



**JUSTICE
COLLECTIVE**

**STRUCTURAL INJUSTICES IN
GERMANY'S DAY FINES SYSTEM**

SEPTEMBER 2021

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AN OVERVIEW OF FINDINGS FROM THE CRIMINAL JUSTICE POLICY PROGRAM AT HARVARD LAW SCHOOL

SEPTEMBER 2021

FOREWORD

From 2018-2019, the Criminal Justice Policy Program at Harvard Law School (CJPP), in partnership with the Institute for Criminology at the University of Cologne, conducted interviews with over 50 judges and prosecutors to learn about how Germany's system of day fines works in practice. At the time of the research, CJPP's goal was to understand whether day fines, a system of proportionate financial sanctions in which criminal legal system fines are set to their economic circumstances, were a model for the US. CJPP released this report in June 2020 critically analyzing whether day fines met their goal of increasing the fairness of fines.

The report identified serious problems with Germany's day fines system that called into question day fines as a reform for the US, and also suggested the need for significant changes to Germany's system. For this reason, the Justice Collective is re-releasing the CJPP report for a German audience, with this new introduction adopted from the report's Executive Summary. Though written for a US audience,

the hope is that this report will inform policy discussions in Germany, where fines make up approximately 85% of all criminal sentences.

The findings are based on in-depth interviews with judges and prosecutors about how day fines work in practice, including how they arrive at the “daily rate”—the amount a person must pay per “day” of punishment and which is supposed to be set according to the person’s financial circumstances. While the law provides some general guidance on how fines should be set, much is left to the court’s discretion, which was why it was so important to hear from judges and prosecutors about how they work. What information about people’s finances do courts have? How do decision makers assess how much someone can afford to pay?

Below is a summary of our assessment of Germany’s system. We discuss three key issues: how ability to pay is defined, how financial information is gathered and used to set the daily rate, and the types of offenses punished with fines. Taken together the findings suggest the need for a drastic rethinking of fines in the German system: Overall day fines punish people for poverty or other social issues that could be solved with non-punitive sanctions, and are imposed in ways that prioritize efficiency at the expense of truly accounting for people’s financial situations.

1. Policies for calculating the daily rate and broad judicial discretion make it so that day fines fail to achieve equality and fairness.

- The extent to which a day fines system achieves tailored, payable fines hinges considerably on policies for calculating the daily rate. This is because the daily rate is the mechanism for tailoring fines to people’s individual financial realities. In Germany, the starting place for calculating the daily rate is a person’s net income, which is their daily take-home pay after common payroll deductions such as income tax and contributions to social security.ⁱ Courts ask how much income a person receives in a month and divide that by 30 days to arrive at net income. Judges and prosecutors may also consider “other relevant assessment factors”ⁱⁱ and the person’s “personal and financial circumstances”ⁱⁱⁱ to increase or decrease net income.

- In practice, German judges usually make a few deductions from net income to arrive at the daily rate, such as a 15% deduction for each child. But these deductions are not standardized and vary greatly depending on the decision maker. Nor are these deductions sufficient. **German law does not require— and judges do not regularly make—deductions for basic living expenses like rent, healthcare, and food. In short, the daily rate in Germany does not fully reflect people’s financial realities.**
- Fine totals are quite high, even in the best-case scenario. A person receiving public benefits totaling 424 euro per month, who could not afford to pay 2.90 euro train fare and therefore evaded the charge, must pay between 35% and 70% of one month’s income as punishment for fare evasion. The wide range is the function of the differences in approach among decision makers: some deduct for rent and other debts, some add on poor people’s non-cash housing subsidies as a source of income, and some give “discounts” to low-income people.
- Evidence suggests that many people fined in Germany are unable to pay their fines. A significant number of people incarcerated for nonpayment in Germany have low incomes or are facing employment insecurity.^{iv}
- **The fact that Germany considers ability to pay, therefore, does not mean that the resulting fines are payable.** Day fines are more likely to achieve greater equality if the jurisdiction’s standards for calculating the daily rate require and guide courts to deduct from people’s net income their reasonable living expenses. For example, if German courts deducted people’s subsistence expenses, recipients of public benefits could be charged only up to 30% of their monthly benefit amount, reserving for themselves the remaining 70%, which is the amount the German government has determined they need for basic living expenses. The daily rate in that case would be between one and five euro (not the more common 10 and 15 euro currently assessed).
- But Germany’s experience also shows that it is not just a harsh daily rate standard that generates fines that are too high. Judges and prosecutors must exercise their discretion to set payable fines. Judges and prosecutors

acknowledge that day fines amounts disproportionately impact people living in poverty who must forego basic necessities to pay fines.^v Yet despite their support for day fines and their understanding of the burden of fines for people with lower incomes, they do not use their discretion to set fines that are affordable for people with lower incomes.

- Our research suggests that too often, **German decision makers assess ability to pay based on a misunderstanding of poverty.** One judge insisted, “no one in Germany has so little money left that they are forced to evade fares.”^{vi} In reality, a large percentage of people sentenced to day fines for fare evasion are poor and are ultimately incarcerated because they cannot pay high fines.^{vii} Several interviewees did not believe that anyone truly could not afford to pay, and they attributed nonpayment to people simply not trying hard enough. One prosecutor commented, “I’ve never seen anyone go to jail [for nonpayment], as long as he’s willing”; another stated, “Well, I always assume that people aren’t stupid enough to go to prison for—yes, nonpayment of a fine. I do assume anyone can manage [paying].” Decision makers’ assessments about what amounts are affordable and their lack of understanding of people’s barriers to payment influence how they approach calculating the daily rate.

2. **Germany’s system to determine a person’s financial resource prioritizes efficiency over accuracy**

- An example. Upon arrest, a person caught for fare evasion in Berlin is asked by the police some basic questions about their financial circumstances. One German state’s police intake form is less than one page long and asks for: the person’s address; partner’s name, address, and occupation; number and ages of children; profession and employer; income at the time of the offense; income at present; and if unemployed, length of unemployment. People often do not know that their answers to police intake questions will eventually be used to set their fine, so they may not provide enough detail.^{viii} For 70% of cases, the information collected on the police intake form at arrest is used to set the fine through what is known as a summary proceeding, in which a case is resolved without a hearing.^{ix} Police and prosecutors do very little additional investigation in summary proceedings.

Based on the person's file, the prosecutor in a fare evasion summary proceeding determines the units and daily rate and calculates the person's day fine. If the form lacks specific numbers and financial details, the prosecutor may estimate the daily rate based on the person's profession. And if that information is not available, the prosecutor may use their own or the jurisdiction's default daily rate amount. Default daily rates, though not specifically sanctioned by German law, are daily rates that decision makers impose in practice when they have no information. The person receives their sentence in the mail, which is enforceable if the person does not object within two weeks.^x

- **German courts process thousands of these low-level cases each day, relying on the summary proceeding process to swiftly move cases from arrest to punishment. Decision makers see fines sentences as less serious, and take procedural shortcuts—and in some cases flout basic procedural protections.**
- While people have the option of appealing their fines by mail or requesting an in-person hearing,^{xi} they are unlikely to know how to navigate such a system, and those who are housing insecure or face other barriers to stability will not have the means to challenge their fines without help. Free public defense is generally not available for these cases.

3. **Day fines are most often used to punish poverty, or otherwise social questions that do not require punitive responses.**

- In Germany, day fines are used to sentence a high volume of low-level cases. Of all the cases sentenced to day fines in 2018, 42% received less than 30 units—suggesting that the severity of the offenses were quite low. Another 49% were sentenced to between 31 and 90 units.^{xii} Two crimes of poverty, fare evasion and low-level theft, accounted for one quarter of Germany's day fines sentences in 2018.^{xiii}
- **Germany should evaluate the purposes of its criminal legal system. For example, criminalizing fare evasion does not solve this problem, it just creates additional problems. Germany should instead work towards solutions that will actually help people access transportation, such as providing fare discounts or free passes. The**

same analysis should be undertaken for other offenses sentenced with fines, many of which are crimes of poverty or —like drug offenses, traffic offenses, and more—warrant solutions outside of the criminal legal system. In part, that fines are supposedly “fair” masks greater injustices in Germany’s system of punishment.

Taken together, the report raises serious questions about Germany’s system of fining. Over the coming months, the Justice Collective will be engaging with German activists, advocates, and others about these problems.

Endotes

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- ii Strafgesetzbuch [StGB] [Criminal Code], § 40.
- iii Strafgesetzbuch [StGB] [Criminal Code], § 40.
- iv Nicole Bögelein, et al., *Bestandsaufnahme der Ersatzfreiheitsstrafe in Mecklenburg-Vorpommern*, 102 *Monatsschrift fürKriminologie und Strafrechtsreform* 282–96 (2019).
- v Interview with prosecutors 2_5, 278–82.
- vi Interview with judges 9_4, 182.
- vii Nicole Bögelein et al., *Vermeidung vonErsatzfreiheitsstrafen: Evaluierung justizieller Haftvermeidungsprojekte in Nordrhein-Westfalen*(2013).
- viii Interview with prosecutors 8_2, 193.
- ix Nicole Bögelein et al., *Vermeidung vonErsatzfreiheitsstrafen: Evaluierung justizieller Haftvermeidungsprojekte in Nordrhein-Westfalen*(2013).
- x Strafprozessordnung [StPO] [Criminal Procedure Code], § 407.
- xi Strafprozessordnung [StPO] [Criminal Procedure Code], § 411.
- xii StatistischesBundesamt (Destatis), Fachserie 10, Reihe 3, Rechtspflege: Strafverfolgung 2018 (2019), https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Strafverfolgung-Strafvollzug/strafverfolgung-2100300187004.pdf?__blob=publicationFile [https://perma.cc/2K45-9GBW].
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The Limits of Fairer Fines: Lessons from Germany

Mitali Nagrecha

About the Criminal Justice Policy Program

The Criminal Justice Policy Program (CJPP) at Harvard Law School conducts research and advocacy to support criminal justice reform. It generates legal and policy analysis designed to serve advocates and policymakers throughout the country, convenes diverse stakeholders to diagnose problems and chart concrete reforms, and collaborates with government agencies to pilot and implement policy initiatives.

For more information, please visit: Criminal Justice Policy Program at Harvard Law School at <http://cjpp.law.harvard.edu>.

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Our research in Germany suggests that a jurisdiction's efforts may, in some cases, be better spent on advocacy that will address structural problems in the misdemeanor system, rather than on trying to right-size misdemeanor sentences using day fines.

Table of Contents

Executive Summary	2
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Introduction	15
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Day Fines in Germany: An Overview of the System 24	Part One: The History of Day Fines in Germany	26
	1. Germany replaced short-term incarceration sentences with fines	26
	2. Germany implemented day fines to reform fine sentences	27
	3. A last minute political compromise resulted in a harsher daily rate standard	29
	4. German day fines laws have remained largely consistent since their original passage	32
	Part Two: Setting Day Fines in Germany	34
	1. Background: Judges' and prosecutors' views on the day fines system	35
	2. Calculating the daily rate	37
	3. Collecting financial information to set the daily rate	54
	4. Setting fine units	60
	5. Calculating the total fine	65
	Part Three: Day Fines in Context	70
	1. Germany sentences most criminal cases to day fines	70
	2. Most day fines offenses are low-level misdemeanors	71
3. Significant numbers of people are imprisoned for failure to pay fines	74	
4. Judges and prosecutors favor day fines because they reduce administrative burdens	75	

Applying Day Fines to the United States 77	Part One: Evaluating Germany's Day Fines System	78
	1. System actors believe in the importance of proportionate fines	80
	2. System actors trust people's testimony about their financial circumstances	81
	3. Germany's practices for calculating the daily rate are inconsistent and result in high fines	82
	4. Court culture thwarts the day fine system's ability to achieve equality	84
	5. German courts fail to provide adequate procedural protections	89
	6. Day fines are used to quickly sentence high volumes of low-level poverty offenses	90
	Part Two: Considerations for Bringing Day Fines to the United States	94
	1. Day fines and ability to pay	97
	2. Day fines within U.S. sentencing structures	101

Conclusion: Decision Guide for Jurisdictions Considering Day Fines	105
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Executive Summary

Over the last few decades, advocates in the United States have exposed the injustices of high fines and fees that courts charge people sentenced to criminal and civil violations. Courts impose fines as punishment for offenses—often in addition to other punishment such as probation or jail—and they charge fees (also referred to as costs or surcharges) to fund the court and other government services. The number of fees and the amounts assessed have been increasing over the last decades,¹ in part because fees are being used to generate revenue for local and state governments.² Rarely, if ever, do U.S. courts consider people’s ability to pay before imposing these sanctions.³ When people are unable to pay, they can become trapped in the system, facing a cycle of consequences including additional fees, court hearings, warrants, arrest, and incarceration.⁴

In response to advocacy exposing how these punitive practices harm people and communities, jurisdictions have begun to reform. The most direct efforts seek to repeal revenue-raising fines and fees. More common, however, is the adoption of requirements that courts assess people’s ability to pay at the sentencing hearing, and/or before punishing people for nonpayment.⁵ Though high monetary sanctions are prevalent in all courts, much of this reform attention has focused on misdemeanor courts that sentence ordinance violations and misdemeanor crimes. This is because fines are a common component of misdemeanor criminal sentences, and because there are clearer conflicts of interest inherent in the structure of some lower level courts that rely on fines and fees to fund their operations.⁶

It is in this reform context that academics, advocates, and government leaders have considered day fines as a potential model for the United States. Day fines are used in over 30 countries in Europe and Latin America to calculate fine amounts that are tailored to people’s ability to pay.⁷ Day fines are set using a two-part inquiry. Courts first consider the nature and seriousness of the offense, measured in units or days. For example, a common low-level

misdemeanor may receive 20 units. Courts then calculate how much the person can pay per day/unit based on their individual financial circumstances. The amount a person must pay per day is called the daily rate. Someone earning very little may be required to pay \$5 per unit for a total fine of \$100, while someone earning more may be required to pay \$20 per unit for a total fine of \$400. Day fines provide a framework for setting a fine based not just on the nature of the offense, but also on how much a fine will impact the person given their financial circumstances. The resulting fines are theoretically more fair because people of different means experience the fines similarly. A \$400 fine affects a person earning that amount per week differently than a person who earns that amount in one day. In the United States, day fines hold the promise not only of making fines more fair, but also of making fines affordable to avoid the spiral of negative consequences that people face upon nonpayment.

Despite the theoretical resonance of day fines as a potential solution, there has been very limited information available about how this model works in practice. This project fills this knowledge gap.

This Project

To understand how day fines are implemented in practice, we chose to study Germany's system. Of the countries that currently use day fines, Germany is one of the largest. It also has a federal system, with different states operating slightly differently. This allowed us to observe some variation in day fines implementation across jurisdictions. We also chose Germany because it relies heavily on day fines in its criminal legal system—in 84% of all criminal sentences, day fines are the sole sanction.⁸ Germany has also been using day fines as a sanction for several decades.⁹

Germany adopted day fines in 1969 because courts were sentencing too many low-level cases to short periods of incarceration.¹⁰ The legislature passed reforms to increase the use of fines, rather than short prison sentences, as the default sentence for most misdemeanors.¹¹ German

lawmakers were concerned, however, that the country's policies for calculating fines were arbitrary.¹² Though the law at the time required consideration of people's financial circumstances in setting fines, there were no standards to guide judges and it was unclear how and to what extent judges tailored fines to income. As Germany expanded its criminal legal system's use of fines, legislators adopted day fines¹³ so that fines could be more equally and transparently assessed.

Over the course of a year, The Criminal Justice Policy Program at Harvard Law School ("CJPP") conducted interviews with over 50 judges and prosecutors in Germany. We asked them how day fines work in practice, including how they arrive at the daily rate and the information they have before them when making that determination. We also asked them about their perspectives on the requirement that they consider ability to pay at sentencing in every case, whether they think the system achieves equality, and what, if any, reforms they would recommend.

Our immersion in a proportionate fines system helped us understand both the benefits and the limitations of reforms centered on right-sizing monetary sanctions. In the United States, many believe that if judges are prompted to consider ability to pay before imposing a fine, then they will set proportionate fines. But our research in Germany revealed that the effectiveness of day fines in reducing the harms of high fines on people with lower incomes varies greatly depending on how the system is structured—the bare-bones requirement to consider a person's ability to pay is not enough. In practice, day fines may do very little to reduce inequities and may even entrench or worsen them absent clear, strong standards for assessing ability to pay. Culture change among system actors so that they will support fairer fines is also critical. Otherwise, practices will likely revert to what judges were accustomed to before reforms were enacted. More fundamentally, our research highlighted how ability-to-pay reforms will not address many of the structural problems in our misdemeanor courts.

An Introduction to Day Fines in Germany: Fare Evasion Prosecutions as a Case Study

Berlin, Germany's capital, is a sprawling city. Commute distances are long, and people with lower incomes rely on public transportation to get around.¹⁴ Over the last several years, Berliners have faced escalating housing costs.¹⁵ People must spend a significant percentage of their incomes on housing, leaving less money for other basic living expenses. It is against this backdrop that Berlin has seen increasing incidents of fare evasion in the city's public transportation system.¹⁶

Subway fares in Berlin are around 2.90 euro per ride. A person caught for fare evasion may, for the first two offenses, receive non-criminal tickets requiring them to pay 60 euro per violation.¹⁷ They may instead be—and as a matter of practice by the third offense, are—prosecuted criminally.¹⁸

Fare evasion in Germany's criminal court is usually punished with day fines. Fare evasion is prosecuted under German Criminal Code Section 265a, under which it can be sentenced to up to one year (or 360 units) of punishment. About half of fare evasion cases receive under 30 units,¹⁹ and in our interviews with judges and prosecutors, we learned from some of them that they assign fare evasion 15–20 units.²⁰ The court then tailors the fine to the person's ability to pay by calculating the daily rate. In Germany, a person receiving public benefits in the amount of 424 euro per month would be assessed a daily rate of between 7²¹ and 20²² euro per unit, with daily rates of 10 and



15 euro being quite common.²³ The units and daily rate are multiplied to arrive at the fine sentence. Thus, under Germany's day fines system, a person who is unable to pay 2.90 euro in transit fare often faces a fine of between 150 and 300 euro.

Germany prosecuted 46,520 cases of fare evasion in 2018, which made up 7% of all fine cases.²⁴ Punishment for fare evasion does not always end with a fine, however, because under Germany's day fines system, the consequence for failing to pay fines is eventually incarceration. In 2016, 7,600 people in Germany ultimately went to prison for failure to pay a fine imposed for fare evasion.²⁵

Summary of CJPP's Findings and Analysis

Below is a summary of our assessment of Germany's system and how the United States might learn from it. We discuss three key issues: how ability to pay is defined, how financial information is gathered and used to set the daily rate, and how day fines might fit into misdemeanor courts.

1. Policies for calculating the daily rate and broad judicial discretion can make it difficult for ability-to-pay reforms such as day fines to achieve equality and fairness.

The extent to which a day fines system achieves tailored, payable fines hinges considerably on the jurisdiction's policies for calculating the daily rate. This is because the daily rate is the mechanism for tailoring fines to people's individual financial realities. The effectiveness of day fines depends on the standards jurisdictions adopt for calculating the daily rate.

- In Germany, the starting place for calculating the daily rate is a person's net income, which is their daily take-home pay after common payroll deductions such as income tax and contributions to social security.²⁶ Courts ask how much income a person receives in a month and divide that by 30 days to arrive at net income. Judges and prosecutors may also

consider “other relevant assessment factors”²⁷ and the person’s “personal and financial circumstances”²⁸ to increase or decrease net income.

- In practice, German judges usually make a few deductions from net income to arrive at the daily rate, such as a 15% deduction for each child.²⁹ But these deductions are not standardized and vary greatly depending on the decision maker. Nor are these deductions sufficient. German law does not require— and judges do not regularly make—deductions for basic living expenses like rent, healthcare, and food. In short, the daily rate in Germany does not fully reflect people’s financial realities.
- As the fare evasion case study illustrates, in absolute terms, German fine totals are quite high, even in the best-case scenario. A person receiving public benefits totaling 424 euro per month, who could not afford to pay 2.90 euro train fare and therefore evaded the charge, must pay between 35% and 70% of one month’s income as punishment. The wide range is the function of the differences in approach among decision makers: some deduct for rent and other debts, some add on poor people’s non-cash housing subsidies as a source of income, and some give “discounts” to low-income people.
- Evidence suggests that many people fined in Germany are unable to pay their fines. A significant number of people incarcerated for nonpayment in Germany have low incomes or are facing employment insecurity.³⁰

The fact that Germany considers ability to pay, therefore, does not guarantee that the resulting fines will be payable. Day fines are more likely to achieve greater equality if the jurisdiction’s standards for calculating the daily rate require and guide courts to deduct from people’s net income their reasonable living expenses. For example, if German courts deducted people’s subsistence expenses, recipients of public benefits could be charged only up to 30% of their monthly benefit amount, reserving for themselves the remaining 70%, which is the amount the German government has determined they need for basic living expenses. The daily rate in that case would be between one and five euro (not the more common 10 and 15 euro currently assessed).



But Germany's experience also shows that it is not just a harsh daily rate standard that generates fines that are too high. Judges and prosecutors must exercise their discretion to set payable fines. Germany's fines are high even though decision makers support day fines and recognize that most people sentenced to fines are lower-income. Judges and prosecutors that we interviewed believe in the necessity of considering ability to pay before sentencing fines. As one interviewee said about day fines: "Everyone . . . is treated the same according to their economic circumstances. That's the beauty of the system."³¹ Judges and prosecutors also acknowledge that day

fines amounts disproportionately impact people living in poverty who must forego basic necessities to pay fines.³² Yet despite their support for day fines and their understanding of the burden of fines for people with lower incomes, they do not use their discretion to set fines that are affordable for people with lower incomes.

Our research suggests two reasons why decision makers fail to exercise their discretion to set lower fines:

- Too often, German decision makers assess ability to pay based on a misunderstanding of poverty. One judge insisted, "no one in Germany has so little money left that they are forced to evade fares."³³ In reality, a large percentage of people sentenced to day fines for fare evasion are poor and are ultimately incarcerated because they cannot pay high fines.³⁴ Several interviewees did not believe that anyone truly could not afford to pay, and they attributed nonpayment to people simply not trying hard enough. One

prosecutor commented, “I’ve never seen anyone go to jail [for nonpayment], as long as he’s willing”³⁵; another stated, “Well, I always assume that people aren’t stupid enough to go to prison for—yes, nonpayment of a fine. . . . I do assume anyone can manage [paying].”³⁶ Decision makers’ assessments about what amounts are affordable and their lack of understanding of people’s barriers to payment influence how they approach calculating the daily rate.

- Germany’s history adopting day fines also illustrates the need for strong institutional support for change or else system actors will revert to past practices. Germany’s weak standards for calculating ability to pay—standards that do not require courts to deduct people’s living expenses—arose out of institutional and political resistance to lowering fines below pre-reform amounts.³⁷ Decision makers and legislators anchored their understanding of fair monetary sanctions to their intuitions about what people could or should pay, which were based on their past practices.

System actors in the United States are just as likely as their German counterparts to be influenced by their misunderstanding of the realities of poverty and the draw of past practice. This creates challenges for the robust adoption and implementation of fairer fines. There are multiple levers by which judges and prosecutors can influence the final fine amount. They can adjust the criminal charges to affect the unit ranges and they can set the number of units via an open-ended inquiry. Both of these decisions will impact the total fine amount. They can also use their discretion when setting the daily rate. Even when the daily rate must be calculated according to a formula or some other specific method, there is still room for individualized determinations by the court. Experience in other countries shows that even after day fines systems are adopted, decision makers often revert back to fine amounts that were imposed before day fines were implemented.³⁸

Jurisdictions in the United States should evaluate whether they can pass a sufficiently robust standard for determining ability to pay, and whether decision makers will change their attitudes and practices with respect to fines. Strong standards and system actor buy-in are necessary for day fines to be

effective. Otherwise, past practices will prevail. A weak daily rate formula or poor implementation that results in unaffordable fines will not accomplish change. Indeed, such half measures could provide a false veneer of reform that could prevent or delay further meaningful changes. In short, decision makers in the United States must be prepared to impose substantially lower fines on people with lower incomes.

In more challenging political or institutional climates, advocates may want to first focus on educating the public and stakeholders about the need for meaningful change, to make sure that any day fines system that is ultimately implemented actually reduces the fines of those who have more limited means. This process of advocacy and education should be in partnership with communities and impacted people to ensure that the realities of living in poverty are adequately understood by advocates and system actors alike.

2. Germany's system provides a model for how to determine a person's financial resources

Germany's day fines system also sheds light on how to fairly assess people's financial situation for purposes of day fines calculation. In Germany, judges rely on people's self-reporting and do not require documentation—a process that can be both accurate and efficient.

In Germany, people are asked about their financial circumstances on a police intake form, and in some cases at trial, and judges and prosecutors in Germany generally trust people to accurately self-report their financial circumstances. Judges rarely demand documentary evidence to support people's self-reported financial circumstances despite having the authority to do so.³⁹ They rely on people's testimony and believe small discrepancies are normal and acceptable.⁴⁰ Some decision makers even suspect that people tend to overestimate their income.⁴¹ Judges explained that most people they interact with have limited financial means and low-wage salaries, and public benefits amounts are generally matters of public knowledge, so misinformation is not

much of a concern.⁴² U.S. courts should trust self-reporting and recognize that they can set accurate fines using this testimony.

While self-reporting does work, Germany's system also reveals the need for procedural protections in obtaining people's financial information. In particular, Germany's policies for setting fines with summary proceedings raise due process concerns.

- Upon arrest, a person caught for fare evasion in Berlin is asked by the police some basic questions about their financial circumstances. One German state's police intake form is less than one page long and asks for: the person's address; partner's name, address, and occupation; number and ages of children; profession and employer; income at the time of the offense; income at present; and if unemployed, length of unemployment. People often do not know that their answers to police intake questions will eventually be used to set their fine, so they may not provide enough detail.⁴³
- For 70% of cases, the information collected on the police intake form at arrest is used to set the fine through what is known as a summary proceeding, in which a case is resolved without a hearing.⁴⁴ Police and prosecutors do very little additional investigation in summary proceedings.
- Based on the person's file, the prosecutor in a fare evasion summary proceeding determines the units and daily rate and calculates the person's day fine. If the form lacks specific numbers and financial details, the prosecutor may estimate the daily rate based on the person's profession. And if that information is not available, the prosecutor may use their own or the jurisdiction's default daily rate amount. Default daily rates, though not specifically sanctioned by German law, are daily rates that decision makers impose in practice when they have no information. The person receives their sentence in the mail, which is enforceable if the person does not object within two weeks.⁴⁵
- While people have the option of appealing their fines by mail or requesting an in-person hearing,⁴⁶ they are unlikely to know how to navigate such

a system, and those who are housing insecure or face other barriers to stability will not have the means to challenge their fines without help. Free public defense is generally not available for these cases.

Germany's model for obtaining financial information at trial is a better starting place because it gives people an opportunity to be heard in court, though more could be done to ensure due process. When a case goes to trial, the judge asks a few questions that are generally focused on understanding income, family circumstances, and other debts.⁴⁷ Therefore, ideally, at trial people are able to supplement the information they provided on the police intake form so that the court sets the daily rate based on more complete information. Judges believe they are able to accurately set the fine using the information gained through this colloquy. Despite their high caseloads, German judges do not find this process to be overly burdensome. The German system demonstrates that it is possible to efficiently and accurately assess ability to pay through a colloquy at a hearing without additional documentation or paperwork.

But additional basic procedural protections are necessary so that people know how their financial information is going to be used and have assistance in representing themselves. To be fair to the people being sentenced, U.S. courts will have to heed the lessons from Germany and increase procedural protections. People should have access to counsel and sufficient notice and information so that they are able to prepare for their cases. Jurisdictions will have to be especially attuned to providing people facing barriers such as mental illness adequate support in representing their financial circumstances. Otherwise, the system risks failing to help those that need it the most.

3. Day fines may not be the right solution for fixing misdemeanor systems

Our research in Germany suggests that U.S. jurisdictions contemplating day fines should consider whether day fines will truly solve entrenched problems in their misdemeanor courts.

- In Germany, day fines are used to sentence a high volume of low-level cases. Of all the cases sentenced to day fines in 2018, 42% received less than 30 units—suggesting that the severity of the offenses were quite low. Another 49% were sentenced to between 31 and 90 units.⁴⁸ Two crimes of poverty, fare evasion and low-level theft, accounted for one quarter of Germany’s day fines sentences in 2018.⁴⁹
- German courts process thousands of these low-level cases each day, relying on the summary proceeding process to swiftly move cases from arrest to punishment. Decision makers see fines sentences as less serious, and take procedural shortcuts—and in some cases flout basic procedural protections.

This raises concerns for day fines in U.S. misdemeanor courts, which also prosecute high volumes of low-level cases. In the United States, many misdemeanor cases are the result of policing practices that target low-income, black and brown communities.⁵⁰ Many of the misdemeanors prosecuted are crimes of poverty or offenses that criminalize common behaviors such as jaywalking. Misdemeanor convictions are also the result of lax procedural protections in low-level cases.⁵¹ These problems are inextricable from the problem of disproportionate monetary sanctions.

Our research in Germany suggests that a jurisdiction’s efforts may, in some cases, be better spent on advocacy that will address structural problems in the misdemeanor system, rather than on trying to right-size misdemeanor sentences using day fines. Consider prosecution of fare evasion. A person who cannot pay a \$3 fare surely cannot pay even a low fine. Right-sizing fines for this offense does not solve the underlying issue that many people charged with fare evasion cannot afford to pay for the public transportation that they need to get to school, work, and medical appointments. Criminalizing fare evasion does not solve this problem, it just creates additional problems. Jurisdictions should instead work towards solutions that will actually help people access transportation, such as providing fare discounts or free passes.

For many cases prosecuted in U.S. misdemeanor courts, day fines may not be a solution, but instead may obscure the structural problem with criminalizing certain behavior, or even entrench bad practices. Jurisdictions may accept that they must impose lower sanctions, but nevertheless continue processing many—or even more—cases to generate sufficient revenue.

In some jurisdictions, day fines may help tackle disproportionate and harmful monetary sanctions practices. In others, focusing on day fines may distract advocates and lawmakers from attempting more effective changes, such as reducing the misdemeanor docket, addressing policing disparities in low-income and minority neighborhoods, and eliminating the conflicts of interest inherent in funding courts through fines and fees. Advocates should consider this broader context as they decide whether day fines make sense in their jurisdictions.

Conclusion

Germany's example provides a useful starting point for jurisdictions in the United States that are considering the day fines model. Germany's experience demonstrates the need for strong political support, public education, and judicial buy-in, as well as a robust daily rate formula that will ensure day fines can be set at levels that people can afford to pay. Germany also shows us that considering ability to pay at sentencing in every case is possible without being unduly cumbersome. When considering day fines, jurisdictions should be thoughtful about their own political, socio-economic, and cultural realities, as well as the specific problems they are trying to address and how day fines would fit into their existing misdemeanor system.

This Report begins with a detailed overview of day fines in Germany, including specific policy details about the system's design. In the second part, we analyze that system and identify areas of consideration for those who might implement day fines in the United States. We conclude with a decision guide for jurisdictions and advocates considering day fines.

Introduction

Day fines are a sentencing structure in which the fine for an offense is set according to both the person's financial circumstances and the nature of the offense. This structure is used in over 30 countries across Europe and Latin America to assess fines in criminal cases. Recently, reports,⁵² scholarly papers,⁵³ and policymakers⁵⁴ in the United States have called for the adoption of day fines as a replacement for the current U.S. system for sentencing fines and fees, which allow judges to set monetary sanctions without regard for ability to pay, and often in a way that is arbitrary.⁵⁵

In a day fines system, courts set fines according to structured guidelines. The first step is to assess the number of "units" or days, which is based on the nature of the offense. The second step is to determine the "daily rate," which is a fixed amount of a person's income, calculated using the jurisdiction's guidelines. For each unit, a person is required to pay the daily rate, so to calculate the total fine amount, the daily rate is multiplied by the number of units. To understand how this system works, consider the following hypothetical. A person is convicted of theft, a criminal offense statutorily punishable by up to ninety units. During sentencing, the court evaluates various factors, such as the seriousness of the offense, mitigating circumstances, and reentry considerations, and concludes that this particular offense should be assigned 10 units. Next, the court assesses the person's ability to pay, and calculates the daily rate—the amount the court will require the person to pay for each of the 10 units. The court begins with the person's daily post-tax income and subtracts a reasonable daily cost of living. Through this calculation, the court determines the person can pay \$10 for each unit. The court then multiplies \$10 by 10 units and sets the total fine amount at \$100. If the person had more economic means—for example, if their income was such that their daily rate was set at \$20, rather than \$10—the person would pay a total fine of \$200. This is the essence of day fines.

Because a day fines system requires tailoring fines to a person's income at the time of sentencing, it has been proposed in the United States as a way to remedy the problem of ever-escalating monetary sanctions imposed on people who lack the ability to pay.⁵⁶ These monetary sanctions are composed of fines, which are the punishment for the offense, and a growing number of fees (also referred to as costs or surcharges) that are imposed on top of the fine.⁵⁷ People face fines and fees in criminal cases and when sanctioned for non-criminal violations. When people are unable to pay these sanctions, courts impose additional monetary punishments, warrants, driver's license suspensions or revocations, jail time, and more.⁵⁸ In short, the human costs of fines and fees are high.⁵⁹ Over the last several years, CJPP has worked to end these harmful practices through advocacy and research. For example, last fall, CJPP released a report, *Proportionate Financial Sanctions: Policy Prescriptions for Judicial Reform*, advising courts how they should use their discretion to end the harms of high monetary sanctions.⁶⁰

As we noted in that report, day fines have been proposed in the United States as a way to reduce these harms: arguably, if fines are tailored to people's financial circumstances, people could afford to pay and avoid the consequences of nonpayment. The purpose of day fines is also to set fines that are experienced equally by people of different means. If the hypothetical case above was sentenced in a U.S. court, the person would be sentenced to pay the same fine regardless of how much money they made and would probably be charged fees on top of their fine. But the fine would impact that person differently depending on their income. Proponents of day fines argue that people who make \$500 per day should not be given the same fine as a person who makes \$50 per day because the punishment would not be experienced equally. But that is precisely what

A more fundamental problem with imposing fees (as opposed to fines) as additional punishment on people who are sentenced is that fundraising from people in this way creates fundamental conflicts of interest because judges and other decision makers may be influenced by revenue-raising goals rather than the need to set an appropriate sanction. Rightsizing fees will not eliminate this conflict of interest, so we advocate eliminating fees altogether.

happens under the current U.S. system: the fine amount is set without regard for a person's income, even though the impact of the punishment on each person is different depending on their financial circumstances.

Though many in the United States have proposed day fines as a promising reform, jurisdictions have little concrete information about how such a system might work. Proportional fines are widely used across the world, but there is very little literature about how they actually operate.⁶¹

In response to this research gap, CJPP spent one year researching day fines in Germany. We conducted focus groups with over fifty German judges and prosecutors in eight jurisdictions about how day fines operate and their views on the fairness of the system. Additionally, in partnership with Fair Trials, a Brussels-based international criminal justice NGO, CJPP is releasing a companion report, *Day Fines Systems: Lessons from Global Practice*, that provides an overview of day fines policy in 13 countries across the European Union and Latin America. Together, these reports provide a new and deeper look at the on-the-ground practices of one of the largest day fines jurisdictions, Germany, as well as a comprehensive analysis of variations in day fines law and policy across nations.

CJPP's research in Germany sought to understand how day fines operate in practice. We focused primarily on the sentencing stage because this is the area for reform that U.S. courts are most interested in exploring. We researched how German courts define ability to pay and how those definitions are applied in practice. We also looked at whether courts can define ability to pay well enough to truly tailor fines to people's financial circumstances. Preliminary discussions in the United States raised concerns about the administrability of day fines, which motivated us to research whether it was practical for U.S. courts to consider ability to pay at sentencing in every case. We looked at how German courts gather information about people's financial circumstances and use that information to set a fine. We situated our questions within the broader context of how day fines fit into Germany's sentencing practices as a whole. We also asked big-picture questions about

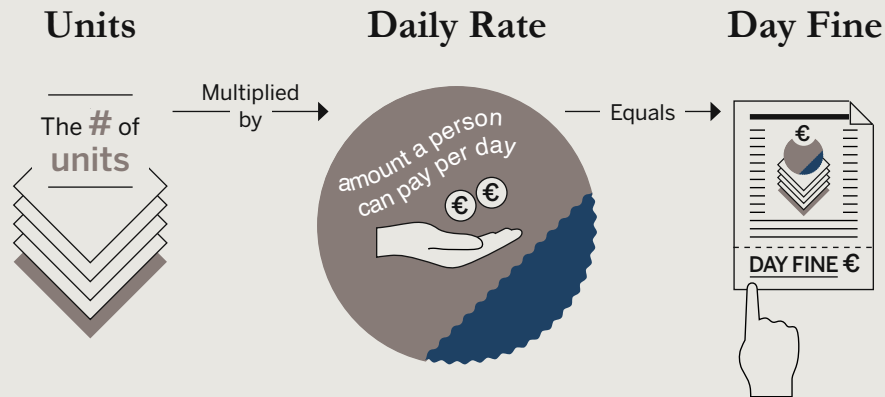
whether day fines increase equality and meet the goals of reducing the harms of high fines. In examining these questions, we aimed to bring the voices of Germany’s decision makers to people in the United States so that they could better understand the perspectives of those who implement day fines. Our research complements work by other scholars who seek to understand the perspectives of the people who are impacted by monetary sanctions,⁶² but we did not interview directly impacted people for this project.

In this Report, we begin by detailing the history of Germany’s day fines system and how day fines work in practice. We then draw lessons from Germany’s experience, and raise questions for U.S. jurisdictions to consider when deciding whether to pilot or adopt day fines. In the final part of the Report, we synthesize the lessons of the Report in a decision guide that advocates and jurisdictions can use to decide if day fines would be an appropriate reform in their courts, and to guide day fines policies should jurisdictions decide to adopt the system.

We situate our research within the context where day fines are most likely to be introduced: U.S. misdemeanor courts. Day fines are most relevant to misdemeanor courts because fines are a common sentence for low-level cases. Research in recent years has shed light on a host of policy problems and injustices in misdemeanor courts in the United States.⁶³ Misdemeanor prosecutions are concentrated in poor communities of color and amount to “punish[ment] without a crime.”⁶⁴ What this means is that misdemeanor systems punish behavior that is either not harmful or should be addressed outside of the criminal courts. Misdemeanor systems exacerbate injustices once cases are in court because people are sentenced without adequate safeguards and face disproportionate sentences, including unaffordable monetary sanctions and damaging collateral consequences. The efficacy of day fines as a policy solution to high fines and fees should be examined within the context of the misdemeanor court system.

Summary and definitions of day fines in Germany

A fine sentence in Germany's day fines system is the product of two numbers.



The first is the number of units or days of punishment, which is assessed based on sentencing factors such as the nature and seriousness of the offense.⁶⁵ Fines are the default sentence for most offenses assessed at under 180 units (or six months of punishment).

The second is the daily rate, or the amount the person is able to pay towards the fine per day/unit given their income, expenses, and other personal circumstances.

The standard for the daily rate in Germany, the net income standard, uses a person's income after standard payroll deductions such as income tax and "social security contributions,"⁶⁶ as the starting point. No further deductions, such as for necessary expenses, are required, though judges may use their discretion to adjust net income.⁶⁷

The total fine or day fine is the product of the number of units and the daily rate. For example, if the court assessed an offense to be 20 units and determined the person could pay 10 euro per day, the total fine amount would be 200 euro.

1. Research methodology

CJPP conducted legal research and a literature review of social science and legal scholarship about day fines in Germany. We also interviewed experts on the German system, and reviewed writing about day fines in other countries.

In Germany, there are two main sources for legal research: statutory commentaries and case law. The Harvard Law School Library's reference guide on German legal sources describes statutory commentaries as a "hybrid primary/secondary source."⁶⁸ In addition to the primary source statutory law, commentary "provides interpretation and analysis of the statute by leading scholars (secondary material). This secondary material often cites relevant judicial decisions, other statutes, and other secondary sources."⁶⁹ There are multiple commentaries for each criminal code provision, and German judges and attorneys rely on them to interpret statutes. As part of our literature review of Germany's system, we read several different criminal law commentaries on the relevant portions of German law. CJPP also reviewed German case law interpreting the country's day fines statutes. Germany is not a common law system, which means that lower courts are not formally bound by the decisions of higher courts like they are in the United States. However, lower courts do tend to follow higher court decisions in practice, and in our interviews, judges and prosecutors often referred to cases to explain their analysis. Throughout the Report, we include case opinions and commentary within the term "German law." Though these are not binding sources of law for German courts, they are persuasive authority, and provide U.S. readers with details and insights about how day fines have been implemented.⁷⁰

CJPP worked with German law students to understand these German-language materials. Students produced legal research memoranda analyzing legal sources and academic literature. CJPP also translated German source materials using DeepL,⁷¹ a machine translation tool, and German law students checked those translations for accuracy. All citations to German-language materials and quotations in English from translations of those materials have been reviewed by German-speaking law students, lawyers,

and/or qualified interpreters. The German government issues official English translations of the Code of Criminal Procedure and the Criminal Code. CJPP relied on those official translations without additional review.

In the course of CJPP's literature review of scholarship on day fines, we found a lack of information about how day fines function in practice.⁷² In response to this gap, CJPP traveled to Germany over the course of a year⁷³ to learn about how its day fines system works.⁷⁴ We also wanted to hear from a diverse set of people about their opinions of day fines. Germany's criminal code is federal, but there are 16 German states, each with distinct legal practices and cultures.⁷⁵ In order to capture a range of experiences across Germany, we selected eight diverse jurisdictions to study.⁷⁶

In each jurisdiction, we conducted focus group interviews⁷⁷ with judges and prosecutors.⁷⁸ We chose to interview prosecutors and judges because they both make discretionary decisions in Germany's day fines system that determine total fine amounts. We spoke with 21 judges and 33 prosecutors, for a total of 54 interviewees.⁷⁹ We facilitated 1,116 minutes—almost 19 hours—of conversations among the decision makers. CJPP conducted its focus group interviews with judges and prosecutors in German with the help of simultaneous whisper interpretation.⁸⁰

We asked each group a series of questions to better understand how day fines are assessed. The topics of discussion included:

- What information about people's financial circumstances do courts and prosecutors have? How do they collect that information?
- How do judges and prosecutors calculate the daily rate and is this process complicated?
- How do system actors determine the number of units for an offense?
- Do judges and prosecutors view their system of day fines as fair? Do they believe that fines should be scaled? Do they believe that the system

achieves its goal of equalizing the impact of fines, including for lower-income people?

- How, if at all, do judges and prosecutors believe the current day fines system should be reformed?

The full list of interview questions can be found in Appendix A.

All interviews were audio-recorded, transcribed, and translated into English by professional interpreters. We cite to the interpreters' written translations in this Report.⁸¹ We analyzed the English transcript data using MaxQDA, a qualitative data analysis platform. We developed a coding scheme and tagged the transcripts by responses to each interview question and according to themes. We used these tags to analyze the interviews.⁸² The benefit of using MaxQDA is that after tagging all of the data, we could systematically review across the fourteen group interviews all responses to a given question or about a particular theme. We used this analytical process to draw conclusions about German practice. Our sample size of 54 judges and prosecutors allowed us to identify patterns and, based on our research, we would not expect the findings to be different with a larger sample size or additional states.

We conducted focus groups with over fifty German judges and prosecutors in eight jurisdictions about how day fines operate and their views on the fairness of the system.

Day Fines in Germany: An Overview of the System

To date, there has been no descriptive account of how day fines operate in practice. Although we understand the theoretical advantages of fines scaled to people's ability to pay—that people can afford to pay and avoid the negative consequences of nonpayment, and that the fines are experienced equally by people of different means—we previously did not know whether this theoretical promise bears out in reality. In this section we provide a detailed overview of Germany's day fines system so that we can begin to assess the extent to which the system fulfills its theoretical promises.

In this overview, we detail Germany's day fines policies and how the system is implemented in practice. We start with the history of Germany's adoption of day fines. We explain how day fines are sentenced, including policies and practices for calculating the daily rate, obtaining ability to pay information, and setting units. We discuss the role of day fines in Germany's criminal legal system today, including the prevalence of day fines as compared to other sentences, the outcomes of cases sentenced to fines, and the types of offenses receiving day fines sentences. We conclude by explaining how payment of fines is monitored and enforced. In the next section of this Report, we use the overview provided here to assess Germany's system and its implications for the United States.

Part One: **The History of Day Fines in Germany**

Germany adopted day fines over fifty years ago, in 1969, as part of a broad overhaul of its criminal system.⁸³ These reforms were debated and drafted by the Great Criminal Law Commission (“The Commission”).⁸⁴ One of the central goals of the reforms was to reduce incarceration for minor offenses by instead sentencing those cases using fines.⁸⁵ The Commission recognized that the

lack of transparency around and arbitrariness of fine sentences were a barrier to the widespread use of fines.⁸⁶ Accordingly, it recommended the adoption of day fines,⁸⁷ which would impose structure on the calculation of fine amounts and achieve greater equality by tailoring the fine to people’s financial circumstances so fines would be more similarly experienced by people of different means. Day fines had been established in some Nordic countries (Sweden, Finland, and Denmark) since the 1920s.⁸⁸

The history of day fines enactment in Germany contains a cautionary tale about the politics of passing such reforms. Despite policymakers’ stated goal of achieving greater equality and their awareness that achieving equality required sensitivity to the impact of fines on people with less money, political pressure led to passage of standards for calculating fine amounts that failed to protect poor people. Policymakers used historical practices and their instincts about what people should pay as references for the new fine amounts, which resulted in fines that were too high for the poor to pay.⁸⁹

1. Germany replaced short-term incarceration sentences with fines

In the 1960s, Germany’s criminal legal system was overwhelmed by crowded prisons and unmanageable administrative burdens.⁹⁰ People were commonly incarcerated for short periods for low-level cases, and reformers at the time emphasized the harmfulness of this practice.⁹¹

Members of the Commission sought reforms to reduce incarceration, and proposed expanding the use of fines as a replacement for short-term custodial sentences.⁹² Fines were already common in Germany's criminal system, making up around two-thirds of criminal sentences prior to the reforms.⁹³ The Commission believed that fines were a sufficient punishment for low-level cases because people would face concrete consequences—they would have less money to spend—but they would be able to maintain social ties⁹⁴ and avoid the stigma of prison.⁹⁵ The Commission members did note “fundamental reservations” to fines, in part because fines impact those without

means more than those with financial resources.⁹⁶ But this concern was outweighed by the perceived benefits of sentencing more people to fines to avoid incarceration.⁹⁷

With the passage of the First Criminal Law Reform Act in 1969, fines were defined as the default sentence for most offenses assessed up to 180 units (the equivalent of six months in jail).⁹⁸ For offenses exceeding 180 units, sentences could include fines, probation, or prison, depending on the statute.⁹⁹ The criminal code did not (and still does not) include other sentencing options such as community service.¹⁰⁰ The First Criminal Law Reform Act anticipated that fines would replace jail for a broad range of offenses such as theft, fraud, battery, and traffic-related offenses.¹⁰¹ Other relevant law changes at the time also reduced incarceration by decriminalizing certain traffic offenses,¹⁰² the number of which was growing at the time.¹⁰³ The First Criminal Law Act included provisions that made prison the consequence for nonpayment of fines.¹⁰⁴

2. Germany implemented day fines to reform fine sentences

The Second Criminal Law Reform Act, which was part of the overhaul driven by the Commission's work and also enacted in 1969, established Germany's day fines system as the method by which fines would be calculated. Before these

legislative changes, Germany's laws required judges to set fines based on the offense and to "consider the economic circumstances of the [person]."¹⁰⁵

The Commission believed that fines had to be based on people's financial circumstances to fulfill the purposes of punishment.¹⁰⁶ The Commission reviewed the pre-reform fine standards and noted a lack of transparency, finding it difficult to know "how much [the fine] amount was influenced by the severity of the crime and the guilt of the defendant on the one hand, versus how much it was influenced by the defendant's financial circumstances on the other hand."¹⁰⁷ The Commission also expressed concern that judges have complete discretion in setting fines¹⁰⁸ and use "gut instinct."¹⁰⁹ It concluded that this led to unequal punishments for the same offenses and fines that were either too low or too high, depending on the judge's individual inclinations.¹¹⁰ Notably, the Commission found that inconsistent fine-setting practices had a disproportionate impact on people with lower incomes because fines set too high carried more severe consequences for those who could not pay.¹¹¹

The Commission's goal was to achieve something close to equality in how fines were experienced by people of different financial means.¹¹² It concluded that inequalities arising from fines could be mitigated—though not eliminated—through regulation of the fine calculation.¹¹³ It also determined that piecemeal changes in the statute would be insufficient, so it turned to the Scandinavian model of day fines for a transparent framework for setting fines based on both the severity of the offense and the person's finances.¹¹⁴

Overall, the adoption of day fines was not very controversial. As one scholar notes, "[l]ooking back, one is surprised to see how easily the idea of day fines found its way into the German criminal law reform and was able to assert itself here without much difficulty."¹¹⁵

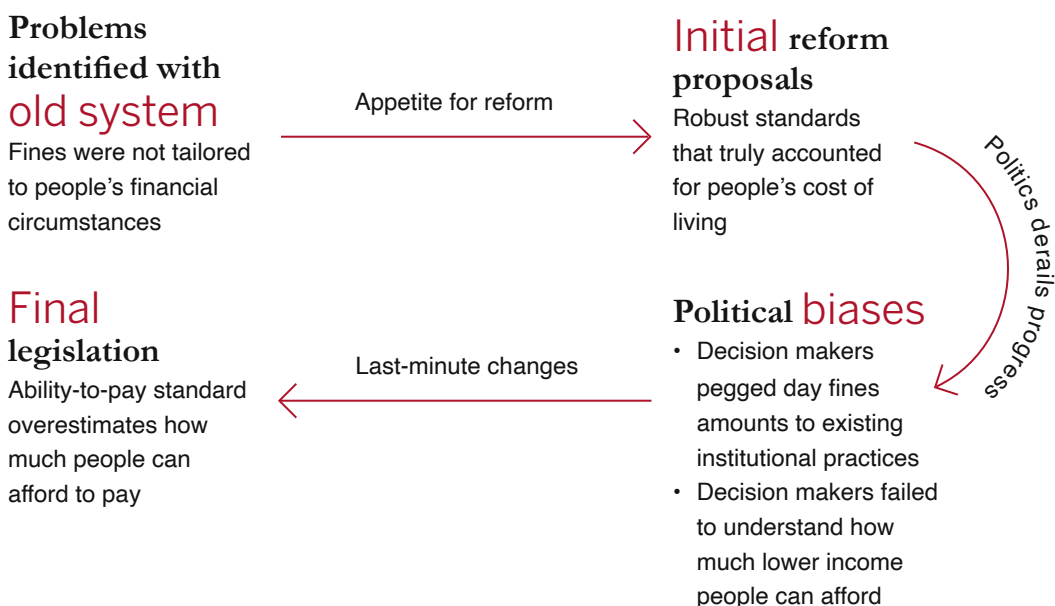
3. A last minute political compromise resulted in a harsher daily rate standard

In drafting the legislation adopting day fines, the Commission recognized that the main challenge to implementing day fines was defining the standard for evaluating a person's ability to pay—what is called the “daily rate.”¹¹⁶ The daily rate governs how the fine is calculated so selecting the right metric would be critical to achieving the system's goal of affordable fines of equal impact, regardless of economic means.¹¹⁷ Unfortunately, the final standards passed by the German legislature were unlikely to achieve that goal. This is because the standards were the result of a compromise in the face of political resistance, most notably by a senior official of the German Ministry of Justice and some members of a body created to implement the work of the Commission (hereinafter referred to as the "Special Commission"), to any standard that would result in fines that were lower than those imposed before reforms.¹¹⁸

The discussions leading up to the passage of the day fines legislation centered on a daily rate calculation that would deduct cost-of-living expenses from a person's daily income.¹¹⁹ The daily rate was to be defined as the amount the person could pay daily “on the basis of their attainable income, usable assets, and actual standard of living, taking into account their maintenance and other reasonable payment obligations as well as their personal circumstances.”¹²⁰ This proposed standard was based on the Scandinavian model and would have adjusted the daily rate to accommodate a person's cost of living.¹²¹ By allowing people to retain money for necessities, this model set fines at a level that people could be reasonably expected to pay.¹²² But at the last minute and after almost no debate, the legislature adopted an amendment, which ultimately passed and remains the law today, that set the daily rate according to a person's full net income without deducting for living expenses.¹²³ Although judges retain the discretion to reduce the daily rate by taking into consideration the “personal and financial circumstances” of the individual, they are not required to do so, and German law provides no guidelines for doing so.¹²⁴

One German scholar deemed this last-minute amendment an “extraordinarily important turnaround,”¹²⁵ and yet there is very little information about the reasons for the sudden change. There is some evidence that stakeholders feared that if day fine amounts were set too low, they would not deter the poor.¹²⁶ There was also a fear that judges would not view the new system as legitimate and would resort to incarceration if they viewed fine amounts as insufficiently punitive.¹²⁷ Both arguments relied on a comparison to the fine amounts imposed under the old system, which, as one German researcher has pointed out, is ironic given that the purpose of reform was to change the way fines were set.¹²⁸ Another argument that was raised in testimony before the Special Commission was that fines should not be lowered for driving under the influence.¹²⁹ The legislature apparently yielded to these arguments that low fines would not deter poor people from committing crimes, that fines should not be lower than the status quo, that judges would resist the new system, and that one offense (driving under the influence) should be punished more harshly, and the last minute amendment set the daily rate at full net income without any required deductions for necessary living expenses.

How Germany compromised on its daily rate standard



Day fines and the daily rate in other countries¹³⁰

Many of Germany's European neighbors also use a day fines system,¹³¹ but not all of them impose fines as frequently as Germany. Germany is among the European countries that sentences the highest proportion of cases to fines.¹³²

The standards and practices for defining the daily rate vary across day fines countries. Below are some examples of countries with more robust deductions. Other day fines countries define the daily rate more broadly or without required deductions, as Germany does.¹³³

- **Sweden** uses a detailed formula to set the daily rate.¹³⁴ Lower income people are usually assessed the equivalent of about 4.50 euro per unit.¹³⁵
- **Spain** makes deductions from net income in setting the daily rate and also takes into consideration people's personal, family, health, and housing circumstances. The daily rate for low-income people is usually set between three and six euro per unit.¹³⁶
- **Hungary** considers income, assets, and family members' income. Hungary also conducts an individualized determination of people's expenses (including mortgages and other debts) and takes into account the money needed to support the person's lifestyle. Living expenses and other required expenses are subtracted from net income to set the daily rate.¹³⁷
- **Finland** uses a formula to set the daily rate. Daily rates are 1/60th of an individual's average monthly salary after taxes and deductions, and deductions account for basic needs.¹³⁸

4. German day fines laws have remained largely consistent since their original passage

Since day fines were implemented, there have been almost no changes to the governing statutes,¹³⁹ but practice and case law interpreting those statutes have developed. Policies have also evolved at the state level. States have discretion over post-sentencing monitoring and enforcement practices such as how payment plans are set up and enforced and the use of community service as an alternative upon nonpayment of fines. States have changed these policies over time. For example, some states have reduced the number of hours of work required per unit of fines, presumably to expand the use of community service as an alternative to payment.¹⁴⁰

One data point is illustrative of the overall consistency of the role of day fines in the German criminal legal system since implementation. Shortly after day fines were enacted in 1969, over 80% of all criminal cases were sentenced to day fines as a sole sanction.¹⁴¹ Today that number is about 84%.¹⁴²

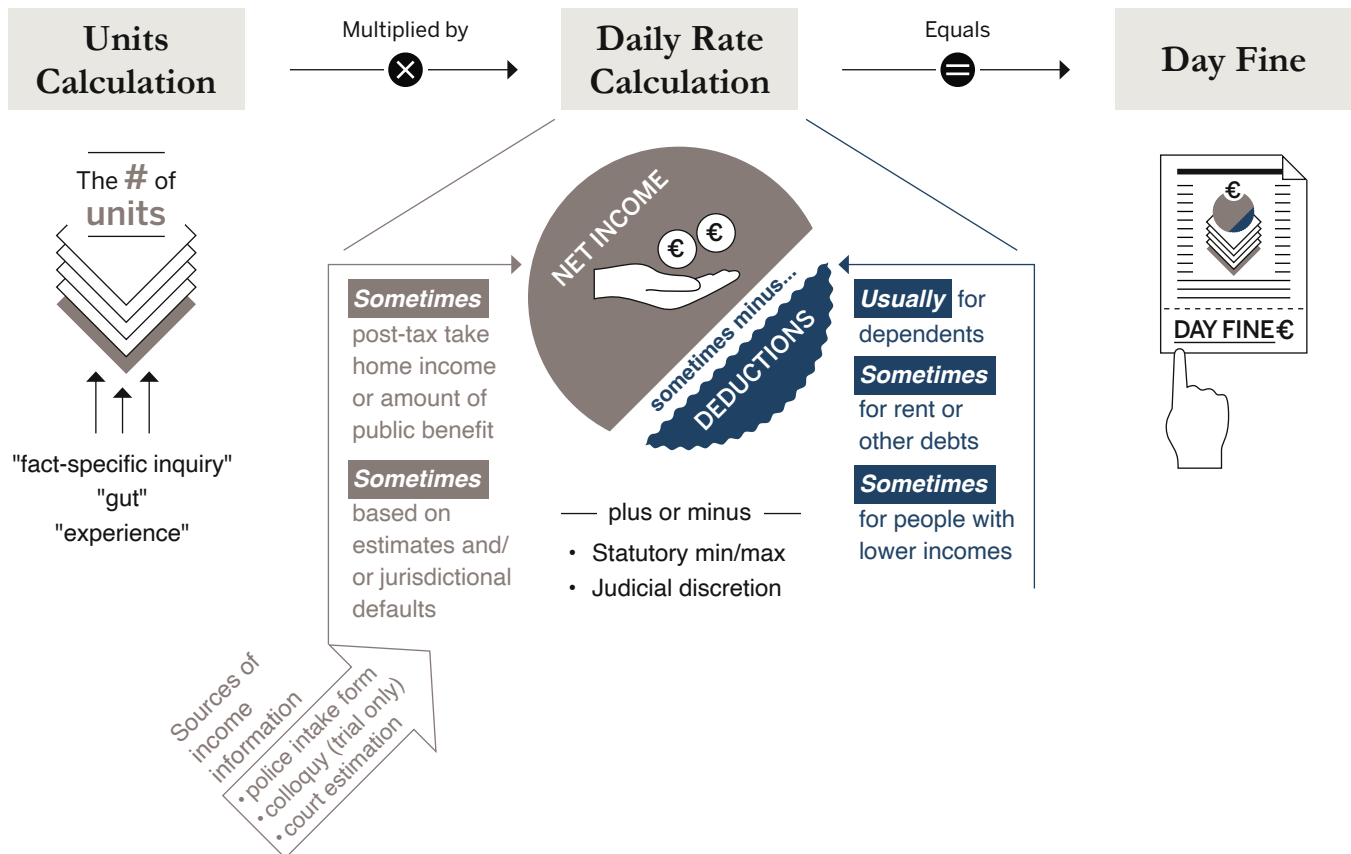
In drafting the legislation adopting day fines, the Commission recognized that the main challenge to implementing day fines was defining the standard for evaluating a person's ability to pay.

Part Two: Setting Day Fines in Germany

This part provides a detailed overview of the present-day sentencing practices in the German day fines system. We refer to German case law and secondary sources, but primarily rely on the accounts of the judges and prosecutors whom we interviewed. In the subsequent section we analyze the system described here and draw out implications for the United States. We

discuss how the daily rate is set, including the sources of information available to the court, how units are calculated, and procedural rules that

Day Fines Calculation



preserve transparency about the basis for fine sentences. We also include a short summary about how payment is monitored and enforced in Germany.

In Germany's day fines system, the final fine amount is the product of two numbers, calculated separately and multiplied to arrive at the total fine. The first number is the daily rate. The daily rate is a dollar amount that is calculated using the person's economic circumstances. Because the daily rate is the mechanism by which fines are tailored to each individual, the formula for calculating the daily rate determines how well a day fines

system will achieve equality of experience for people with different financial circumstances. Policies and practices that fail to account for expenses or unique circumstances may overestimate how much people can pay. Likewise, failing to account for certain types of income may lead to underestimating payment amounts.

The second part of the fine calculation is the number of units, which judges assess through a fact-specific inquiry into the nature of the offense. The daily rate and units are calculated independently and then multiplied to arrive at the total financial sentence.

1. Background: Judges' and prosecutors' views on the day fines system

A. Judges and prosecutors believe in proportionate fines

Judges and prosecutors in Germany strongly believe that fines should be tailored to achieve greater equality and fairness in the system.

“[T]he original goal is equal treatment and . . . that's why I say . . . for me there's no system at the moment that seems to make more sense, in any way, than the system we have now. Because it helps us to ensure that the wealthy are punished in the same way as those without means—by taking into account the actual income situation.”¹⁴³

“Flat fines, something like ‘1,000 euro for a DUI,’ I would consider that incredibly unfair. . . . Even just when you imagine that there is someone who has nothing, and there is someone sitting there who is the head of Deutsche Bank [a large German bank] . . . that’s just not right. That would actually equal a carte blanche for those who earn a lot, for those who are not affected at all, and we do not want to grant carte blanches.”¹⁴⁴

B. Judges and prosecutors acknowledge the poverty of people in Germany's criminal legal system

A recent study in the German state of Mecklenburg-Western Pomerania (“Mecklenburg Study”) found that 95% of people sentenced to prison for nonpayment of fines had a monthly income at the time of sentencing of 1000 euro or less.¹⁴⁵ The average net income in Germany in 2017 for a one person household was 1,633 euro.¹⁴⁶

Judges and prosecutors are aware and speak often about how most people who come into contact with the criminal legal system and face fines have low incomes. Judges and prosecutors also acknowledge the basic truth that fines impact people with lower incomes proportionately more than those with higher incomes or with wealth.¹⁴⁷ It is with this knowledge that they are making decisions about people’s daily rate.

“I really have a lot of [public benefits] recipients. Or many with precarious circumstances, let’s put it like that. . . . People send me their pay slips. And I’m sometimes surprised about how little, or **how many people earn so little**. Well, 1,200 euro, that is very common. I have people who earn 700 euro. . . . But you’d be amazed that this amount of 1,500 euro, which I use as my assumption, that this is, from my experience, a relatively high number indeed.”¹⁴⁸

“The share of defendants who receive [public benefits] is very high here, Actually, it’s the vast majority. And that’s why I have—I rarely ever have

to think about the amount of the daily rate because it is the regular [public benefits] rate.”¹⁴⁹

“You’d probably have to arrive at 25 euro [daily rate], but, of course, it is still—If you consider the burden for the individual *Hartz IV* [public benefits] recipient, that’s, of course, not comparable to someone who has something like 3,000 euro income and then pays 100 euro per day. I mean, that’s obviously a **completely different dimension in terms of financial burden.** That has to be said.”¹⁵⁰

“And I think the crucial point is what you said earlier: the system is meant to ensure that, for example, someone who gets 60 day fine units is deprived of two months’ income. . . . But let’s assume he—[is] a mid-level manager, let’s say, then I can—I could set the day fine in such a way that everything is taken away from him for these two months. But that’s precisely the point: since he has earned much more before and will earn much more after, he will not be hit as hard by the 40 day fine units . . . as a [public benefits] recipient, who has **no savings at all.** And who then has all his money taken away, so to speak, for 40 days.”¹⁵¹

2. Calculating the daily rate

The daily rate under German statutory law is pegged to the person’s daily net income. For example, if a person receives a paycheck of 900 euro per month, their daily net income is 30 euro. Judges have considerable discretion and may consider “other relevant assessment factors”¹⁵² and the person’s “personal and financial circumstances”¹⁵³ to add to or subtract from net income to arrive at the daily rate.

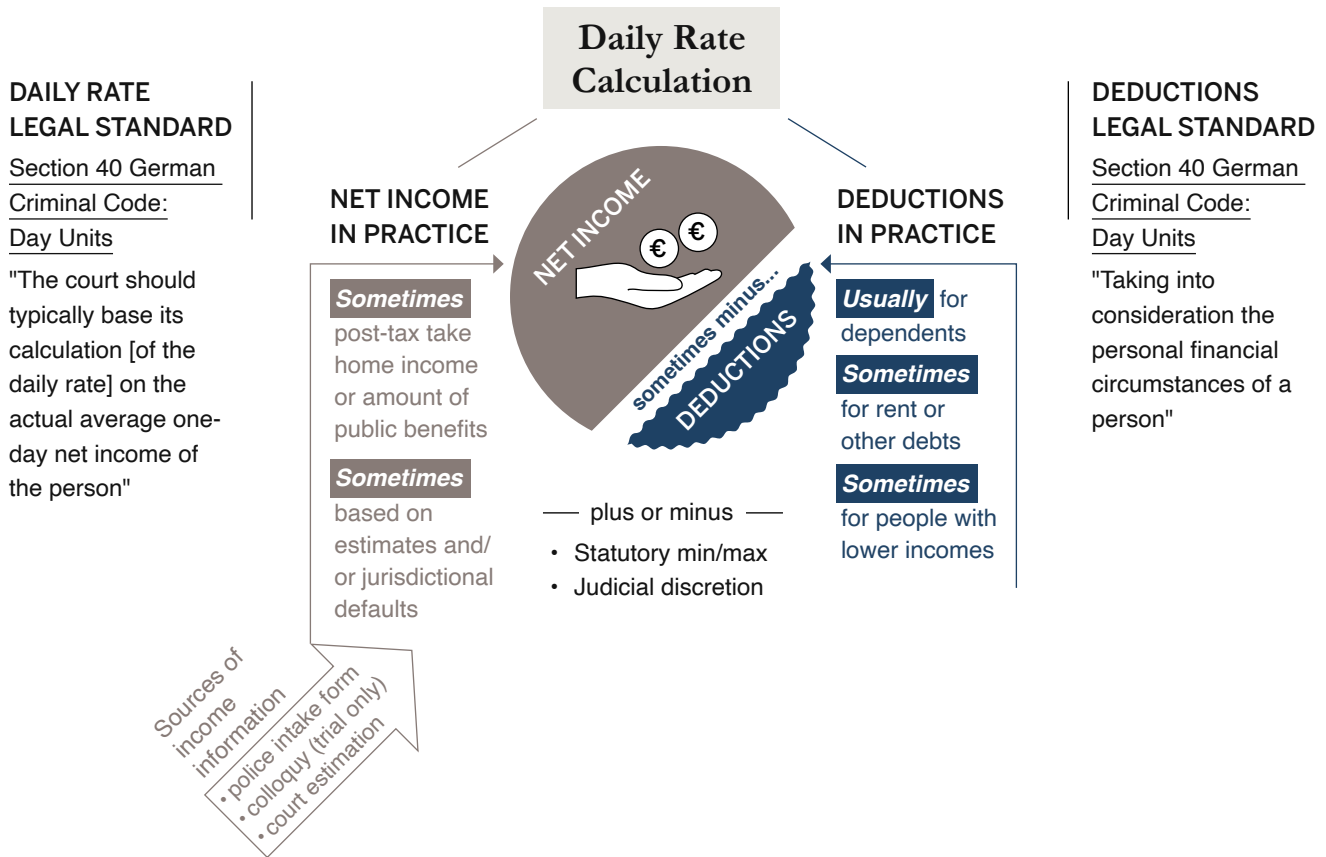
The statutory language requiring courts to base their calculation on net income has been interpreted to mean that the daily rate should usually be a person’s net income, and that is usually how judges and prosecutors¹⁵⁴ approach the calculation in practice.



Daily Rate

Judges and prosecutors in our interviews explained that, in their view, determining the daily rate was not a mechanical exercise of applying a formula, but rather an exercise of discretion.¹⁵⁵ As a commentary explains, the guiding principle should be for judges to exercise their discretion to achieve equality of experience between people with different financial means,¹⁵⁶ with an eye towards setting fines that will not impede the person’s rehabilitation.¹⁵⁷ Fines should have some financial impact on a person but not lead to “misery or poverty” and therefore courts should give closer scrutiny—and more deductions—to people with limited incomes.¹⁵⁸

In practice, in consideration of the person’s “personal and financial circumstances” judges apply certain limited deductions to net income that have



Daily
Rate

developed over time through case law and commentaries, including for support of dependents, rent, and other debts. For example, courts often subtract 10% from net income for each child a person supports. A person sentenced to 10 units with a 30 euro daily rate would pay 300 euro. If they had one child, they would pay 27 euro per unit for a total fine of 270 euro. Practices for applying deductions vary greatly and usually do not involve a holistic inquiry, but rather depend on the application of individual decisionmaker or jurisdictional norms for deductions. The net income standard often results in high fine amounts because necessary living expenses are not subtracted from net income to set the daily rate. For example, a person's rent, health-care expenses, and food costs are not usually subtracted to set the daily rate. Deductions that are made, such as for support of dependents, are also often less than the true amount of the expense. We know of no jurisdiction in Germany where the daily rate fully accounts for people's daily expenses.

When German courts have limited or no financial information about a person, they often apply default daily rate amounts. A jurisdiction or a particular judge may have a practice of setting the daily rate at 35 euro when they have limited information.¹⁵⁹ Courts are also permitted to estimate the daily rate.¹⁶⁰ For example, if the court knows only the person's profession, they may estimate the salary for that occupation and use that amount to set the daily rate.¹⁶¹

Below we discuss in greater detail these practices for calculating the daily rate. We discuss how courts define income for the purposes of setting fines and how they estimate income when they have limited information. We then turn to the deductions courts make before setting the daily rate and the statutory range within which the daily rate must be set.

Public benefits in Germany



Net
Income

Unlike the United States, Germany has programs that provide broad-based social welfare benefits, including monthly monetary benefits. German law and practice for setting daily rates should be read against this backdrop as judges and prosecutors often refer to these government programs and assume that people have income from them (though this may not always be the case).

German citizens and permanent residents have a constitutional right to public benefits (also often translated as “social security”). Every person must be provided the financial means to live “in line with human dignity.”¹⁶² Payments are distributed to recipients under various legal schemes but are collectively referred to as “*Soziale Mindestsicherung*” (“Minimum Social Security”). In 2017 a total of about 7.5 million people, or about 9.2% of the population, received Minimum Social Security.¹⁶³ Throughout this paper, we use “public benefits” to mean Minimum Social Security.

The main categories of recipients of public benefits are (i) long-term unemployed (“*Hartz IV*”) (78.2% of recipients)¹⁶⁴; (ii) pensioners (14% of recipients); and (iii) asylum seekers (6.2% of recipients).¹⁶⁵ Judges and prosecutors in our interviews refer often to *Hartz IV* because it is a common benefit type.

The current minimum guarantee amounts are as follows: single adults living alone receive 424 euro per month; adults living together receive 382 euro each per month; and children (up to age 25) receive between 245 and 339 euro per month.¹⁶⁶ *Hartz IV* recipients also receive an apartment, furniture, and appliances.¹⁶⁷ People may receive less than the minimum guarantee if they have other sources of income or assets¹⁶⁸ or for other reasons.¹⁶⁹ For example, our interviewees reported that asylum seekers receive lower monetary benefits.¹⁷⁰ Scholars and advocates in Germany have long criticized these programs for having too many procedural hurdles that can prevent eligible people from receiving needed benefits.¹⁷¹

The programs described here are also separate from Germany’s unemployment benefits for short-term unemployed people, who receive 60% to 67% of their previous salary for up to one year after becoming unemployed.¹⁷² People in Germany also receive additional services and benefits that are state-funded. Healthcare is provided free of charge to recipients of benefits, including to the long-term unemployed receiving *Hartz IV*.¹⁷³ There are also additional public benefits in Germany that we do not discuss here.



Net
Income

A. Defining income

The guiding statute that defines the daily rate instructs that the court “shall typically base its calculation on the actual average one-day net income.”¹⁷⁴ Net income is understood as “all monetary inflows” and is usually an individual’s take-home pay, after taxes and other payroll deductions.¹⁷⁵ German law does not enumerate the sources of income that judges must include when setting the daily rate, but according to commentaries it includes income from employment, self-employment, and investments.¹⁷⁶ Income for the purposes of day fines may be both more and less inclusive than income as defined by tax authorities.¹⁷⁷ For example, public benefits are not taxable income in Germany, but jurisdictions consider public benefits as income for the purposes of setting the daily rate.¹⁷⁸ In practice, judges and prosecutors rely on information about take-home pay and public benefits to calculate net income; they did not report asking people about other additional sources of income such as investment income.

To calculate a person’s daily net income, German courts divide monthly employment or self-employment income by thirty (the number of calendar days, not the number of working days).¹⁷⁹ Therefore, if a person reports earning 1,200 euro per month, the daily rate would be 40 euro, even if the person has additional monthly investment income. For people who report receiving benefits of 424 euro per month, the daily rate would be rounded up to 15 euro.

B. Estimating net income when courts lack financial details

When judges and prosecutors in Germany lack sufficient financial information to calculate the daily rate, German law permits them to estimate the person’s daily rate.¹⁸⁰ According to commentaries, there must be a factual basis for the estimate: “[m]ere speculations are not sufficient.”¹⁸¹ Courts are expected to avail themselves of reasonable investigatory options, although they are not required to exhaust all evidentiary tools for determining actual income before making a reasonable estimate.¹⁸²

German law and practice provide insights about how courts should think about the income side of the ledger in setting the daily rate.

Income is based on actual earned amounts rather than speculation

Income is calculated according to the person's actual income at the time of sentencing. Courts will not usually make projections about future income, but any imminent, non-temporary changes in economic circumstances will be taken into account.¹⁸³ For example, if an individual is retiring after sentencing, the person's future lower income is used to set the daily rate amount.¹⁸⁴ Our interviewees said they decline to increase the daily rate for projected income, even when a person's income may increase in the near future. One judge explained that he did not usually set daily rates at future expected income, even when the person said they had a job starting soon.

“Well, [I tend to take] a favorable perspective. [I] always [set] the lower [amount]. I mean, if he—if he gets [short-term unemployment benefits] today and says he'll start a . . . job next week or something like that, but he doesn't know exactly how much he will earn, maybe 1,000 or something, then I say, 'Okay, let's give him his [unemployment benefits] amount [as the daily rate]'. . . And if it's the other way round, so to speak, if he has a job now but will lose it for sure and submits the notice of termination, I wouldn't say now, 'Well, you earn 1,800, so you'll get your 60 euro', but, in that case, I would take the expected unemployment benefits as a basis, so perhaps he will get 40 euro.”¹⁸⁵

According to German legal commentaries, courts do not usually speculate about or project what a person's income *should* be: net income is actual earned income and not income the courts assume people are capable of earning.¹⁸⁶ Our interviewees confirmed that they do not set the daily rate according to what they believe

people should or could earn.¹⁸⁷ German commentaries provide a few rationales for this approach. The most common argument is the simplest, which is that the person cannot pay money to the court that they do not actually have.¹⁸⁸ German law also recognizes that there may be good reasons for choosing not to work in traditional wage earning jobs or to work only part time hours, such as caregiving responsibilities for children or the elderly, and individual life decisions should be respected.¹⁸⁹ Courts cannot use high fines to indirectly force people to get a new or different job so they can afford to pay.¹⁹⁰ Doing so would, in the eyes of German law, violate people's constitutionally-guaranteed freedom of action.¹⁹¹ German courts have also explained that the time and effort required for courts to know the labor market well enough to speculate about employment a person could theoretically obtain is burdensome.¹⁹² Finally, assumptions that people are not working because they do not want to work are often based on “prejudice, and can result in discrimination.”¹⁹³ One commentary gives the example of people who are homeless and are struggling with addiction or unemployment. It explains that these factors may preclude the person from working and so a court's assumption of an unwillingness to work would be based on a lack of understanding about these barriers.¹⁹⁴ Courts occasionally make a narrow exception and impute income if there is evidence that the person has intentionally reduced their income for the purpose of paying a lower fine.¹⁹⁵

This may strike U.S. readers as very different from court culture and practice in their jurisdictions. We discuss the implications of this difference in our analysis section below.

The look back for the daily rate depends on the nature of the income

For people with irregular income such as those working in the “gig-economy” (drivers for ride-sharing companies, for example) or seasonal employees, courts

average earnings over a period of time to calculate an average daily income.¹⁹⁶ According to the commentaries, courts will use a one-year look-back period from the date of sentencing.¹⁹⁷ By averaging earnings in this way, courts can better assess the person's financial "life pattern over a longer period"¹⁹⁸ and therefore understand how much the person can truly afford. Otherwise, the court risks using anomalous months to set fines that are too high or too low.

Assets and wealth are generally not included in income

Judges and prosecutors in our interviews did not include assets in calculating the daily rate, including for high earners.¹⁹⁹ Commentaries confirm that courts set the daily rate based on a person's regularly-occurring income and do not include assets,²⁰⁰ though German law does not explicitly bar consideration of assets. The principle behind this practice of excluding assets is that fines should be calculated based on the amount a person has readily available for consumption and should not require that they forfeit their accumulated wealth or assets.²⁰¹ German courts also do not include in the daily rate non-recurring income amounts such as gifts, inheritance, lottery winnings, or proceeds from the sale of assets because, according to the commentaries, such one-off windfalls do not necessarily change people's current ability to pay.²⁰²

German case law contains clear precedent against considering assets to set the daily rate for people with limited means. The commentary argues that for people with lower incomes, small asset holdings may be the key to people's future financial stability, and there is a societal interest in people's financial well-being.²⁰³ Under German case law, courts have specifically excluded from net income a person's home, small savings reserves, other small or medium-sized assets, assets that cannot be immediately liquidated,²⁰⁴ and assets used to generate income such as business assets or land.²⁰⁵ For the vast majority of people, all of their assets would be covered by this list and thus excluded from net income. German courts have

considered assets when setting the daily rate only in exceptional circumstances when they have found that exclusion would give "unreasonable preference" to the wealthy.²⁰⁶

Benefits in kind are sometimes considered income

Benefits in kind are non-cash benefits such as government funded housing or support by family members for non-working family members. They confer some material benefit to a person but are not monetary income. Benefits in kind are sometimes considered income for the purposes of calculating day fines under German law,²⁰⁷ though some recent case law suggests this should not be the case. Some commentators and judges have argued that benefits in kind should not be counted towards net income because the person may not be able to exchange the in kind benefit for money so the fine would be set too high for the person to pay.²⁰⁸

One common instance in which courts consider benefits in kind is when household income is attributed to non-working household members. For example, a spouse out of work may have some portion of their partner's income attributed to them as a benefit in kind. According to case law, German courts should not arbitrarily impute household income to the non-working spouse, for example by considering the person's net income to be 50% of a working family member's income, and instead should assess the value of the benefits that the person actually receives.²⁰⁹

Another common scenario in which the question of benefits in kind arises is when people receive government benefits in kind such as housing vouchers.²¹⁰ Many of our interviewees²¹¹ and some published court cases exclude such benefits. As one case reasoned, because government benefits are calculated at or just above a person's sustenance level, in kind benefits such as housing should not be added to net income.²¹² The person has limited monetary resources and cannot use the housing benefit to pay fines, especially without risking homelessness.²¹³



Net
Income

One common situation in which judges and prosecutors estimate income is when the person indicates their profession but not their exact salary.²¹⁴ In that circumstance, decision makers will research (or know) how much the average person makes in the stated profession and use that to set the daily rate.²¹⁵

In practice, when judges and prosecutors have no information, they “estimate” by setting a default net income that is not tied to any details about the person’s finances, but is instead the customary rate used by a particular judge, prosecutor, or jurisdiction. The default rate among our interviewees ranged from 30–60 euro per unit.²¹⁶ Interviewees also explained that if they had some information indicating that the person receives public benefits, they would impose a different default rate. They would usually assume that the person’s net income was the benefits amount for a single person receiving long-term unemployment benefits (*Hartz IV*), 424 euro per month, and set the daily rate between seven euro²¹⁷ and 20 euro.²¹⁸

As one prosecutor explained, they “often” lack information about people’s financial circumstances and must use the default rate.²¹⁹ Judges and prosecutors acknowledge that setting the daily rate without any specific information is bad practice and that it can lead to daily rates that are too high for poor people to pay. As one prosecutor lamented after discussing how courts in his jurisdiction default to 25 euro per unit, “my calculation of the fine, after all, . . . should at least correspond to their actual economic circumstances, so that they are actually bound to be able to pay.”²²⁰ In another interview, judges said the default rate in their jurisdiction was 20–30 euro, yet one judge in the focus group later acknowledged that an estimated 80% of people sentenced lived on public benefits, which would suggest the default rate should be lower.²²¹

C. Deductions from net income

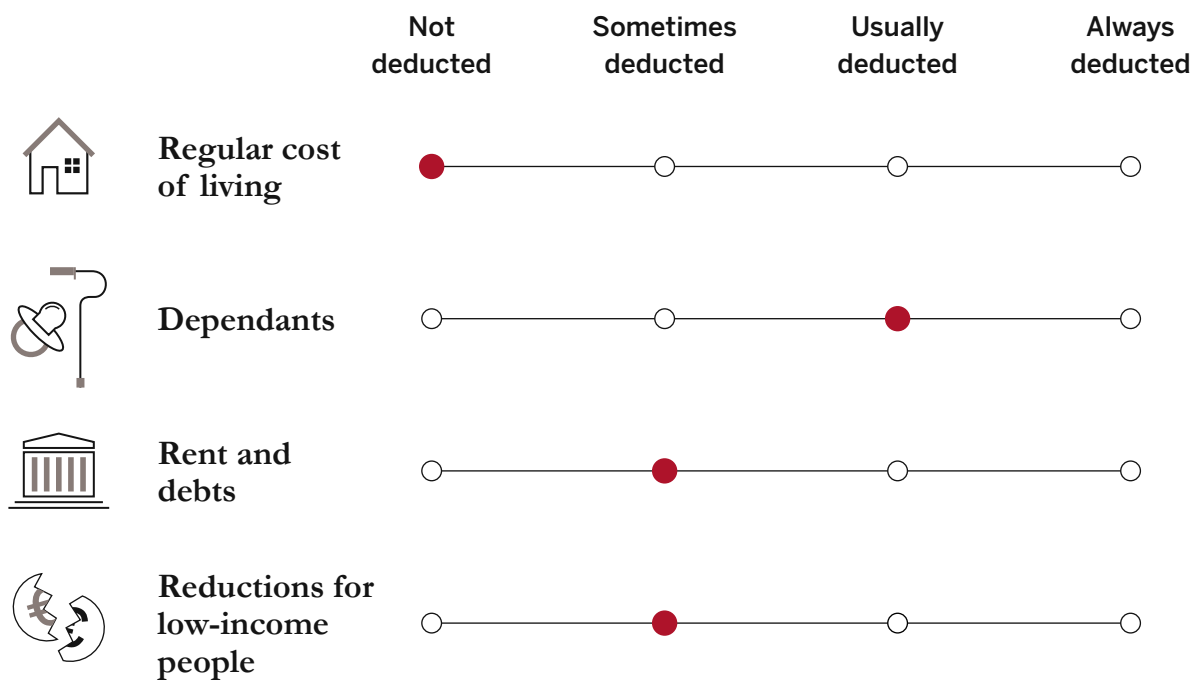
Although they are not required to do so by law, many courts make some deductions from net income under their authority to consider the “personal and financial circumstances” of the person in setting the daily rate.²²² Practices for doing so differ greatly, resulting in significant variations in final day fine sentences depending on the decision maker and the jurisdiction.



Deductions determine how accurately the fine will reflect a person’s expenses, and therefore financial circumstances. As one prosecutor said, “What is always a major topic of discussion is what expenses should I deduct? [This discussion] leads us to the question of the individual’s actual ability to pay in the particular case.”²²³

Our interviewees discussed three main deductions: deductions for support of dependents, which are regularly made, and deductions for rent and deductions for various debts, which are less common but are sometimes made. Judges and prosecutors in our interviews did not deduct other expenses such as general living expenses or otherwise deviate significantly from net income in setting a final daily rate. Our interviewees reported great variations in the

Deductions in Practice





Deductions

way deductions are made, if at all. For example, practices differed regarding whether more than one deduction would be combined.

- **Regular costs of living: *not deducted*.** It is not German law or practice to subtract ordinary expenses from net income.²²⁴ One interviewee explained that only “extraordinary expenses” were to be deducted.²²⁵
- **Rent and debts: *sometimes deducted*.** Rent and debts are sometimes deducted from net income for the purpose of calculating the daily rate. Many respondents said that they did not subtract rent or housing costs from people’s income, but a handful of interviewees reported doing so.²²⁶ Data show that low-wage earners in Germany spend 31% of their net income on rent.²²⁷ Decision makers who deduct rent do so in recognition of the fact that certain low-income people would struggle to make ends meet absent such a deduction. For example, courts will often calculate the daily rate for *Hartz IV* recipients by using the monetary benefits amount as net income without adding people’s housing subsidy, which can be understood as a deduction because it is permissible to include such in kind benefits in income. Courts also sometimes, though not usually, subtract people’s other debts, such as car payments, from their net income in setting the daily rate. There is no consistent approach used to deduct additional debts from net income when calculating the daily rate, and any such deductions are done on a case-by-case basis at the discretion of the court based on its “generosity,”²²⁸ judgments about whether the debt is for a worthwhile expense,²²⁹ the person’s efforts to pay, and the person’s overall financial circumstances.²³⁰
- **Support of family members: *regularly deducted*.** Almost all interviewees agreed that judges and prosecutors deduct a set amount from net income to account for each dependent.²³¹ For those who owe child or spousal support through the courts, the amount of the actual support order is deducted.²³² For all others, courts subtract the amount of support payment that would be ordered under German law under similar circumstances,²³³ or reduce net income by a set percentage.²³⁴ When using a set percentage, courts typically deduct 10%²³⁵ to 15%²³⁶ for each child,



and interviewees implied that this reduction is granted regardless of other household income. Courts also deduct 10%²³⁷ to 43%²³⁸ for spousal support.²³⁹ Some interviewees reported that they capped total deductions for support of dependents at 50% of the total income.²⁴⁰

- **Other expenses: rarely deducted.** It was very rare that judges and prosecutors spoke about deducting other expenses. In one interview, prosecutors said that they will deduct health expenses that are not covered by insurance.²⁴¹

Below are some explanations from German judges and prosecutors of how they approach deductions.

“The gray area starts when people owe money. [T]here are **different degrees of generosity** when it comes to accommodating people’s financial burdens. The lower my income, the more likely [rent or mortgage payments] will be taken into account.”²⁴²

“I think if someone these days gets a minimum wage and only earns . . . 1,200 euro. Then, if I do it right, I can’t really say, ‘You’ll get a 40-euro day fine amount.’ That is 1,200 divided by 30, right? . . . I believe, I’d actually need to **deduct the rent** they pay from the 1,200. . . . **Otherwise**, the . . . guy living on a minimum wage in marginal, precarious circumstances will be placed in a **considerably worse position**.”²⁴³

“I think this really is a **case-by-case** thing. There are also some people where you notice they really make an effort. They have debts, which they may have incurred as teenagers . . . and they really try, even if it’s 10 euro a month. In those cases, we would be more inclined to [reduce the daily rate than] if someone sits in the courtroom and says, ‘I don’t care about it. . . . I can’t pay it off anyway.’”²⁴⁴



Deductions

D. Deductions for low-income people

There is great variation in how courts apply deductions for lower-income people. Commentaries reference a deduction of up to 30% of the total fine for people receiving benefits or people with lower incomes.²⁴⁵ Judges and prosecutors differ in whether and how much they reduce net income, whether they exclude non-cash benefits such as housing subsidies from net income,²⁴⁶ and whether they apply additional deductions such as for support of dependents or debts.²⁴⁷ Judges and prosecutors are inconsistent in how much they reduce fines for lower-income people despite acknowledging that most people being sentenced are poor and thus experience the penalty more severely.²⁴⁸

These differences in approach are reflected in the variation in default daily rates for public benefit recipients, which our interviews revealed range from 7 to 20 euro.²⁴⁹ Under a strict net income calculation, the *Hartz IV* public benefits amount would result in a daily rate of 14 euro. Some courts impose 15 euro, rounding up from 14.²⁵⁰ A common response was 10 euro, which reflects the 30% discount mentioned in commentaries: “Well, if I know that this is an unemployed person and they get *Hartz IV*, because they possibly stated that, as many do, then we currently still apply 10 euro as the amount of the day fine. That’s, I think that’s also still the standard nationwide.”²⁵¹ There were some interviewees who set the daily rate at 20 euro by adding non-cash benefits to net income,²⁵² and some who set it as low as 7 euro because that amount better reflected what people can afford.²⁵³

German case law and commentaries are clear that courts should not peg the daily rate to net income for people with low incomes. As one case explains, deductions from net income should be made for people receiving public benefits and for people who are employed but do not make very much money.²⁵⁴ Some cases have held that people should retain 70% of their cash public benefits and that benefits in kind such as housing assistance should be excluded as a source of income.²⁵⁵ Courts attempt to balance—with different

results—considerations about the person’s poverty with their concern that very low daily rates are insufficient punishment.

In a seminal case, *Hann*, the court reasoned that based on a German Federal Constitutional Court case stating that the amount people receive for public benefits is set at a bare minimum subsistence level,²⁵⁶ criminal courts should set the daily rate for people receiving public benefits at one euro per unit.²⁵⁷ However, without much explanation, the *Hann* court accepted a lower court’s decision to set the daily rate at ten euro per unit.²⁵⁸ In doing so, the court noted that it was taking into account that criminal punishments need to be taken seriously for the criminal legal system to serve its societal purpose of maintaining order.²⁵⁹ It did not explain why a lower fine for a poorer person would undermine this purpose of the system. A conference of ministers from each German state formed a working group in 2014 to discuss whether courts (including the *Hann* court) are adequately protecting the poor as they attempt to balance the interests of punishment with the reality of poverty. The working group was to consider “whether people living close to the subsistence level are hit harder by a fine based on net income (§ 40(2) StGB) and whether the solutions developed by the courts on the basis of the statutory regulation, which are intended to ensure that this group is not deprived of what is ‘indispensable for subsistence’ in the course of the setting and enforcement of fines, prove to be sufficient in the light of the principle of the welfare state.”²⁶⁰ So far, this working group has not generated any policy changes.



Deductions



Three Scenarios

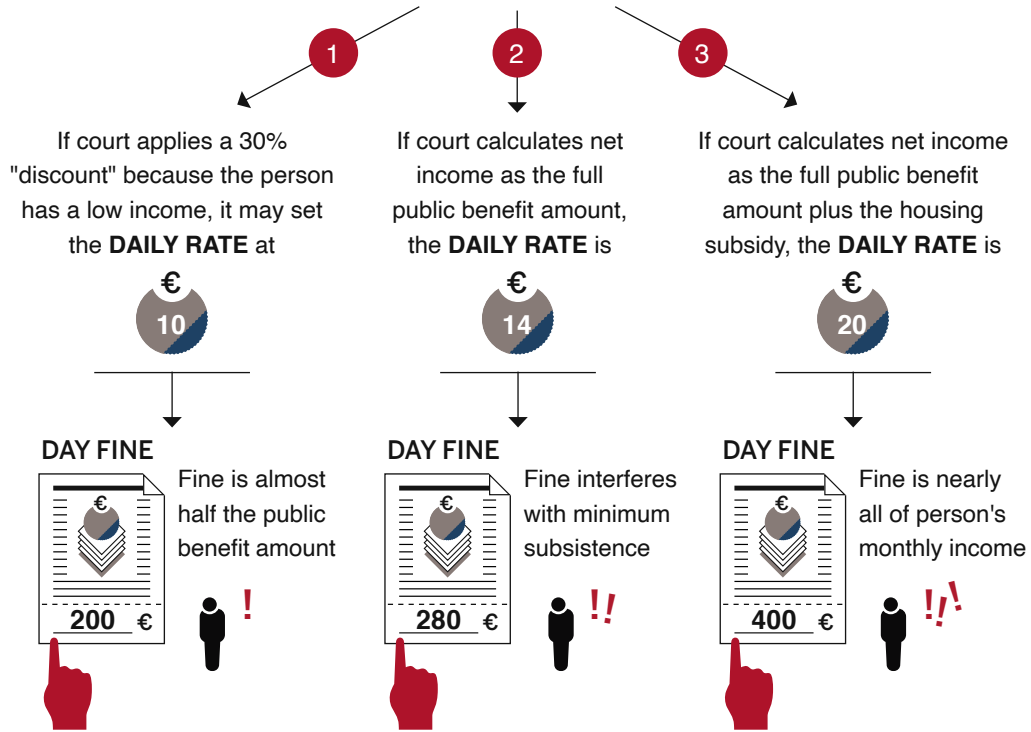
The way judicial discretion is exercised can create significantly different outcomes for low-income people.

A person eligible for public benefits receives
424 € / mo.

The person is sentenced to

20 UNITS

(for fare evasion)



None of the daily rates in these scenarios accurately reflect the person's ability to pay. To be truly affordable, the daily rate would have to be set between 1 and 5 euro.





E. Upper and lower limits for the daily rate

a. Statutory ranges for the daily rate

Although German courts generally set the daily rate based on the calculations described above, there is a statutory floor and ceiling that constrains them.

The daily rate must be set between 1 and 30,000 euro per unit.²⁶¹

In practice, German courts rarely calculate daily rates that trigger the statutory floor or ceiling. As Chart 1 shows, the vast majority of fines are between 5 and 50 euro per unit.²⁶²

Interviewees reported that the statutory ranges were adequate to capture the sentences they thought they should set.²⁶³ Some agreed with the statutory boundaries because “there must be limits somewhere” of total punishment.²⁶⁴ Others disagreed and did not see the purpose of cabining the daily rate.²⁶⁵

Chart 1: Number of cases by daily rate range, 2018

Daily rate set (in euro)	Number of cases sentenced
Up to EUR 4.99	8,493
EUR 5–EUR 10.00	136,927
EUR 10.01–EUR 25.00	201,273
EUR 25.01–EUR 50.00	183,240
EUR 50.01+	20,155
Total number of cases sentenced to day fines	550,312 (data available for 550,088 cases)



b. In-practice ranges for the daily rate

Regardless of their views in the abstract about the fairness of high daily rates, interviewees, including prosecutors who handle crimes committed by wealthy people, reported having limited experience charging daily rates at the higher end of the available range.²⁶⁶ Indeed, German judges and prosecutors hesitate to set high daily rates even when they may be warranted. One interviewee reported revisiting his decision after arriving at a daily rate of 150 euro because the rate seemed too high: “We’d flinch a little if the daily rate amount was somewhere north of 100 or 150 euro, even if it was tallied with the income, on paper. Possibly there is, subconsciously, one’s own ability to pay plays a role somehow.”²⁶⁷ Another said, “I still believe that the very high incomes, which we have relatively rarely, may still not be hit as hard anyway . . . because we are reluctant to go all the way up with the daily rate amounts, which we are definitely free to do.”²⁶⁸

Interviewees also reported that they rarely set daily rates in the lowest part of the range. There have been proposals in Germany to increase the minimum rate from one euro to five euro²⁶⁹ but advocates argue that the real issue is that daily rates in the lowest range are not used often enough for people who have very low or no income.²⁷⁰ Judges and prosecutors did not provide much reasoning for why they do not use the lower end of the range in appropriate cases and instead reiterated their default rates for lower income people.²⁷¹



Putting it all together: judges and prosecutors walk through their process for setting the daily rate

Throughout this section, we have discussed the policies for calculating the daily rate, including what counts as income, deductions the court may make, and how judges approach cases when people have limited means. Below, judges and prosecutors describe how they apply this doctrine in practice by walking through their decision-making in specific cases.



“You estimate it. [Setting] both [the daily rate and units is] based on a gut feeling, really. I mean, we’ve all been doing this for a while now, it doesn’t take time. I have a feeling . . . I have a reference point, and starting from that I go up or down. This means that a decision is made within two, three, four, five seconds. And the amount, it’s either number crunching, if I have something to work with. I’ll make deductions or not. Or I’ll divide it by 30 to arrive at my day fine amount.”²⁷²

“When you set the sixth fine that day, of course that’s a routine thing in your head: bam, bam, bam. . . . So I don’t sit down and make myself a list: let’s see, he’s got 1,400 euro at his disposal, and, according to the [child support] table of payments, he has to pay for his . . . children, [he has to pay] this and that. No. You hear 1,400, okay, he’s got 1 or 2 kids, his wife has got her own income, a bit below that, so we’ll go with [30]. Well, of course that’s not down to the cent, nor do I make day fine amounts of 31 or 32 euro.”²⁷³

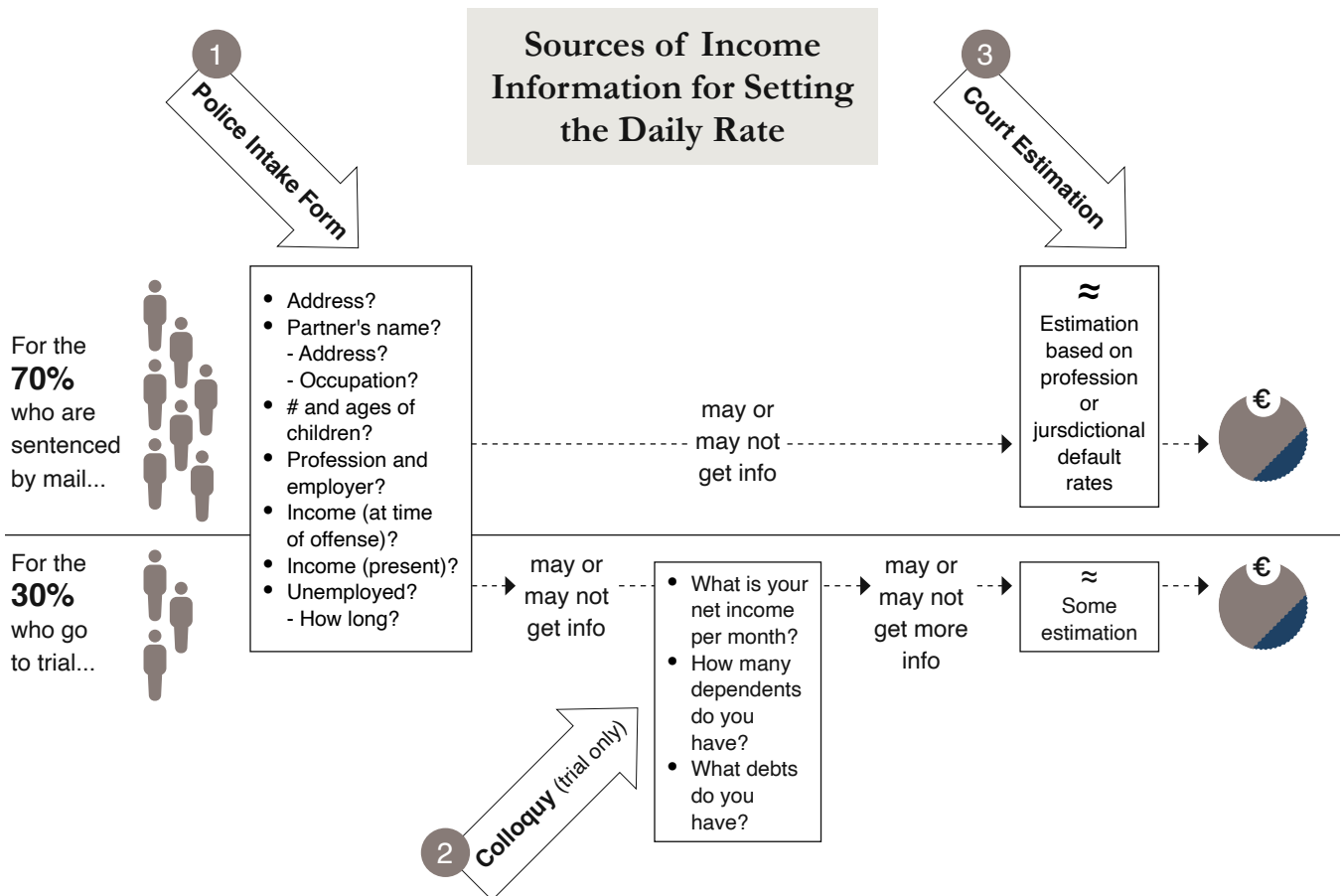
“Daily rate amounts are actually easy [to calculate]. . . . That’s something any judge can calculate in their head. 1,200, 1,500, 1,800, 2,100 net income, these are the corresponding day fine amounts, which one has ready in one’s head. . . . You just have to see what you deduct. Whether you calculate it accurately or whether you say, ‘He is married, he has two children, I’ll deduct 500–600 euro from the income he has stated.’ That’s an estimate.”²⁷⁴



3. Collecting financial information to set the daily rate

To set the daily rate, courts must obtain information about the person’s financial circumstances. In Germany, the process for collecting this information depends on whether the case is decided by summary proceedings or trial. Summary proceedings are expedited procedures available for fine-only cases that resolve the case through the mail and without court appearances, similar to how traffic tickets are processed in the United States. Seventy percent of fine cases are decided by summary proceeding.²⁷⁵

In this subpart we detail how fines are set in summary proceedings and trial. In both scenarios, judges and prosecutors rely on people’s self-reported



answers to a handful of ability-to-pay questions on a short police intake form. In summary proceedings, judges and prosecutors rarely follow up to learn more about people's financial circumstances, primarily relying instead on the intake form and estimates that they are authorized to make by law.²⁷⁶ If the case goes to trial, judges may also ask follow-up questions regarding people's financial circumstances through a colloquy.²⁷⁷

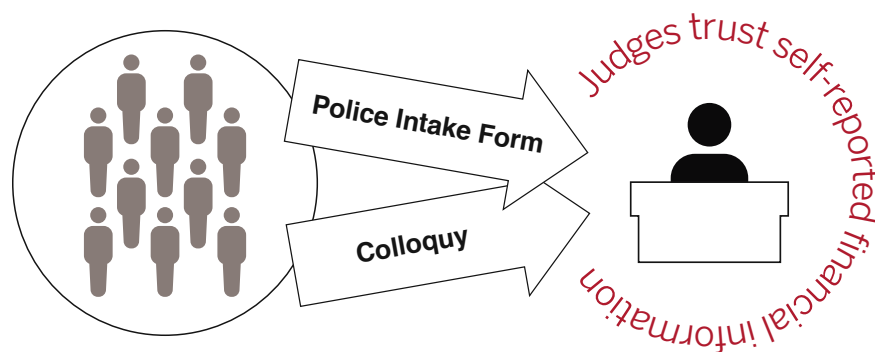


Sources
of Info

A. German judges and prosecutors trust people's self-reported financial information

In general, judges and prosecutors report that they trust the accuracy of self-reported financial information—whether it is provided on the police intake form or given as part of a colloquy. As one German judge stated, “I don't ask to see pay slips if the defendant tells me something about his income. Funnily enough, I have the feeling, from my experience in recent years, they do tell the truth. Defendants even tend to say they earn a little more, because [having more income] is a bit of a status thing.”²⁷⁸

Judges and prosecutors report that while they generally trust the accuracy of self-reporting, they expect and accept that there may be some small discrepancies. One judge explained: “Most of the time . . . I think it's relatively





plausible what defendants say. If it's a little less, so what? But . . . I really don't feel like I'm being lied to from start to finish. They are usually pretty open about what they earn."²⁷⁹ In another focus group, an interviewee stated that they, as judges, will assume the testimony is truthful even if they believe the person may have been aware of the benefits of underreporting their income:

“And, to be honest: what [information] do we rely on when we take the net income as the basis? In these cases, we usually rely only on the information provided by the defendant. So, if a defendant knows how it works, either because he is represented by a lawyer or because he has courtroom experience, then he knows to state his net income as low as possible. And this will not be examined in the main trial and, as far as I know, also not by the Public Prosecutor's Office, if they request summary proceedings. It's assumed that this [information] is truthful, or at least fairly truthful.”²⁸⁰

Judges and prosecutors may rely on people's word because they are motivated by efficiency,²⁸¹ but this is not the only reason they accept self-reporting. When evaluating the trustworthiness of self-reported financial information, judges and prosecutors in Germany also acknowledge that most people in criminal court have limited resources,²⁸² and when they see indicia of poverty, they do not suspect the person of failing to disclose income.²⁸³ A few of the interviewees also noted that the economic lives of lower income individuals were more transparent—everyone knows the amount of public benefits, the salaries of government employees, and approximately what people with common jobs earn²⁸⁴—so misinformation is not a significant problem. Interviewees noted that low-income people may, therefore, proportionately pay more than individuals with more complex finances because the court may not always be able to discover the true income of higher earners.

Summary proceedings, trial, and the role of judges and prosecutors in setting the daily rate

The choice between summary proceedings and trial is a threshold decision that determines the source of the financial information that decision makers will use to set the fine. In all cases, prosecutors first receive a case file from the police, which typically includes details about the offense, and the police intake form, which collects financial information. In about 70% of cases in which the person is facing fines, prosecutors choose to initiate a summary proceeding,²⁸⁵ through which the case may be resolved and sentenced without an oral hearing.²⁸⁶ If the prosecutor does not initiate a summary proceeding, the judge sets the case for trial.²⁸⁷ The prosecutor decides between summary proceedings and trial based on a fact-specific inquiry,²⁸⁸ which includes consideration of whether the decision maker believes additional information is needed to sentence the case.²⁸⁹

If the prosecutor chooses to adjudicate the case by summary proceedings, they determine the number of units, calculate the daily rate and issue a summary proceedings order. To set the daily rate, prosecutors have the authority to investigate the person's finances but, in practice they rely on the police intake form.²⁹⁰ Judges review the order and can either agree to the prosecutor's sentence (including both the number of units and the daily rate), or, if they disagree, schedule a trial. Judges cannot propose a different number of units or daily rate without a trial.²⁹¹ If a judge signs off on the prosecutor's summary proceedings order, the order is mailed to the person, and it becomes enforceable if the person does not object within two weeks.²⁹² The person can appeal the daily rate through mail or request an in-person hearing to dispute the whole order or any part of the order, including the daily rate.²⁹³ If the case goes to trial, either because the prosecutor requested it at the outset or because the judge or recipient objects to the summary proceedings order, the judge may engage in a colloquy to solicit information about the person's ability to pay. Judges rarely use their authority to demand evidence such as bank records, pay slips, or other documents.²⁹⁴ German courts are able to obtain bank information,²⁹⁵ but are not permitted to access tax records.²⁹⁶



Sources
of Info



B. Setting daily rates in summary proceedings

In summary proceedings, courts and prosecutors use the police intake questionnaire to set the daily rate. The police intake form in one German state solicits the following information: the person's address; partner's name, address, and occupation; number and ages of children; profession and employer; income at the time of the offense; income at present; and if unemployed, length of unemployment. The form is about three quarters of a page long.²⁹⁷

The form covers necessary questions to determine the daily rate, but when providing answers to complete the form, people do not always know that their answers will be used to set their fine so they may not provide enough detail.²⁹⁸ People are not entitled to counsel to help them respond to the intake form.²⁹⁹ One prosecutor explained that he thought that the information on the intake form failed to provide unrepresented individuals adequate notice about the importance of providing accurate and detailed information: "I have a lot to do . . . with defendants who don't have an attorney . . . They're not familiar with the day fine system. . . . I therefore believe that [adequate notice] should be [provided] accordingly as a matter of principle, for the sake of fair procedure."³⁰⁰ While we did not interview police for this project, our understanding is that the police do not provide people guidance about filling out the intake information. They simply ask people the questions listed on the form and record the answers.³⁰¹ The police do not conduct additional investigation about people's financial circumstances.³⁰²

Judges and prosecutors rely on the police intake form when setting the daily rate.³⁰³ They reported that they do not follow up on the financial information collected in the police intake form though they have investigatory authority under German law.³⁰⁴ When asked about the fairness of using police intake forms as the sole basis for financial information in summary proceedings, prosecutors and judges stated that if people disagree with how the daily rate was calculated, they can provide additional information, appeal, or request a trial.³⁰⁵ However, interviewees also acknowledged that many people may

have challenges that prevent them from understanding court processes and representing themselves.³⁰⁶ People who are experiencing housing instability, for example, face personal difficulties and also may not receive important information from the court about their case.³⁰⁷ As one interviewee explained,

“Those who have a lower income are rarely those who actually take action against the [summary proceedings], because of their lower income. This is a core issue. Those who earn more anyway, I think, will contest it more often.”³⁰⁸

C. Setting daily rates at trial

For cases that are set for trial, judges and prosecutors are able to supplement the information on the police intake form by asking questions at the hearing. Judges ask questions about income, family circumstances, and other debts.³⁰⁹

German judges do not find calculating the daily rate at trial to be overly complex. German judges often spoke of their high caseloads and limited time to spend per case, estimating that they have less than ten minutes, and sometimes just seconds depending on the jurisdiction and complexity of the case.³¹⁰ Despite these constraints on their time, the judges we interviewed did not report that calculating the daily rate is a burdensome requirement³¹¹ and indeed reported that it does not take very much time.³¹² Even when judges spoke about the process in more detail, including the math they do to arrive at an accurate amount, they still concluded that the process is fast.³¹³

Judges also reported that the ability-to-pay colloquy provides them with the information they need to set the daily rate. As one interviewee summarized, “Well, at trial, it is rather rare that you need to estimate [because of a lack of information.]”³¹⁴ In other words, judges rarely need to estimate income for cases that proceed to trial because they rely on what they are told and observe at trial.



Sources
of Info



D. Privacy and rights against self-incrimination

As described above, prosecutors and judges in Germany rely on financial self-reporting to set fines and it is part of the culture of German courts to rely on this reporting. Prosecutors and judges also limit investigations of people's finances to only the most serious cases because German law considers it a disproportionate invasion of privacy for the state to intensely scrutinize people's financial circumstances when they are before the court for offenses that do not justify such an intrusion, such as most of the offenses that are eligible for day fines.³¹⁵

An additional barrier to self-disclosure of financial information, at least in theory, is that people in Germany have a right to silence and are not required to disclose their income information.³¹⁶ Courts may, therefore, be unable to base fines on people's financial circumstances if people exercise their right against disclosure. However, one prosecutor noted it was "extremely rare that the defendant does not provide information" in a trial.³¹⁷ The right against self-incrimination, therefore, may not be a practical barrier to obtaining people's financial information in Germany. This may be because, for many people, a fine tailored to their actual income is lower than it would be using the jurisdiction's default rate.³¹⁸

4. Setting fine units

The second number that is used to calculate the total day fine amount is the number of units. In Germany, statutes set forth a range of units for each offense and judges and prosecutors determine the number of units based on a fact-specific inquiry.

German statutes do not assign a number of units for each offense, and judges and prosecutors have a lot of discretion to set units within a broad statutory range. According to statutory guidelines, when setting units for each crime, decision makers should consider the nature of the offense and the person's circumstances.³¹⁹ One judge explained that they consider the person's "life



Initial decision to sentence to fines

Under the German criminal code, most criminal statutes that define an offense provide for broad punishment ranges, measured in units or days, and the option for the court to sentence the offense to either fines or prison. For example, the statute defining theft provides that the individual “shall be liable to imprisonment not exceeding five years or a fine.”³²⁰ Fines are the presumed punishment for any offense sentenced to 180 units and below.³²¹ For offenses assessed between 181 and 360 units³²² judges may, in their discretion, sentence the person to a fine.³²³

In practice, judges and prosecutors first determine whether the factual circumstances surrounding the offense merit a sentence of incarceration or a day fine.³²⁴ They assess culpability³²⁵ and reentry considerations.³²⁶ If they determine incarceration is appropriate, they may suspend the sentence or impose jail time. Judges and prosecutors reported that they would not sentence a person to prison instead of a fine just because they believed the person may be unable to pay the fine.³²⁷ If the court or prosecution decides that a fine sentence is appropriate, they assess the number of units of punishment that is appropriate for the offense. This assessment is a fact-specific inquiry, as set forth in this section.

before the offense, their social background, their family background, [and the court’s] expectation of how this specific punishment will impact this specific human being.”³²⁸

One prosecutor provided an example of the factual differences that would alter their assessment of the number of units. “[T]he classic case is theft. If somebody steals something worth 20 euro at the supermarket, then that’s one thing. But if someone at the supermarket steals something, for example, out of a bag hanging from a wheelchair, then that has a completely different dimension of wrongdoing and is automatically, naturally—it then results in a higher fine.”³²⁹

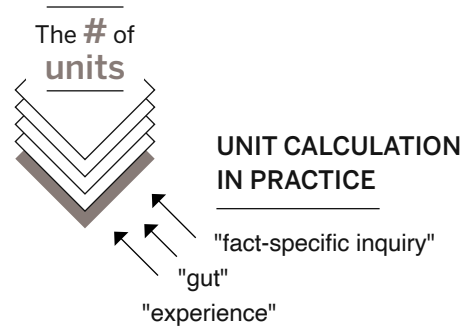


Units Calculation

UNIT CALCULATION LEGAL STANDARD

Section 46 German
Criminal Code:
Principals of
Sentencing

- reentry considerations
- motives + attitude
- consequences
- person's individual characteristics



Across almost all of our interviews, judges and prosecutors stated that they consider mental health and addiction to be factors that reduce people's culpability and thus reduce the number of units assessed.³³⁰ Further, while poverty and income status is usually factored into the calculation of only the daily rate, one commentary notes that factoring poverty into the unit number is considered "necessary if the financial circumstances of the person . . . have impacted the extent of the injustice caused by the offence."³³¹ The commentary explains that poverty may reduce units if a crime is motivated by economic plight.³³²

Judges and prosecutors explained that setting units is a question of "gut"³³³ and that decision makers may differ on their unit assessments.³³⁴ One prosecutor said, "[t]his fine-tuning is something that no one can do for you. And it is something that, I would say, all of us have a feel for. There are no internal agreements either, but we [set units] more or less automatically."³³⁵



Units

Day fine units in practice

Judges and prosecutors provided the following examples of common offenses and the units they typically impose. The units are multiplied by the person's daily rate to arrive at a total fine amount. These examples help us put together how much in total fines people would face for common misdemeanors.

Driving Under the Influence³³⁶

"A blood alcohol level of 1.2 always costs somewhere between 40 and 60 day fine units."³³⁷

"If it's 1.6 [blood alcohol level], then we'll have at least 30 [units]."³³⁸

Fare Evasion³³⁹

One judge said fare evasion received between 15 and 20 units.³⁴⁰

Data show that approximately 20% of fare evasion cases are sentenced to between 5 and 15 units and about 35% of cases receive between 16 and 30 units.³⁴¹ The remaining cases are sentenced to over 30 units.³⁴²

Shoplifting³⁴³

One group of judges discussed the common practice of dropping first time low-level shoplifting cases and sentencing the subsequent offense to 30 units.³⁴⁴

Benefits Fraud³⁴⁵

One judge said, "I often have people who obtained benefits or [fare evasion] where the deal is: summary proceedings, 15 units, or summary proceedings, 20 units." The judge referred to these as "symbolic punishments" because in their view the fine amounts were so low.³⁴⁶



Another interviewee explained:

“[It is] mainly down to **instinct**. But, of course, we have [the statutory principles of sentencing] . . . which don’t say ‘**gut feeling**.’ So, ‘gut feeling’ is that extra ingredient that comes with . . . life experience and professional experience. After all, ‘gut feeling’ encompasses [the principles of sentencing] in its entirety, with all—with all its intricacies.”³⁴⁷

Some people reported that their agency had internal, informal guidelines for setting units for the most common misdemeanors such as driving under the influence, theft, and fare evasion, but these lists are unofficial and vary by office, if they exist at all.³⁴⁸ Judges and prosecutors spoke about the need for these guidelines to create uniformity because otherwise there can be great variation in units depending on the person deciding.³⁴⁹ In practice, even with lists as guidelines, interviewees said unit sentences vary.

“Well, it seems that the list has remained unchanged here for a long time, too . . . At the end of the day, it’s a gut feeling. And **everyone would perhaps judge each case differently** than their colleagues. So if one were to present the very same case to all our colleagues, to 13 public prosecutors, there would certainly be, perhaps not 13 different results, but certainly many different results. So there is definitely not one and the same default number of day fine units that everyone [applies] to the individual case.”³⁵⁰

“We always have a framework within which we move. And there is **no sentence that is accurate**. That is to say, if . . . the four of us have the same case, and each of us is supposed to draft a summary proceedings order, I am firmly convinced—okay, let’s say relatively sure—that we’ll meet in an area where we will deviate from each other by a maximum of 20%, or 30%.”³⁵¹

Total
Fine

5. Calculating the total fine

The unit number and the daily rate are the two components used to calculate the total financial penalty. To determine the total amount of the day fine, courts simply multiply the number of assigned units by the daily rate. German law is explicit that these two figures should be calculated separately and that judges must document the reasons for their decisions. Only after calculating the component parts of the fine do judges multiply them together to arrive at the total fine. After they calculate the fine, judges have discretion to adjust the final amount.

A. Calculating the fine is a two-part inquiry

A fundamental principle in Germany's day fines system is that calculating the daily rate and assessing units are separate and independent steps. This process is often referred to as the "two-part inquiry." The two-part inquiry allows judges to think clearly about each component part of the fine without being influenced by their gut instinct about what the total fine should be.³⁵² They can consider the person's culpability to satisfy the goals of punishment, and then separately consider the person's financial circumstances to satisfy the goals of equity and proportionality.

The basis for each calculation must be documented in writing,³⁵³ including the court's rationale for the daily rate, which must be explained in more detail if the court deviates from net income.³⁵⁴ A judge's failure to follow the two-part inquiry is grounds for an appeal or annulment of the decision.³⁵⁵ For example, there would be strong grounds for appeal if a judge first decided on a total fine they determined to be appropriate based on their own intuition, and then tried to make it fit the day fines model by reverse engineering the daily rate and the unit number.

Judges and prosecutors in Germany see the two-part inquiry as critical to keeping them honest and making the system fair. One interviewee provided a hypothetical example of a difficult case in which they thought the person



Total
Fine

deserved a steep penalty. When asked if they had a total amount in mind going into the case, he responded:

“You try to remain fair and use the actual [financial] circumstances and truly disregard everything you took into account before for the number of day fine units. And I also think this separation is okay, and it is a way to make sure, to some extent, that [they are] really not punished too severely.”³⁵⁶

B. Judges retain discretion to adjust the total fine amount

In the same way that judges and prosecutors have considerable flexibility in assigning the unit numbers and calculating the daily rate, they also have discretion to adjust the total fine amount after they calculate it. The German commentaries provide that the court may reduce the fine if it would be unaffordable, and specifically note that that fines in cases with high units may warrant deductions for lower-income people.³⁵⁷ Courts are also supposed to consider whether the fine is so high as to impede a person’s reentry.³⁵⁸

Interviewees acknowledged their discretion to adjust the total fine amount, but reported doing so infrequently to preserve the two-part inquiry. Many judges never actually calculate or look at the total fine amount.³⁵⁹ One judge explained that he does not look at the total fine amounts because they sometimes do strike him as disproportionate for poor people:

“[P]eople on low incomes are hit harder, even if the day fine system tries to compensate for this, at least in theory. Sometimes when you see the final amount of the fine, you can be taken aback at times. So you think, ‘Well, X amount for theft.’ So, often, you shouldn’t look at the final number, because otherwise you’ll think, well, it doesn’t really fit.”³⁶⁰

Courts are also supposed to consider whether the fine is so high as to impede a person's reentry.

Monitoring and enforcement of day fines

This section provides an overview of post-sentencing policies and practices for collecting and enforcing day fines.

Courts in Germany are not involved in day fines cases after sentencing. When a judge sentences the case, they are sentencing the person to a fine, and the order states that if the person fails to pay, they will be incarcerated without further process.³⁶¹ This part of the system in Germany could not be implemented in the United States because it would violate constitutional protections against incarceration for nonpayment without a determination of willfulness.³⁶²

Payment and payment plans are monitored by clerks.³⁶³ After sentencing, clerks have discretion over how to enforce the fine, including payment plan terms, extensions of time to make missed payments, and the use of community service as an alternative to payment. Practices vary by jurisdiction and by clerk.³⁶⁴ If a person continuously fails to pay, eventually the clerk will decide that the person has had enough time and will order the person to be jailed to serve time for the remaining units on their sentence.³⁶⁵

Payment plans: People are entitled to payment plans under German law.³⁶⁶ Payment plans can be authorized by the court as part of sentencing or by a clerk. Judges must, in theory, balance the need to give people enough time to pay with the

concern that people do not remain stuck in the criminal system for an extended period of time, and, where necessary, they should reduce the daily rate if no reasonable payment terms can be reached. For example, a payment plan that would extend over several years, given the amount the person can afford per month, may be considered unreasonable, and the daily rate amount should be reduced instead.³⁶⁷ In practice, however, it does not appear that this is common.

It is usually clerks who authorize and set payment plan terms.³⁶⁸ Payment plan amounts must be determined using detailed information about the person's financial situation, including expenses such as food and clothing, rent, family support, and other payment obligations.³⁶⁹ There are no additional fees or costs associated with a payment plan.

When a person misses a payment, clerks send reminders and notices. Clerks are not authorized to use arrest, warrants, or additional court dates to compel appearance or payment. Researchers have found that clerks refer to internal guidelines for how long payment plans should last, and at the end of that term, if the person has not paid in full, the clerk will order them to be incarcerated.³⁷⁰

Monitoring and enforcement of day fines (cont'd)

Modifications: There are mechanisms under German law for amending or suspending the fine amount during the course of repayment.³⁷¹ However, post-sentencing relief rarely occurs in practice.³⁷²

Civil collections methods: According to German law, clerks may use civil collections tools such as seizing assets in response to nonpayment.³⁷³ In practice, this is rare. In one study, only about 3% of fine cases were paid this way.³⁷⁴

Community service: Community service may be used in lieu of payment after a person fails to pay, but it is not available as an alternative to fines at sentencing.³⁷⁵ German states have experimented with expanding the availability of community service,³⁷⁶ but currently, it is not always available. People complete their fine sentences with community services in only about 4% of cases.³⁷⁷ German scholars have written with reservations about community service as an alternative to fines, finding that community service poses similar barriers as fines for people who are unable to pay.³⁷⁸

Incarceration: Under German law, for each unit of unpaid fines, a person must serve one day in prison.³⁷⁹ The court or clerk is not required to hold a hearing or otherwise consider the reasons for the person's nonpayment; rather, people are required to serve time for any unpaid units, even if they are unable to afford the fine.³⁸⁰ The length of time

a person is given after nonpayment before being incarcerated varies depending on the clerk and the jurisdiction.³⁸¹

Jailing people for nonpayment is common in Germany: on any given day, approximately 10% of people in prison in Germany are there for failure to pay. While data on the percentage of fines cases that result in incarceration are hard to find, researchers have estimated that it is between 8% and 10%.³⁸² For the past several years, legislators and advocates have considered reforms to reduce incarceration, including proposals to credit people more than one unit per day served in prison.³⁸³ Over the last two years, judicial representatives from every state have also been considering proposals to address the high rates of incarceration for failure to pay.³⁸⁴ Some have called for following Sweden's lead and eliminating prison as a punishment for nonpayment.³⁸⁵

Driver's license revocation: Driver's license revocation is not an available sanction for nonpayment of fines under German law. Driver's licenses may be revoked only in connection with certain driving offenses.³⁸⁶ Our interviewees believe that revoking people's driver's licenses is overly harsh because it hinders people's ability to fulfill their daily responsibilities.³⁸⁷ One judge noted that driver's license revocation also hurts poor people more than people with means.³⁸⁸

Part Three: Day Fines in Context

Understanding the history and structure of Germany's day fines system is important for U.S. lawmakers who are considering designing and implementing a day fines system in their jurisdiction. Equally important is understanding how day fines currently fit into Germany's criminal legal system,

including the prevalence of day fine sentences, the types of offenses that are sentenced to day fines, and the outcomes of cases receiving day fines sentences. Overall, we found that day fines, the most common sentence in Germany, are usually used to sentence low-level misdemeanors. Although they are sometimes used to punish more serious misdemeanors, system actors tend to perceive day fines as appropriate for low-level cases, and an efficient way to sentence high volumes of such cases.

1. Germany sentences most criminal cases to day fines

Germany has a total population of almost 83 million and a low crime rate.³⁸⁹ It also has one of the lowest rates of incarceration in Europe.³⁹⁰ The vast majority of criminal cases in Germany are sentenced to fines as a sole sanction. All fines under the criminal code are imposed as day fines, and day fines are not imposed in combination with supervision, community service, or incarceration.³⁹¹ The percentage of cases sentenced to fines in Germany has remained steady—around 80%—since the adoption of day fines.³⁹² In 2018, German courts decided a total of 653,060 criminal cases.³⁹³ About 84% of those cases were sentenced to day fines.³⁹⁴ In that same year, about 16% of cases were sentenced to prison, of which about 69.5% (10.6% of total convictions) received a suspended sentence, which is similar to probation.³⁹⁵

Non-criminal traffic offenses and other ordinance violations are referred to as “*Ordnungswidrigkeiten*” in German; penalties for such offenses are not

sentenced with day fines, though ability to pay is a factor in setting fines for those offenses.³⁹⁶

2. Most day fines offenses are low-level misdemeanors

Data show that day fines are used primarily to sentence low-level misdemeanors. As Chart 2 shows, the offenses receiving day fines include low-level

misdemeanors, such as drug possession, simple theft, and fraudulent acquisition of services (usually fare evasion). They also include drug trafficking, fraud, assault, and driving under the influence. Though day fines are a sentencing option for up to 360 units, and the default sentence for up to 180

Chart 2: Number of day fines cases by offense, 2018

Offense and Statutory Citation	Number of cases
1 Simple theft (Sec. 242 StGB)	66,836
2 Fraud (Sec. 263 I StGB)	64,540
3 Driving under the influence (Sec. 316 StGB)	48,416
4 Fraudulent acquisition of services (Sec. 265a StGB)	46,520
5 Driving without a valid license (Sec. 21 StVG)	46,108
6 Leaving the scene of an accident without cause (Sec. 142 StGB)	30,093
7 Possession of controlled substances (29 I 1 Nr. 3 BtMG)	26,841
8 Battery (Sec. 223 StGB)	24,380
9 Simple insult (Sec. 185 StGB)	21,655
10 Falsifying documents (Sec. 267 I StGB)	18,118
Total number of cases for top ten offenses sentenced to day fines	393,507

units, data show that day fines are applied primarily to less serious cases. Over 90% of fine cases receive 90 units or less.³⁹⁷

When asked to describe which cases usually receive day fines, judges and prosecutors explained that day fines are most appropriate for low-level offenses, and more serious offenses should receive a period of incarceration or a suspended sentence. For example, one interviewee stated that day fines were appropriate for “minor bodily-harm offenses, minor cases of—I don’t know—property damage, theft, fraud. Really minor offenses. For anything beyond that, fines are out of the question.”³⁹⁸ Another interviewee explained that first or second time cases of shoplifting or assault where the victim did not sustain significant injuries would be appropriate for a day fines sentence.³⁹⁹ Overall, our interviews indicated that judges were most likely to sentence individuals to day fines if the case involved 90 units or less, and these representations are consistent with the data.⁴⁰⁰

There are two additional reasons why judges and prosecutors use day fines most frequently for cases of 90 units or less. First, under German law, people convicted of crimes with 90 units or more receive a criminal record for

Chart 3: Number of cases by unit range, 2018

Number of units imposed	Number of cases
5–15	45,784
16–30	186,222
31–90	271,511
91–180	43,301
181–360	3,270
361+	224
Total number of cases sentenced to day fines	550,312

that case (anything below 90 units is not registered in the person's record) and judges and prosecutors try to impose fewer than 90 units for low-level cases so that people do not suffer that collateral consequence.⁴⁰¹ Therefore, because judges generally see day fines as appropriate for misdemeanors, and because of this 90-day threshold, they seem to cluster fines cases to under 90 days and consider most other cases as "serious" and appropriate for suspended sentences or incarceration.⁴⁰² Second, the fact that day fines are not used as much in more severe cases may be a product of Germany's harsh daily rate formula. Fines add up to significant amounts fairly quickly because the amounts per unit are high. While judges generally deny that people's inability to afford high day fines nudges them towards carceral sentences,⁴⁰³ judges may unintentionally balk at high fine amounts and therefore impose suspended sentences or prison instead when they believe people will not be able to pay.

Outcomes of cases sentenced to day fines

Data on day fines case outcomes are limited but both available datasets show that approximately 75% of people complete payment of fines.

According to one study in the German state of North-Rhine Westphalia ("The NRW Study"), 75% of people sentenced using day fines were able to pay their fines. Approximately 8% were incarcerated for nonpayment. However, many required payment plans and we do not know if they received contributions from family members to pay, or how much they struggled to complete their sentence.⁴⁰⁴

An older study, published in 1990, found that 77% of day fines were settled by payment, 8.5% by community service, and 14% resulted in imprisonment for nonpayment.⁴⁰⁵

3. Significant numbers of people are imprisoned for failure to pay fines

Under German law, each unit of unpaid day fines can be converted into one day in jail. Though Germany has low rates of cases sentenced to prison in the first instance, high numbers of people cycle in and out of prison for nonpayment of their fines. In 2002, the last year for which data are available, 56,000 people were incarcerated for failure to pay a fine over the course of one year.⁴⁰⁶ In that same year, 697,391 people were admitted to prison, which means 8% of all prison admissions were for failure to pay fines.⁴⁰⁷ More recent data capture only the prison population on certain days every year and the number of those people who are in prison for failure to pay fines. It does not capture the total number of people incarcerated per year for nonpayment.⁴⁰⁸ In November 2018, 4,503 of 44,113—or over 10%—of prisoners nationwide in Germany were incarcerated solely for failure to pay.⁴⁰⁹ The Mecklenburg Study found that between 2014 and 2017, approximately 40% of all prison intakes in that state were people who failed to pay their day fines.⁴¹⁰

People sentenced to property offenses, including low-level theft and fare evasion, make up a significant percentage of the people in prison for failure to pay fines. The Mecklenburg Study found that one third of nonpayment-related prison sentences were for property offenses and one quarter were for fare evasion.⁴¹¹ The NRW Study found that one in seven people originally charged with fare evasion end up in prison for nonpayment.⁴¹²

Studies also show that people incarcerated for failure to pay have low incomes and have employment challenges.⁴¹³ They also experience housing insecurity.⁴¹⁴

4. Judges and prosecutors favor day fines because they reduce administrative burdens

The judges and prosecutors in our interviews viewed day fines as an efficient way to resolve cases, and reported that they often use summary proceedings rather than trial to reduce administrative burdens. They were of the opinion that because fines are a less serious punishment, and because fines apply to less serious offenses, fewer procedural protections and processes are required.

“Some [decision makers] also look for **quick, practical solutions**. . . . For example, if I know this is someone who is very careless with their mail. Summary proceedings orders are delivered by mail, after all. Yes, and I can tell that . . . they won’t take care of it, the thing will become final and binding. And I’m simply very busy, and, in addition, I’m looking to **reduce the workload** of court duty, which takes up an incredible amount of time, for the profession as a whole. So you opt for fines simply to get the work done, get it done quickly. Those are the considerations, yes—it is not always entirely, yes, [appropriate] to the matter, yes.”⁴¹⁵

“We have an infinite number of fare evaders, and I just have to go chop-chop so that I have the time, so to speak, for big fraud cases. But, I think, downstream, in terms of the result, the result is not wrong for it. It’s just the classic stuff: what little information do we have? Those are **quick glances**. . . . And the cases that are dealt with by way of summary proceedings are all small cases, street cases, anyway. So, that means that you ultimately have some kind of a standardized system, of course.”⁴¹⁶

“[T]he scope of the investigation, including establishing the income situation, depends largely on the offense in question. . . . I naturally have a completely different depth and breadth of investigation than in proceedings for driving without a license, or fare evasion. Yes, that’s perfectly obvious. . . . **When it comes to petty crime proceedings, that you—let’s say—to put it casually, ‘take a blanket approach.’ So you really don’t investigate every single thing.**”⁴¹⁷

Applying Day Fines to the United States

In the following pages, we analyze what we learned in Germany to draw out lessons for the United States. We begin by making sense of what we heard from German judges and prosecutors through our interviews. We then describe how U.S. policymakers can learn from the German example.

Part One: Evaluating Germany's Day Fines System

In this part,⁴¹⁸ we consider how effective Germany's day fines system is in achieving the stated purpose of setting fines that are experienced equally by people of different means, and that are tailored to people's individual circumstances. More specifically, we focus on whether the system, as implemented, reduces the disparate impact of fines on people with limited financial means, by setting fines at a level that

takes into account the reality that financial penalties are more easily paid by people with savings than those living on tight budgets. We also reflect on whether the system is designed to be fair to people who may have more limited skills or abilities to advocate for themselves in court, including people who struggle with mental illness or substance use.

On the positive side, we find that Germany was able to transition with relative ease from a flat fine system to one in which judges accept the need to account for ability to pay at every fine sentencing. We also find that Germany provides a good example of how courts can ascertain people's financial information at trial without imposing overly burdensome procedures on the court or the people being tried. When setting the daily rate, judges and prosecutors in Germany rely on and believe people's responses to a few simple questions about their finances.

On a more critical note, we learned that even though German system actors accept a graduated fine system, it has not been implemented in a way that accurately accounts for people's individual economic situations or addresses the disparate impact of fines on people with lower incomes. Germany's policies and practices for calculating the daily rate result in fines that are disproportionately high for low-income people, despite judges and prosecutors having discretion to tailor financial penalties. In part, this

may be because Germany does not require cost-of-living deductions to the daily rate and lacks clear guidelines for making such deductions on a discretionary basis.

More fundamentally, Germany's experience reveals that politics and the implementation of day fines is key to the system's success. Our research in Germany surfaced political and socio-cultural barriers to creating day fines systems that truly protect the poor. In enacting day fines, stakeholders in Germany resisted laws that would result in lower fines because they wanted to preserve institutionalized, pre-reform fine amounts. Decision makers also

fail to understand the financial realities of lower income people who come before the court, and their sentencing practices reflect this.

Day fines in Germany are mostly used to sentence low-level misdemeanors, including a large number of crimes of poverty—such as fare evasion—quickly, through summary proceedings. With prison off the table as a sanction, judges and prosecutors treat fines as less serious and adjudicate cases using the bare minimum of procedural protections. In short, judges and prosecutors seem to be motivated by efficiency more than by achieving justice. The consequence of this loose approach to sentencing is that poor people are eventually incarcerated for their inability to pay. Day fines may also hinder other reforms, such as those that would address the outsized role that crimes of poverty play in Germany's otherwise small criminal legal system.

1. System actors believe in the importance of proportionate fines

Although the day fines statute provides structure and guidance for setting fine amounts, judges and prosecutors retain significant discretion and possess multiple tools for adjusting the total fine amount. For day fines to work, therefore, system actors must exercise their discretion in a way that fulfills the goals of the system. As a threshold matter, they must believe in the system.⁴¹⁹

There are multiple levers that system actors may use to exercise discretion in Germany's day fines system. Judges and prosecutors have discretion to decide whether to proceed by trial or summary proceeding, impacting how much information they receive to accurately set the daily rate. They also define the daily rate calculation with little statutory guidance and select units within broad statutory ranges. System actors in Germany also have discretion to adjust the fine after the two-step inquiry. Finally, prosecutors may adjust charging decisions to influence the final fine amount. They may, for example, charge a more serious offense that has a higher unit range.

Critically, judges and prosecutors in Germany say they believe in the fairness of graduated fines over flat fines and, therefore, in a system that considers a person's financial circumstances when sentencing fines. As respondents explained, day fines are about "equal treatment."⁴²⁰ "Everyone . . . is treated the same according to their economic circumstances. That's the beauty of the system."⁴²¹ One metric of judge and prosecutor support for the system in Germany is their commitment to the two-step inquiry, which requires that they first decide on the number of units in a case and then assess ability to pay. This is important because the two-part inquiry is the mechanism by which fines are calibrated to the individual circumstances of the person. As one prosecutor said, "this separation, which may seem somewhat complicated to the layperson . . . I can hardly imagine a better system to arrive at a result that is as fair as possible."⁴²²

Support of day fines is not sufficient—judges and prosecutors should also calibrate fines with more care to people's economic circumstances—but given that they will always have discretion to adjust total fine amounts, their commitment to the system is a minimum requirement.

2. System actors trust people's testimony about their financial circumstances

German practices for setting fines in criminal trials show that it is possible to set accurate fines based on people's financial circumstances—including in busy courts—by relying on people's sworn responses to a few simple questions about their income, expenses, and any other relevant details.

German courts have been successful in building the necessary trust so that judges and prosecutors believe—and therefore can base their decisions upon—people's testimony or questionnaire responses. Judges and prosecutors trust that people usually tell the truth or even overestimate their incomes in self-reporting.⁴²³ Judges and prosecutors are pragmatic. They focus on getting the fine materially correct by relying on self-reporting, but do not worry about—and sometimes even forgive—small discrepancies. Reliance on self-reporting helps Germany's system function smoothly because the process is not bogged down by burdensome reporting requirements, and because system actors are not preoccupied with the possibility that they are being deceived or the fact that they do not know every detail about a person's finances.

According to our interviewees, self-reporting works best when people go before the court in person.⁴²⁴ In trials, courts are able to supplement the police intake form by soliciting additional testimony about people's financial circumstances. When judges in Germany take a few minutes to review people's forms and ask follow-up questions, they get the necessary information to set the daily rate and need not rely on estimation or further documentation. Judges report that these trial processes are practical and produce accurate

daily rates. (See subpart 5, below, for a discussion of additional processes that would strengthen procedural protections at trial.)

3. Germany's practices for calculating the daily rate are inconsistent and result in high fines

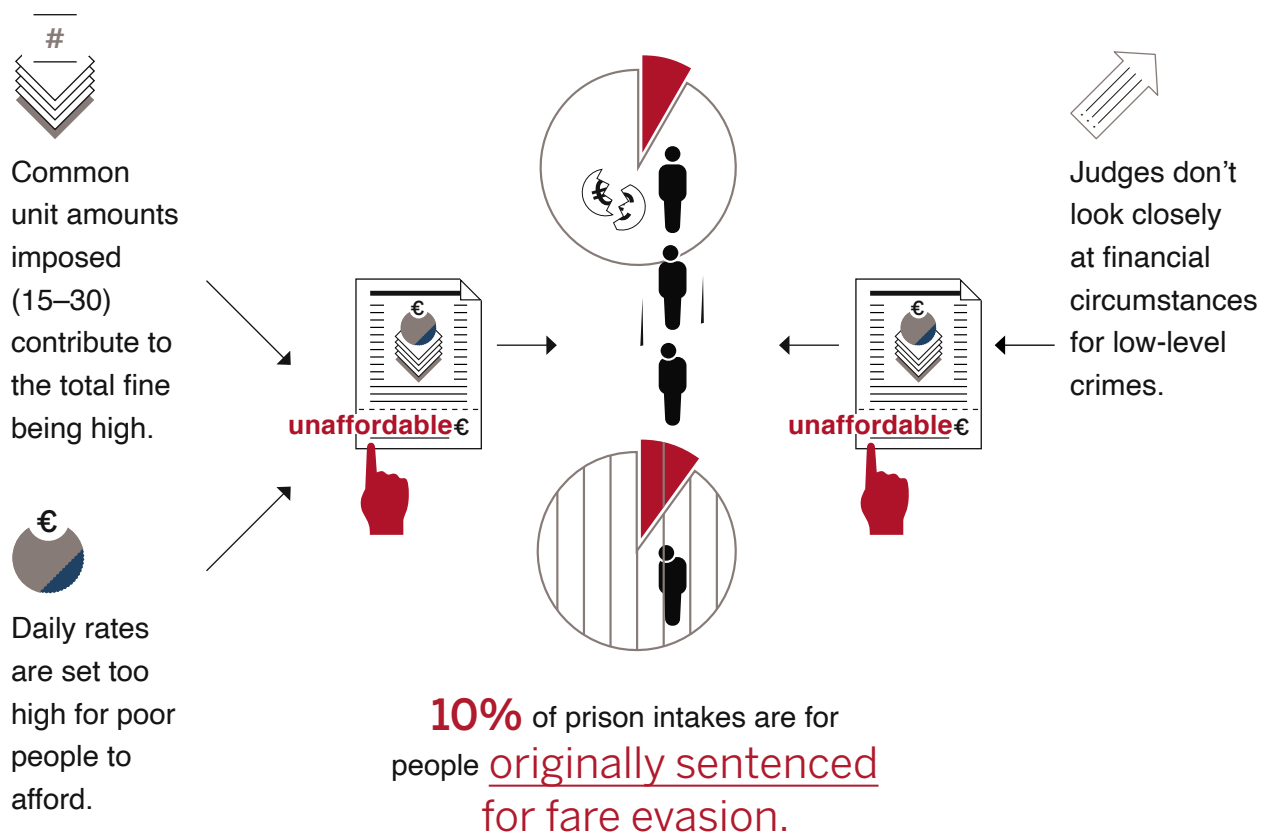
Germany's system provides judges and prosecutors with broad discretion to adjust the daily rate to a person's "personal and financial circumstances."⁴²⁵ The result is that, depending on how system actors interpret this standard, people with the same financial circumstances can be assessed materially different daily rates. More fundamentally, even applying the most robust common deductions, fines in Germany are too high because courts rarely use their discretion to truly tailor fines to people's circumstances.

Variation in deduction practices create vastly different daily rates from court to court. Most judges and prosecutors in our interviews subtract a portion of net income for support of dependents. Beyond this deduction there is little consistency in how judges and prosecutors approach reductions to the daily rate. Some interviewees deduct the cost of rent from everybody's net income, some provide the deduction for only people with low incomes, and some actually *include* government rent subsidies in net income. Some judges and prosecutors reduce net income by up to 30% for the poor, as referenced in some case law and commentaries, and others do not. Some may deduct other debts but only in very limited circumstances. For example, one interviewee said he would not deduct debts "[u]nless they are totally obvious things for me."⁴²⁶ What is obvious to one person may not be to another, however. In the case of this interviewee, he would deduct, "buying a car to be able to visit one's own children who live in another city," provided that the person moved away for work.⁴²⁷ It was also unclear in our interviews whether judges and prosecutors would use multiple applicable deductions in a single case.

Depending on how these deductions are applied in a given case, people face dramatically different fine amounts, and even with the most generous available deductions, poor people in Germany face fines well above what they can afford. A person eligible for Germany's public benefits receives about 424 euro/month, which translates into a daily rate of 14 euro/unit. A person sentenced to 20 units for fare evasion would have to pay 280 euro (\$310 USD), or two-thirds of their total monthly income. That person would not have the

The punishment of fare evasion in German courts

8.5% of all cases sentenced to DAY FINES are for fare evasion, a crime of poverty.



means to meet their basic subsistence expenses. Public benefits amounts are calculated to cover basic needs and German case law and statutes have held that at a minimum, people must be able to retain about 70% of the monthly benefit amount.⁴²⁸ If the court added to net income the value of the person's housing subsidy to arrive at a daily rate of 20 euro (a *Hartz IV* daily rate mentioned in a number of our interviews), a person charged with fare evasion would owe 400 euro (\$443 USD), or almost a whole month of their public benefits. If, instead, the court applied a "discount" of 30% because the person has a low income, the daily rate would be 10 euro, for a total fine of 200 euro (\$222 USD). The differences between 200, 280, and 400 euro are significant for a person living close to the subsistence level. The daily rate is almost never set to one euro, which would better reflect what people receiving public benefits can afford to spare in a day. The total fine with a one euro daily rate would be 20 euro, which is well below current practice.

People who receive fines in Germany experience them as quite high. In one study, 80% of people enrolled in community service alternatives found their fines "too harsh" or "rather too harsh" relative to their offense and their financial circumstances.⁴²⁹ Research also shows that a significant number of people incarcerated for nonpayment—last estimated at around 56,000 people per year—are low-income or otherwise facing employment insecurity.⁴³⁰ Judges and prosecutors in our interviews confirmed the disproportionate impact day fine amounts have on individuals with fewer financial resources, explaining that people with lower incomes must divert what they need for basic living expenses to pay fines, while those with means are able to pay from their savings.⁴³¹

4. Court culture thwarts the day fine system's ability to achieve equality

Germany's experience with day fines shows how the institutional and cultural context in which day fines are passed into law and implemented will shape whether the resulting fines are proportionate. Our research revealed cultural, political, and institutional barriers to the ability of legislators, judges, and

[B]ecause system actors do not fully grasp poverty, they often believe that individuals who fail to pay must have willfully made that choice (despite evidence to the contrary).

prosecutors to set day fines in a way that meaningfully reduces inequality. Overcoming these challenges requires training and other efforts to shift the perspectives of prosecutors and judges and overcome biases that they have developed as a result of their institutional history.

The first barrier is that system actors in Germany gravitate to pre-reform fine amounts, even if those amounts were not based on a principled rationale. Reducing total fine amounts from pre-reform levels is likely necessary to make them truly proportionate, but at least in Germany, this proved difficult, despite the ease with which Germany was able to pass legislation to adopt day fines and generate support for graduated fines among judges and prosecutors. Second, system actors do not always fully understand poverty. They use their own financial circumstances to evaluate whether total fine amounts are affordable, and because the lived experiences of those without means are often unfamiliar to legislators, judges, and prosecutors, day fines practices often overestimate people's ability to pay. Relatedly, because system actors do not fully grasp poverty, they often believe that individuals who fail to pay must have willfully made that choice (despite evidence to the contrary). Taken together, these cultural and institutional barriers limit the ability of the day fines system in Germany to generate fine amounts that low-income people can afford.

A. Decision makers revert to historically imposed fine amounts

Germany's harsh daily rate standard was not the result of thoughtful deliberation, but rather of last-minute political concessions designed to keep fines high. Lawmakers argued that lower fines would be too insignificant to deter people with lower incomes from committing crimes. This argument served to anchor day fines to pre-reform levels rather than to people's ability to pay. Lawmakers also speculated that judges would find lower fine amounts insufficient and reject the reforms. The pull of current practice was strong, and though legislators considered more effective formulations for reducing inequality, those alternatives did not prevail.

This institutional preference for past practice is a barrier not only in the legislative processes, but also in the implementation of day fines. Judges and prosecutors implementing the system have to set fines in a completely different way. Rather than equalizing the fine amount, they must equalize the experience of the sanction. This requires them to set fines that are lower than they are accustomed to (for poor people) and fines that are higher (for rich people). But in practice, we observe that fine amounts cluster at a level that is too high for poor people to afford, and too low to equalize the impact on rich people. This is in part due to the intuition or “gut feelings” of judges and prosecutors, which are undoubtedly informed by institutional history.

B. Decision makers fail to understand poverty

Germany's legislature failed to appreciate the need to include robust deductions in the daily rate calculation to account for basic subsistence needs. One reason for this failure is that decision makers do not always fully understand the economic circumstances of people with limited means. These socio-economic differences between decision makers and those that come before the court influence how judges and prosecutors define and apply the daily rate.

First, judges and prosecutors do not always understand the prevalence and nature of poverty in Germany. In one of our interviews, when asked about the poverty of people who are fined for fare evasion, a judge replied,

“Well, that doesn't change the fact that we give the penalties that we think are appropriate, and we can take into account that, even with the penalty we impose, **no one in Germany has so little money left that they are forced to evade fares.**”⁴³²

However, data show that a large percentage of people sentenced for fare evasion are poor and ultimately face incarceration for nonpayment of fines that they cannot afford.⁴³³

Judges and prosecutors also compare total fine amounts to what they, as professionals, could afford, or set fines based on inaccurate intuitions about what poor people can pay. As one judge acknowledged, “perhaps . . . subconsciously . . . you use your own financial situation as a benchmark.”⁴³⁴ This may explain why judges and prosecutors, as a matter of practice, do not set daily rates below a certain threshold:⁴³⁵ as measured against their own incomes, daily rates at the lowest end of the statutory range do not seem like enough punishment. In one interview, a prosecutor suggested a daily rate of five euro—not lower—for a person who was homeless, did not work, and was not receiving public benefits. Knowing the person was homeless, the prosecutor said, “doesn’t have any direct effect, I would say, in the sense that you’d go down or up [in setting the daily rate]. But you are aware of it, I think it is nothing more than that.”⁴³⁶ This statement is a good example of the lack of understanding of poverty and homelessness.

Another common belief among our interviewees was that because the fine amount is tailored, and because people have alternatives to payment—such as community service or payment plans—anyone who is incarcerated for nonpayment must have willfully decided not to pay. They did not believe that people who failed to pay simply could not afford their fines.

“The person who is willing to pay, okay, he is given so many chances, okay. Even if he cannot pay, . . . he will be given so many opportunities, including, later on, community service which he can do. . . . Because if you don’t want to go to jail, . . . I’ve never seen anyone go to jail, as long as he’s willing.”⁴³⁷

“Well, I always assume that people aren’t stupid enough to go to prison for—yes, nonpayment of a fine. . . . I do assume anyone can manage [paying]. You only have to communicate, ultimately you just have to get in touch and you always have the possibility to extend the term of payment, to convert it into installments and so on. That’ll always work. And going to prison for that? I just expect people to get their act together.”⁴³⁸

“I1: “So nobody gets overwhelmed by this fine, he can pay it off in installments. And if he can’t pay, he may work it off. . . . One day fine unit equals eight hours of community service. He’s got time on his hands. Let him do it, no problem. These working hours—we have an association that organizes community service. . . . And only if someone refuses and says, ‘I’m not doing this,’ will the alternative imprisonment option come into play at all.” I2: “And it’s always amazing when the arrest warrant is out, . . . then money comes from somewhere. Then somebody steps in and pays for him. The grandmother, the father-in-law. The boss, the employer.”⁴³⁹

The evidence contradicts this belief that people are not paying because they are unwilling. Court officials often say that incarceration is a “stick” that works well to compel people to borrow money to pay, which they assume people are able to do. Data do not support this assumption. In a survey of people serving time in prison for nonpayment, 70% said they were unable to pay their fines by asking their networks.⁴⁴⁰ Research also shows that people are unable to access community service and payment plan alternatives because of their limited skills and/or mental and physical health challenges.⁴⁴¹

5. German courts fail to provide adequate procedural protections

Germany’s system lacks sufficient procedural protections for people providing financial information to the decision makers who set their fines. The procedural gaps differ depending on whether the fines are set at the end of a trial or through summary proceedings.

The process for calculating the daily rate in summary proceedings, which make up over 70% of cases in Germany, raises serious concerns. German jurisdictions lack upfront coordination and procedural protections at police intake when people are first asked about their finances. People are not given adequate notice about how their financial information will be used and jurisdictions do not have assistance available, including counsel, to people who may require it. Once judges and prosecutors receive cases from the police,

they rely on the information in the file, if any, and if there is missing information, they estimate people's income rather than follow up with an investigation. They rarely make so much as a simple phone call to the person to clarify their finances. In short, courts often set the daily rate without the necessary information. At trial, people being sentenced can speak up, and judges and prosecutors can ask additional questions; in summary proceedings these options are not available. When questioned about their processes for setting the daily rate in summary proceedings, judges and prosecutors say that they rely on people to object after they receive the summary proceedings order. But while people do have the right to object to the daily rate in their summary proceedings orders, research shows they may not have the skills or ability to avail themselves of this option.⁴⁴²

Germany's system for soliciting testimony at trial offers a sounder model for learning about people's financial circumstances, but it too could benefit from additional procedural protections. Although trials give people an opportunity to be heard about their financial circumstances, our research suggests that Germany lacks adequate procedural protections to allow people to meaningfully present their case during the judicial colloquy. People are not always entitled to appointed counsel for fine-only cases and there are no other resources that we know about to help people answer questions about their finances. This is a barrier for people who are not comfortable speaking in court, who are not trained as advocates, or who face other challenges such as mental health problems. Gaps in procedural protections and access to counsel may, in part, explain why daily rates are set too high for poor people.

6. Day fines are used to quickly sentence high volumes of low-level poverty offenses

Day fines are used mostly to sentence low-level misdemeanors, including a large number of crimes of poverty and other offenses for which responses outside of the criminal legal system, such as social services, may be more humane and effective. Judges and prosecutors admit that because they see so many of these cases, they are less attentive to making accurate,

individualized sentencing determinations and instead use day fines and summary proceedings to sentence many cases quickly. This compounds the harms for people in the system.


Of all cases sentenced to day fines in 2018, 42% received 30 units or less and another 49% of cases were sentenced to between 31 and 90 units. In 2018, fare evasion and low-level theft alone accounted for about 25% of all day fines cases. Both are crimes of poverty: offenses for which the underlying conduct is likely motivated by an inability to afford basic necessities.⁴⁴³

Germany's prosecution of fare evasion illustrates both how a day fines system can process a high volume of cases that should not be in the criminal system in the first place and also how this process can result in the incarceration of people who cannot afford their fines. Fare evasion is an offense that many, including the city council of at least one major U.S. city,⁴⁴⁴ believe should not be criminalized. Many people have no choice but to use public transportation to get to work, school, or medical appointments, even if they cannot afford the fare. In 2018, Germany prosecuted 46,520 cases of fare evasion (or 7% of total fine cases).⁴⁴⁵ For these mostly poor people, the fine amounts—which range from 105 to 400 euro—are out of reach. Questioning whether fare evasion was driven by “criminality,” Berlin's chief prosecutor recently called for the “complete abolition” of fare evasion as an offense—including as an administrative violation.⁴⁴⁶

System actors view day fines as a tool for quickly sentencing “mass offenses,” or common low-level misdemeanors, using summary proceedings. One prosecutor called sentencing these cases “bulk business”⁴⁴⁷ and judges and prosecutors expressed that they were less diligent in reviewing mass offenses because they are repetitive: “Well, let's put it this way: you know where to look, in the file, to find information. And—and you just skip the forms because you don't have to read them anymore. That's just always—eternal repetition of the same.”⁴⁴⁸ Despite their responsibility to individually adjudicate each case, interviewees suggested that they know what the penalty

for low-level cases will be in advance: “[I] think, in case of shoplifting or—or driving without a license or fare evasion, it should usually not be so difficult to get to a result, because it’s just relatively repetitive and you know, ‘Okay, [that’s what this offense] costs.’”⁴⁴⁹ Interviewees also revealed, however that when “mass cases” went to trial, the additional information revealed at trial shifted their assessment of cases.⁴⁵⁰ This suggests that courts sentence day fines with summary proceedings because those proceedings are efficient, not because they are effective in discerning the truth or facilitating a just and proportionate sentence.

In summary, German courts sentence many poor people with day fines for offenses that often relate to underlying poverty. Rather than attempting structural solutions to poverty, Germany allows courts to take procedural shortcuts and process high volumes of low-level cases very quickly. The resulting fines are too high for people to pay. Thus, although German jails are in theory reserved for the most serious cases, many people end up incarcerated for minor offenses because they are too poor to pay their fines.



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Part Two: Considerations for Bringing Day Fines to the United States

Over the last several years, U.S. jurisdictions have been exploring new policies to improve the way they impose and enforce criminal fines and fees. While we know of no jurisdiction that has implemented day fines, several have implemented ability-to-pay reforms that require courts to consider people's financial circumstances before punishing them for failing to pay fines or fees.⁴⁵¹ A few places have even adopted policies that require courts to consider ability to pay at sentencing before imposing

monetary sanctions.⁴⁵² Most jurisdictions have implemented open-ended standards such as requirements that courts refrain from setting fines or fees that cause a "substantial hardship."⁴⁵³ A minority of places have implemented more concrete standards. For example, Louisiana state law sets the required monthly payment plan amount at what the person would earn for an eight-hour workday,⁴⁵⁴ and Illinois law outlines sliding scale discounts for people based on their incomes.⁴⁵⁵

Ability-to-pay reforms, including day fines, are insufficient to remedy the structural problem of charging fees to fund government functions. Such fees should be abolished. Tailoring fees to people's ability to pay with day fines does not solve the underlying problems with using courts as revenue centers, including the conflicts of interest that arise when jurisdictions are motivated to police and prosecute in order to raise revenue. This Report focuses on fines as a sentence because many jurisdictions will continue to use fines even if they phase out fees. If jurisdictions that adopt day fines also impose fees, those fees should be imposed within the day fines framework so that fines and fees together equal the proportionate financial sanction for the case.

To the extent jurisdictions seek to reform how courts impose fines, day fines have some benefits over other approaches for considering ability to

pay. Day fines guide courts to consider both the severity of the offense and financial circumstances so that monetary punishments are proportionate. Without this framework, courts may assess ability to pay but remain unsure about how to use that information to arrive at a total fine amount. Day fines provide a structured way to incorporate financial circumstances into the fine calculation, which would be a significant improvement in most U.S. courts. Day fines also increase transparency and accountability by making the basis for the fine amount more visible and amenable to review.

Our research on day fines should also alleviate U.S. policymakers' concerns about the administrative burdens of assessing people's ability to pay. As we can see from Germany's example, the challenge is easily surmountable.

Courts can rely on a short colloquy to ascertain people's ability to pay for the purposes of setting fines; the inquiry need not be very complicated or require that people provide documentation.

Although the day fines model can serve as a positive example for U.S. jurisdictions, our research reveals that it also presents a cautionary tale. Namely, our immersion in a day fines system helped us understand how difficult it is to achieve fair fines through ability-to-pay reforms. Political and socio-cultural barriers—particularly the harsh practices that have been institutionalized over the last fifty years—are likely to remain barriers to truly equalizing fines for poor people. This is because these institutionalized practices may limit reformers' ability to pass robust daily rate policies and prevent system actors from implementing day fines in a way that meaningfully lowers financial sanctions for poor people. But day fines systems can certainly provide some insight into how U.S. courts might implement more robust ability-to-pay reforms. As Germany's experience shows, the ability of the system to achieve greater equality hinges on how the daily rate is defined and whether it adequately takes into account not only income, but also the true cost of subsistence.

Day fines also cannot solve many of the fundamental problems in our system that undergird the injustices of monetary sanctions, including racist policing, reliance on court fees for revenue, and over-punishment. Put another way, right-sizing disproportionate fines and fees may be an effective tool of harm-reduction by making financial sanctions more affordable. But ballooning criminal justice debt may be a symptom of problems more fundamental than high fines, such as revenue-raising policing in minority neighborhoods,⁴⁵⁶ and use of the criminal legal system to address social problems such as homelessness.

Before implementing day fines, jurisdictions should define the problem they seek to address in their courts and understand how far day fines will go in addressing it. They should assess whether day fines are the right solution or a part of a larger set of solutions. Consider, for example, a misdemeanor court with a high caseload of driving-related cases for which people are not able to pay fines. Some of the underlying offenses are ones that the community agrees should be enforced. For those cases, reformers should, in partnership with communities and impacted people, assess the political and institutional conditions to understand whether it would be possible to implement robust day fines standards that reduce fines for poorer people. A difficult political climate does not mean that reformers should not implement day fines, but they may want to first focus on advocacy and education.

Upon examination, reformers may find that many of the cases are for driving without a license. For these cases, rather than right-sizing fines, advocates may instead choose to find ways to help people get and keep their licenses. Day fines may not always be the right solution and, depending on the goals, may distract from more direct and impactful changes such as shifting judicial resources away from “punishment without a crime,”⁴⁵⁷ eliminating fees, ending reliance on court revenue, and more.

In subpart 1 below, we discuss how jurisdictions that want to reform their fines system may want to think about day fines as an ability-to-pay reform. In subpart 2, we clarify what day fines can and cannot reform and explain

how sometimes ability-to-pay reforms are the right goal, but sometimes other solutions such as legalization of low-level offenses will better target the harms a jurisdiction is seeking to remedy.

1. Day fines and ability to pay

Jurisdictions in the United States will have to assess whether day fines are a helpful tool for assessing ability to pay at sentencing, as was the case in Germany. Implementing day fines requires a fundamental change to sentencing practices. Jurisdictions will have to change their sentencing policies to assign units or ranges of units to offenses and decide which offenses will be sentenced using day fines.⁴⁵⁸ German legislators decided that a transformative approach like day fines would be the most effective way to incorporate consideration of ability to pay into fine sentencing. This may be the case in the United States as well. Stakeholders and policymakers may prefer to implement an innovative new model, such as day fines, rather than tinker with existing policies. The collective work in a jurisdiction to draft new day fines sentencing policies may also generate support for the new system. Or it may be that alternatives, such as reductions of fines according to a sliding scale (as in Illinois) are more politically feasible and can be designed to be just as effective in reducing fines for lower-income people.

If a jurisdiction determines that the structured guidance of day fines will help achieve proportionate sentencing in their courts, it should understand that the success of day fines in reducing disparities for poor people will depend heavily on local politics and court culture. This is because the formula for calculating the daily rate and the availability of any judicial work-arounds will determine whether the reforms are responsive to low-income people's financial realities. Creating an effective method for calculating the daily rate depends on political will and on the context in which the system is implemented, including how judges will interpret the standards and exercise their discretion.⁴⁵⁹ In short, merely adopting a system that considers ability to pay at sentencing does not guarantee a reduction in disparities. Germany's experience suggests that strong ability-to-pay standards are hard to achieve.

Jurisdictions will have to prioritize getting the daily rate right, with the specific goal of identifying standards that meaningfully reduce the consequences of high fines for low-income people.

Examples from the United States suggest that American jurisdictions will likely face the same barriers to reducing inequality that Germany experienced in implementing day fines—the inertia of past practices for setting fines and socio-cultural differences. A recent hearing on day fines in New York City suggests that past practices will remain a strong determinate of which reforms people are willing to consider. In that hearing, council members insisted that day fines should not result in fines for top earners that are higher than what they currently pay.⁴⁶⁰ And as we have seen in our work implementing monetary sanctions reforms in U.S. state and local jurisdictions, socio-cultural differences are also a barrier to reform in U.S. courts. Judges often rely on stereotypes to evaluate whether people’s spending decisions are rational or suggest that people are not trying hard enough to find work or pay their fines.⁴⁶¹ The beliefs and assumptions of policymakers and judges about how high fines should be and how much people can afford will determine how day fines are structured and how they are applied in individual cases.

Germany’s experience suggests effective day fines implementation depends on establishing daily rate standards that are clear and that meaningfully account for people’s cost of living and necessary expenses. Fines in Germany are often too high because the daily rate formula is too harsh, because judges and prosecutors only haphazardly account for people’s living expenses, and because decision makers have trouble setting fines that accurately reflect the lived experiences of the poor, particularly in cases that are processed without a trial. Though research about how to shift judicial behavior is limited,⁴⁶² Germany’s example suggests that open-ended daily rate standards are likely insufficient. Policymakers cannot assume that court actors will accurately interpret people’s financial situations and apply appropriate deductions. In Germany, judges and prosecutors recognize the disparate impact of the system, but they rarely exercise their discretion to meaningfully tailor fines to the reality of poor people’s financial circumstances.

Clear guidelines calling for the deduction of necessary expenses would reduce disparities and improve the fairness of fines.

Jurisdictions in the United States should try implementing daily rate formulas based on concrete criteria that can be applied consistently to all cases, while granting judicial discretion to adjust fines downward, if needed.⁴⁶³ Finland's formula is an example. Finland uses concrete criteria, reduces the daily rate for cost-of-living expenses, and captures only a portion of the person's remaining income in the daily rate.⁴⁶⁴ Such a formula could incorporate local variations in the cost of living, which would be determined in consultation with the community and experts.⁴⁶⁵ Similarly, U.S. day fines pilot projects in the 1990s assigned each offense a specific number of units, which helped ensure robust implementation of scaled fines, because it reduced opportunities for judicial work-arounds.

Another concern for U.S. jurisdictions considering day fines is likely going to be the perceived difficulty of accurately determining people's financial circumstances in busy courts. Germany's example shows that self-reporting is effective, and efforts to collect additional data about people's financial circumstances are not required and will make day fines unnecessarily complex.⁴⁶⁶ Adopting self-reporting in the United States would require only basic infrastructure, such as simple ability-to-pay questionnaires and a short colloquy to capture people's economic realities. Most U.S. misdemeanor courts already routinely collect people's financial information for administrative purposes such as to determine eligibility for a public defender, and these processes can be adapted for day fines.

For a system of self-reporting to work, jurisdictions will have to develop adequate procedural protections so that people know how and why their financial information is being used and can get help presenting the necessary information to the courts. Without attention to these requirements, courts will not have enough information to set truly proportionate fines and the benefits of a proportional system will not be felt by those who need it most. People with limited education; people struggling with mental illness, substance

use, or other health challenges; and people without access to counsel may not be capable of navigating court processes to advocate for themselves. Procedural and informational safeguards are necessary to ensure that everyone is able to present the information necessary for the court to set fines that are truly tailored to people's financial circumstances.

Germany's example informs where and how procedural protections are needed in day fines systems. If forms are used to collect financial information, jurisdictions should provide adequate notice and assistance answering financial questions. Courts in the United States should also use a judicial colloquy to supplement any intake forms and give people an opportunity to be heard. One issue in the United States is that people may not have a constitutional right to court-appointed counsel for fine-only cases. In order to achieve the purpose of implementing day fines—namely, avoiding the consequences of disproportionate, unaffordable fines—jurisdictions should consider providing counsel voluntarily. Advocates across the United States are developing recommendations and guidelines for access to counsel in misdemeanor cases⁴⁶⁷ and jurisdictions considering day fines should work with these experts to develop a system for legal assistance in fine cases. Germany's example raises other areas for consideration including providing adequate judicial oversight of fine-setting (for example by requiring that judges set daily rates even in plea-bargains) and creating streamlined opportunities to appeal fine amounts.

If there is no political will for implementing strong standards for calculating the daily rate and instituting streamlined self-reporting, day fines might not change much in the jurisdiction. They could even make things worse by creating the appearance of fairness without actually making fines more affordable. And, as we have seen in the bail reform context, merely introducing policy changes does not always shift court culture—judges tend to drift back to past practices, despite policy reforms.⁴⁶⁸ Jurisdictions may need to develop strategies for culture change so that strong standards can pass in the legislature, and, when law reform does pass, judges and prosecutors will need robust training about the purposes of the new system and how it should be

implemented. These strategies for culture change will likely require community mobilization to create accountability.⁴⁶⁹

2. Day fines within U.S. sentencing structures

Jurisdictions will likely turn to day fines because they have identified disproportionate financial penalties as a problem in their courts. Deciding whether day fines make sense as a solution requires analysis not only of the harms of high monetary sanctions but also of how day fines will fit into the sentencing patterns in their courts. Community engagement is needed to decide what role day fines should play in the system, especially in light of other alternative sentences and reforms. Above all, day fines should not make sentences harsher, and it may be that different reforms would better address the underlying inequities in the courts.

Jurisdictions will have to identify the offenses to which day fines will apply. As a preliminary matter, day fines should not widen the net of punishment by, for example, imposing fines for cases that used to be resolved with dismissals, diversion, or other less punitive sanctions. Instead, day fines should be used to tailor fines in cases that are currently sentenced using fines or to replace other more harsh sentences such as probation and incarceration.

In many cases, however, right-sizing the penalty will not solve the problem. It may be that in certain jurisdictions, political capital would be better spent addressing the misdemeanor pipeline rather than the misdemeanor sentencing structure. Many cases in misdemeanor courts are there because of policing practices that target low-income black and brown communities, because of crimes of poverty, because of criminalization of common behaviors, and because of insufficient procedural protections in low-level cases.⁴⁷⁰ In other words, it may make sense to right-size the docket rather than right-size the fines. Fare evasion is a useful example: calibrating fines for nonpayment fails to address the underlying issue, which is that some people cannot afford to pay for public transportation. Fare discounts or free fares are better structural solutions than lower fines for fare evasion.

Focusing on fairer fines rather than targeting root causes may have other counterproductive effects on a jurisdiction's criminal legal system. Day fines might lend a veneer of fairness to courts' handling of low-level cases and thus draw attention away from unfair policing and charging practices. Germany's day fines system allows courts to efficiently sentence low-level misdemeanors without addressing fundamental problems such as the overpunishment of crimes of poverty, the disproportionate impact of day fines on the poor, and the lack of procedural protections in summary proceedings. Returning to the example of fare evasion, introducing day fines to calculate fines for fare evasion may have the perverse consequence of emboldening municipal agencies to police and punish these cases because they are able to sentence the cases quickly while under the halo of "fairness."

In the United States, jurisdictions should consider the possibility that day fines would intensify conflicts of interest. Although lower fines could decrease the revenue incentives of prosecuting poor people for low-level offenses, day fines could also streamline such prosecutions, making them more lucrative for jurisdictions.

When it comes to more serious cases, Germany also uses day fines as the sole sanction for offenses that may be considered felonies in U.S. jurisdictions, such as drug offenses, assault, driving under the influence, and fraud.⁴⁷¹ Germany's example shows that these offenses do not require harsh sanctions such as long periods of supervision or jail, and that day fines need not be limited to the lowest-level cases. U.S. jurisdictions may want to consider fines as a sentencing alternative to supervision and incarceration. Though reliance on fines as punishment is counterintuitive given the severity of financial sanctions in our systems today, jurisdictions should consider whether, when tailored to people's financial circumstances, fines may be a less punitive sentencing option. Sentencing commissions created to implement day fines should take the opportunity to reduce penalties for certain offenses by providing judges with scaled fines as an alternative to supervision and incarceration, which is what happened in Germany.

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Jurisdictions in the United States would also have to decide whether day fines would be the sole sanction for eligible offenses, as they are in Germany. Germany sentences over 80% of all criminal cases with only fines, and U.S. jurisdictions may want to consider whether the German approach should be used to reduce incarceration and probation rates here. In jurisdictions that continue to impose fees or combine fines with other sanctions such as probation, community service, or jail, day fines may provide courts a structure in which to evaluate the overall proportionality of a sentence. Jurisdictions could adopt sentencing grids that guide courts in imposing sentences proportionate to the units for a case, taking into account all components of the sentence, including fees.⁴⁷² For example, individuals should not be sentenced to day fines for the full number of units for the crime in addition to fees or in addition to community service. If people are sentenced to jail, supervision, fees, or community service, fine amounts should be offset accordingly.

Conclusion

Decision Guide for Jurisdictions Considering Day Fines

This guide helps state and local jurisdictions determine whether day fines would be a meaningful reform in their courts and, if so, how the day fines system should be structured. Advocates may also use this tool to assess their position on day fines. For ease of explanation, the chart assumes that day fines will apply to misdemeanors, but the analysis is equally applicable for felonies and non-criminal violations.

Step 1

Do day fines have a role
in reform?

Convene a group to study the issue.

- **Bring together diverse stakeholders**, including:
 - Community members;
 - People directly impacted by the criminal legal system;
 - Experts on poverty and local cost of living (such as civil legal aid providers and academics);
 - Justice system actors (including defense attorneys, prosecutors, judges, and court administrators);
 - Lawmakers.
- **Task the group with analyzing data**, including:
 - Sentencing data and historical data regarding case outcomes;
 - Geographic data that reveals misdemeanor policing patterns such as the address of arrest or citation;
 - Historical data about when monetary sanctions have been imposed and how courts determined those amounts;
 - Legal and regulatory sources authorizing and/or requiring imposition of monetary sanctions, including fines, fees, and restitution;
 - Documentation of the flow of revenue from monetary sanctions and how the money is spent;
 - Testimony from people impacted by monetary sanctions;
 - Testimony from other relevant experts including people who know about local poverty and cost of living.

Identify the problem(s) the jurisdiction is trying to solve.

Based on the analyzed data, the group should come to an agreement about the problem that it hopes to solve using day fines. Some examples include:

- **Over-criminalization:** Does the jurisdiction use criminal charges to prosecute behavior that would be better addressed outside the criminal legal system? Indications of this problem include high volumes of crimes of poverty and quality-of-life offenses.
- **High fines:** Are the fines imposed as punishment disproportionate to the offenses and/or people's ability to pay?

- **High fees:** Does the jurisdiction impose revenue-raising fees?
- **Revenue-raising policing:** Are police incentivized to raise revenue through monetary sanctions?
- **Targeting of communities of color or low-income people:** Do policing patterns show concentrated enforcement in marginalized communities?

Based on the problem(s) identified, decide whether day fines have a role in reform.

Are high **fin**es the **main problem**?

If yes → Day fines may be part of the solution.

If no →

- **Prioritize direct solutions.** Jurisdictions should prioritize solutions that squarely solve the problem(s) they identify. This may include:
 - Repealing fees;
 - Legalizing misdemeanors;
 - Ending exploitative and discriminatory policing.
- Decide if day fines may be part of the solution.
 - Day fines may be helpful as a harm reduction strategy if monetary sanctions are high and direct solutions are not possible or are inadequate. For example, the jurisdiction may be punishing too many misdemeanors. The group may decide that legalization will be a longer-term strategy and that day fines would reduce the harms of high monetary sanctions in the interim.
 - Day fines may also be part of the solution for other strategic reasons. For example, day fines might help reduce the jurisdiction’s reliance on the revenue from monetary sanctions as a first step in a long-term strategy to repeal fees altogether.

Step 2

If day fines are identified as a possible part of the solution, conduct additional analysis.

If one of these areas of inquiry counsels against adopting day fines, jurisdictions may choose not to adopt day fines or to take time to address the barrier.

Make sure day fines will not entrench the identified problem(s).

- Assess whether day fines may keep the jurisdiction reliant on monetary sanctions revenue—for example, by continuing to fill budget gaps with fine revenue—and therefore make additional reforms more difficult.
- Assess whether implementation of day fines will create a veneer of fairness that will detract from or prevent other meaningful and necessary reforms.

Partner with community to understand if day fines fit community needs.

- Survey, convene, and strategize with community groups to assess their opinions.
- Learn about their capacity to hold the jurisdiction accountable after implementation.

Assess political climate, educate system actors, and secure commitments for robust implementation.

- Day fines will not succeed if system actors are not prepared to impose lower fines. If support is lacking, the group may need to educate system actors to build support for fairer fines.
- Judges and prosecutors must understand how much people can really afford to pay and be willing to set fines that are low enough.
 - They should not revert to past fine amounts.
 - They should not assume that people who do not pay could have simply tried harder to pay.
 - They should not set fine amounts that are based on what people in their own socio-economic groups could afford.

Ensure that day fines will not widen the net of punishment.

- Day fines should not expand the number of people or offenses punished, but rather should replace current harsher sentences such as high fines, long periods of supervision, or incarceration. Jurisdictions must ensure that day fines are not used to punish minor offenses that are currently being dismissed or diverted.

Identify and address any legal barriers to day fines implementation.

Sometimes judges have discretion to work around legal barriers to day fines, but other times, legislative change is necessary. Consider whether passing legislation is politically feasible.

- **Authorizing legislation:** Determine whether the jurisdiction requires legislation or other authorization to adopt day fines.
- **Mandatory fines and fees:** Determine whether mandatory fines and fees will limit courts' ability to tailor fines. Mandatory fines and fees can impede the success of day fines when they require courts to impose fines higher than those calculated to be affordable by the day fines formula.
- **Statutory minimums and maximums for fines and fees:** Determine whether the statutory ranges are a barrier to tailored fines.
- **Other barriers:** Consider any other potential legal obstacles to reforming the fines and fees sentencing structure.

Step 3

Decide between day
fines and alternative
ability-to-pay reforms.

Here are some considerations:

- **Day fines are one type of ability-to-pay reform.** Although day fines may be more structured than other ability-to-pay reforms because there is a clear bifurcation between units and the daily rate, they do not guarantee more proportionate fines. As with other ability-to-pay policies, the success of day fines will depend on the standards for calculating the fine and other implementation details.
- **Day fines do not eliminate judicial discretion.** Day fines are not necessarily more effective than other ability-to-pay policies in changing judicial behavior. Judges will still retain discretion to set monetary sanctions at levels they deem appropriate and jurisdictions should be aware of the importance of changing judicial culture along with changing policy.
- **Deciding whether to go forward with day fines is a political decision.** Day fines are appealing because they are innovative and new. Such an innovation may be required to catalyze support for ability-to-pay reforms. Jurisdictions may also find that a large structural change such as day fines facilitates implementation more effectively than piecemeal changes. On the other hand, day fines may require more political support because of the necessary changes to sentencing structures.
- **There are alternative ability-to-pay reforms available.**
For example:
 - Deductions to base fines depending on poverty level (e.g., 50% off for people at 300% of the federal poverty line);
 - Day fines “light”/guided payment plans (calculate a payable monthly payment plan amount and set a proportionate number of months the payment plan should last given the offense).

Step 4

If the jurisdiction will proceed with day fines, determine which level of government (state or local) will implement them and whether they will be implemented in one part of the jurisdiction as a pilot project or implemented jurisdiction wide.

Step 5

Begin implementing day fines.

Create a Sentencing Commission to design day fines. Include stakeholders from the planning group and add additional sentencing experts if needed.

Develop accountability mechanisms. Mobilize community early so that they are able to monitor the development and implementation of day fines.

Step 6

Have the Sentencing Commission make policy decisions that will drive the day fines system.

If the Sentencing Commission is unable to create strong policies according to these guidelines, it may be that day fines should not go forward.

Make initial sentencing decisions.

- **Select offenses** for which day fines will be available or required as a sentence.
 - Consider day fines only for offenses where day fines would replace harsher sentences such as high fines, long periods of probation, and/or incarceration.
- Once the offenses are selected, determine if day fines will be the **default sentence for the offense or an available option**.
 - If day fines are one sentencing option among many, include guidance for selecting which sentence is most appropriate. In Germany, fines are the default sentence for misdemeanors unless there are extraordinary circumstances.
- For all offenses eligible for day fines, determine if day fines may be imposed in addition to other **sentence components** or as the only sentence component.
 - In most cases, day fines should be the sole sanction. If they are not the sole sanction, they should be combined with other sanctions only to the degree that the overall sentence is proportionate. If additional sentence components are available, the jurisdiction should develop guidelines so that courts evaluate the overall sentence for proportionality according to the number of units for the offense.
- Determine if the jurisdiction imposes **fees** in addition to fines. Day fines are intended to guide the setting of a proportionate financial sentence of a fine. If fees are added to that amount, it will no longer be proportionate or affordable. Jurisdictions should devise policies to set one proportionate monetary sanction in the form of a fine.

Adopt policies for setting the fine.

Jurisdictions will have to assign unit ranges to all offenses and set standards for assessing units to reflect the nature and seriousness of the case. Jurisdictions will also have to set guidelines for calculating the daily rate, or how much a person must pay per unit. The total fine will be calculated by multiplying the units for the offense by the daily rate.

- **Units.** Units are assessed based on sentencing factors such as the nature and seriousness of the offense.
 - Determine the units for each offense included in the day fines system. Create a sentencing grid that assigns units or a narrow range of units for each offense that is eligible for day fines. Broad unit ranges allow for too much room to work around the day fines structure because decision makers may simply set higher units if they think the total fine arrived at by taking into account the person's financial circumstances is too low.
 - After the Sentencing Commission assigns unit ranges to each offense, adopt standards for sentencing factors that courts should consider in setting units. In Germany, these include typical sentencing considerations such as the nature and seriousness of the offense. Courts also consider the implications of the sentence for the person's reentry.
- **Daily rate.** The daily rate is the amount the person will have to pay per unit. Daily rate policies must meaningfully capture people's financial circumstances so that fines are not set too high. The daily rate formula will determine the success of the day fines initiative: Standards that result in courts overestimating how much a person can pay or that leave them with considerable discretion will not result in fairer fines.
 - Develop the daily rate in partnership with experts on ability to pay, including impacted people.
 - Develop a clear formula to guide judicial discretion in setting the daily rate.

- Ensure that the formula accounts for people's necessary living expenses.
 - Include downward adjustments to account for people's unique personal circumstances.
 - Cap the percentage of people's discretionary income that can be used to pay fines.
- Decide if the daily rate will be limited by a **statutory maximum**. Statutory maximums are a good practice because jurisdictions can balance subjective proportionality (tailored fines) and absolute proportionality (avoiding very high fines in absolute terms). Statutory maximums will also help avoid public resistance to fines that are perceived as too high for a given offense.

Adopt guidelines for collecting financial information and procedural protections.

- **Sources of financial information.** Set policies for how courts will learn about people's financial circumstances. Self-reported financial information is trustworthy and should be the basis for setting the daily rate.
 - Rely on a short judicial colloquy to obtain information for setting fines.
 - Consider soliciting initial financial information from people before sentencing with an intake form and/or an interview with court personnel.
 - Do not require people to provide documentation of their financial circumstances.
 - Protect people's right against self-incrimination. Ensure financial information is not used against people in other parts of the case.
- **Transparency**
 - Require judges to first decide on the number of units and then the daily rate. This is referred to in Germany as the "two-part inquiry" and helps ensure that judges do not work backwards

from the total fine they intuit based on what they used to impose before day fines were enacted.

- Require written findings on the record about both components of the day fine.

- **Access to counsel and informational resources**

- Provide people access to counsel when representing their financial circumstances in court.
- Provide robust information and assistance before sentencing when people are asked to provide preliminary information about their finances.
- Provide early notice about the importance of and use of the financial information.

Final Words

Based on the recommendations of the Sentencing Commission, the broader community should be invited to reassess whether day fines continue to make sense as a solution to the identified problems. If they are adopted, strong implementation and accountability will be essential to reducing harms. It may also be that policies and practices need to be updated as time goes on. Changes should always be made in partnership with the people impacted by these policies.

APPENDIX A: INTERVIEW SCRIPT

(Translated from German and edited for clarity)

Part A: Introduction to the project

I. Introductions

- a. Our research team includes Frank Neubacher, Mitali Nagrecha, and Nicole Bögelein.

II. Topic and objectives of the group discussions

- a. Our goal for today's focus group is to better understand how day fines are set.
- b. We will conduct a total of sixteen focus groups in four states.

III. Methodology

- a. Today's session will differ from everyday conversations because we will follow a scientific methodology with certain rules to structure the discussion.
- b. Unlike moderators, we will not actively participate in the discussion. We will pose questions and ask that you discuss and debate those questions among yourselves.
- c. Please provide details when discussing the questions. We are interested in the specifics of your approaches and experiences in setting day fines.
- d. We welcome you to respond to other participants' comments and develop them further. You may disagree with other participants and/or add your point of view. You may also ask each other questions and respond to those questions.
- e. Ideally, you will develop a natural, unconstrained conversation that will also serve as a learning experience for all participants.

IV. Other background

- a. All of our questions refer to day fines that are set by summary proceedings and by trial.

V. Data protection

- a. It is best for our research if you speak as openly as possible, both when responding to us and when discussing topics among yourselves.
- b. We would like to reiterate the confidentiality, data privacy, and data protection rules that apply to this conversation. Those rules facilitate trust. Please take those guidelines seriously and abide by them.
- c. When presenting our research, we will not attribute anything said in these focus groups to specific individuals.

VI. Discussion format

- a. Please express yourselves freely and openly.
- b. We will occasionally take notes in order to aid us in asking follow-up questions.
- c. When we feel that a topic has been covered, we will move on to the next question.
- d. Do you have any questions before we begin?

Part B: Discussion questions

I. Setting a fine sentence (about 30 minutes)

Though statutes and commentaries provide some background about how day fines are set, they do not thoroughly explain how courts and prosecutors approach the calculation. Please explain how you set the amount of a day fine. We are particularly interested in learning about the sources of information available to you concerning the person's financial circumstances and how you assess the units and daily rate. Please explain in detail.

Additional questions:

- a. How do the procedures in summary proceedings and trials differ, if at all?
- b. Do you estimate net income? If so, how and under what circumstances do you estimate it?
- c. Do you set the daily rate based on projections or expected changes in a person's income?
- d. Do you subtract certain amounts from net income to set the daily rate? How exactly does this work?
- e. Is there a default or customary daily rate amount for people receiving public benefits?
- f. Are there customary units for certain offenses? Where are these defined/how do you know them?
- g. Do you receive enough information about a person's financial circumstances in their court file? What is usually missing, if anything? What else do you wish you could know before setting the daily rate?
- h. Do you think the financial information you are given is correct? Do you have ways to clarify or investigate further, should you need additional information? If so, do you often take advantage of these opportunities to get more information? Do you liaise with the police or prosecution if you need additional financial information?
- i. When assessing the number of units/days of a day fines sentence, do you consider whether imprisonment of that same length would be an appropriate alternative sentence?
- j. Does the person's financial situation play a role when you are deciding between a fine, prison, or a probation sentence?
- k. What is your process for arriving at a total fine amount?

II. Discretion and structural issues (about 20 minutes)

- a. How do you use your discretion when calculating the day fine amount?
- b. Do you feel that the day fines system provides you with enough discretion so that you are able to arrive at a sentence you consider appropriate?
- c. Do you need a lot of time to calculate the day fine amount?
- d. Do you think that the net income principle is the right standard for the daily rate?
- e. Do you think setting day fines is too complex?
- f. Do you feel there are financial expectations or pressures in the justice system to impose higher fine amounts or more day fines?

APPENDIX A: INTERVIEW SCRIPT**III. Fairness and general perspectives on day fines (about 30 minutes)**

The purpose of day fines is to ensure fairer fine sentences. The day fines system aims to achieve this by requiring that fines be calculated according to a person's financial circumstances. Do you believe that day fines are fair?

Additional questions:

- a. Is the system fair for people with lower incomes, including people receiving public benefits?
- b. The disparate impact of fines on low-income people is a recurring theme in the literature. In particular, sources note that it is unfair that people with lower incomes are more likely to face incarceration for nonpayment than people with means. What do you think about this?
- c. What suggestions do you have for reforming the system, if any?
 - i. Should incarceration be a consequence of nonpayment?
 - ii. Do you think the current statutory minimum and maximum amounts for the daily rate make sense?

IV. Post-sentencing

- a. If an appeal is filed, it appears that the amount of a day fine is often reduced. Do you think it is important to have the option for the day fine amount to be adjusted after an appeal? How exactly does such an adjustment happen?
- b. Should judges play a role in the enforcement of the fine? Should the court be involved in the decision to sentence people to prison for nonpayment?

V. Additional questions

- a. How would you react if you found out that a person borrowed money from their family for the payment of a fine?
- b. (For prosecutors only) How exactly are you involved in the enforcement of a day fine? Do you oversee enforcement by the clerks?
 - i. What happens if a person cannot pay? What is the regular process?
 - ii. Are you involved in setting up payment plans?
- c. Do you let people know about the option of payment plans or community service during trial? Do you set installment amounts or do you leave that to clerks?
- d. When you set fines at trial, do you generally get the impression that the person being sentenced understands the proceedings?
- e. Do you ever take into account illegal sources of income?
- f. Do the person's mental health, addiction, or other problems play a role in how you sentence the fine? Are there special considerations for setting fines for refugees or asylum seekers?

ENDNOTES

Citation note: To maintain privacy for our interviewees, citations to our interviews do not include identifying information such as the place or time of the interview. All interviews are labelled with our internal tracking numbers and include a pin cite to the transcript line number. For example, a citation to a transcript of a focus group with judges will be cited, “Interview with judges 5_4, 36.” “5_4” is our internal code and 36 is the line number. In some passages, we include anonymized indicators corresponding to each speaker. These are labeled I1, I2, and so on. Anonymized transcripts are available upon request.

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- 6 *See generally* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018); U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (March 4, 2015), https://www.justice.gov/sites/default/files/crt/legacy/2015/03/04/ferguson_findings_3-4-15.pdf [https://perma.cc/VPG2-B9K4].
- 7 EDWIN W. ZEDLEWSKI, NATIONAL INST. FOR JUSTICE, ALTERNATIVES TO CUSTODIAL SUPERVISION: THE DAY FINE (2010).
- 8 STATISTISCHES BUNDESAMT (DESTATIS), FACHSERIE 10, REIHE 2.6, RECHTSPFLEGE: STAATSANWALTSCHAFTEN 2018 (2019), https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Gerichte/staatsanwaltschaften-2100260187004.pdf?__blob=publicationFile [https://perma.cc/E9KP-7R2N].
- 9 Hans-Jörg Albrecht & Elmer H Johnson, *Fines and Justice Administration: The Experience of the Federal Republic of Germany*, 4 INT’L J. COMP. & APPLIED CRIM. JUST. 3, 6–7 (1980).
- 10 Entwurf eines Strafgesetzbuches, E 1962, mit Begründung [Draft of a Criminal Code E 1962, with Explanatory Report], Deutscher Bundestag: Drucksachen [BT] 4/650, <http://dipbt.bundestag.de/doc/btd/04/006/0400650.pdf> [https://perma.cc/Z58B-PPJM] (Ger.) (hereinafter *1962 Commission Draft and Report*).
- 11 Erstes Gesetz zur Reform des Strafrechts [1 StrRG] [First Criminal Law Reform Act], Jun. 25, 1969, BGBl. I, at 645 (Ger.).
- 12 *1962 Commission Draft and Report*, at 169.
- 13 Zweites Gesetz zur Reform des Strafrechts [2 StrRG.] [Second Criminal Law Reform Act], Jul. 4, 1969, BGBl. I, at 717 (Ger.).
- 14 Jörg Feilbach, *Der Weg zur Arbeit: Verkehrsmittelnutzung in Berlin im Kontext soziostruktureller Merkmale*, 2 ZEITSCHRIFT FÜR AMTLICHE STATISTIK (2018).
- 15 Tobias Buck, *Berlin approves drastic measures to curb surging housing costs*, THE FINANCIAL TIMES, Oct. 22, 2019, <https://www.ft.com/content/0fa537b6-f4cd-11e9-b018-3ef8794b17c6> [https://perma.cc/7M2U-H7WR].
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- 17 Daniel Wighton, *Berlin Attorney-General wants to scrap criminal penalties for fare evasion*, THE LOCAL GERMANY, Jan. 2, 2019, <https://www.thelocal.de/20190102/berlin-attorney-general-wants-to-scrap-criminal-penalties-for-fare-evasion> [https://perma.cc/846T-4VFN].
- 18 STRAFGESETZBUCH [STGB] [CRIMINAL CODE], § 265a, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [https://perma.cc/K3M2-REZ7] (Ger.); *Last Stop Jail? How to deal with fare-dodgers in Germany*, DEUTSCHE WELLE, Jan. 1, 2018, <https://www.dw.com/en/last-stop-jail-how-to-deal-with-fare-dodgers-in-germany/a-42407504> [https://perma.cc/K88F-XGS9].
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- 20 Interview with judges 4_4, 315.

- 21 Interview with prosecutors 13_5, 52.
- 22 Interview with judges 9_4, 43–44.
- 23 See, e.g., Interview with judges 9_4, 43–44.
- 24 STATISTISCHES BUNDESAMT (DESTATIS), FACHSERIE 10, REIHE 3, RECHTSPFLEGE: STRAFVERFOLGUNG 2018 (2019), https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Strafverfolgung-Strafvollzug/strafverfolgung-2100300187004.pdf?__blob=publicationFile [https://perma.cc/2K45-9GBW].
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- 26 Hennig Radke, *StGB § 40: Verhängung in Tagessätzen, in 2 MÜNCHENER KOMMENTAR ZUM STGB [MÜKOStGB] § 40*, rn 68-69 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016).
- 27 STRAFGESETZBUCH [STGB] [CRIMINAL CODE], § 40, translation at https://www.gesetze-im-internet.de/englisch_stgb/index.html [https://perma.cc/K3M2-REZ7] (Ger.).
- 28 STRAFGESETZBUCH [STGB] [CRIMINAL CODE], § 40, translation at https://www.gesetze-im-internet.de/englisch_stgb/index.html [https://perma.cc/K3M2-REZ7] (Ger.).
- 29 KG 10.3.2014 – 121 Ss 23/14; OLG Frankfurt a. M. 8.12.2009 – 1 Ss 467/99 (court accepting a 15% deduction for each child); see also, e.g., Interview with prosecutors 5_4, 107.
- 30 Nicole Bögelein, et al., *Bestandsaufnahme der Ersatzfreiheitsstrafe in Mecklenburg-Vorpommern*, 102 MONATSSCHRIFT FÜR KRIMINOLOGIE UND STRAFRECHTSREFORM 282–96 (2019).
- 31 Interview with judges 1_5, 84.
- 32 Interview with prosecutors 2_5, 278–82.
- 33 Interview with judges 9_4, 182.
- 34 NICOLE BÖGELEIN ET AL., VERMEIDUNG VON ERSATZFREIHEITSTRAFEN: EVALUIERUNG JUSTIZIELLER HAFTVERMEIDUNGSPROJEKTE IN NORDRHEIN-WESTFALEN (2013).
- 35 Interview with prosecutors 5_4, 240.
- 36 Interview with prosecutors 2_5, 140.
- 37 Gerhardt Grebing, *Probleme der Tagessatz-Geldstrafe*, 88 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW 88, 1976] 375, 388-89.
- 38 Jakub Drápal, *Day fines: A European Comparison and Czech Malpractice*, 15 EUR. J. CRIMINOLOGY 461, 11 (2018) (showing how this has been the case in the Czech Republic).
- 39 See Hennig Radke, *StGB § 40: Verhängung in Tagessätzen, in 2 MÜNCHENER KOMMENTAR ZUM STGB [MÜKOStGB] § 40*, rn 117 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016) (explaining court’s investigatory authority); see also, e.g., Interview with judges 1_5, 39 (“But as a rule, I don’t ask people to show me a proof-of-earnings certificate, be it in the trial or, if it is written proceedings, by court order.”).
- 40 Interview with judges 6_3, 23, 35.
- 41 Interview with judges 9_4, 81.
- 42 Interview with judges 4_4, 143.
- 43 Interview with prosecutors 8_2, 193.
- 44 NICOLE BÖGELEIN ET AL., VERMEIDUNG VON ERSATZFREIHEITSTRAFEN: EVALUIERUNG JUSTIZIELLER HAFTVERMEIDUNGSPROJEKTE IN NORDRHEIN-WESTFALEN 28 (2013).
- 45 STRAFPROZESSORDNUNG [STPO] [CRIMINAL PROCEDURE CODE], § 407, translation at https://www.gesetze-im-internet.de/englisch_stpo/index.html [https://perma.cc/MHD8-3Y76] (Ger.).
- 46 STRAFPROZESSORDNUNG [STPO] [CRIMINAL PROCEDURE CODE], § 411, translation at https://www.gesetze-im-internet.de/englisch_stpo/index.html [https://perma.cc/MHD8-3Y76] (Ger.).
- 47 See, e.g., Interview with judges 9_4, 32 (“At trial, of course, we’ll ask, ‘What do you earn? How many children do you have? Do you have a wife? Does she have her own income? Do you have horrendous debts?’ And then we’ll make up our minds about the daily rate.”).
- 48 STATISTISCHES BUNDESAMT (DESTATIS), FACHSERIE 10, REIHE 3, RECHTSPFLEGE: STRAFVERFOLGUNG 2018 (2019), https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Strafverfolgung-Strafvollzug/strafverfolgung-2100300187004.pdf?__blob=publicationFile [https://perma.cc/2K45-9GBW].
- 49 STATISTISCHES BUNDESAMT (DESTATIS), FACHSERIE 10, REIHE 3, RECHTSPFLEGE: STRAFVERFOLGUNG 2018 (2019), https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Strafverfolgung-Strafvollzug/strafverfolgung-2100300187004.pdf?__blob=publicationFile [https://perma.cc/2K45-9GBW].
- 50 See generally ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018).
- 51 See generally ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018).
- 52 See, e.g., BETH A. COLGAN, THE HAMILTON PROJECT, ADDRESSING MODERN DEBTORS’ PRISONS WITH GRADUATED ECONOMIC SANCTIONS THAT DEPEND ON ABILITY TO PAY (March 2019), https://www.brookings.edu/wp-content/uploads/2019/03/Colgan_PP_201903014.pdf [https://perma.cc/T7CE-2WAT]; MATTHEW MENENDEZ ET AL., BRENNAN CTR. FOR JUSTICE, THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES: A FISCAL ANALYSIS IN THREE STATES AND TEN COUNTIES 12 (2019), <https://www.brennancenter.org/sites/default/>

- files/2019-11/2019_10_Fees%26Fines_Final5.pdf [https://perma.cc/J7Y3-BQSU].
- 53 See, e.g., Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 509 (2011); Beth Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53 (2017); Elena Kantorowicz-Reznichenko, *Day Fines: Reviving the Idea and Reversing the (Costly) Punitive Trend*, 55 AM. CRIM. L. REV. 333 (2018).
- 54 See, e.g., A Local Law in Relation to Establishing a Day-Fines Pilot Program in the Office of Administrative Trials and Hearings, N.Y.C. Council, Int. 1823-2019 (Dec. 19, 2019), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4265946&GUID=CB87BD3F-CC74-4FD0-ACC4-5B0217281D1A&Options=&Search=> [https://perma.cc/D8TQ-GGMQ]; *Making Meaningful Use of the Fine Range*, THE RECORDER: J. TEXAS MUN. CTs., Oct. 2016, at 15-16, https://www.tmcec.com/files/1614/7690/9145/The_Recorder_Special_Edition.pdf [https://perma.cc/E4UA-VELR]; ARTHUR PEPIN, CONFERENCE ON STATE COURT ADMINISTRATORS, THE END OF DEBTORS' PRISONS: EFFECTIVE COURT POLICIES FOR SUCCESSFUL COMPLIANCE WITH LEGAL FINANCIAL OBLIGATIONS (2016), <https://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/End-of-Debtors-Prisons-2016.ashx>. [https://perma.cc/V5AY-UAN5].
- 55 Karin D. Martin, *Monetary Myopia: An Examination of Institutional Response to Revenue From Monetary Sanctions for Misdemeanors*, 29 CRIM. JUST. POL'Y REV. 630, 632 (2018) (citing literature about a "variety of legal and extra-legal factors" that influence monetary sanctions practices including the personal characteristics of the person being sentenced (including race and age), the type of monetary sanction, and the jurisdiction).
- 56 Beth Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 56 (2017).
- 57 SHARON BRETT & MITALI NAGRECHA, HARVARD LAW SCHOOL CRIMINAL JUSTICE POLICY PROGRAM, PROPORTIONATE FINANCIAL SANCTIONS: POLICY PRESCRIPTIONS FOR JUDICIAL REFORM 3 (2019), http://cjpp.law.harvard.edu/assets/Proportionate-Financial-Sanctions_layout_FINAL.pdf [https://perma.cc/DXG4-NDQG].
- 58 SHARON BRETT & MITALI NAGRECHA, HARVARD LAW SCHOOL CRIMINAL JUSTICE POLICY PROGRAM, PROPORTIONATE FINANCIAL SANCTIONS: POLICY PRESCRIPTIONS FOR JUDICIAL REFORM (2019), http://cjpp.law.harvard.edu/assets/Proportionate-Financial-Sanctions_layout_FINAL.pdf [https://perma.cc/DXG4-NDQG]; Karin D. Martin et al., *Monetary Sanctions: Legal Financial Obligations in U.S. Systems of Justice*, ANN. REV. CRIMINOLOGY, 2018, at 471.
- 59 See generally ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR (2016).
- 60 SHARON BRETT & MITALI NAGRECHA, HARVARD LAW SCHOOL CRIMINAL JUSTICE POLICY PROGRAM, PROPORTIONATE FINANCIAL SANCTIONS: POLICY PRESCRIPTIONS FOR JUDICIAL REFORM 8 (2019), http://cjpp.law.harvard.edu/assets/Proportionate-Financial-Sanctions_layout_FINAL.pdf [https://perma.cc/DXG4-NDQG].
- 61 Some recent literature has expanded our understanding of day fines, including with updated analysis of day fines pilot projects in the United States in the 1990s. See, e.g., Beth Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 56 (2017).
- 62 Nicole Bögelein, *Money Rules: Exploring Offenders' Perceptions of the Fine as Punishment*, 58 BRIT. J. CRIMINOLOGY 805 (2018).
- 63 See generally ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018); Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731 (2018); Issa Kohler-Hausmann, *Misdemeanor Justice: Control without Conviction*, 199 AM. J. SOC. 351 (2013).
- 64 See generally ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018).
- 65 Section 46 of the German criminal code reads as follows:
- (1) The guilt of the [person] is the basis for sentencing. The effects which the sentence can be expected to have on the [person's] future life in society shall be taken into account.
- (2) When sentencing the court shall weigh the circumstances in [favor] of and against the [person]. Consideration shall in particular be given to the motives and aims of the [person]; the attitude reflected in the offence and the degree of force of will involved in its commission; the degree of the violation of the [person's] duties; the modus operandi and the consequences caused by the offence to the extent that the [person] is to blame for them; the [person's] prior history, his personal and financial circumstances; his conduct after the offence, particularly his efforts to make restitution for the harm caused as well as the [person's] efforts at reconciliation with the victim;
- (3) Circumstances which are already statutory elements of the offence must not be considered.
- STRAFGESETZBUCH [StGB] [CRIMINAL CODE], § 46, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [https://perma.cc/K3M2-REZ7] (Ger.).
- 66 The defendant's net income does not include money that the defendant pays for social insurance premiums. Hennig Radke, *StGB § 40: Verhängung in TAGESSÄTZEN*, IN 2 MÜNCHENER KOMMENTAR ZUM STGB [MüKoStGB] § 40, rn 68-69 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016). Other amounts deducted from people's paychecks in Germany include contributions to a state-run pension plan, state-run unemployment insurance, and other contributions to government benefits. See *Germany, in U.S. SOC. SEC. ADMIN., SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD: EUROPE*, 2018, <https://www.ssa.gov/policy/docs/>

progdesc/ssptw/2018-2019/europe/germany.html [<https://perma.cc/54UU-7FNR>].

67 Paragraphs 2 and 3 of section 40 of the German Criminal Code read as follows:

(2) The court shall determine the amount of the daily unit taking into consideration the personal and financial circumstances of the [person]. In doing so, it shall typically base its calculation on the actual average one-day net income of the [person] or the average income [they] could achieve in one day. A daily unit shall not be set at less than one and not at more than thirty thousand euros.

3) The income of the [person], his assets and other relevant assessment factors may be estimated when setting the amount of a daily unit.”

STRAFGESETZBUCH [STGB] [CRIMINAL CODE], § 40, translation at https://www.gesetze-im-internet.de/englisch_stgb/index.html [<https://perma.cc/K3M2-REZ7>] (Ger.).

68 JENNIFER ALLISON, GERMAN LAW RESEARCH, <https://guides.library.harvard.edu/GermanLaw> [<https://perma.cc/J36Q-MZA9>] (2019).

69 JENNIFER ALLISON, GERMAN LAW RESEARCH, <https://guides.library.harvard.edu/GermanLaw> [<https://perma.cc/J36Q-MZA9>] (2019).

70 This Report is an introduction to the system and its key principles. For jurisdictions in the United States implementing day fines, German commentaries and case law include considerable additional detail about interpreting the daily rate that may be helpful as jurisdictions delve deeper into the details of the system.

71 DEEPL, <http://deepl.com> [<https://perma.cc/Y72B-LCDE>].

72 *See, e.g.*, Frank Wilde, *Die Geldstrafe – ein unsoziales Rechtsinstitut?*, 98 MONATSSCHRIFT FÜR KRIMINOLOGIE UND STRAFRECHTSREFORM 348 (2015) (noting that since day fines were implemented in Germany in 1975, there have been only two large empirical studies of the system that include front-end sentencing) (citing HELMUT JANSSEN, *DIE PRAXIS DER GELDSTRAFVOLLSTRECKUNG: EINE EMPIRISCHE STUDIE ZUR IMPLEMENTATION KRIMINALPOLITISCHER PROGRAMME* (1994) & HANS-JÖRG ALBRECHT, *STRAFZUMESSUNG UND VOLLSTRECKUNG BEI GELDSTRAFEN UNTER BERÜCKSICHTIGUNG DES TAGESSATZSYSTEMS: DIE GELDSTRAFE IM SYSTEM STRAFRECHTLICHER SANKTIONEN* (1980)). Much of what has been written focuses on what happens after nonpayment, including a large body of literature analyzing the possibility of greater reliance on community service as an alternative to incarceration for nonpayment. *See, e.g.*, HEINZ CORNEL, *ABSCHLUSSBERICHT ZUR WISSENSCHAFTLICHEN BEGLEITUNG DES PROJEKTES ISI – INTEGRATION STATT INHAFTIERUNG DER STRAFFÄLLIGEN- UND BEWÄHRUNGSHILFE BERLIN* (2010) (reporting on outcome of evaluation of Berlin’s efforts to increase access to community service alternatives); Frieder Dünkel, *Ersatzfreiheitsstrafen und ihre Vermeidung. Aktuelle statistische Entwicklung, gute Praxismodelle und rechtspolitische Überle-*

gungen, 60 FORUM STRAFVOLLZUG 60 143 (2011) (offering policy recommendations and models for community service as an alternative to incarceration for nonpayment); FRIEDER, DÜNKEL & JENS SCHEEL, *VERMEIDUNG VON ERSATZFREIHEITSSTRAFEN DURCH GEMEINNÜTZIGE ARBEIT: DAS PROJEKT “AUSWEG” IN MECKLENBURG-VORPOMMERN. ERGEBNISSE EINER EMPIRISCHEN UNTERSUCHUNG* (2006) (studying administrative barriers to widespread adoption of community service alternatives); NICOLE BÖGELEIN, ET AL., *VERMEIDUNG VON ERSATZFREIHEITSSTRAFEN: EVALUIERUNG JUSTIZIELLER HAFTVERMEIDUNGSPROJEKTE IN NORDRHEIN- WESTFALEN* (2014) (evaluating, with surveys and interviews of court clerks, practices for back-end enforcement of day fines). None of the prior studies detail how judges and prosecutors—who have considerable discretion—gather and use income information and how they calculate the daily rate amounts. It is because of this gap in the literature about how day fines work in practice that CJPP conducted this study.

73 We conducted this research from late 2018 through late 2019, with data collection occurring between October 2018 and February 2019.

74 CJPP partnered with Nicole Bögelein, a sociologist at the Institute for Criminology at the University of Cologne, to conduct the interviews for this study. CJPP was also supported by Frank Neubacher, a law professor at the University of Cologne. Mitali Nagrecha from CJPP and Nicole Bögelein from Cologne conducted the focus group interviews together, with the exception of three, which only one of them attended.

75 *See, e.g.*, Volker Grundies, *Regionale Unterschiede in der gerichtlichen Sanktionspraxis in der Bundesrepublik Deutschland: Eine empirische Analyse*, in *KRIMINALSOZIOLOGIE: HANDBUCH FÜR WISSENSCHAFT UND PRAXIS* 295 (Dieter Hermann & Andreas Pöge eds., 2018) (arguing that state legal culture impacts outcomes for people who come before the court); HANS ALBRECHT, *STRAFZUMESSUNG UND VOLLSTRECKUNG BEI GELDSTRAFEN: UNTER BERÜCKSICHTIGUNG DES TAGESSATZSYSTEMS; DIE GELDSTRAFE IM SYSTEM STRAFRECHTLICHER SANKTIONEN* 206–09 (1980) (referring to the North-South differences in sentencing in Germany). States also have different policies guiding post-sentencing monitoring and enforcement of day fines because under federal statutory law, state justice ministries are authorized to enact policies for back-end enforcement. For example, they may set the parameters of community service as an alternative to payment. *EINFÜHRUNGSGESETZ ZUM STRAFGESETZBUCH [EGStGB] [CRIMINAL CODE INTRODUCTORY ACT]*, Mar. 2, 1974, BGBl. I at 469, § 293 (Ger. (“Die Landesregierungen werden ermächtigt . . . die Vollstreckung einer Ersatzfreiheitsstrafe nach § 43 des Strafgesetzbuches durch freie Arbeit abzuwenden.”)).

76 We looked at states’ rate of imprisonment for nonpayment, data about the relative severity of all criminal sentences in each state, disparities in sentencing severity within the states, and state size to select a diverse sample of four states. For

example, we selected one state with an above-average rate of imprisonment for nonpayment with a mix of lenient and strict sentencing practices across the state and another state with below average rates of imprisonment for fine default and consistently strict sentencing across the state. Our sample was as follows: State A (average rate of imprisonment for fine default in comparison to other states; strict sentencing practices; higher sentencing disparities within the state; large state); State B (below average rate of imprisonment for fine default in comparison to other states; strict to mixed sentencing practices; fewer sentencing disparities within the state; middle to large state); State C (average rate of imprisonment for fine default in comparison to other states; mixed sentencing practices; fewer sentencing disparities within the state; large state); State D (above average rate of imprisonment for fine default; mixed sentencing practices; fewer sentencing disparities within the state; small state). Aggregated state and district level criminal legal system data, and categorizations of severity and disparities in sentencing were provided by Volker Grundies, Senior Researcher at the Max-Planck Institute for Foreign and International Criminal Law.

- 77 We used the focus group methodology because it has been shown to be effective in drawing out rich information from participants. The theory is that focus groups are effective in generating discussion that reveals a group's perspectives, including divergent views, because of the engagement and social dynamics with their co-participants. PRANEE LIAMPUTTONG, *FOCUS GROUP METHODOLOGY: PRINCIPLE AND PRACTICE* 5 (2011). In the focus groups we conducted, we followed social science methodology in which interviewers pose questions to participants but do not actively participate in the discussion. Interviewees are encouraged to engage with their co-participants in a dialogue.
- 78 A future study should interview the police. A key source of information about people's financial circumstances for setting day fines is the information the police record on the police intake form. From our interview with one police officer and questions we asked prosecutors and judges, we found that the police play very little active role beyond asking the questions on the intake form and recording the answers. This could be confirmed through additional interviews. For more information about the police intake form and financial information, see *Collecting financial information to set the daily rate* (p. 54) herein.
- 79 Each focus group discussion was with prosecutors or judges; we did not combine them because we wanted to understand the procedures and attitudes within each role. In total, we facilitated eight group discussions with prosecutors and six group discussions with judges. The number of people per group discussion (which were conducted in person) ranged from two to seven participants; one discussion was a one-on-one telephone interview. Each group discussion lasted between 47 and 96 minutes.
- 80 For a description of simultaneous whisper interpretation, see generally, Seeber, Kilian G. *Simultaneous interpreting*, in *THE ROUTLEDGE HANDBOOK OF INTERPRETING* 71, 91–107 (Holly Mikkelson & Renee Jourdenais eds., 2015).
- 81 Full anonymized interview transcripts in German and English are also available upon request.
- 82 See generally UDO KUCKARTZ, *QUALITATIVE TEXT ANALYSIS: A GUIDE TO METHODS, PRACTICE AND USING SOFTWARE* (2014) (explaining qualitative methods and coding software). We used deductive coding, which involves developing a coding structure upfront based on the research questions and then fine-tuning the tags along the way. See PHILLIP MAYRING, *QUALITATIVE CONTENT ANALYSIS: THEORETICAL FOUNDATION, BASIC PROCEDURES AND SOFTWARE SOLUTION* (2014) for a description of this method.
- 83 Erstes Gesetz zur Reform des Strafrechts [1 StrRG] [First Criminal Law Reform Act], Jun. 25, 1969, BGBl. I at 645 (Ger.); Zweites Gesetz zur Reform des Strafrechts [2 StrRG,] [Second Criminal Law Reform Act], Jul. 4, 1969, BGBl. I at 717.
- 84 Gary M. Friedman, *The West German Day-Fine System: A Possibility for the United States?*, 50 U. CHI. L. REV. 281, 283–86 (1983) (describing the Great Criminal Law Commission, convened in 1954 to revise Germany's decades old Strafgesetzbuch "Criminal Code"). In 1962, the Great Criminal Law Commission released a draft criminal code and report. See *1962 Commission Draft and Report* (Ger.).
- 85 The Commission determined that the use of fines was the most effective way to drive down incarceration rates for minor offenses. The Commission also concluded that fines were preferable to probation because the fine was a more tangible sentence. *1962 Commission Draft and Report*, at 169 (Ger. ("[Die Geldstrafe] ist neben der Strafaussetzung zur Bewährung das wirksamste Mittel zur Zurückdrängung der kurzen Freiheitsstrafe und scheint mehr als die Verhängung einer Freiheitsstrafe unter Strafaussetzung und erst recht mehr als der Vollzug einer Freiheitsstrafe das Ansehen des Täters.")).
- 86 *1962 Commission Draft and Report*, at 169.
- 87 The Commission recommended adopting day fines based on the model used in some Scandinavian countries, which included in the calculation of the fine the person's personal and financial circumstances. *1962 Commission Draft and Report*, at 170.
- 88 EDWIN W. ZEDLEWSKI, *ALTERNATIVES TO CUSTODIAL SUPERVISION: THE DAY FINE* (2010) (Nat'l Inst. Justice Discussion Paper NCJ 230401), <https://www.ncjrs.gov/PDFFILES1/NIJ/GRANTS/230401.PDF> [<https://perma.cc/M5XP-R9NR>].
- 89 Frank Wilde, *Die Geldstrafe - ein soziales Rechtsinstitut?*, 98 MONATSSCHRIFT FUER KRIMINOLOGIE UND STRAFRECHTSREFORM 348, 348 (2015) (analyzing discussions leading up to the passage of Germany's daily rate standard).

- 90 Hans-Jörg Albrecht & Elmer H. Johnson, *Fines and Justice Administration: The Experience of the Federal Republic of Germany*, 4 INT'L J. COMP. & APPLIED CRIM. JUST. 3, 7 (1980) (describing how the “developments [of day fines] have occurred within a political context and center on the themes of effective administration and the legitimacy of the legal system” and connecting administration concerns to an interest in fines because they could be imposed with “relative ease, quickly, and cheaply, without undue stigmatization”). Prison conditions were also deteriorating. For example, during a three-month period in 1967, the state of North-Rhine Westphalia was ordered by a court to stop incarcerating people who had been sentenced to three months or less in prison. The court held that the overcrowding in the state’s correctional facilities violated prisoners’ rights. *Id.* at 8 (citing Oberlandesgericht Hamm [OLG Hamm] [Higher Regional Court Hamm] Jun. 23, 1967, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2024, 1967 (Ger.) (correcting the citation error in the original article)).
- 91 The Commission stressed that short-term incarceration was counterproductive because it did not rehabilitate people and was criminogenic because people were separated from family and employment. *1962 Commission Draft and Report*, at 98-99; see also Hans-Jörg Albrecht & Elmer H. Johnson, *Fines and Justice Administration: The Experience of the Federal Republic of Germany*, 4 INT'L J. COMP. & APPLIED CRIM. JUST. 3, 7 (1980) (reporting that in 1969, before the implementation of reforms, 17% of prison sentences were for under one month).
- 92 *1962 Commission Draft and Report*, at 169.
- 93 See Hans-Jörg Albrecht & Elmer H. Johnson, *Fines and Justice Administration: The Experience of the Federal Republic of Germany*, 4 INT'L J. COMP. & APPLIED CRIM. JUST. 3, 6-8 (1980).
- 94 Gary M. Friedman, *The West German Day-Fine System: A Possibility for the United States?*, 50 U. CHI. L. REV. 281, 285 (1983).
- 95 *1962 Commission Draft and Report*, at 169.
- 96 *1962 Commission Draft and Report*, at 169.
- 97 Gary M. Friedman, *The West German Day-Fine System: A Possibility for the United States?*, 50 U. CHI. L. REV. 281, 284-85 (1983) (discussing how the most critical reform voice at the time argued that the Commission’s proposals did not rely on fines enough to eliminate short-term incarceration); *1962 Commission Draft and Report*, at 169 (arguing that fines were irreplaceable (Ger. (“*unentbehrlich*”)) as a sanction in the criminal legal system and that concerns could be remedied in part by focusing on reducing disparate impact on the poor in later legislation, so that “fines could become tolerable from the point of view of justice” (Ger. (“*die Geldstrafe[n] unter dem Gesichtspunkt der Gerechtigkeit erträglich werden [können]*.”))).
- 98 Erstes Gesetz zur Reform des Strafrechts [1 StrRG] [First Criminal Law Reform Act], Jun. 25, 1969, BGBl. I, at 645 (Ger.).
- 99 See generally Erstes Gesetz zur Reform des Strafrechts [1 StrRG] [First Criminal Law Reform Act], Jun. 25, 1969, BGBl. I, at 645 (Ger.).
- 100 See generally Erstes Gesetz zur Reform des Strafrechts [1 StrRG] [First Criminal Law Reform Act], Jun. 25, 1969, BGBl. I, at 645 (Ger.); see also STRAFGESETZBUCH [STGB] [CRIMINAL CODE], translation at https://www.gesetze-im-internet.de/englisch_stgb/index.html [<https://perma.cc/K3M2-REZ7>] (Ger.).
- 101 Gary M. Friedman, *The West German Day-Fine System: A Possibility for the United States?*, 50 U. CHI. L. REV. 281, 286 (1983).
- 102 Hans-Jörg Albrecht & Elmer H. Johnson, *Fines and Justice Administration: The Experience of the Federal Republic of Germany*, 4 INT'L J. COMP. & APPLIED CRIM. JUST. 3, 8 (1980).
- 103 Hans-Jörg Albrecht & Elmer H. Johnson, *Fines and Justice Administration: The Experience of the Federal Republic of Germany*, 4 INT'L J. COMP. & APPLIED CRIM. JUST. 3, 5 (1980) (noting high volume of property and traffic cases at time of reforms).
- 104 Erstes Gesetz zur Reform des Strafrechts [1 StrRG] [First Criminal Law Reform Act], Jun. 25, 1969, BGBl. I, at 645, § 29 (4) (providing that judges can order incarceration instead of fines if the person cannot pay the fine without going into debt) (Ger. (“*Kann die Geldstrafe ohne Verschulden des Verurteilten nicht eingebracht werden, so kann das Gericht anordnen, daß die Vollstreckung der Ersatzfreiheitsstrafe unterbleibt.*”)).
- 105 *1962 Commission Draft and Report*, at 169 (“The general reference in Section 27c (1) of the Criminal Code [the pre-reform law] to take the financial circumstances of the [person] into account when assessing the fine was not sufficient to shift practice so that [judges] actually clarify the economic circumstances to the extent possible and make them the basis for the judgment.”) (Ger. (“*Der allgemeine Hinweis des § 27 c Abs. 1 StGB, bei der Bemessung der Geldstrafe die wirtschaftlichen Verhältnisse des Täters zu berücksichtigen, hat nicht ausgereicht, um die Praxis zu veranlassen, die wirtschaftlichen Verhältnisse in dem möglichen Umfange auch wirklich aufzuklären und zur Urteilsgrundlage zu machen.*”))).
- 106 *1962 Commission Draft and Report*, at 169 (Ger. (“*[Die] Geldstrafen [fallen] oft zu niedrig. . . . Im [diesen] Falle verfehlt die Strafe ihren Zweck.*”))).
- 107 *1962 Commission Draft and Report*, at 169 (Ger. (“*[W]ieweit ihre Höhe durch das Unrecht der Tat sowie die Schwere der Schuld des Täters einerseits und wieweit sie durch dessen wirtschaftliche Verhältnisse andererseits bestimmt ist.*”)); see also Gary M. Friedman, *The West German Day-Fine System: A Possibility for the United States?*, 50 U. CHI. L. REV. 281, 287 (1983).
- 108 *1962 Commission Draft and Report*, at 169 (Ger. (“*Auch die zugleich festgesetzte Ersatzfreiheitsstrafe gestattet hierauf kein-*”))).

- en zuverlässigen Schluß, da der Richter sie gemäß § 29 Abs. 3 StGB nach freiem Ermessen bestimmt.”).
- 109 1962 Commission Draft and Report, at 169 (describing how the judges set fines based on gut instinct) (Ger. (“*gefühlsmäßig*”).
- 110 Because judges were setting fines based on instinct, fines were too low (Ger. (“*zu niedrig*”)) or too high (Ger. (“*zu hoch*”). 1962 Commission Draft and Report, at 169.
- 111 1962 Commission Draft and Report, at 169 (“Even if it was possible to reach an acceptable degree of precision [in tailoring the fine], the fine determined by that method will still impact the economically weak significantly harder because of their relatively higher sensitivity to a reduction of their wealth.”) (Ger. (“*Aber selbst wenn man insoweit eine praktisch erträgliche Genauigkeit erreicht, trifft die hiernach bestimmte Geldstrafe den wirtschaftlich Schwachen wegen seiner hierdurch bedingten relativ erhöhten ‘Besitzempfindlichkeit’ wesentlich fühlbarer als den Begüterten.*”).
- 112 1962 Commission Draft and Report, at 170 (calling for a more equitable (Ger. (“*sozialere*”)) system because of the inequities in the old system and pointing to day fines as a model).
- 113 1962 Commission Draft and Report, at 170–71 (Ger. (“*Der Entwurf geht davon aus, daß die Mängel der geltenden Geldstrafenregelung sich nicht genügend durch Änderung einzelner Vorschriften überwinden lassen, sondern daß die gesamte Regelung auf eine neue, sozialere Grundlage gestellt werden muß, Eine solche Grundlage stellt das unter dieser Bezeichnung bekannte ‘Tagesbußensystem’ dar. Es liegt insbesondere den Geldstrafenregelungen Finnlands, Schwedens und Dänemarks zugrunde, mit denen dort gute Erfahrungen gemacht worden sind.*”).
- 114 1962 Commission Draft and Report, at 170.
- 115 Gerhardt Grebing, *Probleme der Tagessatz-Geldstrafe*, 88 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW 88, 1976] 375, 376 (1976) (Ger. (“*Blickt man zurück, so sieht man überrascht, wie leicht der Tagesbußengedanke Eingang in die deutsche Strafrechtsreform fand und sich hier ohne große Schwierigkeiten durchsetzen konnte.*”).
- 116 1962 Commission Draft and Report, at 169.
- 117 1962 Commission Draft and Report, at 170 (explaining that the main challenge was defining the daily rate so that the system achieves “equality of sacrifice” (Ger. (“*Opfergleichheit*”)) among people with different financial circumstances).
- 118 Gerhardt Grebing, *Probleme der Tagessatz-Geldstrafe*, 88 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW 88, 1976] 375, 388–89 (1976).
- 119 See Gerhardt Grebing, *Probleme der Tagessatz-Geldstrafe*, 88 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW 88, 1976] 375, 388 n.45 (1976) (noting other similar propos-
- als that allowed people their “necessary subsistence” (Ger. (“*notwendige[r] Unterhalt[]*”)) or set an amount of income exempt from fines); see also ZWEITER SCHRIFTLICHER BERICHT DES SONDERAUSSCHUSSES FÜR DIE STRAFRECHTSREFORM [SECOND WRITTEN REPORT OF THE SPECIAL COMMITTEE FOR THE REFORM OF THE CRIMINAL LAW], Deutscher Bundestag 5. Wahlperiode, Drucksache 05/4095, at 20 (Apr. 23, 1969), <http://dipbt.bundestag.de/dip21/btd/05/040/0504095.pdf> [https://perma.cc/H3VM-GR7Z] (“The daily rate is to be understood as the amount of money conceived as a valuation unit, the loss of which is to be expected of the [person] on average on a daily basis on the basis of his attainable income, his usable assets and his actual standard of living, taking into account his maintenance and other reasonable payment obligations as well as his personal circumstances.”) (Ger. (“*Als Tagessatz ist derjenige als Bewertungseinheit gedachte Geldbetrag aufzufassen, dessen Einbuße dem Täter aufgrund seiner erzielbaren Einkünfte, seines verwertbaren Vermögens und seines tatsächlichen Lebenszuschnitts unter Berücksichtigung seiner Unterhalts- und sonstigen angemessenen Zahlungsverpflichtungen sowie seiner persönlichen Verhältnisse im Durchschnitt täglich zuzumuten ist.*”).
- 120 1962 Commission Draft and Report, at 170 (Ger. (“*[A]uf Grund seiner erzielbaren Einkünfte, seines verwertbaren Vermögens und seines tatsächlichen Lebenszuschnitts unter Berücksichtigung seiner Unterhalts- und sonstigen angemessenen Zahlungsverpflichtungen sowie seiner persönlichen Verhältnisse bei äußerster Sparsamkeit im Durchschnitt täglich zuzumuten ist.*”).
- 121 The Commission Report referenced the Scandinavian model of day fines throughout when discussing proposed fine reforms for Germany. See, e.g., 1962 Commission Draft and Report, at 98, 170, 172.
- 122 See Frank Wilde, *Die Geldstrafe – ein unsoziales Rechtsinstitut?*, 98 MONATSSCHRIFT FÜR KRIMINOLOGIE UND STRAFRECHTSREFORM 348, 353–54 (2015).
- 123 The Second Criminal Law Reform Act, enacted in 1969, stated that the court is to determine the day fine amount in consideration of the personal and economic circumstances of the convicted person. (Ger. (“*Die Höhe eines Tagessatzes bestimmt das Gericht unter Berücksichtigung der persönlichen und wirtschaftlichen Verhältnisse des Täters*”). ZWEITES GESETZ ZUR REFORM DES STRAFRECHTS (2. StRG) (Second Criminal Law Reform Act), Jul. 4, 1969, BGBl. I, at 717, § 40, para. 2 (Ger.). The final amended Criminal Code states that “as a general rule” courts should calculate the day fine rate based on the person’s net income. STRAFGESETZBUCH [StGB] [CRIMINAL CODE] § 40, para. 2 (Ger.), translation at https://www.gesetze-im-internet.de/englisch_stgb/index.html. The criminal code was amended to include this additional provision with the enactment of the Criminal Code Introductory Act in 1974. Einführungsgesetz zum

- Strafgesetzbuch [EGStGB] [Criminal Code Introductory Act], Mar. 2, 1974, BGBl. I, at 469, II, no. 8 (Ger.).
- 124 See STRAFGESETZBUCH [STGB] [CRIMINAL CODE] § 40, para. 2, translation at https://www.gesetze-im-internet.de/englisch_stgb/index.html (Ger.).
- 125 Gerhardt Grebing, *Probleme der Tagessatz-Geldstrafe*, 88 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW] 375, 388 (1976).
- 126 See Frank Wilde, *Die Geldstrafe – ein unsoziales Rechtsinstitut?*, 98 MONATSSCHRIFT FÜR KRIMINOLOGIE UND STRAFRECHTSREFORM 348 (2015) (explaining that the discussion in the Special Commission (*Sonderausschuss für die Strafrechtsreform*) stressed that standards should ensure fines of a high enough value to deter lower-income people).
- 127 Frank Wilde, *Die Geldstrafe – ein unsoziales Rechtsinstitut?*, 98 MONATSSCHRIFT FÜR KRIMINOLOGIE UND STRAFRECHTSREFORM 348 (2015).
- 128 Frank Wilde, *Die Geldstrafe – ein unsoziales Rechtsinstitut?*, 98 MONATSSCHRIFT FÜR KRIMINOLOGIE UND STRAFRECHTSREFORM 348, 354 (2015).
- 129 Gerhardt Grebing, *Probleme der Tagessatz-Geldstrafe*, 88 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW] 375, 389 (1976) (citing discussion in the Special Commission).
- 130 *Day Fines Systems: Lessons from Global Practice*, a companion to this Report drafted by Fair Trials (<https://www.fairtrials.org> [<https://perma.cc/9JNF-3M9D>]), provides additional details about the calculation of the daily rate in day fines countries in Latin America and Europe.
- 131 FAIR TRIALS, DAY FINES SYSTEMS: LESSONS FROM GLOBAL PRACTICE (2020); see also Jakub Drápal, *Day fines: A European Comparison and Czech Malpractice*, 15 EUR. J. CRIMINOLOGY 461 (2018). Day fines countries include Austria, Switzerland, Czech Republic, France, Sweden, Denmark, Finland, Spain, Portugal, Poland, Estonia. *Id.*
- 132 In 2010, the percentage of criminal dispositions in Europe that were fines were as follows: Finland (87.9%), Denmark (83.9%), Germany (70%), Portugal (67.5%), Sweden (26.1%), and Austria (31.8%). MARCELO F. AEBI ET AL., EUROPEAN INSTITUTE FOR CRIME PREVENTION AND CONTROL, EUROPEAN SOURCEBOOK OF CRIME AND CRIMINAL JUSTICE STATISTICS 196 (5th ed. 2014), https://www.heuni.fi/material/attachments/heuni/reports/qrMWOcVTF/HEUNI_report_80_European_Sourcebook.pdf [<https://perma.cc/3934-85SQ>].
- 133 Jakub Drápal, *Day fines: A European Comparison and Czech Malpractice*, 15 EUR. J. CRIMINOLOGY 461, 466 (2018) (providing examples, including the Czech Republic, Austria, and others).
- 134 Jakub Drápal, *Day fines: A European Comparison and Czech Malpractice*, 15 EUR. J. CRIMINOLOGY 461, 466 (2018).
- 135 Email from Rebecca Shaeffer, Senior Attorney, Fair Trials, to Mitali Nagrecha, Director of the National Criminal Justice Debt Initiative (May 22, 2020, 6:07 PM CET) (on file with the CJPP).
- 136 FAIR TRIALS, DAY FINES SYSTEMS: LESSONS FROM GLOBAL PRACTICE 18 (2020).
- 137 FAIR TRIALS, DAY FINES SYSTEMS: LESSONS FROM GLOBAL PRACTICE 27 (2020).
- 138 Jakub Drápal, *Day fines: A European Comparison and Czech Malpractice*, 15 EUR. J. CRIMINOLOGY 461, 471 (2018); see also Tilastokeskus [Statistics Finland], *Metadata: Concepts: Fine*, https://www.stat.fi/meta/kas/sakko_en.html [<https://perma.cc/JS8B-2Y6J>] (quoting, as translated into English, RIKOSLAKI [CRIMINAL CODE], Ch. 2a §§ 1, 2; Ch. 7, § 3 (Fin.)).
- 139 One change that was enacted was that the cap for the daily rate per unit was increased from 5,000 euro to 30,000 euro in 2009. Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM STGB [MüKoStGB] § 40, rn 54 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016).
- 140 For example, in 2009, Baden-Württemberg amended its regulations to reduce the number of hours of community service required per unit of outstanding fines from six hours to four hours. *Verordnung des Justizministeriums über die Anwendung der Vollstreckung von Ersatzfreiheitsstrafen durch freie Arbeit* (Eng. (“Justice Ministry Regulation on the Use of the Limitations of Freedom, through Free Labor, as a Substitute for Paying Criminal Fines”)), GESETZBLATT FÜR BADEN-WÜRTTEMBERG [GBL] 2009, 338, at § 7(1) (June 30, 2009) (Badem-Württemberg) (Ger.).
- 141 Hans-Jörg Albrecht & Elmer H. Johnson, *Fines and Justice Administration: The Experience of the Federal Republic of Germany*, 4 INT’L J. COMP. & APPLIED CRIM. JUST. 3, 6–7 (1980). From 1971–1977, the percentage of cases sentenced to fines was around 83%. *Id.*
- 142 STATISTISCHES BUNDESAMT (DESTATIS), FACHSERIE 10, REIHE 2.6, RECHTSPFLEGE: STAATSANWALTSCHAFTEN 2018 (2019), https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publicationen/Downloads-Gerichte/staatsanwaltschaften-2100260187004.pdf?__blob=publicationFile [<https://perma.cc/E9KP-7R2N>].
- 143 Interview with prosecutors 11_2, 114.
- 144 Interview with judges 9_4, 188–98.
- 145 Nicole Bögelein, et al., *Bestandsaufnahme der Ersatzfreiheitsstrafe in Mecklenburg-Vorpommern*, 102 MONATSSCHRIFT FÜR KRIMINOLOGIE UND STRAFRECHTSREFORM (MSCHRKRIM) 282, 283–96 (2019) (hereinafter referred to as the “Mecklenburg Study”).
- 146 Wirtschafts- und Sozialwissenschaftliches Institut, *Reale Mittlere Nettomonatseinkommen (in Euro) Privater Haushalte in*

- Deutschland, 2005-2017*, https://www.boeckler.de/wsi_50679.htm [https://perma.cc/VE3K-MGB2].
- 147 German case law also acknowledges the disproportionate impact of fines on people with lower incomes. *See, e.g.*, Oberlandesgericht Jena [OLG Jena] [Higher Regional Court of Jena], Oct. 27, 2017, 1 OLG 161 Ss (Ger.) (citing OLG Oberlandesgericht Hamm [OLG Hamm] [Higher Regional Court of Hamm], Feb. 2, 2012, III-3 RVs 4/12 (Ger.)).
- 148 Interview with prosecutors, 8_2, 63.
- 149 Interview with prosecutors, 11_2, 19.
- 150 Interview with judges 4_4, 181.
- 151 Interview with prosecutors 2_5, 278–82.
- 152 STRAFGESETZBUCH [STGB] [CRIMINAL CODE], § 40, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [https://perma.cc/K3M2-REZ7] (Ger.).
- 153 STRAFGESETZBUCH [STGB] [CRIMINAL CODE], § 40, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [https://perma.cc/K3M2-REZ7] (Ger.).
- 154 For information about the role of prosecutors in setting fines, see *Collecting financial information to set the daily rate* (p. 54) herein.
- 155 Interview with prosecutors 8_2, 86.
- 156 Hans-Jörg Albrecht, *StGB § 40: Verhängung in Tagessätzen*, in 1 KINDHÄUSER/NEUMANN/PAEFFGEN STRAFGESETZBUCH KOMMENTAR § 40, rn 19–23 (Urs Kindhäuser et al. eds., 5th ed. 2017).
- 157 Hans-Jörg Albrecht, *StGB § 40: Verhängung in Tagessätzen*, in 1 KINDHÄUSER/NEUMANN/PAEFFGEN STRAFGESETZBUCH KOMMENTAR § 40, rn 13–14 (Urs Kindhäuser et al. eds., 5th ed. 2017).
- 158 Hans-Jörg Albrecht, *StGB § 40: Verhängung in Tagessätzen*, in 1 KINDHÄUSER/NEUMANN/PAEFFGEN STRAFGESETZBUCH KOMMENTAR § 40, rn 19–23 (Urs Kindhäuser et al. eds., 5th ed. 2017).
- 159 See *Estimating net income when courts lack financial details* (p. 41) herein.
- 160 STRAFGESETZBUCH [STGB] [CRIMINAL CODE], § 40, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [https://perma.cc/K3M2-REZ7] (Ger.).
- 161 Interview with judges 1_5, 43.
- 162 The German Constitutional Court ruled in 2010 that, as required by Article 1.1 of the Basic Law, a national Minimum Social Security amount that is “in line with human dignity” must be determined and that every person must have access to this determined minimum. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvL 1/09 (para. 133), Feb. 9, 2010, *translation at* https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/02/ls20100209_1bv-1000109en.html [https://perma.cc/A5YQ-92B4] (Ger.).
- 163 STATISTISCHE ÄMTER DES BUNDES UND DER LÄNDER, SOZIALE MINDESTSICHERUNG IN DEUTSCHLAND 2017, at 9 (2019), http://www.amtliche-sozialberichterstattung.de/pdf/Soziale_Mindestsicherung_2017.pdf [https://perma.cc/9BBS-VMHE].
- 164 People receive “long-term unemployment” (“Arbeitslosengeld II”) benefits after being unemployed for longer than one year. SOZIALGESETZBUCH II – GRUNDSICHERUNG FÜR ARBEITSUCHENDE [SGB II] [SOCIAL CODE II – BASIC SUPPORT FOR JOB SEEKERS], §19, https://www.gesetze-im-internet.de/sgb_2/_19.html [https://perma.cc/DJ4R-4FKW] (Ger.).
- 165 STATISTISCHE ÄMTER DES BUNDES UND DER LÄNDER, SOZIALE MINDESTSICHERUNG IN DEUTSCHLAND 2017, at 9 (2019), http://www.amtliche-sozialberichterstattung.de/pdf/Soziale_Mindestsicherung_2017.pdf [https://perma.cc/9BBS-VMHE].
- 166 STATISTISCHE ÄMTER DES BUNDES UND DER LÄNDER, SOZIALE MINDESTSICHERUNG IN DEUTSCHLAND 2017, at 14 (2019), http://www.amtliche-sozialberichterstattung.de/pdf/Soziale_Mindestsicherung_2017.pdf [https://perma.cc/9BBS-VMHE].
- 167 SOZIALGESETZBUCH II – GRUNDSICHERUNG FÜR ARBEITSUCHENDE [SGB II] [SOCIAL CODE II – BASIC SUPPORT FOR JOB SEEKERS], §19, https://www.gesetze-im-internet.de/sgb_2/_19.html [https://perma.cc/DJ4R-4FKW] (Ger.).
- 168 STATISTISCHE ÄMTER DES BUNDES UND DER LÄNDER, SOZIALE MINDESTSICHERUNG IN DEUTSCHLAND 2017, at 14 (2019), http://www.amtliche-sozialberichterstattung.de/pdf/Soziale_Mindestsicherung_2017.pdf [https://perma.cc/9BBS-VMHE].
- 169 One reason people used to receive less than the Minimum Social Security level was because they failed to follow required administrative procedures. This practice was held unconstitutional in November 2019 by the Federal Constitutional Court. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvL 7/16, Nov. 5, 2019, https://www.bundesverfassungsgericht.de/e/ls20191105_1bv1000716.html. [https://perma.cc/9RV4-Q9FY] (Ger.). This now defunct policy is explained in an information sheet published by the Federal Labor Agency in August 2019. BUNDESAGENTUR FÜR ARBEIT, MERKBLATT: ARBEITSLÖSENGELD II // SOZIALGELD – GRUNDSICHERUNG FÜR ARBEITSUCHENDE, SGB II, KAPITEL 12 – SANKTIONEN (Aug. 2019), https://www.arbeitsagentur.de/datei/Merkblatt-ALGII_ba015397.pdf [https://perma.cc/SV87-MHRC] (Ger.). The practice was in place at the time of our interviews.
- 170 Interview with prosecutors 2_5, 118.
- 171 *See, e.g.*, Gijsbert Vonk, *Repressive Welfare States: The Spiral of Obligations and Sanctions in Social Security*, 16 EUR. J. Soc. SEC. 188 (2014) (describing German law and cases restricting access to public benefits such as requirements that people work in the community and advance their skills to continue receiving full benefits).

- 172 SOZIALGESETZBUCH III – ARBEITSFÖRDERUNG [SGB III] [SOCIAL CODE III – EMPLOYMENT PROMOTION], §149, https://www.gesetze-im-internet.de/sgb_3/ [<https://perma.cc/A6UY-AJY9>] (Ger.).
- 173 Bundesagentur für Arbeit [Federal Labor Agency], Jobcenter: Kosten für Gesundheit und Versicherung [Jobcenter: Costs for Healthcare and Insurance], <https://www.arbeitsagentur.de/arbeitslosengeld-2/gesundheitsversicherung> [<https://perma.cc/J47W-MS37>]. The Federal Labor Agency, through their Jobcenters, pays for health insurance for people who receive “Arbeitslosengeld II” unemployment benefits. *Id.* (Ger. “Das Jobcenter zahlt die monatlichen Beiträge an Ihre Krankenkasse.”).
- 174 STRAFGESETZBUCH [STGB] [CRIMINAL CODE], § 40, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [<https://perma.cc/K3M2-REZ7>] (Ger.).
- 175 Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM STGB [MÜKOStGB] § 40, rn 57–58 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016); Bernd von Heintschel-Heinegg, *StGB § 40: Verhängung in Tagessätzen*, in BECK’SCHER ONLINE-KOMMENTAR: STRAFGESETZBUCH [BECKOK: STGB] [BECK ONLINE COMMENTARY: CRIMINAL CODE] §40, rn 10-14.2 (Bernd von Heintschel-Heinegg ed., 44th ed. 2019), <http://beck-online.beck.de> (Taxes paid on income and professional expenses by employees, operating expenses for people who are self-employed, social security contributions, and insurance premiums (including health insurance, disability insurance, and more) are deducted to arrive at net income.).
- 176 Bernd von Heintschel-Heinegg, *StGB § 40: Verhängung in Tagessätzen*, in BECK’SCHER ONLINE-KOMMENTAR: STRAFGESETZBUCH [BECKOK: STGB] [BECK ONLINE COMMENTARY: CRIMINAL CODE] §40, rn 10-14.2 (Bernd von Heintschel-Heinegg ed., 44th ed. 2019), <http://beck-online.beck.de> (stating that “relevant income is all monetary inflows” (Ger. (“*Relevante Einkünfte sind all geldwerten Zuflüsse*”)) and listing the following examples of sources of income: self-employment, employment, pensions, and annuities, public benefits, maintenance payments, child support, financial support for students, interest on capital, dividends, rental income) (Ger. (“*selbständiger oder nicht selbständiger Arbeit, Pensionen und Renten, Arbeitslosengeld und Arbeitslosengeld II, Unterhaltsleistungen, Kindergeld, BAföG, Kapitalzinsen, Dividenden, Mieterträge*”)).
- 177 Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM STGB [MÜKOStGB] § 40, rn 57-58, 65 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016). Costs incurred to generate income such as business expenses for the self-employed are deducted. Added may be sources of income that receive favorable treatment under the tax code. *Id.*
- 178 Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM STGB [MÜKOStGB] § 40, rn 58-61 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016).
- 179 Oberlandesgericht Naumburg [OLG Naumburg] [Higher Regional Court of Naumburg], Aug. 18, 2017, 2 RV 96/17, BECKRECHTSPRECHUNG [BECKRS] [BECK CASE LAW] 2017, 125208 (Ger.).
- 180 Under Section 40 of the Criminal Code, “The income of the [person], his assets and other relevant assessment factors may be estimated when setting the amount of a daily unit.” STRAFGESETZBUCH [STGB] [CRIMINAL CODE], § 40, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [<https://perma.cc/K3M2-REZ7>] (Ger.).
- 181 Jörg Kinzig, *StGB § 40: Verhängung in Tagessätzen*, in SCHÖNKE/SCHRÖDER STRAFGESETZBUCH KOMMENTAR § 40, rn 21 (Albin Eser et al. eds., 30th ed. 2019) (explaining that judges may estimate if an individual “makes no or only insufficient (or unbelievable) statements about his economic circumstances . . . and if exact determinations of the bases of assessment are not possible or cause disproportionality great difficulties”) (Ger. (“*Wenn der Angeklagte keine oder nur unzureichende (auch unglaubliche) Angaben über seine wirtschaftlichen Verhältnisse macht . . . genaue Feststellungen der Bemessungsgrundlagen nicht möglich sind oder unverhältnismäßig große Schwierigkeiten bereiten*”)).
- 182 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 67/15, Jun. 1, 2015, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/06/rk20150601_2bvr006715.html [<https://perma.cc/6NKG-GESN>] (Ger.).
- 183 Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM STGB [MÜKOStGB] § 40, rn 71-72 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016); *see also* BGH, Decision of April 28, 1976 – 3 StR 8/76 (LG Düsseldorf) (establishing the proposition that net income should be based on actual income rather than speculation about future income).
- 184 Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM STGB [MÜKOStGB] § 40, rn 72 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016).
- 185 Interview with judges 4_4, 187.
- 186 Bernd von Heintschel-Heinegg, *StGB § 40: Verhängung in Tagessätzen*, in BECK’SCHER ONLINE-KOMMENTAR: STRAFGESETZBUCH [BECKOK: STGB] [BECK ONLINE COMMENTARY: CRIMINAL CODE] §40, rn 12 (Bernd von Heintschel-Heinegg ed., 44th ed. 2019), <http://beck-online.beck.de>. Speculating about income that could have been achieved should be undertaken “with extreme restraint” (Ger. (“*äußerst zurückhaltend*”)). *Id.* The court would require considerable “time and effort” (Ger. (“*beträchtlichen Feststellungs und Begründungsaufwand*”)) to justify its projections, including because people’s “life decisions are to be respected” (Ger. (“*sind individuelle Lebensentscheidungen . . . zu respektieren*”)) and because of the complex analysis of determining whether the person’s abilities would match opportunities in the market. *Id.* (Ger. (“*ihm auf dem Arbeitsmarkt nach seinen*”)).

individuellen Fähigkeiten und Möglichkeiten auch wirklich offen stehen würde“).

- 187 Interview with judges 6_3, 17 (interviewee noting that she had been unaware of the concept of imputing income before reviewing commentaries in preparation for our focus group).
- 188 Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM StGB [MÜKoStGB] § 40, rn 90 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016).
- 189 See, e.g., Landesgericht Bad Kreuznach [LG Bad Kreuznach] [Bad Kreuznach Regional Court], Jan. 30, 2015, 2 Qs 132/14, BECKRECHTSPRECHUNG [BECKRS] [BECK CASE LAW] 2015, 8824 (Ger.) (finding that a person’s decision not to apply for public benefits or work because they were hiding from an open arrest warrant was a legitimate life choice and that the court could not impute income because the court should do so only if the person deliberately reduces his earning power to secure a low fine); see also Bernd von Heintschel-Heinegg, *StGB § 40: Verhängung in Tagessätzen*, in BECK’SCHES ONLINE-KOMMENTAR: STRAFGESETZBUCH [BECKOK: StGB] [BECK ONLINE COMMENTARY: CRIMINAL CODE] §40, rn 12 (Bernd von Heintschel-Heinegg ed., 44th ed. 2019), <http://beck-online.beck.de> (summarizing principle that individuals’ life choices should be respected).
- 190 Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM StGB [MÜKoStGB] § 40, rn 90 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016) (criticizing imputing income as being akin to forced labor because a person is made to choose between changing their way of life—by obtaining a job or a higher paying job—or incarceration for nonpayment).
- 191 Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM StGB [MÜKoStGB] § 40, rn 90 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016). The German Constitution protects individuals’ *Allgemeine Handlungsfreiheit*, or freedom of action, under Article 2 para. 1 Grundgesetz, and the commentary suggests this right would be implicated by imputing income. *Id.*
- 192 Bernd von Heintschel-Heinegg, *StGB § 40: Verhängung in Tagessätzen*, in BECK’SCHES ONLINE-KOMMENTAR: STRAFGESETZBUCH [BECKOK: StGB] [BECK ONLINE COMMENTARY: CRIMINAL CODE] §40, rn 12 (Bernd von Heintschel-Heinegg ed., 44th ed. 2019), <http://beck-online.beck.de>.
- 193 Hans-Jörg Albrecht, *StGB § 40: Verhängung in Tagessätzen*, in 1 KINDHÄUSER/NEUMANN/PAEFFGEN STRAFGESETZBUCH KOMMENTAR § 40, rn 45 (Urs Kindhäuser et al. eds., 5th ed. 2017).
- 194 Hans-Jörg Albrecht, *StGB § 40: Verhängung in Tagessätzen*, in 1 KINDHÄUSER/NEUMANN/PAEFFGEN STRAFGESETZBUCH KOMMENTAR § 40, rn 45 (Urs Kindhäuser et al. eds., 5th ed. 2017).
- 195 German courts have, in limited circumstances, imputed income when people fraudulently, for the purposes of lower fines, reduce their income, for example by quitting a job. However, even this limited exception to the practice against imputing income has been questioned. See, e.g., Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM StGB [MÜKoStGB] § 40, rn 89-91 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016) (explaining that even if the motivation for reducing income was to avoid a high fine, the fact remains the person no longer has the money available to pay).
- 196 Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM StGB [MÜKoStGB] § 40, rn 73 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016).
- 197 Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM StGB [MÜKoStGB] § 40, rn 73 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016).
- 198 Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM StGB [MÜKoStGB] § 40, rn 73 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016).
- 199 Interview with judges 6_3, 145–48 (noting “there is no fine based on assets”).
- 200 Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM StGB [MÜKoStGB] § 40, rn 59-64 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016); Kristian Kühl, *StGB § 40: Verhängung in Tagessätzen*, in LACKNER/KÜHL STRAFGESETZBUCH KOMMENTAR § 40, rn 12 (Kristian Kühl & Martin Heger eds., 29th ed. 2018).
- 201 Kristian Kühl, *StGB § 40: Verhängung in Tagessätzen*, in LACKNER/KÜHL STRAFGESETZBUCH KOMMENTAR § 40, rn 12 (Kristian Kühl & Martin Heger eds., 29th ed. 2018).
- 202 Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM StGB [MÜKoStGB] § 40, rn 62 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016).
- 203 Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM StGB [MÜKoStGB] § 40, rn 113-14 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016).
- 204 Bernd von Heintschel-Heinegg, *StGB § 40: Verhängung in Tagessätzen*, in BECK’SCHES ONLINE-KOMMENTAR: STRAFGESETZBUCH [BECKOK: StGB] [BECK ONLINE COMMENTARY: CRIMINAL CODE] §40, rn 15 (Bernd von Heintschel-Heinegg ed., 44th ed. 2019), <http://beck-online.beck.de> (collecting and summarizing cases).
- 205 Bernd von Heintschel-Heinegg, *StGB § 40: Verhängung in Tagessätzen*, in BECK’SCHES ONLINE-KOMMENTAR: STRAFGESETZBUCH [BECKOK: StGB] [BECK ONLINE COMMENTARY: CRIMINAL CODE] §40, rn 15 (Bernd von Heintschel-Heinegg ed., 44th ed. 2019), <http://beck-online.beck.de> (citing Bayerisches Oberlandesgericht [BayOblLG] [Higher Regional Court of Bavaria], Mar. 23, 1987, RReg. 5 St 27/87, Neue Juristische Wochenschrift [NJW] 1987, 2029 (Ger.); Oberlandesgericht Köln [OLG Köln] [Higher Regional Court of Cologne], Feb. 2, 2001, Ss 15/01-12, StV 2001, 347 (Ger.)).

- 206 Jörg Kinzig, StGB § 40: VERHÄNGUNG IN TAGESSÄTZEN, IN SCHÖNKE/SCHRÖDER STRAFGESETZBUCH KOMMENTAR § 40, rn 12 (Albin Eser et al. eds., 30th ed. 2019).
- 207 Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM StGB [MÜKoStGB] § 40, rn 60 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016) (collecting and summarizing cases). For example, in a 1982 decision, the regional higher court in Celle held that the private use of business enterprises and non-cash withdrawals from a business are considered in net income. *Id.* (citing Oberlandesgericht Celle [OLG Celle] [Regional Higher Court of Celle], May 24, 1982, 1Ss 108/82 (Ger.)).
- 208 *See, e.g.*, Oberlandesgericht Dresden [OLG Dresden,] [Regional Higher Court of Dresden], Jul. 3, 2009, 2 Ss 163/09, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2009, 2966 (Ger.) (declining to add benefits in kind as net income for an asylum seeker with very limited financial resources).
- 209 *See, e.g.*, Hans-Jörg Albrecht, *StGB § 40: Verhängung in Tagessätzen*, in 1 KINDHÄUSER/NEUMANN/PAEFFGEN STRAFGESETZBUCH KOMMENTAR § 40, rn 39-41 (Urs Kindhäuser et al. eds., 5th ed. 2017) (noting that most courts in Germany estimate income for non-working spouses by their support payments or based on support actually received).
- 210 *See, e.g.*, Oberlandesgericht Celle [OLG Celle] [Regional High Court of Celle], Jul. 10, 2007, 32 Ss 95/07, BECKRECHTSPRECHUNG [BECKRS] [BECK CASE LAW] 2009, 6855 (Ger.) (holding that benefits in kind for asylum seekers who receive no cash benefits are excluded from the daily rate).
- 211 *See Deductions for net income* (p.44) herein.
- 212 Landesgericht Köln [LG Köln] [Regional Court of Cologne], Apr. 25, 2018, 153 Ns 89/17, BECKRECHTSPRECHUNG [BECKRS] [BECK CASE LAW] 2018, 7847 (Ger.).
- 213 Landesgericht Köln [LG Köln] [Regional Court of Cologne], Apr. 25, 2018, 153 Ns 89/17, BECKRECHTSPRECHUNG [BECKRS] [BECK CASE LAW] 2018, 7847 (Ger.).
- 214 HANS ALBRECHT, STRAFZUMESSUNG UND VOLLSTRECKUNG BEI GELDSTRAFEN: UNTER BERÜCKSICHTIGUNG DES TAGESSATZSYSTEMS; DIE GELDSTRAFE IM SYSTEM STRAFRECHTLICHER SANKTIONEN 206-09 (1980). In an empirical study, Albrecht found that 54% of case files had no information about net income and that courts relied on individuals' profession and marital status to set net income. *Id.*
- 215 *See, e.g.*, Interview with prosecutors 5_4, 33 ("Well, if we know his profession, if we know the profession, we'll try to find out what people earn in this line of work. If he says he is a worker and works here at our tire factory, for example, . . . And you know, 'Ah, shift workers earn about 1,600 euro, round about,' if he works shifts. That's all the insight we have, yes.").
- 216 Interview with prosecutors 2_5, 111–12 (reporting default rate of 50–60 euro per unit); Interview with prosecutors 3_4, 17 (stating that they usually set the default daily rate to 30 euro per unit, especially if they know the person has a job in a skilled trade or other common professions such as waiters); Interview with judges, 1_5, 39 (reporting a default daily rate of 40 euro per unit).
- 217 Interview with prosecutors 13_5, 52 (discussing rate of seven euro per unit for *Hartz IV* recipients).
- 218 Interview with judges 9, 43–44 (referring to *Hartz IV* recipients a judge said, "At this court, the lowest amounts actually vary. The range is between 10 and 15 euro. The Public Prosecutor's Office is rather between 15 and 20 euro, maximum.>").
- 219 Interview with prosecutors, 11_2, 20.
- 220 Interview with prosecutors, 11_2, 83.
- 221 Interview with judges 9_4, 149–56.
- 222 STRAFGESETZBUCH [StGB] [CRIMINAL CODE], § 40, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [<https://perma.cc/K3M2-REZ7>] (Ger.).
- 223 Interview with prosecutors 2_5, 120.
- 224 Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM StGB [MÜKoStGB] § 40, rn 65 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016).
- 225 Interview with prosecutors 11_2, 20 ("The calculation process is, as a rule, net income, from which you will, certainly, extraordinary expenses are to be deducted. You'd have to look into the law to see what exactly falls under extraordinary expenses. But it's certainly not most of what you'd think. Well, it's not the personal loan for a car, or also, even rent, it's not even the rent for your apartment.>").
- 226 Interview with judges 1_5, 36 ("The net income someone's got—You just take the pay slip, look at it and start doing the math. . . . For example, it will not—the cost of housing will [not] be deducted. Although, as we all know, it has risen considerably in recent years. What is being deducted is his obligations to pay support to his wife and children. And even if he does not have to pay any support, but the children live with him, a certain amount is deducted.>"). In a different jurisdiction, some interviewees were under the impression that all judges deducted rent from net income. Interview with prosecutors 5_4, 67–90 ("1: Not even with rents, because I think everyone has these costs. 13: But all courts [reduce by rent]. 12: It's done this way in practice. 11: Courts do that. . . . 14: I didn't know that the courts do this all the time.>").
- 227 Paul Blickle et al, *Arbeiten nur für die Miete*, DIE ZEIT ONLINE (Dec. 5, 2019), <https://www.zeit.de/wirtschaft/2019-12/mietbelastung-mietpreise-einkommen-wohnen-deutschland> [<https://perma.cc/X8MP-WJMQ>].
- 228 Interview with judges 9_4, 47–53.

- 229 Some commentaries caution against courts evaluating the worthiness of the expenses. *See, e.g.*, Hans-Jörg Albrecht, *StGB § 40: Verhängung in Tagessätzen*, in 1 KINDHÄUSER/NEUMANN/PAEFFGEN STRAFGESETZBUCH KOMMENTAR § 40, rn 34-35 (Urs Kindhäuser et al. eds., 5th ed. 2017) (questioning whether it is appropriate for judges to differentiate between monetary obligations that are “socially acceptable” (Ger. (“sozial akzeptiert”)) or “sensible” (Ger. (“sinnvoll”)) and debts that fall into “unacceptable categories” (Ger. (“nicht anererkennungsfähige Bereichen”)).
- 230 *See* quotations on p. 44 herein.
- 231 *See, e.g.*, Interview with prosecutors 11_2, 118; Interview with prosecutors 5_4, 57; Interview with prosecutors 8_2, 63; Interview with prosecutors 2_5, 118; Interview with prosecutors 3_4, 12; Interview with judges 9_4, 47; Interview with judges 4_4, 149; Interview with judges 6_3, 91; Interview with judges 1_5, 36.
- 232 *See, e.g.*, Interview with judges 9_4, 47.
- 233 *See, e.g.*, Interview with prosecutors 5_4, 106 (“I know roughly what the guidelines for support payments say, and I try to deduct roughly that. Of course, not to the euro, but I know roughly, up to the third, fourth child, what support payments we’ll arrive at. And that will—I just deduct that.”); Interview with judges 9_4, 157 (confirming use of family court child support deductions as basis for reductions). For an example of the support tables from one jurisdiction, the state of North-Rhine Westphalia, see OBERLANDESGERICHT DÜSSELDORF [HIGHER REGIONAL COURT OF DÜSSELDORF], DÜSSELDORFER TABELLE: LEITLINIEN FÜR DEN UNTERHALTSBEDARF [DÜSSELDORF TABLES: GUIDELINES FOR MAINTENANCE REQUIREMENTS] (Jan. 1, 2020), https://www.olg-duesseldorf.nrw.de/infos/Duesseldorfer_Tabelle/Tabelle-2020/Duesseldorfer-Tabelle-2020.pdf [<https://perma.cc/KK28-2GSF>] (providing the Düsseldorf Maintenance Tables for the jurisdiction’s family courts).
- 234 Bundesgerichtshof [BGH] [Federal Court of Justice], Sept. 26, 2007, 2 StR 290/07, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2007-9&Seite=1&nr=41558&pos=58&anz=281> (Ger.) (holding that courts may apply flat percentage deductions for support of dependents); *see also, e.g.*, Interview with prosecutors 8_2, 71 (“I allow between 10 and 15% per child.”).
- 235 Interview with prosecutors 8_2, 71.
- 236 KG 10.3.2014 – 121 Ss 23/14; OLG Frankfurt a. M. 8.12.2009 – 1 Ss 467/99 (Ger.) (court accepting a 15% deduction for each child); *see also, e.g.*, Interview with prosecutors 5_4, 107; Interview with prosecutors 3_4, 12.
- 237 *See, e.g.*, Interview with judges 1_5, 36–38 (“1: Is there a specific amount that you assume, for example, for, say a wife and two children? 12: One tenth, two tenths. That’s how we did it in [training].”).
- 238 *See, e.g.*, Interview with prosecutors 5_4, 106 (prosecutor reducing net income by 3/7 for spousal support).
- 239 It is unclear whether courts deduct spousal support for only non-working spouses. *Compare* Interview with prosecutors 3_4, 12 (prosecutor noting they make deductions for non-working spouses) *with* Interview with prosecutors 5_4, 106 (prosecutor saying they deduct for spouses without specifying that the deduction would apply only if the spouse was unemployed).
- 240 Interview with prosecutors 5_4, 108 (prosecutor saying that they cannot make maintenance deductions of over 50% of total net income). Court cases have also reported a 50% maximum deduction limit. *See, e.g.*, KG 10.3.2014 - 121 Ss 23/14, VRS 126, 97 (99) (Ger.).
- 241 Interview with prosecutors 7_6, 336–40.
- 242 Interview with judges 9_4, 47–53.
- 243 Interview with prosecutors 8_2, 63.
- 244 Interview with judges 9_4, 47–53.
- 245 Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM StGB [MÜKoStGB] § 40, rn 41-43 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016).
- 246 Default amounts for asylum seekers, who receive fewer cash benefits, are between five and fifteen euro, reflecting different practices for accounting for non-cash incomes. *See, e.g.*, Interview with prosecutors 2_5, 118 (“[T]here is a fixed rate for recipients of social benefits, which is in the range of 10 euro. And for asylum seekers, at least in [town], it’s 5, right? Due to the fact that, although benefit levels are similar, they receive more benefits in kind, we have zeroed in on a day fine amount of 5 euro.”); Interview with prosecutors 3_4, 106–07 (“Q: Speaking of asylum seekers, for them, what’s the usual amount for them? I: Those are social benefits as well, and in most cases, just like *Hartz IV*, we’ll arrive at about 15 euro, all in.”).
- 247 *See, e.g.*, Interview with judges 9_4, 157 (“Where I really make deductions without hesitating is if someone really makes an effort, and credibly asserts this, to pay back his horrendous debts little by little. I’ll make use of judicial independence, and I’ll say, ‘Okay, under the circumstances we definitely want to acknowledge and support the fact that he himself has decided to try and get rid of the debts, although his income is actually below the attachability threshold.’ I try to support his efforts to some extent, by saying: ‘Okay, well, I’ll deduct that from the day fine amount.’ But that’s really pretty much the only thing, as I said. Otherwise, I don’t do this for people on *Hartz IV*.”).
- 248 *See Judges and prosecutors acknowledge the poverty of people in Germany’s criminal legal system* (p. 36) herein.
- 249 Interview with prosecutors 13_5, 52 (referencing a rate of seven euro per unit for *Hartz IV* recipients); Interview with judges 9_4,

- 43–44 (noting prosecutors sometimes set the daily rate as high as 20 euro per unit for *Hartz IV* recipients).
- 250 Interview with prosecutors 8_2, 53 (“The current *Hartz IV* rate is 409, I think, euro. If you convert that, we’re already at 14 euro. Round about.”).
- 251 Interview with prosecutors 8_2, 53.
- 252 Interview with judges 9_4, 43–44; *see also* Interview with prosecutors 8_2, 53–55 (noting a *Hartz IV* rate of 15–20 euro per unit).
- 253 Interview with prosecutors 13_5, 52.
- 254 Amtsgericht Hann. Münden [AG Hann. Münden] [District Court of Hannover Münden], Apr. 4, 2014, 4 Cs 43 Js 4382/14 (Ger.).
- 255 Oberlandesgericht Jena [OLG Jena] [Higher Regional Court of Jena], Oct. 27, 2017, 1 OLG 161 Ss (Ger.) (holding it was proper for court to exclude rent from net income and allow the person to retain 70% of their cash benefits amount for living expenses).
- 256 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1BvL 1/09, Feb. 9, 2010, *translation at* https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/02/Is20100209_1bvl000109en.html [<https://perma.cc/A5YQ-92B4>] (Ger.).
- 257 Amtsgericht Hann. Münden [AG Hann. Münden] [District Court of Hannover Münden], Apr. 4, 2014, 4 Cs 43 Js 4382/14 (Ger.).
- 258 Amtsgericht Hann. Münden [AG Hann. Münden] [District Court of Hannover Münden], Apr. 4, 2014, 4 Cs 43 Js 4382/14 (Ger.).
- 259 Amtsgericht Hann. Münden [AG Hann. Münden] [District Court of Hannover Münden], Apr. 4, 2014, 4 Cs 43 Js 4382/14 (Ger.).
- 260 BESCHLUSS DER 85. KONFERENZ JUSTIZMINISTERINNEN UND JUSTIZMINISTER AM 6 NOVEMBER 2014, IN BERLIN, TOP II.12: STÄRKERE AUSRICHTUNG DER GESETZLICHEN REGELUNG ZUR BEMESSUNG DER TAGESSATZHOHE VON GELDSTRAFEN AM SOZIALSTAATSPRINZIP, <https://www.justiz-bw.de/site/jum2/get/documents/jum1/JuM/Justizministerium%20NEU/JuMiKo/Beschl%C3%BCsse/2014%20Herbst/TOP%20II.12%20St%C3%A4rkere%20Ausrichtung%20der%20gesetzlichen%20Regelung%20zur%20E2%80%8EBe-messung%20der%20Tagessatzh%C3%B6he%20von%20Geld-strafen%20am%20E2%80%8ESozialstaatsprinzip.pdf> [<https://perma.cc/XAN6-7QJE>].
- 261 STRAFGESETZBUCH [StGB] [CRIMINAL CODE], § 40, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [<https://perma.cc/K3M2-REZ7>] (Ger.) (“A daily unit shall not be set at less than one and not at more than thirty thousand euros.”).
- 262 STATISTISCHES BUNDESAMT (DESTATIS), FACHSERIE 10, REIHE 2.6, RECHTSPFLEGE: STAATSANWALTSCHAFTEN 2018 (2019), https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publicationen/Downloads-Gerichte/staatsan-waltschaften-2100260187004.pdf?__blob=publicationFile [<https://perma.cc/E9KP-7R2N>]. Chart reflects data from this source.
- 263 *See, e.g.*, Interview with judges 4_4, 476–90 (“Q: Do you think the minimum and maximum day fine amounts, i.e. from 1 euro to 30,000 euro [are] sufficient in your—Did you have the feeling it should go higher? I1: In our department, yes. I4: I’ve never had a case where I thought it was inadequate, I think.”).
- 264 Interview with prosecutors 5_4, 250–66.
- 265 Interview with judges 9_4, 251–53 (suggesting it may be appropriate for the upper limits to be higher to accommodate higher earners but that whether to raise the limit was a question for the legislature and not for the judges to decide); Interview with judges 4_4, 476–04 (judges debating whether there should be an upper limit).
- 266 The highest we heard was a prosecutor estimating a CEO of a company to make 6,000 euro per month. This would reflect an annual net income of 72,000 euro. Interview with prosecutors 8_2, 263–64.
- 267 Interview with judges 9_4, 54; *see also* Interview with prosecutors 7_6, 148 (“Well. Because in cases like that you get into the highest range of daily rates, number of units, so I did want to see the result—but in other cases, it is, I think—because you do it so often—an instinctive value. You don’t question it anymore. But if the daily rate reaches 150 euro—day fine in terms of the amount is in the 150-euro range, then that’s so rare that one does take an additional look at the actual [result].”).
- 268 Interview with judges 9_4, 251–53.
- 269 The German Association of Judges (*Deutscher Richterbund*) called for an increase in the minimum amount of the daily rate to DM 10 (approx. 5 euro) in the year 2000. Heinrich Kintzi, *Die Geldstrafe - eine ausbaufähige Sanktion*, 2001 DEUTSCHE RICHTERZEITUNG (DRiZ) 198, 202 (chairman of the commission discussing recommendation).
- 270 Available data confirms that German judges rarely impose less than 10 euro. 2.7% of cases are sentenced to less than 5.10 euro per unit. The vast majority of fines are between 5 euro and 50 euro per unit of punishment. JÖRG-MARTIN JEHLE, FEDERAL MINISTRY OF JUSTICE AND CONSUMER PROTECTION, CRIMINAL JUSTICE IN GERMANY: FACTS AND FIGURES (6th ed. 2015), https://www.bundesjustizamt.de/DE/SharedDocs/Publicationen/Justizstatistik/Criminal_Justice_Germany_en.pdf?__blob=publicationFile [<https://perma.cc/736Q-4XGH>]). For discussion about how courts should impose the lower range for lower income people *see, e.g.*, DEUTSCHER CARITASVERBAND E.V., POSITION ZUR HÖHE VON TAGESSÄTZEN BEI GELDSTRAFEN FÜR MENSCHEN IM BEZUG VON TRANSFERLEISTUNGEN (Eng. (“POSITION ON THE LEVEL OF DAILY RATES OF CRIMINAL FINES FOR PEOPLE RECEIVING PUBLIC BENEFITS”)) (2015), <https://www.caritas.de/cms/contents/caritas.de/medien/dokumente/stellungnahmen/position-zur-hoehe-v/position-tag->

[essatzhoehen-von-geldstrafen_15-07-09.pdf?d=a&f=pdf](https://perma.cc/R3ZK-4QJR) [https://perma.cc/R3ZK-4QJR].

- 271 See, e.g., Interview with prosecutors 6_3, 152–55 (“Q: Do you ever use this lower limit? I mean, the 1 euro? I5: I don’t usually go below 10. I4: Sometimes, yes, the prosecution offers 5. I5: Rarely.”). In the same interview, the prosecutors discussed their usual practices for setting daily rates for people who are homeless and receive no public benefits and therefore should have a daily rate of one euro: “What do they get a day? 12 euro? That’s 360, again. I4: Although, in that case, you have to—you have to take into account that this is what they require for mere subsistence. . . . You’d actually have to take that into account, and then you’d probably end up at 5 euro after all.” *Id.* at 157–62.
- 272 Interview with prosecutors 2_5, 163–67.
- 273 Interview with judges 9_4, 158–62.
- 274 Interview with judges 1_5, 133–39.
- 275 NICOLE BÖGELEIN ET AL., VERMEIDUNG VON ERSATZFREIHEITSSTRAFEN: EVALUIERUNG JUSTIZIELLER HAFTVERMEIDUNGSPROJEKTE IN NORDRHEIN-WESTFALEN 28 (2013) (reflecting data based on research in the state of North-Rhine Westphalia).
- 276 See *Estimating net income when courts lack financial details* (p. 41) for a discussion of estimation under German law.
- 277 Some interviewees noted that there is more investigation and document review in white collar or similar fraud cases in which determining income is more complex and financial punishment is more central to the case. See, e.g., Interview with judges 9_4, 87 (noting that they do not normally investigate financial circumstances but may do so in the case of “economic crimes”). We focus in this Report on cases similar to ones heard in misdemeanor courts in the United States.
- 278 Interview with judges 9_4, 81.
- 279 Interview with judges 6_3, 35.
- 280 Interview with judges 6_3, 23.
- 281 See p. 71 for more about this.
- 282 See *Judges and prosecutors acknowledge the poverty of people in Germany’s criminal legal system* (p. 36).
- 283 Interview with prosecutors 11_2, 54 (“I2: So my objective is, of course, to reflect the actual income situation in one way or another, you know. . . . You can often certainly get some clues by looking at the profession as such. Of course, the preliminary goal is to reflect the actual income situation and not to punish him at all costs, in a way, by saying, ‘Okay, you gave us no information, so I’m setting you particularly high,’—so, that’s not the goal. . . . I1: Yes, the investigation file often contains actual clues. Or you just look at the [individual’s] milieu. One knows certain parts of town, in [town 1], in [town 2], in [town 3], there are areas where there are only [public benefits] recipients, there are alcoholics, there are. . . okay? One knows they have nothing; you often understand by just looking at the circumstances that you can’t go astronomically high, that there’s no basis for that. As we said, this is readily apparent from the contents of the investigation file: you notice that they have no money. Or some offenses, people committing benefits fraud, when I see that they are on benefits and make fraudulent statements, it’s already clear to me, on the basis of the merits of the case, what their income bracket is.”).
- 284 Interview with judges 4_4, 143 (“In general, it is perhaps a bit easier . . . at the level of low-income earners, yes. There, I think, it’s—In fact, it’s probably actually realistic in most cases if someone says, he is, I don’t know, a warehouse worker. Or he works as a kitchen help, or something. I think it’s easy to gather that they won’t earn more than 1,000 euro a month. Yes, I mean, in your department [colleague who works on white-collar crimes] it is, of course, more difficult, because of the much broader spectrum of incomes that you have.”).
- 285 NICOLE BÖGELEIN ET AL., VERMEIDUNG VON ERSATZFREIHEITSSTRAFEN: EVALUIERUNG JUSTIZIELLER HAFTVERMEIDUNGSPROJEKTE IN NORDRHEIN-WESTFALEN 28 (2013).
- 286 STRAFPROZESSORDNUNG [STPO] [CRIMINAL PROCEDURE CODE], § 407, translation at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html [https://perma.cc/MHD8-3Y76] (Ger.).
- 287 STRAFPROZESSORDNUNG [STPO] [CRIMINAL PROCEDURE CODE], § 407, translation at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html [https://perma.cc/MHD8-3Y76] (Ger.).
- 288 See, e.g., Interview with judges 9_4, 143 (discussing the decision between summary proceedings and trial: “That brings us . . . to the gravity of the crime. The offense, let’s say, theft or something like that, . . . all it says in the law is fine or imprisonment up to five years. The amount of the fine can vary widely. Of course, it must be taken into account: what is the value of the things that have been stolen? What’s the degree of criminal energy involved in the offense? The same elements cover very different constellations, and that is precisely the beauty of our profession, that, without having very strict guidelines, we can respond to the specific, individual offense in a flexible manner and say, ‘To us this seems appropriate, appropriate to the offense and proportionate to fault.’ Speaking of ‘appropriate to the offense and proportionate to fault,’ of course, his life before the offense, his social background, his family background, our expectation of how this specific punishment will impact this specific human being, all of this is important.”).
- 289 Interview with prosecutors 3_4, 115 (“One would [see] things that are easier to present in the main trial and are often not readily apparent to the same extent from the file. . . . But that happens often at the point where you think ‘Do I go for summary proceedings or do I go to trial?’”).

- 290 See, e.g., Interview with prosecutors 11_2, 19–20 (discussing how it is very rare for them to investigate income because of high caseloads). Instead, they estimate the daily rate. *Id.*
- 291 Judges cannot amend the summary proceedings order and in practice judges only challenge the prosecutors' determinations in exceptional circumstances. STRAFPROZESSORDNUNG [STPO] [CRIMINAL PROCEDURE CODE], § 408, translation at https://www.gesetze-im-internet.de/englisch_stpo/index.html [https://perma.cc/MHD8-3Y76] (Ger.).
- 292 STRAFPROZESSORDNUNG [STPO] [CRIMINAL PROCEDURE CODE], § 407, translation at https://www.gesetze-im-internet.de/englisch_stpo/index.html [https://perma.cc/MHD8-3Y76] (Ger.).
- 293 STRAFPROZESSORDNUNG [STPO] [CRIMINAL PROCEDURE CODE], § 411, translation at https://www.gesetze-im-internet.de/englisch_stpo/index.html [https://perma.cc/MHD8-3Y76] (Ger.).
- 294 See Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM STGB [MüKoStGB] § 40, rn 117 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016) (detailing investigative options available to the court); see also, e.g., Interview with judges 1_5, 39 (“But as a rule, I don’t ask people to show me a proof-of-earnings certificate, be it in the trial or, if it is written proceedings, by court order.”).
- 295 Interview with judges 14_4, 38 (explaining that prosecutors can request bank transaction information from the German regulatory authority, the *Bundesanstalt für Finanzdienstleistungsaufsicht*).
- 296 Interview with prosecutors 10_4, 271 (explaining that the courts cannot access tax records because of “tax secrecy”).
- 297 CJPP was provided a police intake form to review for one of Germany’s police districts and was asked to keep the state and actual document confidential. We were unable to review additional police intake forms and so we base our discussion on the one form we saw and interview responses.
- 298 Interview with prosecutors 8_2, 193 (“The problem is, of course, whether the person concerned even knows what happens with the voluntary details. I mean, if I get a form—after all, a lot gets done via written hearings—if I get a form, I mean as a private individual now, and it says, ‘The police want to know what my income is.’ My first reaction will be, ‘That’s none of your business.’”).
- 299 STRAFPROZESSORDNUNG [STPO] [CRIMINAL PROCEDURE CODE], § 140, translation at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html [https://perma.cc/MHD8-3Y76] (Ger.).
- (1) The participation of defence counsel shall be mandatory if
1. the main hearing at first instance is held at the Higher Regional Court or at the Regional Court;
 2. the accused is charged with a felony;
 3. the proceedings may result in an order prohibiting the pursuit of an occupation;
 4. remand detention pursuant to Sections 112 or 112a or provisional placement pursuant to Section 126a or Section 275a subsection (6) is executed against an accused;
 5. the accused has been in an institution for at least three months based on judicial order or with the approval of the judge and will not be released from such institution at least two weeks prior to commencement of the main hearing;
 6. placement of the accused pursuant to Section 81 is being considered for the purpose of preparing an opinion on his mental condition;
 7. proceedings for preventive detention are conducted;
 8. the previous defence counsel is excluded from participation in the proceedings by a decision;
 9. an attorney has been assigned to the aggrieved person pursuant to Sections 397a and 406g subsections (3) and (4).
- (2) In other cases the presiding judge shall appoint defence counsel upon application or ex officio if the assistance of defence counsel appears necessary because of the seriousness of the offence, or because of the difficult factual or legal situation, or if it is evident that the accused cannot defend himself. Applications filed by accused persons with a speech or hearing impairment shall be granted.
- (3) The appointment of defence counsel pursuant to subsection (1), number 5, may be revoked if the accused is released from the institution at least two weeks prior to commencement of the main hearing. The appointment of defence counsel pursuant to subsection (1), number 4, shall remain effective for the further proceedings under the prerequisites mentioned in subsection (1), number 5, unless another defence counsel is appointed.
- 300 Interview with prosecutors 8_2, 247.
- 301 Email from Nicole Bögelein, Senior Researcher, Universität zu Köln, to Mitali Nagrecha, Director of the National Criminal Justice Debt Initiative (Jan. 20, 2020, 3:23 AM CET) (on file with the CJPP).
- 302 Interview with prosecutors 2_5, 107 (“Investigations into economic circumstances are hardly ever carried out by the police, and we hardly ever do them either, I have to say if I’m honest. Well, I can’t think of—I’m always happy when people give information voluntarily [because] that gives me a basis for assessment.”); Interview with prosecutors 13_5, 38 (suggesting that it’s unrealistic for the police to follow up on investigating a person’s financial circumstances: “So the result of the police investigation is focused on ascertaining the offense and finding the [person]. And, well, for the police to [go through the additional effort and] investigate assets so we have something to go on? And most of the time, [the daily rate] is based on voluntary information provided by the accused anyway, or estimations out of thin air.”).

- 303 Interview with judges 1_5, 43 (“[T]he initial investigation starts with the police. And people provide information at the police station: first of all, [they provide] their compulsory personal data, and they can give information about their economic situation, but they don’t have to. This is voluntary information. If you’re lucky, [the file] will say something about the pay, about the salary he earns. In many cases it won’t, though. . . . So the public prosecutor has a file on their table, requests summary proceedings, which are mass proceedings to deal with fines, and simply estimates. He just looks [into the file]: what did he state as his profession, what is a standard income in the industry? And then he estimates an amount of 1,200/1,500 net. That’s the basis on which you work.”).
- 304 See Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM StGB [MüKoStGB] § 40, rn 117 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016) (summarizing investigative options available to the court).
- 305 Interview with prosecutors 5_4, 131 (“12 The question is, of course, often—let’s say if people get their driver’s license revoked and they’re a truck driver, they’ll obviously lose their job. That is often a consequence. But these are things that take place downstream, in the enforcement department, where people report, ‘You’ve assumed a salary of 1,500 euro a month, but I’m unemployed now. I only get 900 euro.’ In such cases, it can be reduced afterwards. That’s possible, but people have to take care of it themselves. 13: That’s the only way to—and we have—because the legislature, at some point, noticed that there can be a problem with the, let’s say, estimation by the prosecuting agency and the issuing of summary proceedings and the ignorance of the actual income and asset situation—there is the possibility, in written proceedings, what is it now, [section] 411, paragraph 3, sentence X [of the Code of Criminal Procedure (*StPO*)], the amount of the day fine may be adjusted separately in written proceedings. Yes. Are you aware of that? Yes. Well, this is something that is not uncommon and that, of course, only ever works in favor of the accused. It’s not possible the other way around.”).
- 306 Interview with judges 4_4, 253 (“11: And then I always say, ‘There is, but it’s very strict, and I don’t want to raise your hopes that it will work out, but you should request it.’ And I add, ‘But when the letter comes, don’t bury your head in the sand.’ Well, that’s, I think, one of my standard phrases. Because, yes, because that’s actually the case with many of our defendants, in the end. Especially the alcoholics, yes, they—who—they receive the letter and put it somewhere . . . or throw it in the garbage as fast as they can. 13: Well, I do get wind of [the fact that people face incarceration for failure to pay]—not specifically of how my own sentences are enforced, but the fact that they are enforced; because I often have persons who appear before me again in a new matter, straight from the sentence they are serving for failure to pay. So, my impression is, in fact, that [imprisonment for failure to pay] does not occur so rarely, especially in the lower income range. And for people who just don’t have—don’t have a lot of structure in their life. People who simply ignore these letters, and at some point, an arrest warrant is issued, and they are just arrested, and it doesn’t even bother them much. They don’t file complaints against anything, but they just endure those measures by the state. And, again: I don’t think it’s that rare.”). Interviewees noted that individuals “don’t read their mail.” Interview with judges 9_4, 199 (“We do a summary proceedings order, we always say, ‘Well, he can appeal if he earns less or if that’s too high.’ But we must not underestimate the fact that we have people sitting here who like to simply throw mail from official bodies in the corner, or just accept it, as long as they don’t have to go to court—and they simply don’t defend themselves, even though it could have been lower.”).
- 307 One study on the use of community service as an alternative to payment in Germany explained the prevalence of housing instability among individuals sentenced to fines as follows:
- The precarious housing situation not only has an impact on the quality of life, but also prevents important information from the judiciary from becoming known to the addressees. For the homeless there is not only the problem that they may not be able to be made aware of an order of punishment, but also, during the course of punishment, they either are not informed, or do not understand that they have a responsibility to inform themselves, about relief or alternatives, such as community service.
- (Ger. (“*Diese prekäre Wohnsituation hat nicht nur Auswirkungen im Bereich der Lebensqualität, sondern verhindert auch, daß wichtige Informationen der Justiz den Adressaten bekannt werden. Für die Obdachlosen ergibt sich nicht nur das Problem, daß sie möglicherweise eine Strafbefehlsentscheidung nicht wahrnehmen, sondern auch im weiteren Verlauf der Vollstreckung über Erleichterung oder Alternativen, wie gemeinnützige Arbeit, entweder nicht informiert werden oder nicht erfassen, daß sie sich entsprechende Informationen besorgen sollten.*”)).
- Bernhard Villmow, *Ersatzfreiheitsstrafe und gemeinnützige Arbeit. Erfahrungen und Einstellungen von Betroffenen*, in 2 INTERNATIONALE PERSPEKTIVEN IN KRIMINOLOGIE UND STRAFRECHT: Festschrift für Günther Kaiser zum 70. Geburtstag 1291, 1297-98 (Hans-Jörg Albrecht et al. eds, 1998).
- 308 Interview with prosecutors 2_5, 269.
- 309 See, e.g., Interview with judges 9_4, 32 (“At trial, of course, we’ll ask, ‘What do you earn? How many children do you have? Do you have a wife? Does she have her own income? Do you have horrendous debts?’ And then we’ll make up our minds about the daily rate.”).
- 310 See, e.g., Interview with judges 6_3, 79 (judges specifying they spend a “very short time” on ability to pay in hearings that

- are a total of ten minutes for the whole case, including witness testimony).
- 311 The exceptions were interviewees who referenced working on white collar criminal cases in which the calculation of net income is more complex. *See, e.g.*, Interview with judges 9_4, 87. However, CJPP did not speak to enough judges and prosecutors working on white collar cases to have a full picture of how fines are set in those cases.
- 312 Interview with judges 4_4, 354–58 (reporting that it took 30 seconds to calculate the fine at trial).
- 313 Interview with judges 1_5, 133–47 (explaining that they supplement the police intake form with questions at trial). The judge usually asks two questions at trial: “What do you do for a living?” This has already been answered when providing personal details [on the police form]. That was the first question. And the second is ‘What’s your net income per month?’” *Id.*; *see also* Interview with judges 4_4, 357 (estimating that calculating the daily rate based on information at trial can take as little as 30 seconds).
- 314 Interview with judges 9_4, 100.
- 315 Jörg Kinzig, *StGB § 40: Verhängung in Tagessätzen*, in SCHÖNKE/SCHRÖDER STRAFGESETZBUCH KOMMENTAR § 40, rn 12-13 (Albin Eser et al. eds., 30th ed. 2019) (“[T]he intrusion into the private sphere of the person concerned will hardly be proportionate to the offence and its punishment.”) (Ger. (“*Hinzu kommt, dass der hierfür erforderliche Arbeitsaufwand und das insoweit notwendige Eindringen in den Privatbereich des Betroffenen schwerlich in einem angemessenen Verhältnis zur Straftat und zu deren Ahndung stehen werden.*”)).
- 316 Interview with judges 1_5, 43.
- 317 Interview with prosecutors 11_2, 52.
- 318 *See Estimating net income when courts lack financial details* (p. 41) for discussion about default rates.
- 319 STRAFGESETZBUCH [STGB] [CRIMINAL CODE], § 46, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [<https://perma.cc/K3M2-REZ7>] (Ger.).
- 320 StGB Section 242. STRAFGESETZBUCH [STGB] [CRIMINAL CODE], § 242, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [<https://perma.cc/K3M2-REZ7>] (Ger.).
- 321 STRAFGESETZBUCH [STGB] [CRIMINAL CODE], § 47, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [<https://perma.cc/K3M2-REZ7>] (Ger.) (“(1) The court shall not impose a term of imprisonment of less than six months unless special circumstances exist, either in the offence or the person, that strictly require the imposition of imprisonment either for the purpose of reform of the [person] or for reasons of general deterrence.”).
- 322 STRAFGESETZBUCH [STGB] [CRIMINAL CODE], § 40, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [<https://perma.cc/K3M2-REZ7>] (Ger.) (“(1) A fine shall be imposed in daily units. The minimum fine shall consist of five and, unless the law provides otherwise, the maximum shall consist of three hundred and sixty full daily units.”). The Court can also apply day fines to crimes with penalties above 360 days if there are mitigating circumstances. STRAFGESETZBUCH [STGB] [CRIMINAL CODE], § 49, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [<https://perma.cc/K3M2-REZ7>] (Ger.) (“If the court may in its discretion mitigate the sentence pursuant to a law which refers to this provision, it may reduce the sentence to the statutory minimum or impose a fine instead of imprisonment.”).
- 323 *See generally* STRAFGESETZBUCH [STGB] [CRIMINAL CODE], *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [<https://perma.cc/K3M2-REZ7>] (Ger.).
- 324 Interview with prosecutors 2_5, 29 (describing how the first step is to look at culpability to decide between fines and imprisonment and to set fines for less serious offenses).
- 325 Interview with prosecutors 11_2, 166 (explaining that the decision between a fine and imprisonment is based on the person’s culpability).
- 326 *See, e.g.*, Interview with judges 4_4, 410 (“Yes, but if we make reintegration paramount: if I lock someone up, he’ll lose his wife, his job, his apartment. In the long run, that’s a disservice to society.”).
- 327 Interview with judges 1_5, 263–66 (“For us it’s about the question of fine or imprisonment at that time [of sentencing]. And not about the question of what happens with the financing afterwards. [You’re asking] [if whether] he can’t pay, I’ll give him the prison sentence straight away? That doesn’t make any sense.”).
- 328 Interview with judges 9_4, 143; *see also* Interview with prosecutors 5_4, 7 (“Well, that’s ultimately an aspect of sentencing. Sentencing is something you can’t learn. Sentencing has a lot to do with professional experience, a lot to do with how many trials I’ve been in. Sentencing also has a lot to do with the personality of the person who assesses the punishment or files the corresponding request. What is his life background? What is his professional background? How important or significant does he think this specific criminal matter is? These are the factors you have to keep in mind.”).
- 329 Interview with prosecutors 2_5, 39.
- 330 *See, e.g.*, Interview with judges 6_3, 135 (“Does the mental state of the defendant play a role in sentencing? So, specifically questions of addictions [or] similar things. Does that play a role, specifically when you think about fines? I3: Not for the day fine amount, but for the number of day fine units. Because the culpability of the perpetrator as such influences the number of day fine units or the duration of the prison sentence. And drug

addiction can indeed lead to diminished culpability, which, in turn, would mean a different penalty range. Reduced in favor of the defendant.”).

- 331 Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM STGB [MÜKOStGB] § 40, rn 31 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016) (Ger. (“*Der finanziellen Situation des Täters im Zeitpunkt der Verurteilung . . . wird für notwendig gehalten, wenn sich die wirtschaftlichen Verhältnisse des Täters – bezogen auf den Zeitpunkt der Tatbegehung – auf das Maß des durch die Tat verschuldeten Unrechts ausgewirkt haben.*”)).
- 332 Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM STGB [MÜKOStGB] § 40, rn 31 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016).
- 333 Interview with prosecutors 7_6, 78.
- 334 See, e.g., Interview with judges 4_4, 57–68 (detailing disagreements with prosecutors on the correct number of units in specific cases).
- 335 Interview with prosecutors 2_5, 39.
- 336 Driving under the influence is prosecuted pursuant to Section 316 of the German Criminal Code.
- Driving under influence of drink or drugs
- (1) Whoever drives a vehicle in traffic (sections 315 to 315e) although they are not in a condition to drive the vehicle safely due to having consumed alcoholic drinks or other intoxicating substances incurs a penalty of imprisonment for a term not exceeding one year or a fine, unless the offence is subject to a penalty under section 315a or 315c.
- (2) Whoever commits the offence negligently also incurs the penalty specified in subsection (1).
- STRAFGESETZBUCH [STGB] [CRIMINAL CODE], § 316, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [https://perma.cc/K3M2-REZ7] (Ger.).
- 337 Interview with prosecutors 5_4, 184.
- 338 Interview with judges 1_5, 20.
- 339 Fare evasion is prosecuted pursuant to Section 265a of the German Criminal Code: “Obtaining Services by Deception. (1) Whoever obtains the service of a machine or a telecommunications network serving public purposes or uses a means of transportation or obtains entrance to an event or institution by deception with the intent of not paying for them shall be liable to imprisonment not exceeding one year or a fine unless the act is punishable under other provisions with a more severe penalty.” STRAFGESETZBUCH [STGB] [CRIMINAL CODE], § 265a, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [https://perma.cc/K3M2-REZ7] (Ger.).
- 340 Interview with judges 4_4, 315.
- 341 STATISTISCHES BUNDESAMT (DESTATIS), FACHSERIE 10, REIHE 2.6, RECHTSPFLEGE: STAATSANWALTSCHAFTEN 2018 (2019), https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Gerichte/staatsanwaltschaften-2100260187004.pdf?__blob=publicationFile [https://perma.cc/E9KP-7R2N].
- 342 STATISTISCHES BUNDESAMT (DESTATIS), FACHSERIE 10, REIHE 2.6, RECHTSPFLEGE: STAATSANWALTSCHAFTEN 2018 (2019), https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Gerichte/staatsanwaltschaften-2100260187004.pdf?__blob=publicationFile [https://perma.cc/E9KP-7R2N].
- 343 Shoplifting is prosecuted pursuant to Section 242 of the German Criminal Code: “Theft. (1) Whosoever takes chattels belonging to another away from another with the intention of unlawfully appropriating them for himself or a third person shall be liable to imprisonment not exceeding five years or a fine. (2) The attempt shall be punishable.” STRAFGESETZBUCH [STGB] [CRIMINAL CODE], § 242, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [https://perma.cc/K3M2-REZ7] (Ger.).
- 344 Interview with judges 1_5, 21 (“I1: Shoplifting up to—what’s the limit value, is it ‘up to 100 euro?’ I2: Well, first of all you have to ask, ‘Is this a first-time offender?’ To see if you impose anything at all. B5: Such cases are usually dropped, if the value is not exorbitant. (I2: Yes, up to 50 euro, 60 euro.) I1: And the first fine would be somewhere around 20? I5: No, that’s already 30. (I1: 30?) 30 day fine units.”).
- 345 “Benefits fraud” is when people are sentenced for obtaining government public benefits in a fraudulent way. Benefits fraud is prosecuted under Section 263 of the German Criminal Code, which states:
- Fraud
- (1) Whosoever with the intent of obtaining for himself or a third person an unlawful material benefit damages the property of another by causing or maintaining an error by pretending false facts or by distorting or suppressing true facts shall be liable to imprisonment not exceeding five years or a fine.
- (2) The attempt shall be punishable.
- (3) In especially serious cases the penalty shall be imprisonment from six months to ten years. An especially serious case typically occurs if the [person] 1. acts on a commercial basis or as a member of a gang whose purpose is the continued commission of forgery or fraud; 2. causes a major financial loss of or acts with the intent of placing a large number of persons in danger of financial loss by the continued commission of offences of fraud; 3. places another person in financial hardship; 4. abuses his powers or his position as a public official; or 5. pretends that an insured event has happened after he or another have for this purpose set fire to an object of significant value or destroyed it,

in whole or in part, through setting fire to it or caused the sinking or beaching of a ship.

(4) Section 243(2), section 247 and section 248a shall apply *mutatis mutandis*.

(5) Whosoever on a commercial basis commits fraud as a member of a gang, whose purpose is the continued commission of offences under sections 263 to 264 or sections 267 to 269 shall be liable to imprisonment from one to ten years, in less serious cases to imprisonment from six months to five years.

(6) The court may make a supervision order (section 68(1)).

(7) Section 43a and 73d shall apply if the [person] acts as a member of a gang whose purpose is the continued commission of offences under sections 263 to 264 or sections 267 to 269. Section 73d shall also apply if the [person] acts on a commercial basis.

STRAFGESETZBUCH [StGB] [CRIMINAL CODE], § 263, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [<https://perma.cc/K3M2-REZ7>] (Ger.).

346 Interview with judges 4_4, 315.

347 Interview with prosecutors 5_4, 15.

348 Interviews with prosecutors 2_5, 28 (“To start with, one can say—well, we have a certain list within our agency. The list contains standard cases of certain offenses, it provides X number of day fine units. For example, in cases of theft or fraud, we have damage X. And then, in this list, a fine of X day fine units is specified for standard cases. So, the first guidance is this internal list, which is really internal and exclusive to our agency. And then there is, as a second step—I think that everyone does that—you just look at that—the person himself. Has he got a criminal record, has he not got a criminal record? If previously convicted, how many times? Of course, this also influences the fine, if it still comes to a fine [rather than incarceration]. Then you look at the circumstances of the offense, for example. These are the main factors that play a role in sentencing, at least in my approach. And how long ago was the offense committed? But, of course, it’s nice when you have a certain degree of comparability, [but there are] only a certain number of offenses that you can compare. Only the standard cases, no extraordinary environmental law cases. You can’t make a list for those. It’s for shoplifting, it’s maybe even for minor bodily-harm cases, and then you can go ahead and compare those. And then one should try, using [the list as an] instruction, to create a level playing field to some extent, at least within [the court district], or perhaps between the three [state] court districts.”).

349 Interview with prosecutors 2_5, 66 (“I1: Even from the same agency with the same list. I4: Exactly, right. I1: There really are differences, marked differences. Especially with things that are not covered by the list at all. I2: Yes. I4: Yes.”).

350 Interview with prosecutors 2_5, 66.

351 Interview with prosecutors 5_4, 7.

352 As scholar Dieter Meyer remarked, “The success of the fine reform stands and falls with the consistent adherence to this separation.” Dieter Meyer, *Zu Fragen bei der Festsetzung der Höhe eines Tagessatzes im neuen Geldstrafensystem*, MONATSSCHRIFT FÜR DEUTSCHES RECHT, 4/1976, at 274, 275 (1976) (Ger. (“Mit der konsequenten Durchhaltung dieser Trennung steht und fällt der Erfolg der Geldstrafenreform.”)).

353 STRAFGESETZBUCH [StGB] [CRIMINAL CODE], § 46(4), *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [<https://perma.cc/K3M2-REZ7>] (Ger.) (“The decision shall specify the number and amount of daily rates.”); Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM StGB [MüKoStGB] § 40, rn 124 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016) (noting that daily rates and the amount of each daily rate are to be indicated separately).

354 Oberlandesgericht Jena [OLG Jena] [Higher Regional Court of Jena], Oct. 27, 2017, 1 OLG 161 Ss (Ger.).

355 Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM StGB [MüKoStGB] § 40, rn 127 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016).

356 Interview with prosecutors 11_2, 109–14.

357 Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM StGB [MüKoStGB] § 40, rn 94–95 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016).

358 *See, e.g.*, Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM StGB [MüKoStGB] § 40, rn 51–53 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016) (explaining that the effects that the sentence can be expected to have on the person’s future life in society shall be taken into account).

359 *See, e.g.*, Interview with prosecutors 13_5, 111–12.

360 Interview with judges 1_5, 214.

361 STRAFPROZESSORDNUNG [StPO] [CRIMINAL PROCEDURE CODE], § 459 *et seq.*, *translation at* https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html [<https://perma.cc/MHD8-3Y76>] (Ger.).

362 *See* *Bearden v. Georgia*, 471 U.S. 660 (1983). Further, as recent advocacy in the U.S. has revealed, jurisdictions should be increasing protections against punishment for nonpayment rather than pursuing punitive enforcement. *See generally* SHARON BRETT & MITALI NAGRECHA, HARVARD LAW SCHOOL CRIMINAL JUSTICE POLICY PROGRAM, PROPORTIONATE FINANCIAL SANCTIONS: POLICY PRESCRIPTIONS FOR JUDICIAL REFORM (2019), http://cjpp.law.harvard.edu/assets/Proportionate-Financial-Sanctions_layout_FINAL.pdf [<https://perma.cc/DXG4-NDQG>].

- 363 STRAFPROZESSORDNUNG [STPO] [CRIMINAL PROCEDURE CODE], § 451(1), *translation at* https://www.gesetze-im-internet.de/englisch_stpo/index.html [https://perma.cc/MHD8-3Y76] (Ger.) (designating the prosecutor's office as the enforcement authority); RECHTSPFLEGERGESETZ [RPFLG] [ACT ON SENIOR JUDICIAL OFFICERS] § 31(1), http://www.gesetze-im-internet.de/englisch_rpflg/index.html [https://perma.cc/KLD7-UCHZ] (Ger.) (explaining that court clerks (senior judicial officers), who are not prosecutors but are within the prosecution's office, have enforcement authority over fines).
- 364 *See, e.g.*, Interview with prosecutors 5_4, 273 ("I1: If he doesn't pay, he'll get 30 days [to pay]. But. . . it depends on the judicial clerk in charge. When does he impose [incarceration]? Does he decide to really go all the way: facilitation of payment, court assistance, orders of attachment? Yes? Or does he say—one judicial clerk says, 'I'll do it', and another one says, 'You know, okay, this is too much hassle, I have a lot on my plate, I might advise [him] once. Okay. And if he doesn't pay, he's going to end up in jail.' And the other—other judicial clerk, who perhaps follows the law strictly, will be chasing—will perhaps really be chasing after him for 2 to 3 years. Until he's exhausted all the options, until he offered him community service, until the bailiff has been around. You'd have to—you've got to have a whole—all the things he has at his disposal. Well, they have to go through a whole range of motions, actually. I3: Well, they should actually follow the law strictly. I1: Yes, but that—it is often not done like that."); *see generally* NICOLE BÖGELEIN, ANDRÉ ERNST & FRANK NEUBACHER, DIE ET AL., VERMEIDUNG VON ERSATZFREIHEITSSTRAFEN: EVALUIERUNG JUSTIZIELLER HAFTVERMEIDUNGSPROJEKTE IN NORDRHEIN-WESTFALEN (2013) (explaining enforcement process based on interviews with clerks and finding variations in their practices).
- 365 STRAFPROZESSORDNUNG [STPO] [CRIMINAL PROCEDURE CODE], § 459(e), *translation at* https://www.gesetze-im-internet.de/englisch_stpo/index.html [https://perma.cc/MHD8-3Y76] (Ger.) ("Execution of Default Imprisonment. (1) Default imprisonment shall be executed on the basis of an order made by the executing authority. (2) The execution order shall be contingent on the fine not being recoverable or on execution being dispensed with pursuant to Section 459c subsection (2)."); *id.* at § 459(2) ("Execution may be dispensed with if it is to be expected that it will not lead to any success in the foreseeable future.").
- 366 STRAFPROZESSORDNUNG [STPO] [CRIMINAL PROCEDURE CODE], § 42, *translation at* https://www.gesetze-im-internet.de/englisch_stpo/index.html [https://perma.cc/MHD8-3Y76] (Ger.) (allowing time for payment and installments). "If a convicted [person], due to his personal or financial circumstances, cannot be expected to pay the full fine immediately, the court shall allow a certain time for payment or allow payment in specified instalments. The court may also order that the privilege of paying the fine in fixed instalments will be revoked if the convicted [person] fails to pay an instalment in time. The court shall also allow for such conditions of payment if without them the restitution by the [person] of any damage caused by the offence were to be substantially impaired; the court may require the [person] to present proof of restitution." *Id.*; *see also* Landgericht Berlin [LG Berlin] [Regional Court of Berlin], Aug. 10, 2010, -Az 519 Qs 21/10 (Ger.) (holding person has a right to a payment plan).
- 367 Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 28, 1976, 3 StR 8/76, Neue Juristische Wochenschrift [NJW] 1976, 1510 (Ger.) (explaining how to set the daily rate for cases with high units to address the fact that payment plans may not sufficiently alleviate the burden of a high fine because people would simply feel the financial burden for longer).
- 368 STRAFPROZESSORDNUNG [STPO] [CRIMINAL PROCEDURE CODE], § 459a(1), *translation at* https://www.gesetze-im-internet.de/englisch_stpo/index.html [https://perma.cc/MHD8-3Y76] (Ger.) ("(1) After the judgment has entered into force the executing authority shall decide whether to grant relaxation of conditions of payment of a fine (section 42 of the Criminal Code).").
- 369 Gereon Wolters, *StGB § 42: Zahlungserleichterungen*, in 2 SYSTEMATISCHER KOMMENTAR ZUM STRAFGESETZBUCH [SK-StGB] § 42, rn 3 (Jürgen Wolter ed., 9th ed. 2016).
- 370 NICOLE BÖGELEIN ET AL., VERMEIDUNG VON ERSATZFREIHEITSSTRAFEN: EVALUIERUNG JUSTIZIELLER HAFTVERMEIDUNGSPROJEKTE IN NORDRHEIN-WESTFALEN 31 (2013).
- 371 For example, people may appeal their sentences and, in some cases, this would result in another review of the person's financial circumstances on remand. Hennig Radke, *StGB § 40: Verhängung in Tagessätzen*, in 2 MÜNCHENER KOMMENTAR ZUM STGB [MüKoStGB] § 40, rn 128-29 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2016).
- 372 NICOLE BÖGELEIN, DEUTUNGSMUSTER VON STRAFE: EINE STRAFSOZIOLOGISCHE UNTERSUCHUNG AM BEISPIEL DER GELDSTRAFE 87 (2016) (finding that 5.1% of fines cases were completed because the person passed away, the jurisdiction stopped enforcing because too much time had passed, or because the person received post-sentencing amnesty).
- 373 According to the Act on Senior Judicial Officers (*Rechtspflegergesetz*), clerks may seize moveable assets, enforce attachments on claims and property rights, hold emergency sales, and seize immovable property or a right relating to immovable property. RECHTSPFLEGERGESETZ [RPFLG] [ACT ON SENIOR JUDICIAL OFFICERS] § 31(1), http://www.gesetze-im-internet.de/englisch_rpflg/index.html [https://perma.cc/KLD7-UCHZ] (Ger.).
- 374 NICOLE BÖGELEIN ET AL., VERMEIDUNG VON ERSATZFREIHEITSSTRAFEN: EVALUIERUNG JUSTIZIELLER HAFTVERMEIDUNGSPROJEKTE IN NORDRHEIN-WESTFALEN 31 (2013) (citing 2011 data for the jurisdictions of Paderborn and Cologne, which used civil collections methods to collect in 3% and 2.7% of fine cases, respectively).

- 375 *See generally* STRAFGESETZBUCH [StGB] [CRIMINAL CODE], *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [https://perma.cc/K3M2-REZ7] (Ger.).
- 376 *See supra* note 72.
- 377 NICOLE BÖGELEIN ET AL., VERMEIDUNG VON ERSATZFREIHEITSSTRAFEN: EVALUIERUNG JUSTIZIELLER HAFTVERMEIDUNGSPROJEKTE IN NÖRDRHEIN-WESTFALEN (2013).
- 378 *See, e.g.*, HEINZ CORNEL, ABSCHLUSSBERICHT ZUR WISSENSCHAFTLICHEN BEGLEITUNGDES PROJEKTES ISI – INTEGRATION STATT INHAFTIERUNG DER STRAFFÄLLIGEN- UND BEWÄHRUNGSHILFE BERLIN (2010) (finding that the success rate with a community service alternative was dependent on the person’s level of schooling and professional qualifications). Given the findings that community service may be out of reach for many, Cornel recommends a policy focus on decriminalization. *Id.*
- 379 STRAFGESETZBUCH [StGB] [CRIMINAL CODE], § 43, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [https://perma.cc/K3M2-REZ7] (Ger.) (“If the fine cannot be recovered, it shall be replaced by imprisonment. One daily unit shall correspond to one day of imprisonment.”).
- 380 *See generally* STRAFPROZESSORDNUNG [StPO] [Criminal Procedure Code], *translation at* https://www.gesetze-im-internet.de/englisch_stpo/index.html [https://perma.cc/MHD8-3Y76] (Ger.).
- 381 Interview with staff at Freie Hilfe, in Berlin, Germany, (Sept. 3–4, 2018) (discussing different practices between clerks in Berlin and North-Rhine Westphalia regarding how much time they wait before ordering people incarcerated for outstanding fines).
- 382 Email from Nicole Bögelein, Senior Researcher, Universität zu Köln, to Mitali Nagrecha, Director of the National Criminal Justice Debt Initiative (Jan. 20, 2020, 3:23 AM CET) (on file with CJPP).
- 383 *See, e.g.*, ABSCHLUSSBERICHT DER KOMMISSION ZUR REFORM DES STRAFRECHTLICHEN SANKTIONENSYSTEMS 47–48 (March 2000), <https://www.bib.uni-mannheim.de/fileadmin/pdf/fachinfo/jura/abschlussber-der-komm-strafreform.pdf> [https://perma.cc/YH46-LQ2U] (law reform commission recommending that people receive two units of credit for every day served in prison for nonpayment of fines).
- 384 BESCHLUSS DER 87. KONFERENZ JUSTIZMINISTERINNEN UND JUSTIZMINISTER 2016, TOP II.11: PRÜFUNG ALTERNATIVER SANKTIONSMÖGLICHKEITEN: VERMEIDUNG VON ERSATZFREIHEITSSTRAFEN GEMÄSS § 43 StGB, https://mdj.brandenburg.de/media_fast/bb1.a.3663.de/top_ii.11_-_pruefung_alternativer_sanktionsmoeglichkeiten.pdf [https://perma.cc/DS57-L8MV] (report of committee of justice ministers from all German states creating working group to study alternatives to incarceration as enforcement for failure to pay fines). There have not yet been any public reports or recommendations coming out of this working group.
- 385 *See, e.g.*, THIMNA KLATT & MERTEN NEUMAN, WISSENSCHAFTLICHE STELLUNGNAHME ZUM THEMA ERSATZFREIHEITSSTRAFEN, (VORLAGE 17/1849 UND VORLAGE 17/1401; ANHÖRUNG DES RECHTS-AUSSCHUSSES AM 6. NOVEMBER 2019), Landtag Nordrhein-Westfalen, 17, Wahlperiode, Stellungnahme 17/1976 (Nov. 6, 2019), <https://kfn.de/wp-content/uploads/2019/11/Stellungnahme%20Ersatzfreiheitsstrafen.pdf> [https://perma.cc/88F2-UF7X] (testifying at hearing in the state of North Rhine Westphalia in support of adopting Sweden’s model); Deutscher Bundestag, *Linke will Ersatzfreiheitsstrafe im Strafgesetzbuch aufheben*, Deutscher Bundestag (2018), <https://www.bundestag.de/dokumente/textarchiv/2018/kw26-de-ersatzfreiheitsstrafe-561866> [https://perma.cc/V3EW-7Z76] (proposal by German political party, “Die Linke,” to abolish imprisonment as a consequence of failing to pay fines).
- 386 STRAFGESETZBUCH [StGB] [CRIMINAL CODE], § 69 *et seq.*, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/index.html [https://perma.cc/K3M2-REZ7] (Ger.).
- 387 Interview with judges 1_5, 316.
- 388 Interview with judges 1_5, 324.
- 389 BUNDESKRIMINALAMT [FEDERAL CRIME AGENCY], POLICE CRIME STATISTICS: FEDERAL REPUBLIC OF GERMANY, REPORT 2018 (2019), https://www.bka.de/EN/CurrentInformation/PoliceCrimeStatistics/2018/pcs2018_node.html [https://perma.cc/H7GR-ZAXK] (noting Germany’s crime rate as 6,982 cases per 100,000 inhabitants in 2018). The report specifies the types of crimes it does not cover as follows:
- Not included are further administrative offences, politically motivated crime (offences against state security), traffic offences (however including sects. 315, 315b PC and sect. 22a German Road Traffic Act, which are not regarded as traffic offences pursuant to the guidelines) as well as violations of Länder criminal laws (with the exception of: data protection laws and assemblies and processions acts of the Länder). Offences not covered by the remit of the police (such as financial and revenue offences) or those directly reported to and handled exclusively by the public prosecutor’s office are not contained in the PCS either.
- Id.* at 6.
- 390 MARCELO F. AEBI ET AL., EUROPEAN INSTITUTE FOR CRIME PREVENTION AND CONTROL, EUROPEAN SOURCEBOOK OF CRIME AND CRIMINAL JUSTICE STATISTICS 196 (5th ed. 2014), https://www.heuni.fi/material/attachments/heuni/reports/qrMWOcVTF/HEUNI_report_80_European_Sourcebook.pdf [https://perma.cc/3934-85SQ]. Germany has the second lowest rate of custodial sentences per 100,000 people receiving sanctions/measures, at 5.4%. *Id.* Finland was lowest at 3.1% and Denmark was at 6.8%. *Id.* Portugal has a rate of 8.1%. *Id.*

- 391 See generally STRAFGESETZBUCH [StGB] [CRIMINAL CODE], *translation* at https://www.gesetze-im-internet.de/englisch_stgb/index.html [https://perma.cc/K3M2-REZ7] (Ger.).
- 392 Hans-Jörg Albrecht & Elmer H. Johnson, *Fines and Justice Administration: The Experience of the Federal Republic of Germany*, 4 INT'L J. COMP. & APPLIED CRIM. JUST. 3, 6–7 (1980). From 1971–1977, the percentage of cases sentenced to fines was around 83%. *Id.* SEE ALSO STATISTISCHES BUNDESAMT (DESTATIS), FACHSERIE 10, REIHE 2.6, RECHTSPFLEGE: STAATSANWALTSCHAFTEN 2018 (2019), https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Gerichte/staatsanwaltschaften-2100260187004.pdf?__blob=publicationFile [https://perma.cc/E9KP-7R2N].
- 393 STATISTISCHES BUNDESAMT (DESTATIS), FACHSERIE 10, REIHE 3, RECHTSPFLEGE: STRAFVERFOLGUNG 2018 (2019), https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Strafverfolgung-Strafvollzug/strafverfolgung-2100300187004.pdf?__blob=publicationFile [https://perma.cc/2K45-9GBW].
- 394 STATISTISCHES BUNDESAMT (DESTATIS), FACHSERIE 10, REIHE 3, RECHTSPFLEGE: STRAFVERFOLGUNG 2018 (2019), https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Strafverfolgung-Strafvollzug/strafverfolgung-2100300187004.pdf?__blob=publicationFile [https://perma.cc/2K45-9GBW].
- 395 STATISTISCHES BUNDESAMT (DESTATIS), FACHSERIE 10, REIHE 3, RECHTSPFLEGE: STRAFVERFOLGUNG 2018 (2019), https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Strafverfolgung-Strafvollzug/strafverfolgung-2100300187004.pdf?__blob=publicationFile [https://perma.cc/2K45-9GBW].
- 396 Gesetz über Ordnungswidrigkeiten [Ordnungswidrigkeitengesetz] [OWiG] [Act on Regulatory Offenses] § 17, *translation* at https://www.gesetze-im-internet.de/englisch_owig/index.html [https://perma.cc/3QN6-R3ZA] (Ger.) (“The significance of the regulatory offence and the charge faced by the [person] shall form the basis for the assessment of the regulatory fine. The [person’s] financial circumstances shall also be taken into account; however, they shall, as a rule, be disregarded in cases involving negligible regulatory offences.”).
- 397 STATISTISCHES BUNDESAMT (DESTATIS), FACHSERIE 10, REIHE 3, RECHTSPFLEGE: STRAFVERFOLGUNG 2018 (2019), https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Strafverfolgung-Strafvollzug/strafverfolgung-2100300187004.pdf?__blob=publicationFile [https://perma.cc/2K45-9GBW]. Chart reflects data from this source.
- 398 Interview with prosecutors 2_5, 29.
- 399 Interview with judges 1_5, 215–18.
- 400 Interview with judges 1_5, 81–83.
- 401 Interview with prosecutors 5_4, 28 (“What tends—what strikes me—and I probably have the longest-standing professional experience here—is that, within the framework that we have—say, this here is zero units and this here is 360 units, more is not possible—we, yes, we tend not to be in the midrange, but always below the midrange. And mostly even well below the midrange. I have no idea why that is. With reference to ‘standards’: if it’s a standard, in the sense of ‘That’s the normal case,’ you’d actually have to be in the midrange. Then you’d have to say, ‘Between 10 and 360, [the medium] is something like 180 or 160.’ But nobody does that. One thing that plays a very big role, which just comes to my mind: a very important factor in talks with defense counsel, in talks with accused persons, in talks with the judge, and also for my own considerations, is the famous 90-unit limit. Very, very important. That plays an insanely big role. If you go for ‘120,’ he’ll say, ‘Oh, then it’ll be in the criminal record. Can’t we do this differently?’ That plays a very big role.”).
- 402 The available data is inconclusive on this point and therefore this inference is based on our interviews. Germany’s incarceration data does not provide sentence lengths separated for those sentenced to prison, those incarcerated on supervision remand, or those incarcerated for failure to pay fines. However, prison sentence lengths do show a low percentage of people serving between three and six months. JÖRG-MARTIN JEHLÉ, FEDERAL MINISTRY OF JUSTICE AND CONSUMER PROTECTION, CRIMINAL JUSTICE IN GERMANY: FACTS AND FIGURES (6TH ED. 2015), https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Criminal_Justice_Germany_en.pdf?__blob=publicationFile [https://perma.cc/736Q-4XGH].
- 403 Interview with prosecutors 11_2, 155-57.
- 404 NICOLE BÖGELEIN ET AL., VERMEIDUNG VON ERSATZFREIHEITSTRAFEN: EVALUIERUNG JUSTIZIELLER HAFTVERMEIDUNGSPROJEKTE IN NORDRHEIN-WESTFALEN (2013).
- 405 JÖRG-MARTIN JEHLÉ ET AL., GEMEINNÜTZIGE ARBEIT STATT ERSATZFREIHEITSTRAFE. FORSCHUNGSKOLLOQUIUM ZU EINER BUNDESWIETEN UNTERSUCHUNG (1990).
- 406 BUNDESMINISTERIUM DES INNERN, & BUNDESMINISTERIUM DER JUSTIZ, ZWEITERPERIODISCHER SICHERHEITSBERICHT [SECOND PERIODICAL SECURITY REPORT] 620 (2006), https://www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PeriodischerSicherheitsbericht/periodischersicherheitsbericht_node.html [https://perma.cc/26NU-NMBW].
- 407 Mecklenberg Study at 283.
- 408 Mecklenberg Study at 283 (noting that 2002 was the last year in which aggregate data of the number of people incarcerated for nonpayment were collected).
- 409 STATISTISCHES BUNDESAMT (DESTATIS), FACHSERIE 10, REIHE 3, RECHTSPFLEGE: STRAFVERFOLGUNG 2018 (2019), <https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publika->

- [tionen/Downloads-Strafverfolgung-Strafvollzug/strafverfolgung-2100300187004.pdf?__blob=publicationFile](https://perma.cc/2K45-9GBW) [https://perma.cc/2K45-9GBW].
- 410 Mecklenberg Study at 287.
- 411 Mecklenberg Study at 290.
- 412 NICOLE BÖGELEIN ET AL., VERMEIDUNG VON ERSATZFREIHEITSSTRAFEN: EVALUIERUNG JUSTIZIELLER HAFTVERMEIDUNGSPROJEKTE IN NORDRHEIN-WESTFALEN (2013).
- 413 See, e.g., Mecklenberg Study at 284–85 (summarizing the research on economic security and people imprisoned for non-payment).
- 414 Mecklenberg Study at 285 (citing a survey finding that in 2017 almost one in five of people serving time for nonpayment in a particular area had no permanent residence).
- 415 Interview with prosecutors 5_4, 41.
- 416 Interview with prosecutors 3_4, 62–64.
- 417 Interview with prosecutors 5_4, 327–28.
- 418 In this part analyzing Germany’s system and in the next, in which we apply this analysis to the United States, we rely on the first half of the Report as the factual basis for our assertions. All information is cited in the first half of the Report and therefore, for readability and length, we do not re-cite the sources within these analytical sections unless we are referring to direct quotations, data, or otherwise think that the citation is helpful.
- 419 In other countries that have experimented with day fines, judges have exercised their discretion to set fines at the level they wanted, often returning to the fine amounts imposed prior to the adoption of graduated fines. For example, a study conducted shortly after the implementation of day fines in the Czech Republic provides an account of how judges may use their discretion to return to past practices. The study found that judges “deal with the system of day fines in a specific manner: first they decide on the total fine they wish to hand down; then they divide so that it fits well into a certain number of day fines and a day fine unit value.” Judges did not agree that there was value in adopting proportionate fines, according to the study, and so they set fines to the amount they wanted, and worked backwards to justify their decision within the day fines framework. The study found that fines were not calibrated to people’s financial circumstances, and that poor people were worse off because they received fines that were multiples more than people with means, relative to their incomes. Jakub Drápal, *Day fines: A European Comparison and Czech Malpractice*, 15 EUR. J. CRIMINOLOGY 461 (2018).
- 420 Interview with prosecutors 11_2, 28.
- 421 Interview with judges 1_5, 84.
- 422 Interview with prosecutors 11_2, 93.
- 423 Interview with judges 9_4, 81–85.
- 424 Though we do not have research showing the differences in outcomes between those facing summary proceedings and trial, judges’ and prosecutors’ accounts of how they estimate income in summary proceedings, including with a default jurisdictional rate well above what people on public benefits receive, and judges’ responses that they ask questions about people’s finances at trial, support the conclusion that there is likely a difference between the two processes.
- 425 STRAFGESETZBUCH [StGB] [Criminal Code], § 40, translation at https://www.gesetze-im-internet.de/englisch_stgb/index.html [https://perma.cc/K3M2-REZ7] (Ger.).
- 426 Interview with prosecutors 2_5, 120.
- 427 Interview with prosecutors 2_5, 120.
- 428 Deutscher CARITASVERBAND E.V., POSITION ZUR HÖHE VON TAGESSÄTZEN BEI GELDSTRAFEN FÜR MENSCHEN IM BEZUG VON TRANSFERLEISTUNGEN (Eng. (“Position on the Level of Daily Rates of Criminal Fines for People Receiving Public Benefits”)) 3 (2015), https://www.caritas.de/cms/contents/caritas.de/medien/dokumente/stellungnahmen/position-zur-hoehe-v/position-tagessatzhoehen-von-geldstrafen_15-07-09.pdf?d=a&f=pdf [https://perma.cc/R3ZK-4QJR].
- 429 Bernhard Villmow, *Ersatzfreiheitsstrafe und gemeinnützige Arbeit. Erfahrungen und Einstellungen von Betroffenen*, in 2 INTERNATIONALE PERSPEKTIVEN IN KRIMINOLOGIE UND STRAFRECHT: Festschrift für Günther Kaiser zum 70. Geburtstag 1291 (Hans-Jörg Albrecht et al. eds, 1998).
- 430 BUNDESMINISTERIUM DES INNERN, & BUNDESMINISTERIUM DER JUSTIZ, ZWEITERPERIODISCHER SICHERHEITSBERICHT [SECOND PERIODICAL SECURITY REPORT] 620 (2006), https://www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PeriodischerSicherheitsbericht/periodischersicherheitsbericht_node.html [https://perma.cc/26NU-NMBW].
- 431 Interview with prosecutors 2_5, 278–82.
- 432 Interview with judges 9_4, 182.
- 433 NICOLE BÖGELEIN ET AL., VERMEIDUNG VON ERSATZFREIHEITSSTRAFEN: EVALUIERUNG JUSTIZIELLER HAFTVERMEIDUNGSPROJEKTE IN NORDRHEIN-WESTFALEN (2013).
- 434 Interview with judges 9_4, 54.
- 435 See, e.g., Interview with judges 6_3, 150–55 (“Q: Do you ever use this lower limit? I mean, the 1 euro or—15: I don’t usually go below 10. 14: Sometimes, yes, the prosecution offers 5. 15: Rarely.”).
- 436 Interview with prosecutors 3_4, 41–44.
- 437 Interview with prosecutors 5_4, 240.
- 438 Interview with prosecutors 2_5, 140.
- 439 Interview with judges 1_5, 219–23.

- 440 Mecklenberg Study, at 284–285.
- 441 See *supra* note 377.
- 442 See *supra* note 306.
- 443 Crimes of poverty also includes benefits fraud; however, it is not possible to isolate cases of benefits fraud in the data.
- 444 See, e.g., Faiz Siddiqui, *D.C. Council decriminalizes Metro fare evasion: 'I'm sad that's Metro's losing money, but I'm more sad about what's happening to black people'*, WASH. POST, Dec. 4, 2018, <https://www.washingtonpost.com/transportation/2018/12/05/dc-council-decriminalizes-metro-fare-evasion-giving-its-final-approval-contested-measure/> [https://perma.cc/WU3X-NSMD].
- 445 STATISTISCHES BUNDESAMT (DESTATIS), FACHSERIE 10, REIHE 3, RECHTSPFLEGE: STRAFVERFOLGUNG 2018 (2019), https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Strafverfolgung-Strafvollzug/strafverfolgung-2100300187004.pdf?__blob=publicationFile [https://perma.cc/2K45-9GBW].
- 446 Daniel Wighton, *Berlin Attorney-General wants to scrap criminal penalties for fare evasion*, THE LOCAL GERMANY, Jan. 2, 2019, <https://www.thelocal.de/20190102/berlin-attorney-general-wants-to-scrap-criminal-penalties-for-fare-evasion> [https://perma.cc/846T-4VFN].
- 447 Interview with prosecutors 11_2, 20.
- 448 Interview with prosecutors 5_4, 183.
- 449 Interview with prosecutors 5_4, 177.
- 450 Interview with prosecutors 11_2, 29 (“Even in simple cases, I have to say, especially simple ones, where you think, ‘Ah, that’s such a harmless charge, a quick criminal matter,’ but what then emerges in the context of the main trial in terms of criteria, how complex and multifaceted they are: the offense, the behavior of the other parties, the defendant. . . . These are all things that enter into it, yes. And therefore I find ‘comparable cases’ very difficult. . . . And even in simple cases, a lot of circumstances can suddenly come to light for which one is not prepared beforehand, right?”).
- 451 See generally SHARON BRETT & MITALI NAGRECHA, HARVARD LAW SCHOOL CRIMINAL JUSTICE POLICY PROGRAM, PROPORTIONATE FINANCIAL SANCTIONS: POLICY PRESCRIPTIONS FOR JUDICIAL REFORM (2019) http://cjpp.law.harvard.edu/assets/Proportionate-Financial-Sanctions_layout_FINAL.pdf [https://perma.cc/DXG4-NDQG].
- 452 SHARON BRETT & MITALI NAGRECHA, HARVARD LAW SCHOOL CRIMINAL JUSTICE POLICY PROGRAM, PROPORTIONATE FINANCIAL SANCTIONS: POLICY PRESCRIPTIONS FOR JUDICIAL REFORM 8 (2019) http://cjpp.law.harvard.edu/assets/Proportionate-Financial-Sanctions_layout_FINAL.pdf [https://perma.cc/DXG4-NDQG] (discussing the introduction of upfront ability-to-pay determinations in Louisiana, Texas, Mississippi, and Arizona).
- 453 See, e.g., MASS. GEN. LAWS, ch. 276, § 87A (2020) (allowing for waiver of probation fees if “payment would impose a substantial financial hardship on the person, the person’s immediate family or dependents”).
- 454 LA. CODE OF CRIM. P. art. 875.1(E) (2019) (eff. Aug. 1, 2019, per 2018 La. Acts, No. 688, § 6).
- 455 725 ILL. COMP. STAT. 5/124A-20 (2020) (eff. July 1, 2019, per 2018 Ill. Leg. Serv. P.A. 100-987 (H.B. 4594)) (providing a sliding scale waiver for people with available income up to 400% of the federal poverty level).
- 456 Sharon Brett, *Reforming Monetary Sanctions, Reducing Police Violence*, 4 U.C.L.A. CRIM. JUST. L. REV. (forthcoming Spring 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3506258 [https://perma.cc/C9M3-6VDG].
- 457 See generally ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018).
- 458 See, e.g., Judith Greene, *The Staten Island Day-Fine Experiment*, in DAY FINES IN AMERICAN COURTS: THE STATEN ISLAND AND MILWAUKEE EXPERIMENTS (1992) (describing process for adopting day fines pilot projects in U.S. jurisdictions, which included changes to sentencing structures).
- 459 Mitali Nagrecha et al., *Court Culture and Criminal Law Reform*, DUKE L. J. ONLINE (forthcoming Spring 2020).
- 460 A Local Law in Relation to Establishing a Day-Fines Pilot Program in the Office of Administrative Trials and Hearings, N.Y.C. Council, Int. 1823-2019 (Dec. 19, 2019), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4265946&GUID=CB87BD3F-CC74-4FD0-ACC4-5B0217281D1A&Options=&Search=> [https://perma.cc/D8TQ-GGMQ].
- 461 Andrea Marsh and Emily Gerrik, *Why Motive Matters: Effective Policy Responses to Modern Debtors’ Prisons*, 34 YALE L. & POL’Y REV. 93, 102 (providing examples of judges conducting ability-to-pay determinations “based on subjective and arguably inappropriate criteria”).
- 462 Mitali Nagrecha et al., *Court Culture and Criminal Law Reform*, DUKE L. J. ONLINE (forthcoming Spring 2020).
- 463 SHARON BRETT & MITALI NAGRECHA, HARVARD LAW SCHOOL CRIMINAL JUSTICE POLICY PROGRAM, PROPORTIONATE FINANCIAL SANCTIONS: POLICY PRESCRIPTIONS FOR JUDICIAL REFORM 8 (2019) http://cjpp.law.harvard.edu/assets/Proportionate-Financial-Sanctions_layout_FINAL.pdf [https://perma.cc/DXG4-NDQG].
- 464 Tilastokeskus [Statistics Finland], *Metadata: Concepts: Fine*, https://www.stat.fi/meta/kas/sakko_en.html [https://perma.cc/JS8B-2Y6J] (quoting, as translated into English, Rikoslaki [Criminal Code], Ch. 2a §§ 1, 2; Ch. 7, § 3 (Fin.)).
- 465 SHARON BRETT & MITALI NAGRECHA, HARVARD LAW SCHOOL CRIMINAL JUSTICE POLICY PROGRAM, PROPORTIONATE FINANCIAL SANCTIONS:

POLICY PRESCRIPTIONS FOR JUDICIAL REFORM 8 (2019) http://cjpp.law.harvard.edu/assets/Proportionate-Financial-Sanctions_lay-out_FINAL.pdf [<https://perma.cc/DXG4-NDQG>].

- 466 *See generally* BETH A. COLGAN, THE HAMILTON PROJECT, ADDRESSING MODERN DEBTORS' PRISONS WITH GRADUATED ECONOMIC SANCTIONS THAT DEPEND ON ABILITY TO PAY (MAR. 2019), https://www.hamiltonproject.org/assets/files/Colgan_PP_201903014.pdf [<https://perma.cc/N3CK-NLAU>] (summarizing research showing that self-reported testimony is reliable).
- 467 *See, e.g.*, DIANE DEPIETROPAOLA PRICE, ET AL., AM. CIVIL LIBERTIES UNION AND NAT'L ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, SUMMARY INJUSTICE: A LOOK AT CONSTITUTIONAL DEFICIENCIES IN SOUTH CAROLINA'S SUMMARY COURTS (2016).
- 468 Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 304, 310–11 (2018) (noting that Kentucky's risk assessment tool adopted in 2013 "did not result in any noticeable improvement in outcomes," because if judges had "followed the action-directives associated with the risk assessment . . . 90% of defendants would be granted immediate non-financial release," but "[i]n practice, only 29% are released on non-monetary bond at the first bail setting").
- 469 Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 1624 NW. U. L. REV. 1609, 1610 (2017) (stating that "communal input into everyday justice" is necessary to ensure "accountability in today's police precincts and criminal courthouses").
- 470 *See generally* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018).
- 471 Germany has a narrower sentencing range than the United States, with only 1.7% of cases receiving five or more years in prison; it is therefore likely that many of the cases charged with fines are more serious. STATISTISCHES BUNDESAMT (DESTATIS), FACHSERIE 10, REIHE 2.6, RECHTSPFLEGE: STAATSANWALTSCHAFTEN 2018 (2019), https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Gerichte/staatsanwaltschaften-2100260187004.pdf?__blob=publication-File. [<https://perma.cc/E9KP-7R2N>]. Also, while a one-to-one comparison is not possible without more data about the content and nature of these cases, which is outside the scope of this paper, recent analysis of the cases of individuals in prison supports this theory. According to an analysis conducted by the Brennan Center, 364,000 people are in United States prisons for offenses they say are "lower-level crimes likely warranting alternatives to prison." LAUREN-BROOKE EISEN ET AL., BRENNAN CENTER FOR JUSTICE, HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED 25 (2016), https://www.brennancenter.org/sites/default/files/2019-08/Report_Unnecessarily_Incarcerated_0.pdf [<https://perma.cc/8LRZ-QUAC>]. Their list includes many crimes punished by fines in Germany including drug possession, minor trafficking, minor larceny, other property crimes, minor fraud, simple assault, and driving under the influence. *Id.*
- 472 For a helpful discussion about assessing the relative severity of non-custodial sentencing options, see Andrew von Hirsch, Martin Wasik & Judith A. Greene, *Punishments in the Community and the Principles of Desert*, 20 RUTGERS LAW JOURNAL 595–618 (1989).

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