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Book Review

Patricia Faraldo-Cabana (2017) *Money and the Governance of Punishment: A Genealogy of the Penal Fine*. Routledge.

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This book makes a welcome contribution to a growing critical literature on the fine. In most jurisdictions across the liberal democratic capitalist world, a fine is the most common penalty imposed by courts, although you would hardly appreciate this fact if you only consulted the academic literature on punishment, especially the English-language literature. A flourishing body of punishment and society scholarship since the 1970s has all but ignored financial sanctions, preoccupied as it has been with the prison, the penal sanction least commonly imposed by the courts, and to a lesser extent with other community sanctions like probation. Interest in the prison is understandable given it is the most consequential of punishments (at least in all those jurisdictions that have abolished capital punishment) and is a penalty of singular symbolic significance. But, as Faraldo-Cabana argues, this hardly justifies neglect of the fine, given the sheer scale of its use and the fact that the history of the fine is intertwined with that of imprisonment. Yet academic analysis of the latter has been typically undertaken ‘as if fines did not exist.’ Her study is centrally concerned to redress this. It is of particular value in that it introduces English-speaking readers to the vast body of research on European law and legal history relating to penal fines and a treasure trove of sources not otherwise available in English.

For the Enlightenment juridical reformers whose goal was a strict legal code of crimes and punishments in which an abstract (quantifiable, divisible) medium permitted the quanta of punishment to be matched to the gravity of crimes, the fine held an obvious attraction; more so than the prison which, as Faraldo-Cabana points out, was not as popular with classical liberal thinkers as is often supposed. The fine was also attractive (at least in principle) because it sanctioned while not intruding upon personal liberty and allowed a system of punishment to be directly assimilated to a market economy: offenders would pay for their wrongs (their bads) just as they did for their goods and without interfering with their ‘freedom’ to participate in the labour market or imposing on the state the cost of ‘caring’ for the families of offenders.

As Faraldo-Cabana points out, latter day neo-liberal law and economics theorists like Gary Becker and Richard Posner quite literally treat the criminal law as a pricing mechanism in precisely this sense. Accepting the possibility of equivalence between amounts of money and amounts of time, they saw the potential for the fine to further dominate the domain of punishment. Their classical predecessors, although supporters of the fine, saw that there were definite limits to its application in the field of punishment. Beccaria thought a fine to be, in principle, the most fitting penalty for

theft but, as theft was generally a crime of poverty, offenders would lack the capacity to pay. The transferability of fines also meant that the innocent would suffer along with (or instead of) the offender. Bentham, author of the panopticon, shared the view of other utilitarian and evangelical reformers that punishment must have a disciplinary function, as well as a strictly legal one, if members of the labouring and poorer classes were to be made subject to the requirements of an industrial market society. This necessarily limited the role that could be played by a non-disciplinary penalty like the fine but, notwithstanding this, Bentham came to look upon it as the ideal sanction.

From being a widely used sanction in the eighteenth century, the fine gave way in the nineteenth century to a greater reliance on imprisonment for the punishment of common crimes. One reason for this was that imprisonment was looked upon as the more equal punishment, freedom being something that was more readily assumed, in Enlightenment thought, to be possessed by everyone in the same degree: 'imprisonment could be applied with more equal force than fines to those with means and those without'. The upper classes should not be allowed to 'buy their freedom', as they had done in previous times. The fine and imprisonment, therefore, were never treated as simply interchangeable.

This pattern was reversed to a degree from the late nineteenth century and Faraldo-Cabana traces the expansion of the fine that took place in most of the countries of Western and Northern Europe thereafter, including providing a detailed account of the adoption of day fine systems. She shows how the failings of the prison, widely condemned prison conditions and obstacles to prison reform eventually led to support for substituting fines for short prison terms where minor offences were concerned. At the same time, the fine offered a resolution to the problem posed by the 'respectable offender'. In the nineteenth century, fines came to be widely used to sanction the crimes and regulatory offences of business, corporations and the well-to-do, those who *could* afford to pay their way and for whom corrective discipline was not regarded as necessary.

However, there were obvious limits to, and contradictions arising from, efforts to expand reliance on the fine as a substitute for imprisonment. These issues are analysed in scrupulous detail by Faraldo-Cabana.

Money's great attraction as a sanction is that it is precisely calculable and endlessly divisible. The self-same characteristics, however, mean that money as punishment compromises the 'principle of personality' of punishment, the idea that the burden of punishment must be borne by the offender. How is it ever possible to know with certainty whose money is paying a fine? In many parts of Europe and elsewhere (for example, in Israel) concerted efforts were made from the late nineteenth century to enforce the personality principle in respect of fines and prevent third party payment. In practice, this is, of course, difficult—if not impossible—to effectively enforce. This reduces the efficacy of the penal fine as an alternative to incarceration.

As noted, the other great attraction of the fine from a liberal philosophical standpoint is that it does not infringe the bodily integrity or personal liberty of the individual. It penalises while preserving personal freedom. The fine burdens only the wealth of the individual. Yet, in liberal capitalist market societies characterised by steep inequalities of wealth and income, this means that the fine is necessarily the most unequal and least fair of punishments. On the one hand, it is unequal in both the sense that small money amounts may impose undue burdens on poor offenders, while even very substantial amounts imposed on wealthy offenders constitute no punishment at all. And, if fines imposed on those who were unable to pay simply converted into a short term of imprisonment anyway due to default, reliance on the fine as an alternative to prison would be self-defeating. On the other hand, if fines were to serve as such an alternative, they could not be reduced to token levels and payment must be effectively enforced.

There is a fundamental tension, therefore, between two forms or principles of equality: equality (or proportionality) relating to the offence and equality relating to the impact on the offender. The problem remained and was widely recognised across numerous European countries: how is it possible to make extended use of the fine in a population where many people live in poverty? Was the fine to be simply a 'privilege of the rich', an overt form of class justice? How to devise a system of fines that reflects—does justice to—both the nature of the offence and the circumstances of the offender? And, how to differentiate cases of inability to pay from unwillingness to pay?

Faraldo-Cabana examines at length the various efforts to address the problem of fine default in Europe from the late nineteenth century on, including unsuccessful attempts to restrict imprisonment for default to those defaulters who wilfully refused to pay; the imposition of limits on prison terms for default; requirements to take account of the financial means of offenders when setting fines; the making of provision for time to pay and payment in instalments; experiments with substituting community service for fine defaulters; and the introduction of day fine systems (initially in several Nordic countries in the 1920s and much later elsewhere in parts of Europe). Some of these efforts did lead to dramatic declines in imprisonment for fine default. Others had mixed results.

Day fine systems are the most sophisticated response to the issue of equity and the problems of default, but implementation is not without major challenges. Accessing reliable information as to the financial means of offenders can be practically difficult, prolonging hearings and undermining the speed and ease of administration of large caseloads by summary courts. A more fundamental problem stems from the need to reconcile the competing equality principles. Although it is obvious that the (penal) impact of money penalties depends on the means of the offender, courts are mindful that a penalty must retain some connection to the gravity of the offence if it is to be consistent with recognised sentencing aims; regardless of the means of the offender, it can be neither derisory nor manifestly excessive, having regard to the offence. The ultimate problem might not be (or not only be) that the poor lack the means to pay fines but that, for the wealthy, even large fines have no punitive effect. England's short-lived experiment with a unit fine system in the 1990s was quickly abandoned under media pressure that stemmed in large part from this tension.

The tension exerts a downward pressure on the range of fines imposed for offences of a similar nature committed by offenders of widely divergent means. In other words, a serious hardship is still imposed on indigent and poor offenders while the impact on the wealthy offender for a like offence of any fine that can be said to satisfy other sentencing principles will amount to no punishment at all. So 'equal impact' becomes a chimera and, therefore, the hardship imposed on the poor cannot but be experienced as unjust. So, although the fine is often championed as the 'ideal penalty'—one that can be finely calibrated to reflect sentencing principles—this may be quite illusory if fines have to be set at levels that tend not to punish the wealthy at all. Only the Nordic countries with their deeply ingrained egalitarian cultures appear able to reconcile the tensions with their day fine systems.

The tension between the equality principles defines the central predicament facing modern penal policy relating to the fine. There is the further issue of whether, given the denunciatory function of criminal law with respect to those wrongs that offend against fundamental values, this can be achieved in the language of money.

The often-cited attractions of the fine—simplicity, speed, efficiency, ease of application, reversibility, and so on—begin to fall away as soon as such problems and contradictions are taken seriously. The tendency in many jurisdictions, both in the common law world and in Europe, has been to fudge them, largely to the unfair detriment of the poor. Critical scholarship on the fine

such as that of Patricia Faraldo-Cabana should contribute to a climate which will make that more difficult.

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