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Prisoners Paying for the Costs of Their Own Incarceration: United States Circuit Courts of Appeal Spar Over the Validity and Application of United States Sentencing Guideline § 5E1.2(i)

I. Introduction

In an effort to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system,¹ the United States Congress passed the Comprehensive Crime Control Act of 1984² which established the United States Sentencing Guidelines Commission. The Commission formulated sentencing policies and practices for the federal criminal justice system designed to insure the ends of justice by promulgating detailed guidelines³ prescribing the appropriate sentences for offenders convicted of federal crimes.⁴ Section 5E1.2 dictates the appropriate procedures and parameters to follow in imposing fines for individual defendants and mandates that the court shall impose, in addition to a punitive sanction, a fine that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release order.⁵ Section 5E1.2(i), which specifically articulates that prisoners must pay for the costs of their confinement, has created discord among United States Circuit Courts of Appeal. Federal courts display little consistency in their interpretation and application of section 5E1.2(i).

Specifically, the Circuit Courts of Appeal disagree over the validity of the Section and the factors to consider in imposing a sanction against criminal defendants designed to reimburse the government for the cost of their imprisonment. Moreover, the United States Court of Appeals for the Third Circuit recently declared section 5E1.2(i) invalid.⁶ Such

1. THE UNITED STATES SENTENCING COMMISSION, *Introduction to GUIDELINES MANUAL*, Ch.1, Pt.A. (1992) [hereinafter U.S.S.G.].

2. Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1988)).

3. The [Sentencing] Commission's initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of Congressional review, the guidelines took effect on November 1, 1987. *Introduction to U.S.S.G., Ch.1, Pt.A.*

4. *Id.*

5. U.S.S.G. § 5E1.2(i).

6. *See United States v. Spiropoulos*, 976 F.2d 155 (3d Cir. 1992).

discord among the circuit courts makes the validity and proper application of the section an issue worthy of Supreme Court consideration.

In Part II, this Comment traces the history of the United States Sentencing Guidelines and the Congressional motivation behind their creation. The Comment further examines the evolution of section 5E1.2 and discusses the law as it exists today, articulating the different factors sentencing judges consider in imposing the fine. The Comment proceeds, in Parts III and IV, to illustrate the inconsistency among federal circuit courts over their interpretation of the section and the disagreement among the circuits on imposing a fine to reimburse the government for incarceration costs. In Part V, the Comment examines both the constitutionality and validity of section 5E1.2(i). Part VI concludes with an analysis of why the section enhances the effectiveness of criminal punishment.

II. Background

A. Legislative History

In 1984, Congress passed the Comprehensive Crime Control Act⁷ [hereinafter the "Act"] designed to address the deficiencies of the criminal justice system. The Act's basic objectives were (1) to combat crime through an effective sentencing system; (2) to create reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders; and (3) to establish proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.⁸ Prior to the Act, the sentencing system was marked with confusion and implicit deception. The preexisting process required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison. This resulted in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence imposed by the court.⁹ The Act created the United States Sentencing Guidelines Commission and delegated broad authority to the Commission to review and rationalize the federal sentencing process.¹⁰ At least three of the

7. Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1988)).

8. *Introduction* to U.S.S.G., Ch. 1, Pt.A.

9. *Id.*

10. *Id.* 28 U.S.C. § 991 (1993) codifies the powers of the Commission. The Statute provides:

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members of the Commission must be federal judges, not more than four of the members must be members of the same political party, and the United States Attorney General serves as an ex officio, nonvoting member.¹¹ The Commission's primary duty is to promulgate guidelines for sentencing judges to use in determining the appropriate sentence in criminal cases.¹²

Congress found the present system's deficiencies rooted in the absence of both a comprehensive federal sentencing law and statutory guidance on how to select the appropriate sentencing option. These deficiencies resulted in inevitable disparity in the sentences which courts imposed on similarly situated defendants.¹³ Congress traced the root of these disparities to the unfettered discretion the law conferred on those judges and parole authorities responsible for imposing and implementing the sentence.¹⁴ Specifically, the United States Senate referred to the

(a) there is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members

(b) The purposes of the United States Sentencing Commission are to:

(1) establish sentencing policies and practices for the Federal criminal justice system that (A) assure the meeting of the purposes of sentencing as set forth in section 3553 (a)(2) of Title 18, United States Code; (B) provide certainty and fairness in meeting the purposes of sentencing, avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct which maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process

28 U.S.C. § 991 (1993).

11. 28 U.S.C. § 991(a) (1993).

12. 28 U.S.C. § 994(a) (1993).

13. Act of Oct. 11, 1984, Pub. L. No. 98-473, 1984 U.S.C.A.N. (98 Stat.) 41.

14. *Id.* at 38. Congress articulated the following goals for sentencing reform:

First, sentencing legislation should contain a comprehensive and consistent statement of the Federal law of sentencing, setting forth the purposes to be served by the sentencing system and a clear statement of the kinds and lengths of sentences available for federal offenders. Second, it should assure that sentences are fair both to the offender and to society, and that such fairness is reflected both in the individual case and in the pattern of sentences in all Federal criminal cases. Third, it should assure that the offender, the Federal personnel charged with implementing the sentence, and the general public are certain about the sentence and the reasons for it. Fourth, it should assure the availability of a full range of sentencing options from which to select the most appropriate sentence in a particular case. Fifth, it should assure that each stage of the sentencing and corrections process, from the imposition of sentence by the judge, and as long as the offender remains within the criminal justice system, is geared toward the same goals for the offender and for society.

Id. at 39.

“outmoded rehabilitational model for federal criminal sentencing,” and recognized that the efforts of the criminal justice system had failed.¹⁵

The Sentencing Guidelines [hereinafter “guidelines”] were promulgated in an attempt to rectify these disparities and to establish uniformity in the sentencing process. The guidelines cover offenses against the person and offenses involving property; public officials; drugs; criminal enterprises and racketeering; fraud or deceit; prostitution; sexual exploitation of minors; obscenity; individual rights; the administration of justice; public safety; immigration; naturalization; passports; national defense; food; agricultural products; odometer laws; prisons and correctional facilities; the environment; money laundering and monetary transaction reporting; taxation; and antitrust offenses.¹⁶ For each offense, the guidelines dictate the appropriate punishment and the factors for judges to take into consideration in imposing the sentence.

In *Mistretta v. United States*¹⁷ the Supreme Court upheld the constitutionality of the guidelines and the validity of a Congressional infusion of authority into the Sentencing Guidelines Commission. *Minstretta* argued that the establishment and empowerment of the Commission violated the separation of powers principle and that Congress had delegated the excessive power to the Commission.¹⁸ Specifically, *Minstretta* contended that the Commission possessed excessive power and that Congress violated the separation of powers principle by placing the Commission in the Judicial Branch, requiring federal judges to sit on the Commission, and authorizing the President to appoint Commission members.¹⁹ Reasoning that Congress had the constitutional authority to delegate an expert body in the Judicial Branch to formulate sentencing guidelines commiserate with statutorily defined objectives, the Court rejected *Minstretta*’s contentions and upheld the guidelines’ constitutionality and validity.²⁰

15. S. REP. NO. 98-225, 98th Cong., 1st Sess. 49 (1983). The Senate determined that the indeterminate sentencing system has two unjustified and shameful consequences. The first is a great variation among sentences imposed by different judges upon similarly situated offenders. The second is uncertainty as to the time the offender would spend in prison. Each is a serious impediment to an evenhanded and effective operation of the criminal justice system. *Id.* at 38-65.

16. U.S.S.G., Table of Contents.

17. 488 U.S. 361 (1989).

18. *Minstretta*, 488 U.S. at 383.

19. *Id.*

20. *Id.* at 412. Specifically, the Court stated:

We conclude that in creating the Sentencing Commission — an unusual hybrid in structure and authority — Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches. The Constitution’s structural protections do not prohibit Congress from delegating to an expert

Such drastic sentencing reform centered around fundamental assumptions concerning the purposes of the criminal justice system. Congress considered the old "rehabilitational" model outdated and determined it inadequate to handle society's needs.²¹ The guidelines propose that the ultimate aim of the law, and punishment in particular, is the control of crime.²² Beyond this point, the Guidelines Commission adopted a view that fused two different notions concerning the aims of the criminal justice system: (1) the appropriate punishment system should be defined primarily on the basis of the principle of "just deserts," where punishment should be scaled to the offender's culpability and the resulting harms; and (2) punishment should be imposed primarily on the basis of practical "crime control" considerations, imposing sentences which most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.²³

B. The Fine as a Criminal Sanction

The justifications for the use of fines as a criminal deterrent differ slightly from the aforementioned objectives. Fines are unequivocally punitive and are designed to deter, which is a significant attraction now that the treatment and rehabilitational ideals have fallen from grace.²⁴ Congress subscribes to the notion that sentencing decisions should be designed to ensure that prison resources are, first and foremost, reserved for those violent and serious criminal offenders who pose the most dangerous threat to society.²⁵ For nonviolent and less serious offenders, Congress has determined that the interests of society as a whole, as well as individual victims of crime, can continue to be served through the imposition of alternative sentences, such as restitution and community

body located within the Judicial Branch the intricate task of formulating sentencing guidelines consistent with such significant statutory direction as is present here. Nor does our system of checked and balanced authority prohibit Congress from calling upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges. Accordingly, we hold the act is constitutional.

Id.

21. The Legislative History of the Comprehensive Crime Control Act of 1984 stated: the rehabilitation model is not an appropriate basis for sentencing decisions. We know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated.

Act of Oct. 11, 1984, Pub. L. No. 98-473, 1984 U.S.C.C.A.N. (98 Stat.) 40.

22. *Introduction to U.S.S.G. Ch. 1, Pt.A.*

23. *Id.*

24. Rod Morgan & Roger Bowles, *Fines: The Case for Review*, 1981 CRIM. L. REV. 203, 203-214.

25. ARTHUR W. CAMPBELL, LAW OF SENTENCING § 3.1 (2d ed. 1991) (citing 18 U.S.C.S. § 3551 ("Sense of the Statute")).

service.²⁶ The widespread use of fines in the United States has been attributed to the belief that they serve a dual purpose, deterring criminal behavior while simultaneously helping to finance the court system.²⁷

There are, however, constitutional limitations on the imposition of fines. These limitations arise chiefly from attempts to assess fines against indigent offenders who must not be sentenced to longer than maximum terms because of financial inability to pay the fine, thereby violating their right to equal protection.²⁸ Finally, as a rule, the courts cannot use community property to satisfy criminal fines or costs incurred by the co-owner unless the property itself was connected to the crime.²⁹

While it may appear that Congress believes the Sentencing Commission will promulgate guidelines which ameliorate the criminal justice system, section 5E1.2(i)³⁰ has created discord among the courts and disagreements over its validity and application. Section 5E1.2 imposes fines on individuals as an alternative order of disposition.³¹

26. *Id.*

27. *Id.*

28. *Id.* at § 3.2.

29. *Id.*

30. Section 5E1.2(i) reads:

Notwithstanding of the provisions of subsection (c) of this section, but subject to the provisions of subsection (f) herein, the court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered.

U.S.S.G. § 5E1.2(i). Subsection (c) of section 5E1.2 articulates the possible maximum and minimum fines for different offense levels, which vary from \$100 to \$250,000 unless the statute which the defendant violated allows for a the imposition of a fine in excess of \$250,000. Subsection (f) provides:

If the defendant establishes that (1) he is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by the preceding provisions, or (2) imposition of a fine would unduly burden the defendant's dependents, the court may impose a lesser fine or waive the fine. In these circumstances, the court shall consider alternative sanctions in lieu of all or a portion of the fine, and must still impose a total combined sanction that is punitive. Although any additional sanction not proscribed by the guidelines is permissible, community service is the generally preferable alternative in such instances.

U.S.S.G. § 5E1.2(f).

31. Section 5E1.2 has been amended and changed since the Guidelines were first introduced in 1987. Note that in amending the section, the Commission consistently attempts to simplify the guideline and insure that it is consistent with Congressional statutes.

The 1988 amendments deleted a section that provided for fines not to exceed \$250,000 for commission of a felony or misdemeanor that resulted in the loss of human life; \$25,000 for any other misdemeanor; or \$1,000 for an infraction. 18 U.S.C. § 3571(b)(1). U.S.S.G. App. C. n.54 (1988). The section was replaced by one which placed the applicable fines within the ranges specified in subsection (c), notwithstanding the fines provided in subsections (f) and (i). *Id.*

The Commission made these changes in an effort to "make the guideline consistent with 18 U.S.C. § 3571, as amended; to clarify the Commentary; and to correct clerical errors in the guideline and Commentary." *Id.* In 1989, section 5E4.1's commentary captioned "background" was amended

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The section articulates the possible fines and factors for the sentencing judge to consider when imposing them. Section 5E1.2(i) reads that the amount of the fine should always be sufficient to ensure that the fine, taken together with other sanctions, is punitive.³²

A "Commentary" section accompanies the guidelines and is designed to assist judges in interpreting the various sections.³³ The particular

by deleting "See S. REP. NO. 225, 98th Cong., 1st Sess. 95-96." and inserting "see 18 U.S.C. § 3563(b)(3) as amended by Section 7110 Pub. L. No. 100-690 (1988)." This change occurred because the Commission wanted to replace a reference to legislative history with a citation to a revised statute. U.S.S.G. App. C. n.279 (1989). This statute, section 7110 of the Anti-Drug Abuse Act of 1988, confirms the authority of a sentencing court to impose restitution as a condition of probation. *Id.* Effective November 1, 1989, section 5E4.2 was renumbered 5E1.2. *United States v. Rafferty*, 911 F.2d 227, 232 n.8 (9th Cir. 1990). This was done "in an effort to correct a clerical error." U.S.S.G. App. C. n.302 (1990). In 1990, section 5E1.2(a) was amended with an addition to the application notes that stated:

Where it is readily ascertainable that the defendant cannot, and is not likely to become able to, pay a fine greater than the maximum fine set forth in Column B of the Fine Table in subsection (c)(3), calculation of the alternative maximum fines under subsections (c)(2)(B) [twice the gross pecuniary loss caused by the offense] and (c)(2)(C) [three times the gross pecuniary gain to all participants in the offense] is unnecessary [T]he determination of the fine guideline range may be dispensed with entirely upon a court determination of present and future inability to pay any fine. The inability of a defendant to post bail bond and the fact that a defendant is represented by assigned counsel are significant indicators of present inability to pay any fine. In conjunction with other factors, they may also indicate that the defendant is not likely to become able to pay any fine.

55 Fed. Reg. 89, 19205 (1990) (to be codified at U.S.S.G. § 5E1.2). Finally, in 1991, the Commission made an addition to the application notes, asserting that "for most defendants, the maximum of the guideline fine range from subsection (c) will be at least twice the amount of gain or loss resulting from the offense." U.S.S.G. App. C. n.384 (1991). The Commission qualified this, however, by stating that "two times either the amount of gain to the defendant or the amount of loss caused by the offense exceeds the maximum of the fine guideline, an upward departure from the fine guideline may be warranted." *Id.* Furthermore, the Commission stated that if the fine dictated by the guideline range was insufficient to ensure disgorgement of any gain from the offense and an adequate punitive fine, then a greater fine may be warranted. *Id.* This amendment was created to simplify the operation of this guideline and conserve probation and court resources by eliminating the need for the determination of loss and gain under this section in most cases. *Id.* No amendments were made in 1992.

32. U.S.S.G. § 5E1.2(e).

33. In *United States v. Anderson*, 942 F.2d 606 (9th Cir. 1991), the court assessed both the authority of the "Commentary" which accompanies the guidelines and the method sentencing judges should use in construing the instructions articulated therein. The court held:

the commentary is entitled to considerable weight, more so than ordinary legislative history, in interpreting the guidelines Because the commentary is printed along-side the guidelines, if a court ignores the commentary and interprets the guideline in a way inconsistent with the commentary, and the inconsistency is readily apparent to the defendant and anyone else who is aware of the decision. In that case, even if the court explains its reason for ignoring the commentary, the sentence may appear arbitrary or unfair. Because the commentary cannot be treated as equivalent to the guidelines themselves but also cannot be treated merely as legislative history . . . the courts shall

commentary, which supports section 5E1.2(i), articulates that in making the determination as to the amount of any fine to be imposed under this provision, the court may be guided by average cost reports published by the Bureau of Prisons and the Administrative Office of the United States Courts.³⁴ The Commission also publishes a GUIDELINE TRAINER'S MANUAL³⁵ to train sentencing judges on the appropriate application of the guidelines. At present, the cost to the defendant for each month of incarceration and for each month of supervised release is roughly \$1500 and \$115.00, respectively.³⁶ The fine provisions of the guidelines are codified, in part, at 18 U.S.C. §§ 3551, 3553, 3556, 3671-3574 (1993).³⁷

(1) consider the guideline and commentary together and (2) construe them so as to be consistent, if possible, with each other and with the part as a whole. If it is not possible to construe them consistently, the court should (3) apply the text of the guideline.

Anderson, 942 F.2d at 612-14.

34. U.S.S.G. § 5E1.2, comment, n.7.

35. This manual instructs the judge:

Guidelines require that a fine be paid in every case except where the defendant establishes an inability to pay or payment of a fine would place an undue burden on the defendant's dependents For guidance in determining the cost of imprisonment and supervision, the Federal Bureau of Prisons and the Administrative Office of the U.S. Courts have provided average monthly costs figures. As of March 1, 1989, the costs are \$1221/month for imprisonment, \$920/month for community confinement, \$83.33/month for probation or supervised release. Calculation of these costs is not possible until the court determines the length of imprisonment and supervision. Once the costs of imprisonment and supervision have been determined, the additional fine is added to the fine amount from the fine range.

U.S. SENTENCING COMMISSION, GUIDELINE TRAINER'S MANUAL 33 (1989).

36. *United States v. Bogan*, 788 F. Supp. 433, 438 (N.D. Cal. 1992). See also *United States v. Orena*, 1994 U.S. App. LEXIS 21898, *37 (2d Cir. 1994) (listing cost of incarceration at \$1,492.00 per month); *United States v. Connell*, 6 F.3d 27, 28 (1st Cir. 1993) (listing cost of incarceration at \$1415.56 per month); *United States v. Favorito*, 5 F.3d 1338, 1340 (9th Cir. 1993) (listing cost of incarceration at roughly \$1500.00 per month).

37. 18 U.S.C. §§ 3553, 3572 provide, in pertinent part:

[a] Factors to be considered in imposing a sentence include]

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed to (A) reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . .

18 U.S.C. § 3553 (1993)

[factors to consider in imposing a fine include]

(1) the ability of the defendant to pay the fine in view of the defendant's income, earning capacity, and financial resources and, if the defendant is an organization, the size of the organization;

(2) the nature and burden that the payment of the fine will impose on the defendant, relative to the burden which alternative punishments would impose;

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Even though the guidelines establish sentencing parameters which judges are instructed to follow, the Commission intended to permit "sensible flexibility" from the guidelines in appropriate cases.³⁸ However, a sentencing court may not depart from the guidelines on the basis of a factor adequately considered by the Sentencing Commission.³⁹ A judge may depart from the close-hewn parameters of the guidelines when idiosyncratic circumstances warrant individualization of a sentence.⁴⁰

Moreover, a district court is statutorily authorized to depart from a guideline range if it finds an aggravating or mitigating circumstance of a kind, or to a degree, not adequately considered by the Sentencing Commission in formulating the guidelines.⁴¹ The United States Court of Appeals for the Ninth Circuit requires the district court to do more than merely list the aggravating circumstances. The sentencing judge must also specifically find that the aggravating circumstances were not adequately taken into consideration by the Sentencing Commission in formulating the guideline.⁴²

District courts may not depart upward from the applicable Sentencing Guideline range without first notifying the parties.⁴³ Furthermore, the United States Supreme Court requires a district court to provide notice of its intent *sua sponte* to depart upward from the applicable guideline range.⁴⁴ In reaching this conclusion, the Supreme Court reasoned that the textual and contextual evidence of legislative

(3) any restitution or reparation made by the defendant to the victim of the offense, and any obligation imposed upon the defendant to make such restitution or reparation to the victim of the offense . . .

(5) any other pertinent equitable consideration.

18 U.S.C. §§ 3572 (1993).

38. *United States v. Landaw*, 733 F. Supp. 1256, 1260 (N.D. Ind. 1990) (citing *United States v. Jordan*, 890 F.2d 968, 972 (7th Cir. 1989)).

39. *Id.* (citing *United States v. Bolden*, 889 F.2d 1336 (4th Cir. 1989)).

40. *Id.* (citing *United States v. Aguilar-Pena*, 887 F.2d 347, 349 (1st Cir. 1989)). In the United States Court of Appeals for the First Circuit, the defendant may not appeal a district court's discretionary refusal to depart downward from an applicable guideline range. *United States v. Lombardi*, 5 F.3d 568, 571 (1st Cir. 1993) (citing *United States v. Lauzon*, 938 F.2d 326, 330 (1st Cir.), *cert. denied*, 112 S. Ct. 450 (1991)).

41. *United States v. Gray*, 1993 U.S. App. LEXIS 15229, *3 (9th Cir. 1994) (citing 18 U.S.C. § 3553(b)).

42. *Id.* at *5.

43. *Burns v. United States*, 111 S. Ct. 2182, 2183 (1991).

44. *Id.* at 2184. In reaching its decision, the court noted that several other circuits require the district courts to provide notice of their intent to depart upward. *Id.* at 2184 (citing *United States v. Palta*, 880 F.2d 636, 640 (2d Cir. 1989); *United States v. Nuno-Para*, 877 F.2d 1409, 1415 (9th Cir. 1989); *United States v. Otero*, 868 F.2d 1412, 1415 (5th Cir. 1989)).

intent indicated Congress, in enacting the Sentencing Reform Act, did not intend district courts to depart from the guidelines *sua sponte* without first affording notice to the parties.⁴⁵

III. Comparison of Courts: Differences Among the Circuit Courts of Appeal in the Application of § 5E1.2(i)

The idea of ordering criminal defendants to pay the costs of their incarceration has generated controversy among federal courts. Specifically, circuit courts demonstrate differing views on how to properly apply section 5E1.2(i). This part will focus on the differing views among the federal courts on the following issues: (a) the aims of the criminal justice system; (b) the standard of review for reviewing sentences imposed under the guidelines; (c) the use of the accompanying "Commentary" Section; (d) whether the courts must mandatorily impose incarceration fines; (e) whether the general purpose of section 5E1.2(i) is punitive or rehabilitative; (f) the role that a defendant's "ability to pay" plays in the imposition of the fine; (g) the treatment of indigent defendants under section 5E1.2(i); (h) who bears the burden of proving "inability to pay;" (i) the use of the presentence report; and (j) the factors to be considered in imposing the sentence and the specificity with which judges must explain their decision making process in imposing the fine.

A. *Aims of the Criminal Justice System*

Federal Circuit Courts of Appeal espouse differing views concerning the aims of the criminal justice system and the role of fines in achieving that objective. The United States Court of Appeals for the Third Circuit has held that the guidelines authorize the assessment of a fine to pay for victim compensation and restitution.⁴⁶ Additionally, the court added that the imposition of fines for victim compensation and restitution are a justified means of effectuating the statutory goal of restitution.⁴⁷ The Third Circuit believes that courts should look to achieve restitution in imposing fines against defendants for "any pecuniary loss inflicted upon others as a result of the offense."⁴⁸ The Third Circuit expresses the view that fines should serve the criminal justice system's goal of restitution.

The United States Court of Appeals for the Tenth Circuit does not hold the Third Circuit view that restitution should be made for a

45. *Id.* at 2186.

46. *United States v. Spiropoulos*, 976 F.2d 155, 166 (3d Cir. 1992).

47. *Id.*

48. *Id.* (citing 18 U.S.C. § 3572(a)(3)).

defendant's crime⁴⁹ and not for the costs of imprisonment. The Tenth Circuit has held that the federal government has a fundamental interest in appropriately punishing persons, rich and poor, who violate federal criminal statutes.⁵⁰ The Tenth Circuit believes the criminal justice system can serve to punish, deter or spare the taxpayers substantial expense, and has noted that the fines imposed must be punitive.⁵¹ The United States Court of Appeals for the Fifth Circuit has reasoned that criminals impose a dual financial cost upon society — both the price of their imprisonment and the expense of trying to alleviate some of the personal cost inflicted upon their victims — and believes that fines serve a rational purpose in an effective criminal justice system.⁵²

The United States Court of Appeals for the Ninth Circuit has articulated that, of the desiderata advanced by Congress for criminal sentences — just punishment, deterrence, incapacitation, and rehabilitation — incarceration directly fosters only the goal of incapacitation.⁵³ The Ninth Circuit bases its position on the notion that rehabilitation is more efficacious outside prisons, which appear to be breeding grounds for criminality; and, thus fines are a more desirable form of punishment than incarceration.⁵⁴ In specifically discussing fines, the Ninth Circuit admits that fines would not deter certain crimes and thus would be inappropriate, especially where the probability of detection and conviction approaches zero or the cost to the victim approaches infinity.⁵⁵ But where feasible, the Ninth Circuit believes fines represent a more desirable form of punishment because they avoid the deadweight loss to society, unlike incarceration where the taxpayers are saddled with the considerable cost of imprisonment and whatever productive endeavor the defendant might otherwise undertake is lost.⁵⁶

49. *Id.* at 168.

50. *United States v. Doyan*, 909 F.2d 412, 416 (10th Cir. 1990) (citations omitted).

51. *Id.* at 414-16.

52. *United States v. Haggmann*, 950 F.2d 175, 187 (5th Cir. 1991), *cert. denied*, 113 S.Ct. 108 (1992).

53. *United States v. Bogan*, 788 F. Supp. 433, 436 (N.D. Cal. 1992) (stating that deterrence can often be achieved as well by a fine if set at appropriate levels).

54. *Id.*

55. *Id.*

56. *Id.* In *Bogan*, the court noted that incarceration did nothing to compensate the victims of crimes while fines, on the other hand, required criminals to repay society for the harm they inflict on both their immediate victims and the commonwealth, presently a less costly form of punishment to society. *Id.*

B. Standard of Review

Federal courts have cited differing language to elaborate on the appropriate standard of review applied in reviewing sentences imposed under the guidelines.⁵⁷ While all circuit courts review under the clearly erroneous standard, some circuits apply additional standards to their review.

The United States Court of Appeals for the District of Columbia Circuit reviews sentences imposed under the guidelines for "a reversible error;"⁵⁸ and, guideline departures will be reversed only if the underlying factual finding is clearly erroneous.⁵⁹ On the other hand, on an appeal concerning the grouping rules of the Sentencing Guidelines, the United States Court of Appeals for the First Circuit exercised plenary review over issues of law.⁶⁰ In that same decision, however, the court reaffirmed the sentencing judge's restitution order because the "district court did not abuse its considerable discretion."⁶¹ Moreover, in reviewing the assessment of a § 5E1.2(i) fine, the First Circuit refused to overturn the sanction because it did not amount to "plain error."⁶²

In addition to reviewing the sentence under the clearly erroneous standard, the United States Court of Appeals for the Fifth Circuit examined the sentence to ascertain if it was imposed in violation of law

57. Congress has statutorily defined the standard of review for United States Circuit Courts of Appeal in 18 U.S.C. § 3742, which states in pertinent part:

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence —

- (1) was imposed in violation of law;
- (2) was imposed as a result of an incorrect application of the sentencing guidelines;
- (3) is outside the applicable guideline range, and is unreasonable, having regard for (A) the factors to be considered in imposing a sentence, as set forth in Chapter 227 of this title; and (B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or
- (4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous, and shall give due deference to the district court's application of the guidelines to the facts.

18 U.S.C. § 3742(e) (1992).

58. *United States v. Mastropiero*, 931 F.2d 905, 906 (D.C. Cir. 1991).

59. *United States v. Burns*, 893 F.2d 1343, 1345-46 (D.C. Cir. 1990); *rev'd on other grounds*, 111 S. Ct. 2182 (1991).

60. *United States v. Lombardi*, 5 F.3d 568, 569 (1st Cir. 1993).

61. *Id.* at 573.

62. *United States v. Carrozza*, 4 F.2d 70, 84 (1st Cir. 1994).

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as a result of a misapplication of the Sentencing Guidelines, or if it was outside of the guideline range and was unreasonable.⁶³ In this jurisdiction, a defendant may not raise on an appeal [to complain about fines] a matter not first presented to the trial court absent showing a mistake so blatant and fundamental as to constitute a miscarriage of justice.⁶⁴ The United States Court of Appeals for the Seventh Circuit applies all the Fifth Circuit's standards and recognizes that section 3742(e) of Title 18 of the United States Code⁶⁵ requires courts of appeal to give due regard to the district courts' credibility determinations, accept the district courts' findings of fact unless they are clearly erroneous, and defer to the district courts' application of the guidelines to the facts.⁶⁶

The United States Court of Appeals for the Ninth Circuit has held that, in conjuncture with the clearly erroneous standard, the court of appeals shall review the district court's interpretation of the Sentencing Guidelines *de novo*.⁶⁷

Joining the Ninth Circuit in this departure, the United States Court of Appeals for the Tenth Circuit reviews the district court's choice of the guideline fine range *de novo*.⁶⁸ The Tenth Circuit also reviews the imposition of a fine for abuse of discretion,⁶⁹ and has even reviewed the district court's application of the Sentencing Guidelines according to a

63. *United States v. Fair*, 979 F.2d 1037, 1040 (5th Cir. 1992) (citing 18 U.S.C. § 3742(e) (Supp. 1992)) which codifies the appropriate standard of review for sentences imposed under the guidelines).

64. *United States v. Francies*, 945 F.2d 851, 852 (5th Cir. 1991) (citing *United States v. Brunson*, 915 F.2d 942 (5th Cir. 1990)).

65. *See supra* note 56.

66. *United States v. Blackman*, 950 F.2d 420, 424 (7th Cir. 1991) (citing *United States v. Armond*, 920 F.2d 480, 481 (7th Cir. 1990); *United States v. Durrive*, 902 F.2d 1221, 1230 (7th Cir. 1990)).

67. *United States v. Ferrin*, 994 F.2d 658, 662 (9th Cir. 1993) (citing *United States v. Robinson*, 967 F.2d 287, 293 (9th Cir. 1992)). The *Ferrin* court further articulated that it reviews the trial court's findings of fact "unless we are left with a definite and firm conviction that a mistake has been committed." *Id.* (citing *United States v. Ramos*, 923 F.2d 1346, 1356 (9th Cir. 1991)). *See also* *United States v. Robinson*, 20 F.3d 1030, 1033 (9th Cir. 1994) (reviewing a district court's factual findings in the sentencing phase for clear error) (citing *United States v. Chapnick*, 963 F.2d 224, 226 (9th Cir. 1992)); *United States v. Favorito*, 5 F.3d 1338, 1340 (9th Cir. 1993) (reviewing *de novo* both the district court's interpretation of the Guidelines and its application of the guidelines).

68. *United States v. Washington-Williams*, 945 F.2d 325, 326 (10th Cir. 1991) (citing *Doyan*, 909 F.2d at 414).

69. *Id.*

“due deference” standard.⁷⁰ Thus, circuit courts of appeal do not apply an accepted standard of review.

C. Commentary Sections

Circuit courts of appeal also differ in their attitudes on the authority contained in the “Commentary” sections, which accompany the guidelines.⁷¹ The Commission designed the “Commentary” section to assist sentencing judges in applying the guidelines. All circuits agree that when the commentary is consistent with the guideline, then the former should receive great consideration, supporting the proposition that the commentary is more of an accurate reflection of Congressional intent than ordinary legislative history.⁷² The courts also view the commentary as essential in correctly and uniformly applying the guidelines because it reflects the intent of the Sentencing Commission.⁷³ The courts’ analysis begins with the language of the guideline, which is to be followed, in absence of express contrary intent, or if it is clear and unambiguous. Furthermore, when the guideline is unclear in light of other guidelines, the commentary sheds light on the meaning.⁷⁴

70. *Doyan*, 909 F.2d at 414. The Supreme Court has noticed a “potential for legal error peculiar to the proceedings under the Sentencing Reform Act of 1984 in the provision that ‘an aggravating or mitigating fact may justify departure from the otherwise applicable guideline range if that factual circumstance is not adequately reflected in the range chosen by the Commission.’” *Burns v. United States*, 111 S.Ct. 2182, 2194 (1991) (Souter, J., dissenting). In his dissent, Justice Souter reasoned that “because such an issue of adequate reflection goes essentially to the Commission’s intentions, it has uniformly, and I believe correctly, been treated as an issue of law subject to customary appellate review.” *Id.* In analyzing the circuits, Justice Souter noted, “every circuit except the Fifth has explicitly held . . . that ‘plenary’ or ‘de novo’ review is appropriate . . . the Fifth Circuit has held that departure will be affirmed when the reasons for departure are ‘acceptable.’” *Id.* at n. 6 (citations omitted).

71. The Commentary that accompanies the guideline sections serves (1) to interpret the guideline or explain how it is applied; (2) to suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines; and (3) to provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline. U.S.S.G. § 1B1.7. Failure to follow such commentary would constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. *Id.* See 18 U.S.C. § 3742. The Commentary is to be treated as the legal equivalent of a policy statement, and, as with a policy statement, the Commentary may provide guidance in assessing the reasonableness of any departure from the guidelines. *Id.*

72. *United States v. Anderson*, 942 F.2d 606, 613 (9th Cir. 1991) (citing *United States v. Gierley*, 922 F.2d 1061, 1066 (3d Cir. 1990)).

73. *United States v. Smith*, 900 F.2d 1442, 1446-47 (10th Cir. 1990).

74. *Id.* In addition to the Third, Ninth and Tenth Circuits, the following circuits have adopted similar views: *United States v. DeCicco*, 899 F.2d 1531, 1535-37 (7th Cir. 1990) (reading the introductory commentary, background commentary, and application notes together to ascertain the intent of commission); *United States v. Smeathers*, 884 F.2d 363, 364 (8th Cir. 1989) (commentary accompanying each section of the guidelines reflects the intent of Commission, and Commission’s instruction of determining how guidelines are to be applied cannot be disregarded). See *Anderson*,

The United States Court of Appeals for the Fifth Circuit has held that the Sentencing Commission's commentary to the guidelines must be given controlling weight by courts unless the commentary is violative of the Constitution or federal statute, or plainly erroneous or inconsistent with the guidelines themselves.⁷⁵

However, discord exists among the circuits regarding the proper treatment of the commentary when it does not coincide, and cannot be construed with the guidelines.⁷⁶ In this instance, most circuits believe the text of the guidelines must prevail.⁷⁷ However, the United States Court of Appeals for the Third Circuit has held the application notes and commentary in higher esteem, and has applied the application note in lieu of the guideline when the two are inconsistent.⁷⁸

D. Fine is a Mandatory Sanction

Section 5E1.2(i) provides that "notwithstanding the provisions of subsection (c) of this section . . . the court shall impose an additional fine that is at least sufficient to pay [for imprisonment costs]."⁷⁹ Subsection (c) articulates the minimum and maximum fine ranges for corresponding offense levels. Subsection (a) articulates that the court shall impose a fine in all cases, and subsection (b) reads that, except as provided in subsection (f) and subsection (i), the fine shall be within the range specified in (c).⁸⁰ Circuit courts espouse differing views over whether

942 F.2d at 613, which cites the aforementioned cases.

75. *United States v. McCaskey*, 9 F.3d 368, 373 (5th Cir. 1993) (citing *Stinson v. United States*, 113 S. Ct. 1913, 1919-1920 (1993)).

76. *Anderson*, 942 F.2d at 613.

77. *Id.* See *Lombardi*, 5 F.3d at 570 (finding that introductory commentary is only background; the subsections of the guideline control); *United States v. Williams*, 922 F.2d 737, 740 n.4 (11th Cir.) (stating that commentary does not have force of law, but serves as aid in interpreting guidelines provision as legal equivalent of policy statement, or as equivalent of legislative history), *cert. denied*, 112 S.Ct. 258 (1991); *Smith*, 900 F.2d at 1446 ("as with statutory interpretations, our analysis must begin with the language of the guidelines in question. In absence of express contrary intent, we must follow the clear and unambiguous language of the guidelines"); *United States v. Bogas*, 920 F.2d 363, 368 (6th Cir. 1990) ("nothing in the manual suggests that the express command of a guideline section may be countermanded by the commentary"); *Brunson*, 882 F.2d at 157 (finding that if interpretation of commentary would conflict with the guideline itself, the guideline prevails); *United States v. Pinto*, 875 F.2d 143, 144 (7th Cir. 1989) (holding that application notes are not formally binding text and text would be followed over note in event of conflict). Finally, it is interesting to note that the United States Court of Appeals for the Ninth Circuit has interpreted the *Anderson* decision as stating that the courts are obligated to consider this commentary in construing the guidelines. *Ferrin*, 994 F.2d at 663 (citing *Anderson*, 942 F.2d at 606).

78. See *United States v. Ofchinick*, 877 F.2d 251, 257 (3d Cir. 1989).

79. U.S.S.G. § 5E1.2(i).

80. See U.S.S.G. § 5E1.2.

the court may impose a subsection (i) fine absent ordering a subsection (c) punitive sanction.

The United States Court of Appeals for the First Circuit regards the fine imposed under § 5E1.2(i) as an additional fine that is instituted only in conjunction with the punitive fine imposed under § 5E1.2(a).⁸¹

The United States Court of Appeals for the Tenth Circuit has explicitly held that the "additional fine" under section 5E1.2(i) may not be imposed unless the court first imposes a punitive fine under section 5E1.2(a).⁸² The court found inconsistent the government's policy of waiving the punitive fine in subsection (c) because of the defendant's indigency while continuing to levy the cost of imprisonment pursuant to subsection (i); the court reasoned that, if the defendant is indigent for the purposes of one fine, he must be indigent for the purposes of the other.⁸³ The Tenth Circuit found that "fundamental semantics dictates that a subparagraph (i) fine cannot be 'additional' unless it augments another fine."⁸⁴

Similar reasoning was adopted by the United States Court of Appeals for the Fifth Circuit, which held that the plain language of section 5E1.2 indicates that a cost of incarceration fine should only be imposed after a punitive fine has been assessed because the fundamental semantics dictate that a subparagraph (i) fine cannot be "additional" unless it augments another fine.⁸⁵ The Fifth Circuit found that the imposition of a cost of incarceration fine, § 5E1.2(i), is not proper absent an initial punitive fine, § 5E1.2(a), and that the imposition of a cost of recovery fine alone is a misapplication of the Sentencing Guidelines.⁸⁶

The United States Court of Appeals for the Seventh Circuit critiqued the view espoused by the Tenth Circuit. The Seventh Circuit has held that an "additional fine" doubtlessly means that the judge must add two numbers together, but zero is a number; "there is no semantic inconsistency in treating section 5E1.2(i) as a command to add the costs of incarceration to whatever fine the court imposes under section 5E1.2(c), including a fine of zero, which is authorized by that subsection."⁸⁷ The Seventh Circuit justified this conclusion by stating that courts ought not read the guidelines in a way that makes the

81. *United States v. Brandon*, 17 F.3d 409, 461 (1st Cir. 1994) (citing *United States v. Corral*, 964 F.2d 83, 84 (1st Cir. 1992)).

82. *United States v. Labat*, 915 F.2d 603, 607 (10th Cir. 1990).

83. *Id.* at 606-607.

84. *Labat*, 915 F.2d at 607.

85. *Fair*, 979 F.2d at 1042 (citing *Labat*, 915 F.2d at 607).

86. *Id.* See also *Corral*, 964 F.2d at 84.

87. *United States v. Turner*, 998 F.2d 534, 537-38 (7th Cir.), *cert. denied*, 114 S.Ct. 639 (1993).

Sentencing Commission look foolish. The Seventh Circuit considered it folly to create a rule under which imposing a fine of \$1 from the table compels the court to add a fine measured by the costs of incarceration, while imposing a fine of \$0 from the table forbids the court to add a fine measured by the costs of incarceration.⁸⁸ The court concluded that this all or nothing approach would exclude all intermediate fines, for no apparent reason.⁸⁹

In resolving this issue, the United States Court of Appeals for the Ninth Circuit looked to the arguments espoused by the First, Fifth, Seventh, and Tenth Circuits and adopted the Seventh Circuit's reading of § 5E1.2.⁹⁰ The Ninth Circuit found § 5E1.2 is properly read to give the sentencing court discretion to calculate a total fine amount, based on both fine provisions, and then to reduce, waive, or stretch out payment of the fine according to the defendant's ability to pay.⁹¹

After examining the same cases from the First, Fifth, and Tenth Circuits, the United States Court of Appeals for the Eleventh Circuit concluded the following: "Section 5E1.2(i)'s plain language imposing costs of imprisonment and supervision as an additional fine amount supports the holding of the courts in the First, Fifth, and Tenth Circuits that such an additional fine may not be imposed unless a fine pursuant to § 5E1.2(a) is also imposed."⁹² In reaching its conclusion, the Eleventh Circuit neither discussed nor distinguished the opposite position taken by the Seventh and Ninth Circuits on this issue.

88. *Id.*

89. *Id.* Support for this position can clearly be gleaned from the U. S. Sentencing Commission's *Guideline Trainer's Manual*, which states that "once the costs of imprisonment and supervision have been determined, the additional fine amount is added to the fine amount from the fine range." U.S. SENTENCING COMMISSION, GUIDELINE TRAINERS MANUAL 33 (1989). Furthermore, the Fifth Circuit has articulated:

In developing the appropriate mechanism by which the proper fine in a given case is calculated, the Commission developed a two — level system: the court must first look to the fine table to determine the initial range and then complete its calculation by looking to the cost of imprisonment. Indeed, § 5E1.2(b) makes specific reference to the fine table and informs the sentencing court that both provisions are applicable. Together, these calculations comprise the Commission's effort to realize § 3553(a)(2)'s goals.

Hagmann, 950 F.2d at 186 (5th Cir. 1991). *See supra* note 37.

90. *Favorito*, 5 F.3d at 1340 (*Turner*, 998 F.2d at 537-538; *Fair*, 979 F.2d at 1042; *Corral*, 964 F.2d at 84; *Labat*, 915 F.2d at 607). The *Favorito* court specifically adopted the decision in *Turner*. *Id.* *See also Robinson*, 20 F.3d at 1034 (citing *Favorito* with approval for the proposition that the district court may impose a cost of incarceration fine without separately imposing a punitive fine as well).

91. *Id.*

92. *United States v. Norman*, 3 F.3d 368, 369 (11th Cir. 1993).

E. General Purpose of Section 5E1.2(i)

The United States Circuit Courts of Appeal hold different views concerning the general purpose of section 5E1.2(i) and its effectiveness as an aid to the administration of criminal justice.⁹³ The Court of Appeals for the District of Columbia found that section 5E1.2(i) constitutes an undoubtedly heavy burden for each defendant and that this burden was to be expected given its punitive purpose.⁹⁴ Justifying this conclusion, the court looked at the guideline itself which states that the amount of the fine should always be sufficient to insure that the fine, taken together with other sanctions imposed, is punitive.⁹⁵ The United States Court of Appeals for the Tenth Circuit also views the fine as an effective punitive measure.⁹⁶ The United States Court of Appeals for the Seventh Circuit found restitution to be the norm and stated that judges who fail to order full restitution must make explicit findings.⁹⁷ The United States Court of Appeals for the Third Circuit has gone so far as to say that authorizing the assessment of a fine to pay for the costs of a defendant's imprisonment does nothing to deter criminal conduct, to protect the public from further crimes of the defendant, or to help rehabilitate the defendant.⁹⁸ The Third Circuit concluded that restitution

93. The U.S. Sentencing Commission's *Guideline Trainer's Manual* articulates that the purpose of the fine range (§ 5E1.2(c)) shall be:

4. Purposes of the fine range (differs for minimum and maximum):

a. Purpose of the minimum:

(1) at the very least, defendant will not have financially profited from criminal activity;

(2) in many instances the minimum provides some level of punishment and deterrence.

b. Purpose of the maximum: to provide the court with sufficient flexibility to impose a more severe financial punishment when deemed appropriate.

U.S. SENTENCING COMMISSION, *GUIDELINE TRAINERS MANUAL* 30 (1989). This section of the comment, however, deals with the purpose of the fine imposed pursuant to section 5E1.2(i). Furthermore, the act's legislative history illustrates that Congress intended that the fine levels were "designed to establish an effective scale for pecuniary punishment and deterrence that will reflect current economic realities [with] penalties for organizations are set at higher levels than those for individuals." Act of Oct. 11, 1984, Pub. L. No. 98-473, 1984 U.S.C.C.A.N. (98 Stat.) 105-106. This was established to help materially penalize and deter white collar crime and other crimes committed for high profit. *Id.*

94. *Mastropierro*, 931 F.2d at 907.

95. *Id.* The court also found that the judge was required, in setting the fine, to consider the need for the combined sentence to reflect the seriousness of the offense (including the harm or loss to the victim and the gain to the defendant) to promote respect for the law, to provide just punishment, and to afford adequate deterrence. *Id.* (citing U.S.S.G §§ 5E1.2(e), 5E1.2(d)(1)).

96. *See Doyan*, 909 F.2d at 415.

97. *United States v. Ahmad*, 2 F.3d 245, 246 (7th Cir. 1993) (citing 18 U.S.C. § 3553(c)).

98. *Spiropoulos*, 976 F.2d at 165.

and victim compensation were legitimate aims of the criminal system which section 5E1.2(i) failed to achieve.⁹⁹

Taking a different position, the United States Court of Appeals for the Fifth Circuit found the uniform practice of fining criminals on the basis of their individual terms of imprisonment to be both an indicator of the actual harm each has inflicted upon society and rational means to assist the victims of crime collectively.¹⁰⁰ The Fifth Circuit adheres to the notion that the clearly enunciated purpose of the fine is punitive.¹⁰¹ This view has also been enunciated by the United States Court of Appeals for the Eighth Circuit, which has recognized that the district court is controlled by the guidelines and must impose sentences that punish and deter.¹⁰²

F. Role of Defendant's "Ability To Pay"

Section 5E1.2(i) states that when a defendant cannot reimburse the government for the costs of incarceration, the court may either waive the fine or prepare alternative arrangements.¹⁰³ This "ability to pay" issue questions the effectiveness of section 5E1.2(i) — if a defendant cannot pay, what is the point of statutorily imposing the cost of confinement?

The federal courts have discussed the issue generally and give considerable weight to the defendant's ability to pay the fine in imposing the sanction. The United States Court of Appeals for the Ninth Circuit has held that the imposition of both fines, punitive and incarceration costs, is subject to the defendant's ability to pay.¹⁰⁴ In the Ninth Circuit, the district court must consider the ability of the defendant to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources.¹⁰⁵ This circuit has also established that courts may impose a fine contingent upon the defendant's ability to pay at either the time of sentencing or release from prison.¹⁰⁶ The Ninth Circuit also notes that the Sentencing Guidelines distinguish current ability to pay from future ability to pay, introduce an additional factor of the burden to dependents, and require consideration of

99. *Id.* at 165-66.

100. *Hagmann*, 950 F.2d at 187.

101. *United States v. Matovsky*, 935 F.2d 719, 723 (5th Cir. 1991).

102. *United States v. Walker*, 900 F.2d 1201, 1206 (8th Cir. 1990).

103. U.S.S.G. § 5E1.2(f). *See supra* note 30.

104. *United States v. Rafferty*, 911 F.2d 227, 232 (9th Cir. 1990).

105. *United States v. Seminole*, 882 F.2d 441, 443 (9th Cir. 1989).

106. *Bogan*, 788 F. Supp. at 437. *See also Robinson*, 20 F.3d at 1035 (remanding defendants sentence and holding that, if defendants established future inability to pay fines, the district court cannot impose a cost of incarceration fine).

alternatives.¹⁰⁷ This jurisdiction believes the court may not simply waive a fine because of the defendant's present or future inability to pay or the burden on his or her dependents, but the district court must consider alternative sanctions to ensure a total combined sanction that is punitive.¹⁰⁸ The Ninth Circuit reads the guidelines to prohibit an upward departure based on a particular defendant's ability to pay a greater fine.¹⁰⁹

The Ninth Circuit has also addressed the issue of when the district court must determine the defendant's ability to pay the fine. The court found implicit in § 5E1.2(a)'s command to impose a fine unless the defendant establishes present and likely future inability to pay is the requirement that the district court decide whether the defendant has established these facts *before* imposing any fine.¹¹⁰ However, the United States Court of Appeals for the Eighth Circuit has determined that basing the fine on the defendant's flagrant abuse of the law was not appropriate; and, the district court must consider the defendant's ability to pay, in light of his earning capacity and the burden the fine places on the defendant.¹¹¹

G. Indigent Defendants

Section 5E1.2(i) empowers the court to either waive the fine or impose alternative sanctions if the defendant cannot pay.¹¹² Naturally, indigent defendants cannot reimburse the government for the costs of their incarceration. However, the United States Circuit Courts of Appeal cannot agree on whether courts should automatically waive the fine for indigent defendants. An additional issue, which becomes salient in this analysis, is whether the court must mandatorily impose the fine. The language of the guideline itself suggests that a fine must be imposed. Section 5E1.2(i) states that the court "*shall* impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment."¹¹³ The use of "*shall*" connotes that the fine must be imposed. Yet, subsection (i) shall be employed "*notwithstanding* the

107. *Id.*

108. *Id.* at 438.

109. *United States v. Gray*, 1994 U.S. App. LEXIS 15229, at *4 (9th Cir. 1994) (citing 28 U.S.C. § 994(d); U.S.S.G. § 5H1.10).

110. *Robinson*, 20 F.3d at 1034 (emphasis in original).

111. *Walker*, 900 F.2d at 1206. *See also United States v. Seligsohn*, 981 F.2d 1418 (3d Cir. 1992) (in determining restitution award, court must consider ability to pay and designate recipients of restitution).

112. *See supra* note 30.

113. U.S.S.G. § 5E1.2(i) (emphasis supplied).

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provisions of subsection (c) but *subject to* the provisions of subsection (f).”¹¹⁴ Thus, the fine should be imposed notwithstanding the fact that the court will order a punitive fine against the defendant, but subject to the defendant’s ability to pay.¹¹⁵

The United States Court of Appeals for the Ninth Circuit recognizes that the guidelines require the court to impose a fine unless the defendant establishes an inability to pay.¹¹⁶ The Ninth Circuit also holds that the guidelines do not permit the substitution of community service for a fine.¹¹⁷ The United States Court of Appeals for the Fifth Circuit finds the cost-recovery assessment mandatory unless the defendant shows the court that the assessment should be lowered or waived.¹¹⁸ The Seventh Circuit holds that the use of the word “shall” in the statute makes the fine mandatory.¹¹⁹ The view espoused by United States Court of Appeals in the Fourth Circuit takes a milder approach. The Circuit views the requirement of the incarceration cost fine as expressly made subject to the court’s discretionary authority to reduce or waive.¹²⁰

Considerable disagreement exists among the circuit courts over the threshold issue of whether courts should automatically waive the fine for indigent defendants. The statute’s legislative history suggests that non-wealthy defendants may still be fined because the law permits installment payments to ease the burden on the defendant.¹²¹ Furthermore, the

114. *Id.* (emphasis supplied).

115. Incidentally, the U.S. Sentencing Commission’s *Guideline Trainer’s Manual* does not carry the same “mandatory” language and states that an additional fine “is to be imposed.” U.S. SENTENCING COMMISSION, GUIDELINE TRAINER’S MANUAL 33 (1989) (emphasis supplied).

116. *Rafferty*, 911 F.2d at 232.

117. *Ferrin*, 994 F.2d at 664. This circuit has also read the Guidelines to provide that any punishment imposed in place of the fine, such as community service, is an *alternative* sanction that must be imposed *in lieu* of all or a portion of a fine; community service cannot be imposed as a fall back punishment to be served if the defendant cannot later pay the fine. *Robinson*, 20 F.3d at 1035 (citing U.S.S.G. § 5E1.2(f)) (emphasis in original).

118. *Francies*, 945 F.2d at 852. The Tenth Circuit takes an equally stringent approach. *See Doyan*, 909 F.2d at 414 (stating that sections 5E1.2(e) and 5E1.2(i) together mandate a punitive fine that is at least sufficient to cover the costs of the defendant’s incarceration and supervision, subject to the provisions of section 5E1.2(f)).

119. *Ahmad*, 2 F.3d at 248 (citing *Ferrin*, 994 F.2d at 665-66).

120. *United States v. Gresham*, 964 F.2d 1426, 1427 n.2 (4th Cir. 1992). *See also United States v. Gates*, 777 F. Supp. 1294, 1295 (E.D. Va. 1991) (holding the guidelines clearly state that the court “shall” impose an additional fine amount comprising the costs of imprisonment and supervised release, and federal statutes make it clear that it is within the court’s discretion to impose on the defendant the costs of prosecution and to direct the defendant to pay his court-appointed attorney’s fees where the court finds that defendant has become financially able to do so) (emphasis in original) (citing U.S.S.G. § 5E1.2(i); 28 U.S.C. § 1918(b); 18 U.S.C. § 3006A(c), (f)).

121. Act of Oct. 11, 1984, Pub. L. No. 98-473, 1984 U.S.C.C.A.N. (98 Stat.) 108. Congress considered, in setting the fine levels, that:

language of the guideline itself, in stating that the court "may" waive the fine, does not insinuate that the court "must" waive the fine for indigent defendants.

The United States Court of Appeals for the First Circuit has held that a district court may not impose a duty to pay for the costs of incarceration or supervised release if the defendant is indigent for purposes of a fine under the Sentencing Guidelines section 5E1.2(a).¹²² This refusal to fine indigent defendants encompasses both the punitive fine under § 5E1.2(a) and the incarceration fine under § 5E1.2(i).¹²³ The First Circuit does not, however, apply the same requirements to restitution. While the court may not impose a § 5E1.2(i) fine on indigent defendants, the First Circuit has refused to extend the same prohibition to restitution orders.¹²⁴ The First Circuit reasoned that "the district court's determination of indigency under U.S.S.G. § 5E1.2(a) is independent of and does not affect its ruling on restitution . . . in the case of restitution, a separate statutory scheme has been established which includes its own independent consideration of defendant's ability to pay."¹²⁵ The United States Court of Appeals for the Eleventh Circuit has also followed this position. The Eleventh Circuit forbids district court's to impose the costs of incarceration or supervised release if the defendant is indigent for purposes of a fine under § 5E1.2(a).¹²⁶

The Tenth Circuit takes a completely different position from the First Circuit, concluding the statute mandated only consideration of indigency in framing a restitution award,¹²⁷ and establishing that

While it is not intended that a fine for a solvent individual be so high as to force him into a lifetime of poverty, if a defendant is wealthy and the court finds that a high fine is necessary to serve the purposes of sentencing, it should not be reluctant to sentence the defendant to pay a high fine. On the other hand, the court need not avoid the use of a sentence to pay a fine against an individual who is not wealthy since the bill would permit installment payments of a fine. In some cases, the most appropriate sentence might be, for example, the payment of a fairly substantial fine in installments of a specified amount out of each pay check over a period of time.

Id.

122. *Corral*, 964 F.2d at 84. In reaching this conclusion, the court reasoned that if a defendant cannot pay a punitive fine, there is no basis for expecting that he will be able to pay for the expense of supervised release; thus imposition of the sanction would be meaningless and result in unnecessary record keeping. *Id.* See also *United States v. Landaw*, 733 F. Supp. 1256, 1264 (N.D. Ind. 1990) (not imposing a fine because defendant cannot, and will not likely be able to, pay the fine for the costs of imprisonment).

123. *Brandon*, 17 F.3d at 461.

124. *Id.*

125. *Id.* (citing 18 U.S.C. § 3664).

126. *Norman*, 3 F.3d at 369 (citing *Corral*, 964 F.2d at 84 and noting *Corral's* reliance on *Labat*).

127. *Doyan*, 909 F.2d at 415 (citing *United States v. Sunrhodes*, 831 F.2d 1537, 1546 (10th Cir.

indigency is not a bar to either restitution or a separate fine levied to repay the government for the costs of incarcerating the defendant.¹²⁸ In reaching this decision, the Tenth Circuit noted that section 5E1.2(f) requires the court to *consider* alternative sanctions and gives the court the *option* to reduce or waive the fine in light of the defendant's financial hardship.¹²⁹ The court also found sentencing judges obliged to consider the defendant's financial status and possible alternative sanctions; however, it found the guidelines devoid of an obligation on the part of the sentencing judge to tailor the fine to the defendant's ability to pay.¹³⁰

This view is also adopted by the Seventh Circuit which does not permit a defendant's inability to pay to justify a lower fine or the use of installments.¹³¹ The Seventh Circuit similarly reasons that 18 U.S.C. § 3664(a) does not require the district court to find that the defendant can pay, but rather only requires that the judge consider a defendant's ability to pay.¹³²

In line with the Seventh Circuit's position, the United States Court of Appeals for the Fifth Circuit has determined that, at the time restitution is ordered, a defendant's indigency does not bar the requirement of restitution.¹³³ The United States Court of Appeals for the Second Circuit holds an analogous view, believing that financial obligations may be imposed upon a defendant who is indigent at the time of sentencing but subsequently acquires the means to discharge the obligations.¹³⁴ Similarly, the United States Court of Appeals for the Ninth Circuit has noted that district courts may "impose a fine upon even an indigent defendant if it finds that the defendant has sufficient earning capacity to pay the fine following his release from prison."¹³⁵

H. Burden of Proof

The court must find that the defendant cannot pay the fine before electing to waive the sanction. Circuit courts hold two distinct views on

1987)).

128. *Id.*

129. *Id.* at 414 (emphasis in original).

130. *Id.* at 415. The *Doyan* court rejected defendant's argument that judicial discretion is limited by the requirement that a court impose a fine based on the defendant's ability to pay. *Id.* See also *Gresham*, 964 F.2d at 1429 n.6.

131. *Ahmad*, 2 F.3d at 247.

132. *Id.* at 246.

133. *Hagmann*, 950 F.2d at 185-86 (citing *United States v. Ryan*, 874 F.2d 1052, 1054 (5th Cir. 1989)).

134. *United States v. Brown*, 744 F.2d 905, 911 (2d Cir.), *cert. denied*, 469 U.S. 1089 (1984).

135. *Favorito*, 5 F.3d at 1339 (citing *Seminole*, 882 F.2d at 443).

this issue. Some courts support the proposition that once the defendant raises the issue and contends that the fine cannot be paid, the burden then shifts to the government to prove otherwise. Other courts hold the view that the fine to cover the costs of imprisonment is mandatory and must be imposed unless the defendant satisfies the burden of proving that he cannot reimburse the government. The guideline reads "the court shall impose a fine in all cases, *except where the defendant establishes* that he is unable to pay and is not likely to become able to pay."¹³⁶ Such language suggests the burden lies on the defendant to prove that the court should not impose the sanction.

In the United States Court of Appeals for the First Circuit, when interpreting the guidelines, the presumption is that a fine will be imposed, and the burden is on the defendant to show that a fine is not warranted.¹³⁷ This view is shared by the United States Court of Appeals for the Second Circuit, which distributes to the defendant the burden of establishing an inability to pay the fine.¹³⁸

The United States Courts of Appeals for the Sixth and Tenth Circuits believe that, while it is true that the district court must consider various factors including the ability to pay and the affect of a fine on dependents, it is equally true that the burden is on the defendant to present evidence concerning these factors to the extent they are not adequately or accurately addressed.¹³⁹

The Fifth Circuit finds it undisputed, in reading section 5E1.2 in its entirety, that the guidelines place the burden of proving an inability to pay a fine squarely on the defendant, and, if the defendant makes such a showing, the court may impose a lesser fine or waive the fine altogether.¹⁴⁰ This Circuit has also articulated that, while the district court must consider certain factors in determining the appropriate fine, the guidelines have placed the burden on the defendant to present evidence of these factors.

The United States Court of Appeals for the Ninth Circuit relies on section 5E1.2(f)¹⁴¹ in determining that the guidelines place the burden on the defendant to prove he is unable to pay a fine and holds that the guidelines require the court to impose a fine unless the defendant

136. U.S.S.G. § 5E1.2(a) (emphasis supplied).

137. *Lombardi*, 5 F.3d at 572 (citing *United States v. Savoie*, 985 F.2d 612 (1st Cir. 1993)).

138. *United States v. Orena*, 1994 U.S. App. LEXIS 21898, *36 (2d Cir. 1994).

139. *Washington-Williams*, 945 F.2d at 327 (citing *United States v. Bradley*, 922 F.2d 1290, 1298 (6th Cir. 1991)).

140. *Fair*, 979 F.2d at 1041 (citing *Hagmann*, 950 F.2d at 185).

141. *See supra* note 30.

establishes an inability to pay.¹⁴² In this Circuit, the defendant must establish by a preponderance of the evidence that he is unlikely to become able to pay the fine in the future.¹⁴³

The United States Court of Appeals for the Tenth Circuit, however, refuses to accept the government's argument that a defendant has the burden of showing an inability to pay the fine when a plethora of evidence exists in a case which clearly establishes an inability to comply with the sanction.¹⁴⁴

I. Presentence Report

In determining a defendant's ability to pay the fine, courts often utilize the information contained in the presentence report. Among the circuits, however, courts are not consistent in their application of the presentence report, with some courts relying more heavily than others on the information it provides. This issue directly relates to the question of who bears the burden of proving an inability to pay a fine because defendants often rely on the presentence report to automatically establish their inability to comply with the sanction.

The Supreme Court of the United States, in examining Rule 32 of the Federal Rules of Criminal Procedure, concluded that the rule contemplated full adversary testing of the issues relevant to the guideline's sentence and mandates that parties be given "an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence."¹⁴⁵

In the United States Court of Appeals for the Fifth Circuit, if the presentence report makes no recommendation concerning the fine and the defendant neither presents evidence on nor objects to the amount of the fine assessed within the guideline range, the defendant may not raise new objections on appeal absent plain error.¹⁴⁶ Yet, the same circuit decided the issue differently on a separate occasion, repealing the section 5E1.2(i) sanction because the trial judge made no findings that supported his

142. *Rafferty*, 911 F.2d at 232.

143. *Robinson*, 20 F.3d at 1035. *Robinson* interpreted the sentencing judge's statement that appellant's had not clearly established their inability to pay fines to mean the district court may have applied a "clear and convincing" standard of proof. This court concluded the appropriate standard in this case would be "preponderance of the evidence." *Id.* at 1033 (citing *United States v. Navarro*, 979 F.2d 786, 788 (9th Cir. 1992)).

144. *Labat*, 915 F.2d at 606.

145. *Burns*, 111 S. Ct. at 2186 (citing FED. R. CRIM. P. 32(a)(1)). See *supra* footnotes 43 & 44 and accompanying text.

146. *Matovsky*, 935 F.2d at 722 (citing *United States v. Smith*, 919 F.2d 123, 124 (10th Cir. 1990)).

departure from the recommendations of the presentence report, pointed to no evidence that differed from the facts contained in the presentence report, and failed to discuss any other evidence concerning the defendant's financial condition.¹⁴⁷ A conflict arose between the two decisions because one sentencing judge imposed the sanction after adopting the presentence report, which did not recommend imposing a fine, and another judge adopted the presentence report, which was also absent a recommendation for a fine. From the decisions, the circuit finally distilled the rule that specific findings are necessary when the court adopts the presentence report's findings, but then departs from the presentence report's recommendation on fines or cost of incarceration.¹⁴⁸

The United States Court of Appeals for the Sixth Circuit takes the straightforward approach and freely empowers the district court to reach a different conclusion than enunciated in the presentence report.¹⁴⁹ Alternatively, the United States Court of Appeals for the Ninth Circuit relies on facts contained in the presentence report as an important factor in determining a defendant's inability to pay fines.¹⁵⁰ Finally, the United States Court of Appeals for the Tenth Circuit allows the presentence report to establish the defendant's burden of proving his inability to pay.¹⁵¹ If the presentence report clearly indicates the defendant's financial incapacity to pay the fine, the burden then shifts to the government to prove otherwise by furnishing evidence to the contrary.¹⁵²

J. Factors to Consider in Imposing the Sanction

Section 5E1.2(d) articulates various factors that the sentencing judge should consider in imposing the sanction.¹⁵³ Congress intended

147. *United States v. Pattan*, 931 F.2d 1035, 1044 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 2308 (1992).

148. *Fair*, 979 F.2d at 1041.

149. *United States v. Hopper*, 941 F.2d 419, 423 (6th Cir. 1991).

150. *Robinson*, 20 F.2d at 1033 (citing *United States v. Schubert*, 957 F.2d 694, 697 (9th Cir. 1992)).

151. *Labat*, 915 F.2d at 606.

152. *Id.*

153. Section 5E1.2(d) states:

in determining the amount of the fine, the court shall consider:

(1) the need for the combined sentence to reflect the seriousness of the offense (including the harm or loss to the victim and the gain to the defendant), to promote respect for the law, to provide just punishment, and to afford adequate deterrence;

(2) any evidence presented as to the defendant's ability to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources;

sentencing judges to consider these and all other relevant factors relating to the defendant before imposing the fine, and such sanctions should only be imposed after thorough consideration.¹⁵⁴ The guideline itself sends conflicting signals on the issue. The language states that courts “shall consider” the articulated factors.¹⁵⁵ “Shall” carries mandatory implications that courts “must” consider the specified factors, yet the use

- (3) the burden that the fine places on the defendant and his dependents relative to alternative punishments;
- (4) any restitution or reparation that the defendant has made or is obligated to make;
- (5) any collateral consequences of conviction, including civil obligations arising from the defendant’s conduct;
- (6) whether the defendant previously has been fined for a similar offense; and
- (7) any other pertinent equitable considerations.

U.S.S.G. § 5E1.2(d). In the application notes and commentary which follow this section, the Commission states:

3. The determination of the fine guideline range may be dispensed with entirely upon a court determination of present and future inability to pay any fine. The inability of a defendant to post bail bond (having otherwise been determined eligible for release) and the fact that a defendant is represented by (or was determined eligible for) assigned counsel are significant indicators of present inability to pay any fine. In conjunction with other factors, they may also indicate that the defendant is not likely to become able to pay any fine.

U.S.S.G. § 5E1.2, comment, n.3. *See supra* note 37, listing 18 U.S.C. §§ 3553, 3572 (1993), which essentially codify this guideline.

154. The legislative history of the Comprehensive Crime Control Act of 1984 illustrates this Congressional intent:

As in the case with regard to other potential sanctions, the court is required to consider the nature and circumstances of the offense and the history and characteristics of the defendant, the purposes of sentencing with regard to which a fine may be an appropriate response, and the guidelines and any policy statements which may be applicable. Use of the qualifier “to the extent that they are applicable,” in referring to the four stated purposes of sentencing is intended as recognition that a fine may often be a highly useful means of providing just punishment and of deterring others from engaging in like offenses — particularly offenses affording the opportunity for monetary gain — while the other purposes of sentencing would less commonly be served by a sentence to pay a fine.

In considering the characteristics of the defendant, the court is specifically required to consider the ability of the defendant to pay a fine in the amount and the manner contemplated in view of the defendant’s income, earning capacity, and financial resources, and, if the defendant is an organization, the size of the organization. The court is also required to consider the burden the fine will place on the defendant and on his dependents, any payment of restitution by the defendant or any requirement that the defendant make reparation to the victim, the impact of the fine on the future financial stability of the defendant, any effort by an organizational offender to discipline the persons responsible for the offense or ensure against recurrence of the offense, and any other equitable considerations that are pertinent.

Act of Oct. 11, 1984, Pub. L. No. 98-473, 1984 U.S.C.C.A.N. (98 Stat.) 107-108. Finally, the Commission has generally suggested that sentencing judges consider: “(a) purposes of sentencing; (b) ability to make payment and burden on defendant’s dependents; (c) restitution obligations; (d) collateral consequences, (e) prior similar fines; and (f) any other pertinent equitable considerations.” U.S. SENTENCING COMMISSION, GUIDELINE TRAINERS MANUAL 33 (1989).

155. *See supra* note 152.

of “consider”¹⁵⁶ does not necessarily imply that courts must utilize all articulated components.¹⁵⁷

The United States Circuit Courts of Appeal do not agree that sentencing judges are required to completely utilize these considerations in imposing their sentences and employing sanctions. Specifically, courts hold different views on whether the sentencing judge must consider all the listed factors and specifically list the considerations made in determining the sanction.

The United States Court of Appeals for the District of Columbia Circuit holds that the guidelines set forth no requirement that the sentencing court make express findings in setting the amount of the fine; and, the Circuit declined to create such a rule.¹⁵⁸ In this circuit, so long as the sentencing judge considers the ability to pay, the judge is in

156. “Consider” means “to fix the mind on, with a view to careful examination; to examine; to inspect; to deliberate about and ponder over; to entertain or give heed to.” BLACK’S LAW DICTIONARY 306 (6th ed. 1990). This word does not carry “mandatory” implications.

157. Defendant’s fine must be paid immediately, unless the district court provides for payment on a certain date or in installments. *Gresham*, 964 F.2d at 1429. In establishing a defendant’s ability to pay courts have considered the defendant’s representation by assigned counsel as a significant indicator of present inability to pay. *Robinson*, 20 F.3d at 1033 (defining “earning capacity” as “education, experience, job skills, or a combination thereof”). Courts have also noted future earning capacity after incarceration. See *Mastropierro*, 931 F.2d at 907 (finding that even though defendants were without substantial assets or gainful employment and unable to pay fines immediately, because each defendant was a healthy young woman with a high school diploma; additional vocational education; experience in the areas of carpentry, electronics, and waitressing; and had supportive families, courts may impose fine); *Matovsky*, 935 F.2d at 723 (holding that defendant with substantial education and no dependents who will be employable after prison term has ability to pay fine); *Blackman*, 950 F.2d at 425 (concluding that defendant demonstrated capacity to earn wages and pay fine by operating his own used car business after prison term during period of supervised release); *United States v. Ruth*, 946 F.2d 110, 114 (10th Cir. 1991) (determining that defendant’s ability as a “wizard” auto mechanic supplies evidence to support contention defendant’s considerable earning potential for purposes of paying court imposed fine), *cert. denied*, 112 S. Ct. 1189 (1992); *Walker*, 900 F.2d at 1207 (finding that defendant, with a high school education and little job experience, does not have future earning capacity after twenty years of confinement to pay fine).

Additionally, in calculating the fine, courts may freeze defendant’s assets to pay sanctions and consider hidden or unexplained assets. See U.S.S.G. § 5E1.2, comment, n.6 (finding failure to disclose assets may justify the imposition of a larger fine); *Hopper*, 941 F.2d at 423 (holding court may use defendant’s equity in home with his wife as an asset in calculating appropriate fine); *Gresham*, 964 F.2d at 1430 (stating that defendant’s interest as a tenant by entirety is a financial resource that the court may properly consider under section 3572(a)(1) because it is presently a vested interest with value to him, and that a legally imposed fine that is due immediately is not rendered illegal merely because it is not collectible immediately); *United States v. Hays*, 899 F.2d 515 (6th Cir. 1990) (finding that a narcotic’s defendant’s unexplained assets were appropriately considered in setting fine), *cert. denied*, 498 U.S. 958 (1990); *Gates*, 777 F. Supp. at 1295 (in freezing defendant’s assets, court was merely assuring assets available at the time of conviction would remain so until sentencing so court could properly assess costs and fines under sentencing guidelines and applicable statutes).

158. *Mastropierro*, 931 F.2d at 906.

compliance with the guidelines' mandates.¹⁵⁹ "Thus, when the record demonstrates that the judge considered [the] factor before imposing the fine, the appellate court will not reverse the fine merely because the district court did not make an express finding was made."¹⁶⁰ Additionally, the United States Court of Appeals for the Fourth Circuit adopts a similar view to the District of Columbia Circuit that the guidelines do not create an obligation for the sentencing judge to tailor the fine to the defendant's ability to pay.¹⁶¹

The United States Court of Appeals for the First Circuit reads 18 U.S.C. § 3664(a) to merely require the court to *consider* financial conditions, among other factors; and, the Circuit noted that there was no requirement that the defendant be found able to pay at the present time.¹⁶² This Circuit has also held that the district court, in imposing an order of restitution, *must* consider not only the amount of the victim's loss, but also the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.¹⁶³

The United States Court of Appeals for the Fifth Circuit determined that conspicuously absent from subsection 5E1.2(i) is any reference to subsection (d) which requires the court to consider the burden that a punitive fine might impose upon the defendant and his dependents.¹⁶⁴ Noting that the sentencing guidelines do not place a similar requirement on a subsection (i) fine, the circuit has determined that a defendant's observation of the resulting harshness is a matter more appropriately addressed by Congress or the Sentencing Commission.¹⁶⁵ This circuit has rejected a defendant's arguments that the district court failed to consider or to articulate findings regarding the guideline factors when assessing a fine, particularly an ability to pay.¹⁶⁶ The court held that the district court need not make specific findings on the record that demonstrate these factors were considered before the fine was imposed because the guidelines set forth no such requirement.¹⁶⁷ The Fifth Circuit has rejected a defendant's objection to the sanction on the grounds

159. *Id.*

160. *Id.*

161. *Gresham*, 964 F.2d at 1430 at n.6 (citing *Doyan*, 909 F.2d at 415).

162. *Lombardi*, 5 F.3d at 573 (citing *Ahmad*, 2 F.3d at 245).

163. *Brandon*, 17 F.3d at 461 (citing 18 U.S.C. § 3664(a); *Savoie*, 985 F.2d at 618) (emphasis supplied).

164. *Francies*, 945 F.2d at 852. See *supra* notes 30, 152.

165. *Id.*

166. *Matovsky*, 935 F.2d at 722.

167. *Id.* (citing *Mastropierro*, 931 F.2d at 906).

that the record did not reflect that the court had considered the relevant factors or the defendant's ability to pay the fine, stating that one's ability to pay the fine is not the only criteria prescribed by section 3553(a) for determining the amount of the fine.¹⁶⁸ In this particular case, the circuit court noted that the court may factor other considerations into imposing the sanction, such as the need to reflect the seriousness of the offense, the need to provide just punishment for the offense, the need to afford adequate deterrence to criminal conduct, and the kinds of sentences available.¹⁶⁹ Finally, the Fifth Circuit rejects the argument that, because of the mandatory language of section 5E1.2(d), courts must make specific findings showing they properly considered the pertinent factors in determining the fine amount. The court notes that no statutory or sentencing guideline intimates that such detailed findings are necessary exists.¹⁷⁰

Taking a different position, the United States Court of Appeals for the Sixth Circuit has vacated and remanded a fine where the district court failed, as far as the appellate court could determine, to consider the factors, such as defendant's income, his ability to pay, and the effect the fine might have on dependents, required by 18 U.S.C. § 3572 and U.S.S.G. § 5E1.2(d)(3).¹⁷¹ Extending the Sixth Circuit's view, the United States Court of Appeals for the Seventh Circuit rigidly reads 18 U.S.C. §§ 3771, 3572 to require the sentencing judge to consider a number of specified factors before imposing a fine.¹⁷² Taking an equally stringent position, the United States Court of Appeals for the Eighth Circuit finds the language of section 5E1.2(d) mandatory, holding that "the court shall consider" implies the sentencing court must make specific findings on the record that demonstrate these factors were considered before a fine may be imposed.¹⁷³

The Eighth Circuit merely adopted the position taken by the United States Court of Appeals for the Ninth Circuit which reads the guidelines

168. *Hagmann*, 950 F.2d at 185. See *supra* note 37.

169. *Id.*

170. *Fair*, 979 F.2d at 1040. See *supra* note 152. It must be noted that one case in this circuit has declined to adopt the aforementioned positions. In *Pattan*, the Court of Appeals found the sentencing court erred in imposing the fine and not explaining its decision to depart from the presentencing report's recommendation that the fine would impose hardship on the defendant's family. See *Pattan*, 931 F.2d at 1044.

171. *Hopper*, 941 F.2d at 423.

172. *United States v. Masters*, 924 F.2d 1362, 1369 (7th Cir. 1991), *cert. denied*, 111 S. Ct. 2019 (1991). See *supra* note 37.

173. *Walker*, 900 F.2d at 1206. The *Walker* court also recognized, however, that the guidelines also control the district court by directing that the sentence imposed should punish and deter. *Id.* (citing U.S.S.G. § 5E1.2(d)(1)).

to specifically require the district court to consider the ability of the defendant to pay the fine (including ability to pay over a period of time) in light of his earning capacity and financial resources.¹⁷⁴ Thus, the Eighth Circuit reads § 5E1.2(d)(2) as containing an implicit requirement commanding the district court to consider any evidence presented as to the defendant's ability to pay the fine in determining the amount of the fine.¹⁷⁵

The United States Court of Appeals for the Tenth Circuit espouses completely different views on the issue. Rather than requiring express findings, this circuit holds that satisfactory compliance with 5E1.2 merely requires that the record reflect the district court's consideration of the pertinent factors prior to imposing the fine.¹⁷⁶ Moreover, the circuit court notes that the guideline merely requires the court to *consider* alternative sanctions and gives the court the *option* to reduce or waive the fine in light of the defendant's financial hardship.¹⁷⁷ The Tenth Circuit recognizes the court's obligation to consider the defendant's financial status and possible alternative sanctions, but fails to read the guidelines as imposing an obligation to tailor the fine to the defendant's ability to pay.¹⁷⁸

Projecting a different view from the Tenth Circuit, the United States Court of Appeals for the Eleventh Circuit remanded a district court sentence which imposed a fine without an explicit discussion of 5E1.2 factors that might justify the fine.¹⁷⁹

IV. Evaluation of Circuit Courts of Appeal's Application of § 5E1.2(i)

In enacting the Sentencing Guidelines, Congress intended for sentencing legislation to contain a comprehensive and consistent statement of the federal law of sentencing setting forth the sentencing system and a clear statement of the kinds and lengths of sentences available for federal offenders.¹⁸⁰ Given the different positions held by the courts on the aforementioned issues, has Congress achieved its desired purpose?

174. *Seminole*, 882 F.2d at 443 (citing U.S.S.G. § 5E1.2(d)(2)).

175. *Robinson*, 20 F.3d at 1034 (emphasis supplied).

176. *Washington-Williams*, 945 F.2d at 328.

177. *Doyan*, 909 F.2d at 414 (emphasis in original).

178. *Id.* at 415. See also *United States v. Granados*, 962 F.2d 767, 774 (8th Cir. 1992) (stating that a court must make specific findings concerning defendant's ability to pay); *United States v. Demes*, 941 F.2d 220, 224 (3d Cir. 1991) (reversing a district court decision because district court failed to make finding as to defendant's ability to pay), *cert. denied*, 112 S. Ct. 399 (1991); *United States v. Nez*, 945 F.2d 341, 343 (10th Cir. 1991) (finding no plain error in sentencing court's failure to make explicit findings to support imposition of fines).

179. See *United States v. Paskett*, 950 F.2d 705, 709 (11th Cir. 1992).

180. Act of Oct. 11, 1984, Pub. L. No. 98-473, 1984 U.S.C.C.A.N. (98 Stat.) 39.

While courts may disagree in their application and interpretation of the guidelines, the guidelines still control the unfettered discretion of sentencing judges by offering, at the very least, a consistent set of parameters that courts must follow in formulating sentences. The inconsistencies among the federal court's interpretations of the guidelines illustrated in this Comment do not serve to indict the ability of the Sentencing Guidelines to provide an effective system with which to adjudicate criminal justice. They merely call attention to the discrepancies among circuit courts in interpreting the guidelines.

From the evidence presented by courts in their different applications of the guidelines, the following conclusions should be drawn. The criminal justice system should aim to deter criminal conduct. Restitution to victims presents one objective of the system, but efforts should focus on deterrence and prevention. Furthermore, courts should not impose restitutionary fines to compensate victims without imposing fines to recuperate the costs of incarceration. Finally, the criminal justice system should serve to punish, deter, and spare the taxpayers substantial expense.¹⁸¹

Congress admits that the rehabilitational model is inappropriate and ineffective.¹⁸² Because criminals impose a dual financial cost on society — both the price of their imprisonment and the expense of compensating victims — fines effectively address both of these problems.¹⁸³ Furthermore, fines present a more desirable form of punishment because they avoid the deadweight loss to society of incarceration where the taxpayers are saddled with the considerable cost of keeping the defendant behind bars.¹⁸⁴ Fines imposed on criminals should aim to serve as punitive sanctions which deter criminal conduct.

A close reading of section 5E1.2 should easily mollify the different views among courts in interpreting the guideline. The statute states that the court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine.¹⁸⁵ From this language, courts can conclude the use of "shall" implies that the fine must be imposed in all cases. As used in statutes, contracts, or the like, "shall" is generally imperative or mandatory.¹⁸⁶ The word in ordinary usage means "must" and is

181. *United States v. Doyan*, 909 F.2d 412, 414-16 (10th Cir. 1990).

182. *See supra* note 21 and accompanying text.

183. *United States v. Haggmann*, 950 F.2d 175, 187 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 108 (1992).

184. *United States v. Bogan*, 788 F.2d 433, 436 (N.D. Cal. 1992).

185. U.S.S.G. § 5E1.2(a).

186. BLACK'S LAW DICTIONARY 1375 (6th ed. 1990).

inconsistent with the concept of discretion.¹⁸⁷ Thus, if the guideline articulates that the court shall impose an additional fine amount that is at least sufficient to cover the costs to the government of any imprisonment,¹⁸⁸ then that fine must mandatorily be imposed. The only limitations on the imposition of the fine occur when the defendant establishes an inability to pay the fine. The language in section 5E1.2(a), “where the defendant establishes she is unable to pay the fine,” clearly suggests the defendant bears the burden of proving an inability to pay. Moreover, the commission gives the court the option of waiving the fine in section 5E1.2(f),¹⁸⁹ rather than requiring them to do so.

The use of “consider” diminishes the mandatory connotation of “shall” in section 5E1.2(d). The use of consider implies the courts may use discretion with regard to the factors articulated by the Commission in imposing the fine.¹⁹⁰ Furthermore, the guidelines do not contain any provision which suggests that courts must specifically articulate their findings in imposing the sanction. Courts must consider ability to pay, but need not articulate express findings. Finally, nothing in section 5E1.2(i) indicates that before ordering the defendant to pay the costs of imprisonment, the court must take into account the factors articulated in subsection (d).¹⁹¹ Not only should the fine be imposed “notwithstanding” the imposition of the punitive fine in subsection (c), but the only limitation placed on the incarceration fine can be found in subsection (f) which provides the court with the option of waiving the fine in the event the defendant cannot pay.¹⁹²

V. Constitutionality

While circuit courts have disagreed over various issues concerning the application and interpretation of section 5E1.2(i), no issue has engendered more controversy among the circuits than the constitutionality of 5E1.2(i). In confronting constitutional challenges by defendants, three circuits have upheld the constitutionality and validity of section 5E1.2(i) while only one, the United States Court of Appeals for the Third Circuit, has declared 5E1.2(i) unconstitutional.

187. *Id.*

188. U.S.S.G. § 5E1.2(i).

189. *Doyan*, 909 F.2d at 414. *See supra* note 30.

190. *See supra* note 152.

191. *United States v. Francies*, 945 F.2d 851, 852 (5th Cir. 1991).

192. *See supra* note 30.

In *United States v. Doyan*,¹⁹³ the United States Court of Appeals for the Tenth Circuit rejected the defendant's argument that requiring those convicted and sentenced to pay the costs of their incarceration violates equal protection principles.¹⁹⁴ Specifically, the defendant argued that requiring convicts to pay the costs of confinement amounts to an irrational and arbitrary classification, impermissibly burdening a narrow group of citizens.¹⁹⁵

The court began its analysis by noting that a strong presumption of constitutionality attends a law which has been produced by the solemn prerequisites of Congressional enactment and Presidential approval.¹⁹⁶ Noting that where a federal statute neither abridges a fundamental right, nor imposes a "suspect classification," the court applied a rational basis test to determine whether the statute has a "rational relationship to a legitimate governmental interest."¹⁹⁷ The Tenth Circuit found that rational basis scrutiny was appropriate because the constitutional claim neither implicated a convicted felon's fundamental constitutional right, namely to have the costs of their imprisonment paid by the taxpayer, nor applied to felons in a discriminatory way.¹⁹⁸ Concluding that section 5E1.2(i) bore some rational relationship to the legitimate, fundamental interest the government has in appropriately punishing persons — rich and poor — who violate its criminal laws, the Tenth Circuit upheld the constitutionality of section 5E1.2(i).¹⁹⁹

The United States Court of Appeals for the Fifth Circuit also refused to invalidate section 5E1.2(i). In *United States v. Hagmann*,²⁰⁰ the Fifth Circuit rejected the defendant's arguments that section 5E1.2(i) is contrary to the Sentencing Reform Act's mandate that the guidelines be consistent with the purposes of sentencing set forth in 18 U.S.C.

193. 909 F.2d 412 (10th Cir. 1990).

194. *Id.* at 416. The court inferred from defendant's brief that he sought to invoke the equal protection component of the Due Process Clause of the Fifth Amendment, where, if the federal government classifies individuals in a way which would violate the equal protection clause of the Fourteenth Amendment, it would be held to contravene the Due Process clause of the Fifth Amendment. *Id.* at 415 n.2 (citations omitted).

195. *Id.* at 415.

196. *Id.* at 416 (citations omitted).

197. *United States v. Doyan*, 909 F.2d 412, 416 (10th Cir. 1990) (citing *Vanacter v. Village of South Point*, 717 F. Supp. 1236, 1244 (S.D. Ohio 1989)).

198. *Id.*

199. *Id.* Specifically, the court held "whether the purpose of the fine is to punish, deter, or to spare the taxpayers a substantial expense that has been generated by an intentional criminal act, we cannot say that Guideline § 5E1.2(i) as applied bears no rational relation to the legitimate governmental interest in criminal justice." *Id.*

200. 950 F.2d 175 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 108 (1992).

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§ 3553(a)(2)²⁰¹ because the additional “incarceration-costs” fine under section 5E1.2(i) imposed a punishment that is greater than necessary to satisfy the goals set forth in that statute.²⁰² The defendant also contended that section 5E1.2(i) is irrational and amounts to a deprivation of property without due process of law in violation of the Fifth Amendment.²⁰³

In response to defendant’s argument that the additional fine imposed with the punitive fine constitutes excessive punishment, the court held that while section 5E1.2(b)²⁰⁴ makes specific reference to the fine table [§ 5E1.2(c)] and informs the sentencing court that both provisions are applicable, together, these calculations comprise the Commission’s efforts to realize § 3553(a)(2)’s goals.²⁰⁵ Rejecting the defendant’s constitutional claims, the *Hagmann* court noted due process requires that information must have some minimal indicium of reliability and bear some rational relationship to the decision to impose a particular sentence.²⁰⁶ Because criminals’ terms of imprisonment generally reflect the seriousness of their crimes and the harm inflicted, the court found that the uniform practice of fining criminals on the basis of their individualistic terms of imprisonment provides a rational means to assist the victims of crime collectively.²⁰⁷

201. See *supra* note 37.

202. *United States v. Hagmann*, 950 F.2d 175, 186 (5th Cir. 1991), *cert. denied*, 113 S.Ct. 108 (1992).

203. *Id.* In support of this contention, Defendant also argued that monies collected under § 5E1.2(i) were actually expended on unrelated functions. *Id.* The court noted that monies collected were deposited into a victim’s fund in the United States Treasury, but stated:

the fact that the monies collected on the basis of the costs of imprisoning a given defendant are expended to generally benefit the victims of crime and realize the goals of 18 U.S.C. § 3553(a) snuffs another argument: § 5E1.2(i) is not premised on the legislative intent of having a criminal pay part or all of the cost of his or her own confinement.

Id. at 187 n.29.

204. Section 5E1.2(b) provides that:

Except as provided in subsections (f) and (i) below, or otherwise required by statute, the fine imposed shall be within the range specified in subsection (c) below. If, however, the guideline for the offense in Chapter Two provides a specific rule for imposing a fine, that rule takes precedence over subsection (c) of this section.

U.S.S.G. § 5E1.2(b). See *supra* note 30.

205. *Hagmann*, 950 F.2d at 186.

206. *Id.* at 187 (citing *United States v. Angulo*, 927 F.2d 202, 204 (5th Cir. 1991), *aff’d* 979 F.2d 210 (1992)).

207. *Id.* at 187. Specifically, the *Hagmann* court determined “once convicted, criminals impose a dual financial cost upon society — both the price of their imprisonment and the expense of trying to alleviate some of the personal cost inflicted upon their victims.” *Id.* Thus, criminal’s terms of imprisonment reflect the serious of both their offense and the harm they have inflicted upon society.

The greatest example of discord among the circuit courts flows from the United States Court of Appeals for the Third Circuit, which has taken a unique position among the circuits and proclaimed section 5E1.2(i) unconstitutional. In *United States v. Spiropoulos*,²⁰⁸ the Third Circuit declared imposing a fine based in part on the cost of the defendant's imprisonment inconsistent with 18 U.S.C. §§ 3553, 3572 and violative of due process. Consequently, sentencing judges in the Third Circuit's district courts do not have the authority under section 5E1.2(i) to impose a sanction to cover the costs of the defendant's confinement.

The *Spiropoulos* court invalidated section 5E1.2(i) on various grounds. First, the court inferred that, although the language of 5E1.2(i) suggested otherwise, fines collected under the act do not, in fact, pay for the costs of incarceration.²⁰⁹ Rather, the court found the monies collected from 5E1.2(i) are paid, pursuant to 42 U.S.C.A. § 10601(a) and (b)(1) (West, 1992 Supp.), into the Crime Victims Fund which provides grants to state programs for crime victim compensation, assistance, and restitution.²¹⁰

The Third Circuit concluded that notably absent from both 18 U.S.C. §§ 3553 and 3572²¹¹ was any language which might authorize the assessment of a fine to pay for the costs of a defendant's imprisonment.²¹² Specifically, the court found no specific reference in those statutes to recouping the costs of imprisonment as an appropriate goal of sentencing. Therefore, because recouping the costs of imprisonment has nothing to do with the nature of the seriousness of the offense, it is not authorized under section 3553(a)(1) or section 3553(a)(2)(A).²¹³ Aiding this conclusion, the Third Circuit did not believe that assessing the costs of imprisonment, in addition to other fines, deters criminal conduct, protects the public from further crimes, or helps to rehabilitate the defendant.²¹⁴

208. 976 F.2d 155 (3d Cir. 1992).

209. *United States v. Spiropoulos*, 976 F.2d 155, 164 (3d Cir. 1992).

210. *Id.*

211. *See supra* note 37.

212. *Spiropoulos*, 976 F.2d at 165. The basis of the court's conclusion rested on the fact that these two provisions provided authorization for the Commission's promulgation of section 5E1.2(i). *Id.*

213. *Id.*

214. *Id.* at 165-66 (citing 18 U.S.C.A. §§ 3553(a)(2)(B), (C), and (D)). The court rejected the government's argument that the guideline is consistent with the Act if the Act authorizes courts to consider victim compensation in sentencing defendants by finding:

We have no doubt that the assessment of a fine to pay for victim compensation and victim restitution would be authorized by the Act. The language of the statute itself makes plain the congressional desire to have victim compensation be a part of sentencing . . .

The *Spiropoulos* court expressed doubts over the rationality of section 5E1.2(i), believing the *cost* of a defendant's incarceration bears no apparent relationship to the amount that a particular defendant's victim has been injured.²¹⁵ The court rejected the *Hagmann* position, believing it fails to recognize that, when the purported statutory justification for imposing section 5E1.2(i) fines is restitution, restitution must be the governmental purpose the guideline serves. Because the price of imprisonment is not a purpose of the Act, it is irrelevant in evaluating the constitutionality of the guideline.²¹⁶ The court failed to find that the guideline advanced the restitutionary goals or the punitive or deterrent purposes of the Act. It found that, because Congress did not specifically authorize a section 5E1.2(i) fine, the Commission overstepped its boundaries.²¹⁷ Finally, the *Spiropoulos* court could not accept the proposition that the cost of imprisoning a defendant relates to the amount the defendant has harmed her victims, and the court found such a sanction questionable as an appropriate method of restitution.²¹⁸

The Third Circuit's position on section 5E1.2(i) has only been adopted in that circuit²¹⁹ and was recently criticized in *United States v. Turner*²²⁰ by the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit refuted the notion espoused by the *Spiropoulos* court that sections 3553 and 3572 do not authorize the imposition of a fine by first looking at the language of 28 U.S.C. § 994(c)(3) and (6). In those sections Congress told the Commission to consider "not only the nature and degree of the harm caused by the

[F]ines for victim compensation are justified as a means of effectuating the statutory goal of restitution. Merely finding that restitution and victim compensation are legitimate purposes of the Act does not, however, compel the conclusion that fines assessed under § 5E1.2(i) are authorized by the Act.

Id. at 166.

215. *Spiropoulos*, 976 F.2d at 167 (emphasis in original). The court noted, however, that there was generally a correlation between the amount of time a defendant is incarcerated and the seriousness of her crime as well as between the amount of restitution a defendant owes her victims and the seriousness of the defendant's crime. *Id.*

216. *Id.* at 168. The Third Circuit specifically found, however, that "sparing the taxpayers the cost of imprisonment would likely be a constitutionally permissible governmental purpose, because it is not specifically expressed in 18 U.S.C. §§ 3553, 3572, it should not be considered in determining the constitutionality of § 5E1.2(i)." *Id.*

217. *Id.* at 168-69.

218. *Spiropoulos*, 976 F.2d at 168.

219. See *United States v. Harvey*, 2 F.3d 1318, 1330 (3d Cir. 1993) (noting "we recently held the Sentencing Reform Act does not authorize payment of incarceration costs . . . [w]e explained that [r]ecouping the costs of imprisonment has nothing to do with the nature or the seriousness of the offense and that a fine based on the costs of incarceration was invalid.") (citing *Spiropoulos*, 976 F.2d at 168-69).

220. 998 F.2d 534 (7th Cir.), *cert. denied*, 114 S. Ct. 639 (1993).

offense," but also "the deterrent effect a particular sentence may have on the commission of the offense by others."²²¹ The court then read 18 U.S.C. § 3553(a)(2)(A) and (B), which requires judges to impose sentences that "reflect the seriousness of the offense" and "afford adequate deterrence to criminal conduct."²²² Considering that the guidelines call for longer sentences as the harm caused by the offense rises, the court concluded that the costs of confinement rise with the seriousness of the offense, and the imposition of a fine based on these costs therefore reflects the seriousness of the offense.²²³ The *Turner* court found nothing in either 18 U.S.C. §§ 3553 or § 994 which rejected an approach to deterrence that includes the costs of custody among the considerations that influence the selection of a fine.²²⁴ Assuming that higher fines are more potent deterrents to crime, section 5E1.2(i) therefore heightens the deterrence by increases the fine.²²⁵

The Seventh Circuit could not support the *Spiropoulos* court's determination that section 5E1.2(i) failed the rational basis test. The court concluded the rationality of the approach could not be doubted because, while the costs of incarceration do not precisely reflect social loss and deterrence, the Constitution does not require a close match between the gravity of the offense and the penalty meted out.²²⁶ The *Turner* court also rejected the argument that, because section 5E1.2(i) funds are deposited into a victims of crime fund rather than given to the Bureau of Prisons, they do not serve their intended purpose.²²⁷ To controvert this argument, the court, operating under the established assumption that the function of section 5E1.2(i) is deterrence, concluded that deterrence does not depend on what the government does with the money. It is enough that the offender be deprived of wealth.²²⁸ From

221. 28 U.S.C. § 994(c)(3), (6)(1993).

222. 18 U.S.C. § 3553(a)(2)(A), (B) (1993). See *United States v. Turner*, 998 F.2d 534, 536 (7th Cir.), cert. denied, 114 S. Ct. 639 (1993).

223. *Turner*, 998 F.2d at 536.

224. *Id.* at 536-38.

225. *Id.* Specifically, the *Turner* court considered inapposite the Third Circuit's view that assessing the costs of imprisonment did not deter criminal conduct, holding:

[t]his is the equivalent to asserting that higher fines do not increase deterrence, a proposition that leaves us flabbergasted. The system of penalties under the guidelines is construed on the belief that higher fines and longer sentences of imprisonment are effective deterrents. . . . Guideline § 5E1.2(i) increases the fines imposed on defendants, and therefore increases deterrence.

Id. at 536.

226. *Id.* (citing *Chapman v. United States*, 111 S. Ct. 1919, 1927 (1991)).

227. *Turner*, 998 F.2d at 536-38.

228. *Id.*

a defendant's perspective, the effect is the same if the money goes to victims, the Bureau of Prisons, or an incinerator.²²⁹

The United States Court of Appeals for the Second Circuit also refused to follow the Third Circuit's position. In *United States v. Orena*,²³⁰ the Second Circuit noted the Fifth, Seventh, and Tenth Circuits have reached opposite conclusions from the *Spiropoulos* court and held that the Sentencing Guidelines explicitly authorize the imposition of a fine to cover the costs of incarceration.²³¹ The *Orena* court reasoned that the "defendants must reimburse society for the drain on economic resources cause by their lives of crime and for the high costs of their own necessary imprisonment."²³²

Other Circuits have refused to approach the issue and express agreement or disagreement with the *Spiropoulos* decision. The United States Court of Appeals for the First Circuit left the matter open in *United States v. Carrozza*²³³ and found it inappropriate to answer the question. In that decision, the First Circuit nonetheless viewed the incarceration fine as one "which has divided our sister circuits" and felt compelled to conclude that the district court did not commit plain error in assessing the § 5E1.2(i) fine.²³⁴

The United States Court of Appeals for the Eleventh Circuit also noted the different positions among the Circuits on § 5E1.2(i) in *United States v. Norman*,²³⁵ but the court expressed neither agreement nor disagreement with either position and declined to address the merits of this discord because the defendant did not raise the argument on appeal.²³⁶

VI. Conclusion

Section 5E1.2(i) meets the threshold requirements of constitutionality and courts should consider the section valid. To pierce the strong

229. *Id.*

230. 1994 U.S. App. LEXIS 21898 (2d Cir. 1994).

231. *Id.* at *36 (citing *Turner*, *Hagmann*, and *Doyan* with approval).

232. *Id.* at *35.

233. 4 F.3d 70 (1st Cir. 1993).

234. *Id.* at 83-84 (reviewing *Turner*, *Spiropoulos*, *Hagmann*, and *Doyan*). The First Circuit also refused to resolve the dispute surrounding *Spiropoulos* on two other occasions. See *United States v. Connell*, 6 F.3d 27, 29 (1st Cir. 1993) (examining *Turner*, *Spiropoulos*, and *Hagmann* and failing to resolve the conflict between the two Circuits because the defendant did not properly preserve that issue on appeal); *United States v. Lombardi*, 5 F.3d 568, 572 n.4 (1st Cir. 1993) (noting *Spiropoulos* and *Turner* and refusing to decide between the two). The *Connell* decision interpreted *Carrozza* as "leaving the question open" in the First Circuit. *Connell*, 6 F.3d at 29.

235. 3 F.3d 368 (11th Cir. 1993).

236. *Id.* at 369, n.3.

presumption of constitutionality associated with any law passed by Congress, section 5E1.2(i) must fail to be rationally related to a legitimate government purpose. Courts should conclude that a fine which mandates that defendants shall reimburse the government for the costs of confinement is clearly rationally related to a legitimate government purpose because (1) the length of a defendant's prison sentence is directly related to the harm she inflicts on society; (2) the government has a legitimate interest in deterring criminal conduct; (3) fines provide deterrent effects on criminal activity; and (4) the fine in question will be greater for defendants with longer sentences who have inflicted greater damage to society.

The argument that, because 18 U.S.C. §§ 3553 and 3527 do not specifically articulate that courts shall have the authority to impose this fine, and therefore the Commission has overstepped its boundaries is without merit. 28 U.S.C. § 991 lists, in pertinent part, the purpose of the Sentencing Commission, to "establish sentencing policies and practices for the federal criminal justice system that assure the meeting of the purposes of sentencing as set forth in 18 U.S.C. § 3553 . . . [and] to reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."²³⁷ Notably absent from both 28 U.S.C. § 991 and 18 U.S.C. § 3553 is any language which prohibits the Commission from developing sentencing practices which empower courts to impose a section 5E1.2(i) fine.²³⁸ Because Congress found the source of the previous system's deficiencies rooted in the absence of a comprehensive federal sentencing law, they empowered the Sentencing Commission with the authority to promulgate a uniform sentencing system.²³⁹ Therefore, the guidelines represent the Commission's attempt to comply with Congressional instructions; and, if the guidelines call for the imposition of an additional fine to reimburse the government for the costs of incarceration, this order flows from Congress and equates to law. Furthermore, because fines deter criminal conduct, the fine flows from a knowledge of human behavior as it relates to criminal justice and is, therefore, consistent with 28 U.S.C. § 991.

Finally, Congress created the guidelines to further the basic purposes of criminal punishment; and consequently, they serve as *de facto* statutes. Like statutes, courts look to and are controlled by the guidelines in imposing sentences.²⁴⁰ Because they were indirectly passed by

237. 28 U.S.C. § 991(b)(1)(A), (C) (1993). See *supra* note 10.

238. *United States v. Turner*, 998 F.2d 534, 536 (7th Cir.), *cert. denied*, 114 S. Ct. 639 (1993).

239. See *supra* note 10.

240. See *United States v. Walker*, 900 F.2d 1201, 1206 (8th Cir. 1991).

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Congress does not necessarily imply that courts should afford them less weight than statutes. District courts apply the guidelines in the same fashion as Congressional statutes. Why should the guidelines fail to possess the equivalent sovereignty statutes hold? Seven years of use in federal courts should instill enough precedent in the guidelines so that they may equate, in authority, to statutes. Ultimately, as long as the guidelines are consistent with the statutorily defined objectives, the Commission is within constitutional boundaries.²⁴¹ The Commission constantly amended 5E1.2 so that the guidelines remained commiserate with Congressionally promulgated statutes.²⁴² Nonetheless, should circuit courts decide to follow the Third Circuit's position, Congress should amend 18 U.S.C. §§ 3553 and 3572 to reflect the validity of the policy which requires prisoners to pay for their confinement.²⁴³

Viewing the government's payment of incarceration costs as a "taxable event" engenders an interesting argument in support of section 5E1.2(i). Section 61 of the Internal Revenue Code provides that "gross income means all income from whatever source derived."²⁴⁴ Gross income includes income realized in any form, whether in money, property, or services; income may be realized in the form of services, meals, accommodations, stock, or other property as well as in cash.²⁴⁵ Following this definition, prisoners receive an economic benefit for which they do not pay taxes. Furthermore, pursuant to I.R.C. § 108 (West 1994), the discharge of indebtedness can be perceived as income and considered a taxable event. Prisoners are repaying society for the harm they have inflicted on both their immediate victims and the commonwealth; and they are, therefore, realizing income which should be taxed.²⁴⁶ While these arguments may seem inapposite because incarceration is clearly involuntary, assuming *arguendo* that imprisonment is not entirely involuntary because it flows from the commission of a voluntary criminal act, it can clearly be said that prisoners receive a taxable economic benefit from the government in the form of free

241. *Minstretta v. United States*, 488 U.S. 361, 412 (1989). See *supra* note 20.

242. See *supra* note 31.

243. In *Braxton v. United States*, 500 U.S. 344 (1991), the court examined discord among United States Circuit Courts of Appeal over the interpretation of United States Sentencing Guideline § 1B1.2. The Court noted that in matters concerning federal law apart from the Constitution, the Supreme Court is not the only body which could "eliminate such conflicts [among Circuits], at least as far as their continuation into the future is concerned. Obviously, Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute, and agencies can do the same with respect to the regulations." *Id.* at 348.

244. I.R.C. § 61(a) (West 1994).

245. Treas. Reg. § 1.61-1(a) (1960).

246. See *United States v. Bogan*, 788 F. Supp. 433, 436 (N.D. Cal. 1992).

accommodations.²⁴⁷ If any ordinary taxpayer were to receive the fringe benefits of meals and lodging free of charge, this would constitute income and a taxable event within the confines of section 61 of the Internal Revenue Code. Prisoners should, therefore, reimburse the government for the taxable economic benefit which they receive in exchange for committing voluntary criminal acts.

From a policy standpoint, section 5E1.2(i) makes perfect sense. The defendant, in perpetrating a criminal act, imposes an initial cost to society. In response, society must then pay a second cost, the defendant's imprisonment. Why should American taxpayers, who have a median household income of \$29,943 per year,²⁴⁸ be forced to pay the government monies to incarcerate criminals just to guarantee their own safety? Consequently, taxpayers absorb two costs, the damage of the criminal act and the costs of confining the individual, and furthermore pay monies to the government just to insure their personal safety, i.e. taxes for prison costs. Moreover, incarcerating prisoners requires American taxpayers to pay two rents: one for their own living accommodations and another, in the form of a tax, to lodge prisoners. Section 5E1.2(i) allows taxpayers to split the costs with criminals. The argument that monies collected pursuant to section 5E1.2(i) do not directly pay for prison costs is inapposite. The purpose of section 5E1.2(i) is to deter and punish criminal conduct. Imposing fines on criminal defendants and depriving them of wealth serves both these functions. The aims of section 5E1.2(i) are satisfied once the deprivation of property has occurred. After the money has been taken, where the government specifically spends this money presents an entirely different issue.

While the court may waive the fine if the defendant cannot pay for the costs of incarceration, it appears that in some form or another, every defendant can pay both the government and taxpayers for the cost of her incarceration. All persons are employable in some way or another and have access to at least twelve years of free education. In this time, even basic motor skills are accumulated which may be employed to society's

247. Assuming that an employer/employee relationship exists between the government and prisoners, the costs of incarceration would not fall within fringe benefit exclusion from gross income found in I.R.C. § 132 (West 1994). Incarceration costs may, assuming such a relationship, fall within the meals and lodging furnished for the convenience of the employer exclusion from gross income found in I.R.C. § 119 (West 1994).

248. See Michael Wines, *Voting Yes on Trade Pact is Folly In Rust Belt. Or Is It?*, N.Y. TIMES, Nov. 17, 1993, at A1, A20 (citation omitted). See also John Wagner, *Census Findings: The Northeast*, WASH. POST, July 20, 1992, at A13 (finding the national median household income was \$30,055 in 1989).

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benefit. Work is the essence of a person's identity. It defines how we feel about ourselves and employ our human capital. Ordering community service in return for the court's waiving the incarceration fine would instill rehabilitational values. Each body in jail presents a resource which could work to reimburse the government for prison costs.

Society is a social compact. Members of a society essentially agree to refrain from inflicting harm on each other's person or property. Without this compact, society could not function and utter chaos would result. Once a criminal act violates this compact, the defendant should assume certain responsibilities for his actions. Even those with minimal training and education can procure some employment after prison which will produce wages capable of garnishment. Such continuing loss, even after the prison sentence has been served, punishes reprehensible conduct and deters future violations.

Finally, while "those who are able to pay for their prison costs" do not constitute a constitutionally protected class, section 5E1.2(i) clearly discriminates against those persons who can pay. The court waives the sanction for defendants who cannot pay while those who can must reimburse the government. Rather than criticize section 5E1.2(i) because of this unequal treatment, courts should bring those who cannot pay the fine within the realm of those defendants affected by the guideline. Payment for incarceration need not be in actual cash but may also be furnished in services. Moreover, paying defendants should receive options unavailable to nonpaying defendants.²⁴⁹ This would act as an incentive to promote payment and discourage hidden assets. Nonetheless, it logically flows that the government has no choice but to waive the fine for prisoners who cannot afford to pay and are not likely to become able. Courts should, however, employ all possible alternatives, including community service²⁵⁰ and work projects, to extract this cost from defendants who are not likely to become able to pay.

249. It is interesting to note that in Columbia, leaders of the Medellin drug cartel built their own prisons with cellular phones and fax machines. *World Notes, Life in the Posh Lane*, TIME MAGAZINE, June 10, 1991, at 43. Perhaps the United States should follow this example and allow prisoners who pay for their prison costs to furnish their cells with their own amenities rather than charge the United States taxpayer.

250. See *United States v. Robinson*, 20 F.3d 1030, 1035 (9th Cir. 1994); *United States v. Ferrin*, 994 F.2d 658, 665 (9th Cir. 1993) (holding that guidelines do not permit substitution of community service for a fine). Even though the United States Court of Appeals for the Ninth Circuit has held that the guidelines do not permit the substitution of community service for a fine, defendants who cannot pay have no other alternative means of payment than their human capital. Therefore, community service, or any benefit conferred upon society, which has already absorbed a loss from the defendant's criminal act, should substitute for actual cash payment to reimburse incarceration costs.

For the foregoing reasons, section 5E1.2(i) presents a constitutionally permissible means to deter criminal conduct and ease the harm inflicted on society from criminal acts. While courts may disagree over the proper application and interpretation of the section, the guideline provides an effective tool in the administration and adjudication of criminal justice.

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