RESTITUTION AND COMPENSATION AND FINES

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I. RESTITUTION AND COMPENSATION

The Law Reform Commission's latest Working Paper on *Restitution and Compensation*,[1] although it can of course stand entirely on its own, represents an important elaboration and development of ideas which the Commission developed in its earlier Working Paper 3 on *The Principles of Sentencing and Dispositions*.[2] It will perhaps be fairer to the Commission, therefore, if we review this latest offering in the light of its conceptual predecessor.

Working Paper 5's most refreshing quality is its direct and pointed style. The Commission has first to be commended for avoiding the typical legal jangle of official reports, and stating its position in clear and eminently readable terms. Nowhere is this refreshing style more apparent than in the opening paragraph of the Paper which, because it poses questions and assumptions which are so crucial to the whole theme developed in the Paper, we wish to quote in full here:

> Doesn't it seem to be a rejection of common sense that a convicted offender is rarely made to pay for the damage he has done? Isn't it surprising that the victim generally gets nothing for his loss? Restitution—making the offender pay or work to restore the damage—or, where this is not possible, compensation—payment from public funds to the victim for his loss—would seem to be a natural thing for sentencing policy and practice. Yet, under present law they are, more frequently than not, ignored.[3]

A review of this Working Paper could scarcely have asked for a more suitable point of departure than that presented to us in this opening paragraph. Central to the Paper is the Commission's expressed assumption that restitution and compensation "would seem to be a natural thing for sentencing policy and practice" and, presumably by logical extension, that they would

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[1] LAW REFORM COMMISSION OF CANADA, WORKING PAPER 5, RESTITUTION AND COMPENSATION (1974).

[2] LAW REFORM COMMISSION OF CANADA, WORKING PAPER 3, THE PRINCIPLES OF SENTENCING AND DISPOSITIONS (1974).

[3] *Supra* note 1, at 5.

seem to be an obvious principal focus of the entire criminal process. We say "presumably" because we recollect an enigmatic but critical observation which was tucked away in the last paragraph of the Preface to the Commission's earlier Working Paper 3 on *The Principles of Sentencing and Dispositions*:

> "[W]e do not consider 'sentencing' as a function which begins at the end of the trial and ends at the beginning of the sanction *but as a process related to all stages of the administration of justice.*" [4]

Moving from this assumption as to the obvious and "natural" place of restitution and compensation as central functions of the criminal law and process, the Commission not surprisingly reaches the conclusions that restitution should "be a central consideration in sentencing and dispositions", [5] thus restoring it to its "natural" place among the criminal law's main priorities, and that compensation should similarly be established and developed through compensation boards which "must be brought visibly to the forefront of the administration of justice and linked to the courts in determining compensation." [6] In reaching these conclusions, the Commission has detailed with great clarity the reasoning which leads it to them. It notes modern criminology's perception of "crime" as an inevitable (and in some senses desirable) reflection of healthy conflict within society, from which change and new values emerge, rather than as some kind of social disease against which a massive war has to be waged. It goes on to review the obvious thereapeutic effects restitution and compensation could have, both on the actors in a criminal transaction ("offender", "victim" and "complainant") and on society as a whole. With these views, and with the Commission's central statement that "[n]ot only is restitution a natural and just response to crime, it is also a rational sanction", [7] we cannot but agree, and congratulate the Commission on the clear and open manner in which it has expressed them.

It is with the central assumption and the major practical conclusions of the Paper, however—namely, that restitution and compensation "would seem to be" a natural and obvious primary focus of the criminal law and process, and that they should therefore be achieved through the adaptation of sentencing policies and practices at the conclusion of criminal trials—with which we take issue. In this connection, whatever might be the difficulties of implementing the Commission's proposals on "diversion" (a word whose recent over-use has virtually stripped it of any further practical utility) in its Working Paper 3 (and doubtless there would be substantial problems), we feel they will not be as great as the problems in trying to reconcile some of the views expressed on it in that Paper, with some of the views expressed on restitution and compensation in this more recent one. Before develop-

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[4] *Supra* note 2, at x (emphasis added).
[5] *Id.* at 8.
[6] *Supra* note 1, at 20.
[7] *Id.* at 6.

ing this point, however, we must return to examine the central assumption of the Paper on *Restitution and Compensation.* In what sense are restitution and compensation obvious and "natural" foci of the criminal law and process?

We might perhaps start by asking what may at first seem to be a somewhat facetious question. It is not intended to be so, however. If restitution and compensation are such obvious and natural priorities of the criminal law and criminal "justice" system in the common law world, how is it that over the eight or nine hundred years of the development of that criminal law they have received such little attention? And why is it that, as the Commission is at pains to point out, "under present law they are, more frequently than not, ignored"? [8]

There are two, at first apparently contradictory, ways of answering these questions, both of which are to be found within the Commission's Paper, although neither of them appear to be explicitly recognized as such by the Commission (probably because it did not expressly ask the question). Their contradictoriness, however, is apparent and not real, since it arises solely from the fact that they answer the question at different levels.

The first answer would be that restitution and compensation are not and never have been ignored by the criminal law and the criminal "justice" system. The Commission itself points this out with some emphasis, when it asks rhetorically, in the opening passages of its Paper:

> How frequently do business firms settle thefts by employees privately, extracting in many cases a promise to pay the money back? How frequently do police, for example, using proper discretion, suggest to the offender and victim that rather than proceed with charges they should work out a suitable compromise involving restitution? [9]

In later passages in its Paper, the Commission goes on to point out the various other ways in which the law provides for the recovery of a victim's losses—through such avenues as unemployment insurance, health and hospital insurance, ordinary property insurance, victim compensation schemes and, of course, through the small claims and civil courts. It also describes the quite considerable, though little used, provisions of the Criminal Code relating to restitution, compensation and restoration of property incidental to a criminal charge or conviction. The upshot of all this appears to be that, far from ignoring restitution and compensation, our present law provides a multitude of various avenues for redress of the victim who may seek it. If the Commission's observation to the effect that "sentencing" is to be considered "as a process related to all stages of the administration of justice" is borne in mind, it may well be argued that, through the increasing recognition given by the law and the courts to police and prosecutorial discretion and to all the other modes of achieving restitution and compensation just described, these two objectives are now, and have been for some time, established as

[8] *Id.* at 5.
[9] *Id.*

part of "sentencing policy and practice" under our present law, and are not "more frequently than not ignored". They have been left to be developed (and, many would say, with good reason) at stages of the process other than the stages of the formal trial and sentencing. According to this concept of the function of criminal law, the formal stages of the criminal process are designed primarily to achieve other objectives, and should be invoked only when these other objectives are considered to be paramount. As the Commission stated in its Paper, "[t]hrough conflicts over value positions society has the opportunity of reaffirming its view of what conduct is so injurious that it ought to be dealt with by penal sanctions." [10]

It is, however, its primary emphasis on *penal* sanctions which essentially distinguishes the criminal court from the civil court; both civil and criminal courts serve the function of reaffirming social values, since this is an inevitable incident to any distributive adjudicative decision. [11] Although, of course, which conduct has been considered an appropriate subject of penal sanctions, and which is considered appropriate for civil sanctions, has tended to be, to some extent, a matter of historical accident in the development of our law, rather than one of consistent taxonomy. [12] Without wishing to pursue this point at great length here, we should perhaps note our view that the Commission's apparent unwillingness to confront squarely the issue of the respective roles of the civil and criminal courts in resolving conflicts in our society, constitutes an important weakness in this and earlier Working Papers. The nearest the Commission appears to come to dealing with this most fundamental issue is in its discussion of the European "combined trial", under which "a claim for damages is presented during the criminal proceedings." [13] The Commission's discussion of this European model is, we feel, somewhat less than adequate, both in terms of its description of it, and in terms of the conclusions which it draws from it. In the first place, the Commission asserts that one of the "practical disadvantages" of this model is that "the prosecution is supposed to inform the victim that charges are being laid, but in practice the prosecution frequently fails to give such notice." "The result", claims the Commission, "is that the victim is effectively prevented from making a timely claim for damages during the criminal proceedings." [14] To those who are familiar with the European model, this must sound strange indeed; for it appears to ignore some of the essential features of the "combined trial". Briefly summarized, these are as follows:

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[10] *Id.* at 6.

[11] *See, e.g.*, Eckhoff, *The Mediator and the Judge, in* SOCIOLOGY OF LAW at 171-81 (V. Aubert ed. 1969). *See also* Aubert, *Competition and Dissensus: Two Types of Conflict and of Conflict Resolution*, 7 JOURNAL OF CONFLICT RESOLUTION 26-42 (1963).

[12] *See, e.g.*, Hadden, *Contract, Tort and Crime: The Forms of Legal Thought*, 87 L.Q.R. 240-60 (1971).

[13] *Supra* note 1, at 11.

[14] *Id.*

(1) In a great many minor cases [15] the consent or request of the "victim" is legally required before any prosecution can be launched at all;
(2) Even when no express consent of the "victim" is legally required, the vast majority of prosecutions in minor cases are instituted only on the request or complaint of the injured party; and
(3) In any event, the nature and scope of the "instruction" (the inquiry conducted by the investigating magistrate), and the compulsory discovery to all parties of the "dossier" before trial, make it extremely unlikely, if not actually impossible, that a prosecution could proceed to trial without first coming to the knowledge of the injured party.

The Commission rightly points out, however, the tendency a civil claim would have in complicating or delaying the hearing of a criminal charge, especially in the light of the different principles of liability and rules of evidence which would have to be applied in determining the separate issues of civil and criminal liability. Equally importantly, however, it notes the possibility that the existence of a combined civil claim could result in prejudicing the impartial determination of the issue of criminal liability. To this last "problem" with the notion of implanting the "combined trial" into the common law system, the Commission poses a solution whose naivety seems to be matched only by its brevity of expression:

> Any potential bias, however, could be avoided by putting off consideration of the civil claim until after the verdict in the criminal trial. However, there is no need to complicate the criminal trial with civil issues. After the matter of guilt has been decided, it should be feasible to consider restitution and even compensation under the more relaxed rules of procedure at the sentencing stage. [16]

On the details of this procedure, the Commission appears to have been struck by a sudden fit of vagueness, not only in describing it but in explaining why the question of the offender's liability to make restitution and compensation should require any less careful and detailed procedure than the question of his liability to a penal sanction. The Commission simply and enigmatically states that:

> In most cases the procedure during sentence is not, and presumably should not be, strictly adversarial as at trial. Notwithstanding the merits of cross-examination and the rules of evidence in clarifying legal issues and determining facts, it is necessary at the sentencing stage to make a broader inquiry than the strict rules would permit into such matters as the history of the offence and the circumstances of the offender. This is not to say that the sentencing process should not be open, fair and accountable. It does mean that a judge should be able to have access to a wide range of material

[15] For example, in Italy, insults, defamation, assaults resulting in illness or injury which persists for less than 10 days, all offences of negligence causing bodily harm or illness which persists for less than 40 days and involves no permanent consequences, breaking and entering where no actual theft is involved, and all sexual offences, including rape. Rape, however, is distinct from the others listed, in that once the "victim" has initiated a prosecution, she is not subsequently free to withdraw it. An essentially similar system applies in all other European "civil law" countries.

[16] *Supra* note 1, at 11.

> relating to the circumstances of the offence, including the amount of loss suffered on the criminal injury. [17]

As we read this passage in its Paper, we could not but reflect on the earlier assertion of the Commission, in its Working Paper 3, to the effect that "[i]t goes without saying that justice demands that sentencing procedures, particularly in serious cases, should require specific findings on all disputed issues of fact relevant to the question for the sentence". [18] What kind of procedure we may expect in a formal sentencing process which is concerned to determine what is essentially an issue of civil responsibility, and which follows a trial the essential purpose of which is to determine the accused's criminal responsibility, remains far from clear from the two Working Papers. Nor can we feel entirely satisfied that removing the issues of restitution and compensation to the formal sentencing stage of the criminal trial will avoid all the problems which the Commission associated with the European "combined trial". In this respect, the Commission seems to have forgotten the insight of its earlier observation as to the limitations of viewing sentencing "as a function which begins at the end of the trial and ends at the beginning of the sanction . . . ." Sentencing, as the Commission pointed out, is "a process related to all stages of the administration of justice", and we have little doubt that the kinds of changes of emphasis which the Commission has recommended—under which in some cases securing restitution or compensation would become the sole objective of sentencing—would have profound effects not only on the earlier stages of the formal trial itself, but on the equally important prior decisions of prosecutorial discretion and plea bargaining. Indeed the complete absence of any consideration by the Commission in its Paper of the implications of its proposals for prosecutorial discretion and plea bargaining—nowadays such crucial elements in the criminal process—is somewhat disconcerting, and leads us to wonder whether the Commission gave its proposals as much careful thought as they demand.

The fact that existing provisions for restitution and compensation at the formal sentencing stage of a trial under the Criminal Code [19] are "little-used", is of course open to diverse interpretations. One of these is that the reason they are little used is that the other opportunities for securing restitution and compensation are perhaps more effective and desirable. In this connection, it is most significant that throughout its Paper, the Commission does not appear to present any clear evidence of what the practical *problem* is which requires changes in the law relating to restitution and compensation. The only "problem" it seems to mention in this connection is what it rightly, we think, describes as the "futility of strictly punitive sanctions" [20] from all points of view. This "problem", as we shall discuss below, seems to us to be amenable to other solutions than by adding restitution and compensation

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[17] *Id.* at 11-12.

[18] *Supra* note 2, at 26.

[19] *See, e.g.*, §§ 388(2), 616, 650, 653-655, 663, and 742 of the *Criminal Code*, CAN. REV. STAT. c. C-34 (1970).

[20] *Supra* note 1, at 8.

as a central consideration at the conclusion of a criminal trial. For the moment, however, we may reflect that it would have been most helpful if the Commission had discovered whether there are in fact thousands, or even hundreds, of dissatisfied criminal victims clamoring for more effective restitution and compensation laws. For the existence of such a problem, and its nature, seems to us crucial in deciding upon the necessity for any "solution", and upon the form it might take. Before pursuing this point further, however, we must consider the second answer which may be given to the questions we raised earlier.

The second way of answering the questions as to why restitution and compensation have received so little attention in the development of the criminal law, and why our present law appears, more frequently than not, to ignore them, would be to say simply that restitution and compensation have never been, and were never intended to be, a primary focus of our criminal law and criminal trials (and hence sentencing policy and practice). It is not, therefore, correct to suggest that they "would seem to be a natural thing for sentencing policy and practice." This answer is only acceptable, of course, in the light of the first answer, if by "sentencing policy and practice" we mean simply the formal process of sentencing at the conclusion of a criminal trial, and not "a process related to all stages of the administration of justice." This answer, however, casts both the "problem" and the Commission's proposed "solution" to it, in a somewhat different light.

This second answer is also to be found within the Commission's Paper. It notes, for instance, (although it apparently does not draw the obvious lesson from it) that "punitive sanctions have been far too long the overriding focus of the criminal process".[21] It also notes that the last time restitution and compensation found a major place in the disposition of criminal-type incidents in England, was in Anglo-Saxon times when "there was no criminal law as we know it."[22] And after what must be one of the shortest histories of criminal law in the common law world ever published, it concludes, we think absolutely correctly, by stating: "It would now seem that historical developments, however well intentioned, effectively removed the victim from sentencing policy and obscured the view that crime was social conflict."[23] If it is true, and we believe it is, that modern criminal law and criminal process has been developed and designed to achieve purposes completely different from those of restitution and compensation, then it is difficult to see in what sense restitution and compensation can be said to be "natural" components of that law and of that process. Far from being obvious goals of modern criminal law, criminal procedure and the rules of criminal evidence, restitution and compensation would appear to us to be largely incompatible with this branch of the law. Indeed, in its rejection of the concept of a "combined trial" (as exists in most continental European countries), the Commission seems

[21] *Id.* at 1.
[22] *Id.* at 8.
[23] *Id.* at 9.

to indicate its clearest appreciation of this incompatability. Modern criminal law, criminal procedure and the rules of criminal evidence in Canada are quite clearly designed to achieve the major purpose of concentrating attention on one of the actors in a "criminal" incident, designating him as a potential offender, and attaching to him "blame" for the incident. They are not normally concerned to discover what parties other than the accused may bear some share of the "blame" for the incident, except in so far as this may assist them in deciding whether the accused was to blame. As hundreds of thousands of potential complainants have learned over the years, this is a process which, far from being useful and effective in securing restitution or compensation, is often completely counter-productive in this regard. This is undoubtedly an important factor in explaining why so much known "crime" goes unreported, and why so many "victims" (both private individuals and corporations) shun the formal criminal process in favour of more effective and less costly alternative means of securing restitution and compensation.

In the light of this historical and present-day reality, substantial questions arise as to the Commission's proposals for introducing restitution and compensation as a major consideration in the sentencing and disposition process following upon a conviction in a criminal trial. If history and current experience tell us that the criminal law and the formal criminal trial are so singularly badly adapted to achieve the objectives of restitution and compensation for the "victim", why, we may ask, does the Law Reform Commission think it would be a good idea to increase the attempts to achieve that goal during the final stages (formal sentencing) of that process? Indeed at one point, the Commission goes so far as to suggest: "What is needed is to give restitution . . . first consideration whenever possible."[24] But if restitution is to be our primary objective in sanctioning state interference in the "incidents" which we currently call crimes, why would we want to continue to seek its achievement through the use of a process whose every detail is designed to achieve completely different and often conflicting purposes? Why would we not want to concentrate on developing other more effective ways of achieving restitution and compensation, which do not involve such conflicts?

As we have noted earlier, the reasons why the Commission feels there is a "problem" with restitution and compensation which requires some "solution", are nowhere clearly stated in the Paper; the existence of a "problem" which needs correction seems rather to be assumed. We have a strong impression, however, that the major "problem" which was on the Commission's mind is the futility of the criminal process as it now operates, in terms of its ability to produce anything other than negative results (both in terms of the "offender" and "victim", and in terms of society as a whole). The style and content of the Commission's reasoning in the Paper suggests to us strongly that it may be to the solution of this problem that its proposals are mainly directed. In our view, however, this is a most unsatisfactory ap-

[24] *Id.* at 14.

proach. The inclusion of restitution and compensation in a process which in almost every other respect is alien to those objectives, does not seem to us to be the best way of going about either achieving the objectives of restitution and compensation, or of solving the current problems and failures of our criminal process, designed as it is to punish and reject the "offender".

While the Commission's proposals for "diversion" in its third Working Paper on *Principles of Sentencing and Dispositions* are certainly not theoretically in contradiction with its proposals in its Paper on *Restitution and Compensation*, in practical terms there would certainly appear to be some problems in reconciling them. For in the latter Paper, the Commission acknowledges that "the chief argument against the implementation of restitution as a major consideration in sentencing and dispositions . . . is: 'It won't work because all criminals are poor and, even if some of them have money, you'll never be able to make them pay'." [25] The Commission's response to this objection is essentially that in the great majority of cases the amounts in question would be quite small and well within the means of the offender. In this connection it notes that the majority of cases coming before the courts involve motor vehicle offences, assault and theft, and cites statistics which suggest that in well over half of these cases the amount of restitution required is below 100 dollars. From this, they conclude that restitution would be a viable disposition in most cases in which it was appropriate. These minor offences, however, appear to us to be the very ones which the Commission argues, in its Working Paper 3, on *Principles of Sentencing and Dispositions*, should be "diverted" from the criminal process, and should not involve a formal criminal trial at all. Thus in that Paper, the Commission stated:

> For example, petty theft or having possession of stolen property under $200.00, common assault, homosexual offences, bestiality or exhibitionism, family disputes, mischief to property, joy riding, minor break and enter cases or cases involving certain types of mental illness, *probably should be diverted unless there are strong factors pointing to the desirability of a trial.* [26]

If these cases are to be removed from the formal criminal process, therefore, it seems to us that the Commission is going to have a hard time meeting the chief objection to its proposals on restitution and compensation in the cases which remain, and the impact of those proposals, if implemented, would be likely to be substantially reduced, if not virtually eliminated. While we have no special interest in seeing the Commission proven wrong, we must confess that, from the point of view of desirable law reform, we can, in this instance, scarcely imagine a more welcome result. For we are among those who believe that many, if not most, of the things that are currently being done to people in the name of criminal "justice" are resulting in more harm than good to society, and that the most desirable way of reforming a great deal of our criminal law and criminal process would be to do

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[25] *Id.* at 12.

[26] *Supra* note 2, at 11 (emphasis added).

away with it and replace it, where necessary (and in many cases it is not), with institutions and procedures which can bring more constructive and humane resolutions to the conflicts which we currently deal with as "criminal". In an age such as this, in which criminal law and the criminal process have been over-extended such as never before, we should be sceptical of any proposals which would attempt to give this overworked horse a new respectability. If we must continue to put people through the degrading and humiliating experience of our punitively-oriented criminal justice system, we must at least ensure that we only do so in those cases in which no other alternative seems reasonable. The more humane objectives of reconciliation, restitution and compensation should be cultivated in new environments which will be more congenial to their achievement, and which will avoid the predominantly negative stigmatisation of our criminal process.

In its Working Paper 3 on *Principles of Sentencing and Dispositions*, the Law Reform Commission showed signs of setting its face, albeit somewhat cautiously, in these new directions. We can but hope that its Working Paper 5 on *Restitution and Compensation*, and the reported disenchantment of its chairman [27] do not indicate a weakening of that resolve. We are left to wonder, however, at the Commission's unexplained silence up to this point, in all of its Working Papers, about the political, economic and constitutional implications in Canada of its earlier proposals for "diversion" and "decriminalisation". [28] Could it be that the provinces would not entirely welcome responsibility for the "diverted" (and hence, presumably, no longer "criminal") cases? Or that the federal government would not entirely welcome the potential lack of uniformity of legal control [29] which it might imagine would result from provincial assumption of responsibility for such "diverted" cases?

If the Law Reform Commission has any answers to these questions, it is keeping them close to its chest. We are hopeful, however, that when it presents its much awaited (by us) Working Paper on "Diversion", it will address itself boldly to these and other seemingly mundane but difficult issues, and will build on the promise of its earlier work.

II. Fines

The most striking feature of the Law Reform Commission's Working Paper 6 on *Fines* is its brevity. The substantive issues of when fines should be imposed, when they should be combined with other dispositions, and how

[27] See the article *A Law Reformer is Disheartened*, Globe and Mail (Toronto), Nov. 16, 1974, at 1-2.

[28] In its sole reference to this aspect of the matter in Working Paper 5, the Commission simply states: "Moreover, in Canada, combining the civil and criminal trial would raise serious constitutional issues; civil law is generally under the jurisdiction of the provinces, while criminal law is a federal matter." *Supra* note 1, at 11.

[29] Let it not be thought, however, that the much-vaunted "uniformity" of existing federal criminal law in Canada is anything but a myth in reality.

to ensure that they do not operate discriminately, are considered by the Commission in four short pages. The remaining six pages of the Paper describe the administrative scheme of enforcement which the Commission recommends. A short appendix contains an outline of the Swedish day-fine system which apparently provided the main inspiration for the Commission's proposals in this area.

We recognise that two important considerations are likely to have influenced the Commission's decision to give such apparently scant treatment in this Working Paper to a subject which is actually quite complex. In the first place, in the context of the Commission's total programme of review, the subject of fines and their enforcement is undoubtedly seen as a relatively low priority concern. Secondly, in a Paper which is written primarily with a view to inform and interest members of the general public about the problems associated with fines as a disposition in criminal cases, the Commission is understandably anxious to present the issues as simply and untechnically as possible.

Such superficiality, however, while it may serve the political purpose of attracting the general public into debate over issues of law reform (although we are not convinced that it does), presents problems for the informed reviewer. For so many of the important issues relating to fines and their enforcement are either omitted entirely from consideration in the Paper (presumably in the interests of simplicity) or considered so cursorily in the Paper that no adequate information about them can be derived from it, that the reviewer finds himself with scarcely sufficient substance to review. And to raise such issues and consider them adequately in a review would inevitably result in the review ending up substantially longer than the Paper being reviewed. Since we do not believe that it is the function of a review to explore in detail the areas not covered by the Paper, we shall confine ourselves here to outlining what, in our view, are the major gaps in the Paper which would need to be filled before any informed assessment could be made of the Commissions proposals in this area.

The Paper initially addresses itself to three substantive "problems" relating to the imposition of fines in criminal cases. These are: (1) the Criminal Code does not currently give sufficient recognition and sanction to the use of the fine as an independent sanction in criminal cases; (2) the use of the "alternative" disposition "X dollars or Y days" results in imprisonment being used as a sanction against too many people for whose offences it is not an appropriate sanction, and in particular results in discrimination against indigent offenders; (3) the imposition of fines expressed in uniform dollar amounts results in unequal justice and discrimination against indigent offenders.

To remedy these "problems", the Commission initially proposes the following solutions: (1) the *Code* should be amended to allow judges to impose fines for any criminal offences other than those for which mandatory sanctions are specified; (2) judges should be prohibited from imposing the

"alternative" disposition "X dollars or Y days"; and (3) all fines of more than 25 dollars should be judicially expressed in terms of day-fines, the actual dollar amount of such fines to be determined by a court administrator by applying standard guidelines in an official inquiry into the offender's means.

Substantial problems face anyone who wishes to assess the appropriateness of these proposals by the Commission. In the first place, it is not clear from the Paper whether the "problems" (particularly the first and third) cited in the Paper are "real" problems, or merely theoretical ones. Secondly, even if they are real problems, it is not clear whether they are big problems or only very small ones. Thirdly, it is not clear whether they are general problems relating to all kinds of criminal offences for which fines are imposed, or problems which relate particularly to certain types of offences, or certain offence groups (*e.g.*, traffic offences, drug offences, vagrancy-type offences, etc.). And finally, it is not clear whether the "problems" relate primarily, or even significantly, to the enforcement of the criminal law, or to the enforcement of all or some provincial laws (*e.g.*, liquor laws).

Perhaps largely as a result of these inadequacies in the definition of the "problems", the Commission strangely offers little or no evidence in the Paper that the solutions it proposes are likely to be substantially effective in resolving the "problems". Legislative changes do not, of course, guarantee changes in practice; in fact, the relationship is more often than not the other way around. Such considerations apart, however, we may expect that changes in federal legislation are unlikely to have the greatest remedial effect if the problems concerning fines are essentially related to the enforcement of provincial statutes (which we strongly suspect they are). In terms of the number of defaulters who are imprisoned, we wonder whether the simpler answer to this problem might not be to ensure that time to pay is given more frequently, rather than the more complex administrative enforcement system which the Commission recommends in the second half of its Paper, and we are aware of some evidence for this conclusion which should not be overlooked.[30] And with respect to solving the problem of discrimination relating to fines expressed in uniform dollar amounts, we have yet to see any evidence (and the Commission does not offer any in its Paper) that the day-fine system actually offers in practice the most desirable or effective solution. Thus we would be concerned to know whether in fact the day-fine system results simply in the size of fines imposed on wealthy offenders increasing, or the size of fines imposed on poorer offenders decreasing, or both. If by any chance such a system would simply result in an overall increase in the amount of fines, we would have substantial reservations about its desirability as a "reform".

In the second half of its Paper, the Commission describes an administra-

[30] Ross, Twenty-five Dollars or Five Days: A study in the Use of Fines, and Alternate Jail Sentences (unpublished paper, 1972, Center of Criminology, University of Toronto—cited with the permission of the author). *See also* R. HANN DECISION MAKING IN THE CANADIAN CRIMINAL COURT SYSTEM Vol. II (Center of Criminology, University of Toronto 1973).

tive enforcement scheme for fines, which would essentially remove this problem from the courts (and, argues the Commission, substantially from the police), and place it in the hands of a centralized administrative agency (the "court administrator's" office). The Commission notes that such a bureaucracy would have to be well staffed, and would require quite sophisticated records and information systems, to be effective. It goes on to outline the procedures which this agency would follow, including the "means inquiry" required when day-fines are imposed, procedures for determining whether time to pay, payment by installment, and extensions of time to pay should be allowed, and elaborate procedures to be followed with respect to "a small percentage of fined offenders" who continue to default. The Commission claims that the result of adopting such a system will be that "much of the inefficiency and resultant inequities of the present system could be removed." [31]

We have already indicated why we feel that the information presented in the Paper is insufficient for anyone to make an informed assessment of whether the Commission's proposed reforms are likely to be substantially effective in resolving the substantive "problems" relating to fines (which are presumably what the Commission is referring to when it speaks of the "resultant inequities of the present system"). On the question of the present system's "inefficiency", however, and the potential of the system proposed by the Commission to remove it, the Paper appears to offer almost no enlightenment at all beyond theoretical speculation. The sole information which is presented on this issue is an "illustration" from which the reader, by doing a little simple mental arithmetic, is able to learn that of 830 fines imposed for Criminal Code offences by provincial judges in one Canadian city in 1971, just under 16 per cent remained unpaid "several months after time to pay had expired".

The reader who asks even the most basic questions about the likely cost-effectiveness of the Commission's proposed system will not find discussion of the matter, let alone answers, in the Working Paper. It is not even clear from the description of the Swedish system in the appendix to the Paper, whether any reduction at all in that 16 per cent default rate might be expected from the introduction of such a system. In fact a number of "features of particular interest" of the Swedish system (*e.g.*, that the public prosecutor has a discretion to "write off" unrecovered day fines of up to five in number, and that "there is thought to be nothing objectionable to a very prolonged period of enforcement") suggest that the introduction of such a system might contribute little to improving the "efficiency" of our present system. The reader who may be curious to know what the implementation of such a system as the Commission proposes for Canada might cost, or what economic benefits (in terms, for example, of recovered fines which would remain unrecovered under our present system, or released police or judicial time or manpower) will find nothing to chew on in the Commission's Paper beyond

[31] LAW REFORM COMMISSION OF CANADA, WORKING PAPER 6, FINES 37 (1974).

the rather bland assertion that "judges and police would not be burdened by these responsibilities". [32]

In fact, after reading the Working Paper on Fines we were left wondering just what to make of this little flight of fantasy, and were reminded of those dying words of Gertrude Stein, as related by Alice B. Toklas:

> I sat next to her and she said to me early in the afternoon, "What is the answer?" I was silent. "In that case", she said, "What is the question?" [33]

[32] *Id.*

[33] A. B. TOKLAS, WHAT IS REMEMBERED 173 (Holt, Rinehart and Winston, 1963).