On the political economy of fines. Rusche and Kirchheimer's *Punishment and Social Structure* revisited

Introduction

"Money is the most frequently used means of punishing, deterring, compensating and regulating throughout the legal system." (O'Malley 2009a, 1) Therefore, it is surprising that Anglo-American criminologists, sociologists and legal scholars have written so little about the nature of money punishments and of their specific characteristics as legal sanctions (as indicated by Bottoms [1983, 168], Young [1989, 47], O'Malley [2009a], McCallum [2011, 541]). Indeed, until recently in the Anglophone academic world we have only been able to find a handful of generally recognized criminological attempts to think about fines in terms of socio-legal theory. One of these theorizations was Georg Rusche and Otto Kirchheimer's brief venture to analyse the fine in terms of Marxist theory, included in *Punishment and Social Structure* (New York 1939).[1]

Punishment and Social Structure established the sociological foundations of what would later become the political economy of punishment (De Giorgi 2013, 41). The work outlines a materialist historical sociology of law and penality, based on the connection between the mode of production dominant in a particular historical period and the structures of social discipline and control. The work has its theoretical underpinnings in historical materialism as Marx (1859/1963], 67) presented it in the Preface to *A Contribution to the Critique of Political Economy*: "The mode of production of material life determines the general character of the social, political, and spiritual processes of life."[2] In *Punishment and Social Structure*, accordingly, penal change is mainly understood as a result of new socioeconomic conditions, disregarding the image of a progressive implementation of the ideas of well-intentioned reformers in a linear advancement toward more humane punishments. Its most influential part explains the historical emergence, consolidation, and transformation of the penitentiary system according to the logic of the principle of less eligibility, and ultimately of the dynamics of the labour market. Rusche and Kirchheimer focused on prison as the principal bourgeois punishment. Deprivation of money in the form of a fine, on the contrary, was considered a mere adjunct, inherently limited by the unequal relations on which it is founded. However, at the end of their historical analysis of the developments in criminal law since the Enlightenment, Rusche and Kirchheimer dedicated one chapter

to the fine.

Rusche and Kirchheimer (1939, 176) were convinced that fines would only develop into a major sanction when poor people could afford to pay them, since the application of fines has its natural limits in the material conditions of the lower strata of the population. For them, the two elements that had the greatest influence on reinstating the fine in the catalogue of punishments were the decrease in poverty and the more widespread distribution of wealth in European societies, an idea already advanced almost half a century before by Bertola in Italy (1895, 5). Moreover, they argued that during periods of depression the fine would become less feasible, and consequently short terms of imprisonment would become more prevalent. Working on the premise that the fine constitutes a typical sanction in the profit-oriented capitalist system, they concluded with the hypothesis that the criminal system will further shift from imprisonment to fines in the future.

We could ask ourselves if this analysis, shared by many authors, is still accurate. As I will explain in this paper, relevant dimensions of the fine were left unexplored by this classical example of the political economy of punishment. Rusche and Kirchheimer did not pay enough attention to the day-fine system, already in use in the Scandinavian countries at that time. They could not foresee the importance of community service as a way of paying off the fine, although the idea was massively supported by literature and applied in some European countries – albeit not very successfully at the time their work was published.[3] For them, the fundamental problem of the fine was its inherent injustice when applied to people with different economic status. They considered the problem of fine defaulters as an insoluble one if default resulted from poverty, and not from negligence or refusal to pay (Rusche and Kirchheimer 1939, 169-70). They explained that efforts to reduce commutation of fines into imprisonment to a minimum could succeed "only when the strata affected receive an income no matter how small" (Rusche and Kirchheimer 1939, 171), an observation that confirmed their own thesis, namely that the extent to which a fine system can be developed is decisively influenced by the conditions of the various social classes. As we will see, they seriously undervalued the radical advance that the day-fine system was introducing by simply combining two coordinates when determining the amount of the fine, namely the severity of the offence and the offender's financial situation.

But in many ways their account was indeed very accurate. They addressed the widespread use of fines in the later middle ages and well until the seventeenth and eighteenth centuries.[4] They explained the later abandonment of the use of fines by taking into account a series of associations based on the idea of money, its essence and its capabilities. These associations generated a pattern of practices and dispositions which have strongly influenced how we view the payment of money to the state as a "suitable" punishment for some offences and types of offenders, but not for others (prefiguring the main argument in O'Malley's works about fines). They predicted the rise of the regulatory fine during the twentieth century, being the first modern scholars recognising its theoretical importance for consumer societies. Years before Sutherland (1945, 1949) suggested that the law was enforced differently against businessmen, Rusche and Kirchheimer denounced the generalised use of fines as a non-deterrent punishment for such offenders.

Using Rusche and Kirchheimer's insightful work to establish a dialogue, my intent with this paper is not to harp on the already well known and much discussed shortcomings of their work,[5] but rather to highlight their premonitory hypotheses regarding the role of fines in consumer societies. In this way the paper aims to fill a stunning gap in the theoretical literature on fines in European context and to begin adding to the short list of works that deal with the political economy of fines. At the same time, I will complement Rusche and Kirchheimer's classical political-economic approach to fines with the discursive dimensions of penal politics related to money sanctions. By doing so, I aim to connect the symbolic and instrumental dimensions of punishment through money sanctions under the comprehensive structural perspective of penal change Rusche and Kirchheimer represent.

Why is such a historical approach to an early-twentieth-century work interesting? The topic is definitely a timely one, particularly if one considers not only the European scenario, which is the main focus of this paper, but also recent developments in the United States, where poor people's inability to pay fines, court fees and other costs (such as defence attorney's fees, court administrative work, per payment and collection charges, surcharges, interest, mandatory treatment therapy and class fees, restitution) has become a significant driver of incarceration in local jails, not to mention extreme cases of discriminatory imposition of fines as revenue-generating strategies for

local administrations, as has been the case in Ferguson, Missouri. Until these legal debts are fully paid, offenders remain under judicial supervision and are subject to court summons, warrants, and even prison stays. In some states, people unable to pay can lose their driver's licence or benefits like food stamps. Although this is not a recent development – the roots of the practice to add more fines and fees to the originally imposed sanction can be dated back to the start of America's tough-on-crime policies, beginning in the 1970s, with even remoter precedents in the early nineteenth century -, in recent years there has been a growing concern in literature. But neither the problem of poor offenders sentenced to monetary punishments that exceed their ability to pay nor the arguments used against the harsh consequences of non-payment are new. As we will see, they reflect a concern which already had been voiced in nineteenth and early-twentieth-century penal discussions, with Rusche and Kirchheimer's work being one good example.

Finally, the choice of the European Journal of the History of Economic Thought also deserves an explanation. Although Rusche and Kirchheimer were sociologists and not economists, they essentially argued that punishment was a mechanism whose rationale was fundamentally economic. Their recognition of the centrality of political economy to an understanding of punishment has since been kept alive within the Marxist tradition, inspiring a large body of critical criminological literature aimed at validating their basic propositions with empirical, mostly economic data, while at the same time being marginalised by other authors as a typical example of the Marxist reduction of all variables to economic determinants.[6] A second reason that justifies publishing in this journal is the relative invisibility of the use of money as a punishment in economic sciences. Economists tend to define money in terms of its functions, following Hicks' core idea that "money is what money does" (Hicks 1967, 1), but they do not usually address the use of money as a sanction, which, in turn, explains their lack of attention towards fines.[7] More than a century ago, Simmel's seminal study on the philosophy of money suggested the need for a closer and more detailed interpretative analysis of the meaning of money since the effects of money transcend the market (Simmel 1907/1990). This assertion remains more urgent than ever in the field of economic sciences, in which the nature of the special monetary relation between the offender and the State that constitutes the essence of the fine has been generally neglected by the economic literature.

The ideological veil: situating fines in nineteenth and early-twentieth-century penal discussion

From the beginning, critics of Rusche and Kirchheimer's work stated that their analysis completely neglected the role of politics, religion and/or culture in penal transformation (Burgess 1940, 986; Riesman 1940, 1299; fifty years later, also Garland 1990, 108-109). In fact, although Rusche and Kirchheimer dealt with the Enlightenment doctrine that supported the use of fines, citing the favourable views of Montesquieu (1748, Book XII, Chapter IV), Beccaria (1764, Chapter XVII), and Bentham (1811, Book III, Chapter IV), their approach to the nineteenth-century official discourse was much more simplified. They explained that "[i]n general…, the application of fines in the first half of the nineteenth century was infrequent because the necessity of commuting the punishment into imprisonment would have unduly complicated criminal procedure." (Rusche and Kirchheimer 1939, 168) On the basis of this brief overview, it has been said that they did not address the reasons given for preferring other sanctions to the fine, probably because they regarded these discourses as an ideological veil hiding the fact that legislative changes had their true origins in the productive order (O'Malley 2009a). They may have oversimplified, but the reasons given *in the second half* of the nineteenth-century official discourse for preferring other sanctions to the fine were, in fact, mostly related to the problem of imprisonment as a subsidiary penalty for fine defaulters. To follow a chronological order, I will come back to this point later. For now, it is necessary to point out that *in the first half* of the nineteenth century imprisonment for fine defaulters was not an issue. At the beginning of the century the reasons for almost completely abandoning the use of fines as a punishment were not of a practical nature. They were mainly ideological. Firstly, by the mid-1770s, a general acceptance of reformation achieved through hard prison labour had been established, which fuelled the rapid development of the idea of imprisonment over the next century (King 1996, 64; Seagle 1948). Fines, on the other hand, were perceived as having no reformative value. Secondly, but in my opinion not less important, many Enlightenment thinkers believed that punishing an offender by imposing a set monetary fine, while appropriate for those offences caused by greed, generally led to the legal imposition of an inequality (in Italy Filangieri [1788]; in Germany von Soden [1792, 103] and von Feuerbach [1804, 228]; in Spain Marcos Gutiérrez [1826, 145-47]). In order to counterbalance this inequality, fine amounts were to be left to the discretion of the judges. But this was considered "seemingly repugnant to the genius of a government,

formed and supported on maxims of freedom." (Eden 1771, 68) Therefore, large swathes of literature in the early and mid-nineteenth century argued that fines were not a "fair" punishment:

> The fine is a punishment of a singular kind, and has little in common with most other punishments established by law. While these cases encumber the person or freedom, which is almost the same person, those affect wealth only, which is something very different. The level of personality is the same for all men, and freedom is similar: wealth is so varied, men's fortunes are so disparate and diverse […]. Therefore, if a personal punishment, death, custodial sentence, imprisonment, affects all men to an equal or similar extent, a pecuniary punishment is the most unequal that can be conceived, when it is applied in identical measures to two persons of different wealth. (Pacheco 1856, 414-15)

Admittedly it could be said that the law was equal for all when the same amount of money was set to be paid, regardless of the class or socio-economic status of the offender. But even from a formal perspective this argument was not upheld. Unlike fines, imprisonment could be equally applied to those both with and without financial means while not directly affecting the prisoner's family. This development led to fines being relegated to a marginal role in the criminal justice system. Fines would once again move to the forefront as criticism of short-term imprisonment and its pernicious practical effects grew. Certainly, criticism of short-term prison sentences did not initially correspond to a more positive view of the use of fines as a punishment. The fact that prisons were being filled with people who originally were fined precisely because their offences were *not* severe enough for imprisonment was commonly recognized in the second half of the nineteenth century (Armengol y Cornet 1894, 57; von Liszt 1889b, 742). Soon, criticism of short-term prison sentences extended to the subsidiary punishment for fine defaulters, usually a form of short-term imprisonment (Felisch 1895, 300 ff.; Stooβ 1916, 5 ff.). Rusche and Kirchheimer referred in passing to this opinion, but, as we have seen, they failed in situating it temporally. O'Malley (2009a, 43) has also pointed out that they also paid little attention to the fact that the increased usage of fines at the beginning of the twentieth century was closely related to a long period of innovation and experimentation that was based on the opposite premise – that people could not pay fines unless major "improvement" was made. Nevertheless, they did mention some of the experiments to manage the overcrowding of prisons with fine

defaulters (Rusche and Kirchheimer 1939, 169). Such experiments envisaged putting legitimate fine defaulters on equal footing with those who fraudulently refused to pay. It is true that striking attempts were made to limit imprisonment to cases in which the offender did not pay the fine "wilfully, through laziness, licentiousness, or negligence" (Swiss Project for a Penal Code 1918, art. 46). This kind of regulation, despite being welcomed by literature (Garofalo 1887, 105; Stooβ 1907, 245; Florian 1934, 807; Baumann 1968, 74), was scarcely enacted in legislation or failed to reduce imprisonments.[8] Its inevitable consequence was the impossibility of imposing fines on those who were unable to pay. And this was thought to lead to recidivism (Heüman 1938, 549 ff.). Well aware of this, Rusche and Kirchheimer (1939, 170) concluded that "carefully drawn legislation and administrative practice may reduce the injustices inherent in the operation of the fine system as it affects the lower classes, but this cannot solve the fundamental problem", the inherent injustice of imprisoning insolvent offenders for the non-payment of fines.

As a matter of fact, a more widespread use of fines became possible when the subsidiary punishment of a prison sentence was only applied in truly exceptional cases. And this only happened when the amount of the fine was set with the offender's financial situation in mind, thereby weakening the arguments used against fines. Strangely - because they did mention the payment of fines by instalments -, Rusche and Kirchheimer paid no attention at all to the day-fine system, a technique that would permit equal punishment to be administered to people with vastly different financial circumstances but convicted of the same crime. For them, "[t]he decline in unemployment and the rising living standard in the second half of the century, however, introduced a fundamental change. Many of the earlier difficulties lying in the way of a fine system lost their force." (Rusche and Kirchheimer 1939, 168)

It seems as if all obstacles to fines would have disappeared by themselves, if the material conditions of the poor had only improved. Reality, though, was very different. The limited effect of the previously mentioned measures to manage the overcrowding of prisons with fine defaulters led to the correctional criticism of short-term prison sentences being broadened to include fine penalties towards the end of the nineteenth century. This negative viewpoint made it necessary to propose either abolishing the fine or making significant amendments to its regulations. Correctional rationale strongly

supported innovations to deal with the problem of fine default (Seagle 1948, 250-252). A new juridical reasoning began to emerge. It was not related to a "new" bourgeois philosophy on punishment, because most of the authors in the criminological and criminal field were still Benthamite in form and essence. The pivotal change was to be seen in their beliefs in the role of prisons as correctional institutions. Leading academics in England, Germany, Austria, Switzerland, Spain, and Italy voiced their criticisms about the drawbacks they perceived in custodial sentences, since they thought that these disadvantages were not outweighed by the prospective benefits that could be derived from imprisonment.[9] A reawakened interest to find a more egalitarian pecuniary punishment began to take hold. This shift promoted eliminating the aspects of fines that made payment difficult for low income persons. In other words, the key idea was to adapt fines to the offender's financial situation, thus rendering prison sentences for non-payment unnecessary.

Three different techniques were adopted in order to avoid imprisonment for fine defaulters: taking the means of the offender into account, giving time to pay (payment by instalments), and paying off the fine by working. Although Rusche and Kirchheimer (1939, 170) applauded the introduction of fine payment by instalments as an effective way of avoiding crowding the prisons with people who cannot pay their fines, they did not recognize the contemporary importance of the day-fine system in the first half of the twentieth century. Neither did they foresee the expansion of community service in the second half of the twentieth century. Why?

Despite the many advantages they highlighted in the use of fines, advancing the foundational idea of the Law and Economy movement,[10] Rusche and Kirchheimer (1939, 169) sustained that "[c]ertain difficulties still stood in the way of a full rationalization of the penal system through the introduction of fines", the main one being "the precise calculation of the size of the fine according to the condition of the delinquent and the amount of damage caused by his crime." Their omission of the day-fine system is certainly strange, because it was already being used in Europe, as mentioned before. It was first introduced in Finland in 1921, then in Sweden in 1931, followed by Denmark in 1939, which is why it is known today as the "Scandinavian system". From there it spread to other European countries. But the day-fine system was not introduced in Germany, the birth country of both authors, until 1969, thirty three

years after it had been originally proposed in the Gürtner project, written under the Nazi regime. This fact could explain Rusche and Kirchheimer's lack of attention. However, we should also remember that the first doctrinal formulations of the day-fine system, defined in terms of the need to break the determination process of the fine down into two elements, are found at the end of the nineteenth century almost simultaneously in Germany (Friedmann [1892, 148], followed by Merkel [1893, 351 ff.]) and Italy (Bertola 1895, 10, 12), so the system was not unknown in German literature, rather the opposite. Keeping in mind this early German interest in making the fine affordable for people with low income, the only possible explanation of Rusche and Kirchheimer's blindness regarding the day-fine system may be their disdain for doctrinal discourses as an explanatory factor of legislative changes.[11]

Rusche and Kirchheimer also disregarded the possibility of reducing imprisonment for fine defaulters by allowing the offender to work the debt off. In that regard they explained that

> [t]he infliction of fines on poor offenders presupposes that the state is not forced to concern itself with the delinquent and his social situation. If the state must obtain work for the offender, however, the administration would be obliged to procure a wage which would be sufficient to maintain him and his family and still permit the payment of the fine. The apparatus for the administration of criminal justice is not adjusted to such positive activity, nor is it expected to be so adjusted under the prevailing conceptions. (Rusche and Kirchheimer 1939, 176)

Admittedly, community service as a way of avoiding imprisonment for fine defaulters was not unproblematic. At the end of the nineteenth century, the idea of establishing a punishment of temporary work, which did not involve imprisonment, began to spread. This proposal, which had interesting legal precedents, was welcomed in the context of criticisms of short-term imprisonment, so work was established as an alternative or substitute punishment for short-term prison sentences and, indirectly, it also became a substitute punishment for unpaid fines. In fact, distinguished representatives of the crusade against short-term imprisonment, like von Liszt (1889a, 46-7, 1892, 221) and Carrara (1871, 464), expressed their agreement with the creation of a compulsory labour sanction that could be used as a substitute for custodial sentences in the case of unpaid fines. Other criminologists, German ones in particular,

supported this proposal.[12] Community service for fine defaulters was massively supported by German literature during the 23rd German jurists' conference, in 1895 (Felisch 1895, 280 ff.; Merkel 1895, 385 ff.). It was also supported by the European one during the 7th International Penal and Penitentiary Congress held in Budapest in 1905. It must be highlighted that the first legal regulations for community service as a substitute punishment for fines emerged in legislation with a very specific purpose, reforestation: for example, the General Ordinance of the Kingdom of Saxony concerning procedures in forestry cases (*General-Verordnung betreffend das Verfahren in Forst-Untersuchungssachen*) of 30 November 1814, the French Forest Code (*Code forestier*) passed on 21 May 1827, or the Prussian Law on Forestry Theft (*Gesetz betreffend den Forstdiebstahl*) passed on 20 February 1879. As there was the need for manpower for a specific task, it was possible to establish jobs that meant this penalty was extremely economical for the State (Bonneville de Marsangy 1864, 302). But when it came to generalising this punishment beyond offences involving forestry issues, various problems of both theoretical and practical nature emerged, which led to its initial rejection.[13] Among them was the issue reported by Rusche and Kirchheimer. In effect, it requires a considerable amount of organisational effort to establish enough jobs for all those sentenced to this punishment. Community service can only be developed within a framework of close cooperation with the community, which is not only the beneficiary of the activity, but is also involved in the execution of the penalty. Community involvement is related to a way of thinking whereby the community plays a role in solving criminal problems that the State alone cannot resolve. The ideas that form the underlying basis are special prevention theories which, as we have seen, saw temporary public service to be a suitable substitute for short-term prison sentences. But the conditions of its widespread expansion are found in the emergence of the Welfare State, which only occurred after the Second World War (Young 1979; Kilcommins 2002, 2014; Faraldo-Cabana, 2018). Certainly, the consolidation of an alternative like the one analyzed here was not possible until minimum standards of dignified and humane working conditions were achieved. The principle of less eligibility helps us to explain why: it was difficult for social actors and legal scholars to accept the generalized implementation of a work penalty that left offenders free when at the time many sections of the "free" population were working in almost inhumane conditions, as occurred with the first industrial proletariat (Rusche and Kirchheimer 1939; Kilcommins 2002, 222 ff.). The notion of community work was strengthened when civil

society started to become structured around free time and leisure, understood as collective commodities and rights. Leisure in its modern sense is a recent phenomenon and a product of modern industry (Sayers, 1989). The growing commodification of leisure has led to a gradual increase in the need to work more to earn more. In turn, this transformation added value to free time (Cross, 1993), played an essential role in the construction of the post-war welfare state complex, and increased the punitive bite of a penalty imposed on free time. Only if free time is seen as a desirable commodity, a lack of it can be seen as the basic element of a criminal sanction (Kilcommins, 2014).

Regulation, consumption, and business: Predicting the monetization of justice through fines

From the perspective Rusche and Kirchheimer called the moral defence of the fine system, they recognised the rise of the consumer society as a factor that was giving force to the use of fines, since "[t]he increasing emphasis on material goods provided an argument for the extended application of fines in place of short-term imprisonment." (Rusche and Kirchheimer 1939, 168) They linked it with the changing meaning of money as an explanatory factor of the expansion of fines during the second half of the nineteenth century:

> Money had become the measure of all things, and it was only right that the state, which extends positive privileges in the form of monetary grants, should also introduce the negative privilege of taking wealth away in punishment for delinquency. (Rusche and Kirchheimer 1939, 168)

They were probably aware of Marx's warnings (1844/1975, 325-26) that money, "confounding and compounding […] all natural and human qualities […] serves to exchange every property for every other, even contradictory, property and object: it is the fraternization of impossibilities." However, they did not share Marx's extremely negative perspective on money. In particular, they viewed the steady growth of regulatory fines as quite positive: "The great mass of minor offences against the existing social order is growing steadily with the growing economic difficulties and the increase in bureaucratic regulations, *but it's not followed by a corresponding intensification of the repressive program.*" (Rusche and Kirchheimer 1939, 206, emphasis added) The reason why regulatory fines do not intensify repression is left unexplained. In my

opinion, it lies in the establishment of regulatory law as a form of regulation through the monetization of the sanction, a sanction that does not affect liberty, not even in the case of non-payment.[14] Payment of regulatory fines is encouraged by debt collection techniques such as reducing the amount of the fine if it is paid in short order and without contest, the compulsory sale of the person's goods, or the charge of a further fee for administrative costs if the offender does not pay voluntarily. This disconnection between failure to pay and imprisonment for default makes it possible to reduce safeguards and protections for the defendant (O'Malley 2009a, 2009b, 2010a, 2010b, 2011a, 2011b, 2013; Ohana 2014). It is precisely this quality that enables fines to assume the central role in the regulation of vast swathes of social and economic life. Once disarticulated from the possibility of imprisonment in case of default, fines allow expensive, time-consuming legal procedures to be curtailed, and encourage guilty pleas. Even more: it is not necessary to adjust the fine to the offender's financial situation because the consequence of non-payment is not imprisonment. Added to this is the fact that calculating the offender's financial ability to pay would excessively complicate a procedure that is required to be expeditious. In other words, it has been possible to establish the fine as such precisely because the fine is the regulatory sanction par excellence.

When speaking about differences between criminal and regulatory offences, Rusche and Kirchheimer implicitly pointed to the classical distinction between offences *mala in se* and offences *prohibita quia mala*. With regard to the latter, the sole interest of the state would be "to compel obedience by levying sufficiently large fines" (Rusche and Kirchheimer 1939, 173), that is to say, to regulate, but not to express moral reproach. Following old precedents (Beccaria 1764, Chapter XVII; Filangieri 1788, Book III, second part, Chapter XXXII), they observed that for regulatory offences

> [t]he fine system is thus tantamount to a licensing system, but unlike the usual administrative practice which requires the license before permission is given, here the fee is paid after the act, and then only if the act is apprehended. (Rusche and Kirchheimer 1939, 175)

This idea has become quite common (see for example Seagle [1948, 250]; Becker [1974]; Ogus [1998]; or O'Malley [2010b]). At first glance, we could agree that

the regulatory fine functions as a price or license, used for regulating some in general harmless but bothersome activities or for discouraging risky activities, and paid after the act provided the offence is detected. Money cancels the debt incurred for the offence which is priced in the fine. These merely technical offences are not accompanied by any feeling of guilt or wrongdoing, thus it is important to calculate sufficiently large fines to compel obedience. To levy light fines without regard for the profit eventually derived from the transgression would undermine the efficiency of the whole system. In a large number of cases, as long as the offender pays the fine, he or she can repeat the offence indefinitely without further consequence. There is no social stigma, no criminal or police record.

Obviously, the underlying flaw in this approach is its disregard for the proscriptive function of law and its foundation in public morality (Roberts 1972, 391-92; Cooter 1984, 1523; Lewin and Trumbull 1990, 280-81). The payment of the fine does not confer a license to engage in illegal activities. It represents a normative reproach for doing what is forbidden, which has a radically different meaning, representing a widely-shared social judgment about correct behaviour. The distinctively ethical element in law should always be considered, even in the more dubious case of regulatory offences.[15] Society is not "essentially indifferent" to regulatory offences, as Lewis and Trumbull (1990, 283) affirmed. The criminal law links the imposition of penalties to a definition of what is socially undesirable, while pricing systems do not.

Rusche and Kirchheimer also pointed out that in another group of offences the fine is used because the state is not interested in the social strata involved or in their rehabilitation. That would be the case of begging and prostitution, in which the money that pays the fine must necessarily come from the very occupations condemned. "The only conclusion, then, is that the state levies fines because it dislikes the activity but is not seriously prepared to put a stop to it." (Rusche and Kirchheimer 1939, 175) In this case, fines take up the character of a regulatory governmental technique, aimed at regulating flows and distributions, but deprived of any rehabilitative value.

Additionally, Rusche and Kirchheimer (1939, 173-174) highlighted the use of fines to punish the new economic offences of white-collar criminals. This led to a new area of expansion for the fine from the mid to late nineteenth century, implemented

accordingly in different countries: it was used to sanction the myriad of new offences in fields related to economics and business. In these cases, only the fine was considered acceptable as it did not involve prison for the businessmen affected. As O'Malley (2009a, 65) pointed out,

> [t]he fine, in other words, with the implication of its reduced stigma, and the fact that it did not lay hands on the bodies of the middle classes, made this regulation politically palatable.

He also said that the courts' leniency to businesspersons in these matters was indicative of the relaxed attitude that prevailed toward imprisonment as a punishment for high-status offenders (O'Malley 2009a, 65-7). In this way, the fine was to be an important tool in resolving the paradox of "the respectable offender". It would help to rebuild the symbolic divide between criminal and non-criminal by asserting the "special nature" of economic crime. However, late twentieth-century research has revealed that the sentencing of white-collar offenders constituted a "paradox of leniency and severity", depending less on the status of the offender than on the moral ambiguity of the offence (Leigh 1980, 1982; Levi 1989; Croall 1991; Taylor 2013). In this regard, it is interesting that Rusche and Kirchheimer cited the case of violations of labour laws by employers as an example of offence handled in the same way as violations of police regulations. Records in England show that 97 per cent of all those convicted in 1928 for violating labour laws were fined. No one was imprisoned for more than three months (Criminal Statistics, England and Wales 1928, 66). In Germany, only 0.03 per cent of all those convicted in 1933 for violating the regulations about hours of labour were sentenced to prison, always for less than three months, while the rest were fined (Kriminalstatistik 1933, 182). Rusche and Kirchheimer did not mention other economic crimes. For example, at that time financial crimes such as fraud were treated with a severity that was atypical for other more morally ambiguous crimes that could be explained with an appeal to business values (Croall 1991). But also in the case of these morally reproachable financial crimes the initial application of custodial sentences was soon revealed to be fairly ineffective. Although imprisonment was provided in law, it was generally not applied in practice. Some extra-legal factors played a role in mitigating the severity of formal penalties (Levi 1989; Wheeler et al. 1988; Croall 1991; Wilson 2006; Taylor 2013). This lack of application of custodial sentences, and the

reactions of outraged astonishment that ensued in the rare cases in which businessmen were sentenced to imprisonment,[16] led to the widespread use of fines in the new regulatory laws applicable to industry and in economic criminal law in what could be considered the resumption of a status quo ante, the historically dominant situation of the fine in the panoply of punishments during the *ancien régime*.[17]

Rusche and Kirchheimer did not object to this state of affairs. Probably they were inspired by the radical and socialist doctrine that promoted the use of fines as a punishment aimed at overcoming social resistance to imposing the infamy of imprisonment on "*honnêtes gens*", replacing it, for crimes typical of their social class, with a punishment in line with their status, insofar as it affected the asset that held the greatest importance for them, money (Gómez Rodríguez 1864, 45; Ciccarelli 1897, 577-78 and 631-32; Conti 1907, 199). In fact, the use of monetary penalties for white-collar criminals went along with the general, longstanding belief that the fine was the appropriate punishment for crimes committed out of greed (Puccioni 1855, 204; Maffei 1875, 406; Wahlberg 1877, 236-37; Mittelstädt 1879, 86; Zürcher 1891, 268; Friedmann 1892, 136; Conti 1910, 462; Saldaña 1931, 206; the 7th International Penal and Penitentiary Congress held in Budapest in 1905). Hence, for example, proposals were made to apply the fine in offences specifically linked to productive processes of industry, in particular when they involved omissions or reckless actions, "caused by selfish improvidence, or criminal neglect from certain industrialists and capitalists", when

> in order to save money, due to simple greed, they disregarded precautions, the measures they were obliged to observe: when they commit this neglect, and by doing so become criminals, let's hit them hard, by taking from them the very capital they aim to increase even with the blood of their fellow men. (Angiolini 1897, 668-669)

Monetary punishments appeared, as effectively expressed by Heilborn (1908, 57), as "the heartbreaking punishment for the rich bourgeois." From the Marxist perspective, Rusche and Kirchheimer could only agree. What they criticised was the practice of levying light fines *without regard for the profit derived from the transgression*, because it would undermine the efficacy of these laws. Once again, they prefigured the preoccupation of the Law and Economy movement for the adequate

measurement of the optimal fine (Becker 1974).

In sum, very few could predict the increase in the use of fines that would occur throughout the twentieth century or the paths it would take. Rusche and Kirchheimer's work was pioneering in this regard. Simultaneously, it must be pointed out that despite their general Marxist approach, they did not adopt a "class law" interpretation of the leniency shown toward employers violating labour laws. They did not concentrate on the high class of the offender, but rather on the regulatory nature of the offence, a perspective now applauded.

Conclusions

Some claim that the section on fines is "less convincing than the first part of the book" (De Giorgi 2013, 44), being the result of Kirchheimer's later reworking of Rusche's original manuscript (Melossi 1978, 1980, 2003), although there are different opinions on this regard (Riesman 1940, 1298). In a certain sense, part of Rusche and Kirchheimer's approach to fines was very classical. For example, as we have already seen, their opinion about the fine as the perfect punishment for crimes committed out of greed had old roots. This belief coincided with the widespread opinion stating that punishments should bear some relation to the crimes (in Spain Lardizábal [1782], Chapter V § V.3; in Italy Beccaria [1764, Chapter XVII] and Filangieri [1788, Book III, second part, Chapter XXXII]), since it was thought that all arbitrary treatment would cease once punishment is determined by the nature of the particular crime (Montesquieu 1748, Book XII, Chapter IV).

In another sense, however, their approach to fines was certainly exceptional, particularly from a Marxist perspective. Accepting as they did that punishment should be mainly understood in terms of relations of production (the narrowly economistic approach that has been so sharply criticised), they recognised that "every specific development permits the introduction or rejection of corresponding penalties." (Rusche and Kirchheimer 1939, 6) As O'Malley (2009a, 37) puts it,

> [t]his use of the term 'permits' says no more than that penalties have certain material conditions of existence; it does not go so far as to argue that the nature of punishment is simply an effect of the mode or relations of production

The charge of economic determinism looming over materialist critiques of punishment is rejected by claiming that the economic field simply contributes, albeit from a preeminent position over other social forces, to the structural intensity of specific punitive systems. Also extraordinary is their interest in fines. The fine was viewed with a great amount of suspicion by some Marxist scholars, who maintained that it was incompatible with some of the basic ideological premises of socialism. This negative perspective explains the limited use of fines in the early penal legislation of the new Russian Soviet Federated Socialist Republic (Frankowski and Zielińska, 1983, 39; Faraldo-Cabana, 2014). In such a context, it is even more surprising that they could hypothesise a shift towards the replacement of incarceration by fines. In fact, although it has also been said that Rusche and Kirchheimer underestimated the emergence of a consumer society and its influence on the rise of regulatory sanctions, mostly fines (O'Malley 2009a, 28 ff.), we can safely conclude that *Punishment and Social Structure* had the extraordinary merit of foreseeing the steady growth in punishing minor offences with regulatory fines and the corresponding increase in bureaucratic regulations during the twentieth century (Rusche and Kirchheimer 1939, 206). They also linked it with the new meanings of money in such societies. On the one hand, they recognized that, "[u]nlike imprisonment, the fine needs not to have the negative effect of penetrating one's whole life." (Rusche and Kirchheimer 1939, 175) This perspective would be taken up again by Bottoms' account of the limited competence of bureaucracies (Bottoms 1983, 189-90), originally proposed by Berger et al. (1973), and more recently by O'Malley's thesis about the 'dividual' as the subject of regulation (O'Malley 2009a, 78-85). On the other hand, Rusche and Kirchheimer denounced what they called 'an extensive commercialization of the penal system', developed with the progress of the fine and the leniency of the new economic crimes directed against businessmen. In sum, for them the fine system was "the epitome of rationalized capitalist penal law" (Rusche and Kirchheimer 1939, 206), an affirmation shared by other Marxist thinkers like Pashukanis (1929/1978, 166-72), but also by non-Marxists. Riesman (1940, 1298), for example, wrote that "the capable discussion of the fine in modern penal practice fits the thesis [of the political economy of punishment] nicely: the fine is obviously the policy of capitalist countries." Rusche and Kirchheimer's lack of attention to the invention of the day-fine system and to community work as a substitute for imprisonment for fine defaulters can be explained by their disdain of ideological discussions and the impossibility to predict the rise of the welfare state, respectively. Nevertheless, as we

have seen, these shortcomings should not preclude a positive evaluation of their innovative and visionary research on fines.

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[1] Kirchheimer was the only author of the chapter on fines (Weihofen 1939, 145; Bottoms 1983, 168; Melossi 2003, xviii). He also wrote the chapter on new trends in penal policy under Fascism and revised the chapters written by Rusche.

[2] Marx and Engels did not pay much attention to crime and punishment (Lea, 2010, 19-20; Matthews, 2012, 93-94; Vegh Weis, 2018, 11-12, 16). The same happened in later Marxist literature, with the relevant exceptions of Bonger, who did not write about fines, and Pashukanis (1929/1978), who did. See in this regard Faraldo-Cabana (2014).

[3] See the Swiss legislation of the canton of Vaud 1875, the Italian Zanardelli Criminal Code 1889 and the Spanish Criminal Code 1928. The three cases were considered pioneering in their day, but they were soon classified as failures (respectively Brenn [1945, 61-62], Paliero [1986a, 152, 1986b, 89-90] and Roldán Barbero [1983, 51]). German legislation on fines in 1921, 1923 and 1924 also established public service work carried out in freedom as a substitute for unpaid fines, but this measure failed in practice (Best 1932, 19; Grebing, 1978, 151; Pfohl, 1983, 29-30).

[4] The fine was a very important sanction in most European countries until the late eighteenth century (s. in England Sharpe [1990, 20-25], Briggs et al. [1996]; in Germany Neumaier [1947]; in Spain Roldán Barbero [1988, 176]; in Italy del Giudice [1905, 507], Cecchini [1991, 282 ff.]). As O'Malley (2009b, 70) explains, "[i]t was not simply corporal punishment that prisons displaced, but also and even more so, fines."

[5] S. Burgess (1940), Hall (1940), Marshall (1940), Jankovic (1977), Greenberg (1980), Wallace (1980), Galster and Scaturo (1985), Inverarity and McCarthy (1988), Garland (1990, 108-09).

[6] Quite unfairly, because at least Rusche (1933/1978, 3) was very conscious of the complexity of the relations between the material structure of society and its punitive institutions: "The dependency of crime and crime control on economic and historical conditions does not, however, provide a total explanation. These forces do not alone determine the object of our investigation and by themselves are limited and incomplete in several ways."

[7] But for the Law and Economy movement.

[8] For example, the English Rating and Evaluation Act 1925, which provided that a defaulter who proved that his failure to pay was due to circumstances beyond his control should not be imprisoned, had no effect at all (Thoday, 1937, 389).

[9] For example, in Spain the literature, influenced by correctionalist approaches, but also by the socio-economic reality, adopted viewpoints that were completely unfavourable towards pecuniary punishments (Vida, 1885, 58, 68; Armengol y Cornet, 1894, 57; Bernaldo de Quirós, 1898, 306; Bernaldo de Quirós and Navarro de Palencia, 1911, 598), or at the very most they expressed resigned acceptance considering them the lesser of two evils compared to short-term prison sentences (Arenal, 1890, 321), with some notable exceptions (Silvela, 1874, 318). In Italy it was also emphasised that, given the fact that a large part of the population was trapped in abject poverty, the fine was a penalty that should be abolished, since in reality it automatically turned into a prison sentence. Ciccarelli (1897, 655) described it as an 'iniquity', nothing more than a 'punishment of poverty'. The same view was held in Switzerland, where Stooβ (1916, 5 ff.) spoke of the fine as a 'privilege of the rich'. And also in Germany, where Merkel (1895, 387) pointed out that imprisonment for fine defaulters gave the administration of justice the nature of a justice of classes, since the rich man pays, while the poor man goes to prison.

[10] As they pointed out,

> The fine costs the state nothing while procuring the maximum penal effect. The economic system retains its labor power, the convict's family is not thrown upon public charity, and society, as represented by the state, receives damages for the wrong done to it instead of having to pay the costs of punishment. (Rusche and Kirchheimer 1939, 169)

This assertion has clear parallels with Becker and Posner's works.

[11] Their perspective was strictly materialistic in that it was based on an examination of the productive forces and the relations of production under a given set of socio-historical conditions. It does not pay attention to ideas, motives, attitudes, and beliefs as methodological and theoretical starting points for research on crime and punishment. The relationship between penal reforms and changing economic and social structures is not to be denied, but the same occurs with the humanitarian and progressive nature of penal reform during the late eighteenth century and early nineteenth century, which fits with the humanitarian and progressive requirements of the emergent liberal society.

[12] See Arschrott (1888, 45-46), Lammasch (1889, 450), Fuld (1890, 457-58), Rosenfeld (1890, 354), Mittelstädt (1891, 66), Schmölder (1902, 22-25). This proposal also spread to cases for uses beyond just replacing unpaid fines (Lammasch 1889, 449; Aschaffenburg 1903, 216). But it met with strong opposition (see, for example, Berolzheimer 1903, 456; Gennat 1905, 50).

[13] Those of a theoretical nature included the concern for the justice of a solution that forced the poor to work, while the rich could simply pay a sum of money; the observation was also made that work is not punishment, we are in fact fortunate to be able to work, therefore linking a penalty and work together devalues the notion of work; and, more recently, the effectiveness of community service in terms of correctional potential. Those of a practical nature were related to the lack of alternatives for offenders who were unable to work, the (un)availability of suitable work for all insolvent offenders, mostly because of lack of organization, and the possible competition to free work. The endeavour to properly answer all these questions is still ongoing.

[14] The only substantial aspect that nowadays differentiates the criminal fine from the regulatory fine is the possibility of replacing the former with a term of imprisonment for cases of non-payment. This possibility does not exist for the regulatory fine. O'Malley opposes this (2009a, 80), explaining that in many jurisdictions regulatory fines may be enforced in default with a term of imprisonment. That is not the case in most of Western Europe, the main object of this study and of *Punishment and Social Structure*. O'Malley (2009a, 81) also recognizes that, for the most part, in marked contrast to penal fines, regulatory fine defaults are dealt with by means other than imprisonment.

[15] Against this position, Lewin and Trumbull (1990, 283) said that

> a civil penalty [what we call here a regulatory fine] functions as a price, not a punishment. Its purpose is to redress the harm and deter future violations. It prices the behavior and internalizes the associated diseconomies, rather than imposing punishment for wrongdoing.

This opinion, based on the inverted application of the law of supply and demand to regulatory law, is not sustainable. As Paliero (2005, 1372) stated, the law of supply and demand aims to explain the distribution on the market of commodities that represent a benefit for the agents in the market – for all of them, for the producer as well as for the consumers. It also involves a model of behaviour aimed at encouraging decisions concerning the commodities, not discouraging them. The logic underlying the 'punishment market' is precisely the opposite: in this market a negative commodity is distributed – the punishment, whether criminal or regulatory -, which involves costs for everyone and does not provide any benefit, either public or private. It is a market based on a logic that aims to depress, not to develop its own dynamics. The offender is thus viewed as a consumer who must be repelled rather than seduced, and above all it aims to discourage both the demand for the punishment from the offender through his or her illegal behaviour, as well as the supply of the punishment from the state.

[16] As noted by Emsley (2005, 57), while contemporaries came to recognize

> that men of wealth and social standing committed offences […] such offenders, however common in fiction, newspaper accounts, and journal literature, were not perceived as members of a criminal class and were categorised as 'criminal' with some difficulty.

About the challenge of respectable crime to the understandings and interpretations of 'the criminal' in the late nineteenth century, see Locker (2008, 115 ff.) and Wilson (2014).

[17] See del Giudice (1905, 507), Neumaier (1947), Roldán Barbero (1988, 176), Sharpe (1990, 20-5); Briggs et al. (1996), O'Malley (2009a)