# Freedom, Labour, and Money: Fines in Post-Revolutionary Russia (1919-1929)

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"Money is probably the most frequently used means of punishing, deterring, compensating and regulating throughout the legal system".[1] If we concentrate our attention on the penal fine, we could also agree that it outnumbers any other penal sanction, including imprisonment, in many jurisdictions. Therefore, it is surprising that sociologists of punishment and social control, legal scholars, and criminologists in Anglo-Saxon countries give such little attention to the role of the fine in the criminal system.[2] It could be argued that there is a vast literature on its specific characteristics as a legal sanction, its contribution to the reduction of imprisonment – albeit not to decriminalization – or the equalization of the impact between rich and poor offenders. In fact, this attention does not usually extend to the historical development of fines and their changing place in the criminal system, depending on the forms of production and consumption and the ideology that justifies them.[3] In order to contribute to this line of research, the intention here is to analyze the ideological justification and practice related to the penal fine in the initial years of the Soviet regime in Russia to see whether Soviet law provided the fine with a theory and practice clearly distinguishable from those prevailing in capitalist countries.[4]

Russia in the 1920s is interesting for many reasons. Russia was the first socialist experiment in the field of crime and punishment. The issue of the inequality of imposing the same amounts of fines on the rich and the poor was commonly recognized in nineteenth-century European literature,[5] being the main reason for the rejection of fines

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1 P. O'Malley, *The Currency of Justice. Fines and Damages in Consumer Societies* (2009), p. 1.

2 See A. E. Bottoms, "Some Neglected Features of Contemporary Penal Systems", in D. Garland and P. Young (eds.), *The Power to Punish* (1983), p. 168; P. Young, "Punishment, Money and a Sense of Justice", in P. Carlen and D. Cook (eds.), *Paying for Crime* (1989), p. 47; O'Malley, note 1 above, pp. 1-7.

3 With some relevant exceptions. For example, see G. Rusche and O. Kirchheimer, *Punishment and Social Structures* (1939); D. Melossi and M. Pavarini, *The Prison and the Factory. Origins of the Penitentiary System* (1981).

4 References used are not only in English, but also in German, Italian, and Spanish with a view to making the huge "non-English-speaking" literature about the penal fine known to the Anglophone academic world. Russian sources are cited through English translations.

5 In Austria see O. Friedmann, "Sind Änderungen des geltendes Recht erwünchst in Betreff des Verhältnisses zwischen Geld- und Freiheitsstrafen?", in *Verhandlungen des Zweiundzwanszigsten Deutschen Juristentages* (1892), II, p. 104. In Germany, K. Birkmeyer, "Das Strafrecht", in *Enzyklopädie der Rechtswissenschaft in systematischer und alphabetischer Bearbeitung*, ed. K. Birkmeyer and D. Häring (1901), p. 1067; and D. Glauning, "Zur Reform der Geldstrafe", *Blätter für Gefängnisskunde* (1905), pp. 277-289. In Italy G. Puccioni, *Il Codice penale toscano*

at that time. Thus, it would be reasonable to assume that fines should have had a more important role in a more egalitarian society than in others where money and wealth were unequally distributed. However, this was not the case primarily by reason of ideological issues regarding the intrinsic bourgeois character of the fine and practical problems in the implementation of the subsidiary punishment in case of insolvency.

Second, the period from 1919 to 1929 was the moment of the search for a "revolutionary concept of law",[6] when loyalty to the Revolution and Bolshevik discipline was considered to be above any concept of law as such.[7] Ironically, this occurred at the time when new codes were being drafted that were essentially modelled after the Western European ones.[8] In fact, the last Russian Imperial Criminal Code of 1903 was based on Western models. This helps explain the striking coincidences found between classical and neoclassical criticism against fines in general, including Soviet fines, confirming Pashukanis' misgivings that new interpretations of old legal formulae would not alter their bourgeois nature. There were more parallels than differences with the Western European criminal systems at the time, fueled by the surprising similarities between Soviet and pre-revolutionary Russian criminal law.[9]

On the other hand, the study of this period sheds light on why the fine was one of the first casualties of the Stalinist penal policies in the 1930s. Fines played a practical, but also a symbolic, role as a fundamental mechanism in establishing a more lenient criminal system in the 1920s. Soviet penal practices before 1929 should not be considered a mere stage in the development of the gulags, as Solzhenitsyn[10] put it, but a sharp contrast from what came later in the 1930s and 1940s.[11]

*illustrato sulla scorta delle fonti, del diritto e della giurisprudenza* (1855), I, pp. 204-205; and E. Bertola, "Della pena pecuniaria", *Rivista Penale*, I (1893), pp. 549-550. In Spain, J. F. Pacheco, *Obras jurídicas de Don Joaquín Francisco Pacheco. Lecciones pronunciadas en el Ateneo de Madrid en 1839 y 1840* (2nd ed; 1854), II, pp. 303-304; S. Viada y Vilaseca, *Código Penal de 1870* (1890), I, p. 467; and P. Armengol Cornet, *Ensayo de estudio de Derecho penal* (1894), p. 56.

[6] In the words of V. I. Lenin, "On the Tasks of the People's Commissariat for Justice Under the New Economic Policy", in V. I. Lenin, *Collected Works* (1969-1970), XXXVI, pp. 562-563. See also G. V. Starosolsky, "Basic Principles of Soviet Criminal Law", *North Carolina Law Review*, XXVIII (1949-1950), p. 360.

[7] See E. Kamenka, "The Soviet View of Law", in R. Cornell (ed.), *The Soviet Political System*, (1970), p. 315.

[8] As pointed out by J. N. Hazard, "Development and 'New Law'", *University of Chicago Law Review*, XLV (1978), p. 637; R. W. Makepeace, *Marxist Ideology and Soviet Criminal Law* (1980), p. 112; M. Łoś, *Communist Ideology, Law and Crime* (1988), pp. 9-10.

[9] See in this regard N. S. Timasheff, "The Impact of the Penal Law of Imperial Russia on Soviet Penal Law", *American Slavic and East European Review*, XII (1953), p. 441ff. As he explained, the state of the criminal law of the Russian Empire on the eve of the Revolution of 1917 was complicated. The most relevant fact for the purpose of this study is that Imperial Russian law belonged to the family of Western law, and that the last Imperial Criminal Code of 1903 embodied the best then available in European criminology. Only on 30 November 1918 did the RSFSR Statute on People's Courts prohibit "references in judgments and decisions to laws of the overthrown governments". Until then, courts and judges could use the Imperial Criminal Code of 1903 only in so far as it did not contradict the revolutionary consciousness and concept of justice, because it had not been abrogated by the decrees of the Central Executive Committee and the Council of People's Commissars. Some of its dispositions were revived in Soviet legislation. Also on the continuity in criminal legislation see J. N. Hazard, "Soviet Law: The Bridge Years, 1917-1920", in W. E. Butler (ed.), *Russian Law: Historical and Political Perspectives* (1977), p. 235ff.

[10] See A. I. Solzhenitsyn, *The Gulag Archipelago 1918-1956: An Experiment in Literary Investigation*, (1973), pp. 26-39.

[11] See P. H. Solomon, "Soviet Penal Policy, 1917-1934: A Reinterpretation", *Slavic Review*, XXXIX (1980), p. 195; P. Beirne and A. Hunt, "Lenin, Crime, and Penal Politics, 1917-1924", in P. Beirne (ed.), *Revolution in Law: Contributions to the Development of Soviet Legal Theory, 1917-1938* (1990), p. 106ff.

This issue is addressed in four sections. First, the principal difference is explained between imprisonment and fines in terms of the equality principle, because this difference has been relevant for the theoretical and practical approaches to both penalties since the Enlightenment. Second, we consider one of the first Marxist theorizations of bourgeois criminal law, Pashukanis' *Law and Marxism*, as a relevant example of the negative opinion most Marxist scholars had of fines, based on the notion that fines were incompatible with some of the basic ideological premises of socialism. Third, we analyze how fines were implemented in the first two Russian Soviet criminal codes, and the measures taken to eliminate their class character. Finally, we turn to the question of whether Soviet Russia succeeded in providing fines with an applicative theory and practice clearly distinguishable from those prevailing in Western Europe at that time.

## FREEDOM, MONEY, AND THE EQUALITY PRINCIPLE

Since the Middle Ages[12] and well into the late eighteenth century,[13] fines were among the most important sanctions in many European countries, including Russia. As O'Malley[14] explains:

[12] Under ancient Germanic, Celtic, and Slav laws deprivation of money through a fine or confiscation, together with redressing the damage, was considered to be punishment enough even for the more serious crimes. Germanic law believed that the crime offended an individual and also breached social order. Therefore a pecuniary penalty (*Busse*) with two recipients was established: the *Wergeld*, or "worth payment", was paid to the offended person or family for the concept of *capitis aestimacio*, or "price of the injured man"; the *Friedgeld* was paid to the tax authority for the concept of the remedy owed to society. See P. Grierson, *The Origins of Money* (1977), p. 28; H. von Hentig, *Die Strafe* (1955), II, p. 401; and R. His, *Geschichte des deutschen Strafrecht bis zur Karolina* (1928), pp. 96-97. The same happened in ancient Anglo-Saxon codes, where the monetary sanction was divided into *Wer*, the value of the injured party, and *Wite*, a fine payable to the king or to some other public authority. See F. Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I* (1898), I, p. 53-54. In turn, in the Spanish law of the High and Late Middle Ages, of Germanic origin, many jurisdictions also set a pecuniary penalty – the *caloña* – which was usually split into three parts: "*prima querimonioso, secunda palatio, tertia vero concilio*", in other words, one part went to the injured party or his family, another went to the king, and the third went to the municipality. This was a unique pecuniary penalty in which the *Wergeld* of the relatives changed its nature, as it did not put an end to the enmity, but rather it was a public, official penalty. See J. Orlandis Rovira, "Las consecuencias del delito en el Derecho de la Alta Edad Media", *Anuario de Historia del Derecho Español*, XVIII (1947), p. 88 ff.; A. López-Amo Marín, "El Derecho penal español de la Baja Edad Media", *Anuario de Historia del Derecho Español*, XXVI (1956), pp. 560-561. On the use of specific payments (fines) to victims of torts or crimes (or to their kin) in accord with the severity of an injury and with the status of the person injured or slain in the middle ages ancient Slav law code known as Pravda Russkaia (known in three versions), see G. Baranowski, *Die Russkaja Pravda - ein mittelalterliches Rechtsdenkmal* (2005), p. 167ff., where he explained that it is still not clear who was the recipient of the money. English translation by D. H. Kaiser, *The Laws of Rus'-Tenth to Fifteenth Centuries* (1992). On the continuity of the practice of compensation for harm or loss in cases of less serious crimes against property through *samosud*, that is, through the action of the community without reference to any formal law code until the late nineteenth century, see C. Frierson, "Crime and Punishment in the Russian Village: Rural Concepts of Criminality at the End of the Nineteenth Century", *Slavic Review*, XLVI (1987), p. 68.

[13] On the predominant position of fines in the European criminal systems until the eighteenth century, see in England: J. Sharpe, *Judicial Punishment in England* (1990), pp. 20-25; J. Briggs, C. Harrison, A. McInnes, and D. Vincent, *Crime and Punishment in England. An Introductory History* (1996); in Germany, R. Neumaier, *Die geschichtliche Entwicklung der Geldstrafe vom 15. Jahrhundert bis zum StGB* (1947); in Spain, H. Roldán Barbero, *Historia de la Prisión en España* (1988), p. 176; in Italy, P. del Giudice, "Diritto penale germanico rispetto all'Italia", in *Enciclopedia del diritto penale italiano* (1905), I, p. 507, and B. M. Cecchini, "Il reato e la condanna nel sistema della Leopoldina. Mutamenti e variazioni nella struttura della pena (1781-1790), in L. Berlinguer and F. Colao (eds.), *Criminalità e società in età moderna* (1991), p. 282 ff.

[14] O'Malley, note 1 above, p. 70,

'[i]t was not simply corporal punishment that prisons displaced, but also and even more so, fines.'

Why then was the use of fines as a punishment abandoned? It has been argued that by the mid-1770s, a general acceptance of reformation achieved through hard prison labor had been established, which fueled the rapid development of the idea of imprisonment over the next century. Fines, on the other hand, were perceived as having absolutely no reformative value. Although this may have been an important factor, the paradigmatic shift mainly resulted from the acceptance of imprisonment as a more equal punishment than fines. Contributing to this shift was the changing perception of freedom at the end of the eighteenth century. Freedom was viewed as an unalienable right equally possessed by every person. Only when freedom was abstracted and thought of in general as something that can belong "to everyone" could the idea of turning to the deprivation of freedom as a punishment emerge.[15] It was this new understanding that contributed to the emergence of the deprivation of freedom as a punishment.

In this way imprisonment means the loss of freedom and is paid in time, something presumed to be possessed in the same "*quantum*" by all subjects. In contrast, fines did not sit well with the formal understanding of the principle of equality. It is generally well known that individuals are not on an equal financial footing. Fines are settled and paid in money, a resource unequally distributed between individuals in society. In this regard fines differ fundamentally from imprisonment.[16] Admittedly, it could be said that the law is equal for all when the same amount of money is set to be paid, regardless of the class or socio-economic status of the offender. But even from a formal perspective this argument was not upheld. Imprisonment could be equally applied to those both with and without financial means, while not directly affecting the prisoner's family, unlike fines.[17] Therefore, the sanction *par excellence* became imprisonment. Fines were relegated to the periphery of the catalogue of punishments.

At the end of the nineteenth century, it was commonly accepted in Western Europe that fines could only be characterized as an appropriate punishment for all social classes when measures to equalize their impact in unequal societies were established. This was considered paramount in avoiding short-term imprisonment for fine defaulters. On the other hand, from a Marxist viewpoint[18] fines could be generalized only when money

[15] G. Tarello, *Storia della cultura giuridica moderna. Assolutismo e codificazione del diritto* (1976), p. 53, n. 18.

[16] As pointed out by Young, note 2 above, p. 63.

[17] All punishments may indirectly affect third persons, which has never prevented punishments from being considered personal in the sense that they should befall the perpetrator: it is he or she who is imprisoned, or is deprived of exercising a right or has to work for the benefit of the community. It is not considered acceptable for an innocent third person to suffer the distress of the punishment instead of the offender, releasing him or her from the punishment. This principle, which comes from the principle of guilt, expressed in the Latin aphorism "*poena non alios quam suos teneat auctores*", according to which misconduct should only bind its own authors, has been considered a cornerstone of the theories of crime and punishment since the Enlightenment. See A. von Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen Peinlichen Rechts* (3rd ed.; 1805), §138. Compared to other punishments, the fine is characterized, however, by the fact that its direct effects – i.e., the distress of the punishment, the payment of a sum of money to the State – can be borne entirely by an innocent third person, which is what happens when a third person pays the fine with liberating effects for the offender. See K. von Lilienthal, "Sind Aenderungen des geltenden Rechts erwünscht in Betreff des Verhältnisses zwischen Geld- und Freiheitsstrafe?", *Verhandlungen des Deutschen Juristentages*, XXII (1892), p. 87.

[18] See a clear example in Rusche, note 3 above, p. 166-176. Also E. Bertola, "Ancora della pena pecuniaria", *Rivista Penale*, II (1895), p. 5.

was placed in the hands of the working class. Accordingly, it was argued that fines could not be deployed to any degree before the late nineteenth century because of the extent of unemployment and poverty. It was thought that with the increase in employment and living standards into the twentieth century the conditions required to undertake a fundamental change in the penal regulation of the fine were present. Contrary to this, as O'Malley notes,[19] we must ask ourselves:

> '[i]f, in fact, the fine's use expands rapidly because of the increasing real income of the population, then why does its increased usage appear to be so closely related to the beginning of a long period of innovation and experimentation that was based exactly on the opposite premise – that people could not pay fines unless major "improvement" was made?'

As a matter of fact, a more widespread use of fines in Western European criminal systems 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 in accordance with the offender's financial situation and allowing for payment by instalments.[20]

Based on this line of thought, it would be reasonable to assume that in socialist countries, where economic differences were (thought to be) less acute and the non-payment of the fine did not lead to imprisonment, the fine should have had a more important role. It would be also reasonable to think that in a more egalitarian society the payment of a certain amount of money could have a moral and juridical connotation more similar to the deprivation of freedom.[21] This hypothesis did not materialize though, mostly for reasons of a theoretical nature, that is, mostly related to the theoretical focus of the problem rather than to the fact that the socialist societies of the first revolutionary wave, especially the Russian one, in practice never managed to eradicate material inequalities.

As we will see, the post-Revolutionary enthusiasm of the Bolsheviks brought Russia a more lenient and rational approach to crime, with a strong emphasis on non-custodial penalties.[22] Nonetheless, the fine was basically rejected. This can be largely attributed to arguments similar to those employed by liberal thinkers of the eighteenth and nineteenth century, but also some new ones.

## MONEY, LABOUR, AND THE METRICS OF PUNISHMENT

Pashukanis' *Law and Marxism*, among the first Marxist theorizations of bourgeois criminal law, posited that "punishment functions as a settlement of accounts",[23] with the arithmetical expression of the severity of the sentence being the bourgeois punishment's most characteristic feature. Because of the focus on the labor theory of value – Pashukanis

[19] O'Malley, note 1 above, p. 43.

[20] See in this regard P. Faraldo Cabana, "Towards Equalisation of the Impact of the Penal Fine: Why the Wealth of the Offender Was Taken into Account", *International Journal for Crime, Justice and Social Democracy*, III (2014), pp. 3-15, available at https://www.crimejusticejournal.com/article/view/143/pdf.

[21] It was suggested that the innate injustice of the tariff- or fixed-fine systems would disappear if everyone had an equal amount of wealth. For all, see J. Marcos Gutiérrez, *Práctica criminal de España* (4th ed.; 1826), III, p. 145.

[22] See L. Radzinowicz, *Ideology and Crime. A Study of Crime in its Social and Historical Context* (1966), pp. 14-28.

[23] E. B. Pashukanis, *Law and Marxism* (1978), p. 179; first published in English in 1929.

was a legal nihilist and radical jurist of the commodity exchange school of law – this settlement is effected through time and money, both abstract mediums of exchange. The use of time and money in the form of imprisonment and fines is linked with a conception of man in the abstract, "and abstract human labour measurable in time". Pashukanis succinctly and powerfully elaborated on money punishment in what he called the "archaic penal law".[24] He did, however, pay little attention to modern fines. His arguments were centred in the commodification of criminal justice through the equivalence between the deprivation of liberty for a fixed amount of time and the appropriation of labor time. For him, the fine could be merely converted into a certain amount of labor time and thus to a certain amount of time in prison:

> 'Deprivation of freedom, for a period stipulated in the court sentence, is the specific form in which modern, that is to say bourgeois-capitalist, criminal law embodies the principle of equivalent recompense.'[25]

Pashukanis focused on prison as the principal bourgeois punishment. Deprivation of money in the form of a fine, on the contrary, was only an adjunct, inherently limited by the unequal relations on which it is founded. This position is certainly strange because money, in the form of labor wages, is critical to the labor theory of value[26]. Pashukanis could have easily incorporated the fine into his arguments about the commodity form of law.[27] It bears mentioning that although he considered imprisonment to be the bourgeois penalty *par excellence*, he viewed the fine as a criminal measure typical of the capitalist system in which everything, even the criminal justice system, is profit-oriented. For him, the monetary transaction that is implicit in the fine expressed relations of power because the institution of monetary exchange is built on the asymmetrical economic relations specific to capitalism.

This opinion, rather widespread at the time,[28] supports the fact that 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. Consequently, this negative perspective also explains the limited use of fines in the early penal legislation of the new Russian Soviet Federated Socialist Republic.[29]

[24] Pashukanis, note 23 above, pp. 166-172. According to him, criminal law reflected a market-place mentality, with its precisely specified payments, one could say "prices", for precisely specified crimes.

[25] Pashukanis, note 23 above, pp. 180-181.

[26] See some interesting reflections on the adoption of the daily wage as the standard of value during the French Revolution and the birth of "labor money" as the basic unit of value in G. Simmel, *The Philosophy of Money* (3rd ed.; 1990), pp. 356-357; English translation from the original German edition of 1907.

[27] As O'Malley, note 1 above, p. 35, pointed out.

[28] Pashukanis was influential within Marxist legal philosophy and the Soviet legal profession during the twenties and first half of the thirties. He was the Director of the Soviet Institute of Law of the Academy of Science and editor of the leading journal *Soviet State and Law*. He had to renounce to his doctrines in 1936 and 1937, and was executed as a "Trotskyite saboteur" in September 1937. On him, see M. Head, "The Rise and Fall of a Soviet Jurist: Evgeny Pashukanis and Stalinism", *Canadian Journal of Law and Jurisprudence* XVII (2004), pp. 269-294.

[29] See in this regard S. Frankowski and E. Zielińska, "Non-Custodial Penal Measures in European Socialist Countries", *International Review of Criminal Policy*, XXXVI (1983), p. 39.

## FINES AND SUBSIDIARY PUNISHMENT FOR DEFAULTERS IN SOVIET AND WESTERN EUROPEAN PENAL LEGISLATION

In the period immediately after the Soviet revolution there was a widespread negative attitude towards the fine. This led to its omission as a sanction in the Leading Principles of Criminal Legislation of the Russian Soviet Federated Socialist Republic, approved by the People's Commissariat of Justice on 12 December 1919.[30] Curiously, the reason put forth was exactly the same one that justified the rejection of the fine by the vast majority of enlightened thinkers[31] one century earlier: the fine had been used during the *ancien régime* by the higher classes to purchase liberty from corporal punishment. As Rusche and Kirchheimer[32] put it:

> '[p]oor people were exempt from the payment of fines, whereas the imprisonment of criminals of higher social rank depended chiefly on the nonpayment of fines.'

As a result, although the Russian Soviet criminal codes of 1922[33] and 1926[34] emphasized non-custodial sanctions, which came to dominate the practice of the courts until the early 1930s, the fine was only used for petty offenses and offenses committed for personal gain.[35] This utilization of fines reflected the observation made some years earlier by German scholars,[36] who argued that the pecuniary penalty was particularly adequate in these cases because it was necessary to counterbalance the logic of unlawful gain. They further argued that the fine was not an appropriate punishment when the crime was committed of necessity, because then it would have criminogenic effects,[37] an observation that had already been proposed by Enlightenment thinkers such as Beccaria.[38] The initial Bolshevik insistence on education and correction of offenders rather than on retribution and deterrence, coincident with one of the most important characteristics of the neoclassical

[30] Consisting of only twenty-seven articles, they were the first systematic attempt to codify Soviet criminal legislation. They addressed not only the concepts of crime and punishment, criminal attempt, preparation, participation, and other related matters, but also the types of punishment. See W. E. Butler, *Russian Criminal Law and Procedure* (2011), p. viii; Butler, *Russian Law* (3rd ed.; 2009), p. 646.

[31] But not for two of its major exponents, Beccaria and Bentham, for whom the fine was the ideal penal sanction, accompanied by monetary compensation of harm and loss for the victim. See Cesare Bonesana di Beccaria, *Dei Delitti e delle Pene* (1764), here cited through the English version *An Essay on Crimes and Punishments. By the Marquis Beccaria of Milan. With a Commentary by M. de Voltaire. A New Edition Corrected*, W. C. Little & Co., Albany 1872, Chapter XVII, available at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=2193; J. Bentham, *The Rationale of Punishment* (1830), Book Three, Chapter IV, Section II.3 available at http://www.laits.utexas.edu/poltheory/bentham/rp/index.html.

[32] Rusche, note 3 above, p. 83.

[33] Adopted on 24 May 1922 and entered into force on 1 June.

[34] Adopted on 22 November 1926, following the Fundamental Principles of Criminal Legislation of the USSR and the Union Republics of 1924, it entered into force from 1 January 1927. This Criminal Code remained the keystone of Soviet criminal policy for more than three decades. See Butler, note 30 above, 2011, p. viii, and 2009, p. 646; H. J. Berman (ed.), *Soviet Criminal Law and Procedure* (2nd ed.; pp. 17-18; Timasheff, note 9 above, pp. 445-446.

[35] See G. Grebing, *The Fine in Comparative Law: A Survey of 21 Countries* (1982), p. 15, citing the Soviet National Report; Frankowski and Zielińska, note 29 above, p. 38.

[36] For example, see O. Mittelstädt, *Gegen die Freiheitsstrafe. Ein Beitrag zur Kritik des heutigen Strafensystems* (1879), p. 86; or M. F. Rauh, *Die Vermögensstrafen des Reichsstrafrechts und ihre Reform* (1912), p. 58.

[37] See F. Carrara, *Programma del Corso di Diritto Criminale dettato nella R. Università di Pisa. Parte Generale* (4th ed.; 1871), p. 463; E. Ferri, *Sociologia criminale* (4th ed.; 1900), p. 454, available online at http://archive.org/stream/sociologiacrimin00ferr#page/n9/mode/2up.

[38] Beccaria, note 31 above, Chapter XVII.

criminology emerging in Europe at the time,[39] also played an important role. Despite these limits, fines accounted for were 30-35 percent of all sentences during the twenties:[40] 38.1 percent in 1923, 28.3 percent in 1925, and 33.7 percent in 1927.[41]

Fines were considered a discriminatory penalty "because the rich could not be seriously affected by it, while, for the poor, the fine, especially if administered excessively, was unbearable and in practice was replaced by imprisonment (due to the non-payment of fine)".[42] In order to eliminate its "class character", Articles 39 of the 1922 RSFSR Criminal Code and 42 of the 1926 Code provided that the amount of the fine had to be determined on the basis of the significance of the offense, as well as on the basis of the offender's financial circumstances. The similarities to what was happening in Western criminal systems are noteworthy. Although the justification was partially different, since it reflected an ideology more concerned with the elimination of class differences, the legal regulation of the penal fine displayed noteworthy parallels with earlier and contemporary stages of the evolution of Western European criminal systems.

Indeed, the legislation of the *ancien régime* already accepted provisions determining the amount of the fine based on the greater or lesser wealth of the offender,[43] and the same can be seen in some of the first penal codes.[44] Montesquieu,[45] Filangieri,[46] and Bentham[47] strongly supported this recommendation. However, the equality principle in the first Western European constitutions was initially understood to be – until well into the twentieth century, in some cases[48] – a formal equality in terms of rights and obligations, in rewards and punishments, which prevented or advised against establishing differences based on the offenders' wealth. But what was considered at the time to be a manifestation of the equality principle – that punishments were imposed on everyone to the same extent – appeared at the end of the nineteenth century as a manifestation of inequality. The reason is that equality can pull in two directions: one towards the achievement of formal equality related to the seriousness of crime, and the other related to the income characteristics of the offender. One followed the other during the transition into the twentieth century, ending in the adoption of measures to ensure that the offender's wealth should be taken into account when calculating the amount of the fine. Nevertheless, this undertaking was not without obstacles.

Since the end of the eighteenth century, three arguments have been used to advocate *not taking the offender's financial situation into account* when fixing the amount of the fine:

[39] Beirne and Hunt, note 11 above, p. 107-111. See also Starosolsky, note 6 above, p. 371ff.

[40] Coinciding L. von Koerber, *Soviet Russia fights Crime* (1934), pp. 8-9; Makepeace, note 8 above, pp. 80-91; G. P. van den Berg, *The Soviet System of Justice: Figures and Policy* (1985), p. 99.

[41] N. S. Alekseev, "Die Geldstrafe im sowjetischen Strafrecht", *Zeitschrift für die gesamte Strafrechtswissenschaft* (1974), p. 617. In contrast, the percentage of fines in revolutionary tribunals was low. For example, only 2.8 percent of all convictions in 1920. See P. H. Juviler, *Revolutionary Law and Order: Politics and Social Change in the USSR* (1976), p. 27.

[42] Frankowski and Zielińska, note 29 above, p. 39.

[43] For example, in Spain Law VIII, title 31, Seventh *Partida* of the Seven Parts or *Siete Partidas*, a compilation of laws completed in 1265 by King Alfonso X of Castile.

[44] For example, see the Austrian Penal Codes 1803, § 23, and 1852, § 260, or the Penal Code for the Kingdom of Wurttemberg 1839, Article 32.

[45] Charles de Secondat, Baron de Montesquieu, *De l'esprit des lois* (1748).

[46] Gaetano Filangieri, *La scienza della legislazione* (1788).

[47] Bentham, note 31 above, Book Three, Chapter IV, Section II.3.

[48] See G. Bettiol, *Diritto penale* (8th ed.; 1973), p. 721.

- the need to combat the arbitrariness of the *ancien régime* by establishing fixed penalties that did not leave judges too much margin;[49]
- the wish to prevent the courts from having to thoroughly investigate what the offender possesses, as this procedure had inquisitorial overtones;[50]
- the belief that it was unfair to determine the amount of the fine based on the offender's financial capacity, because this meant that the amount set for the fine would not be proportionate to the criteria of the seriousness of the offense, but rather it would depend on external circumstances.[51] It was commonly admitted that punishment should be proportioned to social harm caused by crime[52] and not to the damage suffered by the injured party or the offender's wealth.

Despite the general conviction that the seriousness of the committed crime should equal the imposed penalty, late nineteenth-century Western European literature extensively addressed the issue of inequality when imposing the same amount of fine on the rich and the poor.[53] Practitioners and scholars perceived it as necessary to reinforce the obligation of paying the fine with an emphatic subsidiary sanction. Unpaid fines were quickly leading to prison sentences being handed down as a substitute sanction.

Initially, at least until the second half of the nineteenth century, the demand for severity against insolvent offenders faced no opposition. In fact, the first regulations of imprisonment for fine defaulters in European penal codes were applauded and considered an "extremely fair and significant new development".[54] They were based on the commonly accepted axiom *quod non habens in bonis luat in corpus* – "let him who has nothing in purse pay in person". But the fact that prisons were being filled with people who originally were sentenced to pay a fine precisely because they were not considered to deserve imprisonment was commonly recognized in the second half of the nineteenth century and early twentieth century.[55] In the late nineteenth century the use of short-term prison sentences for non-payment of penal fines began to be rejected on the grounds of being counterproductive. This stance, based on a theoretical rationale of correctionalist and humanitarian nature,[56] generally criticized short-term imprisonment, and explicitly aimed to tackle the problem of overcrowded prisons. In addition to being counterproductive, imprisonment for fine

[49] We can see this approach in the Spanish author Manuel de Lardizábal y Uribe, *Discurso sobre las penas, contraído a las leyes criminales de España, para facilitar su reforma* (1782), Chapter V, §5.16.

[50] See I. Aurioles Montero, *Instituciones del Derecho penal de España, escritas con arreglo al nuevo Código* (1849), pp. 95-96; P. L. O. Rossi, *Trattato di diritto penale* (1853), p. 496.

[51] See Carrara, note 37 above, pp. 464-465; and F. Berolzheimer, *System der Rechts- und Wirtschaftsphilosophie* (1907), V, p. 255.

[52] As stated by Beccaria, note 31 above, Chapter VI.

[53] See the works cited in note 5 above. Also in Germany, A. Merkel, "Sind Aenderungen des geltenden Rechts erwünchst in Betreff des Verhältnisses zwischen Geld- und Freiheitsstrafen?", *Verhandlungen des Deutschen Juristentages*, XXII, no. 4 (1893), p. 344, or Rauh, note 36 above, pp. 32-33; in Spain, Armengol Cornet, note 5 above, p. 56, and E. Vila Miquel, *De la necesidad y medios de sustituir las penas cortas de privación de libertad* (1917), pp. 169-170; in Italy, Bertola, note 5 above, pp. 549-550.

[54] Aurioles Montero, note 50 above, p. 63.

[55] U. Conti, "La pena e il sistema penale del codice italiano", in *Enciclopedia del diritto penale italiano* (1910), IV, p. 457; W. Thoday, "Imprisonment for Debt", *The Howard Journal*, IV (1934), p. 30.

[56] In Spain, C. Arenal, "Informe al Congreso penitenciario internacional de San Petersburgo. 2ª parte: ¿Cómo se disminuiría el número de incorregibles?", *Revista General de Legislación y Jurisprudencia*, LXXVII (1890), pp. 313-314; in Italy, G. Molinari-Tosatti, "Le brevi pene e la condanna condizionale", *Rivista Penale*, XL (1888), p. 557ff., or Bertola, note 5 above, p. 553; in Germany, Mittelstädt, note 36 above, or Berolzheimer, note 51 above, p. 233ff.; in Sweden, J. Thyrén, *Prinzipien einer Strafgesetzreform* (1910), I, p. 67; in Austria, W. E. Wahlberg, *Das Princip der Individualisierung in der Strafrechtspflege* (1869), p. 55ff.

defaulters was also criticized with arguments based on the equalization of impact.[57] This new concept of equality, different from the one accepted during the Enlightenment, gave rise to three different techniques being adopted in Western Europe in order to avoid imprisonment for fine defaulters: taking the offender's financial means into account, giving time to pay (i.e., payment by instalments), and paying off the fine by working.

Meanwhile, in Soviet Russia the main ideological purpose of the Bolsheviks was to eliminate the class character of the fine by imposing it in equal measure to all offenders who had committed the same crime and by prohibiting the substitution of fines with imprisonment in case of default. This reflected the same strong reaction against the purchase of liberty by the higher classes as in the European criminal systems of the late eighteenth and mid-nineteenth centuries.[58] At the same time, the imposed obligation of taking into account the offender's financial circumstances was a significant step towards overcoming the formal understanding of the equality principle. In order to determine the offender's financial capacity his or her salary and family responsibilities were to be taken into account, which seemed to be in line with a society made up mainly of salaried workers. Curiously, the capitalist countries arrived at the same conclusion, but on completely different grounds. The viewpoint of the growing industrial and commercial bourgeoisie, concerned with holding on to their wealth, took the stance that fines should be determined in accordance with income, as a guarantee against the confiscation of assets.[59] The spread of salaried work tipped the balance in favour of income, which was relevant to a growing number of people, instead of assets, which only concerned a fairly small sector of the population.[60]

The problem in Russia, just as in Europe, was that given the situation affecting a large part of the population, trapped in abject poverty, fines remained unpaid. In 1924/25 35.8 percent of the imposed fines were properly settled, whereas only 29.7 percent were in 1925/26[61]. This brought to the fore the nature of the subsidiary punishment to be applied in case of insolvency.

The major Bolshevik innovation in this regard was the complete abolition of imprisonment for fine defaulters. The 1922 RSFSR Criminal Code took a position of principle concerning the indispensability of a fine to imprisonment, thereby precluding insolvent offenders from being deprived of their liberty because they could not pay the fine.

[57] See J. P. Goldschmidt, "Die Geldstrafe", *Vergleichende Darstellung des deutschen und ausländischen Strafrechts*, IV (1908), pp. 408-409.

[58] The Codes of Criminal and Correctional Penalties of 1845 and of 1866 were based on the principle that all are unequal before the law, because punishments were arranged in a descending order of severity corresponding to the seriousness of the crime committed *and* the social state of the offender. For example, as a rule, privileged estates comprising the nobility, clergy, honorary citizens, merchants of the first and second guilds were exempt from corporal punishment. See A. Wood, "Crime and Punishment in the House of the Dead", in O. Crisp and L. Edmondson (eds.), *Civil Rights in Imperial Russia* (1989), p. 221; R. Wortman, *The Development of a Russian Legal Consciousness* (1976), pp. 10-11. This complex scale of punishments remained in force right up to 1917. Because the peasantry did not have money to pay fines, there was a tendency to impose them only on wealthier people, reserving harsher punishments for the poor. See S. P. Frank, *Crime, Cultural Conflict, and Justice in Rural Russia, 1856-1914* (1999), p. 218. Punishment for petty crimes applied to all classes and comprised various forms of confinement, fines, and loss of rights, as pointed out by F. Nethercott, *Russian Legal Culture Before and After Communism* (2007), p. 26.

[59] Aurioles Montero, note 50 above, p. 96; T. M. Vizmanos and C. Álvarez Martínez, *Comentarios al Código penal* (1848), I, pp. 306-307; Goldschmidt, note 57 above, p. 403.

[60] As highlighted by von Lilienthal, note 17 above, p. 80.

[61] U. Schittenhelm, *Strafe und Sanktionensystem im sowjetischen Recht* (1994), p. 114.

Some attempts in this direction had been made in Western Europe, particularly in order to limit imprisonment for fine defaulters to cases in which the offender did not pay the fine "wilfully, through laziness, licentiousness, or negligence" (for example, the 1918 Swiss draft Penal Code, Article 46). This kind of regulation, despite being welcome by doctrinal literature,[62] was rarely enacted or failed to reduce imprisonments[63] because its inevitable consequence was the impossibility of imposing fines on those who were unable to pay, as was acknowledged in some of the first enlightened criminal codes.[64] It was feared that if fines inflicted upon paupers could not be commuted, this would lead to recidivism.[65]

The chosen substitute penalty in Soviet Russia was non-custodial compulsory work at the offender's place of employment but at a reduced level of payment, from 1933 known as correctional tasks. The rate of exchange of days of compulsory work for a given amount of money was fixed, but the time imposed could never be longer than one year. A maximum of twenty per cent of the offender's pay may be deducted. All those sentenced to the penalty of correctional tasks were subject to several restrictions, this fact being the most important difference to a fine paid in instalments. For example, offenders could not change their place of work without permission of the State agency supervising the performance of the labor. Moreover, they were not entitled to regular paid vacations. In addition, the period of work was not taken into account in assessing their years of seniority nor entitled the offender to a pension, privileges, or other benefits.[66]

The efforts to eliminate short-term imprisonment for fine defaulters also demonstrated clear parallels with the situation in Western Europe, despite the totally opposite ideological

[62] See, for example, R. Garofalo, *Indemnización a las víctimas del delito. Traducción y estudio crítico* (2002), translated into Spanish from the original of 1887, p. 105; E. Florian, *Parte generale del Diritto penale* (4th ed.; 1934), II, p. 807; or J. Bauman, *Beschränkung des Lebensstandards anstatt kurzfristiger Freiheitsstrafe*, (1968), p. 74.

[63] See, for example, the Swedish Statute of 9 April 1937, n° 119, giving the possibility of remission of sentence where the offender was unable to pay the fine, after a second examination of the case before commutation of the fine into imprisonment by default, commutation being mandatory if the offender was refractory or negligent or if it was considered necessary for his or her reform. On the other hand, the English Rating and Evaluation Act 1925, which provided that a defaulter who proved that his or her failure to pay was due to circumstances beyond his or her control should not be imprisoned, had no effect at all. See W. Thoday, "The Money Payments Act at Work", *The Howard Journal*, IV (1937), p. 389.

[64] For example, the Prussian *Allgemeines Landrecht* 1794, § 85, which provided that "fines cannot be imposed on persons without means of the lower classes", and which stated that they should be replaced with a proportionate prison or labour sentence. As Neumaier, note 13 above, pp. 48-49, pointed out, it was a paradoxical privilege for the rich proving that this legal text still did not fulfil the equality principle as described in the enlightened philosophy. In fact, some of the subsequent codes on this matter, of German influence, like the Penal Law Code for the Kingdom of Bavaria 1813 (Article 34), explicitly stated that "none of the punishments of deprivation of liberty or corporal punishments established in law may be replaced with a fine", admitting the conversion of a fine into imprisonment only in the case of offenders under 16 years old, persons under guardianship and the poor. It is interesting to note that the project added a fourth case to these three cases, consisting of those who were so wealthy that the loss of the sum legally established would not be a punishment for them. See Neumaier, note 13 above, p. 55. As a means of avoiding "mortifying" financial investigations, this category disappeared from the final approved text. The 1838 Criminal Code for the Kingdom of Saxony, as a reaction against the fine being used to buy freedom and the personal indemnity by the rich, also stated that "fines are only admissible in cases in which this Code or subsequent laws or ordinances impose them as the exclusive punishment, or as an alternative or accumulatively with other punishments" (Article 15). Other similar rulings existed in, among others, the 1839 Penal Code for the Kingdom of Wurttemberg (Article 46), or that for the Kingdom of Hannover 1840 (Article 29).

[65] See M. Heüman, "Schweden", *Zeitschrift für die gesamte Strafrechtswissenschaft*, LVII (1938), p. 549ff.

[66] Frankowski and Zielińska, note 29 above, p. 42; B. S. Nikiforov, "Fundamentals of Soviet Criminal Law", *Modern Law Review*, XXIII (1960), p. 89.

background.[67] One of the first arguments used against imprisonment by fine default had nothing to do with the adverse effects of short-term imprisonment but rather with the idea that the punishment replacing the fine should maintain, to a certain degree, an element of pecuniary punishment. As Stooß[68] said:

> '*Money* and *freedom* are *unequal* assets. Freedom should be held in higher esteem by the legislator and the citizen than money. Prison is a worst evil than a fine. If a fine turns into a custodial sentence, the offender suffers a greater evil than, according to his or her legal sentence, he or she deserves.'

This criticism spread to nearly all the penal systems under German influence. It was not without autochthonous precedent in countries like Spain, where in 1874 Silvela had already said that:

> '[t]he injustice of completely changing the essence of the Punishment and turning it, as is commonly said, from that of a pecuniary nature into a personal one based on something entirely unrelated to the offence, should be something deemed worthier of consideration by our experts; and if a less irrational substitution than the one accepted to date is not possible in practice, the pecuniary punishment should be abolished with no excuse. But this substitution is fully appropriate in our opinion; in other words, the fine can change without losing its character. There is nobody whose spiritual or physical activity does not have any economic value and does not imply an income or wealth. Withholding part of the offender's wage, demanding – if he is not currently earning – that he works for the benefit of the State or the Municipality, does correspond to the idea of a pecuniary punishment, or rather it presents a new aspect under which the same punishment can be considered.'[69]

This passage underlines that rather than deprivation of liberty, the fairest substitute penalty would be forced work, in which case the balance would shift from the time/ freedom and money axiom to the labor and money axiom. Such an equation was presumably far more compatible with the emerging capitalist systems of the time, but also with the Soviet one.

By 1930 it was evident that compulsory work was a complete failure. On theoretical grounds, most judges in Russia saw compulsory work as nothing more than a "masked fine"[70], with no corrective value at all, and were reluctant to use it. From a more practical viewpoint, as Makepeace[71] pointed out:

[67] As already Frankowski and Zielińska, note 29 above, p. 45, pointed out.

[68] C. Stooß, "Sind die wirtschaftlichen Verhältnisse des Schuldigen bei der Geldstrafe ein Strafzumessungsgrund?", *Zeitschrift für die gesamte Strafrechtswissenschaft*, XXXVII (1916), p. 5.

[69] L. Silvela, *El derecho penal estudiado en principios y en la legislación vigente en España* (2nd ed.; 1903), p. 340, available online at https://openlibrary.org/books/OL6555020M/El_derecho_penal_estudiado_en_principios_y_en_la_legislación_vigente_en_España.

[70] Solomon, note 11 above, p. 216; and also from the same author, *Soviet Criminal Justice under Stalin* (1996), p. 222.

[71] Makepeace, note 8 above, p. 135.

> '[p]ractical difficulties adversely affected the system of punishment used, as the more adventurous and constructive kind involving work rather than imprisonment were found to be unworkable when great numbers were considered.'

Non-custodial compulsory work remained unfulfilled, mostly because no jobs would be found.[72] Lack of funds to pay for the work was also an important problem.[73]

As a result of this failure, the courts eventually refrained from sentencing offenders to fines that could end in this new type of punishment. The perceived difficulties in implementing the substitute penalty for fine defaulters were the main practical reason for not using fines. The same can be said not only about short-term imprisonment for fine defaulters in Western Europe, at least until fines were made affordable for members of the lower class, but also for community service.[74]

Compulsory work fell increasingly out of use during the period of New Economy Policy. In the 1930s, as Stalin set aside the progressive penal policy of the 1920s and encouraged the increasing severity of punishments by emphasizing retribution and deterrence over reform and education as the purpose of punishment, fines were seen as a penalty with neither corrective nor deterrent meaning. They fell to some 10 percent of all sentences until the end of the 1940s.[75] Penal slavery was to become the most used punishment in the Stalinist era.[76]

## CONCLUSION

Soviet Russia failed to provide the fine with an applicative theory and practice clearly distinguishable from the one prevailing in countries of capitalist influence. The legislation adopted immediately after the Revolution should have meant a complete rupture with the political and legal institutions of bourgeois society, following the requirements of the

[72] Juviler, note 41 above, p. 36; Schittenhelm, note 61 above, pp. 113-116. The problem was well known in *volost'* courts. Both before and after the abolition of Russian serfdom in 1861, rural courts made little use of enforced public work, although this punishment had long existed under Russian law. Villages had virtually no worthwhile tasks for offenders to perform. See Frank, note 58 above, p. 216.

[73] D. J. Dallin and B. I. Nicolaevsky, *Forced Labor in Soviet Russia* (1947), p. 162.

[74] The first regulations of community service as a subsidiary punishment for fine defaulters appeared in laws with a precise purpose: afforestation. For example, the General Ordinance of the Kingdom of Saxony regarding the 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 regarding Forestry Theft (*Gesetz betreffend den Forstdiebstahl*) passed on 20 February 1879. As there was a need for manpower to carry out the clearly specified work, jobs could be established that allowed this penalty to be extremely economical for the State. See A. Bonneville de Marsangy, *De l'amélioration de la loi criminelle en vue d'une justice plus prompte, plus efficace, plus généreuse et plus moralisante* (1864), II, p. 302. But when the time came to generalize it to extend beyond forestry infringements several problems of a practical nature emerged: the lack of alternatives for offenders unable to work, the (un)availability of suitable work for all insolvent offenders, mostly because of a lack of organization, and the potential competition to free labor. In 1939 Rusche and Kirchheimer, note 3 above, p. 176, still could say that

> '[t]he 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.'

[75] Alekseev, note 41 above, p. 617.

[76] It was a return to the past, because a system of hard-labour exile was maintained as late as Imperial Russia did, that is, until 1917. See J. W. Daly, "Criminal Punishment and Europeanization in Late Imperial Russia", *Jahrbücher für Geschichte Osteuropas*, XLVIII (2000), p. 351ff.; id, "Russian Punishments in the European Mirror", in S. P. McCaffary and M. Melancon (eds.), *Russia in the European Context 1789-1914* (2005), pp. 168-170; Wood, note 58 above, pp. 223-224.

revolutionary transition from capitalism to communism. However, Soviet law could not overcome the trends that were emerging in Western Europe. Therefore, the fine was not given an applicative theory and practice different from that of capitalist countries or the own Russian Imperial past.

Curiously, despite Marxist views on the obvious nexus between capitalist production and fines, America, the epitome of capitalism, exhibits a similar aversion to fines, on the similar grounds that fines have little or no reformative value. A relevant exception is the law and economics movement of the Chicago School.[77] Despite the support of prominent figures in the ranks of economics scholarship, such a Richard Posner, and despite having become the neoliberal rationality of government *par excellence*, fines did not move to a position of greater prominence in the United States. O'Malley[78] explains that:

> '[i]n an era of increased punitivism, despite the apparent tailoring of arguments for the fine to fit with a neoliberal rationality, punishment is to a greater extent than before expected to be more than a price, more than "just money". Specifically, this means loss of liberty.'

In fact, it is the impact of neoconservatism, despite the influence of neoliberalism, which allows us to explain the American reticence to use fines, combined with a resistance based on the idea that fines have no reformative value at all. But that is another story to be told another time.

[77] For them, fines are to be preferred as the optimal punishment because they can fully compensate victims, including the State, "so that they are no worse off than if offences were not committed". G. Becker, "Crime and Punishment: An Economic Approach", in G. Becker and W. Landes (eds.), *Essays in the Economics of Crime and Punishment* (1974), p. 24. Fines are the "stars" in Becker's essay. He dedicates a special section to them with many arguments which imply that social welfare is increased if fines are used whenever feasible. The reason is easy to understand:

> 'The social cost of punishments is the cost to offenders plus the cost or minus the gain to others. Fines produce a gain to the latter that equals the cost to offenders, aside from collection costs, and so the social cost of fines is about zero, as befits a transfer payment. The social cost of probation, imprisonment, and other punishments, however, generally exceeds that to offenders, because others are also hurt' (p. 13).

Other recognized representatives of the economic analysis of law reach the same conclusion and recommend the use of pecuniary punishments whenever possible, while custodial sentences of imprisonment should only be applied as a supplement to complement the fine, once it has been set at its maximum possible level and its purposes, as established in the criminal system with regards the specific crime committed, cannot be reached. See for example A. M. Polinsky and S. Shavell, "The Optimal Use of Fines and Imprisonment", *Journal of Public Economics*, XXIV (1984), pp. 89-99.

[78] O'Malley, note 1 above, p. 60.