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Law Reform Commission
of Canada

Commission de réforme du droit
du Canada

restitution and compensation

fines

Working Papers 5&6

Law Reform Commission of Canada

Working Papers 5&6

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and
compensation
■
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October 1974

Notice

This *Working Paper* presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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Foreword

In Working Paper No. 3, The Principles of Sentencing and Dispositions, the Commission has laid out a framework for further, more specific studies. This volume contains Working Paper No. 5, Restitution and Compensation, and Working Paper No. 6, Fines.

Restitution and compensation have been chosen for early consideration because they represent means of directing more attention to the victim of crime, stressing the responsibility of the offender and the state to make up for the harm done to the greatest possible extent. Punitive sanctions have been far too long the overriding focus of the criminal process even though these sanctions have been given rehabilitative purposes. For that matter, rehabilitation too has been directed mainly to the offender and not to the victim and very little has been done to reconcile the victim to society and its laws.

Only during the last decade have compensation schemes been developed for a small number of offences. And restitution has been available only to a limited extent, whether through the criminal process or civil action. The present working paper has as its primary aim to make restitution—the responsibility of the offender to the victim to make good the harm done—a basic principle in criminal law, and to supplement it by a scheme for compensation—assistance by the state where the offender is not detected or where he is unable to assume responsibility for restitution.

The role of fines would shift accordingly. Apart from situations where they are imposed for crimes that have no specific victim, such as offences against public order, a fine would represent the penalty for an offence, over and above restitution. In addition, to ensure a more equitable application of fines, we recommend a system of day-fines based on income rather than fixed amounts. Finally, following the principle that imprisonment should only be used when that form of punishment is absolutely necessary, we are opposed to the automatic alternative of days in jail to fines.

Further working papers in the area of sentencing and dispositions will deal with subjects such as diversion, imprisonment and release. Background studies for these working papers dealing with the subjects in greater detail and from various perspectives will be made available

through Information Canada. The working papers should lead to a comprehensive policy of sentencing and dispositions. We therefore strongly urge the public to give us its criticisms and suggestions.

Working Paper No. 5
Restitution and Compensation

Restitution

Introduction

Doesn't it seem to be a rejection of common sense that a convicted offender is rarely made to pay for the damage he has done? Isn't it surprising that the victim generally gets nothing for his loss? Restitution—making the offender pay or work to restore the damage—or, where this is not possible, compensation—payment from public funds to the victim for his loss—would seem to be a natural thing for sentencing policy and practice. Yet, under present law they are, more frequently than not, ignored.

In Anglo-Saxon times restitution was seen as the natural and accepted mode of settling disputes. Today the criminal law of Canada gives little recognition to restitution or its place in sentencing theory. Some other countries, however, do accept the notion of reparation as a primary consideration in sentencing. In some jurisdictions the criminal law provides for a broadened concept of restitution, including apologies for the wrong done or the notion of paying back through work.

Not only are such legislative statements in accord with common sense, but with social practices as well. How frequently do business firms settle thefts by employees privately, extracting in many cases a promise to pay the money back? How frequently do police, for example, using proper discretion, suggest to the offender and victim that rather than proceed with charges they should work out a suitable compromise involving restitution?

Not only are these practices in accord with common sense, they are also just. If justice is to be done, the violation of the individual victim's personal and property rights ought to be redressed. The sanction in criminal cases becomes justifiable on account of the offender's violation of someone else's rights—rights that are publicly supported through the criminal law. Under present sentencing policy, however, it is not the damage to the victim's rights and interest that are recognized at the time of sentencing, but society's interests. Thus, in the interests of public protection, the offender's fine is payable to the Crown, or his

liberty is forfeited to the state. As his losses tend to be swept aside by state interests in the criminal trial, the victim is left unsatisfied.

To some extent the victim's losses are recovered through various types of social insurance legislation. If the crime resulted in loss of employment, benefits may be available under the unemployment insurance law. Other welfare measures may also mitigate losses. Thus, medical and hospital bills will be paid for under the public health insurance schemes. More recently various provincial statutes provide for some compensation to victims of crime although property losses are excluded. In addition, the victim may sue the offender for damages, providing his identity and whereabouts are known. This civil remedy, however, is expensive, often illusory, and little used. There is, therefore, a practical need to consider restitution as a sanction.

Not only is restitution a natural and just response to crime, it is also a rational sanction. This can best be perceived by examining the nature of crime.

In seeking to understand crime and to develop responses to it, it may be helpful to view it not as a pathology or an evil to be suppressed at all costs but as an inevitable aspect of social living. In civil law the inevitability of social conflict has long been recognized. Thus, many social conflicts classed as torts or breaches of contract are understood to be normal features of social life, frequently serving the social purpose of clarifying different value positions. In criminal law, too, the wrongful conduct can be seen as an aspect of conflicting values as, for example, in some drug offences and in abortion. Through conflicts over value positions society has the opportunity of reaffirming its view of what conduct is so injurious that it ought to be dealt with by penal sanctions. Should the emphasis in sentencing policy, then, be on the suppression of crime through severe sanctions or should it be on making clear what values are at stake in the conflict and affirming in a tolerant but firm way those values that have the support of the community? Should sentencing policy emphasize the rejection of the offender as a parasite on the body politic, or should we, on finding the offender responsible for having committed an offence take into account what the social sciences and common experience teach us about human behaviour and impose a sanction that encourages reconciliation and redress?

Doubtless there are offences in respect of which reconciliation is useless and where the most rational sanction may be prolonged imprisonment. For the great majority of offences, however, restitution would

appear to be appropriate. Restitution involves acceptance of the offender as a responsible person with the capacity to undertake constructive and socially approved acts. It challenges the offender to see the conflict in values between himself, the victim, and society. In particular, restitution invites the offender to see his conduct in terms of the damage it has done to the victim's rights and expectations. It contemplates that the offender has the capacity to accept his full or partial responsibility for the alleged offence and that he will in many cases be willing to discharge that responsibility by making amends.

As pointed out in the working paper on The Principles of Sentencing and Dispositions, the concern in sentencing should be to choose a just sentence. We suggest that in many cases restitution as a sanction would satisfy the demands of justice: in other cases supplementary sanctions may be necessary. Furthermore, to the extent that they may be operative, deterrence and rehabilitation would find scope within the sentence supported by a reasoned explanation. Thus, the offender's restitution payments, for example, or his work done in lieu of such payments would become his correction, for we believe the most valuable form of correction is self-correction.

It is not only on *a priori* grounds, such as those just discussed, that restitution should be given greater prominence in sentencing and dispositions. On quite practical grounds restitution offers greater satisfactions and benefits to all concerned. Under restitution the victim, first of all, is no longer used largely as a means of protecting society's collective values. Rather his claim to satisfaction as well as society's is recognized in restitution and compensation. An important part of this recognition is the victim's psychological need that notice be taken of the wrong done.

Recognition of the victim's needs underlines at the same time the larger social interest inherent in the individual victim's loss. Thus, social values are reaffirmed through restitution to victim. Society gains from restitution in other ways as well. To the extent that restitution works towards self-correction, and prevents or at least discourages the offender's committal to a life of crime, the community enjoys a measure of protection, security and savings. Depriving offenders of the fruits of their crimes or ensuring that offenders assist in compensating victims for their losses should assist in discouraging criminal activity. Finally, to the extent that restitution encourages society to perceive crime in a more realistic way, as a form of social interaction, it should lead to more productive responses not only by Parliament, the courts, police,

and correctional officials but also by ordinary citizens and potential victims.

The offender, too, benefits in a practical way from a sentencing policy that emphasizes restitution. He is treated as a responsible human being; his dignity, personality and capacity to engage in constructive social activity are recognized and encouraged. Rather than being further isolated from social and economic intercourse he is invited to a reconciliation with the community. While he is not permitted to escape responsibility for his crime his positive ties with family, friends and the community are encouraged, as are opportunities for him to do useful work.

In this way restitution acknowledges the limitations of a sentencing policy designed to "correct" or "rehabilitate" offenders and yet attempts to avoid the futility of strictly punitive sanctions. In coming to the point of view that restitution be a central consideration in sentencing and dispositions, the Commission has drawn upon the social sciences and philosophy as well as history.

The Meaning of Restitution

For the purposes of this working paper, "Restitution" is a sanction permitting a payment of money or any thing done by the offender for the purpose of making good the damage to the victim. Since the purpose is to restore, as far as possible, the financial, physical or psychological loss, restitution could take many forms including an apology, monetary payment, or a work order.

Restitution refers to the contribution made by an offender towards the satisfaction of his victim. It moves from the offender to the victim and is personal. "Compensation", on the other hand, is impersonal and refers to a contribution or payment by the state to the victim. The proposed reform would supplement restitution, where necessary, with compensation.

Historical Roots

In Anglo-Saxon England there was no criminal law as we know it. Disputes were dealt with by a process greatly resembling our civil law. When an individual felt that he had suffered damage because of another's wrongful conduct he was permitted either to settle the matter by agreement or to proceed before a tribunal. Restitution was the order of the day and other sanctions, including imprisonment, were rarely used.

As the common law developed, criminal law became a distinct branch of law. Numerous antisocial acts were seen to be "offences against the state" or "crimes" rather than personal wrongs or torts. This tendency to characterize some wrongs as "crimes" was encouraged by the practice under which the lands and property of convicted persons were forfeited to the king or feudal lord; fines, as well, became payable to feudal lords and not to the victim. The natural practice of compensating the victim or his relatives was discouraged by making it an offence to conceal the commission of a felony or convert the crime into a source of profit. In time, fines and property that would have gone in satisfaction of the victim's claims were diverted to the state. Compounding an offence (that is, accepting an economic benefit in satisfaction of the wrong done without the consent of the court or in a manner that is contrary to the public interest) still remains a crime under the Canadian Criminal Code and discourages private settlement or restitution.

It would now seem that historical developments, however well intentioned, effectively removed the victim from sentencing policy and obscured the view that crime was social conflict.

Current Canadian Law

Today in Canada restitution can be made a condition of a probation order. In addition, in minor offences of damage to property the court may order the accused to pay "compensation" not exceeding \$50.00. This sanction can only be imposed as an additional penalty; it cannot stand by itself. There are also the little-used provisions in the Code whereby at the time of sentence the victim or "a person aggrieved" may ask the judge to have the accused pay to him an amount by way of satisfaction and compensation for loss or damage to property suffered as a result of the offender's crime. Still other provisions in the Code relate to restoration of stolen property purchased by third parties or held by the court or the police for the purposes of the trial.

There is nothing in the Criminal Code to suggest that restitution should be seen as a sanction in its own right and nothing to tie restitution to a theory of sentencing or criminal law. The isolated provisions related to restoration of property and compensation for property loss appear to be historical carry-overs from English legislation that were grudgingly grafted onto the penal law in order to save victims the expense of a civil suit to regain stolen property or secure compensation. The civil nature of these provisions is shown by the fact that they

come into operation for the most part, "on application" of the victim. With one exception the judge does not have power to impose them on his own initiative, as he does with fines. In practice these provisions are used infrequently and even when they are, it is often a large company that appears as the victim to ask for compensation. More frequently losses by companies tend to be dealt with under insurance law, a mode of settlement that many lawyers and businessmen prefer to applications in the criminal courts.

Somewhat more widely used are the restitution provisions under a probation order. In a survey of records covering over 4,294 convicted appearances from 1967 to 1972,* however, restitution was recorded only for 6 convictions, that is, in approximately .1% of the sentences. It is possible, however, that the records do not completely reflect how often restitution is used. For one thing restitution is sometimes used unofficially on adjournment before sentence. If restitution is made during the adjournment the prosecution and the judge will necessarily take it into account at the hearing on sentence. At the same time, the extent to which fines are used and paid is referred to later in this paper.

Although there is little empirical evidence of how frequently restitution is used, there are indications that restitution appears to be working out well where it is imposed. At the same time there can be no doubt that some probation officers dislike the added burden of collecting restitution payments. To what extent the office of the court clerk or administrator could assist the probation officer in this regard remains to be explored. It should also be noted that there may be some coolness towards restitution among the judiciary. This may be owing in part to a reluctance to get involved in assessing the amount of the claims. In part, too, restitution has suffered in the criminal courts because it was seen, unfortunately, as an unwanted child of the civil process: a debt collection technique that had no place in the criminal courts. Counsel for the victim and the prosecution have also, usually, all but forgotten the need to press for restitution in sentencing.

Rather than rest content with the present fragmented state of the criminal law with its various references to restitution, restoration and compensation, surely it is more rational and just to make restitution central to sentencing theory and practice and to supplement it with a compensation scheme for victims of crime.

* This survey, to be released by the Commission, is referred to as the "September Study" and involved an analysis of the records of all persons who appeared in court for the first time in September, 1969.

The "Combined Trial"

In some countries the claim for restitution is not deferred to an administrative compensation board, nor is the victim left to pursue his remedy by suing the offender in the civil courts. Instead, a claim for damages is presented during the criminal proceedings.

Depending on the jurisdiction, the procedure obliges the prosecution to put forward the victim's claim for damages or leaves the initiative with the victim to present the claim himself; in effect it allows for a combined trial of both criminal and civil liability. In some systems there are, however, practical disadvantages to this procedure. In theory, the prosecution is supposed to inform the victim that charges are being laid, but in practice the prosecution frequently fails to give such notice. The result is that the victim is effectively prevented from making a timely claim for damages during the criminal proceedings. A further weakness of the combined trial in some jurisdictions is the power of the judge to refuse to determine the issue of damages if he thinks it would not be suitable or would delay the trial. Differences in the concept of causation and in the rules of evidence in civil and criminal proceedings are sometimes given as reasons why judges are unwilling to hear claims for damages in the criminal trial.

Other critics question the desirability of giving the plaintiff in a civil action a central place in the investigation and conduct of the trial. Any potential bias, however, could be avoided by putting off consideration of the civil claim until after the verdict in the criminal trial. However, there is no need to complicate the criminal trial with civil issues. After the matter of guilt has been decided, it should be feasible to consider restitution and even compensation under the more relaxed rules of procedure at the sentencing stage. Moreover, in Canada, combining the civil and criminal trial would raise serious constitutional issues; civil law is generally under the jurisdiction of the provinces, while criminal law is a federal matter.

For various reasons, therefore, we do not favour the combined trial as a device in considering restitution in criminal law.

Will it Work?

Administration Too Burdensome

In most cases the procedure during sentencing is not, and presumably should not be, strictly adversarial as at trial. Notwithstanding the merits of cross-examination and the rules of evidence in clarifying legal issues and determining facts, it is necessary at the sentencing stage

to make a broader inquiry than the strict rules would permit into such matters as the history of the offence and the circumstances of the offender. This is not to say that the sentencing process should not be open, fair, and accountable. It does mean that a judge should be able to have access to a wide range of material relating to the circumstances of the offence, including the amount of loss suffered on the criminal injury.

One objection to restitution is that criminal courts are not able to deal with the complicated questions involved in assessing the amount of the damage. The force of this argument must be weighed against the fact that almost all judges are trained and experienced lawyers. In addition county court and supreme court judges hear both civil and criminal cases and are familiar with the assessment of damage or loss. According to our information, judges in England and Wales are not experiencing any great problems in administering the new sentencing provisions relating to reparation. Also crime compensation boards make assessments of loss regularly without undue trouble.

Where assessment of the amount of the loss is complicated or time-consuming, the judge could order that restitution be made, with the exact amount and terms of payment to be assessed by the court clerk or administrator. A similar suggestion has been made with respect to calculation of the amount of the day-fine in the Commission's Working Paper on Fines. Alternatively, assessment of the amount of restitution could be made by the existing compensation boards. It should not be forgotten, however, that restitution is a sentencing matter and assessment should remain within the control of the court.

Assuming that restitution is moved from the background to centre stage in sentencing and dispositions, zeal in recovering restitution payments should not wipe out the reality that some offenders may have difficulty in making payments unless they are given time to do so. Indeed, the offender's ability to pay should be given attention at several different stages. This type of consideration, as in fines, could perhaps best be handled through the court clerk or administrator. A more detailed discussion of enforcement procedures may be found in the Commission's Working Paper on Fines.

Do They Have the Money?

At this point it would be naive not to acknowledge the chief argument against the implementation of restitution as a major consideration in sentencing and dispositions. In colloquial terms the argument is: "It won't work because all criminals are poor and, even if some of them have money, you'll never be able to make them pay".

An examination of the education and means of Canadian offenders indicates that, while many are below or near the poverty line, it is wrong to suggest that all offenders are without means to pay any monetary sanction. Experience with fines, which are currently imposed without a means test in many cases, shows that a great many offenders can pay. A study of fines imposed on female-offenders in Toronto during a four month period in 1970 showed that the fines were paid in full in 79 percent of the cases. This is consistent with an analysis of fines collected in New Brunswick, Halifax, and Vancouver where the data shows that fines imposed are paid in approximately 83 percent of the cases. In addition, the Toronto study on fines showed that 44 percent of the fines were in amounts of \$25.00 or less while another 24 percent ranged from \$30.00 to \$75.00. An analysis of sanctions imposed in property offences as revealed in statistics released by Statistics Canada shows that fines are imposed in approximately 31 percent of indictable offences. If fines are being paid, it is likely that restitution is within the capacity of the offender to pay.

The nature of offences and the amounts of losses involved are factors that will affect the restitution order. Statistically, the most frequent Criminal Code offences in Canada apart from motor vehicle offences are assault and theft. Precise statistics on the damage or amounts of money involved are not available but from an analysis of Toronto police records it appears that in cases of theft, break and enter, possession of stolen goods, robbery, and fraud, the average value of stolen goods as estimated in police reports was less than \$25.00 in 27 percent of the cases. In another 36 percent the value of the goods was between \$26.00 and \$100.00. If this data has general application it would indicate that in many cases a restitution order need not be unduly large and could be within the ability to pay of a great number of offenders notwithstanding their relative poverty. Losses in cases of personal injury may be somewhat larger. Studies in 1966 in Ontario and in 1973 in Vancouver indicated that the amount of the loss to victims, including both personal injury and property loss, on the average, approximated \$300.00 some of which was covered by insurance or other measures. However, in Ontario through 1969-71, the average award by the Criminal Injuries Compensation Board was \$1,900.00. This may not be representative of all offences against the person as it is estimated that less than 3 percent of those eligible for compensation actually apply. As indicated earlier, where restitution is made a term of a probation order, payment and collection appear to be working well.

Can They Work?

If the offender does not have the money to make good a restitution order, he should be given an opportunity to do work either for the victim, some other person, or some agency. In some cases the work could be service in lieu of payment, while in others the offender could be paid the going wage and make restitution payments out of his wage. In this way, in so far as possible, the losses brought about by the offender would be restored in part by his own work and effort and not simply passed on to the victim's family, private charity, or public welfare.

Admittedly, this sort of thing is already being done in isolated cases. What is needed is to give restitution—including not only money payments but work, or restitution in kind—first consideration whenever possible.

Frequently, however, the courts do not have the kind of support services needed to make work or service orders feasible. This and other aspects of the problem will be developed in the Commission's forthcoming paper on Community Service Orders.

It is not only at the court level, however, that restitution should be considered. Presumably, it would be an important consideration in pre-trial settlement procedures under a diversion scheme, and could also be a factor in determining release procedures during a term of imprisonment. If a prisoner is gainfully employed at a reasonable wage, he should be given the opportunity to budget part of his income for restitution payments. Yet under present conditions, no more than 20 percent of prisoners in federal institutions are engaged in working at industrial-type jobs. Moreover, until the recent announcement to pay the minimum wage to those who work at industrial jobs, wages paid in federal institutions ranged from a mere \$3.00 to \$4.00 a week. Until imprisonment is recognized as a deprivation of liberty, and not necessarily a deprivation of the opportunity to work at a reasonable wage, restitution at the institutional level will remain impossible.

The Role of Other Sanctions

Under the Commission's proposal, restitution would become a central consideration in sentencing and dispositions. The term "central consideration" is used to indicate that restitution would merit foremost, but not exclusive, consideration. What is anticipated is a range of sanctions ranging from relatively light to severe, with restitution receiving consideration in most offences.

In many cases, especially those not requiring deprivation of liberty, restitution may be the main sanction. Yet it would hardly be just were the offender merely required to pay back what he had taken. It is fitting that he would be required to pay back more than he took. Consequently, in many cases, a fine would be an appropriate additional sanction in recognition of the harm done to society and the costs involved in upholding values and protecting individual rights.

In addition, it is anticipated that fines would continue to play an important role as a sanction in their own right in cases such as impaired driving where the injury is not to a specific victim but to the public.

Moreover, in cases where restitution is to be the main sanction, it may be useful to impose probation as an additional penalty for offenders requiring community supervision.

Among the goals of the proposal to give increased attention to restitution is a reduction in the use of unnecessary imprisonment. As noted in the Commission's forthcoming working papers on Diversion and Imprisonment, in non-violent offences against property short terms of imprisonment may not always be necessary if restitution and work orders are available.

Compensation

Restitution by offenders cannot deal with all cases in which there is a need to pay back the loss suffered by victims of crime. In some instances an offender may not be able or willing to pay restitution, or, having agreed to pay, may for various reasons be unable to pay all or part of the amount required. In another type of case the offender will not be known or proceedings may not be undertaken because of lack of evidence. Accordingly, there is a need to consider a scheme of compensation from the state to supplement restitution from the offender.

Justification

Compensation for victims of crime can be a valuable tool in supporting the purposes of the criminal law. As suggested in the Commission's working paper, *The General Principles of Sentencing and Dispositions*, the Commission is of the view that one of the purposes of the criminal law is to protect core values. At the basis of any society is a shared trust, an implicit understanding that certain values will be respected. Some of these values are thought to be so important that they are protected through various provisions of the criminal law. A violation of those values in some cases may not only be an injury to individual rights, but an injury as well to the feeling of trust in society generally. Thus, the law ought not only to show a concern for the victim's injury but also take concrete measures to restore the harm done to public trust and confidence. Public confidence and trust might also be reinforced by prompt police action or dispositions that demonstrate a serious concern for the wrong done. This concern, however, is directed against the offender. Compensation, on the other hand, is directed towards the victim and should not be lost sight of as another meaningful and visible demonstration of societal concern that criminal wrongs be righted.

Before considering whether compensation for criminal injuries should be through the criminal law, social insurance or some other system, it will be helpful to review other arguments sometimes put forward as justifying compensation to victims of crime.

It is stated from time to time that the state, in taxing the citizen to maintain police forces, has reduced the citizen's capacity to protect himself. The actions of the state in its taxing and policing functions, are, undoubtedly, a desirable trade-off against the situation where men would build their own fortresses or turn to the law of the jungle, but part of the trade-off, it is said, should include reasonable compensation for some criminal injuries.

Some schemes for compensation to victims of crime are based purely and simply on sympathy and offer no "right" to compensation. To care about victims of crime and to offer compensation out of sympathy is understandable, but since caring and sympathy can be swayed by largely personal factors it may be desirable to relate this sympathy to some objective basis that would reduce the risk of favouritism. In some jurisdictions this objective basis is found by requiring proof of "need". While it is difficult to reconcile "need" and the welfare approach with the demands of justice in sentencing, the notion of concern for the individual is worth preserving.

Among the foregoing, arguments are sometimes put that the state, in undertaking to provide security to all members of society, is under a duty to provide compensation when that security fails. It has been pointed out, however, that the state does not really hold out a promise to protect everyone from all criminal injuries. At most it simply attempts to keep the peace and keep crime to a minimum. These attempts by the state do not give rise to legal promises nor legal rights or duties. At most the state may be under a moral obligation to provide compensation to victims of crime.

Another argument favouring state compensation is based on the proposition that since society generates conditions favourable to crime such as inadequate education and housing or inadequate health services, unequal economic opportunities, or marketing and tax structures that invite avoidance or abuse, society must take the responsibility for compensating those who are injured by crime. An analogy could be made to Workmen's Compensation. In the interests of economic growth society encourages men to work in the presence of risk to life and limb yet compensates those who are injured in doing so. In effect this approach is really one of distributing the losses and is a recognition of a social liability for this kind of injury or loss. Greater security generally comes about by sharing the cost of the losses rather than letting them rest where they fall. In Workmen's Compensation the losses are borne by the industry and not by the injured worker or society generally. The logical consequence of this approach to injuries leads to public insurance schemes under which major losses are covered

whether they arise as a result of industrial accident, for example, automobile crash, or crime. The recent New Zealand Accident Compensation Act and the current British Royal Commission on compensation for personal injury are illustrations of this approach.

In a society that places a high value on openness and freedom from pervading police control the argument for social liability for criminal injuries is understandable. However, as will be pointed out shortly, there are good reasons why such a liability should not be discharged through a public insurance scheme, but be closely associated with the criminal justice system.

Delivery Systems

What is the best instrument for achieving the two principal aims of a compensation scheme: namely, to sustain public confidence and trust that core values will be supported and to demonstrate a concern for individual rights and well being? Is it adequate to leave the victim of criminal injuries to his civil law remedy of suing for damages or to private insurance? Not only is a private remedy in tort useless where the offender is not known or cannot be found, it is generally illusory and unprofitable even where the offender is sued. Private insurance also is inadequate not only because it probably leaves out more people than it covers, but also because it does not meet the real problem. At issue is the need for a social response demonstrating concern for the individual well being of the victim and a collective and visible affirmation that certain core values remain important.

Can public insurance schemes serve these objectives? To a certain extent the victim's needs can be met by a variety of social insurance laws including Unemployment Insurance, Workmen's Compensation, Canada Pension Plan, public medical and hospital insurance schemes, or welfare. No doubt the general framework of social insurance, private insurance and tort law are useful parts of an approach that can alleviate the losses of victims of crime. At the same time these measures by themselves are not entirely satisfactory and their benefits are limited. Moreover, it should not be overlooked that, to the extent that the victim does qualify under one or other of these social insurance schemes, he reduces the amount to which he might be entitled in subsequent crises. Even a comprehensive public insurance scheme, such as the one enacted in New Zealand and that under consideration in England, is not an appropriate means of giving compensation to victims of crime.

To place in one scheme compensation for all losses whether arising from sickness, industrial accident, unemployment, or motor vehicle

accident—to offer compensation for all such injuries without distinction—may well be undesirable. Do we want to place criminal injuries on the same plane as industrial accidents? To compensate victims of crimes and victims of automobile accidents out of the same insurance scheme may tend to blur the distinction between crime, negligence and accident. To be sure, while the victim of crime receives compensation from insurance officials, the offender may be apprehended or face threatened apprehension and conviction at the hands of the police and courts. Does it raise confusion about the purposes of the criminal law to treat the criminal event, on the one hand, on the same basis as an industrial accident and, on the other hand, threaten punishment of the offender on the basis of his individual responsibility? Compensation to victims of crime can be used to further the purposes of the criminal law and ought not to be lost in social insurance programs aimed at sharing the losses arising from the social and economic policies of society as a whole. That being so, the structures and mechanisms for delivery of compensation to victims of crimes should be related to the criminal law and its processes.

Accordingly, it becomes important that compensation to victims of criminal injuries be connected to the Departments of Justice or Attorneys-General and visibly be seen as an instrument in support of the administration of justice. From this point of view the isolation of the existing compensation to victims of crime legislation can be appreciated. To begin with the legislation exists in only eight of the ten provinces, and is not obviously tied to criminal processes. In some provinces the legislation is administered by the Department of Labour rather than the Department of Justice or the Department of the Attorney-General. In most provinces the schemes are administered by administrative boards, and judging by the number of applications for compensation, are relatively unknown to victims. If the purposes of criminal law are to be well served, the compensation boards must be brought visibly to the forefront of the administration of justice and linked to the courts in determining compensation.

Moreover, if the educative function of the criminal law and its concern for individual well-being are to be best served, compensation should be timely. If the monetary payment is to serve as a demonstrable affirmation of the importance of the individual and social values violated by the crime, compensation should be made promptly to restore the faith, confidence and trust that core values be respected. This would have important psychological value for the victim: a timely monetary payment in compensation of loss can substantially reduce the anxiety arising from the injury.

Scope

If compensation is to have a correctional component should it be restricted only to crimes of violence as is generally the case under existing provincial schemes for compensation to victims of crimes? Should victims be compensated for property loss? Are offences against property the type of criminal event in which it is desirable not only to see that the victim is compensated but that compensation be through the medium of the criminal law and at state expense? Are commercial frauds the kinds of injuries that the criminal law should be most concerned about, or should they be excluded for compensation on the ground that these are injuries foreseeably arising out of an enterprise entered into with a view to making a profit? Finally, should the range of victims be extended to include businesses or other corporate persons?

First of all, there can be little disagreement with the view that compensation to victims should cover personal injuries resulting from crimes of violence. Whether compensation should be extended to cover property loss is more difficult. Logically, it can be said that property loss should be covered, since such compensation would support core values, strengthen social bonds, reduce the victim's anxiety and affirm individual rights. On a practical level, however, the cost of compensating property losses would be substantial and funds available for compensation are limited. Since it is justifiable to draw a distinction between laws protecting individual dignity and well being and those protecting property or commercial interests, there can be no doubt that the former should have priority in receiving compensation.

What are the estimates of the cost of extending compensation for loss of property? Property crimes are among the most numerous of all criminal offences. In 1971 in Canada over 800,000 such offences were reported to the police, almost 300,000 of which were theft under \$50.00. Considering that over fifty per cent of these latter cases involved losses of less than \$25.00 and in other property offences over fifty per cent involved losses of less than \$200.00, it is estimated that the loss from property offences, not including auto theft, would be approximately \$96,000,000 a year. Over one-half this amount can probably be attributed to losses by corporate victims, and another ten per cent could be paid by offenders actually apprehended and able to make restitution. Thus, apart from losses to corporations and cases where the offender himself can make restitution, compensation claims by individual victims for property loss would still approximate the substantial amount of \$40,000,000 annually.

Other disadvantages to extending compensation to property losses can be anticipated. Such a coverage would probably greatly increase the reported crime rate. It is commonly assumed that many property offences are not reported to the police. According to one estimate, for every crime of this type that is reported, another two go unreported. One reason given for such non-reporting is that victims feel it will do no good. Police, they feel, will not be able to apprehend the offender nor recover the goods. Were reporting to be followed by an opportunity to claim compensation, it is likely that reported crimes would greatly increase in number. This may be a disadvantage particularly in a society that wants to encourage individuals to handle minor conflicts on their own.

Furthermore, it is said, extending compensation to crimes involving property loss would encourage numerous fraudulent claims. One way to combat these, would be to rely on police investigation or setting up a claims bureau similar to those operated by the insurance industry. This in turn would result in an increased drain on the tax dollar.

Finally, it is said, property today no longer has the high value it had a hundred years ago. In the "throw-away" consumer oriented society of plastic, foam and nylon, many consumer items are looked upon as readily replaceable and, indeed, are made for early obsolescence. Under these circumstances, it is said to be only reasonable to exclude property loss from victim compensation schemes.

For these reasons the Commission is opposed, at this time, to extending compensation to victims of crimes for property losses in general. The distinction between values promoting individual dignity and well-being as opposed to property interests seems sound.

Still, there are some crimes against property that, in our view, should be considered in much the same light as crimes against the person. Crimes, such as for example, breaking and entering into the home result in injuries to feelings, dignity and personal security as much as crimes against the person. The same can be said of theft from the person. In such cases tangible expression of concern by the state would tend to enhance trust and cohesiveness in society. We are, therefore, of the view that compensation should extend to victims of such crimes. However, theft of property not under an individual's personal control or possession, while still a matter of concern, does not involve an invasion of a person's dignity and personal well-being in the same way. Monetary loss or an invasion of rights of ownership through theft or fraud relate more to protection of economic interests. This seems to be the type of losses for which insurance can adequately protect the victim.

If property losses generally are to be excluded as an item of compensation in criminal injuries there is little to be gained by asking whether corporate or institutional victims should be compensated. Compensating corporations in relation to crimes of personal violence is not an issue: the corporate body does not bleed as ordinary mortals do. In any event, losses from crimes against corporate bodies can be, and are generally adequately covered by insurance or through increased charges and services borne by society generally.

Financing

Financing compensation raises other considerations. Restitution, of course, would be paid by the offender to the extent that he was able. Should the offender's resources be such as to make it unrealistic to order full restitution, the victim should be entitled to compensation to cover the outstanding loss. Similarly, when the offender is unable to pay, or is not located and brought to justice, the victim's claims for compensation should be met by the state.

So far as possible money for compensation should be derived from fines or forfeitures imposed in the criminal courts. That is to say, those who commit criminal offences should be the initial source of funds to compensate victims. Even though fines may be expected to give way to restitution in many cases, fines will still be an important sanction. This will be so particularly in crimes against public order where there may be no individual victim. Funds from fines or forfeitures or subrogation could be reserved in a special compensation fund, a *caisse d'amendes* or a reparation chest. Such a fund would serve as a highly visible reminder that in crime, it is not only the damage to society that must be paid back but the injury to individual victims. Only if the fund is not sufficient to pay adequate compensation should it be supplemented from the federal or provincial treasuries.

Conclusion

The foregoing has set forth a position respecting restitution and compensation that would give increased recognition to the victim in the criminal process and encourage a broad look at the criminal event in arriving at a disposition.

It recognizes the contribution the criminal law can make through sentencing and dispositions to preserving that mutuality or shared trust that is the basis of much of civilized society. If the lawless wilfully break the rules that protect core values they ought to be held accountable and provided with the opportunity to restore the harm done to the victim and to the social fabric. When the offender is not available or cannot pay back the harm done, the victim ought not to be left on his own nor should the attack on shared values be left unattended. Rather, through compensation from the state the importance of the individual can be reaffirmed and a concern to uphold common values be visibly demonstrated.

Under existing law much can be done to extend the practice of imposing restitution as a condition of a probation order or of conditional discharge. But more can be done by legislative change to facilitate the position taken in this working paper that restitution be made a central consideration in sentencing and dispositions. Specific recommendations for legislation will be made in the Commission's final report to the Minister and Parliament. More substantial changes in law and practice, particularly at the provincial level, may be needed if compensation and compensation boards are to be visibly linked to the administration of justice. There may also be a need to reconsider the existing administrative structures supporting the court and its services. In this respect the Commission's working paper on Fines and Their Enforcement is also relevant.

Working Paper No. 6

Fines

Introduction

The authority to deprive an individual of his liberty may be the most awesome power people have given to the state. To maintain him in this condition and, further, to attempt to re-form him into a more "productive" participant in our society is a costly undertaking and its effectiveness remains in doubt.

For these reasons we recommended in working paper No. 3 that imprisonment be used with greater restraint. We suggested that some offenders should be diverted out of the formal criminal trial into forums more appropriate for arbitration and conciliation. We argued that restitution to the victim, community service, and probation are much more humane, at least equally effective in preventing recidivism, and far cheaper ways of dealing with many offenders whose minimal involvement in criminal activity or lack of dangerousness to the community does not necessitate incarceration.

It is these underlying principles that bring us to consider the fine as a sentencing alternative. Fines are certainly less awesome than imprisonment; they have not been shown to be any less effective a deterrent than any other disposition; they are clearly the least expensive measure possible.

The Commission has already indicated a preference for restitution where an individual victim is harmed. Even in those cases, however, fines may be a supplementary or alternative sanction. In other cases where the harm is not to an individual but to society generally, there may be good reason to impose a fine. In some respects this type of sanction may be looked at as paying back to the whole community.

If, both as a natural outcome of a decrease in the use of imprisonment and as a result of a positive preference for the imposition of the fine in certain cases, perhaps as an alternative to restitutions, the use of the fine in sentencing can be expected to increase, it is necessary to look at the present problems in both the imposition and enforcement of fines, and attempt to correct their shortcomings. Even if the use of the fine does not increase, we find some serious problems with the fine as it presently exists and have some positive recommendations for its improvement.

Principles in the Imposition of Fines

Which Offences?

The fine being a humane and economical form of criminal sanction, it would seem to be a sound policy for the judge to be able to impose fines for any offence for which a mandatory sanction is not specified. He would then be further enabled to exercise his discretion, directed perhaps by sentencing guidelines, according to the individual offender, his record, and the particular circumstances of the offence.

Present Criminal Code provisions preclude the judge from imposing a fine for any indictable offence punishable by more than five years imprisonment, except in conjunction with a term of imprisonment or possibly probation. This prohibition affects approximately two-thirds of all Criminal Code offences. In order to circumvent this restriction, some judges have adopted the practice of sentencing the offender to one day in prison in addition to the "real" sentence deemed appropriate in the case, the fine.

To make the law correspond with current attitudes and practices and to discourage the use of imprisonment where a fine might be as appropriate, by broadening the sentencing alternatives available to the judge, **the Commission recommends that judges be given the discretion to impose a fine as the sanction for any Criminal Code offence, except those for which a mandatory sanction is specified, and that, in order to effect this recommendation, present Criminal Code restrictions on the use of the fine be removed.**

Alternative Jail Sentences

When a judge imposes a fine as the appropriate sanction, he has presumably determined that imprisonment is an inappropriate penalty or unnecessary for the protection of society. Yet present practice sets up the fine, not to stand in its own right as the sentence of the court, but rather to be accompanied by an alternative sentence of imprisonment if the fine is not paid. "X dollars or Y days" is the typical pronouncement of a sentence that would seem to involve an inherent contradiction. It is as if the court were saying, "While we find imprisonment inappropriate in your case, you may choose to be imprisoned if you do not want

to accept the sentence we have deemed appropriate. Furthermore, whether you choose imprisonment or not, although we find imprisonment unsuitable, you will be imprisoned if you do not, for whatever reason, pay the penalty we have imposed”.

The effect of the fine or days in default sentence is that approximately 50% of admissions to provincial and local correctional institutions in certain parts of Canada in recent years have been for default in payment of fines. A considerable amount of money is therefore being spent to imprison offenders who were not meant to be imprisoned in the first place. It is recognized that most of these people are imprisoned for non-payment of fines resulting from violations of provincial statutes, primarily liquor offences. However, studies indicate sufficient use of imprisonment as an alternative to a fine in Criminal Code offences for such practice to warrant concern at a federal level as well. While some of those being imprisoned are people who choose to spend a short term in jail although they could afford to pay their fines, many seem to be people who simply cannot afford the fine owing to financial circumstances, or who are unable to organize their incomes so that they could manage to pay. In one study 40% of people imprisoned for not paying fines made partial payment either before or while in custody. This figure demonstrates a willingness but inability on the part of these people, to pay the full amount of the fine which also may have been the case for some of those imprisoned who made no payment at all. Furthermore, several studies indicate that the types of offences for which persons are imprisoned for non-payment of fines are typically “poor people’s” offences, such as vagrancy and drunkenness. In other words, the alternative jail term seems to fall discriminatorily on the poor offender. The discriminatory effect of the alternative jail term has been found in several provinces to weigh most heavily on the relatively poorer Indian population. In 1970-71 in Saskatchewan correctional centres 48.2% of admissions were for non-payment of fines. However 57.4% of native admissions were for default of fines as compared to 34.7% of non-native admissions.

Besides the discriminatory effect and cost of the days in default sentence, we believe that the whole system of criminal justice becomes suspect when the fine is seen not as a sanction but as a means of purchasing liberty.

Commissions and law reform bodies both in Canada and elsewhere have recommended **that judges be prohibited from imposing a fine and simultaneously imposing a sentence of imprisonment to be served in the event that the fine is not paid.** We adhere to this recommendation.

It has been said that where a convicted person lacks the means to pay even the smallest of fines, a short term of imprisonment is justified. We firmly reject this use of imprisonment as being a punishment for being poor and believe that by giving the individual the opportunity, for instance, to do work, that is, by a work order, justice will be far better served. Although enforcement of fines will be considered at a later stage in this paper, we would like to note that we adopt the two basic principles enunciated in the New Zealand Fines Enforcement Committee's Report, and recommend:

- (1) That, as the court in imposing a fine must have considered this to be the appropriate penalty for the offence, every effort should be made to collect the fine before resorting to imprisonment or other forms of detention.**
- (2) The final sanction of imprisonment should not be resorted to unless:**
 - (a) all other methods of enforcement have been unsuccessfully attempted or were unavailable or inappropriate, and**
 - (b) the defendant has the means or ability to pay.**

In advocating removal of the immediate threat of imprisonment, we have considered its possible effect on payment of fines. Although it is probable that the likelihood of imprisonment has some effect on securing payment, no significant increase in failure to pay has been noted, at least in New Zealand or England where imprisonment has been relegated to a last resort enforcement measure.

Day-Fines

In previous papers we have expressed the belief that a major concern of a just sentencing policy must be reasonably uniform sentences for similar offences and offenders, whether this concern be expressed in legal terms of due process and equality before the law, or by moral criteria of fairness and humanity. But with regard to pecuniary sanctions, equality of punishment is not achieved by uniformity in the dollar amount of fines. Clearly a fine of, say, \$100 would affect a poor man's life far more severely than a rich man's. We feel that the principle of equality would be far better served by a scheme that recognizes the financial circumstances of each individual offender. The financial hardship society imposes on its law-breakers through the imposition of fines is unjustifiable when it bears more heavily on its poorer members. This financial fact of the differential effect of similar fines on different offenders distinguishes the fine from other sanctions and calls for a different scheme for achieving desired

uniformity. A method that has been employed successfully in several countries is the day-fine.

Under a day-fine system the fine would be determined by the amount earned by the offender. The sentencing judge would not concern himself with the dollar amount of the fine. Having satisfied himself that the offender can pay at least a modest fine, he would, without further regard for his financial circumstances, determine the severity of the sanction in terms of a number of day-fines. Translating the sentence into dollars would become an administrative matter rather than a judicial one. In Sweden, one day-fine is equivalent to 1/1,000 of the yearly gross income of the offender. Sentenced to twenty day-fines, the person with a gross income of \$5,000 would be required to pay \$100, while another person with a gross income of \$50,000 would pay \$1,000. (Computation of the amount of the day-fine as well as the office whose responsibility it would be are dealt with further in Part Two of this paper). Thus, on being fined, the offender would be required to go immediately to the office of the court clerk, where an inquiry into his means would be held, the amount of the fine arrived at, and arrangements for payment made.

It is recognized that there may be initial difficulties in the administration of day-fines, but it is believed that the compensating benefit of greater equality in sanctions for rich and poor alike justifies its implementation. However, small fines in sums of up to \$25, which cause little hardship for anyone notwithstanding his financial circumstances, need not be subject to the administrative process of determining means and the value of the day-fine. This exception to the day-fine scheme would encompass a large number of those fines presently imposed. In Toronto provincial courts from January to April 1971, 44% of the women fined were fined in amounts of \$25 or less, and over half of these fines were for Criminal Code offences.

We recommend, therefore, that all fines over \$25 be judicially expressed in terms of day-fines, and that the court clerk or court administrator conduct a means inquiry to determine the dollar value of the fine, immediately upon pronouncement of the sentence. We would suggest, however, that before the day-fine system is fully adopted, a pilot project be undertaken, in which day-fines are tested for one Criminal Code offence, that of impaired driving, for example, an offence for which fines are relatively high and which encompasses offenders with a wide variety of incomes.

La caisse d'amendes: A Reparation Chest

In our working paper on Restitution and Compensation, we recommended that a highly visible fund be set up from which some

victims of criminal activities would receive financial compensation for their losses. While we will not here delve into the underlying philosophy of this "compensation pot", we repeat our proposal that all revenues from fines collected as criminal sanctions flow into such a fund. If it is considered desirable to reinstate the victim in his historic position of importance in the criminal process, the conclusion follows that revenue from fines should go not to the state as is presently the case, but to the victims of criminal offences. In this way, criminal offences, the monetary penalties imposed for them, and the victims' losses would properly be seen as being interrelated.

An Administrative Scheme of Enforcement

Introduction

Although the Criminal Code presently places the responsibility for enforcement of fines on the sentencing judge, usually much of the initiative is taken by the clerk of the court, with the assistance of local police. The judge generally has neither the time nor the resources to oversee the payment of fines which, after all, is an administrative matter; similarly the police, charged with the responsibility of finding offenders in default and arresting them, do not have the time to give this task a great deal of attention. Furthermore, complications arise when the offender lives or moves beyond the geographical jurisdiction of the police and court.

To illustrate the difficulties of this shared responsibility in the enforcement of fines, let us look at what happened to the 830 fines imposed for Criminal Code offences by provincial judges in one Canadian city in 1971. Although 199 fines were not paid in the time allotted, only 158 warrants were issued before the end of the year. Although 158 warrants were issued, only 81 were executed (73 of which resulted in payment, 8 resulted in jail terms for non-payment). So, several months after time to pay had expired, 118 of the original 830 offenders continued to avoid payment. Where offenders are negligent in making prompt payment or wilfully avoid making payment, the costs of administration are needlessly increased. The desirability of passing part of these additional costs on to the offender in certain cases should not be overlooked.

By centralizing all aspects of enforcement of fines in one administrative agency with adequate manpower and facilities to execute these functions, and to keep accurate, accessible and up-to-date records possibly through computerization, much of the inefficiency and resultant inequities of the present system could be removed. Furthermore, judges and police would not be burdened by these responsibilities. We recommend, therefore, that the office of the court clerk or administrator be expanded in order that it take over these functions. A strengthened court administration would also be responsible for the collection and enforcement of restitution payments, as suggested in our working paper on Restitution and Compensation.

Procedures for Payment of Fines

Means Inquiry

The Criminal Code does not always require the court to consider the means of the accused before determining the amount of the fine. Only if the judge orders the fine to be paid immediately should he be satisfied that the accused is able to do so (and this provision may be nullified as will be seen in the following section). Even later when the offender is faced with jail for failure to pay, no inquiry into the offender's ability to pay need be held except where the offender is under 21. Even in such a case, the Code does not specify the depth to which the inquiry must go.

A means inquiry is an integral part of a day-fine system. We suggest that, as with enforcement, determination of means would best be handled by a branch of the court clerk's office with adequate time and resources allotted for the specific task. After asking the offender some basic questions about employment, number of dependants, extent of debts and assets, the court administrator would compute the amount of the day-fine by an estimation of 1,000th of the offender's gross income in the past year, with rules for reductions for dependants, large debts, and high incomes (because of progressive taxation) as well as for increases for offenders with large amounts of capital. Specific rules for this computation might best be developed through the proposed pilot project.*

Time to Pay

The first decision now made by the judge with regard to enforcement is whether the offender should pay immediately. As argued above, the administrative arm of the court would be better equipped to make this determination through its inquiries and could relieve the judge of the task. While at present the judge cannot order immediate payment unless

- (a) the court is satisfied that the person convicted is able to pay forthwith, or
- (b) upon being asked the accused person states that he does not require time to pay,

these provisions are undermined by another provision which permits the judge to order immediate payment if for any special reason he deems it expedient.

We suggest that everyone with immediately available means be required by the court clerk or court administrator to pay forthwith.

* We have included as an appendix a summary of the day-fine system as it operates in Sweden.

However, no special reason such as likelihood of absconding or history of non-payment should supersede the fact that an individual cannot pay immediately. Surely it is absurd for someone to be considered in default of payment of his fine as soon as it is imposed, if he does not have the money with him but for some special reason is required to pay immediately. It would be preferable for the judge to choose an alternative sanction such as a work order or probation where he has reason to believe that payment of a fine would be unlikely or too burdensome to enforce.

Where time to pay is granted, it must at present be a minimum of fourteen days. In practice, many payments are made shortly after the deadline. (In one study 44.6 percent of offenders paid after the deadline but before a warrant was issued). Do these statistics suggest that extending the usual two week time to pay period to a minimum of three or four weeks might result in a somewhat lower default rate? Or do they equally suggest a tendency for people to pay at the last possible moment whatever the allowed time may be? We are not convinced that the two week period need be increased. What is more important is that each case be considered individually and carefully and that the court clerk or administrator in consultation with the offender, set a time that appears to be both feasible for the offender and no later than necessary.

Instalments

In our present-day economy, instalment payment is the normal and often the only feasible means of payment for many people. Having adopted the principle that every effort be made to collect the fine before resort to imprisonment, we must be willing to accommodate this practical reality by acceptance of the need for instalment payment of fines. If accurate records are kept, instalment payment can be an efficient means of decreasing the likelihood that the offender will be unable to meet the time set for payment. As with the time to pay, the decision about the desirability, times and amounts of instalment payments should be made by the court clerk or administrator after consultation with the offender. In this connection it may also be desirable to consider the availability of debt counselling services, possibly through cooperation with another agency, to assist the offender in organizing his finances so that he would be able to manage payments.

Extension of Time to Pay

The offender should be made aware that if he has unforeseen difficulties in meeting payment, he has the right to apply to the clerk of the court for extension of time to pay.

Procedures in the Event of Non-Payment

It has been suggested above that the judge and the police be relieved of their responsibilities in enforcing payment of fines and that collection be concentrated in the office of the court clerk or administrator. Such an office should have the facilities and the time to discharge a specific duty of arranging and enforcing quick but feasible terms of payment. It has also been suggested that day-fines be introduced, that provisions for payment by instalments and extension of time to pay be made and that the availability of counselling facilities be considered. All of this should have the effect of keeping the amount of the fine more in line with the ability of the offender to pay and make the terms of payment more realistic. Through these improvements it is expected that the number of persons who do not pay in the allotted time will be decreased.

Yet the question remains—what do we do with the person who fails to pay his fine on time? To meet this question we have discussed a number of possible steps. The procedures which follow should have to be invoked for only a small percentage of fined offenders. We must keep in mind the principle that imprisonment ought only be resorted to after all other methods of enforcement have been unsuccessfully attempted or were unavailable or inappropriate, and the offender has the means or ability to pay. These procedures, then, are meant to ensure that those offenders who do not pay their fines do not get away, but also that they do not end up in prison unless all other methods of enforcement have been exhausted and wilfully continue to refuse payment.

The first step to be taken when an offender has not met the time set for payment and has not requested an extension, would be the calling of a means inquiry. For those who had been sentenced in day-fines it would mean a second and more detailed examination of their means. At this inquiry the offender would be given the opportunity to show cause for his non-payment of the fine. The onus would be on him to produce evidence of his financial position that might suggest a miscalculation at the first means inquiry or a deterioration of means since that time. Through such an inquiry the clerk could make a preliminary determination whether or not the non-payment was deliberate or negligent.

In order to get the defaulting offender to this means inquiry, the court clerk's office would mail a warning, explaining that the deadline had passed and that the offender must pay immediately or be summonsed to attend at the court clerk's office for examination

and disclosure of means. If payment were not then made, a person from the court clerk's office would serve the summons, in person. The experience in several jurisdictions has been that many tardy offenders pay on receipt of the warning or the summons. Finally, if the offender ignores the summons to appear, the court administrator's office would request that a warrant be issued by the court, which the staff of the court clerk would execute, forcing the offender's appearance at the means inquiry.

Depending upon the results of the means inquiry, some offenders might decide to pay at that time. Other offenders, upon showing a change in their financial circumstances, might ask for a re-adjustment of the dollar value of the day-fine, an extension of time to pay, or an alteration in the terms of instalment payments. However, if it were found that the offender's circumstances had changed so drastically since the sentence was imposed that no payment was possible, the court administrator should have the power to apply to the judge to change the sentence.

On such an application the judge should have the power to do one of several things. One possibility would involve a total forgiveness or removal of any sanction. One factor leading to such a determination might be the gravity of the misfortune that caused the deterioration of means. While at present the power to forgive a sanction (remission) is exercised by the Governor-General in Council through the National Parole Board, it is suggested that justice would in this connection be better served if such power were placed in the local judge.

The judge should also have the power to re-sentence the offender and to order, for example, that an offender lacking the means to pay work off the amount of his fine through community service. (The concept of work orders will be treated in a forthcoming working paper). While community service orders are viewed as a preferred alternative, it is recognized that such a scheme would not be practicable at all times in every community. Therefore, the offender might also be re-sentenced to a term of probation. Similarly, probation might be considered as a re-sentencing alternative for the offender who cannot pay and refuses to cooperate in a work order.

Finally, intentional defiance of a work order or a probation order would constitute a new offence punishable on summary conviction, as is presently the law for violations of probation orders (Criminal Code of Canada, s. 666). If tried and convicted of this offence, the offender would be subject to possible imprisonment as one of the regular sentencing alternatives for summary conviction offences.

Where the office of the court clerk found through its means inquiry that the offender had the means to pay his fine but deliberately refused to do so, or where the offender neglected to provide evidence to prove his inability to pay, that office would also apply to the judge for re-sentence or conversion of the sanction. It is suggested that the judge in those cases have the power to make collection of the fine coercive, no longer dependent on the cooperation of the offender who has demonstrated his unwillingness to cooperate. This may be done through an order that sums of money belonging to the accused including wages be placed under garnishee and attached at a specified rate until such time as the entire amount of the unpaid fine has been collected. Employers should not be allowed to use such garnishment as a basis, in whole or in part, for the discharge of an employee or for any other disciplinary action against an employee. Another possible order of the court which may be considered is the seizure and sale of goods belonging to the recalcitrant defaulter. However, this method may be considered too problematic to be practicable.

Where these methods of forced collection of fines owed are found to be unavailable or inappropriate, the court should have the power to re-sentence the offender with means who intentionally refuses payment to a term of imprisonment.

Appendix

The Swedish Day-Fine System*

What it is and how it operates

1. The day-fine was brought into force in Sweden in 1932 in order that monetary penalties for criminal offences should affect the rich and the poor more equitably, and we understand that it is now completely accepted there by both the public and the judiciary. Somewhat similar systems are, we understand, in force in Denmark and Finland. The principle of the system as applied in Sweden is simple enough. The fine is calculated by multiplying together a number (from 1 to 120, or from 1 to 180 in the case of multiple offences) reflecting the gravity of the offence, and a sum of money (varying from 2 kr. to 500 kr.) known as the day-fine, which is assessed according to the offender's ability to pay. The two factors, the seriousness of the offence and the offender's means, are determined quite independently of each other, and both the number of day-fines and the amount of each are announced in court. The information about the offender's means is obtained by the police before the trial, and is usually confirmed with him in court. In general, the day-fine is estimated at 1/1000th of his annual gross income (less expenses directly related to his employment); and there is provision for the reduction of the day-fine according to his liabilities, and for its increase if he has capital exceeding a specific amount. The system does not apply to minor offences, which are punishable by fines up to a maximum of 500 kr; these offences are excluded because to calculate the day-fine in the very large number of cases concerned would involve a heavy administrative burden and because the payment by the well-to-do of a very large fine for a petty offence is thought to be out of place.

Scope of the application of the system

2. Under the day-fine system the fine imposed is arrived at by multiplying a number (from 1 to 120, or 180 for multiple offences), reflecting the gravity of the offence (which may be affected by any

* Home Office, Report of the Advisory Council on the Penal System, *Non-Custodial and Semi-Custodial Penalties*, 1970, p. 7, 8, 74-76.

previous convictions for similar offences), by a sum of money (varying from 2 kr. to 500 kr. and called a day fine) assessed according to the offender's ability to pay. Both the number of day fines and the amount of each day fine are announced by a judge in passing sentence. Fines for all offences under the penal code are imposed in the form of day fines, except where a maximum sum of 500 kr. is specified (monetary fines) or where there is a special basis of computation (standardised fines). (Monetary fines are available for drunkenness, disorderly conduct, minor traffic offences and regulatory offences; standardised fines are primarily applied in the use of income tax evasion.) Certain statutes other than the penal code also provide for specific offences to be punished by day-fines, and in a few cases a minimum number of day fines is prescribed. In the more serious motoring offences, such as dangerous driving, careless driving, etc., day-fines up to the maximum of 120 may be added when a conditional sentence (suspended judgment) is passed or probation ordered; damages may also be ordered where the issues are clear but this is rarely done. (Compensation and costs are ordered independently from the day-fine). It is understood, however, that in motoring cases insurance companies take account of the number of day-fines ordered by the courts, which is taken to reflect the degree of culpability of the offender.

3. The imposition of day-fines is not exclusively the prerogative of the court. If the penalty prescribed for an offence is only a fine the public prosecutor may issue an "order of summary fine" (Strafforelaggande) instead of instituting proceedings. His discretion is limited to a maximum of 50 days fines, or 60 days fines in the case of multiple offences. If the accused agrees to pay the fine the order is deemed to be a final judgment delivered by the court; if he does not the prosecutor will institute proceedings. There appears to be no special limit on the amount of the day-fine ordered in cases disposed of by the public prosecutor.

4. The table at the end of this appendix* gives some indication of the pattern of sentencing in the Swedish courts and of the extent of the use of the fine. In their present form the Swedish statistics do not distinguish between fines which are assessed on a day-fine basis and those which are not, and it is therefore difficult to assess the extent of use of the day-fine. One unofficial estimate by the Swedish authorities is, however, that of fines imposed by courts and prosecutors in the period 1965-67, 20-25% were assessed as a day fine basis; in the case of fines imposed by courts only, probably 45-65% were assessed on a day-fine basis.

* Not included herein.

Assessment of the offender's means

5. The assessment of the offender's capacity to pay is very much a rough and ready business; it involves no great volume of work and presents no real problem. The courts are apparently much less fussy now in their assessment of the offender's means than they were when the system was brought into operation in the early 1930's. Information about the offender's means is obtained by the police as part of their investigation of an offence and is not infrequently obtained from the offender by telephone¹. Where the offender is present at the hearing, which he usually, but not always, is, the judge will check with the defendant whether the information given in the police report is accurate. In theory, the case may be adjourned for further enquiries if it is evident that the offender is untruthful, but this apparently is seldom done. The giving of false information concerning means is not an offence, and the offender risks no penalty by giving untrue information, either in the form or orally to the court. It is perhaps relevant that information about income is public property in Sweden; an annual register of the income of most wage earners is published and there is a national system of graduated pensions, a feature of which is that each person has an insurance card showing his tax grade which the court may ask to see. It is also possible to confirm income with the tax authorities, and the defendant knows that his statement of income can be checked. The form commonly used for less serious offences is a short version, which includes details of gross income, tax assessment, capital, debts, marital status, wife's income and number of dependent children; there is also a fuller type of form which fulfils in addition the function of a social enquiry report. The simple form, requiring only a few entries, is usually endorsed by a rubber stamp on the papers. Inaccuracies in the information supplied in the form seem to be not uncommon but, where necessary, these are cleared up by direct inquiry from the defendant in court. It appears in fact that the system could be operated even without the use of the form. The public prosecutor does not ask for any particular fine to be imposed and it is left entirely to the judge to decide upon the number of day-fines and the amount of each.

Computation of the amount of the day-fine

6. In general, the day fine is estimated as 1,000th of the offender's annual gross income (less expenses directly related to his employ-

¹ There is no system of bail in Sweden. The offender is brought before the court and a decision taken whether or not to release him pending trial. As long as five days could elapse before such release is ordered.

ment). If the offender is married and his wife has no income of her own, a reduction of 1/5th is made, and a further reduction of 2 kr. is made for each child. There are rules governing the reduction of the amount of the day-fine when the income is high (because of progressive taxation) and for its increase when the offender has capital of 30,000 kr. or more. There are also rules for computing the amount of the day-fine in the case of married women with no income of their own and for offenders with large debts; for those without means the day-fine, normally set at a minimum of 5 kr., is usually reduced to 3 kr., but can be reduced to 2 kr.

Enforcement

7. The collection of the fine is the responsibility of the enforcement authority and no money may be paid into the court. The enforcement authority is also responsible for the enforcement of unpaid fixed penalties, unpaid fines imposed by the public prosecutor, maintenance, taxes and civil debts. A register of fines is sent to the enforcement authority and in theory enforcement action commences after eight days if payment is not made. The offender may arrange with the enforcement office to pay the fine by monthly instalments over a period of one year or, exceptionally, two years, and the authority is entitled to grant a respite of four months or, in special circumstances, eight months before collecting the fine. If no satisfactory arrangements are made action is taken to attach the defaulter's earnings; if this expedient is not available and threatening him with imprisonment proves unsuccessful, the next step is to distrain on his property. As a last resort the case may be referred to the public prosecutor; if this action is not taken within three years of the imposition of the fine recovery is no longer possible. The public prosecutor may write off outstanding sums up to 50 kr. or 5 day-fines (100 kr or 10 day-fines in respect of multiple offences); these fines cannot be converted into imprisonment unless the offender has been refractory or manifestly neglectful in fulfilling his duty to pay, or unless the conversion is deemed to be needed as a means of inducing him to amend his ways. The court may convert the outstanding sum to imprisonment of up to 90 days' duration, and the usual tariff is one day's imprisonment for each day fine unpaid. (Once actually admitted to prison the offender may not secure release by payment of the outstanding sum.) Alternatively, the court may refer the case back to the enforcement authority with a view to further extension of the period of payment, or it may impose a conditional sentence. It is understood that of 29,000 cases dealt with by the enforcement office in 1967 4,000

were referred back to the public prosecutor. Only a hundred or two cases a year are in practice converted to imprisonment. The maintenance of children has first claim on any monies received, and taxes, fines and civil debts follow in that order. An interesting feature of the system is that fines imposed in one of the Nordic countries may be enforced in any other, subject to the proviso that the defaulter may be imprisoned only in his country of origin.

Features of particular interest

8. The following aspects of the system deserve comment:

- (i) It is claimed that the introduction of the day-fine led to a striking (50%) reduction in the number of fine defaulters imprisoned; and it is to be assumed, therefore, that the system has operated to correct the imposition in some cases of unrealistically high fines. The system is, however, primarily designed to ensure that an even justice is done.
- (ii) A wide discretion is conferred upon the executive authority. The public prosecutor can impose fines of up to 500 × 50 kr. and has discretion to "write off" unrecovered day-fines of up to 5 in number. (Driving licences can be withdrawn by the licensing authority for traffic offences, and it is understood that this power is automatically invoked where fines in excess of 30-40 kr. are imposed.)
- (iii) There is thought to be nothing objectionable to a very prolonged period of enforcement. One Swedish official explained to members of the Sub-Committee that the objective was not to punish, but to deter by bringing home to the offender that the commission of further offences would prove costly.
- (iv) In practice, offenders may be fined fairly stiff amounts (up to 500 kr.) without the use of the day fine system. There is some anomaly in this, because such fines for lesser offences could be higher than fines imposed under the day fine system for more serious offences on those with limited means.
- (v) The wide discretion in matching the penalty to the offence is said not to result in practice in any marked disparity between one court and another in the assessment of the gravity of the offence.
- (vi) The day-fine system is completely accepted both by the public and the judiciary. After many years of its operation the procedure is well established, and there is no question of

reverting to the old system of prescribing minima and maxima for specific offences.

- (vii) The penal code provides that fines may be used as a collective punishment for several crimes, with a corresponding increase in such cases of the normal maximum or 120 day-fines to 180 day-fines, and an increase of a maximum fine directly imposed from 500 to 1,000 kr.