Statute of the ICC, do not provide for different sentencing levels for perpetrators and accessories. Yet, as long as the law distinguishes between several forms of involvement in a criminal offence – and the ICC Statute in Article 25 (3) clearly makes such a distinction[21] – those who apply the law may not use the various labels arbitrarily. A judge cannot on Monday convict a defendant of aiding and abetting, and on Tuesday convict another defendant of joint perpetration on the same or very similar facts, telling the Tuesday defendant that it makes no difference, in the result, whether he is convicted of perpetration or of aiding and abetting.[22]

2.3. Criticism of Judge Van den Wyngaert

Judge Van den Wyngaert, in her concurring opinion in *Ngudjolo*, takes issue with both effects of the control-theory; in her opinion, that theory is at the same time too broad and too narrow. She suggests that joint perpetration does not require an 'essential' causal contribution[23] but 'a *direct* contribution to the realisation of the material elements of the crime'.[24] Like Judge Fulford, Judge Van den Wyngaert rejects the 'essentiality' requirement because it compels judges 'to engage in artificial, speculative exercises about whether a crime would still have been committed if one of the accused had not made exactly the same contribution'.[25] But she also finds insufficient Judge Fulford's broad-stroke approach under which anyone who provides some 'causal' element can be treated as a perpetrator. Instead, Judge Van den Wyngaert would limit perpetratorship to those who *directly* bring about the material elements of an offence.[26] She concedes that the notion of 'direct' perpetration is not easy to apply to some of the more complex offences typical of international law, such as displacing a civilian population in violation of Article 8(2)(e)(viii) of the ICC

21 Judge Fulford claims that the concepts which appear in the four subsections of Art. 5(3) of the ICC Statute 'will often be indistinguishable in their application vis-à-vis a particular situation, and by creating a clear degree of crossover between the various modes of liability, Article 25(3) covers all eventualities'. Therefore, he thinks, 'the possible modes of commission under Article 25(3)(a)–(d) of the Statute were not intended to be mutually exclusive.' (Separate and Dissenting Opinion Judge Fulford, para. 7). It is not quite clear on what evidence Judge Fulford makes this claim. But even if the authors of the ICC Statute had foreseen that, in a given situation, more than one mode of liability under Section 25(3) might be applicable, that would not justify leaving these various modes undefined and adjudicating cases using a vague 'crossover' form of criminal liability.

22 The dispute over whether Art. 25(3) (a)–(d) of the ICC Statute contains a hierarchical ranking of various forms of liability (*Lubanga* Judgment, paras. 994–999, See also G. Werle, 'Individual criminal responsibility in Article 25 ICC Statute', (2007) 5 JICJ 953, 957, or a mere listing (Separate and Dissenting Opinion Judge Fulford, para. 9; Concurring Opinion Judge Van den Wyngaert, paras. 22–30) is not of much relevance to the question whether it is necessary to properly define these forms of liability.

23 Concurring Opinion Judge Van den Wyngaert, paras. 41–42.

24 Ibid., para. 44 (emphasis in the original).

25 Ibid., para. 42.

26 Ibid., para. 44.

Statute. In these cases – which may well be the majority of cases coming before the ICC – she would regard as 'direct' perpetrators even those who plan or organize the acts in question, because planning is 'an intrinsic part of the actual execution of the crime'.[27]

One may regard this 'softening' of Judge Van den Wyngaert's approach as a sign of welcome flexibility. But the adaptations proposed by Judge Van den Wyngaert also indicate that the criterion of 'directness' has only a modest measure of distinctive substance. If 'direct' causation can also mean participation in the planning stage long before the actual displacement of civilians takes place (to use Judge Van den Wyngaert's example), what then is the difference between 'direct' and 'indirect' or 'remote' causation? Judge Van den Wyngaert claims that what is 'direct' will have to be determined by the facts of each case.[28] But if it is the judges who in each individual case need to determine what is 'direct' and what is not, why not simply leave the question who is a perpetrator to the appreciation of the court, as Judge Fulford suggests?

The 'directness' criterion also lacks a convincing normative basis. Judge Van den Wyngaert's main argument in favour of this criterion is that it treats individual and joint perpetrators equally: since a person acting alone can be convicted only if he 'brings about' the material elements of the offence (e.g., by shooting the victim), she claims, the same should apply if two or more persons act jointly.[29] But joint perpetration differs in one critical aspect from perpetration by an individual offender: the job of committing the offence is divided up among the co-actors; they join forces for the very purpose of relieving each participant of the necessity to 'bring about' by himself the result of the criminal plan. If it were a necessary requirement for every joint perpetrator to individually fulfil each element of the offence definition, the concept of joint perpetration would be superfluous – every participant could be convicted as an individual perpetrator. Judge Van den Wyngaert's equation of individual and joint perpetration thus misses the very point of joint perpetration: the division of labour among the co-perpetrators.

2.4. What makes joint perpetration?

What, then, is the distinctive feature of joint perpetration? Before we proceed to suggest an answer to this question let us consider why it is necessary to do so. As we said above, whenever the law differentiates between perpetrators and accessories there have to be criteria for drawing the line between these categories, lest the courts apply them on a mere hunch or on arbitrary grounds. A need to define joint perpetration and to keep it apart from other types of criminal liability therefore exists in all legal systems that, like the ICC Statute, distinguish between perpetrators and accessories.

As we have seen, single-word 'theories' (relying on expressions like 'direct' or 'operative link' to solve the problem) hardly satisfy the need to inform and shape the

27 Ibid., para. 47.
28 Ibid., para. 46.
29 Ibid., para. 45.

application of the law in this area, because they do not offer more than a very general idea about what may be the gist of joint perpetration. The control theory as devised by the *Lubanga* Pre-Trial Chamber has the great advantage of offering a binary criterion: either one's contribution to the completion of the crime is essential, i.e., a *conditio sine qua non* – or it is not. And the 'essentiality' criterion is also *prima vista* plausible: it reflects the value judgement that those who provide central contributions are, in general, more blameworthy than those who remain at the margins of the criminal enterprise and provide only support that the main actors could have done without.

Yet, even the control-theory may lack sufficient sophistication. One of its problems is the question from what perspective the 'essential' character of a given act is to be determined. This can be done from an *ex ante* and an *ex post* perspective; that is, looking forward from the stage of planning the crime,[30] or looking backward after its completion (or frustration). The analysis of the 'essentiality' of any participant's contribution is easier and more reliable if one gauges it *ex ante*, for example at the planning stage of the crime. Looking at the plans of the persons involved, it is not difficult to determine whose contribution they deem indispensable and which contributions they regard as 'accessorial'; that is, useful but not crucial to the success of the plan. Taking an *ex ante* view has the disadvantage, however, that the judge must accept as binding any miscalculation on the part of the conspirators: if A and B think that a robbery can succeed only if B provides a gun, that expectation would, under an *ex ante* 'essentiality' test, turn B into a joint perpetrator if he actually furnishes the gun; and that would hold true even if A does not use the gun in the robbery but obtains the money by mere verbal threats. Using an *ex post* perspective ('Was B's contribution "essential" to the robbery as it was actually carried out?') avoids this difficulty but leads to the problem of hypothetical guessing, which Judges Fulford and Van den Wyngaert raised in their opinions. If A, in the robbery hypothetical, actually uses B's gun in order to threaten the victim, we cannot say with any degree of certainty what the outcome would have been if B had not provided the gun. Perhaps A would have desisted from the robbery altogether, or perhaps he might have hidden a banana or some other object in his pocket and pretended that it was a gun, thus threatening the victim sufficiently to make him hand over the money. In conclusion, then, while both perspectives may lead to different results in any given case, neither is without flaws.

But that is not even the main problem with the 'essentiality' test. Contrary to what Judge Fulford has written,[31] the *Lubanga* court's control-theory may not define perpetratorship too narrowly but too broadly. The way the Trial Chamber applies

30 The Trial Chamber in *Lubanga* seems to take an *ex ante* perspective where it refers to the *assignment* of roles as the test for what is 'essential' (*Lubanga* Judgment, para. 1000); but it is not entirely clear whether the Chamber would rule out a reassessment of the distribution of roles after the fact. The prosecution in *Lubanga* proposed to distinguish between an assessment *ex ante* (where the co-perpetrator must have been assigned a contribution that was 'central to the implementation' of the common plan) and a retrospective assessment of the plan as it was carried out (where it should be sufficient that the co-perpetrator's contribution can be deemed 'substantial'); cf. *Lubanga* Judgment, paras. 990–991. The Trial Chamber did not adopt or even discuss that distinction, thus leaving unresolved the question whether the requirements of joint perpetration should be assessed from the participants' perspective *ex ante* or from an objective perspective *ex post*.

31 Separate and Dissenting Opinion Judge Fulford, para 16.

the test to the facts of *Lubanga* gives an indication of how far the net of perpetration is cast under the seemingly narrow 'essentiality' test. A joint perpetrator, the *Lubanga* majority holds, does not have to be present at the scene of the crime, and there need not even exist a direct or physical link between his contribution and the commission of the crime; it is sufficient for a perpetrator to assist in formulating the relevant strategy or plan, to become involved in directing or controlling other participants' or to determine the roles of those involved in the offence.[32] If all these contributions, which can be quite remote in time and place from the commission of the offence, are deemed 'essential' and thus sufficient to establish perpetratorship, then one must ask what remains for mere accessorial liability as an instigator or an aider and abettor. If, for example, a scientist in 2012 provides critical information which enables the leadership of a state to produce chemical weapons prohibited under Article 8(2)(b)(xviii) ICC Statute, is he then – assuming he has foreseen the use of the weapons – a joint perpetrator of an attack carried out with these weapons in 2014?

If we wish to distinguish between those who are at the centre of the criminal offence and therefore deserve to be labelled as perpetrators, and those who remain at the margins in a supporting role and should therefore be punished as accessories, then the one-dimensional criterion of the indispensability of the contribution may be insufficient because it captures only one aspect that may be relevant. We might indeed have to give up the (attractive) idea of basing the distinction on a single factor and look instead for a cluster of factors that will have to be taken into consideration. In doing so, we should be aware that the line between (joint) perpetrators and accessories cannot be drawn on empirical grounds but requires a normative (value) judgement – a judgement that in the last resort is based on a notion of fair attribution and is therefore soft at the edges. The factors relevant for this value judgment cannot simply be deduced from the facts of each individual case, because facts by themselves give us no clue as to their normative valuation. What we can do, however, is try to identify factors which indicate a 'central' role in a criminal enterprise, and thus perpetratorship. Even when we have agreed on such factors, there is still plenty of room for judicial weighing and balancing in each case, because these factors may, on a given set of facts, pull in opposite directions. But at least we would have criteria by which to rationally evaluate any borderline case.

One approach in defining such criteria centres on *mens rea*. It has often been emphasized that participation in or at least adherence to a common plan is one factor that must exist in any case of joint perpetration. A person who does not co-operate with others on the basis of some – albeit silent – agreement may be liable as an individual perpetrator but cannot be a 'joint' perpetrator. What other *mens rea* requirements may be necessary for perpetratorship depends on each offence definition.[33] One should note, however, that a common plan, as that term is traditionally understood by international courts, often exists also between perpetrators and accessories: an instigator consciously works together with the perpetrator in

32 *Lubanga* Judgment, paras. 1003–1004.

33 It is not logically impossible for several persons to co-perpetrate a crime of recklessness or *dolus eventualis*; but inadvertent negligence and joint perpetration in a technical sense seem to be mutually exclusive.

the initial stage, and aiders and abettors also often support the commission of the offence based on an agreement with the main perpetrators. The existence of such a minimal agreement therefore is a necessary but not a sufficient condition of joint perpetration. One of the authors of this article has recently developed the idea that a joint intention that the group commit a collective crime is the defining element of co-perpetration; what is required, under this approach, is joint deliberation and the meshing of sub-plans among co-perpetrators.[34] Another subjective factor of possible relevance is a strong personal interest in the success of the criminal enterprise, going beyond the minimal requirement of *mens rea*. Such a personal interest may be regarded as a (weak) indicator of joint perpetration, because a person interested in the outcome will, *ceteris paribus*, contribute more eagerly and persistently than a person who acts out of altruism or for a set fee.[35]

An alternative approach places greater emphasis on *objective* factors. If one follows that approach, the indispensable nature of a person's contribution weighs heavily as an indicator of perpetratorship, and might even be regarded as a necessary requirement for a finding of perpetratorship. A person whose contribution has no critical bearing on the implementation of the criminal plan hardly qualifies as a 'central' or 'essential' participant. But as we have tried to show above, the indispensability of a contribution is not under all circumstances a sufficient condition for attributing perpetratorship. One option is to add an element of immediacy, of carrying out a task temporally close to the commission of the material elements of the offence. Roxin, whose writings have to some extent influenced the international debate on this subject,[36] has suggested that only those who participate in the crime after the stage of attempt has been reached should be considered co-perpetrators.[37] This limitation goes in the right direction but may be a bit too 'technical' since it would make joint perpetration depend on the vagaries of the definition of attempt. But under an objective approach, an element of 'control' over the actual commission of the offence is an important indicator of joint perpetration. Typically, a joint perpetrator (co-)decides whether and how the offence is actually perpetrated, either by directly

34 See J. D. Ohlin, 'Joint Intentions to Commit International Crimes', (2011) 11 Chicago JIL 693, at 721.

35 German courts have traditionally relied heavily on subjective factors for distinguishing between perpetrators and accessories, treating as mere accessories those who participated in the crime with an *animus socii* (mind of an associate); see Bundesgerichtshof (Federal Court of Justice), Judgment of 23 January 1958, 11 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 268, at 271–2; Bundesgerichtshof, Judgment of 10 March 1961, 16 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 12, at 14; for a summary of the present position of the Federal Court of Justice see Bundesgerichtshof, Judgment of 24 October 2002, 48 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 52, at 56. Of course, in most cases it is the judges who determine, in hindsight and on considerations of equity, what may have been the 'mind' of a participant at the time of the crime. The emphasis on subjective elements thus leaves the distinction between perpetrators and accessories to the practically unreviewable discretion of the trial court.

36 It is not necessary here to discuss at length Professor Roxin's many contributions to the German debate on perpetratorship. But it should be noted that Roxin has expressly rejected the 'essentiality' theory as defined by the *Lubanga* majority: Roxin – followed by the great majority of German writers – requires for co-perpetratorship a 'substantial' contribution to the common plan as regarded *ex ante*, but writes that the contribution of a co-perpetrator need not be 'causal' for the offence as a whole (See Roxin, Strafrecht Allgemeiner Teil *supra* note 6, at Section 25, marginal note 213). For an overview of the current German debate on the subject, see B. Weißer, *Täterschaft in Europa* (2011), 333–7.

37 See Roxin, Strafrecht Allgemeiner Teil *supra* note 6, at Section 25, marginal note 199.

taking part in the *actus reus* or at least by overseeing – by telephone, for example – the commission of the crime by the immediate actors.[38]

In sum, the concept of 'control' in the control-theory as propounded by the *Lubanga* majority may be too one-dimensional. What we should be looking for is a more comprehensive model of joint perpetratorship which contains both subjective and objective elements. Typical factors are a person's involvement in the planning of a joint enterprise, his *mens rea*, and possibly his personal interest in the success of the enterprise; furthermore, the importance of his contribution to the success of the criminal plan and the proximity of his contribution to the actual commission of the offence. It is a matter of debate whether greater emphasis should be placed on subjective or on objective factors. But only if we recognize that there is a cluster of different considerations that may be relevant can we rationally lead that debate.

3. Indirect co-perpetration

Judge Van den Wyngaert, in her concurring opinion in the *Ngudjolo* acquittal, analyses the mode of liability known as indirect co-perpetration and concludes that the theory is not included in Article 25(a) of the ICC Statute.[39]

The issue is of the highest importance, since many of the recent indictments at the ICC, including *al-Bashir* and the Kenya cases, have accused the defendants of perpetrating their crimes as indirect co-perpetrators.[40] Indeed, one can easily understand why the doctrine is so powerful. Since the ICC concentrates on the highest-level perpetrators far removed from the scene of the crime (and the *actus reus*), the Office of the Prosecutor must assert a linking principle that connects the defendants to the physical commission of the crime by street-level perpetrators.

The building blocks of the doctrine stem from combining other modes of liability already introduced into the ICC jurisprudence through German criminal-law theory. In *Lubanga*, an ICC Pre-Trial Chamber defined co-perpetrators as perpetrators exercising joint control over the crime.[41] In addition, Roxin had developed the notion that a person can be guilty of indirect perpetration where he controls the direct perpetrators – who may themselves be criminally responsible – by means of a hierarchically organized structure. He labelled this as

38 Under that test, a gang leader might be a joint perpetrator of a bank robbery where he is in contact, by mobile phone, with the actors in the bank, and can decide, for example, that the robbery attempt should be abandoned when the perpetrators report unexpected obstacles. If that is not the case, the leader of a criminal group would come under the label of 'ordering, soliciting or inducing' (Art. 25 (3)(b) ICC Statute), or he might be considered a perpetrator 'through another person' if the special requirements of domination of others are fulfilled. For extensive argument on these points, see Roxin, *Strafrecht Allgemeiner Teil supra* note 6, at Section 25, marginal notes 198 et seq.; B. Schünemann, Section 25, marginal notes 180 et seq., in H. W. Laufhütte, R. Rissing-van Saan, and K. Tiedemann (eds.), *Strafgesetzbuch: Leipziger Kommentar*, Vol. 1 (2007).

39 Concurring Opinion Judge Van den Wyngaert, para. 59.

40 See, e.g., *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on Confirmation of Charges, Pre-Trial Chamber II, ICC-01/09-02/11, 23 January 2012 (hereinafter *Muthaura et al.* Confirmation Decision); *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Confirmation of Charges, ICC Appeals Chamber, Case No. ICC-01/09-01/11 (hereinafter *Ruto et al.* Confirmation Decision); *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ICC-02/05-01/09, 4 March 2009.

41 *Lubanga* Confirmation Decision, para. 340.

Organisationsherrschaft, or perpetration through an organized apparatus of power.[42] By combining these two modes of liability, the Office of the Prosecutor and the ICC developed the doctrine of indirect co-perpetration – what can only be described as a truly potent prosecutorial tool; it allows the conviction of defendants who are substantially removed from the physical perpetrator of the crime along two axes.[43]

One can imagine the wide applicability of this theory; it is certainly not limited to the *Katanga and Ngudjolo* case. Indeed, it may very well represent the future of international criminal prosecutions before the ICC, just as joint criminal enterprise (JCE) came to define the prosecutorial strategy regarding perpetration at the ICTY. In most cases involving governmental or similarly organized atrocities, multiple higher-level government or rebel officials will collaborate to perpetrate the criminal conduct. Moreover, none of these officials will commit the crimes directly by themselves; rather, one or more of them will utilize vertical bureaucracies under their authority. The result is a deadly efficient division of labour. Or so proponents of the doctrine would argue, thereby equating the culpability of all leaders at the horizontal level as full perpetrators. Indeed, this was the original theory in the *Katanga and Ngudjolo* case. Both Katanga and Ngudjolo allegedly utilized rebel organizations at their disposal and only by combining their forces could they perpetrate the atrocities. Therefore, according to the OTP, each defendant was not only responsible for the actions of their own troops but also responsible for the actions of the other's troops.[44] This cross-liability represented the full force of the indirect co-perpetration doctrine. Leaders become responsible not just for individuals under their command, but also for individuals that their collaborators command.

3.1. Can modes of liability be combined at will?

In our view, Van den Wyngaert was right to express caution about this mode of liability. First and most importantly, Van den Wyngaert argued that there was nothing in the text of Article 25 to justify such ad-hockery.[45] Article 25(3)(a) talks of perpetrating 'jointly with another' and 'through another person', but does not mention the possibility of combining these modes of liability.[46] Can separate modes of liability be combined without special justification?[47] There are normative reasons to be sceptical of such combinations and it must be determined whether they are consistent with *international* criminal law in general and the ICC Statute in particular.

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42 See Roxin, 'Crimes as Part of Organized Power Structures', *supra* note 6, 193–207.

43 Not only are such defendants vertically removed from the commission of the crime (by virtue of their indirect perpetration), but they are horizontally removed as well (by virtue of their co-perpetration with other collaborators on the horizontal level). The notion of 'control' then provides the connection that links such defendants, along the two axes, to the physical perpetrators of the atrocities. See J. D. Ohlin, 'Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability', (2012) 25 LJIL 771. Indirect co-perpetration therefore has some *structural* similarities with later versions of JCE theory, because under the latter doctrine the leadership-level JCE need not encompass the relevant physical perpetrators, who might report directly to one member of the JCE.

44 *Katanga and Ngudjolo* Confirmation Decision, para. 484.

45 See Concurring Opinion Judge Van den Wyngaert, para. 60.

46 Ibid., para. 61.

47 See Concurring Opinion Judge Van den Wyngaert, para. 62 (concluding that modes of liability can be combined when the elements of each are established). For a comparative-law perspective on combining modes of liability: Van Sliedregt, *supra* note 10, at 68–9.

In the case of indirect co-perpetration, one might argue that the defendants in such cases will independently satisfy the criteria for each mode of liability. Consequently, the demands of both co-perpetration and indirect perpetration are independently satisfied. So what could be the harm in that?

Indirect co-perpetration involves something more than a *straightforward* application of the concepts of indirect and co-perpetration as those terms are used in Article 25 of the ICC Statute. The *Katanga and Ngudjolo* Pre-Trial Chamber decision on the Confirmation of Charges concluded that only with the co-operation of both forces were the defendants able to consummate the international crimes.[48] But it was not the case that each of the defendants met the standards for both co-operation and indirect perpetration. Indeed, if that had been the case, the doctrine of indirect co-perpetration would have been superfluous; prosecutors could simply have selected between co-perpetration and indirect perpetration and could have proceeded with one of these doctrines as their theory of the case. For example, in the ICTY *Stakić* case, one of the first to attempt application of the control-theory, the Trial Chamber, held that Stakić was responsible as a principal to the crime even though it was subordinates of his co-perpetrator who performed the actual killings.[49] It was therefore not the case that Stakić independently met the standards for indirect perpetration, since he was not personally in control of the vertical organization that performed the killings. The question is whether such doctrinal overreach is a natural *outgrowth* of the judicial application of the doctrine of indirect co-perpetration or whether it is implicit in the doctrine itself.

None of this suggests that an adequate theory of indirect co-perpetration cannot be constructed. However, it cannot be merely assumed, and that theory is certainly not a straightforward application of the bare text of the Statute. Constructing this theory requires a judicial recognition of how the control-theory has evolved in German criminal law doctrine and how far it should be extended, based on an independent examination of basic principles of criminal law *Dogmatik*. Some theory must explain this new mode of liability as it emerges from the raw materials of Article 25(3)(a). Through forming a common intent, both Katanga and Ngudjolo allegedly reached beyond their own troops. They built a team of two, a collective with power over both of their troops. This fact may justify a legal attribution of the acts of Lubanga's troops to Ngudjolo, and vice versa.[50] However, an adequate theory needs to carefully distinguish between individuals who control distinct organizations but deploy them towards a common cause and individuals who jointly exercise combined authority over a single vertical organization. The latter constitutes a junta model of indirect co-perpetration via a single apparatus of power, while the former represents a joint

48 *Katanga and Chui* Confirmation Decision, para. 493.

49 *Prosecutor v. Stakić*, Trial Judgement, IT-97-24, T.Ch., 31 July 2003, para. 469.

50 On this point, see the analysis by B. Burghardt and G. Werle, 'Die mittelbare Mittaterschaft–Fortentwicklung deutscher Strafrechtsdogmatik im Völkerstrafrecht?', in R. Bloy (ed.), *Gerechte Strafe und legitimes Strafrecht: Festschrift für Manfred Maiwald zum 75. Geburtstag* (2010), 849; Weigend, *supra* note 10, at 110–11; S. Wirth, 'Co-Perpetration in the Lubanga Trial Judgment, (2012) 10 JICJ 971, at 980 et seq.

perpetration through multiple vertical organizations.[51] The judicial standards for each flavour of the doctrine might be different, given the different structure of the 'control' in these cases. So far the ICC has not explored these differences to a satisfactory degree.

3.2. The role for organizations under Article 25

Van den Wyngaert also expressed anxiety about the growing importance of organizations within the control-theory. Simply put, she argued that Article 25 applies to indirect control over *persons* committing international crimes, but not indirect control over *organizations* committing the crimes.[52] This is a complex point and one that the various Pre-Trial Chambers have shown insufficient dedication to addressing. Of course, all organizations, whether criminal or corporate, are composed of natural persons.[53] Hence Article 25 is applied to the indirect control of persons even where control is exercised by means of an organization. The question is whether it is appropriate for the doctrine to give a special position to 'organizations' as a legally significant mediator that stands between the defendant and the relevant physical perpetrators who commit the actual crimes.[54] For Van den Wyngaert, apparently, the concept of the organization is a distraction that finds no support in the Statute; furthermore it necessarily involves situations where individual control over the street-level perpetrators is increasingly attenuated (through bureaucracy) rather than direct. This objection is debatable. Roxin's theory in fact emphasized that bureaucratic control is, in its own way, 'immediate' because the organization carries out the orders of the leader as a matter of course.

If the ICC Appeals Chamber wishes to continue using *Organisationsherrschaft* within the context of indirect co-perpetration, it ought to come up with a deeper theoretical argument that explains why indirect perpetration through an organization is consistent with the language of Article 25 and its reference to persons. One argument might be that the organization is nothing more than a convenient legal shorthand for the control exercised by the defendant over the street-level perpetrators who performed the *actus reus* of the crime. Under this approach, *Organisationsherrschaft* would not be a separate mode of liability at all, and therefore its absence from the text of Article 25 would be irrelevant. Rather, it would be classified as one avenue towards reaching the Article 25 standard of indirect perpetration: under that view, the indirect perpetrator indeed commits the offence through

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51 See Burghardt and Werle, *supra* note 50, at 863–4 (distinguishing between 'indirect co-perpetration' per se and cases of 'joint indirect perpetration'); Weigend, *supra* note 10, at 111 (junta model involves 'one group of subordinates subject to control by a group of leaders working together'); Ohlin, supra note 43, at 779.

52 See Concurring Opinion Judge Van den Wyngaert, para. 52 ('elevating the concept of "control over an organization" to a constitutive element of criminal responsibility under Article 25(3)(a) is misguided').

53 Ibid., para. 53.

54 Ibid. ('there is a fundamental difference between the interaction among individuals, even within the context of an organisation, and the exercise of authority over an abstract entity such as an "organisation". Moreover, by dehumanising the relationship between the indirect perpetrator and the physical perpetrator, the control over an organisation concept dilutes the level of personal influence that the indirect perpetrator must exercise over the person through whom he or she commits a crime').

another person, namely the immediate actor. The organization provides the 'through' element; it connects the indirect perpetrator with the actor.

Another trend that might support the role of organizations within Article 25 is the growing importance of organizations in other areas of the substantive doctrine of international criminal justice. For example, the requirement of an 'organizational plan or policy' in crimes against humanity is now an accepted element along with the requirement of a widespread or systematic attack.[55] Although this element is controversial, and some would prefer to eliminate it, the recent cases at the ICC are built around it.[56] For example, the indictments against the Kenyan suspects relied on the existence of two organizations – the Mungiki and what the ICC dubbed the 'Network' – to fulfil both the organizational requirement for crimes against humanity and also the organizational requirement for an organized apparatus of power.[57] A coherent judicial theory of 'organizations' within international criminal law would have to holistically address all of these issues with one theory of macro-criminality.

3.3. *Dolus eventualis*

The final – and perhaps most important – objection to the ICC's continued reliance on indirect co-perpetration involves the application of *dolus eventualis* to these cases. The term *dolus eventualis* is notorious for competing and often conflicting definitions; the term may very well obscure more than it illuminates. Scholars at the domestic and international levels have argued extensively over whether it includes a so-called 'volitional' component, i.e. an attitude by the defendant (either resignation, reconciliation, approval, or consent) regarding the future event. There is also a parallel debate about whether *dolus eventualis* is similar to – or greater than – its common-law cousin, recklessness. However, all definitions agree that *dolus eventualis* involves liability for foreseeing the mere *possibility* of future events.

One way of extending criminal liability to cases where the actor does not directly foresee the harmful result has been devised by the ICTY. Under the third variant of JCE (JCE III), a participant in a JCE is held responsible for any reasonably foreseeable act of any other participant done in furtherance of the joint enterprise. JCE III thus allows convictions – as a principal, no less – for crimes committed by co-venturers that fall outside the scope of the agreed-upon plan. The ICC has so far been reluctant to adopt JCE doctrine. By refusing to read JCE doctrine into Article 25(3)(d) of the ICC Statute, the ICC developed a reputation for analytical rigour with regard to criminal-law theory. Yet, at least part of the rationale for the ICC's adoption of control-theory, though never explicitly stated as such,[58] may have been to reach

55 For different views on this requirement, see the symposium in (2010) 23 LJIL 825.

56 But see M. Cupido, 'The Policy Underlying Crimes against Humanity: Practical Reflections on a Theoretical Debate', (2011) 22 *Criminal Law Forum*, 275 (suggesting that the facts as applied in various cases show a greater similarity between the ICTY and ICC standards for crimes against humanity with regard to the plan or policy requirement).

57 See *Muthaura et al.* Confirmation Decision, para. 229; *Ruto et al.* Confirmation Decision, para. 186.

58 The Trial Chamber in *Stakić* was more explicit about searching a new path away from JCE.

similar results as would have been possible under JCE without explicitly adopting that much-maligned doctrine.

Indirect co-perpetration, as *applied* by the ICC, may indeed not be that much different from JCE III and its *Pinkerton*-like vicarious liability.[59] A structural similarity appears as soon as liability for *dolus eventualis* is imposed. To be sure, there is conflicting precedent in this area, and some ICC Chambers have concluded that *dolus eventualis* is not applicable to most crimes prosecuted before the court.[60] But some Chambers have declared that *dolus eventualis* (or some version of it) is consistent with Article 30; and when combined with indirect co-perpetration, the two produce a result that is very similar to the controversial JCE III.[61] Specifically, indirect co-perpetration allows the defendant to be convicted for the crimes committed by the virtual apparatus of power deployed by one of the defendant's co-perpetrators. If *dolus eventualis* is added to the mix, a conviction is allowed even if the crimes committed by the organized apparatus of power were not part of the criminal endeavour agreed to by the horizontal co-perpetrators. The only limiting principle, according to the Pre-Trial Chamber in *Lubanga*, is that the defendant must have been aware of the possibility that such crimes might be committed and must have reconciled himself to that possibility or consented to it.[62] Indeed, the Pre-Trial Chamber recognized that 'if the *risk* of bringing about the objective elements of the crime is low, the suspect must have clearly or expressly accepted the idea that such objective elements *may* result from his or her actions or omissions'.[63] The result is substantially similar to JCE III because both the defendant and his co-perpetrator are prosecuted as principals even though their attitudes to the crime are quite different. The defendant did not desire the crimes but nonetheless realized that they might occur; his co-perpetrator, however, might have indirectly perpetrated the crimes with full-blown intent. Whatever the merits of this theory, one should not pretend that it departs *significantly* from the underlying premise of JCE III.[64] Both involve liability for risk-taking behaviour.[65]

None of this is to suggest that *dolus eventualis* is not a legitimate mental state, used in many jurisdictions, to ground criminal culpability. It certainly is. Rather, the doctrinal question is whether it is consistent with the default *mens rea* standard expressed in Article 30 of the Statute, which states that the applicable mental state shall be intent and knowledge 'unless otherwise provided'. Intent and knowledge

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59 *Pinkerton* liability allows vicarious liability for the acts of co-conspirators that fall outside the scope of the criminal plan. It was cited with approval in *Prosecutor v. Tadić*, Judgment, Appeals Chamber, IT-94-A, 15 July 1999, para. 224 n. 289 (hereinafter *Tadić* Appeals Judgement), citing *Pinkerton*, 328 U.S. 640 (1946).

60 See *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the ICC Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Pre-Trial Chamber II, 15 June 2009, paras. 366–369 (rejecting application of *dolus eventualis* under the ICC Statute).

61 For example, see the analysis in *Lubanga* Confirmation Decision' paras. 352–353 (applying *dolus eventualis*).

62 Ibid., para 352. There are, of course, different formulations of *dolus eventualis* in domestic legal systems; the notion of 'reconciling' oneself to the potential consequence is just one of them, though it is arguably the most influential. For a discussion of the different versions, see M. E. Badar, 'Dolus Eventualis and the Rome Statute without It?', (2009) 12 New Crim. L Rev. (2009) 433.

63 *Lubanga* Confirmation Decision, para. 354 (emphasis added).

64 See, e.g., Ohlin, *supra* note 43, 771 et seq.

65 In *Tadić*, the ICTY Appeals Chamber explicitly referred to *dolus eventualis* as the basis for JCE III, where the defendant 'willingly took the risk'. See *Tadić* Appeals Judgement, para. 220.

require awareness that the consequence will occur 'in the ordinary course of events'. Most of the authoritative commentators writing about the ICC Statute drafting process agree that *dolus eventualis* was not explicitly covered by the Article 30 standard. For example, Roger Clark famously wrote that '*dolus eventualis* and its common law cousin, recklessness, suffered banishment by consensus' at Rome.[66] The key piece of evidence is the draft of the 1996 Preparatory Committee report, which included a subsection on *dolus eventualis* and recklessness that was subsequently *deleted* and never made it into the final version of the ICC Statute.[67]

To reiterate the point, none of this demands a form of global scepticism regarding *dolus eventualis*. Rather, the point is simply that its application to situations of indirect co-perpetration is powerful, and the ICC must tread carefully to determine whether it is consistent with the principle of individual culpability. A defendant charged with being an indirect co-perpetrator is held responsible for actions perpetrated by a vertical organization that he does not personally direct. In cases of *dolus eventualis*, the crimes are not desired by the defendant but merely foreseen as a potential risk. What is this hypothetical defendant's level of culpability? Surely such individuals are guilty of some offence under some mode of liability, but that is not the question here – the issue is whether they are deserving of Roxin's label of *Täter hinter dem Täter*, the mastermind who stands behind the criminal operation. Given that indirect co-perpetration is not explicitly listed in Article 25, the ICC ought to be certain that such a classification is warranted. As it stands now, none of the previous opinions of the court have yet accomplished this task.

4. Hierarchy of blameworthiness?

4.1. Normative approaches to criminal participation

According to the proponents of control-theory, Article 25(3)(a) is an expression of what can be called a normative approach to criminal participation: the principal is the one who is 'most responsible' in the sense that he or she has decisive influence on the commission of the crime, without necessarily physically committing it. This contrasts to what can be termed the naturalistic or empirical approach to liability, which takes as a starting point the natural world and the reality of cause and effect.[68] In 'empirical terms', the perpetrator is the one who performs the material elements of the offence and thus 'perpetrates' or 'commits' the crime. The accessory or accomplice is the one who contributes to causing the *actus reus*. Anglo-American

66 See R. Clark, 'Elements of Crimes in Early Decisions of Pre-Trial Chambers of the International Criminal Court', (2009) New Zealand YIL. Piragoff and Robinson conclude that while *dolus eventualis* can be defined in many ways, if it refers to 'substantial or serious risk that a consequence will occur and indifference whether it does' then it was 'not incorporated explicitly into article 30' and the only way to bring it into play is with the 'unless otherwise provided' prong of Article 30. D. K. Piragoff and D. Robinson, 'Mental Element', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008), at 849, 860 n. 67. Schabas's analysis is similar. See W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), at 476 (concluding that *dolus eventualis* was rejected during Rome Statute negotiations).

67 Chairman's Text, UN Doc. A/AC.249/1997/WG.2/CRP.4.

68 On normative and naturalistic approaches to criminal participation in international law, see J. Vogel, 'How to Determine Individual Criminal Responsibility in Systematic Contexts: Twelve Models' (2002) *Cahiers de défense sociale*, 151–69.

complicity law, based on a physical concept of 'commission', is the classic example of the empirical approach to criminal participation.

The empirical system can be referred to as a bottom-up system. If it is applied to a complex structure of criminal co-operation, say an army, one starts with the soldier who killed a civilian, and then moves on to his superior who gave the orders, and then further on to the government minister who devised the relevant policy. The normative approach, on the other hand, represents a top-down system. One starts with the person who has the main responsibility, for example the minister, and then works one's way down to the smaller fry in the lower echelons of the military unit. Thus, in the Anglo-American complicity scheme the government minister is an accessory, while on the basis of a normative system like the control-theory he is a principal.

The ICTY has adopted a normative approach with regard to JCE liability. The Appeals Chamber in *Tadić* referred to JCE, or common purpose as it was then termed, as 'a form of accomplice liability'.[69] But it also used the term 'perpetrator' and 'co-perpetrator' to refer to a 'participant' in a JCE.[70] Moreover, it brought JCE liability under the heading of 'committing' and distinguished it from aiding and abetting, which, it felt, understates the degree of criminal responsibility.[71] These findings sparked a debate amongst Trial Chambers in subsequent cases. There were judges who felt it important to adhere to the principal/committing–accomplice/participation distinction,[72] and there were others who thought that the principal–accomplice classification is immaterial because it is at sentencing level that variance in roles is expressed.

Without going into details of the debate,[73] it suffices to conclude that with JCE a categorization of offenders along normative lines was introduced to ICTY case law. In the *Odjanić* Decision, the majority of the Appeals Chamber – over a strong dissent by Judge Hunt – affirmed that 'joint criminal enterprise is to be regarded, not as a form of accomplice liability, but as a form of commission'.[74] With the latter position, aiding and abetting developed into a mode of liability that is considered less blameworthy than participation in a JCE. This was confirmed in *Šljivančanin*, where the Appeals Chamber held that 'aiding and abetting is a lower form of liability than ordering, committing, or participating in a joint criminal enterprise and may as such attract a lesser sentence'.[75] Research into international sentencing confirms that aiding and

69 *Tadić* Appeals Judgement, para. 220.

70 Ibid., para. 192.

71 Ibid.

72 The *Krstić* and *Kvočka* Trial Chambers, on the other hand, readily accepted the distinction between co-perpetrators and aiders and abettors. *Prosecutor v. Krstić*, Judgement, Trial Chamber I, IT-98-33-T, 2 August 2001, paras. 643–645; *Prosecutor v. Kvočka*, Judgement, Trial Chamber I, IT-98-30/1-T, 2 November 2001, paras. 278 and 284.

73 See further H. Olasolo, *Criminal Responsibility of Senior Political and Military Superiors as Principals to International Crimes* (2009), 23–7; C. Damgaard, *Individual Criminal Responsibility for Core International Crimes* (2008), 198–212; E. van Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide' (2007) 5 JICJ 184.

74 *Prosecutor v. Milutinović et al.*, Decision on Dragoljub Ojdanić Motion Challenging Jurisdiction – Joint Criminal Enterprise, Pre-Trial Chamber, IT-05-87-PT, 22 March 2006, para. 20.

75 *Prosecutor v. Šljivančanin*, Judgement, Appeals Chamber, IT-95-13/1-A, 5 May 2009, para. 407.

abetting has been treated, by the ad hoc tribunals, as less blameworthy than other modes of liability.[76] By now it is safe to assume that a mitigation principle applies at the ICTY with regard to aiding/abetting versus JCE liability, which shows the influence of a normative approach to criminal participation.[77]

The same hierarchy of blameworthiness with regard to aiding/abetting vis-à-vis JCE can be found in SCSL law. The conviction of Charles Taylor is interesting in that respect. Taylor was convicted for aiding and abetting war crimes and crimes against humanity and sentenced to 50 years in prison.[78] Had he been convicted for JCE, the sentence would have been higher.[79] Still, 50 years is a serious sentence in the overall SCSL sentencing practice. While aiding and abetting is considered a lesser form of liability, it does not *automatically* imply a lenient sentence; leniency is a relative concept.[80]

Preference for the normative model is even stronger at the ICC. The majority of the Court strictly adheres to the distinction – introduced by the control-theory – between principals and accessories and distinguishes between principal liability ('committing') in subparagraph 3(a) and accessorial liability ('contributing to') in subparagraphs (3)(b–d) using a normative approach.[81] Charging defendants as intellectual or remote principals under 25(3)(a) means that they played a central role, that they had 'control of the crime'.[82] This is contrasted to liability under subparagraphs 25(3)(b–d) where control plays no role and accessories are regarded as less responsible and less blameworthy.

But also at the ICC the normative approach of the control-theory has been subject to dispute. Judge Tarfusser, in his dissent to the Appeals Decision in the Regulation 55 case in *Katanga*, referred to the Court's case law on Article 25(3) as 'far from . . . uncontentious or settled';[83] and Judges Fulford and Van den Wyngaert in their concurring opinions manifestly disagreed with the normative hierarchy that the control-theory (allegedly) creates in Article 25(3) of the ICC Statute.

From the viewpoint of comparative law, it is interesting to note that the majority opinions in *Lubanga* (PTC and TC), on the one hand, and the concurring opinions of Judges Fulford and Van den Wyngaert, on the other hand, reflect a clash of legal cultures that, interestingly, cuts across the civil-common-law divide. The majority

76 As empirical research has shown. B. Hola et al., 'International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR' (2011) 9 JICJ411, at 417.

77 See also Olasolo, *supra* note 73, at 27.

78 *Prosecutor v. Charles Taylor*, Judgment, Trial Chamber, SCSL-03–1-T, 26 April 2012, para. 6959.

79 Consider the statement of Judge Lussick, a member of the Taylor bench, who held that the 80-year imprisonment requested by the prosecutor would have been excessive as Taylor was convicted of aiding and abetting, which 'as a mode of liability generally warrants a lesser sentence than that imposed for more direct forms of participation'.

80 Rather, it affects, along with other factors, the sentence of the convicted person. Charles Taylor's capacity as a former head of state was an aggravating factor that seems to have 'compensated' the mitigation that aiding/abetting implies.

81 *Lubanga* Confirmation Decision, paras. 330–335; *Katanga and Ngudjolo* Decision, paras. 506–508.

82 *Katanga and Ngudjolo* Confirmation Decision, para. 518.

83 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons', Appeals Chamber, ICC-01/04-01/07 OA 13, 27 March 2013, para. 15.

views stand for a 'dogmatic' concept of perpetratorship and accessorial liability, which expects the substantive law to reflect (or describe) subtle differences in the measure of responsibility and seeks to establish criteria that permit distinctions between forms of liability (and, consequently, degrees of blameworthiness). This approach is typical for the German/Hispanic tradition. The minority approach, by contrast, looks at the substantive criminal law more from the perspective of the legality principle: it is enough that the definitions of the general and special parts capture as comprehensively as possible all potential forms of reprehensible conduct. Differentiating between degrees of responsibility is not the purpose of offense descriptions or of rules of the general part, but is left for judicial sentencing. This reflects the French and the Anglo-American traditions.

Leaving these comparative-law considerations aside, in what follows we try to shed some light on the reasons and implications of the dispute between the majority opinions and the Fulford and Van den Wyngaert opinions.

4.2. Accessorial and derivative liability

Problematic in the control-theory is the use of the term 'accessorial' and the normative meaning attached to it. Consider the *Katanga and Ngudjolo* Confirmation Decision with regard to indirect co-perpetration viz-a-vis ordering:

> The leader's ability to secure this automatic compliance with his orders is the basis for his principal – rather than accessorial – liability. The highest authority does not *merely* order the commission of a crime, but through his control over the organization, essentially decides whether and how the crime would be committed.[84]

'Accessorial liability' is equated to 'lesser liability'. This is confusing to the extent that it does not comport with the empirical model of criminal participation where 'accessorial', as non-principal/accomplice liability, has no normative connotation.[85] It merely indicates that liability is 'derivative', i.e. that liability depends on the principal crime. Indeed, the modes of liability in Article 25(3)(b–d), by requiring the crime to be at least attempted, and by criminalizing a contribution to a crime, constitute forms of derivative liability. They differ from principal liability in subparagraph 25(3)(a), where 'commission' of a crime is defined. Clearly Judge Van den Wyngaert reasoned from an empirical approach to criminal participation when she argued that the principal–accessory distinction in Article 25(3) of the ICC Statute is merely 'conceptual' and that it should not translate to a 'different legal treatment'.[86] We agree with that position to the extent that the terminology in Article 25(3)

84 Ibid., para. 518, emphasis added.

85 Originally, in felony law there was a normative distinction between principals in the first degree (the perpetrator/principal), principals in the second degree (secondary principal), and accessories before the fact. The difference between secondary principals and an accessory before the fact, both of whom are accomplices, was that the secondary principal was *at* the scene of the crime while the accessory was not. The secondary principal was generally more closely involved in committing the crime than the accessory, while the crime was physically committed by the principal in the first degree. J. Dressler, 'Reassessing the Theoretical Underpinning of Accomplice Liability: New Solutions to an Old Problem', (1985) 37 Hastings LJ 191, at 194–5. See Van Sliedregt, *supra* note 10, 112–16.

86 Para. 22.

(b–d) cannot in itself be taken as a normative indication of lesser blameworthiness. Support for this position can be taken from comparative criminal law; there is no rule or theory that categorically links accessorial/non-principal liability to lesser responsibility.[87]

Having said that, aiding and abetting in subparagraph (3)(c) can be regarded as less blameworthy vis-à-vis joint perpetration in subparagraph (3)(a). Where accomplices such as aiders and abettors are further removed from the centre of the commission of the offence, their responsibility is reduced in comparison to perpetrators, and consequently their punishment should be reduced as well. This interpretation of aiding and abetting comports with the previously mentioned normative approach to aiding and abetting in international jurisprudence.

In our view, the hierarchical distinction among four types of perpetrators and accomplices, as proposed by the *Lubanga* Pre-Trial and Trial Chamber and the Pre-Trial Chamber in *Katanga and Ngudjolo*, does not adequately reflect the normative relationship between these types of participant. Ordering, soliciting and inducing others to commit crimes in subparagraph 3(b) is not necessarily less blameworthy than indirectly perpetrating a crime as penalized in subparagraph (3)(a). Even Kai Ambos, a staunch supporter of the control-theory and its (alleged) hierarchical structure,[88] admits that the hierarchy in Article 25(3) is 'less evident with regard to subparagraph (b) – especially with regard to 'ordering' which belongs structurally and systematically to subparagraph (a)'.[89]

Moreover, it is highly questionable whether Article 25(3) is based on a single coherent, normative theory of participation. Nothing in the drafting history of the ICC suggests that Article 25(3) was to constitute a self-contained system of criminal participation with a coherent doctrinal grounding. To the contrary, as the chairman of the Working Group on General Principles recalls, drafting Article 25(3) posed great difficulties to negotiate; eventually, a near-consensus was reached where there would be one provision to cover the responsibility of principals and all other modes of participation. Article 25(3) was to provide the Court with a range of modalities from which to choose.[90]

Bearing in mind this 'aggregate' background of Article 25(3) of the ICC Statute, it seems that Article 25(3) reflects elements of the normative and empirical approaches to criminal participation without clearly distinguishing between the two. The fact that Article 25(3)(a) provides for instances of intellectual perpetration does not make it the sole theoretical grounding for the whole of Article 25. Nor does it relegate all participants covered by subparagraphs (b–d) to lesser liability. The ICC, in forging

87 Even in those systems that provide for a distinction between principals and accessories where labelling comes with a sentence reduction, 'principal liability' may still be derivative/accessorial. For instance, co-perpetrators in Dutch law have the status of accessories. Their liability rests on that of the physical perpetrator; they are only liable when the crime is committed or attempted. They are punished as if they were principals (Art. 47(1) Dutch Penal Code: 'Als daders van een strafbaar feit worden gestraft: 1zij die het feit plegen, doen plegen of medeplegen').

88 K. Ambos, *Treatise on International Criminal Law*, Vol. 1 *Foundations and General Part* (2013), 146–7.

89 Ibid. at 152–3.

90 As discussed in P. Saland, 'International Criminal Law Principles' in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (1999), at 198.

its path to identifying the responsibility of principals versus accessories, has been too rigorous in drawing lines according to the vague legislative concepts embodied in Article 25(3) of the ICC Statute.

5. Concluding observations

The fact that international courts adhere to a principal–accomplice classification is noteworthy, particularly since this labelling in international law does not result in a mandatory mitigation or increase of sentences.[91] The reason why the distinction is cultivated may well be a desire to extend the status of principal in international criminal law.[92] Despite the noted lack of practical value, stigmatization through attributing the status of principal is important because of the expressive value and the denunciatory and educational function of conferring this status in international criminal law.[93] Making clear who masterminded crimes by referring to him/her as the 'principal' who 'commits' crimes is important in communicating to victims and the international community as a whole who was the 'real' culprit.[94] Bearing this purpose in mind, there is value in adopting a normative approach to conferring the status of 'principal' (rather than accomplice) to persons who are the main concern of international criminal law: the remote or intellectual perpetrators who use others to commit crimes.

Yet the control-theory as developed by the ICC Pre-Trial Chambers and Trial Chamber in the *Lubanga* and *Katanga and Ngudjolo* cases suffers from ambiguities and wrongful assumptions. So far, the control-theory does not provide the limitation of liability that some expected it to bring.[95] In current ICC jurisprudence, co-perpetration and indirect co-perpetration are broad liability theories, suffering

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91 According to Arts. 77 and 78 of the ICC Statute the Court can impose any sentence (up to lifelong imprisonment) taking into account the gravity of the crime and the individual circumstances of the convicted person; no distinction is made between forms of responsibility. This does not mean that in sentencing role-variance does not play a role. Rule 145(1)(c) of the Rules of Procedure and Evidence of the ICC stipulates that judges in their determination of sentence give consideration to the 'degree of participation of the convicted person'. This accords with practice at the ICTY where the Appeals Chamber held that 'the gravity of the offence, as stipulated in Art. 24(2), requires judges to consider the crime for which the accused has been convicted, the underlying criminal conduct in general, and the role of the offender in the commission of the crime (ergo the degree of participation). Still, it is at the level of sentencing, not at conviction level, that the degree of responsibility is expressed.

92 Consider in this respect F. Z. Giustianini's paper on the ICTR's Appeals Chamber's ruling in *Seromba* where a broad concept of 'commission' was adopted and where instigation would have been more appropriate. According to F. Z. Giustanini this was to impose a severe and exemplary punishment on Seromba. F. Z. Giustanini, 'Stretching the Boundaries of Commission Liability: The ICTR Appeals Judgment in *Seromba*', (2008) 6 JICJ 783, at 798. See also G. Townsend, 'Current Developments in the Jurisprudence of the International Criminal Tribunal for Rwanda', (2005) 5 ICLR 147, at 156.

93 See M. A. Drumbl, *Atrocity, Punishment and International Law* (2007), 174. In sentencing practice, this translates to attaching much weight to the sentencing purposes of retribution and deterrence. E.g. *Prosecutor v. Delalić et al.*, Judgement, Appeals Chamber, IT-96-21-A, 20 February 2001, para. 806; *Prosecutor v. Serushago*, Sentence, Trial Chamber, ICTR 98-39-S, 5 February 1999, para 20; *Prosecutor v. Tadić*, Judgement in Sentencing Appeals, Appeals Chamber, IT-94-1-A and IT-94-1-Abis, 26 January 2000, para. 48. See R. Henham, 'Some Issues for Sentencing in the International Criminal Court', (2003) 52 ICLQ 81. Note also Section 5 of the preamble of the ICC Statute, which comprises the aim to contribute to the prevention of international crimes.

94 See C. Kress, 'Claus Roxins Lehre von der Organisationsherrschaft und das Völkerstrafrecht', (2006) 153 *Goltdammer's Archiv für Strafrecht* 304, at 308; Weigend, *supra* note 10, at 102–3.

95 See for instance Ambos, *supra* note 88, at 146.

from unclear underlying tenets and a one-dimensional use of the concept of 'control'. Moreover, the alleged normative hierarchy of blameworthiness rests on a confusing interpretation of 'accessorial' and takes the normative interpretation of Article 25(3) of the ICC Statute too far. The authors hope the ICC Appeals Chamber takes this unique opportunity to reconsider or improve the control-theory as developed by the Pre-Trial Chambers in the *Lubanga* and *Katanga and Ngudjolo* cases.