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Alternatives to Custodial Supervision: The Day Fine

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Introduction

Corrections populations in the U.S. have risen at alarming rates. From 1990 to 2007, probation populations rose 61 percent, with 4.3 million persons on probation as of December 31, 2007 (Bonczar and Glaze, 1999, 2008). Parole populations have risen 55 percent to a level of 824,000 persons (Bonczar and Glaze, 1999, 2008). Incarceration sentences have expanded by even greater amounts — jail populations rose 93 percent (to 780,000), and prison populations rose 311 percent (to 2.3 million inmates) over the same interval (Beck and Gilliard, 1996; Sabol and West, 2008) More than 7.2 million persons are under correctional supervision today (Bonczar and Glaze, 2008).

Releasing “low risk” offenders from confinement can provide only modest relief because these offenders simply become parolees and thus remain under justice supervision. Additionally, sentencing rates continue to increase. Felony conviction rates for violent crimes increased from 23 percent to 31 percent between 1994 and 2004, and the volume of convictions overall rose 24 percent (to 1.08 million in 2004) (Durose and Langan, 2007). The percentage of time served for violent felonies has also increased, from 46 percent to approximately 66 percent (Durose and Langan, 2007).

Policymakers are now facing growing populations in all parts of the corrections system with no trend reversals in sight and no alternative sentences that are capable of significantly reducing custodial populations.

Introducing Day Fines in the Criminal Justice System

One resolution that is being examined is introducing and expanding fines as a criminal sanction. This would be an alternative to sanctions requiring direct supervision, either in the community or an institution. More specifically, this paper examines the implementation of income-calibrated fines, known as “day fines.” Day fines are monetary penalties imposed on an offender that take into consideration the offender’s financial means. They are an outgrowth of traditional fining systems, which were seen as disproportionately punishing offenders with modest means while imposing no more than slaps on the wrist for well-to-do offenders.

The outcome goals of this research are to determine the degree to which day fines could become legitimate and widespread forms of punishment in the U.S. criminal justice system, and could serve to reduce the levels of custodial sentences.

Advantages of Day Fines

Many opportunities exist to reduce supervised populations and the concomitant costs. Costs of community supervision and confinement vary widely across jurisdictions. For example, federal costs for the community supervision of an offender were \$3,743 annually in FY 2008, and annual incarceration costs were \$25,894 (Rowland, 2009). Any reduction in the number and duration of sentences represents a net system saving. Federal probation officers are directed to consider such cost savings as part of their presentence reports:

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“Pursuant to U.S.S.G. § 5E1.2 (d)(7) and 18 U.S.C. § 3572(a)(6), the court shall, when determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, consider the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence. We ask that probation officers begin to reference the updated costs in their presentence reports.” (Rowland, 2009)

The public also stands to benefit if these costs are reduced without sacrificing public safety. Offenders and their families can benefit as well. Offenders are not separated from their families and communities, and can continue to work at legitimate jobs to provide both family income and fine payments.

Day fines have numerous system applications. They can be used in lieu of prison, jail and community supervision. When used in conjunction with suspended sentences, day fines approach probation in terms of leverage against subsequent offending. Day fines can also be used in lieu of probation and parole revocations, and can be combined with any custodial sanction. Judges can provide revocation options similar to those available for probation simply by combining day fines with suspended sentences. The difference is that no supervision costs are incurred and offenders are not sent back to jail or prison for technical violations.

Calculating Day Fines

Day fines take the financial circumstances of the offender into account. They are calculated using two factors:

- **Gravity of the offense.** The number of fine units (also called offense units) imposed is based on the gravity of the offense. Most jurisdictions have written guidelines that rank offenses by severity and then assign a fine unit to each. The range of fine units varies greatly by country. For example, in Sweden the range is from 1 to 120 units. In Germany the range is from 1 to 360 units.
- **Offender’s daily income.** Court officials determine the daily income of the offender. The daily income is the net amount an offender makes per day minus certain fixed expenses. (Junger-Tas, 1994, p.23). Deductions take into account the costs an offender incurs because of dependents, including a nonworking spouse and children, fixed obligations and basic living expenses (Tonry and Hamilton, 1995, p. 16)

Once these two factors have been determined, the officer calculates the amount of fine imposed by multiplying the fine units an offender receives by his or her daily income (adjusted for family and housing obligations).

Several issues arise in the computation of the day fine. First, the court has to establish what proportion of the offender’s daily income should be subject to the day fine. Two

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different standards are used to determine the amount of the income that will be subject to the day fine. The first is “strict economy.” Under this notion, the offender should be deprived of that amount of money “which — on a daily basis — can be spared when restricting expenses drastically (to the very basic needs)” (Albrecht, 1987, p. 6). The second standard is “net income.” The net income standard calculates the day fine based on after-tax income less allowable tax deductions (Albrecht, 1987). Only regular salary and other legitimate income (i.e. pensions, maintenance payments, social welfare, unemployment benefits, and stipends) are part of the calculation of income under the net income standard. Criminal earnings are excluded from the calculation.

Descriptions of Day Fine Systems

A number of northern European countries use day fines extensively. Day fines were first implemented in Finland in 1921. Other Nordic countries (Sweden, Denmark and Norway) followed suit. Starting in 1975, day fines have been successfully implemented in Germany,. Although these systems have similar structures, there are variations in practice.

The Penal Code of Finland, under Chapter 2: Penalties, Section (a) Fine, conversion sentence and summary penal fee (550/1999), sets out the guidelines for imposing day fines as a criminal sanction. The minimum number assigned to a day fine unit is one, and the maximum is 120. The amount of the day fine is calculated as one sixtieth (1/60) of the average monthly income of the person fined instead of being based on actual “daily” income. The courts review the defendant’s tax records to determine his or her income. Should an offender fail to pay all or a portion of the day fine, the portion unpaid may be converted to a term of imprisonment. Two unpaid day fines correspond to imprisonment for one day.

Sweden adopted day fines in 1931 (Thornstedt, 1975, p. 307). Sweden uses the “strict economy” form of day fine system. In the Swedish day fine system, the number of day fine units represents the measure of punishment, and the amount of each day fine unit is estimated in accordance with the financial situation of the accused.¹ The number of units imposed increases with the severity of the offense but does not escalate for repeat offenses of the same kind.² Sweden has a fairly unique system, because more than 75 percent of the fines in Sweden are imposed by public prosecutors, with consent by the accused (Thornstedt, 1975, p. 308). Fines account for roughly 70,000 of the 110,000 sentences handed out annually.³ Furthermore, all tax-relevant information may be disclosed, and police, public prosecutors and courts have free and unrestricted access to any information known to tax authorities, although they rarely use it in practice (Albrecht, 1987, p. 8). The police manage day fine collection as an ordinary debt

¹ Personal visit and conversations with officials at Swedish National Crime Prevention Council, September 2009.

² Personal visit and conversations with officials at Swedish National Crime Prevention Council, September 2009.

³ Personal visit and conversations with officials at Swedish National Crime Prevention Council, September 2009.

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collection process. Payments may be made at the bank or by Internet; defaults lead to confiscation of automobiles and home furnishings.⁴

The day fine was introduced into Danish courts in 1939 (Thornstedt, 1975, p. 307). Day fines in Denmark range between one and 60 units. They can be combined with other sanctions (e.g., community service, imprisonment) or used as a sole penalty.⁵ According to the Danish Ministry of Justice, only courts use day fines and only for criminal sanctions. Police and prosecutors fine offenders as well, but they use only “lump sum” or flat fines. Fines and imprisonment are the two categories of sentences imposed. Probation is used to provide services or control the offender’s activity. Fines have an exact conversion scale to days in prison, and nonpayment leads to imprisonment for the balance of the unpaid fine units. Unlike the Swedish courts, Danish courts practice deterrence and escalate penalties for repeat offenses.⁶

Germany implemented two major penal law reforms in 1969 and 1975. The First Criminal Law Reform Act, passed in 1969 (Friedman, 1983, p. 281), reinstated the fine as a criminal sanction and made it the primary sanction for crimes formally punishable by a prison term of six months or less. Much research at the time showed that short sentences did little to rehabilitate offenders and that low-level offenders who were sent to jail for a short period of time became hardened by the system and came out more violent and dangerous than they were before they went in. The Second Criminal Law Reform Act passed in 1975 drastically changed the way Germany calculated the fine amount. The new calculation was based on the Scandinavian “day fine” system, which used a variable fine dependent on the income of the offender, rather than a fixed fine. The German system is based on “what a day of freedom costs,” also known as “net daily income” (Junger-Tas, 1994, p. 23).

The United Kingdom briefly used the “unit fines” system — where units were based on disposable weekly income, rather than daily income. Pilot projects were established in four magistrates’ courts and evaluated by the Home Office Research and Planning Unit. The findings were positive, so the Criminal Justice Act of 1991 mandated a national system of unit fines to take effect in October 1992. The unit-fines system was abandoned 7 months later. The true reasons for this change are unclear but many cite negative media coverage and the misapplication of the fine as justification for its abandonment. (Tonry and Lynch, 1995, pp. 130-131)

Many Latin American countries use some variation of day fines. Their history is as long as those of European societies. The Dominican Republic claims to have started their system in 1884. Latin America uses two distinct styles of administration: “salary-based day fines” and “regulation-based day fines.” The salary-based day fines resemble the European systems insofar as fine amounts are income-based and sanctions increase with the gravity of the offense. Regulation-based fines are not income-based but, like salary-

⁴ Personal visit and conversations with officials at Swedish National Crime Prevention Council, September 2009.

⁵ Personal visit and discussion with Danish Ministry of Justice officials, September 2009.

⁶ Personal visit and discussion with Danish Ministry of Justice officials, September 2009.

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based fines, increase with offense seriousness. Like the Danish system, they establish an equivalency between fine units and days in prison (Gonzalez and Garita, 1990). The table below classifies the countries by the type of system they use.

Table 1. Latin American Day Fine Systems			
Regulation Day Fines	Year	Salary Day Fines	Year
Peru	1924	Uruguay	1933
Mexico	1984*	Colombia	1980
Costa Rica	1970	Guatemala	1973
Bolivia	1972	Ecuador	1971
El Salvador	1974	Paraguay	1914
Brazil	1969	Honduras	1983
Cuba	1936	Nicaragua	1974
Panama	1984	Venezuela	1964
		Argentina	1921
*Mexico had salary day fines from 1931 to 1983.		Dominican Republic	1884

U.S. Efforts to Incorporate Day Fines

Despite impressions to the contrary, fines are fairly widely imposed as criminal sanctions in the U.S. The most frequent applications are for traffic violations and other minor offenses (Tonry and Hamilton, 1995, p. 17), but jurisdictions have experimented with day fines for felonies. Examples follow below:

- **Criminal Court of Richmond County, Staten Island Project.** In 1988, the Vera Institute of Justice, with funding from the National Institute of Justice, in collaboration with the Criminal Court of Richmond County and the county's district attorney's office set up a pilot day fine project at the Criminal Court of Richmond County, located in Staten Island, N.Y. The court has limited jurisdiction, and hears only misdemeanor cases. The project's goal was to broaden the use of the fine as a criminal sanction. (Tonry and Hamilton, 1995, p. 21)
- **Milwaukee Municipal Court Experiment.** In 1989, the Milwaukee Municipal Court started a 12-week experimental program to test whether the day fine could successfully be used as a substitute for the traditional fine in punishing low-level noncriminal offenses. The court issued day fines for some offenders and continued to use traditional fines for others, who were designated as an experimental control group. The judges established "benchmarks" similar to sentencing guidelines. Benchmarks "represent a consensus view of what level of punishment is deemed appropriate for each given charge" (McDonald, Greene, and Worzella, 1992, pp. 61-77). Day fines in the Milwaukee experiment applied only to noncriminal violations. They resulted in reduced total fine collections and as a result, they were abandoned (Tonry and Lynch, 1996, p. 130).

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The Bureau of Justice Assistance (BJA) funded four day fine pilot projects beginning in 1991 and 1992. In each of the four locations, “benchmarks were established to specify the numbers (or ranges) of penalty units for crimes of different severity and procedures were developed to calculate the offenders’ daily income” (Tonry and Hamilton, 1995, p. 27). These four projects included:

- **Maricopa County Ariz., Financial Assessment Related to Employability (F.A.R.E.) Probation Project.** Started in 1991, the F.A.R.E. is an intermediate sanction based on a day fine system that targets indicted felony offenders with little need for supervision or treatment. These offenders have nonetheless historically received supervised probation. In place of this supervised probation, offenders are fined. (Vera Institute of Justice, 1995)
- **Polk County, Iowa.** This pilot program included only misdemeanors.
- **Bridgeport, Conn.** Started in May 1992, it covered a variety of felonies and misdemeanors.
- **Coos, Josephine, Malheur, and Marion Counties, Ore.** This project included misdemeanors and felonies punishable by probation (excluding Marion County, which covered only misdemeanors)

A few states tried to implement day fines through statutes:

- In Alabama (Code of Ala. § 12-25-32 (2009)), day fines or means-based fines are listed in the continuum of punishments.
- In Alaska (Alaska Stat. § 12.55.036 (2009)), certain misdemeanors can be punished with day fines. The statute sets forth a day fine plan that the Alaska Supreme Court should adopt when assessing the fine, which includes instructions on how to compute the range of units for each class of crime, how to convert the defendant’s income, and how to collect the money judgment.
- In Oklahoma (22 Okla. Stat. § 991(a) (2009)), when determining what sentences the court can impose under the Elderly and Incapacitated Victim’s Protection Program, the use of day fines is described in Section A(y). The day fine cannot exceed 50 percent of the net wages earned and shall be paid to the local community sentencing system as reparation.

Strengths of Day Fines

Day fines convey a number of advantages in terms of ease of use and containment of other system costs:

- **Day fines achieve equity and proportionality in sentencing.** One benefit of the day fine is that it achieves proportionality and equality in sentencing offenders

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with different financial means. It is equitable in its attempt to treat the rich offender and the poor offender the same. It is proportionate because in order to treat the rich and poor offender the same, it only fines an offender an amount that the offender is capable of paying.

- **Day fines are punitive.** Day fines can be just as punitive as imprisonment or other alternatives to incarceration because they attack the offender's pocketbook (Tonry and Hamilton, 1995). Offenders are typically required to pay the fine imposed at sentencing. In many instances they may be unable to pay the entire amount at the time of sentencing. In these cases, the judge will allow for payment over a certain fixed period of time. Some courts will allow adjustments to the timetable if offenders' circumstances change, as long as they do not willfully refuse to pay. Default, however, can lead to imprisonment. Some systems issue an automatic arrest warrant for offenders if they miss a payment. Other systems have complex notification procedures that send letters out to offenders about missed payments and the consequences of default.
- **The U.S. justice system already accepts fines as criminal sanctions.** Day fines have been used as alternative sentences for misdemeanors and low-level felonies (traffic violations, peace violations, etc). On the other hand, U.S. courts have not often applied fines as punishments for more serious or violent crimes. The United States has a strong recent history of using court sentences to exact retribution in the form of confinement. The American public, through media coverage, has often reinforced these tendencies. Various states are now taking steps to reduce prison populations, suggesting that a combination of changing public attitudes regarding incarceration and financial pressures may have reduced these tendencies to confine.
- **Day fines impose fewer system costs.** Fining offenders instead of placing them under correctional supervision reduces costs to the criminal justice system. Costs associated with enforcing compliance with probation or parole conditions are reduced. These include costs to "prepare arrest warrants, the clerical time to record and prepare arrest warrants, law enforcement apprehension, booking and conveying prisoners, additional court appearances, and court personnel time for violators repeatedly brought back to court on warrant returns, and commitment to correctional facilities" (McDonald, Greene, and Worzella, p. 77).
- **Day fines divert people from more expensive forms of custody.** Because day fines allow for a larger range in the amount of the fines imposed (no minimums and ideally no caps) they allow for a greater range of punishments (more severe offenses can be considered) and can be used in place of other intermediate sanctions such as probation, community service and boot camps. By imposing monetary fines on offenders instead of removing them from society, criminal justice systems avoid severing the social bonds and networks that offenders have with their communities and families. Day fines punish offenders monetarily without depriving them of social support. Offenders can still live in the

community and earn an income while paying off their debts to victims and society.

Weaknesses of Day Fines

- **Day fine administration requires sound collection systems, which are not present in most jurisdictions.** European countries have developed collection and monitoring protocols that require minimal effort, but U.S. jurisdictions have not implemented such systems. Collection agencies, probation services and the court clerk are generally tasked with collecting fines *ad hoc*. In some jurisdictions, no specialized office is tasked. Court administrators often make it a low priority. The means of collecting the fines is often convoluted and confusing. (Tonry and Hamilton, 1995, p.17).

Collection rates are enhanced in court systems where:

- Installment systems are in place.
 - Monitoring systems are in place.
 - Interest and surcharges are tallied (Hillsman, 1990, pp. 69-71).
- **Offenders sometimes need coercion to pay day fines.** The types of coercive methods used to enforce payment include:
 - Imprisonment.
 - Work programs or community service,
 - Civil procedures, including property seizures (Hillsman, 1990, pp. 71-74).
 - **Implementation may bring unanticipated short term costs.** For day fine systems to work, comprehensive fine collection and enforcement systems must be in place. Many resource costs occur at the beginning of the implementation process. Money is needed to train judges, court personnel and others on how to calculate day fines. After implementation, some portion of the funds must be allocated to staff and labor hours needed to track offender payments and follow up with offenders who have defaulted on their fines.
 - **The administration of day fines can be costly.** The court, or the agency tasked with administering the day fine, must gather all the preliminary data (net income) from a variety of sources to help fairly assess the offender's wealth in order to calculate an appropriate day fine. Courts are often satisfied if they have determined an "approximate" income for the offender. However, there are instances where (by the demeanor and lifestyle of the offender) it appears that the offender is underreporting his actual net worth, whether he receives money legally or illegally. In those instances, court personnel may need to better investigate the offender's finances.

Legal and Cultural Impediments to Day Fine Implementation

One of the major impediments to implementing a day fine program in the United States is limited access to an offender's income information. The Internal Revenue Service is not permitted to disclose income tax information to courts. Also, federal and state privacy laws prohibit financial institutions from disclosing information without consent. As a result, most of the day fines are assessed based on an offender's self-reported income. These self-reports may not be reliable or trustworthy.

Despite the lack of access to official reports of income, courts already have access to considerable information about the offender's income through information disclosed to police during interrogations and initial investigations of the case, pretrial services, and other contacts with the offender. Furthermore, the court could issue a subpoena for an offender's records to be produced in court if there is an issue as to the validity of the amount. This can occur if an offender reports a modest income but seems to be living a lavish lifestyle (e.g., the offender has expensive clothes, the offender hires a private defense attorney).

Another impediment to the collection of day fines is a stipulation of minimum and maximum amounts that can be collected in many jurisdictions. These can greatly reduce one benefit of using day fines, which is as a means of generating revenue for the jurisdiction.

Data Needed to Evaluate the Use of Day Fines

Various measures of program performance can be constructed. A successful day fine system should have goals that include:

- Reducing the use of custodial sanctions as the first or only punishments for offenders.
- Creating equal and proportionate punishment for all offenders.
- Increasing criminal justice system revenues and decreasing system costs (e.g., system budgets, victim funds, costs associated with the courts)
- Ensuring that offenders pay fines.
- Safeguarding against increased public safety arrests.

Data regarding relative use of sanctions, fine payments and recidivism should be readily available. Most jurisdictions will need special efforts to collect data on cost savings from reduced supervision and confinement, and on actual revenues obtained from fine collections.

Conclusion

Day fines convey many important benefits to criminal justice systems, especially the capability to greatly reduce corrections populations. Drawbacks are essentially procedural

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and reduce the benefits only modestly. Moreover, the administrative structures of day fine systems are so varied that most systemic peculiarities can be accommodated.

Previous U.S. experiences indicate that courts had little trouble sentencing offenders to day fines and computing fine amounts. The challenges involved monitoring and enforcing fine collections. European systems offer multiple ways to address these challenges.

Fines should be imposed on a wide range of criminal offenses, including lesser felonies. The goal is to reduce corrections populations, especially prison and jail populations. This requires targeting some offenses for which people are normally sent to prison. Penalties may escalate for repeat offenses to include prison or jail, but probation sentences should be avoided. Combining fines with suspended sentences or community service will minimize the drain on system resources.

Court systems that successfully implemented day fines exhibited similar characteristics

- Fines were set in relation to the offenders' financial circumstances.
- Collection procedures emphasized reasonable payment schedules, close monitoring of offenders' performance and swift response to nonpayment.
- Enforcement efforts to compel payment did not start with threats of imprisonment but instead with a progression of mounting pressures and threats of more coercive responses (Hillsman, 1990, pp. 74-75):.

Nonetheless, all U.S. courts that started day fine programs eventually terminated their efforts. This indicates that law enforcement must look for additional recommendations.

One such recommendation would be to move the collection process out of the courts, which are ill-equipped to track payments and manage a fine-collection system. Responsibilities could be transferred to some other office of municipal government with capabilities for collecting revenues (e.g., a tax assessor). Alternatively, courts could contract with private collection services that routinely collect funds for a variety of loans. Either solution would remove a significant challenge to administration of the system.

Another suggestion that would help with day fine administration is to follow the example of Nordic countries, who try to collect the fine in a lump-sum payment (via credit card) at the point of levy. This vastly simplifies the administration of the system and reduces monitoring overhead.

Finally, enforcement of collections should follow the Swedish model: confiscate property to remedy nonpayment. If the primary reason for implementing day fines is to reduce corrections populations, it seems counterproductive to consume prison and jail resources as part of the process.

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