

# Fines and the Freedom of Consumption

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## I. Introduction

For a sentence to be fair, just, and proportionate, it must be tailored not only to the offense, but also to the individual offender. In this regard, the day-fine system (called unit-fine system in the United Kingdom) has many advantages compared to other types of fines, such as tariff and fixed fines. These systems are based on the assumption that the same or similar amounts of money should be imposed on all defendants convicted of a particular offense. But the result of such fines is a lack of deterrent effect on richer offenders and, eventually, the insolvency of less affluent ones. Since the late eighteenth century, it was commonly observed that punishing an offense with the imposition of a standardized fine led to this inequality of impact, an especially grievous consequence given that fine defaulters ended up in prison, even when they were unable rather than unwilling to pay.<sup>1</sup> In fact, imprisonment for fine defaulters created a class-based hierarchy in the administration of justice: the rich man paid, while the poor man went to prison.<sup>2</sup> This flaw relegated fines to the periphery of the catalogue of punishments until the late nineteenth century, when critics of short-term imprisonment, pointing out its pernicious practical effects, sought a more egalitarian pecuniary punishment that could replace it. Leading academics imprisonment critics across Europe—Austria, England, France, Germany, Italy, the Netherlands, Portugal, Scandinavia, Spain, and Switzerland—expressed their uneasiness about the drawbacks of custodial sentences, which they did not believe were outweighed by the prospective benefits that could be derived from imprisonment.<sup>3</sup> This led to a series of international penitentiary

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<sup>1</sup> In Italy, Gaetano Filangieri, *La scienza della legislazione* bk. III, pt. 2, ch. XXXII (1788). In Germany, Paul Johann Anselm von Feuerbach, *Kritik des Kleinschrodischen Entwurfs zu einem peinlichen Gesetzbuche für die Chur-Pfalz-Bayrischen Staaten* 228 (1804). In Spain, José Marcos Gutiérrez, *Práctica criminal de España*, tomo III 145-48 (4th ed. 1826).

<sup>2</sup> As indicated by Adolf Merkel, *Empfiehl sich die Einführung von Verschärfungen der Freiheitsstrafen im Sinne des österreichischen Entwurfs?*, in 23. *Verhandlungen des Deutschen Juristentages*, 2. Band 350, 387 (1895). In the same vein, Angelo Ciccarelli, *Per l'abolizione della pena pecuniaria*, VIII *La Scuola Positiva* 577, 594 (1897), who described the situation as a “monstrous iniquity,” nothing more than a “punishment of poverty,” or Carl Stooß, *Geldstrafe und Bußenabdiener*, 29 *Zeitschrift für Schweizer Strafrecht* 5 (1916), who spoke of the fine as a “privilege of the rich.”

<sup>3</sup> See 2 Arnould Bonneville de Marsangy, *De l'amélioration de la loi criminelle en vue d'une justice plus prompte, plus efficace, plus généreuse et plus moralisante* 258-59 (1864); Franz von Holtzendorff, *Die Strafrechtreformvorschläge von Bonneville de Marsangy*, 4 *Allgemeine Deutsche Strafrechtszeitung* 642 (1864); Wilhelm Emil Wahlberg, *Das Princip der Individualisierung in der Strafrechtspflege* 55-58 (1869).

congresses<sup>4</sup> where short imprisonments were deplored and fines, especially when levied against the poor, were decried because they often led to imprisonment for nonpayment. The proposals mainly focused on introducing or increasing the use of suspended sentences. Few could predict the increase in the use of fines that would occur throughout the twentieth century. For the fine to become widespread, two of its most criticized characteristics had to be reformed: its impersonality, which allowed the fine to be paid by an innocent third party, and its unequal class-based impact on offenders.<sup>5</sup>

In fact, a major topic of research and legal experimentation during the nineteenth and twentieth centuries was the equalization of the impact of the penal fine on poor and rich offenders,<sup>6</sup> a condition that was seen as necessary for the use of fines to be expanded. A reformulated fine tailored to the financial situation of the individual offender would prevent the imposition of sentences for non-payment of fines, a major cause of imprisonment during that period. During the reform movements of the twentieth century, objections to the unequal impact of fines on poorer offenders were circumvented, if not completely resolved, by the adoption of the day-fine system in European countries such as Finland, Denmark, Germany, Spain, and Sweden. Other countries such as the United Kingdom that did not adopt this system established an obligation to take into account the economic situation of offenders. Viable alternatives to imprisonment for defaulters were developed, such as community service and conditional sentence suspensions. A more widespread use of fines became possible without a concurrent increase in imprisonment for nonpayment. The generalization of the day-fine system marked a turning point in European criminal policy in the twentieth century.

Under the day-fine system, the amount of the fine imposed is based on the seriousness of the offense *and* the offender's ability to pay. The amount of the fine is determined through a two-step process. The number of days or units varies depending on the severity of the offense, usually between a minimum and a maximum. The amount of money to be paid per day depends on the offender's ability to pay, also usually between a minimum and a maximum. The final amount is determined by multiplying the number of days in the first stage by the amount of money to be paid each day in the second stage. The day-fine system explicitly requires consideration of the offender's financial circumstances, which enhances fairness. It provides a transparent explanation of the court's decision-making process, which ensures a better understanding of the sentencing process and builds trust in the criminal justice system. It makes fines available as a sentencing option for more serious offenses, expanding their application as an alternative sentencing option to imprisonment. It also

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<sup>4</sup> The first was held in London in 1872, the second in Stockholm in 1878, and the third in Rome in 1885. The inaugural meeting of the International Union of Penal Law was held in Brussels in 1889, and the third meeting in Christiania (later Oslo) in 1891.

<sup>5</sup> See Gerhardt Grebing, *The Fine in Comparative Law: A Survey of 21 Countries* 8 (1982); Patricia Faraldo-Cabana, *Money and the Governance of Punishment* (2017).

<sup>6</sup> Patricia Faraldo-Cabana, *Towards Equalisation of the Impact of the Penal Fine: Why the Wealth of the Offender Was Taken into Account*, 3 *Int'l J. Crime, Justice & Soc. Democracy* 3 (2014).

creates a clear and fair method to convert an unpaid fine into a subsidiary custodial or non-custodial sentence: the seriousness of the offense—not the offender’s financial circumstances—determines the number of days the offender must spend in prison or community service.

Compared to imprisonment, day-fines are the most effective means of achieving all the benefits traditionally ascribed to fines. They can be adjusted to the seriousness of offenses and the perpetrators’ financial situation using criteria of proportionality and equality and are cost-effective to enforce, as they avoid the costs associated with other types of punishments. An unjust fine is more repairable, since fines affect an “impersonal” commodity and thus the convicted person can be more easily returned to the situation they were in (*status quo ante*) before experiencing the punishment. Fines can also contribute to repairing the damage suffered by the victim. However, despite these benefits, and the widespread recognition of the shortcomings and drawbacks of imprisonment, the last third of the twentieth century saw a resurgence in the use of imprisonment. The slogan “prison works”—used by Home Secretary Michael Howard in his speech to the Tory Party Conference in 1993—had clear implications for fines and other intermediate punishments. “Prison works” symbolized a new turn towards a more punitive penal climate, and imprisonment rates rose until the Great Recession of 2008. Though they have declined substantially since then, imprisonment remains the dominant punishment in many American and European countries.

The persistence of the prison system is the subject of much academic scrutiny. I argue here that it can be attributed to the fact that imprisonment performs the same functions as it did in the twentieth century. Just as then, freedom is still considered a universally and intensely valued resource of which all offenders, rich and poor, can be deprived.<sup>7</sup> But while the very essence of freedom and liberty has barely changed, the meaning of money has dramatically shifted.<sup>8</sup> I will address these changes in the next section. Following Simmel’s intuitions,<sup>9</sup> I sketch two perspectival moments around the nature of money in relation to punishment: the archaic approach of directly quantifying human value through money and the transition to a conception of infinite human worth resistant to such calculations. In the third section, I characterize the fine as a punishment that not only deprives the offender of money, but also of freedom—the freedom of consumption. I will here explain the close association between individual freedom and consumption. In the fourth section, the fine as a means to regulate behavior, as a mechanic of training in discipline, will be thoroughly explored and discussed. In the concluding section of this paper, I will call into question the

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<sup>7</sup> See, e.g., Peter Young, Punishment, Money and a Sense of Justice, in *Paying for Crime* 46 (Pat Carlen & Dee Cook eds., 1989); Dan M. Kahan, What Do Alternative Sanctions Mean? 63 *U. Chi. L. Rev.* 591 (1996) (citing Robert Cooter, Prices and Sanctions, 84 *Colum. L. Rev.* 1523 (1984)); Martin H. Pritikin, Fine-Labor: The Symbiosis Between Monetary and Work Sanctions, 81 *U. Colo. L. Rev.* 343, 343-57 (2010).

<sup>8</sup> Pat O’Malley, *The Currency of Justice: Fines and Damages in Consumer Societies* (2009); Patricia Faraldo-Cabana, Who Dares Fine a Murderer? The Changing Meaning of Money and Fines in Western European Criminal Law, 25 *Soc. & Legal Stud.* 489 (2016).

<sup>9</sup> In his canonical *The Philosophy of Money* (1907 [1990]).

essentially negative evaluation which socio-legal scholarship has traditionally placed on the fine to reframe it as a more acceptable sanction for serious offenses.

## II. The Changing Meaning of Money and Freedom in Criminal Law

Both time and money are quantifiable and divisible. This circumstance gives the modern penalty, the one emerging from the Enlightenment, the character of an abstract and equal sanction that can be legally predetermined in both nature and content as the deprivation of a *quantum*: a specific time period of freedom in the case of custodial sentences, and a specific sum of money in the case of a fine.<sup>10</sup> The abstract and measurable character of both penalties allows them to be applied programmatically, with the punishment quantitatively determined in accordance with the circumstances of the case and within certain specified limits, ensuring proportionality. However, the Enlightenment principle of equality, which did not allow the offender's personal circumstances and particularly their social class to be taken into account when determining the appropriate punishment, had—and indeed still has—a considerable impact on the way we understand the functioning of the fine as a criminal sanction.

Under the *ancien régime*, punishment was measured based on the offender's economic and social circumstances and position.<sup>11</sup> The dominant perspective of the middle of the eighteenth century was that the social status of the delinquent was a central aspect to be considered when selecting the type of punishment, and to a lesser extent the severity of punishment. Differentiation of punishments according to status was rejected fifty years later. New codifications from the beginning of the nineteenth century onwards avoided reference to social class or economic status thanks to the influence of the equality principle, which was in part constitutionally guaranteed. Under the banner of the equality principle, legislative parity was centered on the value of “freedom,” which is presumed to be possessed in the same *quantum* by all subjects, excepting deeper probing into the inner feelings of each prisoner—which was considered at the time to be a forbidden intrusion.

In this regard, imprisonment was considered a more equal punishment than the fine, and a more rehabilitative one. The generalized acceptance of the program of reformation through hard labor by the end of the eighteenth century helps to explain the further rapid development of the idea of imprisonment over the next century. At least during the first half of the nineteenth century, when the use of the prison system responded to a philosophy of individual transformation and correction, the fine was considered to have no reformatory value at all, as deprivation of money could not be conceived as a morally improving factor in the same way imprisonment was. The possibility that offenders could be reformed by hygienic, strictly regulated prison regimes directly undermined the use of the

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<sup>10</sup> Luigi Ferrajoli, *Diritto e ragione: Teoria del Garantismo Penale* 388-89 (1990).

<sup>11</sup> Mario Sbriccoli, *La penalistica civile: Teorie e ideologie del diritto penale nell'Italia unita*, in *1 Storia del diritto penale e della giustizia: Scritti editi e inediti* (1972-2007) 493 (Mario Sbriccoli ed., 1990 [2009]).

fine. As King<sup>12</sup> explains, “the acceptance of the penalty of imprisonment first relegated the fine to a comparatively minor role as a punishment for light misdemeanors and police offences.”

The position to the fine is very different. In fact, it is exactly the opposite of what is presumed in the use of imprisonment.<sup>13</sup> No one assumes that individuals are in an equal position with respect to the commodity, money, that is to be taken from them. It was not the relatively equal amount of money paid as a punishment for a particular crime that determined the fairness of the sentence, but rather the fact that the amount paid was insignificant for one offender but substantial for the other. Though fines were formally equal, they were brutally unjust in practice. The use of fines as a punishment did not fit well with the material understanding of the equality principle. Admittedly, it could be said, and some<sup>14</sup> in fact did say, that the law is equal for all if the same amount of money is set to be paid, regardless of the class or socio-economic status of the offender. But even from a theoretical point of view this argument did not hold up: imprisonment could be applied more equally than fines to those with means and those without, and did not directly affect the offender’s family, unlike fines. This placed fines outside the cultural boundaries of nineteenth-century liberalism, relegating them to the periphery of possible punishments until the critics of short-term imprisonment, while pointing to its pernicious practical effects, reawakened interest in finding a more egalitarian pecuniary punishment. Their proposed fine system would allow for individualization according to personal inequalities, adapting to the financial situation of the offender so that it would no longer be necessary to impose prison sentences for non-payment. This new system was proposed within the framework of a new concept of equality, no longer formal but material.<sup>15</sup>

The changing importance of money also played a significant role. During the nineteenth century, there were a number of changes in the meaning of money that influenced not only the establishment of the consumer society, but also the use of fines. In contrast to freedom, money came to be seen as impersonal. Monetary punishment was viewed and experienced differently because of the changing meaning and value that liberal societies attached to money and, accordingly, to its deprivation in the form of a fine: “The progressive differentiation of people and the equally progressive indifference of money combine to make expiation for murder and other serious crimes by money completely impossible.”<sup>16</sup>

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<sup>12</sup> Peter King, Punishing Assault: The Transformation of Attitudes in the English Courts, 27 *J. Interdisc. Hist.* 43 (1996).

<sup>13</sup> Young, *supra* note 7, at 63.

<sup>14</sup> E.g., Francesco Carrara, *Programma del Corso di Diritto Criminale dettato nella R. Università di Pisa: Parte Generale* (4th ed. 1871); Adolf Merkel, *Lehrbuch des Deutschen Strafrechts* 227 (1889).

<sup>15</sup> Otto Friedmann, *Sind Änderungen des geltendes Recht erwünscht in Betreff des Verhältnisses zwischen Geld- und Freiheitsstrafen?*, in *Verhandlungen des Zweiundzwanzigsten Deutschen Juristentages*, 2. Band 95, 96 (Deutscher Juristentag ed., 1892); Andrea Brenn, *Die Busse und ihr Vollzug nach dem Schweizerischen Strafgesetzbuch* 21-23 (1945).

<sup>16</sup> Simmel, *supra* note 9, at 365-66.

Simmel rightly asserted that our sense of human worth and the evolution of the meaning of money move in opposite directions.

The increasing valuation of the human soul with its uniqueness and individuality meets with the opposite trend in the development of money [so that i]t is precisely because money represents the value of incommensurable things and has become colourless and indifferent that it cannot be used as an equivalent in very special and uncommon conditions where the inner most and most basic aspects of the person are concerned.<sup>17</sup>

This lack of meaning is the most important feature of modern money, shaped by the cultural matrix in which it is embedded. Because money is a commodity that is valued less than freedom, fines are seen as running the risk of commercializing criminal law. Their use gives the impression and that money can be used to avoid the weight of the repressive power of the state, or at least to lessen its impact.

The social message projected by various forms of punishment is as important as their successful technical implementation. The universal use of money deprived it of a sacred, moral meaning comparable to that of freedom. Money was no longer a satisfactory form of penance for moral transgressions. In this sense, an important obstacle to the use of fines as punishment for non-trivial offenses is that sentencing judges and courts, and the community itself, do not accept them as sufficient punishment for certain offenses. As Young points out, a “cultural separation” exists between money and punishment, meaning that “an ambivalent, even contradictory, set of cultural values form the context in which money is used as a judicial punishment.”<sup>18</sup>

I argue here that fines can be afforded a new and more significant meaning that can achieve even this social purpose of punishment. Beginning in the 1930s, discussions focused on the serious impact of a loss of economic means in a society as deeply money-centered as our own. A general deterrent effect was attributed to the fine, based simply on the increased importance of money in consumer societies and the premise that an increase in its value would lead to a fear of its loss.<sup>19</sup> In a world where so much depends on money, money has freedom-enhancing qualities, while deprivation of money in the form of a fine is unmistakably punitive and deterrent.<sup>20</sup> In the decades that followed, such arguments were

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<sup>17</sup> Id. at 365.

<sup>18</sup> Peter Young, Putting a Price on Harm: The Fine as a Punishment, in *Penal Theory and Practice: Tradition and Innovation in Criminal Justice* 185, 187 (Antony Duff et al. eds., 1994).

<sup>19</sup> Georg Rusche & Otto Kirchheimer, *Punishment and Social Structure* 168-69 (1939 [2003]).

<sup>20</sup> Charles H. Miller, The Fine: Price Tag or Rehabilitative Force?, 2 *Crime & Delinq.* 377, 382 (1956); Jürgen Baumann, *Beschränkung des Lebensstandards anstatt kurzfristiger Freiheitsstrafe* 38-40 (1968); Derek A. Westen, Fines, Imprisonment, and the Poor: Thirty Dollars or Thirty Days, 57 *Cal. L. Rev.* 778, 810 (1969); Enzo Musco, *La pena pecuniaria* 71-73 (1984).

widespread.<sup>21</sup> As Thornstedt pointed out,<sup>22</sup> “The high standard of living makes people more reluctant than formerly to pay out money for offences and thus deprive themselves of opportunities to buy TV sets, cars, etc., or to be forced to postpone holiday trips.” Can we finally equate money with freedom?

### III. Money, Fines, and the Freedom of Consumption

O’Malley writes that “maybe money is a medium through which new forms of liberalism, new forms of freedom, simultaneously constitute meaning and are constituted by it.”<sup>23</sup> Indeed, money can obviously buy not only experiences and goods, but also independence from the will of others.<sup>24</sup>

Thus, money can be understood as a kind of objectified freedom,<sup>25</sup> since the freedom enjoyed by all in liberal societies can only be fully exercised if the individual has the means, and therefore the ability, to do so. If we describe freedom as the power to determine action without constraints, then freedom is compromised by interference from others, but also by lack of means.<sup>26</sup> The poor are formally free to pursue many interests, but they are not really free to achieve many of them due to financial limitations. Economic freedom is broadly understood as a set of institutional factors that determine how individuals can earn their income (or livelihood), and how they can spend (or save) that income. This second component—freedom of consumption—overlaps with personal freedom.<sup>27</sup> Money helps to construct freedom.

According to this argument, the fine can be considered as a freedom-limiting penalty, since it involves the “loss of financial opportunities”<sup>28</sup> and thus reduces freedom of

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<sup>21</sup> Antonio Beristain Ipiña, *La multa penal y la administrativa en relación con las sanciones privativas de libertad*, in *III Jornadas de Profesores de Derecho Penal* 11, 19 (1976); see also Mohamed Ali Hassan, *L’amende pénale dans les droits modernes et spécialement dans le Code Pénal Suisse* 38-39 (1959); Enzo Musco, *La pena pecuniaria* 69-72 (1984).

<sup>22</sup> Hans Thornstedt, *The Day-Fine System in Sweden*, 9 *Crim. L. Rev.* 307, 312 (1975).

<sup>23</sup> O’Malley, *supra* note 8, at 15.

<sup>24</sup> Simmel, *supra* note 9, at 300-01; see Gianfranco Poggi, *Money and the Modern Mind: Georg Simmel’s “Philosophy of Money”* 144-47 (1993).

<sup>25</sup> See Günther Dürig, *Der Staat und die vermögenswerten öffentlich-rechtlichen Berechtigungen seiner Bürger*, in *Staat und Bürger: Festschrift für Willibalt Apelt zum 80. Geburtstag* 31, 47 (Theodor Maunz et al. eds. 1958). Since the end of the twentieth century, it has widely been argued that consumption is increasingly defining human freedom. John Fiske, *Shopping for Pleasure: Malls, Power, and Resistance*, in *The Consumer Society Reader* 306 (Juliet B. Schor & Douglas B. Holt eds., 2000); Zygmunt Bauman, *Freedom* (1988 [1997]).

<sup>26</sup> William M. Reddy, *Money and Liberty in Modern Europe* 113 (1987).

<sup>27</sup> Matthew Mitchell, *Economic Freedom: What Is It? How Is It Measured? And How Does It Affect Our Lives?*, *Fraser Institute* 9 (2024); Klaus Kraemer et al., *The Social Ambiguity of Money: Empirical Evidence on the Multiple Usability of Money in Social Life*, 82 *Rev. Soc. Econ.* 101 (2022).

<sup>28</sup> Friedrich Nowakowski, *Das Tagesbußensystem nach § 19 der Regierungsvorlage (1971) eines Strafgesetzbuches*, *Österreichische Juristen-Zeitung* 197, 200 (1972).

choice in consumption,<sup>29</sup> both material and immaterial, experiential and possessive. Following work in philosophy<sup>30</sup> and consumer research on escapism<sup>31</sup> and identity construction,<sup>32</sup> the experience of freedom generated by consumption can be construed in different ways. One kind of freedom is “freedom from” the worries, duties, and stresses of everyday life.<sup>33</sup> Here, people experience freedom mainly when the consumption of goods or activities allows them to distance themselves from obstacles, constraints, or internal and external disturbances. On the other hand, people experience “freedom to” when the consumption of goods or activities allows them to explore, decide, and enact who they are or want to become in an effort to achieve self-determination or self-realization.<sup>34</sup> Both notions of freedom are key to a new understanding of the impact of fines. Although different types of punishment restrict freedom in different ways, all punishment is coercive and deprives the offender of freedom in some way. In a society in which individuals discover themselves and realize themselves through consumption and the spending of money, the imposition of a fine restricts the offender’s personal autonomy and daily choices. In this sense, the fine deprives offenders of a substantial part of their freedom to consume.

The fine reduces the offender’s control over money, a major means of self-expression and enjoyment under capitalism. Money deprivation imposed based on income levels is not simply an indicator of the unavailability of certain goods, but of a diminished capacity to act and to pursue goals. Money is an important component of the sense of self, as evidenced by the diminished sense of self when money is unintentionally lost or stolen,<sup>35</sup> or

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<sup>29</sup> Jürgen Baumann, *Von den Möglichkeiten einer Laufzeitgeldstrafe*, *Juristenzeitung* 733 (1963); Baumann, *supra* note 20.

<sup>30</sup> Isaiah Berlin, *Four Essays on Liberty* (1958 [1969]); Erich Fromm, *Escape from Freedom* (1941).

<sup>31</sup> Bernard Cova et al., *Re-Conceptualizing Escape in Consumer Research*, 21 *Qualitative Mkt. Rsch.* 445 (2018).

<sup>32</sup> It has been argued that consumption plays an important role in defining individuals. The linkage between consumption and human identity is well accepted in the literature. At the same time, identity appears implicated in the monetization of human value. See Russell W. Belk, *Possessions and the Extended Self*, 15 *J. Consumer Rsch.* 139 (1988); Mike Featherstone, *Consumer Culture and Postmodernism* (1991); Douglas B. Holt, *Poststructuralist Lifestyle Analysis: Conceptualizing the Social Patterning of Consumption in Postmodernity*, 23 *J. Consumer Rsch.* 326 (1997); George Ritzer, *Enchanting a Disenchanted World: Revolutionizing the Means of Consumption* (2004). An explanation of how practices of consumption can be linked to the political problem of the government of conduct can be found in Nikolas Rose, *Powers of Freedom: Reframing Political Thought* 86-89 (1999).

<sup>33</sup> Berlin, *supra* note 30, at 122, describes negative freedom: “I am normally said to be free to the degree to which no man or body interferes with my activity.”

<sup>34</sup> Charlotte Gaston-Breton et al., “I Want to Break Free!” How Experiences of Freedom Foster Consumer Happiness, 121 *J. Bus. Rsch.* 28 (2020). As described by Berlin, *supra* note 30, at 131, “the ‘positive’ sense of the word ‘liberty’ derives from the wish on part of the individual to be his own master. I wish my life and decisions to depend on myself not on external forces of whatever kind. I wish to be the instrument of my own, not of other men’s acts of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes, which are my own, not by causes which affect me, as it were from outside.” As Fromm, *supra* note 30, at 266, appropriately argues, human freedom lacking in positive control is only limited emancipation.

<sup>35</sup> Belk, *supra* note 32, at 142.

when individuals are systematically deprived of money when they enter prison, but also when they have to pay a certain amount as a punishment.

The impact of fines may seem to diminish after they are imposed, especially if the amount is to be paid over a period of weeks or months. Oftentimes, the monetary induction of behavior ends once the fine is settled. Contrarily, paying in installments can create relationships of dependency. This is the case when an offender is permanently reliant on payments, for instance, because he cannot pay overnight. Regular payments can potentially be seen as part of the punishment, because they provide a weekly or monthly reminder of the consequence of the offense for the duration of the penalty and require some change in spending habits. Therefore, installment payments are beneficial because they help reduce fine default, but also because “[they serve] as a constant reminder that society will not condone the criminal act.”<sup>36</sup> As Bathurst stated:

it could be said, with some justification, that only by having to dip into his pocket each week or each fortnight over a protracted period of time can a defendant really be made to feel the pain and inconvenience that a court punishment sets out to inflict.<sup>37</sup>

The idea of paying fines in installments was, as O’Malley<sup>38</sup> points out, “a high-profile commercial innovation that criminal justice would borrow and adapt—a maneuver that unintentionally brought paying a fine and purchasing a commodity one step closer to each other . . . .” In fact, it was largely linked to the expansion of a consumer culture. But paying fines in installments is not a solution for people with no income at all.<sup>39</sup> Those excluded from consumer society for lack of money cannot benefit from payment by installments. Punishing them with fines is a futile attempt to squeeze blood from the proverbial stone.<sup>40</sup>

This effect of poverty influences the nature of the monetary penalty. The typical organization of a fine system creates an opportunity for offenders to control the enforcement process, i.e., to administer their own punishment, at least to some extent: first, by deciding whether or not to pay, and if they decide to pay, by negotiating the amount and number of installments to be paid, which nearly all fine systems permit; and second, by deciding what goods and services they will forgo in order to pay the fine. Thus, the punitive effect of the fine depends largely on the offenders’ choices. They can choose not to cooperate by refusing to pay entirely. They can also choose to sacrifice physical rather than

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<sup>36</sup> Dennis M. Ryan, *Criminal Fines: A Sentencing Alternative to Short-Term Incarceration*, 68 *Iowa L. Rev.* 1285, 1300 (1983).

<sup>37</sup> David Bathurst, *Financial Penalties: Collection and Enforcement in Magistrates’ Courts 2* (1996).

<sup>38</sup> O’Malley, *supra* note 8, at 52-53.

<sup>39</sup> See Franz von Liszt, *Kriminalpolitische Aufgaben*, 9 *Zeitschrift für die gesamte Strafrechtswissenschaft* 737, 781 (1889); Eduardo Bertola, *Della pena pecuniaria*, I *Rivista Penale* 549 (1893); Eduardo Bertola, *Ancora della pena pecuniaria*, II *Rivista Penale* 5 (1895); Francesco Carfora, *Pene* (in genere ed in specie), in *Il Digesto italiano: Enciclopedia metodica e alfabetica di legislazione, dottrina e giurisprudenza*, vol. XVIII, pt. 1 1430 (Luigi Lucchini ed., 1928).

<sup>40</sup> Alexis Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 *Am. J. Socio.* 1753 (2010).

financial freedom by choosing an acceptable term of imprisonment or other non-custodial sanction, such as community service, over a fine. They can choose to cooperate by paying the fine either all at once or in installments, thereby limiting their own freedom of choice by reducing their ability to consume. Thus, freedom of choice is reduced, but not completely eliminated. However, these choices are further restricted when the offender is impoverished, and even more so when the monetary penalty is imposed without taking into account their economic situation. Abject poverty automatically limits the offender's freedom of choice. The poor must necessarily use what little money they have for basic needs, and spend it for specific purposes. They *cannot choose* to pay the fine. The rich, on the other hand, have the opportunity to use their money in a variety of ways. They can spend, save or invest money to accumulate wealth, thereby securing their personal freedom in spite of the fine. Only those who already have the means to engage in consumption can avoid imprisonment by paying the fine in installments. For the poor, the imposition of a fine directly leads to imprisonment, unless there is an alternative for defaulters. In fact, the realization that payment by installments is not possible for those who have no means or employment led to the introduction of payment of the fine by work,<sup>41</sup> with a minority unsuccessfully asking for the fine to be waived.<sup>42</sup>

#### IV. Training in Discipline: Reducing the Freedom of Consumption

As Simmel<sup>43</sup> argues, the defining feature of money is that it requires us to enter into exchange relationships in which we are faced with choice. For him, money embodies the infinite possibilities for exchange in society and the limitations to future options that come from making any choice. Following this idea, Young<sup>44</sup> explains that:

money forces us continually to evaluate what we do against market mechanisms and against different opportunity costs. It requires us continually to evaluate those other commodities and relationships with which it is proposed at this or that point to strike an equivalence. If we decide one way, we pay our money and we have to accept the loss of opportunity—but there is always the possibility of difference, of different outcomes.

Money emerges as the most abstract and universal means of achieving goals, which is reflected in the central role of money in the expansion of individual freedom in social and political systems.<sup>45</sup> Simmel also elaborates on the transformative effects of money. The diffusion of money drives a process of increasing individualization and growing autonomy of the individual, with money commodifying social relations, allowing them to be assigned a

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<sup>41</sup> See references in Patricia Faraldo-Cabana, *Paying off a Fine by Working Outside Prison: On the Origins and Diffusion of Community Service*, 17 *Eur. J. Criminology* 628 (2020).

<sup>42</sup> E.g., Carl Stooß, *Die Geldstrafe im schweizerischen Strafgesetzentwurf*, 20 *Zeitschrift für Schweizer Strafrecht* 242, 246 (1907).

<sup>43</sup> Simmel, *supra* note 9, at 212-17.

<sup>44</sup> Peter Young, *The Fine as an Auto-Punishment: Power, Money and Discipline*, in *Criminal Justice in Scotland* 195 (Peter Duff & Neil Hutton eds., 1999).

<sup>45</sup> Simmel, *supra* note 9, at 341-54.

monetary value, while at the same time allowing for a maximal degree of individualization.<sup>46</sup> Money represents the objectified articulation of exchange relationships, because, separated from all other goods, it is the transformer of objects into commodities.<sup>47</sup> It represents the sheer unlimited possibilities of exchange, within the constraints of the available quantity of money. In delineating these possibilities, money carries value of its own. Rather than being an end in itself, it has infinite capacity for exchange. At the same time, money can become a purpose *for itself*, precisely because of its unlimited potential as a means, which has implications for the deprivation of money in the form of a fine.

In fact, money as an institution also has transformative effects on human behavior. Simmel's analysis of the modern meaning of money has been a major source of inspiration for theories of the postmodern, in spite of the modernist core of his work.<sup>48</sup> Postmodern theory posits a close relationship between freedom and consumption,<sup>49</sup> where money secures personal freedom through consumption. Money exerts influence in a variety of social domains; in criminal law the fine can transform punishment into a monetary claim. Deprivation of money as a penalty shapes the internal organization of the offender's behavior. Installment payments encourage the systematic monitoring by individuals of their own life and the internalization of constraint, engaging offenders in a quasi-corporate practice.

Punishment mediated by money may trigger related notions of discipline and obedience. The resulting behavioral changes can be understood as a "mechanic of training" in a post-Foucauldian sense.<sup>50</sup> The fine does not act upon the body and soul of individuals to transform them, but focuses on disciplining their consumer behavior. By extracting money via fines, the sovereign power can impose discipline and enforce obedience.<sup>51</sup>

Through the imposition of fines, offenders are accorded a new and active relation to their status as consumers, limited by their capacity for self-management. But disempowered groups suffering from abject poverty remain unfree to consume. Those that have been excluded from consumption—the underclass, the marginalized, the truly disadvantaged—must be disciplined through other means: mainly imprisonment, and eventually its alternatives, such as probation and community service.

These ideas I resume in the conclusion.

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<sup>46</sup> Id. at 297-312.

<sup>47</sup> Mathieu Deflem, *The Sociology of the Sociology of Money: Simmel and the Contemporary Battle of the Classics*, 3 J. Classical Socio. 67, 71 (2003).

<sup>48</sup> Id. at 88; David P. Frisby, *Simmel and Since: Essays on George Simmel's Social Theory* 64-79, 155-74 (1992).

<sup>49</sup> Baumann, *supra* note 29; A. Fuat Firat & Alladi Venkatesh, *Liberatory Postmodernism and the Reenchantment of Consumption*, 22 J. Consumer Rsch. 239 (1995); James B. Twitchell, *Lead Us Into Temptation: The Triumph of American Materialism* (1999).

<sup>50</sup> On the propensity toward more immanent and internalized forms of monetized governance, see Tero Auvinen, *At the Intersection of Sovereignty and Biopolitics: The Di-Polaric Spatializations of Money*, 9 Foucault Stud. 5 (2010).

<sup>51</sup> Devin Singh, *Speculating the Subject of Money: Georg Simmel on Human Value*, 7 Religions 182 (2016).

## V. Conclusion

The fine has a colorful history of controversy and contestation that socio-legal analysis that is conscious of the potential pitfalls of ahistoricism would be unwise to ignore. In the preceding sections I have examined the history of changing conceptions in how fines have been conceived and used, using a set of interpretative techniques sensitive to how money and freedom are perceived. I have explored how a fine calculated according to the offender's wealth and wages and paid in installments can be conceptualized as a "mechanic of training"—not training the bodies and souls of individuals to transform them into productive entities and a potential source of value in the manner suggested by Foucault, but rather by imposing an obligation of austere and prudent behavior, as indicated by the later post-Foucauldian literature.<sup>52</sup> The fine disciplines individuals by reducing their capacity of consumption and thus their freedom of choice, but not by imprisoning them and thus restricting their ability to work for a relatively long period of time. Consumerism represents personal liberty in modern society, reacting to and reflecting changing work and leisure patterns. By limiting the exercise of this freedom, the penal fine constitutes itself as the perfect disciplinarian mechanism of our time, allowing money to become a two-sided symbol of discipline and freedom.

If it is possible to build such a nexus between money and freedom, it may be also possible to make financial sanctions for serious offenses more palatable, further reducing the use of imprisonment. One possible path to this goal is a revised conception of the meaning of money in criminal law, one that would force us to rethink the nature of the relationship between fines and other sanctions, particularly imprisonment, but also community service and probation. As a result, new questions may emerge, which need to be debated and answered. This paper has been written in the hope of stimulating such questions and debate.

Examining the evolution of money's role in society sheds light on the development of both monetary and custodial penalties. For better or worse, this evolution has influenced the development of the criminal justice system. Understanding the role that fines can play in limiting human freedom provides decisionmakers with a valuable set of analytical tools to reform or reorganize existing arrangements.

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<sup>52</sup> Susan M. Easton & Christine Piper, *Sentencing and Punishment: The Quest for Justice* 144 (2008); George Rigakos, *The New Parapolice: Risk Markets and Commodified Social Control* 25, 113-15 (2002); Rose, *supra* note 32, at 233-73.