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Comment David Alan Sklansky

When economists turn their attention to the legal system, the result is often an effort—sometimes successful, sometimes not—to demonstrate that something that on its face has little to do with anything tangible can nonetheless be understood, assessed, and improved by thinking in terms of prices and utility maximization. The insightful chapter that Anne Morrison Piehl and Geoffrey Williams have written about fines is different. Its pleasure and its great value lie in the opportunity to watch two first-rate economists explore how something that seems to lend itself to analysis in the simplest terms of monetized costs and benefits is actually a good deal

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more complicated, in ways that present both challenges and opportunities for institutional design.

It can be awkward to think about prison or parole as a “price” that people weigh in deciding to commit a crime, but it seems straightforward to think in that manner about fines. But Piehl and Williams show that two kinds of variability can bedevil efforts to use fines as a means of crime control: variability in individuals, and variability in institutions.

Regarding variability of individuals, Piehl and Williams point out that the problem is not just, as might be supposed, that people vary in their *sensitivity* to fines. Even worse, people vary in their *ability* to be fined. There are defendants who are effectively “fine proof,” in a way somewhat analogous to that category of potential civil defendants that have long been the bane of tort plaintiffs’ lawyers, the “judgment proof.” Lawyers call a tortfeasor judgment proof when her assets, her income stream, and most importantly her liability coverage are, taken all together, just not enough to provide for a meaningful recovery. Piehl and Williams show that a similar problem can occur with fines. There are individuals, for example, whose wages are so unpredictable, and who rely so extensively on forms of consumption beyond the reach of the state, that fines cannot impose a meaningful drop in their overall welfare.

Nor is that the end of it. Piehl and Williams point out that these fine proof defendants are merely a subset of a larger category of offenders whom fines will not deter. There are people who are simply irrational, for example, and individuals whose principal sources of income are themselves criminal. The bottom line is that people vary widely, in ways that present serious challenges when trying to use fines to control crime.

Even more daunting, perhaps, are the challenges posed by variations in institutions. A range of institutions are involved in any effort to impose fines and criminal penalties: police, courts, parole and probation authorities, the agency charged with collecting the fines, and, if another sanction, like imprisonment, is to be used as a backup, then whatever agency administers *that* sanction. The problem is not just that these various agencies may pursue their goals in *different ways*. As Piehl and Williams make clear, the agencies often pursue completely *different goals*. That is true with any form of criminal punishment, because of the familiar range of goals that punishment may be thought to serve: deterrence, incapacitation, rehabilitation, retribution, and expression. But there is a special problem with fines, as Piehl and Williams point out: the tension between viewing fines as a means of revenue collection and viewing them as a way of purchasing a public good, punishment, in a manner that happens to trigger a partial rebate. This is a problem that fines share with any use of monetary sanctions or prices as a means of social control; the same problem is faced, for example, in cap-and-trade systems of emissions control.

Among the many useful lessons that Piehl and Williams draw from all of

this, the two that strike me as most important are, first, not to assume that a system of fines needs to pay its way in order to represent an attractive alternative to incarceration, and, second, that there are advantages to a tiered system of penalties, where offenders who somehow pass through the thicket of fines face incarceration or some other form of backup penalty.

It seems both churlish and dispiriting to suggest that efforts to use fines for criminal punishment face additional complexities and difficulties, beyond what Piehl and Williams describe. But I will do so anyway. The three additional challenges I want to flag might be called the problem of unequal justice, the problem of alternative alternatives, and the problem of the cookie jar.

Piehl and Williams themselves flag the problem of unequal justice early in their chapter, when they refer to the challenge of imposing fines in a manner that does not unfairly discriminate against the poor. The challenge is knottier and more pervasive than one might think. As Piehl and Williams make clear, any system of fines, to be effective, needs a set of backup penalties for offenders who fail to pay the fines, and the backup penalties, to be effective, need to be even less pleasant than the fines. So the offenders who wind up saddled with the backup penalties are, of necessity, more sorely imposed on than the offenders who pay the fines. The trouble is that the failure to pay a fine does not always make an offender more blameworthy. All kinds of morally neutral circumstances, including but not limited to poverty, can make it harder for an offender to pay a fine. It turns out to be quite difficult to devise a thicket of fines that sorts offenders based on blameworthiness—and it seems wrong to impose harsher penalties on a group of offenders who are *not* more blameworthy.

Unlike the problem of unequal justice, the problem of alternative alternatives has to do not with the *design* of a system of fines but with its *assessment*. Much of what drives the chapter by Piehl and Williams is the comparison of fines, sometimes explicitly and sometimes implicitly, with incarceration. That makes sense: incarceration is our default form of punishment, and it is scandalously expensive. The problem is that the comparison is almost too easy. Compared to imprisonment, almost everything looks good. Before ramping up our use of fines, we might want to know not just how they compare with prison cells, but how they compare—and how compatible they are—with other alternatives to incarceration.

There are interesting questions to be asked, in particular, about comparing fines with restorative justice, and with combinations of the two kinds of sanctions. John Braithwaite and other proponents of restorative justice have called explicitly for a tiered set of responses very much like what Piehl and Williams advocate, but with the first line of response being efforts at restoration of social peace and reintegration of offenders, rather than fines. Of course, fines can themselves be part of an effort at repairing the social fabric, particularly when they are framed as restitution—or when they enlist

relatives, friends, and community members in the sanctioning and reintegration of offenders. The latter approach has deep roots in English legal history, running back to the Saxon system of tything and the Norman frankpledge. We do something similar today (or purport to do so) with bail bonds. All of these mechanisms, though, threaten to produce inequality and unfairness—not just the unfairness of burdening the innocent, but the unfairness of selectively punishing the friendless. For it is precisely the friendless—the socially isolated—who are most likely to slip through this kind of a thicket.

The last problem I want to warn about is the problem of the cookie jar—or, put differently, the problem of institutional dynamics. The range of institutions that Piehl and Williams discuss, and the range of perspectives these institutions have toward fines, will not remain static when a system of fines is introduced or greatly expanded. Two dynamics can be expected. One is an ongoing shift in the back-and-forth between thinking of fines as a source of revenue and thinking of fines as a public good to be purchased. There is a tendency for any social institution that happens to raise revenue to be seen, more and more, as first and foremost a *means* of raising revenue, even if that is not what it was originally designed to be. This was very much the story of frankpledge, for example; it may also be the story of parking tickets. The second kind of institutional dynamic worth worrying about is net widening: the tendency of sanctions initially proposed as a *substitute* for a more onerous or intrusive form of control, such as imprisonment, to morph into a *supplement*—with the result that the use of imprisonment stays constant, but the overall level of punishment increases, because more offenders are being sanctioned. What is more, these two dynamics can interact: once a system of fines becomes viewed as a means of raising revenue, there is a financial incentive to impose the fines on as many people as possible. Designing a system of fines requires attention not just to the existing variation in organizational goals, but to the ways those goals can themselves begin to alter once a system of fines is implemented or expanded.

None of this is to deny that we could use fines more widely, and more productively, than we now do. It is just to underscore and extend the central lesson of Piehl and Williams's chapter: for a system of fines to be fair and effective, it must take account of the complexities both of individuals and of institutions.