

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

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REPORT
ON
THE INDEXATION OF FINES

IRELAND
The Law Reform Commission
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THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the Law Reform Commission Act, 1975 on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

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The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General thirty-six Reports containing proposals for the reform of the law. It has also published eleven Working Papers, five Consultation Papers and Annual Reports. Details will be found on pp93-96.

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NOTES

This Report was submitted on 30th October 1991 to the Attorney General, Mr Harold Whelehan, S.C., under Section 4(2)(c) of the *Law Reform Commission Act 1975*, and, at the Attorney General's request, is being made available to the public at this stage while the proposals it contains are being considered in the relevant Government Departments.

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INTRODUCTION

1. On 6th March 1987, pursuant to s4(2)(c) of the Law Reform Commission Act 1975, the then Attorney General requested the Commission to undertake to conduct research on, and to formulate and submit to him proposals for the reform of, sentencing policy in general. The indexation of fines to inflation was singled out for individual attention. The opportunity was also taken to consider the issue of means-related fines, which had been intended to be treated in the forthcoming Consultation Paper on Sentencing Policy.¹ To assist us in coming to our conclusions, we circulated a Discussion Paper among lawyers and other persons expert in the enforcement of the law. We are very grateful for the observations and suggestions we received, and express our thanks to the following contributors:

Commissioner Patrick Culligan, Garda Síochána;

Mr James Hamilton, Attorney General's Office;

Mr Brian Lenehan, Department of Finance;

Mr Paddy McDonald, Central Statistics Office;

Mr Michael Quinlan, County Registrar, Dublin Circuit Court;

Judge Peter Smithwick, President of the District Court.

This Report contains proposals based on the original Discussion Paper and the subsequent exchange of views. However, the Commission is solely

¹ See our *Eleventh Report* (1989), p8.

responsible for the contents of the Report

2 Fines are the most commonly imposed penalty in the countries of the developed world, and the reasons for their appeal are clear. There has been a loss of faith in prisons as a means either of deterring or of rehabilitating offenders, and fines are seen as an effective alternative to short-term imprisonment for less serious offences. Also, fines are cost-effective compared to other criminal penalties. They bring in revenue which helps underwrite the criminal justice system, while forcing the offender to repay society in some way for the damage he has caused. Third, fines are flexible: they can be adjusted in individual cases both to the seriousness of the offence and to the offender's means. Finally, fines are easily remissible, as they can be repaid in the event of injustice.

3 These advantages are, however, dependent on the good design of a country's system for the imposition of fines. Some problems are apparent in the Irish system. Widely differing fines may be permitted for offences of similar gravity, simply because the relevant legislation was enacted at different times. Furthermore, fine maxima set out in legislation of any age are eroded each year by inflation. The net effect of these two factors is to give an impression of inconsistency and injustice, and also one of reduced deterrence and denunciation of crime. As inflation also devalues revenues collected, this advantage of fines is also undermined. At the same time, the number of persons imprisoned for fine default is disturbingly high, which suggests that the system at the moment is insufficiently flexible.

4 All these considerations point to a pressing need for reform of the fines system. Such reform should

- (a) ensure equal fines for offences of equal gravity,
- (b) take account of the past and future effect of inflation on the real value of fines, and
- (c) have the flexibility to adjust for the differing means of those on whom fines are imposed.

5 There are also constitutional considerations. Article 38, sections 2 and 5 of the Constitution make varying provision for the trial of minor and non-minor offences. The former may be tried summarily in the District Court, in certain circumstances, for the latter, jury trial is compulsory. The Supreme Court decision in *The State (Rollinson) v Kelly*² suggests that the maximum

2 [1984] ILRM 625

fine for an offence is an important indicator of its minor or non-minor status and that the courts will take account of the changing value of money in assessing this. Thus, an offence with a fine maximum of £500 would have been non-minor in 1962, but minor in 1982. This must be undesirable, and is presumably contrary to the legislative intention. This state of affairs must give impetus to the scheme of reform just outlined (and especially to the achievement of object (b)).

6. Two further ancillary issues should also briefly be mentioned. First, the scale of businesses, investment, etc. has expanded at a rate which outstrips even inflation, so that many enterprises may have become almost immune even to inflation-adjusted fines. Also, prices have not risen uniformly in all fields - some have plummeted, others have soared. Whatever scheme is adopted should be sufficiently flexible to take account of these features of the modern economy.

7. Broadly speaking, there are two possible avenues of reform. A *standard fine system* is one whereby all old fine maxima are given an up to date value e.g. £25 in an Act of 1922, and £250 in one of 1972, are both given a 1992 value of £500. This helps achieve object (a). Object (b) is attained by placing all fines in suitable categories (perhaps five, A to E) whose maximum value is then periodically increased; or by applying a multiplier (which is changed every year) to the modernised 1992 values to get the equivalent value for subsequent years.

8. A *variable fine system* (or unit fine or day-fine system) imposes fines in terms of units of gravity, whose monetary value is in each case dictated by the means of the offender. This directly addresses object (c), but achieves object (b) indirectly as well, as people's incomes vary roughly in line with inflation. A modernising process like that described above would still be necessary in respect of object (a) - up to date values would then be equated with a certain number of fine units in order to operate the system.

9. The scheme of the Report which follows is this. Section I will flesh out in greater detail the problems and possible solutions here outlined. Section II will examine the means by which fine values could be indexed to inflation. Section III will discuss the features, advantages and disadvantages of standard fine systems; Section IV will similarly address variable fine systems. In all cases, experience in other countries will be adverted to, while we remain mindful of the unique features of the Irish Constitution and criminal justice system.

SECTION 1: FINES AND THE PROBLEM OF INFLATION

10. At a time of disquiet about the efficacy of imprisonment as a rehabilitative measure (and of some agnosticism about its superiority over other measures in point of deterrence),¹ the advantages of fines are considerable.

In the first place, fines are said to be "penologically effective" as an alternative to short-term imprisonment (with its perceived adverse effect on recidivism rates).² For many categories of offenders, the incapacitative function of imprisonment (to protect society) is unnecessary, the exposure to prison and criminal culture deleterious and the outlay of expenditure involved, as a result, disproportionately high. In such cases, non-custodial options which are of penal effect, such as fines, are preferable.

Secondly, the imposition of fines has economic benefits (while imprisonment and most other non-custodial penalties entail very substantial costs).

1 See Daunton-Fear, *The Fine as a Criminal Sanction*, 4 *Adelaide Law Review* 307 at p307
2 Morgan & Bowles, *Fines: The Case for Review* [1981] *Crim LR* 203 at p204 See also CA Warner, *Research Paper on Fines for the Tasmanian Law Reform Commission*, July 1984, p3 Fines accounted for almost 80% of sentences imposed by courts in England and Wales in 1989 See D Moxon & ors, *Unit Fines Experiments Conducted in Four Courts* (1990) p1

Revenues can help underwrite the expenses of the courts system,³ while the fine involves the offender paying back to the community something in return for the damage he has done.

Thirdly, a fines system is (or can be) a flexible instrument of legislative and judicial sentencing policy: in the individual case, the fine can be adjusted both to the gravity of the offence and to the offender's means. This allows courts to adhere to the principle of equality of impact of penalties on offenders in different circumstances. (See below). If properly assessed, a fine can punish the offender without damaging his opportunities for employment or his family responsibilities.

Finally, the fine is easily remissible in that it can be repaid in the event of injustice.

Against fines, it may be said that while they can be retributive and deterrent, they are not reformatory in a positive way. Also, it is difficult to ensure that a fine is paid by the defendant himself without causing unwarranted hardship to his dependants.⁴ In general, the objective disadvantages of a fines system are few.⁵ However, most of the advantages are contingent upon the system's good design. An inflexible system loses most of the advantages listed above.

11. Disparities in fine maxima for offences of equivalent gravity, enacted at different times, create an impression of inconsistency and injustice (though this can be equally true of other penal options). The number of persons

3 See Warner, *op cit*, p2: "In Tasmania \$2,204,482 was paid into consolidated revenue in the year 1982-83 from fines and costs. However economic costs of enforcement in cases of default are considerable, and no detailed analysis of the net profit from fines is available in this jurisdiction" In England it has been estimated that for magistrates courts, receipts from fines and fees exceed day to day running costs of the courts. Morgan & Bowles, *op cit* at p204 After collection costs, every fine yielded an average of £377 in 1989, Home Office, *Magistrates' Courts: Report of a Scrutiny* (1989) For Irish figures, see Appendix I(i) below

4 Daunton-Fear, *op cit* at p309 However, imprisonment also imposes huge burdens on offenders' families

5 See A Samuels, *The Fine: The Principles* [1970] Crim LR 201.

imprisoned for fine-default is also disturbing in some jurisdictions.⁶ It indicates that fines imposed may be too great a burden on the poorer sections of society, and that a proper measure of flexibility has not been achieved - the response of the courts to individual circumstances is of an *ad hoc* nature, under the District Court Rules 1948, which state that the means of the offender should be taken into account when determining the value of a fine.⁷ Also, imprisonment for default negates the advantages of fines over custodial penalties.

12. But of most immediate and obvious concern, and most simple of solution, is the eroding effect of inflation upon the value of legislatively prescribed maximum (or minimum) fines. At common law, courts have a discretion to impose fines upon conviction for any misdemeanour (but not for felonies, with the exception of manslaughter),⁸ and there is no limit to the value of the fine which may be imposed (subject only to restrictions on the competence of particular courts).⁹ Fines are, however, more normally provided for by statute. Many of our criminal statutes are of some age, and, because they are clear and workable, have survived without amendment. An unfortunate corollary of this is the fact that the monetary penalties which were attached to these offences when they were created remain unchanged as well. Alternatively, the proposed revision of entire statutes can make it seem unnecessary to amend the penalties for old offences in the meantime.¹⁰

13. Courts cannot impose maximum or near maximum fines unless the offence is one of extreme gravity, even when inflation has very much reduced the value of that maximum. This naturally must reduce fines' deterrent effect, so that even in respect of offences for which the chances of detection are high,¹¹ the penalty imposed upon conviction may be so slight as to be a negligible component in the criminal's calculations. The fine can come to be

6 While fine-defaulters usually constitute only a small proportion of the prison population, they often constitute a very high proportion of the number of prison receptions e.g. in England & Wales, the figures were 3% and 21% respectively in 1980 (Prison Statistics England & Wales, 1980, Cmnd 8372). The disparity is explained by the short periods of imprisonment served. According to the recent UK White Paper "*Crime, Justice and Protecting the Public*", 16,800 people were imprisoned for fine default in 1988, down from 24,000 in 1982. They formed 1.5% of those in custody at any time (Cm 965, Feb 1990). Australian States imprison, on a population basis, ten times more defaulters than most other countries (F Rinaldi, *Imprisonment for Non-Payment of Fines* (1976) 2nd ed at p7). For Irish figures, see Whitaker Report excerpt at p3, *post*.

7 District Court Rules 1948, rule 65(1)(a)

8 *Offences against the Person Act 1861*, s5

9 See Ryan and Magee, *The Irish Criminal Process* (1983), p402

10 Examples include the Dublin Police Acts and Vagrancy Acts, on which the Commission has already reported and in which penalties are ludicrously low. See Law Reform Commission Report on *Offences under the Dublin Police Acts and Related Offences* (LRC 14-1985)

11 This is the most important factor in deterrence. See Warner, *op cit* para 3, A Ashworth, *Sentencing & Penal Policy* (1983) p25

regarded as an incidental aggravation, as a tax on criminal activity or as an inexpensive licence to infringe the law¹²

14 These and other aspects of the problem are illustrated by the following excerpt from the Whitaker Report¹³

"The defects are generally a consequence of the outdated nature of the relevant rules or statutes. In the case of fines, the sentencing ranges available to the courts are frequently fixed in sums that are far below what would be regarded as reasonable at the present time. The maximum fine or damage that a 'child' (aged 7 to 15) can be ordered to pay is £2, the maximum for a young person (aged 15 to 17) on summary conviction for an indictable offence is £10 [*The Summary Jurisdiction over Children (Ireland) Act, 1884*]. Equally important, fines must, under the prevailing rules, be paid in a lump sum, there being no provision for payment by instalments or by phased deductions from wages or other income sources. Some 14% of adults committed to prison in 1983 were fine defaulters. The current scale relating days of imprisonment to the size of a fine was set in 1947 and states that a fine of 50 pence or less should lead to not more than seven days imprisonment and a fine of £30 or more to not more than six months imprisonment¹⁴

Even in comparatively recent legislation like the Gaming and Lotteries Act 1956, the maximum monetary penalty which can be imposed is £100, which must have been only a minor inconvenience to those involved in the spate of very lucrative, unlawful lotteries in the 1980's. Such travesties also have the effect of alienating public opinion from the law

15 It has also been suggested that the courts, frustrated by their inability to impose appropriate fines, will have recourse to other less suitable measures in order to achieve some equivalence between sentence and offence. It would be a great shame if resort were had to short-term imprisonment merely because of defects in a system whose chief advantage is its diversion of offenders from the prison system¹⁵. However, the impression of those involved in the Irish court system is that this problem has not arisen¹⁶

12 See Ashworth, *op cit*, p288

13 *Report of the Committee of Inquiry into the Penal System* (1985) para 5.8 at p45

14 For the full "exchange rate" between fines and default terms of imprisonment, see District Court Rules 1948 rule 65(3)

15 This fear was expressed by the Australian Law Reform Commission *Sentencing of Federal Offenders* Report No 15 Interim (1980) p253

16 This view was expressed during an interview on 6th November 1990 with officials at the Courts Division of the Department of Justice

16. There is also a problem of the loss of real revenue as fines lose their value.¹⁷ For a calculation of this loss, based on Department of Justice figures, see Appendix I(ii).

17. These considerations provide an entirely pragmatic incentive to reform the present legislative practice of stating a specific monetary penalty for each offence created, which has no in-built capacity for inflation. Another practical reason for a general reform is that pressure is building up in a number of areas to put individual indexation provisions in new offence-creating legislation. In recent years, such a step was mooted in the Social Welfare Bill, the Finance Bill, the Central Bank Bill and the Statistics Bill.¹⁸ Such a proliferation of possibly different indexes would create needless confusion.

18. The constitutional implications of this state of affairs must also be considered. There are at least some grounds for concern that the intention of the legislature is being defeated, while the letter of its enactments is being observed, by the "real" decrease in penalties due to inflation - a fact of which it must be possible to take judicial notice. The question whether an Irish Court would heed such an argument for a purposive interpretation of fine-imposing enactments (the intention arguably being to punish the offender to a certain degree, only incidentally stated in contemporary monetary terms, rather than to enjoin for all time a monetary amount which has no fixed objective value) is moot. Such a case is unlikely to arise unless money begins to *gain* in value (so that fixed fines become progressively more burdensome),¹⁹ but would in any event be liable to be viewed with some scepticism from the Bench. The present state of affairs does, however, present another argument for legislative, rather than judicial, action.

19. There are also more immediate causes for concern. Article 38.2 of the Constitution states:

"Minor offences may be tried by courts of summary jurisdiction"

This, read with Article 38.5, has the effect:

(i) that minor offences *may* be tried in the District Court;

17 See Warner, *op cit*, p24

18 Communciation from Mr James Hamilton, Attorney-General's Office, 21st April 1989.

19 The constitutional right to equality before and under the law must arguably extend over time, so that it could be said that the man convicted in respect of lottery offences in 1960 was not treated equally to a man in 1990, even if both were fined £100. In *Parsons v Kavanagh* [1990] 560, O'Hanlon J considered that the High Court had a reserve power to enforce by injunction a statute where the passage of 55 years since its enactment had rendered the monetary penalties for its breach "somewhat densory as a deterrent".

- (ii) that "non-minor" offences *must* be tried on indictment before a jury.

This means that certain specified indictable offences (e.g. larceny of property worth less than £200) are triable summarily (with the accused's agreement, upon being informed of his right to jury trial) where the court is "of opinion that the facts proved or alleged constitute a minor offence fit to be so tried".²⁰ It also means that indictable offences which are "non-minor" cannot be tried summarily.²¹ As will be seen, the primary indicator of the status of an offence is the severity of the penalty which attaches to it, but other factors are also relevant.

20. The effect of inflation in the first respect is probably to cast many or all of the occasions of the commission of the relevant offences into the minor category (at least in light of the maximum fine which can be imposed). This result is not perhaps unwelcome in itself. The fact that a greater than anticipated number of accused can avail themselves of the option of summary trial (which is cheaper and speedier than trial before a jury) is hardly to be regretted. But this can be at the cost of some conceptual confusion in the law. Considerations other than the penalty include the moral quality of the acts involved in the offence's commission and public opinion at the time of the measure's enactment.²² Fines set at that time would presumably reflect these considerations, but must of necessity depart from them over the years due to inflationary pressures, so that the "indicators" of the status (minor or non-minor) of a particular infraction may point in different directions. This problem becomes more acute when the specified fine loses any real equivalence to any other available penalty. For example, section 44 of the Gaming and Lotteries Act 1956 sets as a maximum penalty for breach of section 4(1)(c) a fine of up to £100 and/or 3 months imprisonment.²³

21. The effect of this confusion becomes very serious in respect of offences which are summary only; should they embrace acts, or penalties, which are not "minor", the entire offence-creating section may founder on constitutional grounds. This occurred in *Kostan v Ireland and the Attorney General*,²⁴ when McWilliam J found section 221 of the *Fisheries (Consolidation) Act 1959* to be repugnant to the Constitution. The penalty specified was a maximum fine of £100 with the mandatory forfeiture of the catch and fishing-gear here

20 In certain cases, the DPP's consent is also required - *Criminal Justice Act, 1951*, s2; *Criminal Procedure Act, No 12, 1967*, s19

21 See *Cullen v AG* [1979] IR 394

22 See *Conroy v AG* [1965] IR 411.

23 In fact, the line between minor and non-minor prison sentences lies somewhere between 6 months and 3 years, but the point remains valid for cases where the prison term is non-minor and the fine is minor - which could be up to £3,500 at today's values, if £100 was minor in 1937. See JP Casey, *Constitutional Law in Ireland* (1987), p253.

24 High Ct, 10 Feb 1978

valued at £102,040, which no one can deny is severe, and must have been vastly in excess of any exaction contemplated by the legislature²⁵ This is an example not of inflationary erosion of fines but of the distortion induced by the change in the scale of many business (and criminal) operations in a modern economy (which problem must also be addressed in this paper)

22 The intrusion of inflation upon the workings of the fines system has caused some confusion on the Bench In the High Court in *State (Rollinson) v Kelly*,²⁶ Gannon J, assessing the seriousness of a fine of £500 enjoined by section 25(2) of the Finance Act 1926, had regard to the value of money at the time of enactment, and to a District Justice's salary during that period (£1,000 p a) He concluded that the fine must then have been regarded by the legislature and judiciary (and indeed until the 1960's) as a very severe penalty In *Melling v O Mathghamhna*,²⁷ Kingsmill-Moore J²⁸ and O Dalaigh J²⁹ (both dissenting on the conclusion, but not on the reasoning) related the severity of a fine to its effect in 1922

23 This approach did not, however, find favour with the Supreme Court in the appeal from Gannon J's decision in *Rollinson*³⁰ While his reasoning would reflect the initial intention of the legislature with regard to seriousness, however outmoded, the Supreme Court would allow it to be overtaken by inflation Griffin J suggested³¹ that a fine "fairly considerably in excess" of £500 would still be minor, Henchy and Hederman JJ referred to the problem of inflation £100 in *Melling* was not serious, in 1962, and this was equivalent to £900 in 1984, so that a fine of £500 could safely be imposed after summary conviction The penalty prescribed may be viewed with reference to the time of the relevant conviction O'Higgins CJ dissented, holding the offence not to be minor, and urging that the penalty be viewed in the light of circumstances at the time of enactment

24 It is clear that neither of these approaches is satisfactory The latter is unrealistic (and would cause the seriousness of a number of fines, all of the same amount, to vary according to the time of their prescription), while the former disregards the parliamentary intention It also seems clear that a system of indexation of fines could suitably resolve this conflict, allowing the original gravity of the offence to be maintained relative to the changing value of money

25 See Casey *op cit* pp251-2 on the incidental controversy on primary and other punishment
 26 [1982] ILRM 322
 27 [1962] IR 1
 28 *Id.* at p35
 29 *Id.* at pp42-43
 30 [1984] ILRM 625
 31 *Id.* at p638

25. It thus seems reasonably clear that some scheme should be devised in order to restore and then maintain the real value of the fine maxima stated in criminal legislation. The design of such a scheme is not the simple task it might first appear. A basic choice must be made between what will be termed "standard fine" and "variable fine" systems.

26. Under a standard fine system, such as exists at present, set fine maxima apply across the board to all persons convicted of relevant offences (with possible discretionary reductions due to inability to pay). Fine maxima can be kept up to date either by being placed in categories, or subjected to multipliers, which are adjusted according to fluctuations in money values or income levels, for example.

27. On the other hand, variable fine (or day-fine) systems calculate fines by reference to two components: the gravity of the offence and the means of the person sentenced. A convict may be fined 100 units, for example, for an infraction of a certain gravity. Each unit will be a prescribed fraction of his income (eg 1/1000). There is no need for indexation in such a system, as it adjusts automatically to differing levels of income over time, as well as between different persons.

28. It is worth noting, at the outset, that adopting a variable fine system, while subject to considerable problems, avoids three difficult questions which are posed by the standard fine system, which will be mentioned here, and considered in due course.

- (i) A suitable index must be chosen by which to adjust fine levels from time to time. While a consumer price/inflation rate index is the most commonly proposed, at least two others are possible: one is an index based on levels of real disposable income of the average citizen (an approach more in keeping with that of Gannon J in *Rollinson*); the other, one dictated by severity scaling surveys.
- (ii) Compared to variable fines, a standard fine system, adjusted across the board according to a prescribed index, can seem a blunt instrument. Two issues can arise, in cases in which relative money values, or income levels, are not the only relevant fact. One is that the greater relative size of businesses, and greater real levels of investment, in the present day, mean that the increased gravity and scale of offences need not be solely attributable to inflation *simpliciter*. This factor would appear to have been at work in *Kostan* (because of the huge investment now involved in the fishing industry) and also in *Cartmill* (forfeiture of £120,000 worth of gambling machines).

- (iii) The second non-inflation related problem is that in certain fields, prices have risen (or fallen) according to patterns totally unrelated to the general inflation rate, with the result that the proceeds of crime, or consequences for victims thereof, become disproportionate even to indexed fine levels (e.g. art thefts, city scandals, medical expenses³²). Certain additional measures, which will be suggested below, are necessary for a standard fine system to deal adequately with such issues

29 Before considering the arguments for and against a standard fine system and the various options available within such a system, the choice of index will be discussed

32 The liability for unlimited damages under s57 of the *Road Traffic Act 1961* outlawed in *Cullen v AG* [1979] IR 394 was all the more serious it can be suspected, because of the spiralling cost of medical treatment

SECTION 2: CHOOSING AN INDEX

30. The most commonly proposed index upon which to base an indexation scheme is the consumer price index (CPI), from which derives the rate of inflation and the tables on the relative value of money. (See Appendix II, Table (i)).

31. The several statisticians' disputes on the calculation of such indexes cannot properly concern us here. But there does exist an important question of policy. It has been suggested¹ that an entirely different index be employed. Figures on changes in levels of disposable income would, on this thesis, be fairer to the fine payer.

32. The argument in favour of this position is not difficult to appreciate. The index on income is meant to be a better indicator of the finnee's ability to pay (and of the impact of the fine as a penalty) than a rate of inflation which may outstrip incomes. Writing in the early 1980's, when memories of the "stagflation" of the 1970's were still fresh in Britain, it is understandable that Ashworth should have proposed this alternative, if the measure of the severity of a penalty is its impact on the citizen.

33. However, such an approach would have served the fine-payer very ill indeed were it in place in Ireland in the middle and later 1980's. "The most appropriate measure of incomes accruing to the residents of a country is Gross National Disposable Income (GNDI).² Central Statistics Office tables

1 Ashworth, *loc cit.*

2 Sean Nolan, Cap 7, *Economic Growth* in O'Hagan, *The Economy of Ireland* (5th ed 1987), at p261.

show GNDI to have increased considerably throughout the latter part of the decade. Even after inflation is taken into account, there was a 13.7% *real* increase in GNDI from 1982-1988 (See Appendix II (ii)). This should reflect an increased capacity to pay fines among the general population.³

34. But it must be decided what is meant by the maintenance of the penal impact of fines. Is it sufficient that they take the same effective "amount" of money from pockets (i.e. that amount of money which in 1960, 1990, or whenever, would buy a certain quantity of goods from the basket from which the CPI is calculated) at all times? Or should fines take account of real increases in the wealth of the population, which brings about a dilution in the penal effect of monetary exactions quite separate from that caused by inflation? One might say that this is the least that could be done in a standard indexation system with no provision for variable fines.

35. This, however, has significant drawbacks. While the CPI and inflation affects everyone fairly uniformly (if the CSO Household Budget Survey is in fact a realistic representation of most citizens' chief areas of expenditure), fluctuations in personal incomes do not necessarily affect all people equally. No satisfactory estimates of *individual* disposable income exist beyond a per capita deduction from the estimates of national income.⁴ Kirwan and McGilvray add⁵ that very little data exists to allow an accurate assessment of the degree of inequality of distribution of personal income in Ireland (or, presumably, of relative rates of growth in income in the various sections of society).

36. Clearly, however, Ashworth's proposal is designed to help those on lower incomes, and some conclusions can be drawn from figures on increases in various social welfare payments. No consistent policy is evident in the pattern of social welfare increases during the 1980's save one of allowing social welfare entitlements to stay abreast of inflation (not always achieved). Efforts have been made in certain sections to increase payments ahead of inflation in order to effect some real improvement in the financial position of recipients. There have been no steps of this kind sufficiently general and sustained to allow us to presume the continuance of such policies in formulating a suitable index. (See Appendix III). Given the apparent commitment of governments at most times merely to maintain the position of social welfare dependents in real terms, it would seem to base the index on inflation figures.

3 It should be borne in mind, however, that GNDI measures income levels *before tax*. Also, as it is individuals who pay fines, the GNDI change between 1982 and 1988 would have to be corrected for population changes in order accurately to depict changes in average gross incomes

4 See Kirwan and McGilvray, *Irish Economic Statistics* (1983) p153. Some guidance on household incomes is given by the Household Budget Survey

5 *Id.*, p156

37. As the practical difficulties involved in implementing a variable fine system are very considerable, and a standard system is a more likely choice by legislators, the avoidance of an index which might penalise the poor should be a priority. The poor cannot normally expect their position to improve beyond minimal increases in social welfare payments to keep pace with inflation, despite any real growth in overall national income. Consequently, the CPI index, and the tables on relative money values, recommend themselves (even if wealthier people feel a decrease in the impact of fines relative to their incomes in times of income growth).

38. A further argument for a CPI-based index is that it is already the basis of Capital Gains Tax indexation multipliers. Indexation relief has the effect of eliminating from consideration for Capital Gains Tax purposes the part of the gain from sale of an asset attributable to inflation, so that only the "real" gain is taxed. Otherwise, the effect of inflation would be to make the tax progressively more punitive with the passage of years, just as fines become progressively less so. The cost\market value of an asset on 6 April 1974 (after which date the relief applies) is indexed by reference to the multipliers set out in tabular form in the *Capital Gains Tax (Amendment) Act 1978* (See Appendix IV). Regulations are issued for each subsequent year of assessment setting out the multipliers for asset disposals in those later years.

Table A⁶

SAMPLE CALCULATIONS

An asset costing £1000 was acquired in 1964.
The value at 6\4\74 was £10,000. The asset was
sold in February 1983 for £40,000

	£
Sale proceeds	40,000
Value 6\4\74	10,000
Indexed	$\times 3,342 = \underline{33,420}$
Gain	<u>£6,580</u>

39. The multipliers can be derived from a simple calculation from CSO tables on the relative value of money, as specified by section 3(1) of the 1978 Act. Many of the monies involved in capital gains will be earmarked for types of expenditure and investment which may be subject to altogether different inflationary pressures from goods and services from the household basket. Nonetheless, CPI-based figures have been judged to be the fairest basis for indexation, just as in the present case. More refined systems tend

6 From Appleby & Roche, *Taxation of Capital Gains in Ireland* (1989), p54.

towards over-complexity.

40. That such an index already has legislative status is in itself an argument for its adoption in the case in hand. The Consumer Price Index is also the index expressly employed by An Post in its "index-linked" savings schemes, and is used frequently in private agreements for the indexation of payments.⁷ Whether a system is advisable which is quite as exact as that necessary for taxation purposes is a separate question, to be discussed below.

41. Much of the effect of criminal penalties lies in their perception by the public, and it may be that there is no evenly paced arithmetical progression of deterrence with fine increases. The primary factor in a criminal's calculations, it appears, is the chance of being caught. Where this is low, even very considerable increases in the severity of penalties are of limited deterrent effect. Bentham's principle of *parsimony* in sentencing - of imposing the minimum punishment consistent with the aims of the penal process - might favour a more considered approach to individual offences and their attendant penalties, and to the need for increases, over an automatic raising of all fines - especially if higher sentences are not found greatly to increase general deterrent effect.⁸

42. But general deterrence is only one of the possible aims of criminal penalties. Another is the possible *incapacitation* of criminals (not directly achievable by fines) and another *individual deterrence* (from recidivism) - this is difficult to gauge, but there is some evidence that increased fines are of some effect.⁹ Yet another more intangible aim of sentencing is that of *retribution*. Often caricatured as mere vengeance-seeking, it is better justified as an attempt symbolically to restore the balance disturbed by the commission of the offence. In Hegel's blunt formulation, punishment is the negation of a negation. Implicit in this concept is the notion of *desert* (quite separate from that of deterrence), and the requirement that sentences should be proportionate to the seriousness of the case. This requires in turn an agreed ranking of the severity of offences and of sentences.

43. The remarks of Lord Ashley notwithstanding - "There is no rationality in the arithmetic of perception"¹⁰ - there would appear to be some rhyme and reason to public views in this respect. A number of surveys have indicated relatively consistent perceptions of sentencing in various sections of the population. Unfortunately, studies were not conducted over time, so

7 Communication from the Central Statistics Office, 10th June 1991

8 J Bentham, *Principles of Morals and Legislation*, Cap XIV, para 6.

9 Bottoms, *Fines The Case for Agnosticism* [1973] Crim LR 296.

10 Cited by Flood & Young *Dangerousness and Criminal Justice* (1981), p5

changes in attitudes due to the decline in the value of money have not been gauged. But the surveys suggest such widely held and quite sophisticated opinions on sentencing that there is ground for confidence that attitudes would alter to take account of the creeping effects of inflation.

Table B¹¹

**STUDY BY A KAPHARDIS AND DP FARRINGTON ON SUGGESTIONS TO
MAGISTRATES ON SEVERITY SCALING**

Score	Sentence	Mean Score in Pilot Study
1	Absolute discharge	9.9
2	Bound over, 1 year	23.2
3	Conditional discharge, 1 year	24.9
4	Fined £10	26.0
5	Fined £40	38.3
	Sentence deferred, 6 months	47.0
6	2 years Probation	47.5
7	Fined £100	53.2
8	60 hours Community Service	58.2
9	6 months, suspended for 2 years	64.2
10	6 months	77.5
11	Committed to Crown Court	76.1

44. Sebba & Nathan's studies¹² also indicate that a meaningful severity scale is possible. While, there was considerable disagreement on the relationship of offences and sentences between their study groups of prisoners, probation officers, students and police officers, there was a very high correlation between them with respect to the relative weight of sentences:

11 *An Experimental Study of Sentencing by Magistrates* (1981) *Law and Human Behaviour* 107, at p114.

12 *Further Exploration in the Scaling of Penalties* 24 *BJ Crim* 221 (1984).

Table C

£50,000 fine	=	5 or more years imprisonment
£10,000	=	12 months
£ 5,000	=	6 months or 5 years probation
£ 1,000	=	3 months

The high degree of consensus again indicates that social perceptions are finely tuned and that the monetary amounts in the above equations would change with time.

45. Sebba & Nathan's conclusion is that it should therefore be possible to establish a criminal penalties code which would be adjusted in line with changes in perception. That, however, would be problematical. Great as is the consensus expressed in Sebba's survey, there has been very little sustained study of this issue. For Sebba's proposals to be adopted, there should first be:

- (i) Survey results on changes in public perception over time
- (ii) Some agreed formula by which the public consensus (if such persisted) could be accurately and reliably gauged.

The first requirement is lacking at present; the second, would seem almost impossible of complete satisfaction without huge administrative difficulties.¹³

46. The surmise that public perception would respond to inflation is nonetheless probably a sound and useful one. In that case, however, as perception is thought to be "inflation-driven", the source to which to refer sentencing adjustments in respect of fines need not be changing and nebulous public opinion, but the inflation index which decisively influences that opinion. In short, Sebba Nathan's study leads not so much to a radical "democratic" indexing of sentencing so much as to an affirmation of the wisdom of indexing pecuniary penalties to more readily available, reliable inflation rates. Under such a scheme the requirement of *retribution* (and of *desert*) in setting penalties can be respected. So also, broadly speaking, can

13 It is hardly likely that any automatic legislative appeal to public opinion would be justifiable if based on a survey of any other than the voting population as a whole, ie a regular referendum

those of *individual deterrence* and of *general deterrence* (as even when penalty levels are only one of several elements in potential criminals' calculations, it is still as well to maintain their *real* penal effect).

SECTION 3: STANDARD FINE SYSTEMS

Categories

47. One of the most common means of indexing fines to inflation in standard fine systems is through the use of categories. Existing fine levels are first brought up to date. Then categories of fine maxima are prescribed, in one of which a place can be found for every monetary fine maximum e.g. in categories of up to £100, up to £500, up to £1,000 and so on. Thereafter, reference is only made to the category; and the monetary maxima which attach to each category can be amended from time to time in a process which is both simple and comprehensive. Such systems have been adopted in the United Kingdom, the Netherlands and the Australian State of Victoria, and proposed in the United States.

The United Kingdom: The Standard Scale

48. Prior to 1982, the position regarding the calculation of fines in the United Kingdom resembled the present position in Ireland. In the absence of a standard index or table, individual amendment was the only means by which specific fines could be adjusted in order to accommodate changes in the value of money. With the enactment of the *Criminal Justice Act 1982*, an attempt was made to rectify the situation by introducing a general method of indexation.

49. Presenting the Criminal Justice Bill for its second reading before the House of Commons, Mr. William Whitelaw, the then Home Secretary, explained both the nature of the problem and the proposed solution:

"Until now, the revision of fines for summary offences has been a slow and piecemeal business. Criminal Justice Bills have brought some fines up to date, and others have been revised when there has been a Bill on

the topic to which the offences relate. But a large number of fine maxima remain outdated, and the penalty structure for summary offences generally suffers from gross inconsistencies.

Part III of the Bill for England and Part IV for Scotland lay the basis for a more rational and cohesive penalty structure. They introduce a standard scale of fines for summary offences and assimilate all maxima in Acts to that scale. The Bill takes over the fine level scale established by the *Criminal Law Act 1977*, updates to it all maximum fines for summary offences in Acts unaffected by that Act or subsequent Acts, and assimilates to the levels on the scale all summary maxima so that they may be altered by order. Some adjustment of the broad effect of these provisions in relation to particular penalties is carried out in parts III and IV and in schedules 1 to 7.¹

Section 37 of the *Criminal Justice Act 1982*² provides:

"(1) There shall be a standard scale of fines for summary offences, which shall be known as "the standard scale".

(2) The scale at the commencement of this section is shown below.

<i>Level on the scale</i>	<i>Amount of fine</i>
1	[50]
2	[100]
3	[400]
4	[1,000]
5	[2,000]

(3) Where any enactment (whether contained in an Act passed before or after this Act) provides -

- (a) that a person convicted of a summary offence shall be liable on conviction to a fine or a maximum fine by reference to a specified level on the standard scale; or
- (b) confers power by subordinate instrument to make a person liable on conviction of a summary offence (whether or not created by the instrument) to a fine or maximum fine by reference to a specified level on the standard scale,

it is to be construed as referring to the standard scale for which this section provides as that standard scale has effect from time

1 20th January, 1982 Parliamentary Debates (1981-82) Commons, vol 16, col 301.
 2 See generally *Halsbury's Laws of England*, 4th ed, vol 11, para 520A.

to time by virtue of this section or of an order under section 143 of the *Magistrates Courts Act 1980*"

50 The standard scale establishes a limited number of maximum fines fixed at present day values. Each maximum is categorised and the range of categories is designed to reflect and accommodate the gravity of individual offences. Minor offences may be expected to attract fines within the ambit of *Level 1*, for example, while fines calculated to fall under *Level 5* may be imposed for the most serious offences for which a monetary penalty is an appropriate sanction. The gravity of the offence is measured by the amount of the fine as originally stated in the offence-creating statute, taking into account the value of money at the time of enactment. Once an offence is identified as a *Level 2* offence, for example, the amount of any subsequent fine is calculated by reference to the *Level 2* maximum, as it exists at the time of sentencing. While the monetary value of the fine may be expected gradually to increase with time, the classification of the offence will remain the same.

51 Fluctuations in the value of money will lead to adjustments in the standard scale so that the amounts specified in *Column 2* constantly reflect present day monetary values. To maintain the effectiveness of the standard scale in this regard, provision was made in the *Criminal Justice Act 1982* for a complementary mechanism to update those monetary amounts. The Secretary of State is empowered under section 143 of the *Magistrates' Courts Act 1980*,³ to issue an order altering the amounts listed in *Column 2* of the standard scale, to meet with change in the value of money. An increase in the statutory maxima was in fact made in 1984.⁴

52 In addition, it was necessary to devise a means of assimilating existing individual fines to the standard scale. This was done by means of a table not dissimilar to that described below. In this respect, the draughtsmen of the 1982 Act avoided the cumbersome task of updating every such fine in some form of comprehensive, detailed schedule.⁵ To a large extent this was unnecessary since a broad spectrum of offences had been updated by individual amendment in the years immediately preceding the introduction of the 1982 Act.

3 As amended by section 48(1) of the *Criminal Justice Act 1982*

4 N Walker *Sentencing Theory Law and Practice*, (1985), para 16.3

5 VG Vines in *Judicial Discretion in Sentencing by Judges and Magistrates*, with Supp, para 9.18 describes it as unfortunate that the Act stopped short of setting out such a detailed schedule 'with the consequences that it is necessary when dealing with an offence to consider the quantum of permissible fine in light of the provisions [in the Act]

53 Sections 30 and 31 of the *Criminal Law Act 1977* provided for increases in fines for a substantial number of summary offences listed in Schedule 6 to the Act. Section 32 of the *Magistrates Courts Act 1980*, established a "prescribed sum" for penalties on summary conviction for offences triable either way. The prescribed sum was originally set at £1,000, but has been increased to £2,000 by order of the Secretary of State,⁶ pursuant to his power to alter specified sums under section 143 of the same Act. References to "statutory maximum" in the *Criminal Justice Act 1982*, are interpreted as meaning "prescribed sum" in accordance with section 32 of the 1980 Act.

54 The 1982 Act catches all other fines which have not been updated by the *Criminal Law Act 1977* or by subsequent legislation. Section 38 of the 1982 Act provides for a general increase in existing maximum fines for summary offences. Where a relevant enactment refers to a fine or maximum fine of the same monetary value as one of the figures in *Column 2* of the standard scale, a simple substitution is required. Section 46 provides for the insertion of the corresponding category number in *Column 1* for the amount of the fine specified in the statute. The penalty is subsequently fixed by reference to the standard maximum for that level on the standard scale.

55 Where the amount of the existing statutory fine differs, it is increased, so as to bring it in line with the closest greater amount in *Column 2* of the standard scale. Section 38 provides

- "(1) Subject to subsection (5) below and to section 39(1) below, this section applies to any enactment contained in an Act, passed before this Act (however framed or worded) which, as regards any summary offence created not later than 29th July 1977 (the date of the passing of the *Criminal Law Act*), makes a person liable on conviction to a fine or maximum fine which -
- (a) is less than £1,000; and
 - (b) was not altered by section 30 or 31 of the *Criminal Law Act 1977*; and
 - (c) has not been altered since 29th July 1977 or has only been altered since that date by section 35 above
- (6) The fine or maximum fine for an offence under an enactment to which this section applies shall be increased to the amount at the appropriate level on the standard scale unless it is an enactment in relation to which section 39(2) below provides for some other increase

⁶ Criminal Penalties etc (Increase) Order 1984 SI 1984/447 at 2(1) Sch 1

- (8) Subject to subsection (9) below, the appropriate level on the standard scale for the purposes of subsections (6) and (7) above is the level on the scale next above the amount of the fine or maximum fine that falls to be increased
- (9) If the amount of the fine or maximum fine that falls to be increased is £400 or more but less than £500, the appropriate level is £1,000 "

Section 39 of the Act deals with special cases to which section 38 does not apply. In respect of these offences, the fines remain at their existing levels or are subject to special increases. Section 40 provides for a general increase of fines under subordinate instruments, in similar fashion to section 38.

56 Overall, this system of indexation has the merit of being relatively simple. The determination of present-day maxima does not require any significant element of mathematical calculation on the part of the judge. By merely altering the amounts of maximum fines, the scheme does not in any way effect present sentencing procedure *per se*, nor impair the existing discretion which judges enjoy regarding the assessment of what constitutes a suitable sanction in the individual case.

57 The efficacy of the standard scale is dependent upon an accurate assessment, at the outset, of the number and range of categories which are required adequately to encompass the varying levels of fine, currently in existence. It is obviously advisable to avoid unnecessary complexities. Nevertheless, there is a danger that over-simplification, leading to a limitation in the range of maxima available, may result in some disparity in the fixing of fines. Owing to the simple nature of the scheme in general, it is important that the standard scale be regarded as a table of general maxima and not as a series of precisely tabled calculations.

58 The existence of a mechanism for the continual and effective updating of the standard scale itself is, of course, vital. It is also essential, in the first instance, that existing statutory maxima are assimilated to the standard scale. In this regard, the process of increasing fines employed in the English legislation seems unnecessarily complicated and fragmented. There is some evidence, indeed, that the UK method of restoring the value of fine maxima unaffected by the Acts of 1977 and 1980 is not very accurate, or at least is not directly applicable to Irish circumstances, as many legislative maxima have been left unamended in this jurisdiction for inordinate periods, and to a degree far greater than in Britain. A maximum fine of £100 prescribed in

1962 should in 1984 have been worth some £900,⁷ and in 1990 over £1300.⁸ Yet under the UK Scheme, as set out in s38 of the Act of 1982, such a 1962 fine could have increased to a maximum of £400. Such an outcome is hardly satisfactory in a system designed to maintain fine values. The creation of a table, identifying changes in the value of money and covering a timespan which encompasses all existing enactments, would constitute a far more sensible approach. Future changes in the value of money could be accommodated by extending the table periodically, the present-day figures on the table representing the current amounts on the standard scale.⁹

Australia: Penalty Units

59. The Australian Law Reform Commission, in its recent Report on *Sentencing*¹⁰ examined the problem of inflation eroding the value of fines. It noted that in every jurisdiction in Australia, it has been necessary to update fines by regularly amending each piece of offence-creating legislation.¹¹ Accordingly, the Commission recommended that a more efficient method of adjusting fines, known as the "penalty unit" system should be enacted for both federal and Australian Capital Territory offences.¹²

60. The penalty unit system was introduced in Victoria in 1981. Monetary maxima for fines were replaced by a specified number of penalty units, varying in amount according to the seriousness of the offence. The value of the penalty unit, which is currently set at £100,¹³ is fixed by legislation and can be constantly updated. The Tasmanian Law Reform Commission has proposed that a similar scheme be introduced in Tasmania.¹⁴

61. One problem with the Victorian innovation is its piecemeal approach. The *Penalties and Sentences Act 1981* (the relevant legislation) applies to some 400 offences under 56 previous Acts, but this number is just a fraction of the thousands of offences in existence in Victorian law.¹⁵

62. A system was established by which fines could be up-dated. This was not based on a "value of money" indexation. Rather, the accompanying prison sentence was taken as the measure of gravity, with the fine being adjusted accordingly. One month's imprisonment is equivalent to 5 units, six months'

7 See discussion of *Rollinson* above.

8 See calculations below.

9 See proposals below.

10 ALRC 44-1988.

11 Para 111.

12 *Id.*, para 119.

13 *Id.*

14 Tas LRC 41, 9-10.

15 Fox and Freiberg, *op cit* p567.

to 25, and so on¹⁶ The reason why this system is not of universal application to all Victorian criminal law is that the level of penalties must be examined by the Attorney General in each case before the 1981 Act can apply Clearly, this is a long and cumbersome task While there may be a case for such a review of Irish penalties and the varying gravity thereof, it cannot be recommended as a preliminary step to an indexation process If anything, the reverse should be the case, penalties being reviewed in the light of their newly restored impact on offenders

The Netherlands. Categories

63 A committee was instituted by the Dutch Minister for Justice in 1966 (the van Binsbergen Committee) to advise on possible amendments to the law relating to fines It referred to a situation similar to that pertaining in Ireland at the present repeated amendments to the Criminal Code had resulted in chaos, "a patchwork made up from literally hundreds of pieces, over large parts of which other patches have been sewn It is high time (the Committee added) for this to be jettisoned because no reasonable purpose is served by such a situation"¹⁷ The Committee resolved to adopt throughout the Code the generic maxima, collectively assigned to broad categories, which existed in respect of economic offences - a classical category system in which the appropriate adjustments to inflation can be made by amending one statutory article only¹⁸

64 This scheme was enacted in 1983, in the context of a general reform of the Penal Code Article 23 of the Code runs as follows

"The fine is at least five guilders
The highest fine that can be imposed for a criminal offence equals the amount of the category that has been fixed for that offence
There are six categories
the first category five hundred guilders
the second category five thousand guilders
the third category ten thousand guilders
the fourth category twenty five thousand guilders
the fifth category one hundred thousand guilders
the sixth category one million guilders

In the case of conviction of a legal person, if the category fixed for that offence does not allow for an adequate punishment, a fine can be

16 *Id* This approach has appeal only if the maximum terms of imprisonment set in legislation over the years are in some degree consistent a claim which cannot be made for the *corpus* of Irish criminal law

17 Vermogensstraffen (Property Penalties) Interim Report Staatsuitgeverij Gravenhage 1969 p70

18 See Sharples *The Fine An Outline of Certain Novel Dutch Proposals* (1970) Sol rs JI 835 also Warner *op cit* at para 82

imposed of a next category".

65. All offences can be punished by a fine, including murder. However, there are no offences for which a fine in the sixth category has been fixed. This category is reserved for legal persons, ie. corporations, which cannot be imprisoned, and the scale of whose operations may necessitate the imposition of an especially heavy fine. The merits of this provision will be discussed below.

66. All offences were reviewed and placed in a suitable category. This did not involve any re-examination of the gravity of offences.

"According to certain criteria the formerly existing fines, also paying due regard to the legally possible deprivation of liberty in case of the offence, have been transposed into the new system of fines. By this we could limit the review to a technical operation".¹⁹

Belgium: Multipliers

67. In Belgium the impact of inflation on fines is avoided by use of a system which applies multipliers to all fines prescribed in the Belgian Penal Code. The law of 5th March 1952 is applicable.²⁰

68. The effect of the present provision (effective from 8th January 1990) is to add to every prescribed fine 790 decimals, or tenths, of the original amount. This allows one simply to multiply it by 80. Formerly, the multiplier was 60 (i.e. 590 decimals were added).²¹

19 Communication from A Patijn, Legislative Counsellor, Dutch Ministry of Justice (24/4/90) Unfortunately the precise criteria employed in adjusting fines to categories were not described

20 Law relating to additional decimals on Criminal fines

Art 1 The level of criminal fines imposed by courts and tribunals under the Penal Code and certain laws and regulations, even those enacted after the present law, is increased by (seven hundred and ninety) decimals, without this increase modifying the juridical character of these penalties

Courts and tribunals will state in their decisions or judgments that, by application of the present law, the fine imposed in accordance with the above, under the Penal code, the special law or certain regulations is increased by (seven hundred and ninety) decimals, indicating the figure which results from this increase

The additional decimal amounts will be enacted at the same time and by the same means as the principal sum, conforming to the law and the sentence

21 Communication from M Melchior Wathelet, Belgian Minister for Justice, 7th September 1990

69 From the limited information available, the Belgian system does not appear to be suitable for Irish purposes. The application of a single multiplier across the board seems to be based upon the assumption that existing fine levels are fairly consistent (and thus fairly uniformly under valued). Precisely the opposite assumption must inform any system adopted in this jurisdiction, that fines prescribed at various times correlate badly not only with present money values, but also with each other. The Belgian scheme, thus, performs only the same task as a category system and seems the less appealing of the two options. The subjection of fines still expressed in legislation in now minuscule amounts to a changing multiplier is rather an abstract process. The characterisation of offences, and corresponding penalties, as category one, two, or otherwise, will probably evoke greater public identification and familiarity with the system. The changing levels of category maxima would also, conceivably, become fairly common public knowledge. In other respects also, category systems are preferable. Fine categories, and occasional changes therein, can be readily assimilated and justified by the judiciary. While the use of a multiplier is a simple operation, the increase several-fold by the maximum penalty stated in the relevant legislation might be mystifying for the convicted offender and the public alike. A category system is therefore to be favoured over multipliers of the Belgian type.

Proposals

70 *A category system is our preferred form of standard fine indexation.* It was remarked above, however, that the means of bringing fines up to date in Britain, so that a category system might apply thereafter, would be less than satisfactory if implemented in Ireland.

71 How does one get everything into line before implementing a category system? Tables of relative money values exist going back beyond 1922 well into the last century (though they become less reliable as one goes further back). The main table is published quarterly in the Statistical Bulletin based on a 1914 index of 100.²² Pre-1914 tables also exist,²³ but these indicate why the problem has only fairly recently become acute - changes in money values before 1914 were so slight that for present purposes they can probably be disregarded.

72 There could be a system whereby one would arrive at an appropriate sum as follows. A £10 fine is provided for in the Act of 1928, using the table we find that the relationship in the value of money between 1928 and 1989 is in the proportion 177.5,335, £10 then is equivalent now to

22 See Appendix II (ii)

23 See Appendix II (iv)

$$\frac{\pounds 10 \times 5,335}{177} = \pounds 301^{24}$$

But even if every District Justice was equipped with a pocket calculator this would be impracticable. The scope for error in a busy courtroom, even in such a simple calculation, is considerable, which could give rise to irksome appeals. Such a process must necessarily be difficult of comprehension for the defendant and onlookers. In any event, the degree of mathematical exactitude which such a system would achieve, while desirable in tax computations, seems unnecessary in the criminal sphere.

73. *A simpler system which we favour, would work as follows.*²⁵ First, one would have only a limited number of possible maximum fines. For example, it might be decided that three levels was adequate. These could, be fixed in present day values at (a) not more than, say, £100 (for relatively trivial offences), (b) £500 (more serious offences) and (c) £1,500 (the most serious). These one would call categories A, B, and C. The sums fixed would not, of course, stand for all time but a mechanism to update the values of each category would be fixed.

74. The next step is to decide to which category to assign each existing maximum fine, so as to arrive at the appropriate level of fine. Again, mathematical exactitude is not required and it is probably not necessary to deal individually with each Act. From looking at the tables we see that roughly speaking the value of money has halved since 1980, decreased four times since 1975, decreased ten times since 1964, decreased twenty times since 1942, and decreased fifty times since 1914. A maximum fine of £100 today therefore equates to a maximum fine of £50 in 1980, £25 in 1975, £10 in 1964, £5 in 1942 and £2.00 in 1914. In the century before 1914 prices were very stable.

75. Using this logic we can construct a table which enables us to assign any maximum fine in any piece of legislation to its appropriate category, as in the following example:

24 This is the system adopted in section 3(1), CGT (Amendment) Act 1978.

25 The Commission is indebted to Mr James Hamilton of the Attorney General's Office for suggesting much of what follows.

Table D

	Category A (Present maximum £100)	Category B (Present maximum £500)	Category B (Present maximum £1,500)
1980-	£100 or less	Over £100 - £500	Over £500
1975-1979	£ 50 or less	Over £ 50 - £250	Over £250
1965-1974	£ 25 or less	Over £ 25 - £125	Over £125
1945-1964	£ 10 or less	Over £ 10 - £50	Over £ 50
1915-1944	£ 5 or less	Over £ 5 - £25	Over £ 25
-1914	£ 2 or less	Over £ 2 - £10	Over £ 10

The appropriate category is fixed by reading the level of fine opposite the date of the Act in which it is contained and seeing into which category it falls

76 The table can, of course, be made much more exact and elaborate, but it is suggested that too much elaboration is undesirable and unnecessary. In some cases, the bands of time can be quite wide because money values were quite stable. With our recent experience of inflation we can find it hard to remember how recent a phenomenon this is. Between 1815 and 1914 money values hardly changed at all. Inflation really only began to take off seriously in the late 60's and became extreme in the 70's and 80's. Even our present "low" inflation is higher than in all but a few of the years before 1970.

77 There would be advantages in picking "memorable" dates for the time bands even at the expense of loss of financial exactitude since it would be of

advantage to practitioners to be able to remember the categories into which fines fell without always having to check the table. The fixing of levels of fines by the Dail or Westminster has never been an exact science in any event.

78. *We consider that, rather than having the table enacted to be referred to by judges and practitioners (and to mystify others as any multiplier system must), the table should be used to update and categorise every single fine "up front" in a statute with long schedules. Thereafter, a ministerial order could increase category maxima with ease. Nor would such a process necessarily be a mammoth task. Subject to ascertaining the existence of the offences, the dates of their creation and the penalties then fixed, hundreds of fines could be recalculated and placed in the appropriate categories in a single working day - provided, that is, that the opportunity was not taken at the same time to reconsider the gravity of offences (a step disapproved of above). A category system on the lines of that in Britain could then run smoothly; judges, practitioners, offenders and the public alike would be presented with clear fine maxima requiring no further legislation; and there would be the added benefit that almost all sentencing provisions in the Irish criminal law would be "codified" in a single piece of legislation. (It might be possible to "restate" non-pecuniary penalties in the same legislation, in order to complete that codification process. New offences and penalties might be added to the schedule as enacted, so that it would always be comprehensive).*

79. Against such an approach, it could be said that the labour involved in codifying the vast numbers of criminal offences now in existence would hardly be repaid by the benefit resulting. Few statutes nowadays, no matter what their subject matter, fail to establish criminal offences, be it in company law, consumer law and so on. *There must however be a number of offences regularly prosecuted in the courts, in respect of which it would be wasteful of court time (and an invitation to occasional error) to have judges having daily recourse to the tables. Perhaps the fine maxima for such regular offences could be expressly updated according to the proposed scheme, without prejudice to the application of the same revaluation mechanism to all other fine maxima as they arise in court.*

If a standard fine approach is to be adopted, such an approach is recommended.

Implementation of Proposals

80. The precise means of implementing such a scheme remain to be considered, as certain constitutional issues intervene under the rubric of Article 15.2, which states:

"1° The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has

power to make laws for the State

2° Provision may however be made by law for the creation or recognition of subordinate legislatures and for the powers and functions of these legislatures"

81 The delegation of legislation under Article 15 2 2 is supervised by the courts. The decision in *Pigs Marketing Board v Donnelly*²⁶ gave an indication of the latitude which would be allowed to experts employed by the Executive in formulating rules in matters of detail. Relating to the setting of a hypothetical trade price, Hanna J remarked in the High Court

"That is a statutory direction, it is a matter of such detail and upon which such expert knowledge is necessarily required, that the legislature, being unable to fix such a price itself, is entitled to say 'We shall leave this to a body of experts in the trade who shall in the first place determine what the normal conditions in the trade would be apart from the abnormal conditions prescribed by the statute, and then form an opinion as to what the proper price in pounds, shillings and pence would be under such normal conditions'"²⁷

A similar conclusion - that it was futile to ask the legislature to fix the amount of prices or levies which must be based on complex calculations about market conditions and needs - was drawn by the Supreme Court in *City View Press v AnCO*²⁸

82 That case concerned levies prescribed by the *Industrial Training Act 1967*, the extent of their application to various sectors of industry being decided by AnCO. O'Higgins CJ, for the Court outlined a test: one must ask if the power delegation is more than a mere giving effect to principles and policies contained in the statute itself. The Act in that case contained clear declarations of aims and policies, and established machinery for their achievement. "The only matter which is left for determination by AnCO is the manner of calculating this levy in relation to a particular industry. This is doing no more than adding the final detail which brings into operation the general law which is laid down in the section"²⁹

83 Stout summarises the criteria as being very similar to those pertaining in the US

26 [1939] IR 413

27 *Id* at p422

28 [1980] IR 381

29 *Id* at p399

"the statute should define the subject of regulation with sufficient specificity, and should provide statutory standards both as to the objectives to be achieved and the processes for attaining those objectives."³⁰

This jurisprudence has been outlined because it is essential that the implementation of any indexation system comply with it. Two recent cases may shed light on how the principle will be enforced by the courts.

84. *Hogan & Morgan* expressed in 1986 their scepticism as to the invulnerability of s1 of the *Imposition of Duties Act 1957* to constitutional challenge. That section empowers the Government to impose customs duties by statutory order, with or without qualifications or limitations, "of such amount as they think proper". This, they submitted, goes well beyond giving effect to statutory principles and policies, and appears to allow the Government to amend legislation, and to levy taxes by executive decree.³¹ This point was raised in *McDaid v Sheehy*,³² in which the applicant sought to quash his conviction under the *Imposition of Duties (No. 221)(Excise Duties) Order, 1975* by *inter alia* challenging the constitutionality of s1 of the 1957 Act. Blayney J in the High Court found the Order to be applicable because it had been confirmed by s46 of the *Finance Act 1976*, and so had legislative authorisation. Nonetheless, he found the Act to be unconstitutional. Citing the decision in *City View*, he stated that the Oireachtas under Article 15.2.1 of the Constitution must provide a scheme of principles and policy in the primary legislation so that the *vires* of secondary legislation could be tested. Otherwise, the Oireachtas's authorisation was unconstitutional. This Blayney J found to be the case in respect of the 1957 Act - s1 gave the executive an entirely free hand and should therefore be struck down.

85. *Byrne and Binchy* remark that these comments should be treated as *obiter*, on the principle that constitutional questions should be addressed only where they are necessary to a decision.³³ This was also the opinion of the Supreme Court majority on appeal. Given that the 1975 Order derived its validity as of 1976 from the Finance Act of that year, the applicant could not be prejudiced or damaged by any provision of the Act of 1957, and the Court declined to pronounce on the constitutional validity of the impugned section.³⁴

30 RM Stout, *Administrative Law in Ireland* (1985), 49-50.

31 GW Hogan & DG Morgan, *Administrative Law* (1st ed, 1986) p15. See also GW Hogan, *Imposition of Duties (Stamp Duty on Certain Instruments) Order* (1985) 7 DULJ (ns) 134.

32 [1991] ILRM 250 (Sup Ct, 1990), affirming in substantial part, [1989] ILRM 342; (High Ct, Blayney J, 1989).

33 R Byrne and W Binchy, *Annual Review of Irish Law 1989* (1990) at pp112-13.

34 [1991] ILRM, at 258-259 (*per* Finlay CJ; Griffin, Hederman and O'Flaherty JJ concurring). McCarthy J dissented on the appropriateness of deciding the constitutional issues, but did not comment on them himself.

Blayney J's comments and conclusions are not therefore of binding legal effect, but they are still indicative of judicial thinking. However, in a case decided in the Supreme Court between his decision and that on the appeal in *McDaid*, a somewhat different approach was manifested. In *Harvey v Minister for Social Welfare*,³⁵ the constitutional validity of s75(1) of the *Social Welfare Act 1952* (ss310-12 of the *Social Welfare (Consolidation) Act 1981*) was contested. The section makes provision for "adjusting" any benefits, allowances, etc where two or more are payable to one person. Here also there was found to be delegated to the Government "an unfettered discretion",³⁶ but the Supreme Court took as its starting point the presumption of constitutionality described in *East Donegal Co-operative*. One had to assume that the Oireachtas intended the powers conferred on the respondent Minister by s75(1) of the 1952 Act to be exercised in accordance with the Constitution. It was held that the provision was not such as to make it necessary or inevitable that the Minister would make a regulation which was in breach of Article 15.2 of the Constitution. "The wide scope and unfettered discretion contained in the section can clearly be exercised by a Minister making regulations so as to ensure that what is done is truly regulatory or administrative only and does not constitute the making, repealing or amending of law in a manner which would be invalid having regard to the provisions of the Constitution"³⁷

86 In fact, the regulation in question³⁸ was held invalid because it negated the intention of the legislature as expressed in s7 of the *Social Welfare Act 1979*. Article 15.2 of the Constitution can be used to restrain rather than to invalidate an open-ended legislative delegation of powers. Thus, it is regulations which are more than merely regulatory in effect which will be struck down, rather than the Act which ostensibly permits this. This is probably a salutary change of emphasis, it in no way undermines the separation of powers, but rather upholds it by less drastic means.

87 Whether the primary or the secondary legislation would be struck down, it is in any event apparent that "legislative" regulations are to be avoided. Even a limited provision, directing the Minister for Justice to raise fine category levels in accordance with *inflation* (presuming all fines had been initially updated by statute) might be suspect, simply because academic opinion may vary on the correct meaning of that term. Rather, the means employed in the *Capital Gains Tax (Amendment) Act 1978* are to be preferred. Section 3(1) of that Act³⁹ gives full guidelines on how indexation multipliers are to be derived from the Consumer Price Index. It is further provided that

³⁵ [1990] II RM 185

³⁶ *Id.* at p188 (*per Finlay CJ*)

³⁷ *Id.*

³⁸ *Social Welfare (Overlapping Benefits) Regulations 1953* s3b as amended by s4 *Social Welfare (Overlapping Benefits) Amendment Regulations 1979* s4

³⁹ See Appendix V

regulations be issued specifying the multipliers determined in accordance with subsection (1). The Consumer Price Index is defined. Thus, only the compilation of the CPI, and its application in a prescribed fashion, remain the responsibility of the executive - which conforms to the practice of leaving such matters of detail to experts, for the purpose of effectuating principles and policies contained in the statute itself. *We favour this approach.*

88 *Similarly, we favour an approach whereby statutory provision is made for the periodic review of fine category levels (e.g. every four years), or for their increase whenever the previous figure became devalued by, say, 10%, as calculated from CPI/relative money values.* The formulae described above would be employed, and the executive function would then be purely instrumental,⁴⁰ no danger of unconstitutionality should then exist.

The USA and Australia Proposals and Special Schemes

89 A hybrid category system has been proposed for the United States in the *Model Penal Code*. Section 6.03 sets specific dollar limits for each degree of felony and misdemeanour. Additionally, it provides for the increase of fines in line with the proceeds of crime.

Section 6.03 Fines

A person who has been convicted of an offence may be sentenced to pay a fine not exceeding

- (1) \$10,000, when the conviction is of a felony of the first or second degree
- (2) \$5,000, when the conviction is of a felony of the third degree,
- (3) \$1,000, when the conviction is of a misdemeanour,
- (4) \$500, when the conviction is of a petty misdemeanour or a violation,
- (5) any higher amount equal to double the pecuniary gain derived from the offence by the offender
- (6) any higher amount specifically authorized by statute

The *Model Penal Code* thus seems to adopt a standard scale approach - in 1968, its primary function was not to respond to inflation, but it could easily be employed to do so. Unlike the position here, the degrees of felony and misdemeanour have maintained their significance, as is illustrated by section 1.04 of the relevant title and chapter of the draft Code.⁴

⁴⁰ The results could be then be embodied in a statutory instrument.
⁴¹ Tentative Draft No. 13 *Sentencing and Correction* s1.04 (1961)

90 The *Model Penal Code* is of more interest for the way in which it deals with two problems outlined above, which can elude solution by a simple index those of vast business offenders, and of exorbitant criminal proceeds. This is done by prescribing, in addition to the normal fine, an exaction of up to twice the proceeds of the particular crime. A similar course of action was recommended by the America Bar Association

"In fixing the maximum fines for some offences, the legislature should consider the feasibility of employing an index other than a dollar amount in cases where it might be appropriate. For example, a fine gain might be appropriate in cases where the defendant has profited by his crime, or a fine relative to sales, profits, or net annual income might be appropriate in some cases, such as business or antitrust offences, in order to assume a reasonably even impact of the fine on defendants of variant means"

91 Similar steps have been taken in Australia. In addition to the Victoria measures described above, some 200 provisions have been enacted in Victoria and Australian Commonwealth law providing that fines for the relevant offences be computed with reference to the quantum of damage caused by the extent of the financial obligations breached. This has been done with very little consistency. Ordinarily, the fine is the value of the property, etc involved plus a further amount not exceeding a maximum. This is sometimes coupled with a minimum penalty. The fine is generally expressed in taxation cases as a percentage or multiple of the amount evaded. Very infrequently, a ratio is set (usually fixed, but sometimes variable) between some quantifiable aspect of the subject matter of the offence and the penalty to be exacted.⁴²

46 Such a situation is obviously and undesirably confused. Nonetheless, all of the American and Australian provisions here described embody a single principle that the problem we are addressing be dealt with by confiscation of some fraction or multiple of criminal proceeds.⁴³ The Dutch approach already remarked upon is different. It is designed to deal with corporations so large that even a heavy fine would be meaningless, by providing that such legal persons be subject to fines one category above those normally applicable in any case. Sharples points out the van Binsbergen Committee's reasoning

'In view of the increasing part played by massive organisations within society, eg in food supply, banking and credit facilities, transportation, and the merger of firms in trade and industry, the committee considered that a provision was advisable to empower the courts, in the instance mentioned, to impose a fine not exceeding the maximum of the next

42 Fox & Freiberg *op cit* p569

43 In this connection see the recent Law Reform Commission Report on the *Confiscation of the Proceeds of Crime* (LRC 35 1991)

higher category"⁴⁴

93 It will be remembered that when the issue was discussed above, the two problems were stated separately – coping with large-scale offences is not precisely equivalent to the task of dealing with large-scale offenders, though the two will often overlap. *We therefore recommend that both approaches be adopted in some form within a category or standard scale system. General provisions of both types would sit equally well in a multiplier system. The model we favour would thus involve the imposition on legal persons of a certain size of fines of the category immediately above that ordinarily applicable to the offence in question.*

44 Sharples *op cit* p836

SECTION 4: SENTENCING THEORY AND VARIABLE FINES

94 Any one considering various sentencing theories in respect of fines will come upon a conflict between two principles of equality¹

95 One is the principle of equality of impact. The same penalty can have radically different effects on various individuals. This can be true of all penalties, including imprisonment, but it is especially the case with relation to fines. Personal financial circumstances can differ enormously, and so, therefore, can the impact of a fine of a fixed monetary amount. "It is as if the rate of income tax were the same for all, instead of the graduated scale of taxation which has come to be widely accepted"²

96 If one attributes more importance to the notions of desert and proportionality than to the more uncertain benefits of general deterrence, what should matter in sentencing is not consistency of penal measures, but rather consistency of penal effect³. Such consistency may require fining the poor man £10, and the rich man £1,000, for offences of the same gravity. Hence the variable fine systems which are now to be discussed.

97 Quite obviously opposed to this is the principle of equality before the law - that no one should suffer disadvantage before the law on the basis of his race, gender, religion, social background or *means*. Few would deny such a principle, and it is difficult to contest that it should protect the rich as much

1 See Ashworth *op cit* Chap 7 *Sentencing & Penal Policy* (1983)

2 *Id.*, p273

3 The forthcoming Law Reform Commission *Consultation Paper on Sentencing Policy* will contain a detailed treatment of sentencing theory

as the poor. Thus, while in *Markwick's Case*⁴ it led Lord Goddard CJ to sentence a wealthy man to 2 months' imprisonment rather than a £500 fine, so that there might be no suggestion that the rich could buy themselves out of being sent to prison, the principle has more often worked to prevent the imposition of higher than normal fines on the rich in an attempt to achieve some equality of impact. In England section 35 of the *Magistrates Courts Act 1980* requires those courts (and a similar obligation is placed on Crown Courts) to consider *inter alia* the means of the person so far as known to the court. The English Court of Appeal has held, however, that means should be considered only *after* a decision on the amount of the fine, on the basis of the gravity of the offence, so that while the fine may be reduced for the poor, higher fines for the rich are excluded⁵.

98 It is submitted that the principle of equality before the law *strictu sensu* should primarily be considered a procedural rule, linked to due process. In respect of substantive issues, like sentencing, a different idea of equality might serve better: that equality not only involves treating like cases alike, but also treating different cases differently. The English provision for that principle, in respect of sentencing, was until recently half-hearted and lopsided, making allowances for poverty but not for wealth, and applying in an entirely discretionary fashion.

99 However, whether equality of impact is capable of practical achievement is another question, which brings us to consider the merits of variable fine systems. It is worthwhile bearing in mind, given the brief of this Report, that one of their great advantages is the ease with which they can accommodate inflationary pressures.

*Germany and Sweden - The Day Fine System*⁶

100 Fines are directly addressed in Chapter 25 of the *Swedish Penal Code* which came into force on 1st January 1965 and was amended on 1st January 1972. The Code establishes three types of fines: monetary fines, day fines, and standardised fines⁷. Monetary fines are imposed for lesser offences such as drunkenness, disorderly conduct, and minor traffic infringements. Standardised fines, which are fixed on a special basis of computation, are primarily applied in cases of tax evasion and of offences regarding trade and

4 (1953) 37 Cr App R 125

5 *R v Fairbairn* (1980) 2 Cr App R (S) 315. *R v Thomas* [1981] Crim LR 191

6 It is not clear whether the day fine system has been extended to the five eastern Laender of the Federal Republic of Germany. References are therefore made occasionally to West Germany meaning those Laender which were never part of the German Democratic Republic.

7 The Swedish Penal Code vol 17 of the American Series of Foreign Penal Codes, 1972 pp79-80. See Stromholm *An Introduction to Swedish Law* (2nd ed 1987) para 6.5.1

industry⁸

101 The overwhelming majority of fines are imposed in the form of day fines. In fact, the day fines system pre-dated the enactment of the *Penal Code*. A day fine mechanism was in operation in Finland as early as 1921.⁹

102 In the day fine system, the *number* of day fines represents the measure of punishment, and the *amount* of each day fine is estimated in accordance with the financial situation of the accused. The day fine is calculated by multiplying these two numbers together. These two factors are assessed independently of each other.

103 Van Kalmthout and Tak describe the process which is used to calculate the offender's means and therefore the value of a "day"

"A circular from the Office of the Chief Public Prosecutor indicates how the level of the day fine must be fixed. The calculation is based on the gross income for the year prior to the conviction less income tax, living costs and the costs involved in earning the income.

The amount which is left over is used to calculate a day fine which is fixed at one thousandth part of it"¹⁰

Whatever the result of these calculations, however, there is a minimum "day" of 10 Kronor, and a maximum of 1,000.

104 Reductions may be made where the offender has a dependent spouse and for each of the offender's children. There are also provisions providing for adjustments in the amount of day fines in specific cases. For example, the fine may be reduced where the offender has large debts, or where the offender is a married woman without an independent income, and increased where the offender has capital over 30,000 Kronor.¹¹

105 The *number* of day fines imposed is determined by an evaluation of the gravity of the offence. The more serious the nature of the offence, the greater

8 See *Non Custodial and Semi Custodial Penalties*, Report of the Advisory Council on the Penal System, UK, 1972, at p74, AM Van Kalmthout & PJP Tak, *Sanctions-Systems in the Member States of the Council of Europe*, Part 1, p273

9 Warner, *op cit*, para 72.

10 Van Kalmthout & Tak, *op cit* p273

11 Report of the Advisory Council on the Penal System, *op cit* p75

the number of day fines imposed. The minimum number of day fines is 1 and the maximum 120, although in special cases, for example involving multiple offences, the maximum may be increased to 180. The highest sum which can be imposed, therefore, is 120,000 Kronor (120 x 1,000 Kronor) for a single offence, and 180,000 Kronor (180 x 1,000 Kronor) for multiple offences. In the German case, the Criminal Code mandates that both the number of day fine units and the value of each unit be published in the court's decision.¹²

106. Thus the composition of the fine is transparent. A Report of the *British Advisory Council on the Penal System* described the manner in which Swedish courts assess the offender's financial means:

"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 1930s. 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 telephone. Where the offender is present at a 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".¹³

107. However, the successful operation of the German scheme depends upon voluntary disclosure of personal financial means by the offender. The authorities have no right of access to an individual's taxation records and the offender cannot be forced to divulge information revealing his ability to pay.¹⁴

108. The bulk of Swedish day fines are in fact determined by public prosecutors, who can invite the offender to accept a fine, rather than be prosecuted in court.¹⁵ This process has the same legal effect as sentencing by a court, but prosecutors cannot impose more than 50 day fines (60 in the case of multiple offences).¹⁶

109. While a day fine mechanism such as the Swedish model is primarily designed to relate the amount of the fine to the offender's ability to pay, this

12 St GB S40(4); Friedman, *op cit* p288. An argument is given below for the confidentiality of unit values.

13 *Advisory Council op cit* p75.

14 Warner *op cit* paras 74-75 & pp110-111. See also below.

15 Warner, *op cit* para 72.

16 H Thornstedt, *The Day-Fine System in Sweden* [1975] Crim LR 307, at p308.

very process allows the system to keep pace with changing money values. While raising fines in *real* terms (e.g. to increase deterrence or retribution) can be achieved by altering either the *number* of days which can be imposed for various offences or the fraction of income which constitutes one "day", no such changes are necessary simply to *maintain* the penal impact of fines. Just as the system is tailored to adjust to variations in income over the spectrum of classes, so it can also adjust to income differences over time. Admittedly, it is a response to changes in nominal income levels rather than to inflation rates, but this is consistent with the individualised nature of the day fine mechanism¹⁷. The considerations which dictated the choice of the inflation rate as an index over national disposable income do not apply here.

110 One solitary amendment might be necessary, to the minimum and maximum levels of fines, so that the operation of the day fine process would not be too much circumscribed by outdated financial limits. That the Swedish system was not as resilient as the above paragraph suggests is possible is evident from the necessity of replacing the Chief Public Prosecutors' circularised sentencing guidelines of 1963 in 1973¹⁸. The precise deficiencies of the system in this respect are not clear from the literature published in English. It is evident, however, that were a limited day fine system to be adopted - one which placed individuals in broad income categories for "day" calculation purposes, rather than always calculating from their precise income - the categories employed would have to be reviewed from time to time in line with inflation or changes in income levels. That judges and prosecutors would adopt such a categorising approach in practice is highly probable, it is thought - but where this is only informal (and its legislative adoption is not recommended), it is likely that it would be altered spontaneously in the light of relevant changes. Arguments do exist, however, and are rehearsed below, for the legislative adoption of a maximum unit value, and this would have to be altered periodically.

111 It is said that the day fine system has been endorsed in Sweden by the judiciary and public alike and that in addition, the wide discretion which it creates to tailor the fine to the individual case does not result in any marked disparity in sentencing practice¹⁹. It has been observed that in practice, "the apportionment of day fines has a tendency to be made according to a set of patterns when the prosecutors and the courts are dealing with offences of the more frequent types"²⁰.

17 As noted above it is fairer where practicable to adjust fines to changes in nominal income rather than to inflation especially where the latter outpaces the former.

18 Thornstedt *op cit* p308

19 Report of the Advisory Council on the Penal System *op cit* p76

20 Thornstedt *op cit* p308

112. One further positive feature of the day fine system should be noted. As was suggested above, as the value of fines maxima is eroded, their relationship not only with the gravity of offences but also with imprisonment provisions is distorted. Both the Swedish and German variable fine systems provide for this. While it is rare for a short-term prison sentence to be available as an alternative to a fine (particularly in Germany), tables are set out for the conversion of fines to prison terms in cases of default. In Sweden, the conversion is done according to a sliding scale, which again is almost inflation-proof because stated in terms of "days". 5 day fines are converted to 10 days imprisonment, 100 day fines to 64 days', 120 day fines to 70 days' and 180 day fines' to 90 days' imprisonment.²¹ In Germany, the fine may be converted into a prison sentence at the "exchange rate" of one day in prison for each day fine unit.²²

113. It has been suggested in many quarters that default imprisonment should be abolished, not least in Sweden.²³ But should it be maintained, it is as well that it should be implemented in a consistent fashion, as outlined above. Also, the day fine system should ensure that default is kept to an absolute minimum. In Sweden, many default prison terms are suspended, so that (in 1975), of 250,000 fines imposed per annum, fewer than 150 resulted in actual imprisonment: this from a 'high' of 12-13,000 *per annum*.²⁴ In Germany, offenders serve default prison terms in less than 4% of cases, which Friedman believes results from imposing fines commensurate with offenders' ability to pay.

114. The Swedish scheme has served as a model for the implementation of similar regimes in other jurisdictions, such as Denmark, where it was introduced in 1939,²⁵ and West Germany in 1975.²⁶ Day fine schemes are currently in operation in a number of countries, including Austria, Hungary, Costa Rica, El Salvador and Bolivia. As of 1984, recommendations had been made for its introduction in Poland and Spain,²⁷ and in Canada.²⁸ A scheme was adopted in France in the 1980's.²⁹ A scheme was also considered for

21 Thornstedt *op cit* p311

22 St GB S43

23 Report cited by Grebing. See also, Warner, *op cit*, p102.

24 Sutherland and Cressey, *Principles of Criminology* (3rd ed 1960)

25 *Id*, p307

26 See generally: Friedman, *The West German Day-Fine System. A Possibility for the United States?* (1983) 50 U Chicago LR 281 The introduction of the German system was accompanied by a phasing out of virtually all short-term imprisonment in favour of fines. Fines increased as a proportion of penalties imposed from 63% in 1968 to 84% a decade later Bishop *Aspects of European Legal Systems*, Chap 6, of L Blom-Cooper ed *Progress in Penal Reform* (1974) 83, at p84

27 *Id*, para 76

28 See *Community Participation in Sentencing*, LRC of Canada Working Paper on Fines (1976) p34

29 Moxon, *op cit* at p3

Scotland,³⁰ and one has now been adopted for the entirety of the United Kingdom.

The United Kingdom: Proposals and Legislation

115. The Scottish Home and Health Department's 1988 Consultation Paper, *Fines and Fines Enforcement*, remarks that a considerable problem of fine default exists in Scotland: while most fines are paid, and fine defaulters account for only 6% of the prison population at any time, they constitute almost 50% of prison admissions.³¹

116. Section 395(1) of the *Criminal Procedure (Scotland) Act 1975* requires the court to consider the offender's means so far as they are known to the court (but there is no corresponding obligation of disclosure).³² Section 395A allows the remission of the fine by the court which imposed it or which is responsible for its enforcement. The court cannot, moreover, at the time of imposing the fine, impose imprisonment in the event of a future default unless the offender is before the court, and the court determines that, having regard to the gravity of the offence or the character of the offender, or to some other special reason, it is expedient that in the event of default the offender be imprisoned without further enquiry.

117. Section 396 of the 1975 Act requires that a court shall, save in certain circumstances, allow an offender at least seven days to pay a fine (or the first instalment thereof); Section 397 allows the offender to apply to the relevant court for further time to pay a fine, which may be granted unless the previous non-payment has been wilful, or the offender has no reasonable prospect of paying even if further time is allowed.

118. Section 398 applies to those offenders who have not had imprisonment imposed in the event of default at the time of the imposition of the fine, and who fail to pay. In these circumstances the court must enquire in the offender's presence into why the fine has not been paid (although this does not apply if the offender is in prison). The options available to the Means Enquiry Court (MEC) are:- to remit all or part of the fine (under section 395a); to reduce the level of instalments and to extend the period over which they must be paid (under section 399); to order supervision of the fined

30 Rt Hon M Rifkind, Secretary of State for Scotland, Speech, November 1988 to the Howard League for Penal Reform 28 Howard JI 81 (1989)

31 Para 1 1, at p1.

32 This provision parallels section 35 of the *English Magistrates' Courts Act 1980*. In neither case are there many rules to guide courts. save in exceptional circumstances, fines should be capable of being paid in 12 months (*Knigh's Case* (1980) 2 Cr App Rep (5) 82), and it has been suggested that the offender's income should not be reduced below subsistence level ((1979) Justice of the Peace 302) See Walker, *op cit* p239

person, normally by a local authority social worker, who will assist and advise the offender in regard to payment of the fine. Such supervision *must* be ordered in the case of a person aged under 21 before detention in default can be imposed (section 400); or to impose a period of imprisonment or detention not to exceed the maximum specified in section 407(1A).

119. While it is not technically within the brief of this Report, it is thought that the adoption of similar provisions in this jurisdiction would be a salutary measure; this would be especially welcome if a variable fine system were not ultimately to be introduced.

120. One of the factors impelling consideration of a day fine system in Scotland was precisely the opposite of that which is our chief concern: an analysis of the movement of average fines since 1977 in comparison with the increase in prices (as measured by the Retail Price Index) and average earnings of manual workers in Scotland shows that fines rose much faster than prices and earnings.³³ This factor, together with the unstructured nature of existing means enquiries, led the Department to advocate in the Consultation Paper the introduction of pilot schemes. Some of the arguments in favour of and against day fines which follow in this Report are rehearsed. It adds two further possible *cons*, though neither seems unsurmountable:

- (a) that it might be necessary to introduce statutory penalties for giving false and misleading information, although it was possible that such would be covered by the *False Oaths (Scotland) Act 1933*.³⁴
- (b) that the offender with capital assets but little disposable income may get off relatively lightly, unless the scheme included the discovery and valuation of assets (but this had proved possible in other circumstances e.g. in relation to claims for supplementary benefit).³⁵

121. As a result of the responses received to the Consultation Paper, a clause was introduced to what was then the Law Reform (Miscellaneous Provisions) (Scotland) Bill relating to the experimental day fine proposal. However, it was dropped from the Bill during its passage through the House of Commons.³⁶ A copy of the clause is contained in Appendix V.

33 *Id.*, at para 5.2.1. It should be noted, however, that much of this disparity may be attributable to the introduction, and later amendment, of the standard scale.

34 *Id.*, at para 5.13.2. The recent LRC Report on *Oaths and Affirmations* (LRC 34-1990) should shed light on the Irish position.

35 *Id.*, para 5.13.4.

36 Communication from Ms S MacLeod, Scottish Home and Health Department, 22nd November 1990.

122 The Home Office proposed a day fine system for England and Wales in its 1990 White Paper "Crime, Justice and Protecting the Public"³⁷ As elsewhere, the primary motivation was to achieve equality of penal impact. It was also thought desirable to induce a return to the high level of recourse to fines by courts of the 1970's. Experiments were conducted in four magistrates' courts of which details have since been published. The four areas were Bradford, Basingstoke, Teeside and Swansea. It is noted in the White Paper that magistrates who were sceptical at the start came to take a positive view.³⁸

123 Evaluation was confined to 17 offence categories. Almost 7,000 cases in which unit fines were imposed were compared to more than 6,000 in which fines were imposed under the traditional system. The experiments were, however, constrained by doubts about imposing larger fines on the better off. Courts therefore set local norms for the average weekly disposable income they thought an employed person in their area would have. They would then reduce the fine for anyone they assessed to have less than this norm.³⁹ Nonetheless, in Basingstoke, where the norm was higher than in the other three areas (£20 rather than £10 per week), the better off did pay more than before. In each trial, the minimum unit value was £3.⁴⁰ The unit used for assessment was a week's disposable income, after deducting tax and necessary living expenses. Courts were accustomed to assessing weekly income in determining payments, so this approach fitted better with existing practice. It was also felt that few people think in terms of daily income and expenditure, and those fined would more readily understand a system similar to how they planned their finances. Disposable income was calculated by subtracting from net income an allowance for each person supported by it e.g. £50 for a spouse, £25 for a child, etc.⁴¹ All the courts began with the same form, reproduced in Appendix VI which solicited basic information on income and family commitments, with provision for a submission by the defendant about any special circumstances. In its simplicity, this form was closer to that used to determine eligibility for legal aid than to a detailed means inquiry.⁴² One court (Swansea) also sought information on savings and occupation.⁴³ It was found that information was made available (without compulsion) in most cases,⁴³ that the simple means forms employed did not greatly affect court workloads, and that the actual arithmetic of calculating fines was quite straightforward. Other findings were that the use of fines did not increase, though fine revenues did in Basingstoke, because of the more realistic ceiling

37 Cmnd 965 February 1990. This follows similar proposals by the Penal Affairs Committee *Means related Fines* (1990) Justice *Sentencing: The Way Ahead* (1989) the Prison Reform Trust *Tackling Fine Default* (1990) and NACRO *Fine Default* (1981).

38 *Value Added* op cit para 52.

39 *Value Added* op cit p 11.

40 *Id.* p 14.

41 *Value Added* op cit p 11. *Fines* 1990.

42 For further debate on calculation of relevant income see *Moynihan* op cit pp 24-25.

43 This may however be attributable to the decision only to reduce fines where warranted and not to increase them for those on above average incomes.

Disparities between courts in fines imposed on poorer offenders were significantly reduced. There was a drop in default imprisonment, and fines were paid more quickly.⁴⁴

124. The proposals of the White Paper should now be considered. The extension of the unit fine system to legal persons, who see commercial advantages in criminal acts because of the low level of normal fines, was recommended.⁴⁵ Attachment of earnings, or of benefits, was considered a valuable method of enforcing fines,⁴⁶ though disquiet was expressed in the media about automatically deducting sums from social security payments which are already paltry.

125. What appears to be an irksome limitation is that the monetary value of the fine would have to be within the statutory maximum for each offence.⁴⁷ This will normally be an undesirable step. Fine maxima under present arrangements mark the level of punishment for the most grave manifestation of commission of the relevant offence, *not* the penalty for the less serious acts of a wealthy offender. Otherwise, the punishment for the most serious transgressions of the well-off would be subject to an unnecessarily low ceiling. Also, these maxima would still need to be updated in accordance with inflation, which would defeat our most immediate purpose. Most such criticisms are defused by the manner in which the proposals have been incorporated in the United Kingdom's *Criminal Justice Act 1991* (relevant provisions of which are contained in Appendix VII). The unit fine system has been combined with the scheme of maximum penalties which already existed - an offence's level on the standard scale dictates the number of fine units which can be imposed.⁴⁸ There is a maximum unit value of £100 per week.⁴⁹ No minimum is stated. If it is thought that this maximum is a reasonable one, then the wealthy will not be perceived to get away relatively lightly for their more serious infractions, and such a hybrid scheme may be workable. It will remain necessary, however, periodically to update the standard scale maxima and the unit maximum dictated by them.

126. Provision is made to compel offenders to furnish the court with a statement of means. It is a summary offence to fail to furnish such a statement; knowingly or recklessly to furnish materially false information; or knowingly to withhold any material information.⁵⁰ Where no statement is furnished, the court may make such determination of the offender's means as

44 For a further assessment of the trials see Justice, *op cit* pp22-23

45 *White Paper*, para 5

46 *Id.*, para 5.4

47 *Id.*, para 5.3

48 See the 1991 Act, s16

49 *Id.* s16(3)

50 See the 1991 Act, s18

it thinks fit.⁵¹ Provision is also made for default imprisonment, and for the recovery of fines by deductions from income support.⁵²

127. *Markwick's Case* is superseded by s17(2) of the new Act. S17 reenacts for cases not embraced by the unit fine scheme the old general rule that the means of the offender be taken into account as far as possible in fixing the amount of fines; subsection 2 adds the rider that this rule applies whether it "has the effect of increasing or reducing the amount of the fine".

128. Table E sets out some likely fines for different income groups under the new system.

Table E⁵³

	Drunk/ Disorderly	Speeding 30 mph over	Shop- lifting	Drunk driving twice limit	Assault
Current going rate (approx)	£50	£150	£150	£350	£400
Likely new unit value (approx)	5	10	15	18	25
50k salary married, two children mortgage	£500	£1,000	£1,500	£1,800	£2,500
25k salary single mortgage	£500	£1,000	£1,500	£1,800	£2,500
married, two children no mortgage	£375	£750	£1,125	£1,350	£1,375
10k salary single mortgage	£325	£650	£975	£1,170	£1,625
married, wife self supporting no children mortgage	£250	£500	£750	£900	£1,250
married, wife not earning two children, mortgage	£100	£200	£300	£360	£500
Unemployed single	£50	£100	£150	£180	£250
married, two children	£20	£40	£60	£72	£100

51 *Id.* s16(8).

52 *Id.* ss19, 20, 21.

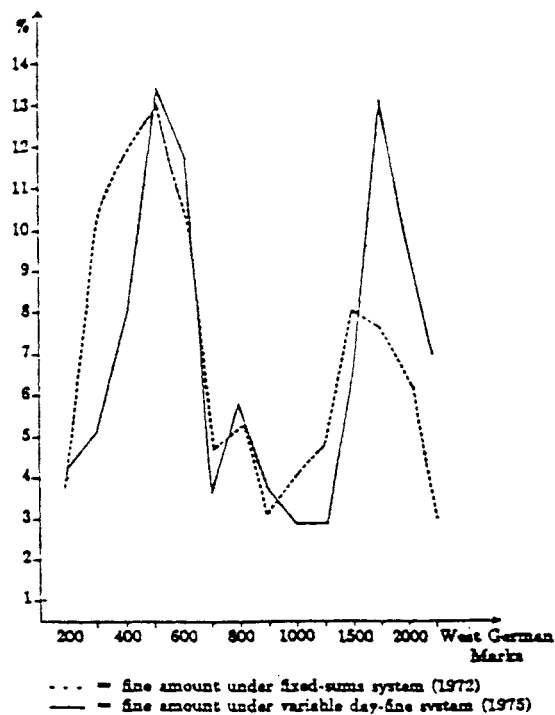
53 Devised by B Gibson and the Magistrates' Association, *The Independent*, 12th July 1991.

Variable Fine Systems: An Assessment

129. It remains to be seen how successful variable fine systems are in achieving their aims. The Max Planck Institute for Foreign and International Criminal Law investigated the effectiveness of the German measures. Table F indicates a reduction in the number of quite low fines (e.g. a halving in the number of 300 DM fines and a diminution by $\frac{1}{3}$ of the number of 400 DM fines), and fines above 1500 DM increased noticeably after the new law took effect. This may be either because the reforms have the desired effect of burdening more affluent offenders with progressively higher fines, or because courts simply started to punish some crimes more severely. The low level of fine default indicates the former, but there is no guarantee that this is done accurately.

Table F

DISTRIBUTION OF FINES, 1972 AND 1975,



130 From the above account, the advantages of a day fine system can be summarised as follows

- (i) Day fines do not require any adjustment for inflation one of the major reasons for their adoption in some Latin American countries Also, German figures indicate some increase in fine revenues The English experiments suggest that total fine revenues will increase in a unit fine system Raising the ceiling value of a unit from £10-20 (as in the trials) to £100 (as in the 1991 Act) would afford increases in revenue substantially in excess of any increase in enforcement costs⁵⁴
- (ii) They provide a clear simple and fair correlation between fines and imprisonment (default or primary)
- (iii) They achieve a modicum of equality of impact on those sentenced There have been more radical suggestions in this respect Ashworth⁵⁵ remarks, that a day fine system such as Sweden's might impose a £500 fine on a person with £20,000 *per annum*, but that this would have less impact than a £50 fine on a person earning £2,000 *per annum* because in the former case, the purchasing power of what remains is greater in real terms the person fined may still have to forego very little as a result of the financial deprivation This is a similar argument to that for progressive taxation of income, and indeed, Ashworth suggests a 'progressive' rather than an arithmetical calculation of the amount of a day unit Similar reasoning inspired the group of academics who prepared an alternative draft to the German Penal Code which contains the day fine system They sought equal impact on all offenders by attempting to replicate imprisonment outside of prison The fine in their scheme would have taken enough income from each offender to place him at a subsistence level for a period of up to two years⁵⁶

This suggestion was rejected as extremely cumbersome, but it is objectionable in other respects, as are Ashworth's proposals They appear to embody a different notion of the principle of equality of impact, which we believe should accommodate the differing needs of different individuals There is no common level of need or of subsistence⁵⁷ - this is defined in each case by a person's prior circumstances Any attempt to achieve total uniformity of penal impact in this fashion, by widely differing treatment in different cases (as opposed to a consistently computed scheme of *per diem* exactions), would be inconsistent with the principle as we understand it

54 Moxon *op cit* p23

55 *Op cit* p291

56 Friedman *op cit*, p286

57 Levels of social assistance are employed in the text accompanying Table G merely to indicate absolute minimum subsistence

- (iv) Day fines promote efficiency in fine collection, as defaults are substantially reduced⁵⁸
- (v) Transparency is achieved by allowing the calculation of the amount of the fine from the separate elements, the gravity of the offence and the means of the offender, to be readily discernible. This is because two separate scales operate, with their own maxima. One is the scale of gravity which allows for a particular offence a fine of anything from zero to the maximum, say ten units, depending on the circumstances of the case, the other is the means scale, with the value of each unit having a possible range from zero (or perhaps a very low minimum) to perhaps £100. This allows judicial calculations of greater sophistication and consistency than one surmises take place at the moment. For example, under the present system, where an offence bears a maximum fine of £100, a judge may impose a £20 fine either (a) because of an offender's poverty (even though the instance was very grave) or (b) because the instant commission of the offence was not peculiarly serious (even if the offender is wealthy). But if the judge does not impose a fine of £4 on the person who (c) shows his offence to have been an equally minor or excusable infraction and (d) is of equally slender means, the decision is inconsistent and unfair. One or other element (gravity or means) will have had less importance attributed to it than in case (a) or (b) above. There is room for suspicion that such inconsistency and unfairness is quite normal, given the *ad hoc* nature of such determinations at the moment. Day fines afford to judges the necessary analytical tools to consider and determine the often confused questions of gravity and of ability to pay separately from each other.
- (vi) Day fines may encourage greater resort to fines, in preference to more expensive and specialised community disposals, or to imprisonment. Certainly, unit fines make it easier effectively to fine the poor⁵⁹. If we consider the example given immediately above, one may think that there is little difference for even the poorest offender between fines of £4 and £20. But it is a vital distinction if fines are to be extended to more serious offences, so as to reduce recourse to other often inappropriate and uneconomical penalties. If the £100 maximum is translated to 10 penalty units,⁶⁰ the not very serious infraction under discussion is held to be worth 2 units, and the more serious 10, the poorer offender has one fifth the income of the richer,⁶¹ and the unit values of £2 and £10 derived therefrom are within any minimum and maximum set by the

58 See Moxon *op cit* p21 who records declines of 15-25% in default imprisonment in the English trials

59 *Ibid*, p23

60 This equivalence is suggested merely for convenience of calculation. Table F below suggests that a £100 maximum should translate to some 15 penalty units based on a mean unit value in 1989 of £6.60

61 Again for ease of calculation the rather improbable incomes of £2,000 and £10,000 per annum respectively are attributed to them

system, the scenario will replicate itself. But consider a more serious offence, with a maximum penalty of 100 units. The difference in exactions for grave and minor infractions, and from poor or wealthy offenders, will then be highly significant. The former will be fined £40 for a minor commission, of say 20 units, and £160 for a serious one worth 80, our better-off offender will in the same circumstances pay £200 and £800 respectively. It is in such circumstances that transparency and clarity of judicial calculation are especially necessary, and only a day fine system allows the extension to cases of such gravity of fines as an effective and just penalty. The alternative would be the sort of "fines for the rich/ (default) imprisonment for the poor" scheme condemned in *Markwick*⁶² - only a variable fine scheme, fully accepted in the public mind, can enable fines of £160 and £800 for essentially the same offence to have equal denunciatory effect and penal impact on an offender, expressly separating as it does the elements of his culpability and his means.

- (vii) Unit fines should help promote greater consistency of approach to sentencing. In the past, differences in income levels across countries like England have contributed to difficulties in achieving consensus on the appropriate level of fines. But a "unit" is a unit of seriousness wherever the offence occurs, or whoever the offender. That different courts could resort to similar "unit ranges" for offences was borne out by the English experiments⁶³. Thus, unit fines can actually reduce disparities between fines imposed by different courts on people of similar means (even though the difference in the average size of fines might actually increase because of the differences in local incomes)⁶⁴.

131 The objections to variable fine systems are also of some weight

- (i) Achievement of complete equality of impact is impossible (which point is illustrated by the flaws of the more radical schemes outlined above). But as Ashworth points out, this does not stand against attempts to improve the present situation.
- (ii) As more stress falls on questions of desert, and of the offender's circumstances, there is reason to fear that this will result, in the public perception, in a diminution of the deterrent/denunciatory role of fines, despite the transparency of the computational process.

Friedman, following an economic analysis (as advocated by Posner⁶⁵), asserts that the advantages of day fine adjustment, outlined above, are

62 (1953) 37 Cr App R 125. See above.

63 Moxon *op cit* p7.

64 *Id* p10.

65 See R Posner *Economic Analysis of the Law* (2nd ed 1977).

desirable only if they can be effected without diminishing the economic disincentive to crime created by the penalties of the criminal law. He gives an example illustrative of the problem.

Suppose that a person is assessing the consequences of committing a crime from which he would gain \$10,000 if successfully completed. The would be criminal draws the potential fine and the probability of being convicted into his assessment.

$$\text{Expected Gain} = (\text{Probability of Success}) \times (\text{Potential Benefit}) \text{ minus} \\ (\text{Probability of Conviction}) \times (\text{Potential Fine})$$

If he anticipates a forty percent chance of being sentenced to an \$18,000 day fine, he should expect a net \$1200 loss,⁶⁶ and hence he will face an economic disincentive to commit the crime. If the potential criminal is less well-off, however, and he knows he will face a day fine of only \$13,000, he can expect a net gain of £800 from the deed.⁶⁷

More generally, when an individual's income is below some threshold, he will face an economic incentive to commit certain crimes and the *incentive increases with diminishing income*.

This skewing of incentives by an *income adjusted day fine system* results from the fact that the potential benefit of a crime is a constant value, but the potential cost of a crime decreases with diminishing income. The skewing effect is most acute when the day fine is imposed on low-income offenders.⁶⁸

Friedman remarks that this incentive to crime (which is very real even if criminals do not indulge in the precise calculations which he set out) may not have attracted notice in West Germany because that part of the Federal Republic enjoys substantial income homogeneity. Friedman notes that this is not the case in the USA. Nor is it so in Ireland, but the breadth of income distribution is not thought to be as wide here as in the USA. Friedman suggests setting a minimum fine for various offences, to preserve the disincentive to criminal activity (though at the cost of abandoning the ideal of more precise adjustments of fines according to income).

It will be appreciated that the prognosis for this jurisdiction must be

66 Expected Gain = (0.6 x \$10,000) - (0.4 x \$18,000) = \$6,000 - \$7,200 = () £1200

67 Expected Gain = (0.6 x \$10,000) - (0.4 x \$13,000) = \$6,000 - \$5,200 = \$800

68 Friedman *op cit* 302

even worse than in Friedman's model, which assumes that there will be no proceeds to the criminal if there is a conviction. While a comprehensive scheme for the confiscation of the proceeds of a number of scheduled offences has been recommended by this Commission, the present regime for the forfeiture of such money and property is in all but a few isolated cases highly deficient.⁶⁹ If one assumes that the convicted person can keep the proceeds of his crime, he might calculate on this basis

$$\begin{aligned} \text{Expected Gain} &= (\text{Probability of Success}) \times (\text{Potential Benefit}) \\ &\quad \text{minus } (\text{Probability of Conviction}) \times (\text{Potential} \\ &\quad \text{Fine minus Potential Benefit}) \\ &= 1 \times (\text{Potential Benefit}) \text{ minus} \\ &\quad (\text{Probability of Conviction}) \times (\text{Potential} \\ &\quad \text{Fine})^{70} \end{aligned}$$

Friedman's examples would then be computed as follows

$$\begin{aligned} \text{Expected Gain} &= 0.6 \times \$10,000 - 0.4 \times (\$18,000 - \$10,000) \\ &= \$6,000 - \$3,200 = \$2,800 \\ &(\text{or } \$10,000 - (0.4 \times \$18,000) = \$2,800), \end{aligned}$$

and

$$\begin{aligned} \text{Expected Gain} &= 0.6 \times \$10,000 - 0.4 \times (\$13,000 - \$10,000) \\ &= \$6,000 - \$1,200 = \$4,800 \\ &(\text{or } \$10,000 - (0.4 \times \$13,000) = \$4,800) \end{aligned}$$

In *both* cases, the criminal could be expected to profit by his crime even if convicted. This constitutes a considerable argument for the confiscation of criminal proceeds. To what extent both the Friedman model and our Irish variant constitute an argument against an unrestricted day fine system must depend on whether, and in what degree, we believe that

- (a) probable outcomes, benefits and penalties for crimes are readily identifiable, and that
- (b) offenders actually calculate on this basis

There is evidence that much crime is opportunistic, thus excluding such cerebral considerations. Nonetheless, the apparent undermining by day

⁶⁹ See Law Reform Commission Report *The Confiscation of the Proceeds of Crime* (LRC 35 1991) pp7 8 73 77

⁷⁰ We are very grateful to Mr Brian Lenehan of the Department of Finance for suggesting this alternative model and for providing the computational examples which follow

fine systems of the general deterrence which criminal sanctions are supposed to provide is disturbing⁷¹ Friedman's proposed minimum penalties offer only an imperfect solution to this problem⁷²

- (iii) Difficulties arise when the offender has a low income or no income at all. Much writing has been devoted to ascribing income to housewives, students, those in receipt of social welfare payments, and those who might give up their jobs in anticipation of a fine. Daunton-Fear⁷³ suggests that it would be appropriate to require some form of community service to be performed by the offender, the type to depend on his skills, state of health, etc.

While this exposes a weak point in the day fine system, it must be admitted that the problem of low-income fines who of necessity default on payment is even greater in standard fine systems, with their generally higher imprisonment rates for non-payment.

- (iv) One of the more fundamental and principled objections to day fine systems is the assertion that offenders ought to be aware when committing crimes of any especially dire consequences for them of the due process of law. Against this argument can be pitted that for equality of impact. As the two are logically incommensurable, the resolution of the dispute must lie with the balance of practicality and appeal between standard and variable fine schemes.
- (v) It is alleged, especially in Denmark, that the system is a "social facade", or a parody - that judges in fact fix a lump sum and then divide it into the number and level of day fines as required by the system⁷⁴. Grebing points out, however,⁷⁵ that this is atypical - the German experience certainly tends to give the lie to this criticism.
- (vi) An objection to day fines voiced by the Dutch Commission on Financial Penalties is the "over-dimensionalisation" of the offender's financial capacity,⁷⁶ at the expense of disproportionality in relation to harm caused. This criticism is unjustified as the system takes full account of the gravity of offences as well as of criminals' means. However, financially heavy penalties for minor infractions may be unacceptable to some sections of the community (even when their impact on the particular offender is not great). Therefore, maxima are set in Sweden.

71 General deterrence remains one of the functions of the criminal justice system, even though its efficacy as a theory for the distribution of criminal penalties must be doubted. See the forthcoming Law Reform Commission *Consultation Paper on Sentencing Policy*.

72 See also the solution attempted at s16(6)(d) of the UK *Criminal Justice Act 1991*. However, it does not take account of differing probabilities of conviction.

73 *The Fine as Criminal Sanction* 4 Adelaide LR 307 at p312.

74 Grebing *op cit* p73.

75 *Id* p74.

76 Warner *op cit* p69.

and Germany to avoid this situation. Also, in Sweden a further exception is allowed from the principle that the gravity of the offence should influence the *number* of day fines and not their *amount* - the law allows the amount of a heavy day fine to be abated if the offence is petty⁷⁷. This inconsistency is regrettable, but is probably necessary because the Swedish day fine system does not extend to many minor offences (for which fines are imposed on a standard basis), and amounts of fines under the two systems for infractions of a similar seriousness should not differ enormously.

- (vii) Extending a day fine system to minor offences is itself problematical. The UK Advisory Council on the Penal System⁷⁸ remarked that it was probably in this sphere that day fines would be most beneficial, but also most impractical.

Swedish practice excludes all offences for which as the law stands the maximum penalty is below a certain figure. This in itself would present a problem. On one view it would be right to follow the Swedish pattern and exclude all minor offences on the ground of administrative convenience, on the other hand, motoring offences are much the largest group in which fines are imposed and involve the widest range of offenders in terms of financial status, so that here the injustice of unequal treatment might be most marked.

In fact, it seems many minor offences are in practice punishable by day fines in Sweden. In any event, the extension of the system to all offences is possible, as in Finland, with modified procedures being adopted in minor cases⁷⁹. Unfortunately, there is no evidence in the literature of the success or otherwise of the Finnish system.

- (viii) Warner asserts that day fines would involve a complete re-orientation of the legislative provision for sentencing. If it were desired to restate all statutory maxima in terms of day units of gravity, a comprehensive review of all criminal legislation would be necessary⁸⁰. As the UK Advisory Council remarked:

"Under a day fine system it would not be possible to retain our system of monetary limits to the maximum fine of an offence, since it would be necessary to determine a whole new set of maxima in order to vary the size of the penalty so as to reflect the offender's means as well as the relative seriousness of the

77 Thornstedt *op cit* p311

78 Report of the Advisory Council on the Penal System p7

79 Warner *op cit* p69

80 *Id.*, p68

offence. If the principle of statutory maximum penalties for magistrates' courts were retained it would probably be necessary to substitute statutory maxima in terms of the numbers of day fines.⁸¹

This obstacle is not insurmountable, but the same objections to it exist as do to a UK style category scheme in a standard fine system: that the result is not a sufficient reward for the labour involved (especially as this Report's brief compels primary consideration to be given to the ease of adjustment to inflation of any system over any of its other possible advantages).

It is submitted, however, contrary to the above that such a review of all penalties need not be necessary to implement a day fine system with statutory unit maxima. If the present monetary maxima embodied in Irish legislation were brought up to date using a simple multiplier or other such mechanism, it would then be assumed that this is the maximum fine which it was just to impose on a person with an average income for that period. Mean disposable income could be deemed to be the average industrial wage, less PRSI and tax for a married couple, less minimum subsistence.⁸² The social assistance rate could be employed as a measure of minimum subsistence, for this calculation and for calculating disposable income in individual cases.⁸³ To convert this to a maximum stated in units of gravity applicable across the board to persons of all income levels (assuming, for example, that a unit was to be $\frac{1}{1000}$ th part of an offender's income) would be a simple matter of dividing the value of the fine by the value of a mean unit (being $\frac{1}{1000}$ th part of mean disposable income).⁸⁴ Table G below is illustrative.

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- 81 Advisory Council, *op cit*, p8. See however the discussion above of the 1991 Act's retention of monetary maxima in a unit fine system.
- 82 We are grateful to Mr Brian Lenehan of the Department of Finance for suggesting this approach to average income, and for a number of helpful comments on the text which follows
- 83 Perhaps 90% of this figure, or some such fraction, would be better; otherwise social assistance recipients would have zero nett income. However, this problem would be provided for by having a minimum unit value.
- 84 This is subject to one cautionary rate, GNDI is calculated *before* tax, while a day-fine system might take account of net income. The mean income figure work then be liable to adjustment for taxation

Table G

Take for example a maximum fine of £100 under the Gaming and Lotteries Act 1956. For 1990 that maximum should be increased thus

$$\frac{100 \times 5426}{420} = \text{c } £1292$$

Mean disposable income for 1989 could be calculated as follows

Average industrial wage		£13,100
Tax (married couple)	£2,540	
PRSI, etc	£ 730	
Social Assistance (married)	<u>£3,952</u>	
	£7,222	
Nett		£ 5,878

Mean unit value is thus £5,878 / 1,000 = c £5.90. The unit maximum for the relevant offence under the 1956 Act would then be £1292 / 6.6 = c 195 units

Fine maxima, stated in units, could then be grouped into general categories of maxima, e.g. 50, 100, 250, 500. Thereafter, further calculations for inflation or for changes in national income levels would be unnecessary. The maximum fine for a "small-time" operator on a disposable income of £10,000 *per annum* would thus be £2,190 (or perhaps £2,500), and a larger concern turning a profit of £500,000 *per annum* would be liable to a fine of up to £109,500 (or perhaps £125,000).⁸⁵ If wider, more approximate tables were available converting old fines to modern values in bands of five or ten years, such a system would not be unduly cumbersome.

- (ix) By far the greatest obstacle to implementation of a variable fine system is the difficulty of ascertaining means. This problem was responsible for the systems' rejection in Mexico (after a two year experiment)⁸⁶, England before now,⁸⁷ Western Australia,⁸⁸ and the Commonwealth of Australia.⁸⁹ In Sweden, unusually, the documents in all government

85 There might however be special provisions for corporations

86 Grebing *op cit* p75

87 Advisory Council *op cit*. See now the 1990 White Paper

88 The Dixon Report. Report of the Committees of Inquiry into the Role of Imprisonment 1981. Votes & Proceedings of Parliament. Western Australia (1982) Vol 4

89 Australia Law Reform Commission (ALRC 44 1988) paras 114-118

offices and the courts are in principle open to inspection by the public. While tax returns are confidential, the authorities' records of the amount of individual citizens' taxable income and the amounts of income and wealth tax payable by him are on public access⁹⁰. This is not the case in Ireland, but neither is it the case in Germany, where the day fine system operates without automatic judicial access to personal financial information. While, as illustrated above, the scheme's introduction resulted in a change in fining rates, there are some doubts as to the accuracy with which fines are related to means. The Max Planck Institute's Study revealed⁹¹ that courts impose a day fine without any information on the defendants' income in 55% of cases. The willingness to provide information about income varied considerably among socio-economic groups. Unskilled workers were the most likely to provide information, the self-employed were the least so. In only 17% of the surveyed cases did the court or state prosecutor's office make a supplementary investigation into the defendant's income or wealth.

Friedman concludes

"The courts' lack of information about offender income and wealth in over one-half of the cases in which a day fine is imposed undercuts two of the goals of the Second Criminal Law Reform Act. First, West German courts cannot impose a fine whose culpability and income components are trustworthy when they have no information concerning income. Second, the lack of information about an offender's income undermines the goal of effecting equality in the impact of fines. When a court guesses the income of an offender, there is a large margin for error, and the resulting fine can be inadequate or overly burdensome⁹².

This suggests that some means of eliciting financial information from offenders is necessary for a variable fine system to work adequately. At the same time, the acquisition of such information must not be too time-consuming, if the system is to be extended (as it should be, if implemented at all) to fairly minor crimes. Ideally then, there should be compulsory disclosure of income, through tax returns or social welfare documents. It will be objected that these are highly confidential documents, and certainly a decision on this point would be highly controversial. Daunton-Fear lists some of the arguments against such a step and concludes as follows:

First, it is clear that the scheme will add to the burden of the

90 Thornstedt *op cit* p310 See also above

91 Friedman *op cit* p295

92 Friedman *op cit* p296

courts, both judicially and administratively. Secondly, some will argue that the commission of a criminal offence does not justify an examination of the defendant's means, at least unless the circumstances are exceptional. Thirdly, there is always the possibility that a defendant may prefer even imprisonment to the compulsory disclosure of his financial position. In spite of all these difficulties, it is submitted that a means enquiry is less objectionable than a system which inevitably discriminates against the poor. Pressure on the courts should be met by the appointment of additional officers. The means enquiry itself should be viewed as a vehicle of equality between those convicted of similar offences. Further penalties, such as the imposition of community service orders or periodic detention orders should be available against those who refuse to disclose their means. In favour of the means inquiry, it is possible that its mere existence may deter some would be offenders from the commission of crimes.⁹³

The solution proposed by that writer is well beyond the scope of this Report. But there are numerous simpler ways of achieving the same result. The very basic means form employed in the English trials was quite successful. Alternatively, judges could easily pronounce sentence in day units only, without any means inquiry in open court. This would have the added benefit of precluding the sort of "think of a number and work backwards" parody of the system adverted to above. Offenders could then present themselves at the court office appointed for the payment of fines, where officials could calculate the amount of the fine from documents compulsorily submitted. In cases of doubt, or where suggested by the prosecution, the Revenue Commissioners, Department of Social Welfare or other relevant authority could be consulted for confirmation (without the information obtained being made available even to prosecuting counsel). The measure of a fine imposed would thus be a private matter between the offender, possibly his counsel, the judge, and a handful of civil servants bound to the same rules of confidentiality as those in other sensitive departments. Nor would the denunciatory and deterrent role of the penal sanction be reduced, once the public adjusted to the system, as the day unit publicly pronounced in the sentence is the expression of the judge's opinion of the gravity of the offence. However, a system under which officials calculated the amount of the fine imposed might be of dubious constitutionality. While the calculation itself would be mechanical, the officials might have to assess the reliability of the evidence of means produced by the finee. They might therefore be forced to stray into the realm of the judicial function.

The Justice organisation has proposed a scheme similar to that

93 Daunton Fear *op cit*, p318

employed in the English pilot scheme:

"Offenders should be required to complete detailed means of enquiry forms indicating income, savings, capital and outgoings such as mortgage payments or rent and any maintenance payments. The unit fine sum should be assessed on the basis of capital and disposable income. The enforcement of fines should become the responsibility of an enforcement authority which should have power to enquire into and require proof of the offender's means. Greater use should be made of money payment supervision orders. These include training in managing resources and could be carried out by probation ancillaries. Though we recommend a unit fine system we recognise that any final proposal to introduce a unit fine system in this country should take account of the result of the three experiments introduced in 1988 and 1989."⁹⁴

Ultimately, it is thought that any scheme of compulsory disclosure of means would be both highly unpopular and administratively unwieldy (in point of enforcement, etc.). However, it is possible to create a meaningful incentive for those convicted and fined voluntarily to provide information on their means. After all, the day fine system is designed to help those on lower incomes, and it should not be too difficult to elicit their cooperation. Judges could simply order that in the event of non-disclosure of means, the monetary amount of the day unit be assessed as the maximum possible. This would be an inducement for all but the very wealthy (who could not be fined any more in any event) to declare their position.⁹⁵ In either case, the monetary amount of the fine would only become public in the event of proceedings for default, and conceivably not even then.

In all documents sent to accused persons in advance of trial or sentence, their attention could be brought to this arrangement, and to the need to bring relevant documents to court in order to avail themselves of any advantage offered by the day fine system. The introduction of a presumption in favour of the maximum unit value in the absence of evidence to the contrary would therefore place on individual fines the onus of ensuring the successful operation of the system.

However, this does not solve the problem of false statements of means. Verification may remain a difficult obstacle to introduction of a variable fine system. Considerable reservations have been expressed about the reliability of the information which would be made available in many cases. More than one contributor to our deliberations voiced the

⁹⁴ From Justice, *Sentencing: A Way Ahead* (1989) para 52.

⁹⁵ See Moxon, *op cit*, p22.

opinion that day fines might be unworkable for this reason, and because of the scale of the "black" economy

'Someone who owns a car, taxes and insures it, fills it with petrol and then drinks a gallon of beer (not an uncommon occurrence) is able to pay a heavy fine even if he is on the dole. A shrewd judge is more useful than a Nordic calculation in getting the penalty right'⁹⁶

The problem of means assessment must therefore be seen as a considerable barrier to a practicable day fine system. On the other hand, under the present system, the court imposing a fine will invariably ask about the means of the accused, and may be 'fixed' with the answer given, truthful or otherwise.⁹⁷

- (x) It may be asserted that the adoption of a day fine system in Ireland would be contrary to the constitutional guarantee of equality contained in Article 40.1

It should be noted, however, that the courts are very reluctant to strike down legislation on this ground (and have done so in only one case, *TOG v AG*⁹⁸). More substantively, the courts tend to subscribe to what in US jurisprudence is called a 'rationality test', and usually attribute a rational purpose to classifications and distinctions adopted by the legislature.⁹⁹

But even if a strict scrutiny test were adopted, and certain classifications were open to particular suspicion (as was initiated in the US under the Warren Court), it is submitted that a variable fine system would not be repugnant to the Constitution.

The test of equality has been variously (but never comprehensively) formulated by the judiciary. eg by Henchy J in *Dillane v AG* he spoke of a distinction which was "arbitrary or capricious, or otherwise not reasonably capable, when objectively viewed in the light of the social function involved, of supporting the selection or classification complained of"¹⁰⁰

In fact, a variable fine system seems to fit very well with the proviso to Article 40.1 on distinctions based on capacity or social function, seeking as it does to embody an effective equality in penal exactions (as is already attempted in respect of taxation, which progressive system has

96 Communication from the President of the District Court 13th May 1991

97 See e.g. the *District Court Rules 1948* Rule 65

98 [1985] ILRM 61

99 J. Casey *op cit* p363

100 [1980] ILRM 167 at p169

never been challenged in Ireland) Walsh J has summarised the authorities as endorsing the Aristotelian idea that real (or material) equality can only be achieved by treating like alike and different things differently, in *de Burca & Anderson v AG*¹⁰¹

Differences in financial capacity to pay fines must surely be a relevant factor in classifying and differentiating persons and one which reinforces rather than undermines their equality as human persons

Also, in *O B v S*¹⁰² Walsh J gave the following formulation

'the object and nature of the legislation concerned must be taken into account, and the distinctions or discriminations which the legislation creates must not be unjust, unreasonable or arbitrary and must, of course, be relevant to the legislation in question Legislation which differentiates between citizens or which discriminates between them does not need to be justified under the proviso [to Article 40,1] if justification for it can be found in other provisions of the Constitution Legislation which is unjust, unreasonable or arbitrary cannot be justified under any provision of the Constitution Conversely, if legislation can be justified under one or more Articles of the Constitution, when read with all the others, it cannot be held to be unjust within the meaning of any Article"

Despite its first paragraph, Article 45 of the Constitution has been recognised as an aid to interpretation of other constitutional provisions¹⁰³ It can be argued that a measure of the Oireachtas which seeks to achieve some of the objectives set out in Directive Principles of Social Policy, and does so methodically and rationally, is unlikely to be found to be arbitrary or invidious In particular, a variable fine system would have as its justification Article 45, sections 1, 2 i, 2 ii, and especially 4 i

A thornier problem arises from Article 38 2 of the Constitution, which together with Article 38 5 prescribes jury trial for all non-minor offences, but makes available the option of summary trial for minor offences In the discussion in Section I above, it was pointed out that it is the level of penalty which is the chief indicator of whether an offence is minor or non-minor In *State (Rollinson) v Kelly*,¹⁰⁴ the Supreme Court considered the maximum fine which could be imposed on a minor offence Fines of at least £1,000 can be imposed without

101 [1976] IR 30 at p68

102 [1984] IR 316 at p335

103 See Kenny J's observations in the High Court in *Muragh v Cleary* [1972] IR 330 regarding implied rights under Article 40 3

104 [1982] ILRM 322

trial on indictment becoming necessary. Though the Court was careful not to specify exactly where it considered the boundary to lie between minor and non-minor fines, it is clear that it operated on the basis of a threshold denominated in monetary terms. There presently exists a statutory provision which could be said effectively to amount to a legislative delimitation of District Court jurisdiction, though it is obvious that care was taken to remain consistent with the courts' jurisprudence. S17 of the *Criminal Justice Act 1984* raises from £100 to £1,000 the maximum fine on conviction for a range of summary offences scheduled in the *Criminal Justice Act 1951*.¹⁰⁵ This also extends to a vast number of indictable offences to which the accused pleads guilty, and which the DPP does not object to being dealt with summarily.¹⁰⁶

A day fine scheme cannot easily be grafted onto our present system of jurisdictional allocation, with its rigid (though uncertain) monetary limitation on competence of the District Court. The same offence might be either minor or non-minor, depending on the means of the offender, which might make him liable to a fine either above or below the threshold. While a means-based variation in the level of penalty imposed has been submitted to be fully in accordance with the equality guarantee of Article 40.1 of the Constitution, it is inconceivable that the choice between jury and summary trial should be made available, or denied, depending on a person's means. As long as the courts adhere to their present scheme for differentiating between minor and non-minor offences, it is likely that a day fine system would be very vulnerable to constitutional challenge.

The courts might be tempted to abandon their present position. One could argue, consequent upon the theory of equal impact (which is thought to be consistent with Article 40.1), that offence seriousness should be determined for constitutional purposes on the basis of the maximum number of fine units which can be imposed for an offence. Fine units are a "pure" statement of the perceived gravity of an offence. They could be more easily related to equivalent imprisonment maxima than arbitrarily chosen monetary maxima. A threshold defined in unit terms also would not shift in the way the monetary limit has done in response to inflation, thus introducing stability to an area heretofore marked by fluidity and uncertainty. Such arguments might appeal to the Supreme Court. It should also be remembered that the courts developed their present test in the absence of any better alternative. If the Oireachtas were to regulate the minor/non-minor distinction by legislation, such a reform might be welcomed from the judicial bench. A statutory statement that a minor offence was one for which the

105 See s4(1) and First Schedule, *Criminal Justice Act 1951*

106 *Criminal Procedure Act 1967*, s13. The only indictable offences for which this is not possible are offences under the *Treason Act 1939* (murder, attempt to murder, conspiracy to murder, piracy) or offences (under s3(1) of the *Geneva Conventions Act 1962*)

maximum punishment was, for example, 1 year's imprisonment or a fine of 150 units, would greatly clarify the situation.¹⁰⁷ It would also have in its favour, if challenged, the presumption of constitutionality.

Nonetheless, at least two contrary arguments exist. Firstly, while the level of penalty is the chief indicator of offence seriousness, it is not the sole one. The others, such as the moral quality of the acts involved in the commission of the offence, and public opinion at the time of the measure's enactment,¹⁰⁸ are less easily encapsulated in a neat legislative formula. That the proposed statutory statement could not accommodate all relevant factors might make it constitutionally suspect. Secondly, despite the centrality of the number of fine units imposed, rather than of monetary amounts, to the day fine system's concept of proportionality, many people might question the occasional imposition, after summary trial, of fines considerably in excess of those prevailing at present.

Conclusions

132. Most criticisms of day fine systems can be answered. However, because of what one might consider to be the peculiar circumstances of this jurisdiction, two difficulties of more stubborn mien present themselves. One is practical, relating to the ascertainment of the means of offenders; the other is constitutional, being the problem of the relationship of a day fine system with the regime of summary trial and trial on indictment.

133. In its favour, it has an inherent capacity to accommodate fluctuations in the value of money, as well as setting out to be absolutely fair in terms of the weight of punishment imposed on each finee. The alternative of a standard fine system, no matter how well designed, must inevitably entail either unnecessary hardship for poorer offenders, or meaningless fines for the more wealthy.¹⁰⁹ Day fines allow the penal impact of fines to be maintained not only over time, but also over socio-economic class. Also, they tend to promote clarity in the sentencing process, and consistency in fining offenders. They allow the extension of fines to more serious offences.

107 Such a legislative provision would set out consciously to change present policy, rather than to follow it, as did s17 of the *Criminal Justice Act 1984*

108 See *Conroy v AG* [1965] IR 411

109 The UK Advisory Council (*op cit*, p9) rejected a day-fine system, and would only go to far as to recommend that

"sentences should be encouraged to adopt its general principle when computing fines be addressing their minds separately to the two issues of the gravity of the offence and the ability of the offender to pay"

Section 35 of the *Magistrates Courts Act 1980* (UK) may be partly attributable to this general proposal. The failure of this approach is implicitly admitted in the 1990 White Paper

134 While it is thought that the social and economic advantages of a day fine system would be considerable, the obstacles to its introduction could be unlimited in duration and effect (including the possibility of being found repugnant to the Constitution) The idea was met by considerable reservations on the part of those to whom the earlier Discussion Paper was circulated Many were of opinion that the practical difficulties posed by the adoption of a variable fine system could be even greater than we surmised In the light of such responses from professionals working in all parts of the criminal justice system, and of the system's potential practical and constitutional infirmity, we feel unable positively to recommend a variable fine system for this jurisdiction at this stage We remain confident of its potential merits, however, and suggest that the question be considered again, after a standard fine scheme has been introduced, and in the light, in particular, of British experience

SECTION 5: CONCLUSIONS AND RECOMMENDATIONS

Conclusions

- I. Considerations of consistency and justice, of revenue, and of the coherence of Article 38.5 of the Constitution, all dictate that action be taken to combat the erosion by inflation of the value of criminal fine maxima.
- II. A choice exists between standard fine systems, which maintain fine values by reference to an index, and variable fine systems, which are means-related, and therefore adjust automatically to fluctuations in income at an individual level.
- III. To perform the central task of countering the effect of inflation, a standard fine system would be adequate.
- IV. If penological goals additional to the central one of maintaining fine values are to be pursued, a variable (or unit, or day) fine system could be considered. This would calculate the fine applicable in a particular case by reference to the gravity of the offence and the means of the offender.
- V. No monetary fine maxima need be retained if such a system were adopted. Unit maxima would instead be prescribed for each offence. However, a maximum unit value would be necessary for the operation of the presumption described at VI below, and for fixing the threshold between minor and non-minor offences.

- VI The onus could be placed upon fines to indicate to the fining authorities some evidence of their means in order to avail of the advantages of unit fines. Otherwise, the maximum rate should apply.
- VII Adopting either the standard or unit fine system would transform the present situation for the better. Ultimately, it is thought that a variable fine scheme could be superior to a standard fine system. However, we are inclined to the view that a variable fine scheme would be difficult and complicated to operate, particularly because of the difficulty in ascertaining readily the means of convicted persons. Its constitutional validity, moreover, cannot be regarded as being beyond doubt. Our conclusion therefore is that, as an initial step, priority should be given to the immediate introduction of a standard fine system. This would not, however, preclude the introduction of a variable fine system at some stage in the future.

Recommendations

- I It is recommended that a standard fine system be introduced by legislation. p28
- II It is recommended that a category system be chosen, for reasons of practicality and clarity. p28
- III It is recommended that between three to five categories be chosen (A-E). These categories should extend retrospectively to embrace equivalent bands of fine values for earlier periods. For example, Category A, with a present maximum of £100, should include fines of up to £5 created in the period 1915-44, of up to £10 from 1945-64, and so on. A multiplier system, as well as being needlessly and mystifyingly exact, makes no such allowance for existing inconsistencies. The categories and time periods should be fixed by reference to tables of relative money values based on the CPI. pp28-37
- IV It is recommended that if practicable, in the interests of clarity, all existing fine levels be expressly allocated to their proper categories by this method, in a statute with long schedules. Certainly this should be done in respect of the more common offences. p31
- V It is recommended that category levels be periodically updated by statutory instrument, with specific reference (as prescribed by statute) to the Consumer Price Index (CPI). p35

- VI It is recommended, in order to deal with large-scale and profitable offences, that additional provision be made for the confiscation of criminal proceeds¹ p37
- VII It is recommended, in order effectively to punish large-scale offenders, that provision be made for the imposition on legal persons of a certain size of fines of the category immediately above that ordinarily applicable to the offence in question p37

¹ See our recent *Report on the Confiscation of the Proceeds of Crime* (LRC 35 1991)

APPENDIX I(i)

TOTAL AMOUNT COLLECTED IN FINES

Calendar Year	District Court	Circuit Court	Total
1982	£2,613,668	£ 837,960	£3,451,628
1983	£3,271,124	£1,362,500	£4,633,624
1984	£3,884,293	£ 462,754	£4,347,047
1985	£4,548,786	£ 949,999	£5,498,767
1986	£6,402,422	£ 399,711	£6,802,133
1987	£5,255,922	£ 611,238	£5,867,160
1988	£5,339,347	£ 786,114	£6,125,461
1989	£5,977,318	£ 519,022	£6,496,340
1990 (to end June)	£3,325,334	£ 219,827	£3,454,161

These figures should not, however, be taken at face value. One factor which must be taken into account is the large amount of fines which go unpaid for long periods. The Department of Justice (which provided the above figures) also supplied the following information:

From 1983 onwards, due to staff shortages in District Court offices, there were delays in preparing and issuing warrants for unpaid fines. Serious arrears developed and, in monitoring the situation over this period, statistics were kept by the Department of the numbers of unissued warrants in District Court offices and also of the warrants in the hands of the Garda Síochána awaiting execution together with estimates of their face value. The figures are as follows:

District Court Offices

Date	No. Unissued Warrants	Estimated Face Value
31 December, 1983	80,000	£1,863,000
31 December, 1984	176,103	£6,627,500
31 December, 1985	75,616	£3,441,678
31 December, 1986	89,967	£2,916,313
30 June, 1987	52,055	£2,982,497
31 December, 1987	58,721	£2,745,077
30 June, 1988	76,909	£3,599,026
31 December, 1988	59,657	£3,007,803
30 June, 1989	61,120	£3,412,924
31 December, 1989	74,555	£4,569,904
30 June, 1990	54,937	£3,721,005

Garda Síochána

Date	No. Unissued Warrants	Estimated Face Value
1983 - 1986	- figures not ascertained	
31 December, 1987	65,002	£5,497,368
31 December, 1988	55,417	£4,498,837
31 December, 1989	48,439	£4,206,410

The throughput of warrants was also monitored from 1987:¹

Calendar Year	Issued by District Court Offices	Executed by Garda Síochána
1983 to 1986	-figures not ascertained	
1987	84,850	104,585
1988	86,280	97,670
1989	(73,500)	86,256

¹ Source: Communication from the Department of Justice (Courts Division) 7/11/90

Nor can the figures for each year for fines collected and warrants unissued simply be added together to get a picture of the value of fines imposed in a particular year, as neither year has any necessary relation with the year of imposition while most fines are collected within six months of imposition, even then they may appear in the figures for the next year if imposed in the latter half of the year. Clearly, those fines which go uncollected for longer periods make it even more difficult to draw conclusions.

Also, the figures must be seen in the light of changing levels of court business. There was a large jump in convictions in the early 80's, due largely to the computerisation of the summons issuing process (according to Department of Justice Officials) the steep drop in the later years is probably due, in part in any event, the decision in the *Senzio* case² that the issuing of summonses is a judicial function for which court clerks are not qualified. The total figure for fines imposed, or collected, in each year, will naturally have been influenced by these fluctuations.

2 *State (Clarke) v District Justice Maura Roche* [1987] ILRM 309

SUMMARY OF CASES HEARD IN THE DISTRICT COURTS³

Type of Business	1982	1983	1984	1985	1986	1987	1988	1989
Criminal Business:								
Summary Cases								
Imprisonment or Detention	3 906	4 430	4 677	5 461	5 529	5 156	5 093	6 345
Fines	193 323	238 285	273 800	251 533	221 241	148 193	181 500	175 380
Otherwise (eg Probation)	233 777	258 058	329 585	395 161	366 409	288 590	285 636	299 975
Community Service Orders				106	463	419	967	1 060
Indictable Cases								
Returned for Trial	4 798	5 111	6 458	4 810	4 529	5 329	6 610	5 039
Information Refused	138	89	195	115	145	90	66	91
Imprisonment or Detention	9 659	11 614	9 680	7 988	6 996	9 408	8 307	8 598
Community Service Orders (Otherwise (Probation etc))	42 948	42 960	42 210	39 597	33 454	32 975	34 989	29 721
Applications for Extradition			189	189	81	35	99	80
Applications under s29 Road Traffic Act 1961	2 599	3 233	3 964	3 542	3 592	2 881	1 987	2 867
TOTAL	496 792	565 827	676 078	714 041	648 442	499 177	533 018	533 995

APPENDIX I (ii)**CALCULATED LOSS IN REAL FINE REVENUE**

The factors alluded to in Appendix I (i) above make it difficult to calculate with any accuracy the loss of fine revenue in real terms due to inflation. However, if one makes the assumption that the range of penalties available to judges has hardly changed during the 1980's (with the exception of the introduction of Community Service) it is still possible to reach some conclusions. In particular, fine maxima have been static.

We can then take the fine revenue of a particular year eg. 1982, when £3,451,628 was collected. (That year's figures are useful because the problem of staff shortages and unissued warrants was not yet critical). Given inflation over the decade, that sum should be equivalent to £4,602,170 in 1990 values, given a similarly constituted case load. (The fact that much more was collected in 1989 from a similar number of cases, and fines, is immaterial - the proportion of the case-load formed by various offences, or various damages of offence, may have changed; or, more disturbingly, judges may be imposing higher fines despite static maxima, which would, if true, confirm the need for action on this front). If in fact fines were imposed in 1990 for a similar set of cases at the 1982 levels (as they should be, as maxima have not changed), then there is a 33% loss in the revenue over the period, that being the overall rate of inflation for those eight years.¹

Even this calculation assumes that fine levels in 1982 were at their proper value. Given that inflation was much higher in the seventies and early eighties than in the later part of the decade, the situation must be much

1 33% of the amount imposed, which is to say 25% of the amount which might have been imposed

worse than described. The loss on a *1970 case-load* would be over 700% (the levels of fine maxima not having changed much even since then).

APPENDIX II (i)¹
 CONSUMER PRICE INDEX

Year	Periods				Average Annual Index	Year	Periods				Average Annual Index
	Mid-March	Mid-June	Mid-Sept	Mid-Dec			Mid-Feb	Mid-May	Mid-Aug	Mid-Nov	
1922	—	191	185	189	188	1956	420.7	428.7	429.3	428.7	427.0
	Mid-Jan	Mid-April	Mid-July	Mid-Oct		1957	429.5	440.2	455.0	453.3	444.5
1923	190	181	180	186	184	1958	460.2	464.3	466.1	466	464.3
1924	188	179	183	193	186	1959	469.3	468.3	461.0	454.2	464.4
1925	195	188	188	188	190	1960	460.2	467.3	467.3	470.3	466.4
						1961	474.1	479.7	480.5	482.3	479.3
1926	188	180	182	189	185	1962	491.7	504.4	502.0	500.3	499.7
1927	182	171	171	175	175	1963	509.2	508.0	507.5	523.2	512.0
1928	177	170	173	176	174	1964	525.0	546.7	553.5	559.4	546.4
1929	177	173	174	173	175	1965	565.4	575.4	577.4	577.4	573.3
1930	179	168	168	168	171	1966	577.3	588.5	598.1	599.7	591.0
	Mid-Feb	Mid-May	Mid-Aug	Mid-Nov		1967	600.5	610.3	611.3	615.3	609.5
1931	164	156	157	165	160	1968	623.0	638.0	639.2	648.3	638.5
1932	162	153	153	155	157	1969	670.2	681.3	682.3	698	685.3
1933	151	148	149	156	15	1970	709.3	738.3	751.3	768.1	742.0
1934	152	149	152	157	152	1971	780.5	801.3	817.4	834.0	808.5
1935	153	151	156	162	156	1972	853.1	866.1	890.1	903.1	879.1
						1973	938.3	967.3	990.0	1,017.3	979.4
1936	159	157	159	166	160	1974	1,065.3	1,124.3	1,167.1	1,221.0	1,144.4
1937	167	167	170	177	170	1975	1,218.3	1,299.4	1,388.4	1,425.5	1,282.0
1938	173	171	173	176	173	1976	1,530.3	1,525.4	1,550.5	1,720.5	1,532.1
1939	174	172	173	192	178	1977	1,786.1	1,853.2	1,873.2	1,906.0	1,854.3
1940	197	204	206	214	205	1978	1,933.1	1,967.3	2,027.3	2,057.2	1,996.2
						1979	2,42.3	2,211.3	2,302.5	2,385.3	2,250.5
1941	218	220	228	237	225	1980	2,475.2	2,557.3	2,706.3	2,820.5	2,572.4
1942	237	240	250	273	250	1981	2,994.5	3,111.5	3,287.0	3,478.1	3,217.3
1943	273	275	284	294	281	1982	3,559.5	3,754.3	3,844.3	3,906.1	3,768.3
1944	296	292	296	296	295	1983	4,003.3	4,113.2	4,220.3	4,268.5	4,164.0
1945	295	292	293	298	294	1984	4,410.0	4,511.5	4,566.3	4,597.5	4,521.4
						1985	4,583.5	4,746.0	4,816.3	4,824.1	4,757.5
1946	294	287	288	293	290	1986	4,898.3	4,956.3	4,964.7	4,976.4	4,949.1
1947	295	305	319	309	307	1987	5,066.3	5,097.5	5,24.8	5,28.3	5,104.4
1948	316	319	316	316	317	1988	5,163.3	5,91.2	5,224.2	5,265.3	5,213.7
1949	316	316	319	319	318	1989	5,335.3	5,390.5	5,468.5	5,511.3	5,425.3
1950	319	325	319	325	322	1990	5,561.2				
1951	329	348	354	360	348						
1952	364	367	389	392	378						
1953	392	402	399	399	398.0						

1 CSO Statistical Bulletin 1980, p185.

APPENDIX II(ii)

GROSS NATIONAL DISPOSABLE INCOME AND ITS USE

£Million

Description	1982	1983	1984	1985	1986	1987	1988
Gross Domestic Product at Market Prices	13 382.3	14 799.2	16 429.6	17 644.1	18 685.1	19 989	21 326
Net Factor Income from the Rest of the World	927.7	1 183.9	1 638.3	1 965.7	1 957	1 957	2,542
Gross National Product at Current Market Prices	12,454.6	13 595.3	14 790.8	15 698.4	16 728.1	18 032	18 784
Current Transfers from the rest of the world less Current Transfers to the rest of the world	494.2	579.7	731.3	923.4	925.8	892	957
Gross National Disposable Income	12 948.8	14 175.0	15 522.1	16 621.8	17 653.9	18 924	19 741

G N D.I. for 1989 is estimated to be £21,915,000,000

**GROSS NATIONAL DISPOSABLE INCOME AT CONSTANT (1985) MARKET PRICES
ADJUSTED FOR TERMS OF TRADE**

£Million

Description	1982	1983	1984	1985	1986	1987	1988 ^a
Gross National Product at Constant (1985) Market Prices (average estimate)	15 620	15 429.4	15 723.2	15 698.4	15 596	16 409	16 670
Terms of Trade Adjustment	217.4	61.6	51.9	0.0	480.3	454	403
Net Current Transfers from Abroad at Constant (1985) Prices	576.5	642.5	750.3	923.4	1 031.1	982	991
Gross National Disposable Income at Constant (1985) Prices	15 888.4	16 133.6	16 421.6	16 621.8	17 107.3	17 846	18 072
Index of Gross National Disposable Income at Constant (1985) Prices	95.6	97.1	98.8	100.0	102.9	107.4	108.7

Preliminary

APPENDIX II(iii)
PRE-1914 MONEY VALUES

Empirical estimate of the cost of living

1914 = 100					
1846	106	1858	106	1870	110
1847	110	1859	108	1871	113
1848	96	1860	113	1872	120
1849	93	1861	112	1873	122
1850	94	1862	113	1874	115
1851	94	1863	115	1875	111
1852	96	1864	115	1876	110
1853	108	1865	113	1877	110
1854	115	1866	114	1878	104
1855	114	1867	114	1879	101
1856	114	1868	113	1880	105
1857	117	1869	111		

(From AL Bowley, "Wages and Income in the United Kingdom since 1860", at p122).

APPENDIX III:

SOCIAL WELFARE AND INFLATION

INCREASE IN VARIOUS WELFARE RATES 1980 - 1990

SINGLE PERSON/WIDOW - WITHOUT CHILD DEPENDENTS

Date/Period	Unemployment Assistance				Widow/Deserted Wife (Non Con)				Old Age (Con) Pensioner			
	CPI increase	Per Week	Nominal Increase	Real increase	Per Week	Nominal Increase	Real increase	Per Week	Nominal Increase	Real increase		
	%	£	%	%	£	%	%	£	%	%		
:80		17.00			21.00			24.50				
:85	-81.3	34.95	-105.6	-13.4	40.15	-105.4	-13.3	51.40	-29.7	-5.7		
:86	-3.1	36.70	-5.0	-8	44.90	-4.1	-1.0	53.45	-4.0	+0.4		
:87	-3.2	37.80	-3.0	-0.2	46.20	+3.0	-0.2	55.10	+3.1	+0.1		
1988	-2.1	42.00	-11.1	-8.8	47.50	+3.0	-0.9	56.50	+3.1	+1.0		
1989	-4.5	47.00	-11.9	+7.1	49.00	+3.0	1.4	58.50	+3.0	+1.4		
1990	-2.9	52.00	-10.6	+7.5	53.00	+8.2	-5.2	61.50	+5.1	+2.1		
1980 1980	-111.9	52.00 77.00	-205.9	+44.4	53.00 21.00	+8.2	-19.2	51.50 51.40	+151.0	+18.5		
1990 1985	-16.8	52.00 39.95	-48.3	+27.4	53.00 43.75	-22.8	-5.1	61.50 51.40	+19.6	+2.4		
1990 1985	-7.5	52.00 42.00	-23.8	+15.1	53.00 47.50	-11.3	-3.8	61.50 56.50	+8.3	+1.7		

APPENDIX IV
CAPITAL GAINS TAX (AMENDMENT) ACT 1978
AND TABLE OF MULTIPLIERS

3. (1) For the purposes of computing the chargeable gain accruing to a person on the disposal of an asset, each sum (in this section referred to subsequently as "deductible expenditure") allowable as a deduction from the consideration for the disposal under clauses (a) and (b) of paragraph 3(1) of Schedule 1 to the Principal Act shall be adjusted by multiplying it by the figure (in this section referred to subsequently as the "multiplier") specified in subsection (4) or determined under subsection (5), as may be appropriate (the multiplier being the quotient, rounded to three decimal places, obtained by dividing the Consumer Price Index number for the year in which the disposal is made by the Consumer Price Index number relevant to the year of assessment in which the deductible expenditure was incurred):

Provided that this subsection shall not apply in relation to deductible expenditure where the person making the disposal had incurred the expenditure within the period of twelve months ending with the date of the disposal.

(2) For the purposes of the Capital Gains Tax Acts it shall be assumed that an asset held by a person on the 6th day of April, 1974, was sold be deemed to have been given by him, as consideration for the re-acquisition, an amount equal to the market value of the asset at the said date.

(3) Subsections (1) and (2) shall not apply in relation to the disposal of an asset:

- (a) if as a consequence of the application of the said subsections (1) and (2) a gain would accrue on that disposal to the person

making the disposal and either a smaller gain or a loss would so accrue if the said subsections (1) and (2) did not apply, or

- (b) if as a consequence of the application of the said subsections (1) and (2) a loss would so accrue and either a smaller loss or a gain would accrue if subsections (1) and (2) did not apply

and, accordingly, in a case to which paragraph (a) or (b) applies, the amount of the gain or loss accruing on the disposal shall be computed without regard to the provisions of the preceding subsections of this section but, in a case where this subsection would otherwise substitute a loss for a gain or a gain for a loss, it shall be assumed, in relation to the disposal, that the relevant asset was acquired by the owner for a consideration such that neither a gain nor a loss accrued to him on making the disposal

- (4) In relation to the disposal of an asset made in the year 1978-79, the multiplier shall be the figure mentioned in column (2) of the Table to this subsection opposite the mention in column (1) of the said Table of the year of assessment in which the deductible expenditure was incurred

TABLE

Year of assessment in which deductible expenditure incurred (1)	Multiplier (2)
1974-75	1 815
1975-76	1 466
1976-77	1 263
1977-78	1 083

- (5) The Revenue Commissioners shall make regulations specifying the multipliers, determined in accordance with subsection (1), in relation to the disposal of an asset made in the year 1979-80 and shall make corresponding regulations in relation to the disposal of an asset made in each subsequent year of assessment

- (6) Every regulation made under this section shall be laid before Dail Eireann as soon as may be after it is made and, if a resolution annulling the

regulation is passed by Dail Eireann within the next twenty-one days on which Dail Eireann has sat after the regulation is laid before it, the regulation shall be annulled accordingly but without prejudice to the validity of anything previously done there-under.

(7) In this section "the consumer price index number" means the All Items Consumer Price Index Number compiled by the Central Statistics Office and the consumer price index number at mid-November, 1968, is 100.

TABLE OF INDEXATION MULTIPLIERS

EXPENDITURE INCURRED IN	MULTIPLIERS				
	SALE IN 1973/79	SALE IN 1979/80	SALE IN 1980/81	SALE IN 1981/82	SALE IN 1982/83
Year to 5/4/75 or any earlier year*	1315	2012	2324	2312	3342
Year to 5/4/76 (1975/76)	1466	1625	1377	2277	2699
Year to 5/4/77 (1976/77)	1293	1400	1577	1956	2325
Year to 5/4/78 (1977/78)	1083	1200	1386	1677	1993
Year to 5/4/79 (1978/79)	—	1109	129	1549	1842
Year to 5/4/80 (1979/80)	—	—	1155	1398	1662
Year to 5/4/81 (1980/81)	—	—	—	1210	1439
Year to 5/4/82 (1981/82)	—	—	—	—	1189
	SALE IN 1983/84	SALE IN 1984/85	SALE IN 1985/86	SALE IN 1986/87	SALE IN 1987/88
Year to 5/4/75 or any earlier year*	3759	4140	4397	4598	
Year to 5/4/76 (1975/76)	3306	3344	355	3714	
Year to 5/4/77 (1976/77)	2615	2887	3059	3200	
Year to 5/4/78 (1977/78)	2242	2470	2523	2743	
Year to 5/4/79 (1978/79)	2077	2292	2423	2534	
Year to 5/4/80 (1979/80)	1369	2059	2186	2296	
Year to 5/4/81 (1980/81)	1578	1732	1893	1979	
Year to 5/4/82 (1981/82)	1337	1473	1564	1636	
Year to 5/4/83 (1982/83)	1125	1239	1316	1376	
Year to 5/4/84 (1983/84)	—	1102	1170	1224	
Year to 5/4/85 (1984/85)	—	—	1062	1111	
Year to 5/4/86 (1985/86)	—	—	—	1046	

*An asset owned at 6 April 1974 (regardless of when it was actually acquired) is deemed to be acquired at 6 April 1974 at a cost equal to its market value at that date. That cost is deemed to be incurred in 1974/75, and accordingly the multiplier relating to 1974/75 applies.

APPENDIX V
DRAFT SCOTTISH DAY FINE CLAUSE

51. After section 412 of the *Criminal Procedure (Scotland) Act 1975* there shall be inserted the following section -

412A - (1) The Secretary of State may by order under this section (an "experimental income-based fines order") provide that during such period not exceeding 5 years as may be prescribed by the order all qualifying fines imposed on individuals by such courts of summary jurisdiction as may be specified in the order shall be determined in accordance with the provisions of the order and not otherwise

(2) An experimental income-based fines order shall include provision that qualifying fines shall be determined by multiplying the offence factor by the disposable income factor, where -

- (a) the "offence factor" is such number, not exceeding the maximum number, as the court thinks just,
- (b) the "disposable income factor" is £50 or, if it is less than £50, the offender's disposable weekly income,
- (c) the "maximum number" is the maximum fine for the offence divided by £20 rounded up to the nearest whole number, and
- (d) the "maximum fine for the offence" is -
 - (i) in the case of a statutory offence, the maximum fine fixed by an enactment for that offence, and
 - (ii) in the case of a common law offence, the maximum fine within the jurisdiction and powers of the court which convicted the offender of the offence

(3) In subsections (1) and (2) above, a "qualifying fine" is a fine of which there is a maximum (within the meaning of subsection (2)(d) above) which does not exceed level 5 on the standard scale

(4) In the case of a statutory offence, a fine determined under an experimental income-based fines order may exceed the maximum fine for that offence within the meaning of subsection (2)(d)(1) above

(5) An experimental income-based fines order shall include provision -

- (a) defining "disposable weekly income",
- (b) requiring offenders to disclose to the court such information as may be prescribed by the order for the purpose of enabling the court to assess the disposable weekly income of offenders,
- (c) making it an offence, punishable on summary conviction by a fine not exceeding level 3 on the standard scale, to make, in the course of a purported disclosure under paragraph (b) above, any false statement or false representation, and
- (d) making a person who fails to disclose information required under paragraph (b) above to be disclosed liable to be fined in accordance with the order as if his disposable weekly income were £50

(6) An experimental income-based fines order -

- (a) may, notwithstanding, anything in subsection (1) above, include provision applying, with or without modification, any of the provisions of this Act relating to penalties, and
- (b) shall include provision so applying section 407 of this Act (imprisonment for non-payment of fines) that, in the application of the Table in subsection (1A), the ratio of the number of the offence factor by reference to which a fine was determined to the number of weeks' imprisonment to be imposed in default of payment of that fine will be 3 to 1 (any fractions of a week being rounded off as follows

one third of a week 2 days,
two thirds of a week 4 days)

(7) An experimental income-based fines order may contain such other provisions (including transitional provisions) as appear to the Secretary of State to be necessary or expedient

(8) The Secretary of State may by order substitute other amounts for the amounts of £50 mentioned in subsection (2)(b) and (5)(d) above and £20 mentioned in subsection (2)(c) above

(9) An order under this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament

(10) This section shall cease to have effect on the expiry of the period of 5 years beginning with the day on which the experimental income-based fines order is made or, if more than one such order is made, the day on which the first such order is made, but this subsection shall not affect any transitional provision made under an experimental income-based fines order in connection with the repeal of this section "

APPENDIX VI

Means Enquiry Form, English Unit Fine Trials.¹

If convicted, the court may impose a financial penalty (a fine or compensation) The court would set the level of the fine partly according to the seriousness of the offence and partly in relation to your means It helps if the court has a statement of your means which can either be sent in advance of the hearing or brought with you when you attend court Please answer the questions below even if you intend to plead not guilty

- | | |
|---|--------------|
| 1 Full name Mr / Mrs / Miss / Ms | |
| 2 What is your total income from - | Week / Month |
| Take-home earnings (i.e. after tax but including overtime, bonuses, etc.) | £ |
| State benefit (after deductions) | £ |
| DO NOT INCLUDE CHILD BENEFIT | £ |
| Other (specify) | £ |
| 3 What is the take-home income of your spouse / partner? | Week / Month |
| | £ |
| 4 Does anyone else contribute to your household? | YES / NO |
| If YES, how much have they given in the last 4 weeks / month? | £ |
| 5 How many people do you support? | Children |
| | Adults |

¹ Appendix C Moxon *op cit* p27

- 6 Do you have any outstanding fines
or compensation to pay? YES / NO
How much are you paying each week? £
When will payment be completed?
- 7 Please state amount of any maintenance paid
to anyone living outside your household £
- 8 If a fine is imposed, at what weekly
rate could you pay it? £
- 9 If there are any other exceptional outgoings, either write them on the
back of this form or on another piece of paper

You should bring to court any documents, such as pay slips, to back up the
information given in this form

Date Signature

APPENDIX VII

U.K. CRIMINAL JUSTICE ACT 1991
(RELEVANT EXTRACTS)*Fixing of certain fines by reference to units*

16-(1) This section applies where a magistrates' court imposes a fine on an individual

- (a) for a summary offence which is punishable by a fine not exceeding a level on the standard scale, or
- (b) for a statutory maximum offence, that is to say, an offence which is triable either way and which, on summary conviction, is punishable by a fine not exceeding the statutory maximum

(2) Subject to the following provisions of this section, the amount of the fine shall be the product of -

- (a) the number of units which at the time of the conviction is determined by the court to be commensurate with the seriousness of the offence, or the combination of the offence and other offences associated with it, and
- (b) the value to be given to each of those units, that is to say, the amount which, at that or any later time, is determined by the court to be the offender's disposable weekly income,

and where a determination under paragraph (b) above is made at a later time, the offender shall be notified of the amount of the fine in such manner as the court considers appropriate

(3) The number of units determined under subsection (2)(a) above shall not exceed

- (a) 2 units in the case of a level 1 offence,
- (b) 3 units in the case of a level 2 offence

- (c) 10 units in the case of a level 3 offence,
- (d) 25 units in the case of a level 4 offence, and
- (e) 50 units in the case of a level 5 offence or a statutory maximum offence,

and in this subsection "level 1 offence" means a summary offence which is punishable by a fine not exceeding level 1 on the standard scale, and corresponding expressions shall be construed accordingly

(4) Subject to subsection (5) below, the amount determined under subsection (2)(b) above in the case of any offender shall not be -

- (a) less than 1/50th of level 1 on the standard scale (£4 at the commencement of section 15 above), or
- (b) more than 1/50th of level 5 on that scale (£100 at that commencement)

(5) Where the fine is payable by a person who is under the age of 18 years, subsection (4) above shall have effect as if for any reference to a fraction or amount there were substituted -

- (a) a reference to 1/20th of that fraction or amount in the case of a fine payable by a person who is under the age of 14 years, and
- (b) a reference to 1/5th of that fraction or amount in the case of a fine payable by a person who has attained that age

(6) Nothing in subsection (2) above shall prevent any of the following, namely -

- (a) in a case of an offender who is convicted of one or more other offences, the reduction of the amount of the fine by the application of any rule of law as to the totality of sentences,
- (b) in the case of a fine which forms part of a community sentence, the reduction of the amount of the fine to take into account the community order or orders included in the sentence,
- (c) in the case of a fixed penalty offence (within the meaning of Part III of the Road Traffic Offenders Act 1988), the increase of the amount of the fine to the level of the fixed penalty, and
- (d) in the case of an offence in relation to which a compensation order is not appropriate but which resulted in a financial benefit to the offender, the increase of the amount of the fine by an amount not exceeding the value of that benefit

(7) The Lord Chancellor may by rules provide that determinations under subsection (2)(b) above

- (a) shall be made in such manner and taking into account such matters as may be prescribed by the rules, and
- (b) may be made by such persons acting on behalf of the court as may be so prescribed

(8) Where, by reason of the offender's failure to comply with an order under section 18(1) below, the court has insufficient information to make a proper determination under subsection (2)(b) above, it may, within the limits set by subsection (4) above, make such determination as it thinks fit

(9) Section 85(1) of the 1980 Act (power to remit fine) shall apply in relation to any fine fixed under this section as if the reference to any change in the offender's circumstances since the conviction included a reference to the amount determined under subsection (2)(b) above proving to be excessive

Fixing of fines in other cases

17-(1) In fixing the amount of a fine (other than one the amount of which falls to be fixed under section 16 above), a court shall take into account among other things the means of the offender so far as they appear or are known to the court

(2) Subsection (1) above applies whether taking into account the means of the offender has the effect of increasing or reducing the amount of the fine

Statements as to offenders means

18-(1) Where a person has been convicted of an offence by a magistrates' court, the court may, before sentencing him, order him to furnish to the court within a period specified in the order such a statement of his means as the court may require

(2) A person who without reasonable excuse fails to comply with an order under subsection (1) above shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale

(3) If a person in furnishing any statement in pursuance of an order under subsection (1) above

- (a) makes a statement which he knows to be false in a material particular,
- (b) recklessly furnishes a statement which is false in a material particular, or
- (c) knowingly fails to disclose any material fact,

he shall be liable on summary conviction to imprisonment for a term not exceeding three months or a fine exceeding level 4 on the standard scale or both

(4) Without prejudice to the generality of subsection (1) of

- (a) section 84 of the Supreme Court Act 1981, and
- (b) section 144 of the 1980 Act,

the power to make rules under each of those sections shall include power to prescribe the form in which statements are to be furnished in pursuance of orders under subsection (1) above, and rules made by virtue of this subsection may make different provision for different cases or classes of cases