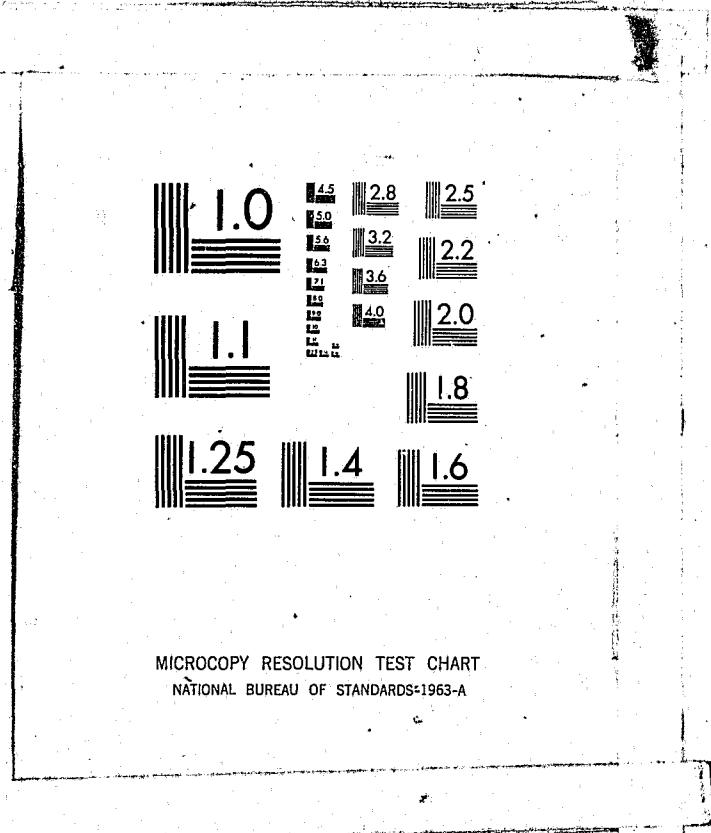


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# Federal Probation

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DECEMBER 1980

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# Federal Probation

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## This Issue in Brief ACQUISITIONS

**Prisoners' Rights Litigation: A Look at the Past Decade, and a Look at the Coming Decade.**--A number of startling changes have occurred in the prisons during the 1970's, according to Richard G. Singer, professor of law at Rutgers University. The question he explores in the first part of his article is whether these changes are attributable, in whole or in part, to the prisoners' rights movement, and specifically the litigation arm of that movement. In the second part he discusses the impact the recent Supreme Court case of *Bell v. Wolfish* will have on prison litigation in the future.

**Children of the Holocaust and Their Relevancy to Probation: Presentence Investigations and Case Planning.**--Federal Probation Officer Stephen L. Wishny of Los Angeles suggests that a social history of parent or parents as survivors of the Holocaust, or survivors of like social trauma, might provide an additional element in explaining defendant behavior and developing treatment plans. His article reexamines a presentence investigation in the light of recent research in the field of Holocaust survivor psychology and discusses casework planning from the same perspective.

**Managing the Interorganizational Environment in Corrections.**--In the face of declining governmental and public support for human service programs, correctional administrators will be required to do more with fewer resources, asserts Dr. Ronald I. Weiner, associate dean of The American University School of Justice. One approach for becoming more competent in the management of scarce resources is the necessity for understanding interorganizational problems in corrections and designing effective strategies to overcome them, he maintains. Management training in corrections would be wise to expand its knowledge base beyond concern for the administration of personnel and programs internal to the organization. Future training needs will require

both knowledge and strategies for more effectively negotiating favorable relationships with other organizations in the task-environment, he concludes.

**Fines as an Alternative to Incarceration: The German Experience.**--Although many issues of correctional reform have been discussed and debated in the United States during the last decade, the potential role of financial penalties (fines) is not among the issues raised. This omission, according to Professor Robert W. Gillespie of the University of Illinois, stands in sharp contrast to similar discussions and policy innovations in Europe regarding fines. The innovations in recent German penal policy and practice in the use of fines is reviewed and contrasted to the role accorded fines in selected United States courts.

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**Assessing Parole Violation Rates by Means of the Survivor Cohort Method.**--The examination of parole violation statistics will invariably show a larger number of parole violators each month during the first year or so of parole as compared to the number of violators during the latter parole periods. Two reasons could account for this. Either the probability of violation is highest during the immediate postrelease period, or the number of parolees "at risk" is greater thus providing a larger pool of possible violators. The purpose of this article by George F. Davis, supervisor of information systems for the California Youth Authority, is to present additional data relating to the issue of whether the early months on parole are the most risk-prone.

**Purchasing Services in a Community-Based Juvenile Corrections System: The Ohio Experience.**--Despite the widespread practice of state juvenile corrections agencies contracting with private agencies to provide residential and social services, there is little in the literature concerning what is needed to develop and maintain a successful purchase of service system, writes Don G. Shkolnik, community residential services administrator for the Ohio Youth Commission. A review of the strengths and weaknesses of such a system is the backdrop against which the Ohio Experience is examined.

**His Day in Court.**--Frederick Greenwald, executive director of International Probation and Parole Practice, believes that sentencing the alien offender is as vital a part of the judicial process as the sentencing of a citizen or long-time resident. It may have far-reaching effects both on the individual and the na-

tions, not to mention the families involved. He states that when economic and social costs and values are weighed, the balance favors providing equal rights to the alien offender and an equal opportunity to the court to have benefit of full and complete knowledge of the offender when considering the sentence to be imposed.

**Patterns of Probation and Parole Organization.**--Organizational relationships between programs providing services to mutual clients have a critical impact on the timeliness and quality of those services, according to authors Charles L. Johnson and Barry D. Smith. Their article discusses the impact on services of organizational relationships among probation, parole, and correctional functions. At issue is the compliance of each state with specific portions of standards recommended by the National Advisory Commission on Criminal Justice Standards and Goals.

**Understanding Alcoholism and the Alcoholic Offender.**--Alcoholism is a major national health problem in the United States. Its costs to American society in terms of mortality, economic loss, and social and emotional disturbance are escalating. Current research evidence indicates that there is a basis for optimism in treating the alcoholic when the focus of treatment is on alcoholism as a primary disease entity rather than as a symptom of an underlying emotional disturbance or inter-personal problem. This article by Professor Gloria Cunningham of Loyola University of Chicago discusses the implications of emerging knowledge about alcoholism for criminal justice practice.

All the articles appearing in this magazine are regarded as appropriate expressions of ideas worthy of thought but their publication is not to be taken as an endorsement by the editors or the federal probation office of the views set forth. The editors may or may not agree with the articles appearing in the magazine, but believe them in any case to be deserving of consideration.

## Fines as an Alternative to Incarceration: The German Experience\*

BY ROBERT W. GILLESPIE, PH. D.

Associate Professor of Economics, University of Illinois, Urbana

IN THE UNITED STATES, as in many European countries, the last decade has seen much discussion and implementation of penal reform. However, the central penal reform issues and programs differ significantly among these nations, even though they are all modern industrial democracies. In the United States a central issue has been the institutional method for setting the length of sentences to incarceration--indeterminant vs. determinate sentencing (Miller, 1977). The more fundamental issue is the purpose to be served by incarceration--punishment or rehabilitation. Far less concern has been evidenced regarding whether the emphasis upon incarceration may produce a less than optimal mix of sanctions. In particular, there is only a miniscule amount of literature addressing the potential for greater use of fines in United States correctional policy.

The continuing commitment to incarceration as the primary means of social control in the United States for crime stands in sharp contrast to contemporary penal reform in European countries, where a major focus of penal reform involves reducing the use of incarceration, in large part, by more extensive and innovative use of fines.

The German penal reform of the last decade offers an important case study in the substitution of fines for incarceration; it deserves far more attention by United States policymakers than it has received. It is the purpose of this article to review this experience, and in so doing hopefully, to stimulate interest and research in the potential in the United States for substituting, at the margin, fines for incarceration.

### German Penal Reform

In 1954 a Grand Commission for Penal Reform (Grosse Strafrechtskommission) was formed with a mandate to produce a new penal code to replace the existing code which dated back to 1871. The work of the Commission provided the basis for the official

\*Financial support for this research is gratefully acknowledged from Illinois Investors in Business Education and the Center for International Comparative Studies of the University of Illinois-Urbana.

government draft of 1962 (German Draft Penal Code E 1962). This draft was viewed by many reform-minded legal scholars as "no more than a codified commentary on the old penal code" (Eser, 1973: 247). This dissatisfaction crystallized in the form of an Alternative Draft produced by a group of young legal scholars (Baumann, 1977). As a result of this organized criticism and alternative proposals, there emerged from the legislative process a degree of change that surprised many.

Two major thrusts of the reform were decriminalization of many minor and moral offenses, and in sentencing, a shift in philosophy from "retributive justice" towards "resocialization" (Lee and Robertson, 1973: 191; Herrmann, 1976: 720). This change in philosophy was manifested by a general substitution of milder penalties, in particular, a decrease in the use of incarceration. And, even for serious offenses where incarceration remained the primary sanction, the previous more harsh "penal servitude" form of incarceration, was abolished; incarceration was to be uniform in nature for all offenses where this sanction was applied (Eser, 1973: 253).

For the less serious offenses, those which previously would have received prison sentences of 6 months or less, fines or suspended sentences were to replace incarceration altogether. The First Law Reforming the Penal Code, effective September 1, 1969, provided that prison terms of less than 6 months were to be replaced by fines or probation in all but exceptional cases. This policy was to be followed, general deterrence considerations, aside. Although short-term sentences were not abolished completely, a very significant reduction was achieved as is shown in table 1. In 1968 over 110,000 sentences to prison terms of less than 6 months were awarded; in 1976 this figure dropped to only about 10,000, even though total convictions rose--rather remarkable achievement.

This impressive shift away from short-term incarceration found support from two quite different rationales. One viewed prisons as "schools of crime" and thus not only incapable of effecting resocialization, but even counter productive in achieving this

TABLE 1.—Number of Persons Sentenced to Short Prison Terms and Persons Fined

	1968	1969	1970	1971	1972
Total convicted:	572,629	530,947	553,692	571,423	591,719
Prison Terms of Less Than 6 Months, Without Suspension	113,273	64,073	23,664	22,207	20,045
% of total	20%	12%	4%	4%	3%
Prison Term of Less Than 6 Months, With Suspension	70,220	68,088	32,180	32,875	35,964
% of total	12%	13%	6%	6%	6%
A Fine Sentence	361,074	371,918	464,818	476,785	494,399
% of total	63%	70%	84%	83%	84%
	1973	1974	1975	1976	
	601,419	599,368	567,605	592,514	
	17,747	18,033	11,350	10,704	
	3%	3%	2%	1.8%	
	37,482	41,427	35,802	36,349	
	6%	7%	6%	6%	
	504,266	494,266	472,577	492,561	
	84%	82%	83%	83%	

Source: Drucksache 7/1089, Deutscher Bundestag 7. Wahlperiode 17/10/73 and Federal Ministry of Justice.

goal. The other view professes faith in the possibility of resocialization under appropriate conditions of incarceration. These conditions include uncrowded prisons and incarceration-treatment-for an extended period (Jescheck, 1975: 305; Artz, 1979: 47). Part of the reform program was the creation of special institutions devoted to providing treatment. These institutions, however, have yet to be fully implemented because of budgetary restrictions; in addition, there now appears a growing doubt as to the efficacy of treatment (Kaiser, 1978: 419).

This increased use of fines was not a direct response to rising crime and the concomitant pressure on prosecutorial and court resources; nevertheless, it has helped to relieve these pressures. To fully appreciate the resource implications of the use of fines in Germany, one must be aware of two important aspects of German criminal law procedure: the "legality principle" and "penal orders." The legality principle requires German prosecutors to prosecute all serious crimes and, with exceptions, most misdemeanors (Langbein and Weinreb, 1978: 1561). Taken literally, the principle implies prosecution *not* negotiation. Indeed, some American legal scholars familiar with the important (essential) resource rationing role played by discretionary prosecution-plea bargaining-in the United States have characterized the adherence to the legality principle as a myth (Goldstein and Marcus, 1977). This skepticism, however, has been effectively criticized (Langbein and Weinreb, 1978: 1559). The plausibility of adherence to the legality principle is greatly enhanced by the availability to prosecutors of penal orders. The penal order is a form of summary prosecution and sentencing available to the prosecutor for less serious offenses, roughly misdemeanors and less serious felonies; only fines can be imposed by a penal order. On the basis of the police investigation, and in some cases his own, the prosecutor may determine guilt and levy a fine. Penal orders, however, do require judicial approval. Further, if the accused objects, the penal order is set aside and the case goes to trial, otherwise the fine is routinely enforced (Feldsweiner, 1979: 310). By using penal orders for the less serious crimes, but those which occur in great volume, prosecutorial resources are economized for use in prosecuting all serious crimes.

Although the shift from short-term imprisonment to the use of fines and suspended sentences went into effect in 1969, a further reform law, effective in 1975, introduced a day-fine system. The day-fine is a Scandinavian innovation used extensively in Sweden since 1931. The function of the day fine is to

divide fine sentencing into two distinct decisions. The first is an assignment of the number of day fines according to the degree of guilt and gravity of the offense. The second is to explicitly consider the economic status of the offender and assign a unit value to the day fine for the particular offender. The absolute amount of the fine is the product of the unit value and the number of day fines. The result is a fine system which seeks to punish equally offenses of similar gravity but at the same time, given the penalty is monetary, to achieve equity across offenders of disparate financial means. While a great many legal systems recognize the equity issue in the use of fines, most deal with it in a far less explicit manner. Indeed, it is fair to say that for some United States observers the equity issue precludes greater use of fines in the United States. However, all jurisdictions in the United States use basically a flat fine system.

#### Fines in Practice

The basic legal provisions of the day-fine system are that the number of day fines which may be levied for an offense are restricted to a minimum of 5 to a maximum of 360. The permissible range for the unit value assessment cannot be less than 2 Deutsche Marks nor more than 10,000 Deutsche Marks. In assigning the unit value in individual cases a concept of net income is to be used. The legal guideline states, "The day-fine is the average sum of money which may be daily chargeable to the offender taking into account his income, his realizable assets, his actual standard of living, his maintenance responsibilities, his normal expenditure and his family situation" (Beristan, 1976: 260). In the event of default, incarceration may be substituted in the ratio of one day of incarceration for each unpaid day-fine.

Although there appears to be general acceptance of the goals of the day-fine system, legal scholars and legal practitioners have voiced criticisms of certain aspects of it. There is some concern that the basic objective of separating the seriousness measure of the crime from the economic status of the offender is not being observed in practice. Rather the amount of the fine is established first, based upon previous practice, and then the number of day-fines and unit value assessment are set to be consistent with the prior determined amount (Driendl, 1976: 1142). However, it is also recognized that for many high volume, minor routine offenses it would be impractical, and perhaps even wasteful, to expend a great deal of resources on an accurate determination of the offender's net income (Greb-

ing, 1976: 1087). Felstiner observed in his study that when a penal order is used the defendant will not even know what income the prosecutor has attributed to him (Felstiner, 1979: 312). The offender can judge the "fairness" of the fine only by comparing the absolute value to fines levied on individuals for the same offense and having a similar income. In principle, a day fine sentence levied by a judge would explicitly state both the number and unit value components used to arrive at the total fine. Another concern is that the determination of income must rely only upon the offender's statements and indirect evidence such as occupation (Driendl, 1976: 1147). Further, the defendant is under no obligation to cooperate with the court, and direct measures, such as tax information, are not available.

Observers have also criticized the very high potential maximum fine that could be levied, 3.6 million DM (360 times 10,000DM). At current exchange rates this would be about \$1.8 million; judged by United States criminal statutes this is exceedingly high (Grebbling, 1976: 1067; Herrman, 1976: 731; Jescheck, 1975: 307). This criticism, however, appears to be exclusively theoretical inasmuch as actual fines levied have been criticized as being too low (Driendl, 1976: 1147, 1149; Grebbling, 1976: 1061). The basis for this criticism of low fines is the inference that fines have not yet been applied to more serious crimes. It is reported that less than 1 percent of all day fines have unit value greater than 50 DM (Kaiser, 1978: 417). However, another study which compares data from 1972 with data from 1975, finds a significant increase in fines of higher amounts. This result is taken to indicate that greater equity in the use of fines is being realized by higher income offenders paying larger fines (Albrecht, 1978: 3). Published data, presented below, also shows that fines are being used for a wide range of offenses, including offenses which would be considered serious by American standards.

The provision that permits incarceration in the event of default has also been criticized both because the substitution of a day of incarceration for every day fine is unpaid is too harsh and because some object to use of incarceration at all (Beristan, 1976: 26; Driendl, 1976: 1152, 1154). In fact, however, the use of incarceration as an enforcement mechanism is relatively rare. It is reported that only 2.7 percent to 4 percent of all cases involve incarceration (Kaiser, 1978: 417; Albrecht, 1978: 4).

One of the most important concerns regarding the substitution of fines for imprisonment is the efficacy of a fine as a deterrent to future criminal

behavior. Only one study could be found that addressed this issue. Since fines are used most frequently for first offenders, the study compared two groups of first offenders, one group which received fines and the other which received a prison sentence. The reconviction rate was 16 percent for those who were fined and 50 percent for those who were imprisoned (Albrecht 1978: 5). Without further information on what other characteristics might have distinguished the two groups, e.g., nature of offense, age, etc., these results must be considered as providing only the most tentative of answers to the question of relative effectiveness of the two sanctions. This qualification, notwithstanding, the data provide support for the effectiveness of fines as used in Germany and suggest that the sentencing reform has not imposed a cost in the form of higher levels of crime.

#### Sentencing Patterns

Although most observers of the German penal system note the very high percentage of all penal code convictions disposed of by fines, this can be misleading if used for comparative purposes with other country's sentencing patterns. The reason is that the scope of the penal code, i.e., the types of deviant behavior which are criminalized, may vary considerably between countries. Consequently, we use data which are not only crime specific, but also are restricted to types of behavior which are criminalized in all industrialized democracies. However, even at this lower level of aggregation legal definitions of similar "act," e.g., robbery, may still differ in important ways between countries. But for a comparison of general sentencing patterns we feel that the classifications are sufficiently similar.

The data on sentencing patterns are presented in table 2. The data show that fines are used extensively for a wide range of offenses, including many which would be considered moderately serious to serious in nature. Of all convictions for crimes against the person 66 percent were disposed of by a fine; for all theft and embezzlement convictions, 76 percent were disposed of with a fine; finally, of all fraud, fencing and forgery convictions 77 percent were disposed of by a fine. These three categories comprise 88 percent of all convictions tabulated in table 2. Within these three major categories it is noteworthy that theft offenses involving force or violence, breaking and entering and robbery, were dealt with to a far less extent with fines and far more by incarceration. However, these two sub-categories account for only 8 percent of all convictions in the three categories discussed. This very

TABLE 2.—Crimes Against the German Penal Code and Sanctions Imposed—1977<sup>1</sup>

	Total Sentenced <sup>2</sup>	Immediate Incarceration	Fine	All Other
Criminal Acts Against the State and Public Order	13,818 (6%)	972 7%	10,997 80%	1,879 14%
Criminal Acts Against Sexual Sovereignty	5,327 (2%)	1,503 28%	1,860 35%	1,964 37%
Crimes Against the Person—	46,550 (19%)	3,795 8%	30,633 66%	12,122 26%
<i>Of Which:</i>				
Assaults and Assault Type Offenses	20,446 (8%)	1,429 7%	15,980 78%	3,037 15%
Theft and Embezzlement—	111,694 (45%)	12,873 12%	85,323 76%	13,498 12%
<i>Of Which:</i>				
Breaking and Entering to Steal	14,666 (6%)	6,465 44%	2,698 18%	5,503 38%
Embezzlement	5,301 (2%)	395 7%	4,180 78%	726 14%
Robbery and Extortion	2,641 (1%)	1,725 65%	142 5%	774 29%
Fraud, Fencing, Forgery and Debt Related Offenses	59,189 (24%)	5,031 8%	45,478 77%	8,680 15%
Crimes Dangerous to the Public	8,573 (3%)	991 12%	6,182 72%	1,400 15%
Total of All Above:	247,792 100%	26,890 11%	180,595 73%	40,317 16%

<sup>1</sup> Source: *Strafverfolgungsstatistik, 1977*, table 6.

<sup>2</sup> Percentages in parentheses are the distribution of sentences among offenses; other percentages are the distribution of sanctions over each offense.

low percentage of these violent crimes in Germany must also contribute to the high overall use of fines for all offenses recorded in the table. However, differences in criminality patterns notwithstanding, Germany's sentencing policy which emphasizes fines in lieu of incarceration must be the major explanation for the low overall rate, 11 percent, of incarceration and high rate, 73 percent, of fines.

To illustrate the significant difference in the role accorded fines as a criminal sanction in Germany compared to a United States jurisdiction, the sentencing patterns for similar offenses of the Superior court of Washington, D.C., are given in

table 3. Among the offenses which account for 10 percent or more of all sentences the greatest use of fines, 14 percent, is for drug offenses. Surprisingly, only 2 percent of all larceny sentences are fines. For all sentences, fines comprise only 6 percent and this includes a substantial number of victimless crimes.

#### Conclusion

An overall assessment of the German experience, as it relates to the substitution of fines for incarceration, is that it has accomplished this goal without either a significant cost in terms of higher rates of crime or incarceration for fine default. A more

TABLE 3.—Defendants Sentenced in Superior Court of Washington, D.C.—1974

Offense Type <sup>1</sup>	Total Sentenced <sup>2</sup>	Sanction Imposed		
		Incarceration	Fine Only	All Other
Assault	578 (12%)	146 25%	20 4%	412 71%
Burglary	578 (12%)	298 52%	5 1%	275 48%
Larceny	738 (15%)	259 35%	14 2%	465 63%
Stolen Vehicles	152 (3%)	87 57%	2 1%	63 41%
Forgery and Counterfeiting	70 (1%)	21 30%	1 1%	48 69%
Fraud	87 (2%)	28 32%	1 1%	58 67%
Embezzlement	23 (1%)	2 9%	6 26%	15 65%
Sex Offenses	81 (2%)	56 69%	0 0%	25 39%
Dangerous Drugs	545 (11%)	79 15%	74 14%	392 72%
Stolen Property Dealing	199 (4%)	42 21%	21 -%	136 68%
Weapons Offenses	537 (11%)	113 21%	32 6%	392 73%
All Other	634 (13%)	135 21%	106 17%	393 62%
Total Sentences	4,900 (100%)	1,765 36%	287 6%	2,848 58%

<sup>1</sup> Charges originally classified by local penal code are classified here by SEARCH (System for Electronic Analysis and Retrieval of Criminal Histories) codes.

<sup>2</sup> Percentages in parentheses give distribution of defendants among offenses; other percentages give distribution of sanctions imposed for each offense. Source: 1974 PROMIS data tape from the Inter-University Consortium for Political and Social Research.

humanitarian system of punishment has been created.

Humanitarian motives are commendable; however, they need not be the primary attraction of fines. From an economic perspective, fines offer society a far less costly form of punishment than incarceration. Any evaluation of a greater use of fines in United States policy should consider both aspects.

Although the correctional literature has largely ignored the potential role of fines, it is interesting to note that there is a growing interest in restitution (Bridges, *et al.*, 1979). In an economic sense, fines and restitution are simply different forms of monetary penalties; fines are paid in cash and restitution may be in cash or in kind. However, both represent a lower economic cost to society of punishment than incarceration. The use of incarceration

reduces the total economic output of society by immobilizing the labor resources of the offender and society's resources needed to enforce the sentence. By substituting, at the margin, monetary penalties for incarceration more resources become available for economic production and an economic gain is realized. The difference between fines and restitution rests in how this gain is distributed. Fines distribute it exclusively to taxpayers, while restitution distributes it, in part, to the offender's victim. Which distribution is superior is an ethical, not an economic, judgment. The economic judgment is that, other things equal, monetary penalties, in either form, are superior to incarceration.

Concern over the victim of crime may be one reason why restitution is the favored form of monetary penalty in United States correctional literature; however, it is not the only explanation.

One of the most basic issues in contemporary correctional philosophy is the degree to which sentencing policy should be based upon rehabilitation or upon "just deserts." Those advocating restitution also see it as a method of effecting rehabilitation.

...restitution can provide a low cost, middle ground approach for corrections which can satisfy society's demands for punishment as well as the offender's needs for rehabilitation. This approach would also recognize and serve the badly neglected victims of crime, as well. (Bridges, *op. cit.*, p. 29)

Monetary penalties in the form of fines emphasize the punishment aspect and, thus, reflect a "just deserts" philosophy.

We conclude that the German experience as well as the economic costs of punishment

establish a strong presumption that United States sentencing policy falls short of the optimal use of monetary penalties, whether in the form of fines or restitution, as an alternative to incarceration.

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