



## Money for Justice: Comparing Day Fines in Germany and Maricopa, County AZ [Note]

Item Type	Note; text
Authors	Rysenbry, Elliot
Citation	40 Ariz. J. Int'l & Comp. L. 554 (2024)
Publisher	The University of Arizona James E. Rogers College of Law (Tucson, AZ)
Journal	Arizona Journal of International and Comparative Law
Rights	Copyright © The Author(s)
Download date	19/03/2024 22:37:04
Item License	<a href="http://rightsstatements.org/vocab/InC/1.0/">http://rightsstatements.org/vocab/InC/1.0/</a>
Link to Item	<a href="http://hdl.handle.net/10150/671329">http://hdl.handle.net/10150/671329</a>

# MONEY FOR JUSTICE: COMPARING DAY FINES IN GERMANY AND MARICOPA COUNTY, ARIZONA

Elliot Rysenbry\*

## TABLE OF CONTENTS

I. INTRODUCTION .....	555
II. BACKGROUND ON DAY FINES .....	558
A. Global Day Fines in Practice .....	560
B. The Appeal of Day Fines .....	562
III. IMPLEMENTATION, PRACTICE, AND OUTCOMES OF DAY FINES IN GERMANY AND MARICOPA COUNTY .....	564
A. Day Fines in Germany: The Product of National Reform .....	564
B. Day Fines in Maricopa County: A Short-Lived Experiment .....	568
C. Politics and Practicalities: Day Fine Systems Compared .....	572
1. Origins and Stakeholders .....	572
2. Objectives and Design .....	574
3. Different Designs, Different Outcomes .....	579
D. Lessons for Day Fine Advocates .....	581
IV. CONCLUSION .....	583

## ABSTRACT

*This Note examines the concept of day fines and their implementation in two contrasting jurisdictions: Arizona's Maricopa County and Germany. Day fines, a system of monetary sanctions weighted according to a person's income, gained traction in the twentieth century as a means of ensuring substantively equitable punishment regardless of an individual's financial status. Maricopa County, among a handful of other U.S. jurisdictions, experimented with day fines during the early 1990s, only to see its program falter due to legislative constraints and political dynamics. In contrast, Germany has maintained a robust day fine system for over four decades, with a flexible yet occasionally heavy-handed approach. This Note delves into the historical and operational aspects of day fines, highlighting the differences in implementation between the two jurisdictions. It investigates the*

---

\* J.D. Candidate 2024, University of Arizona James E. Rogers College of Law. A heartfelt thank you goes to my wife, Chelsea Kelly, whose unwavering resilience, drive, and professional success provided the foundation for my journey through law school—and for this Note. Special thanks also to my Note advisor, Professor Jordan Woods, my Note and Comment Editor, Scott Kirker, and the 2023-24 members of Arizona Journal of International and Comparative Law.

*reasons behind the failure of the U.S. day fine experiment and its continued success in Germany, considering factors such as political climate, economic considerations, and procedural intricacies. By comparing these experiences, the article offers insights that might inform the potential adoption of day fine systems in the United States—serving as a resource for activists, scholars, and policymakers seeking to enhance the fairness and effectiveness of punitive measures.*

## I. INTRODUCTION

Another break-in. This time, the thief had unbolted part of the fence, bending the panels back to make an opening and get into the bicycle lock-up. My bike was still there, somehow, but my wife's distinctive red and white bike was missing. This was the third time the lock-up had been raided. At least she didn't like her bike that much—she said it looked like a candy cane. I broke the news to her. Then, less than half an hour later, I got a call: the building manager had spotted a red bike in the park across the street, could I come and see if it was hers? In Armory Park, a large recreation area in downtown Tucson less than 500 feet from where the bike had been stolen, two police officers stood on the sidewalk next to a red and white bike. It was definitely hers. The bike sat on the grass, propped upside down on its seat and handlebars. The frame was scuffed where an angle grinder had been used to cut the thick U-lock it had been secured with. Two men sat a few feet away on the grass, squinting in the bright Arizona sun. They looked confused. The officers took down our information and, after some back and forth, we wheeled the bike home.

Within a few weeks, a mountain of mail began to arrive. As it turns out, Arizona's Constitution includes a victim's bill of rights.<sup>1</sup> As a consequence of being robbed, my wife received paperwork on a near-weekly basis about the defendant's progress through the criminal justice system.<sup>2</sup> Eventually, she got a proposed plea agreement that made my jaw drop: the defendant, who was alleged to have stolen various things (bikes, alcohol, and car parts) in a six-month spree, would be required to pay restitution, fines, and mandatory fees.<sup>3</sup> The fees alone grabbed my attention. In addition to whatever the judge might assess as a fine, he would be required to pay an additional 78% to cover, among other things, state elections.<sup>4</sup> On top of that, he would be required to pay a laundry list of flat fees for officer equipment, organized crime squads, and more.<sup>5</sup>

---

<sup>1</sup> ARIZ. CONST. art. II, § 2.1.

<sup>2</sup> *PCAO Victim Services Division*, PIMA CNTY. ATT'Y, <https://www.pcao.pima.gov/wp-content/uploads/2021/07/VSD-Brochure.pdf> (last visited Oct. 21, 2022).

<sup>3</sup> Letter from Laura Conover, Pima County Attorney's Office, 32 N. Stone Ave., Tucson, AZ 85701 (Sep. 21, 2021) (on file with author).

<sup>4</sup> ARIZ. REV. STAT. § 12-116.01 (55% in surcharges on fines for any criminal offense); § 12-116.02 (adding another 13%); § 16-954 (10% surcharge for elections).

<sup>5</sup> § 12-116.08 (\$9 surcharge for victim's rights funds); § 12-116.09 (\$2 surcharge for victim's rights); § 12-116.10 (\$4 for officer training and equipment); § 12-116.04 (\$13

What on earth, I wondered, was the point? The last time I had seen the defendant he had been sitting on the grass. It looked like he might have slept in the park that night. I do not think he possessed much more than whatever he had in his battered backpack. He claimed that he had traded some food for my wife's bike. The likelihood of this man emerging from the criminal justice system, getting a job, and then paying back all the restitution, fines, and fees seemed remote. If anything, I thought that Arizona taxpayers would pay more money in administering the debt than they would ever see in collections, and the defendant would be saddled with a burden he could never bear.<sup>6</sup>

In the early 1990s, right around the time that Arizona was amending its Constitution to include the Victims' Bill of Rights,<sup>7</sup> Maricopa County—a large, fast-growing metropolitan jurisdiction encompassing Phoenix, the fifth largest city in the United States<sup>8</sup>—began experimenting with a way to fit the fine to the defendant. Thus, day fines emerged.<sup>9</sup> A common feature in European jurisdictions, day fines are aimed at ensuring monetary sanctions are equal in punitive effect, rather than equal in amount, for rich and poor alike—in essence, achieving a different type of equality.<sup>10</sup> Maricopa County was one among a handful of jurisdictions in the United States to implement the system during a surge of interest in day fines during the late 1980s and early 1990s.<sup>11</sup> While almost all such systems in Europe have proven resilient to reform,<sup>12</sup> Maricopa County's program was a

---

for officer equipment and gang enforcement); § 12-116 (\$20 fee for payment of fines and restitution over time); § 12-114.01 (\$20 fee for probation).

<sup>6</sup> This seems likely to be true. See Robin Kaiser-Schatzlein, *Alabama Takes from the Poor and Gives to the Rich*, N.Y. TIMES (Jul. 27, 2022), <https://www.nytimes.com/2022/07/27/opinion/alabama-fines-fees.html>.

<sup>7</sup> Steven J. Twist & Keelah E.G. Williams, *Twenty-Five Years of Victims' Rights in Arizona*, 47 ARIZ. STATE L.J. 421, 421 (1998).

<sup>8</sup> *Maricopa County Quick Facts*, MARICOPA CNTY. [hereinafter MARICOPA CNTY.], <https://www.maricopa.gov/3598/County-Quick-Facts> (last visited Feb. 22, 2023); *Phoenix Facts*, CITY OF PHOENIX, <https://www.phoenix.gov/pio/facts> (last visited Feb. 27, 2023); JUDITH A. GREENE, THE MARICOPA COUNTY FARE PROBATION EXPERIMENT 9 (Apr. 1996), <https://www.vera.org/downloads/publications/364.6gj.pdf>.

<sup>9</sup> Tina Rosenberg, *Instead of Jail, Cut Fines to Fit the Wallet*, N.Y. TIMES (Oct. 5, 2015), <https://archive.nytimes.com/opinionator.blogs.nytimes.com/2015/10/09/scaling-fines-to-what-offenders-can-pay/>; Susan Leonard, *Maricopa County to Test New System of Fines*, ARIZ. REPUBLIC (Jun. 10, 1990), at B1; FAIR TRIALS, DAY FINE SYSTEMS: LESSONS FROM GLOBAL PRACTICE 10 (2020), [hereinafter FAIR TRIALS] <https://www.fairtrials.org/app/uploads/2021/11/day-fines.pdf>.

<sup>10</sup> Substantive rather than formal equality is the concept underpinning day fines. Beth A. Colgan, *Graduation Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 97 (2017).

<sup>11</sup> The jurisdictions were Staten Island, New York; Maricopa County, Arizona; Bridgeport, Connecticut; Coos, Josephine, Malheur, and Marion Counties, Oregon; Polk County, Iowa; and Milwaukee, Wisconsin. Several of these experiments were funded by the Bureau of Justice Assistance, while others were independently implemented. EDWIN W. ZEDLEWSKI, ALTERNATIVES TO CUSTODIAL SUPERVISION: THE DAY FINE 5–6 (2010), <https://www.ojp.gov/pdffiles1/nij/grants/230401.pdf> [<https://perma.cc/LA8Z-YFAG>].

<sup>12</sup> See FAIR TRIALS, *supra* note 9, at 4.

microcosm of the American experience with day fines: a brief flurry of experimentation followed by stall and collapse.<sup>13</sup>

Germany's day fine system has been running for more than 40 years and is one of the most extensive and robust in the world.<sup>14</sup> In Germany, day fines operate with few guidelines and constraints beyond the basic principles of the system, making them easy for prosecutors and judges to manage.<sup>15</sup> However, this same flexibility allows them to be heavy handed at times, often leading to excessive fines for poorer defendants and prison time for those that cannot or will not pay.<sup>16</sup> Nevertheless, the system is perceived by the judiciary as fair, and there is little to no legislative and public debate about it.<sup>17</sup>

In contrast, Maricopa County's system was limited to less than 6% of felony convictions and ran for less than ten years.<sup>18</sup> Day fines were constrained by state law and politics from the start, preventing it from gathering support from the legislature or the judiciary.<sup>19</sup> During the day fine program's run in the 1990s, the Arizona state legislature—like other state legislatures—was in the midst of an effort to extract more and more money out of defendants by increasing fines and fees.<sup>20</sup> These efforts took place against a backdrop of skyrocketing incarceration costs: between 1982 and 2001, state government spending on incarceration increased 256% in real terms.<sup>21</sup> Combined with tight state budgets during the 1980s due to a general recession, high interest rates, and decreased federal aid,<sup>22</sup> efforts to force

<sup>13</sup> See Elena Kantorowicz-Reznichenko, *Day Fines: Reviving the Idea and Reversing the Costly Trend*, 55 AM. CRIM. L. REV. 333, 335–36 (2018); Colgan, *supra* note 10, at 106.

<sup>14</sup> Mitali Nagrecha, *The Limits of Fairer Fines: Lessons from Germany*, PRISONPOLICY.ORG 3 (June 2020), [https://www.prisonpolicy.org/scans/cjpp/Day-Fines\\_Report\\_FINAL\\_digital-6.29.20.pdf](https://www.prisonpolicy.org/scans/cjpp/Day-Fines_Report_FINAL_digital-6.29.20.pdf).

<sup>15</sup> *Id.* at 38, 60.

<sup>16</sup> *Id.* at 82–83.

<sup>17</sup> *Id.* at 35; Frank Wilde, *Die Geldstrafe – ein unsoziales Rechtsinstitut?* [The Day Fine—an Anti-Social Institution?], 98 MONATSSCHRIFT FÜR KRIMINOLOGIE UND STRAFRECHTSREFORM [MSCHRKRIM] 348, 350 (2015).

<sup>18</sup> Susan Turner & Judith Greene, *The FARE Probation Experiment: Implementation and Outcomes of Day Fines for Felony Offenders in Maricopa County*, 21 JUST. SYS. J. 1, 4, 19 (1999) (indicating the program started in 1991 and that “5.5 percent of defendants in the [day fine] courts were sentenced to [day fines.]”); Telephone interview with Judge Ronald Reinstein (Ret.), Maricopa Cnty. Super. Ct. (Oct. 12, 2022) (indicating the program ended by 1999).

<sup>19</sup> Rosenberg, *supra* note 9; Colgan, *supra* note 10, at 57.

<sup>20</sup> See, e.g., *Driving Under the Influence of Alcohol or Drugs—Extreme Influence—Ignition Interlock Devices, etc.*, 1998 ARIZ. LEGIS. SERV. CH. 302 (West) (adding a mandatory \$250 or \$500 fine for DUI offenses).

<sup>21</sup> TRACEY KYCKELHAHN, STATE CORRECTIONS EXPENDITURES, FY 1982-2010 1 (2014), <https://bjs.ojp.gov/content/pub/pdf/scefy8210.pdf>.

<sup>22</sup> State budgets were squeezed by incarceration costs and other factors. In Arizona, incarceration costs essentially doubled as a share of the state budget. *Borrowing Against the Future: The Impact of Prison Expansion of Arizona Families, Schools, and Communities*, PRISONPOLICY.ORG 2 (2003), [https://static.prisonpolicy.org/scans/az\\_borrowing.pdf](https://static.prisonpolicy.org/scans/az_borrowing.pdf). In general, state budgets were squeezed by the national economic and political environment.

defendants to pay for their defense, prosecution, and incarceration became politically attractive.<sup>23</sup> Simultaneously, the U.S. Constitution required relatively time-consuming procedural safeguards,<sup>24</sup> and the design of Arizona's day fine system required a strict, formulaic calculation of the severity of the offense and the defendant's daily income.<sup>25</sup>

American interest in day fines is rising again.<sup>26</sup> This Note will give a brief overview of the history and mechanics of day fines, followed by a description of the origins, practice, and changes to day fines in Maricopa County and Germany. The two systems will then be compared to understand why day fines in the United States failed yet remain resilient in Germany. These lessons may be useful as activists, academics, and legislators consider whether and how to implement new day fine systems in the United States.

## II. BACKGROUND ON DAY FINES

Day fines originated in Finland during the 1920s as a way to hold the real value of fines steady during currency inflation and deflation.<sup>27</sup> Since then, day fines have been implemented in 22 European countries, 6 American jurisdictions, and 17 Central and South American countries.<sup>28</sup> The purpose of the programs vary: some European jurisdictions focus on higher fines for wealthy people to preserve the effectiveness of the fine,<sup>29</sup> whereas American efforts have generally focused on reducing the impact of monetary sanctions on the poor.<sup>30</sup> Both European and American systems emphasize fines as an alternative to incarceration or

---

Roy Bahl & William Duncombe, *State and Local Debt Burdens in the 1980s: A Study in Contrast*, 53 PUB. ADMIN. REV. 31, 31 (1993).

<sup>23</sup> Fox Butterfield, *Many Local Officials Now Make Inmates Pay Their Own Way*, N.Y. TIMES (Aug. 13, 2004), <https://www.nytimes.com/2004/08/13/us/many-local-officials-now-make-inmates-pay-their-own-way.html>.

<sup>24</sup> See, e.g., *Lewis v. U.S.*, 146 U.S. 370, 374–75 (1892) (noting that the right of the defendant to be present at all parts of the trial is rooted in the U.S. Constitution).

<sup>25</sup> See, e.g., DOUG PILCHER & MARYLINN WINDUST, DAY FINE DEMONSTRATION PROJECT (F.A.R.E. PROBATION) (1991), <https://www.ojp.gov/pdffiles1/Digitization/134626NCJRS.pdf>.

<sup>26</sup> Rosenberg, *supra* note 9; Matthew Walsh, *Day Fines: A First Step in Ending Mass Incarceration*, BROWN POL. R. (Nov. 21, 2019), <https://brownpoliticalreview.org/2019/11/day-fines-a-first-step-in-ending-mass-incarceration/>; Kantorowicz-Reznichenko, *supra* note 13, at 336.

<sup>27</sup> Nagrecha, *supra* note 14, at 26, 99. For instance, if the currency experiences inflation leading to rising wages and prices, the value of fines would also increase.

<sup>28</sup> *Id.* at 2; ZEDLEWSKI, *supra* note 11, at 5; Colgan, *supra* note 10, at 57.

<sup>29</sup> FAIR TRIALS, *supra* note 9, at 10, 19, 26.

<sup>30</sup> Colgan, *supra* note 10, at 55–57.

supervision.<sup>31</sup> Above all, supporters of day fines consider them to be fair in a way that flat-rate, tariff fines are not.<sup>32</sup>

Day fines, as opposed to tariff fines, are monetary sanctions that are indexed to the unique economic circumstances of the defendant and aim to punish all defendants equally.<sup>33</sup> Where a tariff fine simply imposes the same sum for the same offense, regardless of the defendant, day fines are intended to be flexible.<sup>34</sup> To achieve this, day fines are calculated based on the defendant's daily income and the units of punishment that fit the defendant's crime.<sup>35</sup> The two are then multiplied to produce the fine which will be imposed.<sup>36</sup> Importantly, each of these components is to be calculated without reference to the other—the goal is to avoid selecting a total fine that seems appropriate and then reverse engineering the daily income and units to reach that figure.<sup>37</sup>

Day fines are best explained by a brief illustration: imagine that two people in a bar get into a fight. One is a rideshare driver, the other is a banker. The assault involved the same conduct under the same circumstances; therefore, they are charged with the same crime. The court first assesses the severity of their offenses as 64 units (or days), given that their conduct was essentially the same. Then, the court takes each defendant's daily income and multiplies it by the units. The rideshare driver earns minimum wage, and so the court calculates his income as about \$70 a day. Because he has a family, the judge will cut him a break and halve this amount, arriving at a daily income of \$35. The judge will therefore fine him \$2,240 (\$35 per day multiplied by 64 units). On the other hand, the banker earns a yearly salary of \$150,000. That comes out to \$411 a day. She has a family and so the judge halves her income too. She will be fined \$13,184 (\$206 per day multiplied by 64 units). The result: both are fined 64 days of income and the resulting variance in the total fine means each feels the same “sting.”<sup>38</sup>

Contrast this with “tariff” fines used in most U.S. jurisdictions.<sup>39</sup> Because this approach imposes the same fine regardless of the defendant's circumstances, they are regressive.<sup>40</sup> If the fine was \$2,240 for each, then the banker's finances and lifestyle would barely change. If it was \$13,184, then the rideshare driver would likely be in dire financial straits, unable to buy gas or afford food. The tariff and the day fine therefore represent two different concepts of fairness: formal equality, which treats all equally regardless of their circumstances, and substantive equality,

---

<sup>31</sup> FAIR TRIALS, *supra* note 9, at 30; Colgan, *supra* note 10, at 55; Kantorowicz-Reznichenko, *supra* note 13, at 335–37.

<sup>32</sup> See, e.g., Kantorowicz-Reznichenko, *supra* note 13, at 358.

<sup>33</sup> Kantorowicz-Reznichenko, *supra* note 13, at 358.

<sup>34</sup> *Id.*; Colgan, *supra* note 10, at 55–56.

<sup>35</sup> Colgan, *supra* note 10, at 56–57.

<sup>36</sup> *Id.*

<sup>37</sup> See *id.* at 57.

<sup>38</sup> This example is largely pulled, with modifications, from a newspaper article describing the end of day fines in the United Kingdom under pressure from the public which believed that they were unfair. *Fine Plans Echo 1991 Tory Policy*, BBC NEWS (Jan. 14, 2005, 12:40 GMT), [http://news.bbc.co.uk/2/hi/uk\\_news/politics/4173913.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/4173913.stm).

<sup>39</sup> Colgan, *supra* note 10, at 55.

<sup>40</sup> *Id.*

which seeks to achieve the same punitive effect given each defendant's circumstances.<sup>41</sup>

### **A. Global Day Fines in Practice**

Generally speaking, day fines are applied to minor offenses. For instance, in Spain, day fines are typically applied in driving offenses and minor thefts.<sup>42</sup> However, they have occasionally been used for more serious offenses like assault, and even weapons charges.<sup>43</sup> While some see day fines as just a replacement for tariff fines, they have been implemented in some countries—like Austria and Germany—to replace harmful short-term prison sentences.<sup>44</sup>

Jurisdictions vary in how they assess the appropriate units to punish the offense committed.<sup>45</sup> Some jurisdictions, like England during its brief experiment with day fines, use strict formulas which assign the number of units for each offense, such as a DUI.<sup>46</sup> This approach can limit inadvertent bias and ensure fairness.<sup>47</sup> However, such strict systems can undermine the judiciary's traditional discretion in sentencing people and generate resentment.<sup>48</sup> On the other hand, where broad judicial and prosecutorial discretion is allowed, as in Germany, the system is more flexible and able to accommodate judicial norms—but this can lead to informal standards for the units per offense that may lead to excessive fines for the poor.<sup>49</sup>

Jurisdictions also vary on the methods they use to calculate daily income. Generally speaking, day fines are calculated by first assessing the defendant's monthly income, and then dividing it by 30 to arrive at their daily income.<sup>50</sup> Gathering financial information is the most obvious hurdle.<sup>51</sup> The sources used for

---

<sup>41</sup> Formal equality treats everyone equally under the law—however, because of differences in circumstances, unequal results are inevitable when the law pursues formal equality. Substantive equality focuses on the goal to be obtained rather than equality of treatment under the law and requires accounting for the “effects of economic, social, and cultural discrimination and oppression.” Martha A. Fineman, *Equality Across Legal Cultures—The Role for International Human Rights*, VULNERABILITY & HUM. CONDITION (Sep. 21, 2020), <https://scholarblogs.emory.edu/vulnerability/2020/09/21/equality-across-legal-cultures-the-role-for-international-human-rights>; Colgan, *supra* note 10, at 97.

<sup>42</sup> FAIR TRIALS, *supra* note 9, at 17.

<sup>43</sup> *Id.* at 20 (noting that, on occasion, day fines are used in Sweden for weapons possession charges).

<sup>44</sup> *Id.* at 21–22; Hans-Joerg Albrecht, *Day Fines in Germany*, in DAY FINES IN EUROPE: ASSESSING INCOME-BASED SANCTIONS IN CRIMINAL JUSTICE SYSTEMS 85 (Elena Kantorowicz-Reznichenko & Michael Faure, eds., 2021) [hereinafter DAY FINES IN EUROPE].

<sup>45</sup> Kantorowicz-Reznichenko, *supra* note 13, at 338.

<sup>46</sup> Valsamis Mitsilegas & Foivi Sofia Mouzakiti, *Day (Unit) Fines in England and Wales*, in DAY FINES IN EUROPE, *supra* note 44, at 200.

<sup>47</sup> *See id.*

<sup>48</sup> FAIR TRIALS, *supra* note 9, at 31.

<sup>49</sup> Nagrecha, *supra* note 14, at 4.

<sup>50</sup> *See* FAIR TRIALS, *supra* note 9, at 9.

<sup>51</sup> *See* Colgan, *supra* note 10, at 74.



this information vary—but in most cases, courts trust defendants to self-report.<sup>52</sup> Many systems use forms filled out by the defendant with only cursory follow-up investigation, while others make an on-the-spot determination based on the defendant's statements and basic circumstances (for instance, whether they receive welfare, or their job if the salary is well known).<sup>53</sup> Select jurisdictions take a more detailed approach: in Finland, for instance, police and courts can access tax records (in the case of a speeding ticket, even from the roadside) to make such a determination.<sup>54</sup> In most cases, income from a job, welfare, capital gains, or a business is all that is considered.<sup>55</sup> Other jurisdictions (for example, Hungary and Poland) incorporate the defendant's assets, such as savings or real property, when assessing the daily rate.<sup>56</sup> A few jurisdictions allow the court to reach beyond the defendant and include wages from the defendant's spouse or other family resources.<sup>57</sup>

Some courts will also include income from illegal sources, such as gambling or drug sales<sup>58</sup>—although there are fairness and court legitimacy concerns.<sup>59</sup> On the one hand, excluding such income will reduce the defendant's daily rate and essentially let them benefit from illegal gains. Why should a drug dealer with an illegal income pay a lower fine than a nurse with a legal income?<sup>60</sup> On the other hand, imposing fines on drug dealers based on their illegal income could be seen as court approval of the income's source and could incentivize defendants to continue that illegal activity to pay the fine.<sup>61</sup>

Most jurisdictions will allow deductions for living expenses, dependents, and other fixed obligations.<sup>62</sup> Some have a rigorous process for such deductions, while others provide flat rates, and others still leave it entirely up to the judge. In the U.K, magistrates were provided with a table of factors to consider—but no actual guidelines.<sup>63</sup> In comparison, Bridgeport, Connecticut allowed flat deductions of 33% for taxes, 15% for self-support, and then other fixed deductions for

---

<sup>52</sup> Colgan, *supra* note 10, at 62.

<sup>53</sup> *Id.* at 75.

<sup>54</sup> Raimo Lahti, *Day Fines in Finland*, in *DAY FINES IN EUROPE*, *supra* note 44, at 28.

<sup>55</sup> See, e.g., *FAIR TRIALS*, *supra* note 9, at 20; Colgan, *supra* note 10, at 75; Gary M. Friedman, *West German Day Fines: A Possibility for the United States?*, 50 *U. CHI. L. REV.* 281, 288 (1983).

<sup>56</sup> *FAIR TRIALS*, *supra* note 9, at 26–28.

<sup>57</sup> See *id.* at 18, 28.

<sup>58</sup> JUDITH GREENE & CHARLES WORZELLA, *DAY FINES IN AMERICAN COURTS: THE STATEN ISLAND AND MILWAUKEE EXPERIMENTS* 29, 31 (1992), <https://www.ojp.gov/pdffiles1/Digitization/136611NCJRS.pdf>.

<sup>59</sup> Colgan, *supra* note 10, at 93–94.

<sup>60</sup> See *id.*

<sup>61</sup> *Id.*

<sup>62</sup> Nagrecha, *supra* note 14, at 31.

<sup>63</sup> *FAIR TRIALS*, *supra* note 9, at 32.

dependents.<sup>64</sup> Germany leaves deductions entirely up to the judge—some will allow more deductions, others less.<sup>65</sup>

The resulting daily income rate after deductions may be constrained by statute to maximum and minimum amounts.<sup>66</sup> When combined with maximum units, these provide caps on the total amount that a defendant could be fined. In Finland, for instance, there is a cap of 120 units (240 if the defendant is being sentenced for multiple offenses) but there is no maximum daily rate.<sup>67</sup> As a result, there is no maximum fine. In Spain, on the other hand, the maximum daily income rate for individuals is 400 EUR and the maximum units is 730.<sup>68</sup> The maximum fine in Spain is thus 292,000 EUR. Day fines may also be constrained by statutory caps on fines for each offense, as they were in Staten Island.<sup>69</sup> This resulted in fines that were consistently less than \$500.<sup>70</sup> Statutory caps like these can be a way to mitigate fears of judicial overreach and excessive, headline-grabbing fines.<sup>71</sup>

## **B. The Appeal of Day Fines**

The overall appeal of day fines includes reduced incarceration rates and probation costs combined with improved collections.<sup>72</sup> The tradeoff is a more complex administration process for the fines and often a more expensive collections operation.<sup>73</sup> The costs and results vary by jurisdiction, however.

Many jurisdictions use day fines in the hope of reducing incarceration rates.<sup>74</sup> However, while day fines are often an alternative to prison, they are generally backed up by the threat of incarceration.<sup>75</sup> When a defendant is imprisoned for failing to pay, most countries use a ratio of units remaining to days of incarceration to calculate the sentence. This ranges from 1:1 in Germany to 1:2

---

<sup>64</sup> SUSAN TURNER & JOAN PETERSILIA, DAY FINES IN FOUR U.S. JURISDICTIONS 55 (1996), <https://www.ojp.gov/pdffiles1/pr/163409.pdf>.

<sup>65</sup> Nagrecha, *supra* note 14, at 7.

<sup>66</sup> FAIR TRIALS, *supra* note 9, at 15.

<sup>67</sup> FAIR TRIALS, *supra* note 9, at 15.

<sup>68</sup> *Id.* at 16. The maximum time the daily rate can be assessed for is two years, or 730 days; thus, 730 units.

<sup>69</sup> See TURNER & PETERSILIA, *supra* note 64, at 9.

<sup>70</sup> *Id.* at 10.

<sup>71</sup> Colgan, *supra* note 10, at 97–99; Joe Pinsker, *Finland, Home of the \$103,000 Speeding Ticket*, ATLANTIC (Mar. 12, 2015), <https://www.theatlantic.com/business/archive/2015/03/finland-home-of-the-103000-speeding-ticket/387484/>.

<sup>72</sup> Turner & Greene, *supra* note 18, at 1.

<sup>73</sup> ZEDLEWSKI, *supra* note 11, at 8.

<sup>74</sup> FAIR TRIALS, *supra* note 9, at 14.

<sup>75</sup> *Id.* at 18.

in Poland.<sup>76</sup> Some jurisdictions allow defendants that are unable to pay to convert some (or all) of their fine to community service.<sup>77</sup>

Different applications of day fines produce different results. For instance, in Spain, day fines did not lower the overall rate of incarceration despite their use in 94% of all fines imposed.<sup>78</sup> In contrast, Germany implemented day fines with the objective of reducing incarceration rates for minor offenses.<sup>79</sup> As a result, the number of people sentenced to prison for less than six months fell by 79% between 1970, before the implementation of day fines, and 1979, after the system had been in use for some time.<sup>80</sup>

Day fine advocates also hope to reduce recidivism as a byproduct of keeping people out of prison and minimizing the disruptive and harmful effects of incarceration.<sup>81</sup> Some jurisdictions that have implemented day fines have experienced steady or reduced recidivism.<sup>82</sup> For instance, Milwaukee had steady recidivism rates in the year after the implementation of the program, while Maricopa County data showed steady or lower rates of recidivism for defendants sentenced to pay day fines rather than tariff fines.<sup>83</sup> In Germany, research also shows stable or lower recidivism in the decades after implementing day fines.<sup>84</sup> In the vast majority of jurisdictions, data on recidivism is unclear or unavailable—although there is no research showing higher rates of recidivism after jurisdictions implement day fines.<sup>85</sup>

Finally, supporters of day fines hope that, by assessing fines that are matched to each defendant's ability to pay, defendants will feel they are treated more fairly and collections will improve.<sup>86</sup> Results are mixed: on the one hand,

<sup>76</sup> FAIR TRIALS, *supra* note 9, at 28; Nagrecha, *supra* note 14, at 74.

<sup>77</sup> There is regional variation. Portugal, for instance, allows defendants to request conversion into community service days instead of imprisonment—however, Sweden does not give this option. Compare Maria Fernanda Palma & Helena Morão, *Day Fines in Portugal*, in DAY FINES IN EUROPE, *supra* note 44, at 189 n.17, with Jacob Öberg, *Day Fines in Sweden*, in DAY FINES IN EUROPE, *supra* note 44, at 55 n.67.

<sup>78</sup> FAIR TRIALS, *supra* note 9, at 17.

<sup>79</sup> Nagrecha, *supra* note 14, at 3.

<sup>80</sup> 113,273 people were sentenced to less than 6 months in prison compared with 23,664 in 1979. Friedman, *supra* note 55, at 291.

<sup>81</sup> Turner & Greene, *supra* note 18, at 1.

<sup>82</sup> Rosenberg, *supra* note 9; TURNER & PETERSILIA, *supra* note 64, at 13.

<sup>83</sup> “Arrest warrants for violators [in Milwaukee] who failed to pay fines and had warrants issued for their arrest was similar (41 and 46 percent for day fines and conventional fines, respectively[]).” TURNER & PETERSILIA, *supra* note 64, at 14. While in Maricopa County, “FARE and comparison group offenders were not significantly different in their likelihood of being arrested. Eleven percent of FARE offenders were arrested during the 12-month follow-up, contrasted with 17.3 percent of the comparison offenders.” *Id.* at 35.

<sup>84</sup> Albrecht, *supra* note 44, at 111.

<sup>85</sup> A review of recidivism data in Europe reveals no data showing an increase in recidivism and scant data showing a decrease as a result of day fines. *Id.* at 111–12; Lahti, *supra* note 54, at 38; Thomas Elholm, *Day Fines in Denmark*, in DAY FINES IN EUROPE, *supra* note 44, at 79; Maja Munivrana Vajda, *Day Fines in Croatia*, in DAY FINES IN EUROPE, *supra* note 44, at 298.

<sup>86</sup> Colgan, *supra* note 10, at 65.

collections have often resulted in a higher percentage of fines being paid, but on the other hand, their administration may become more costly.<sup>87</sup> Milwaukee experienced similar collections rates, but lower absolute collections due to lower total fines per defendant after it implemented a day fine program.<sup>88</sup> Staten Island, NY, achieved steady collection rates even as fines increased after it implemented a day fines program.<sup>89</sup> Polk County, IA, achieved a dramatic increase in defendants paying the full value of their fine.<sup>90</sup> Research in general does indicate that an increased sense of fairness and self-efficacy theory may be driving the improved collections.<sup>91</sup> Data for collections in Europe is sparse, perhaps because these jurisdictions implemented day fines nationally in one fell swoop rather than in an experimental fashion as in the United States.<sup>92</sup>

### III. IMPLEMENTATION, PRACTICE, AND OUTCOMES OF DAY FINES IN GERMANY AND MARICOPA COUNTY

#### A. Day Fines in Germany: The Product of National Reform

In Germany, day fines were the result of a long-running push to reform the criminal justice system.<sup>93</sup> Policymakers had several objectives: to reduce recidivism by reducing rates of incarceration, and to achieve greater equality in the effects of sentences on defendants regardless of their socio-economic circumstances.<sup>94</sup>

West German legislators, legal scholars, and the public debated criminal justice reform during the postwar period with a view of eliminating the most harmful aspects of the criminal justice system.<sup>95</sup> During this time, incarceration and recidivism rates were high, and debate centered on the harmful effects of prison that perpetuated crime rather than prevented it.<sup>96</sup> Franz von Liszt's "Marburg Programme" was one of the key intellectual foundations of the debate and resulting reform.<sup>97</sup> The central idea of the Marburg Programme was that short prison sentences did far more harm than good to both offenders and society.<sup>98</sup> A newspaper article from the period summed up the public's antipathy to short prison sentences

---

<sup>87</sup> See *infra* notes 88–90 and accompanying text.

<sup>88</sup> Default rates in Milwaukee were 61% before the day fine program was implemented and 59% after. Colgan, *supra* note 10, at 110–11.

<sup>89</sup> TURNER & PETERSILIA, *supra* note 64, at 10.

<sup>90</sup> *Id.* at 48.

<sup>91</sup> Colgan, *supra* note 10, at 66–67.

<sup>92</sup> Compare Colgan, *supra* note 10, at 64, with Albrecht, *supra* note 44, at 111.

<sup>93</sup> Albrecht, *supra* note 44, at 85.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 86.

<sup>98</sup> Albrecht, *supra* note 44, at 86.

during this time: A business man is sentenced to two weeks in prison for speeding.<sup>99</sup> He is stripped down, put in prison clothes, forced to shower and defecate in public, and generally suffers the discomfort and indignities of prison life.<sup>100</sup> Instead of being rehabilitated, he is brutalized.<sup>101</sup>

The Grand Commission on Criminal Law was created in 1953 to write a new criminal code that would deal with rising incarceration and persistent recidivism.<sup>102</sup> The reform process took nearly 20 years.<sup>103</sup> In 1962, the Commission produced their first draft, which included a day fine system allowing fines to replace prison sentences of less than three months, where appropriate.<sup>104</sup> A vocal group of legal scholars and practitioners roundly criticized it for failing to do away with short prison sentences and, in 1966, they wrote an alternative draft that would entirely eliminate prison sentences of six months or less.<sup>105</sup> In place of short prison sentences, the alternative draft envisioned fines that were tailored to “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.”<sup>106</sup>

In 1969, as the debate about fines raged on, the German criminal code was streamlined, decriminalizing many minor offenses and creating a presumption in favor of fines and against imposition of prison sentences shorter than six months.<sup>107</sup> But still the question remained of what system of fines would replace these short prison sentences.

The debate was resolved by a critical last-minute compromise that defines the law to this day.<sup>108</sup> Final versions of the bill included the alternative drafts’ language requiring judges to deduct living expenses from daily income rates—but the legislature adopted a late amendment at the behest of the Senior Minister for Justice and members of the commission charged with implementing the reform.<sup>109</sup> These elements demanded a last minute amendment, fearing that judges would be unable to jail dangerous individuals, that such an intensive income assessment

---

<sup>99</sup> *Aus Dem Blechnapf* [From the Tin Bowl], DER SPIEGEL, (Jan. 17, 1961, 1:00 PM), <https://www.spiegel.de/politik/aus-dem-blechnapf-a-75d179b3-0002-0001-0000-000043159449>.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Christoph Krehl, *Reforms of the German Criminal Code—Stock-taking and Perspectives—also from a Constitutional Point of View*, 4 GER. L. J. 421, 423 (2003).

<sup>103</sup> The process began in 1954 and the last major reform (which included day fines) was finalized in 1974. *Id.* at 423–24.

<sup>104</sup> Friedman, *supra* note 55, at 284.

<sup>105</sup> *Id.* at 284–85.

<sup>106</sup> *Id.* at 286; WILHELMI ET AL., 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 (1969), <http://dipbt.bundestag.de/dip21/btd/05/040/0504095.pdf>.

<sup>107</sup> Albrecht, *supra* note 44, at 85.

<sup>108</sup> Friedman, *supra* note 55, at 287; Nagrecha, *supra* note 14, at 29.

<sup>109</sup> Nagrecha, *supra* note 14, at 29–30.

would be burdensome, and that the proposed day-fine system would lead to lower (and therefore less effective) fines for common offenses.<sup>110</sup> The last-minute amendment quelled this fear by removing language requiring judges to deduct living expenses.<sup>111</sup> This compromise produced a statutory scheme that contains a strong, rebuttable presumption against prison sentences of less than six months and imposes all fines as day fines by default.<sup>112</sup> While it requires judges to assess the defendant's income, it offers no guidelines for when or how to deduct the cost of living or other expenses.<sup>113</sup> The law has remained basically unchanged since its passage.<sup>114</sup>

In practice, the German day fine system is efficient, effective, and generally perceived by the judiciary, legislators, and the public to be fair.<sup>115</sup> However, it assesses high fines for low-income defendants, and many indigent people are sent to prison when they are unable to pay.<sup>116</sup>

Prosecutors and judges see great value in the ability to use summary proceedings (discussed in detail in Part C) and rapid, rudimentary daily rate calculations to process defendants *en masse*.<sup>117</sup> However, speed comes at the cost of consideration. In practice, judges and prosecutors use their own impressions and self-reported monthly income to come up with a daily rate.<sup>118</sup> For instance, if a judge knows or suspects that a defendant is on public benefits of 424 EUR per month, they may assign them a daily rate of seven to 20 EUR.<sup>119</sup> They may even use a default daily rate for that region or court.<sup>120</sup> The number units per offense has a similarly short-hand, rapid quality to it, often based on "gut feel."<sup>121</sup> For example, a defendant charged with driving under the influence with a blood alcohol level of 1.2mg/100ml will receive between 30 and 60 units, depending on the prosecutor and judge.<sup>122</sup> Because the law does not require judges to deduct living expenses (which take up the vast majority of a poor defendant's income), such expenses are deducted haphazardly, resulting in fines that are often too high for low-income defendants to pay.<sup>123</sup>

The system has been broadly effective in reducing incarceration by eliminating most short prison sentences—although day fines are just one driver of

---

<sup>110</sup> Wilde, *supra* note 17, at 355; Nagrecha, *supra* note 14, at 29.

<sup>111</sup> Nagrecha, *supra* note 14, at 30.

<sup>112</sup> Strafgesetzbuch [StGB] [Penal Code] § 47, para. 1, [https://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p0274](https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0274) (Ger.); Wilde, *supra* note 17, at 349.

<sup>113</sup> See § 40.

<sup>114</sup> Nagrecha, *supra* note 14, at 32.

<sup>115</sup> *Id.* at 35–36; Albrecht, *supra* note 44, at 115.

<sup>116</sup> Nagrecha, *supra* note 14, at 74, 83.

<sup>117</sup> *Id.* at 82.

<sup>118</sup> *Id.* at 62–64.

<sup>119</sup> This is based on *Hartz IV* benefits. *Id.* at 40, 44.

<sup>120</sup> *Id.*

<sup>121</sup> Nagrecha, *supra* note 14, at 64.

<sup>122</sup> *Id.* at 63.

<sup>123</sup> *Id.* at 38–37; Wilde, *supra* note 17, at 350.

this trend.<sup>124</sup> After implementation, the number of defendants sentenced to prison terms of six months or less dropped from 113,273 in 1968 to 10,609 in 1979.<sup>125</sup> This reduction is partly a result of day fines: since 1980, 80% of defendants have been sentenced to a day fine.<sup>126</sup> This reduction and the share of defendants sentenced to day fines has been stable for the last 30 years.<sup>127</sup> Yet because so many poor defendants are sentenced to relatively high fines, defendants sentenced to day fines and then imprisoned for failing to pay make up about 20% of the prison population.<sup>128</sup> About 8% of people sentenced to day fines go to prison for failure to pay, according to various estimates.<sup>129</sup>

The public, the legislature, and the legal community have remained supportive of—or at least apathetic about—day fines. Relatively expensive fines and imprisonment for the poor are considered a fact of life.<sup>130</sup> Yet public opinion surveys show that Germans would impose fines instead of incarceration at a similar or higher rate than judges do in practice for crimes such as burglary or robbery.<sup>131</sup>

Criminal reforms since day fines were implemented have left the system essentially untouched. During the 1990s and 2000s, Germans became more concerned with sexual offenses, corruption and terrorism.<sup>132</sup> The legislature responded with a flurry of new offenses covering these categories, often with little input from legal scholars.<sup>133</sup> Yet day fines remained largely unchanged, with the exception of small tweaks and expansions.<sup>134</sup> In the 1980s, community service was added as an alternative to prison.<sup>135</sup> In 2009, the legislature raised the maximum daily rate in response to concerns that day fines would not be severe enough to punish top earners at large corporations.<sup>136</sup> Recently, a parliamentary faction proposed removing imprisonment for default entirely.<sup>137</sup> Overall, there has been

<sup>124</sup> The 1974 bill that implemented day fines was preceded by a 1969 law giving priority to fines over prison sentences. The incarceration rate dropped from 96/100,000 in 1968 to 76/100,000 in 1970. Albrecht, *supra* note 44, at 86.

<sup>125</sup> Friedman, *supra* note 55, at 291.

<sup>126</sup> Albrecht, *supra* note 44, at 101–02.

<sup>127</sup> *Id.*

<sup>128</sup> Nagrecha, *supra* note 14, at 74.

<sup>129</sup> *Id.* at 69.

<sup>130</sup> *Messer mit Klinge [Knife with a Blade]*, DER SPIEGEL (Apr. 10, 1983, 1:00 PM), <https://www.spiegel.de/politik/messer-mit-klinge-a-90de0a26-0002-0001-0000-000014018212> (detailing the effect of—and public support for—imprisoning defendants unable to pay); *Je Obszoener Desto Teurer [The More Obscene the More Expensive]*, DER SPIEGEL (Apr. 28, 2000, 2:38 PM), <https://www.spiegel.de/auto/aktuell/stindefinger-und-co-je-obszoener-desto-teurer-a-74498.html>.

<sup>131</sup> Albrecht, *supra* note 44, at 114.

<sup>132</sup> Krehl, *supra* note 102, at 426–27.

<sup>133</sup> *Id.*

<sup>134</sup> Nagrecha, *supra* note 14, at 32.

<sup>135</sup> Albrecht, *supra* note 44, at 116.

<sup>136</sup> *Id.* at 95.

<sup>137</sup> *Id.* at 116.

essentially no mainstream political or legal debate about the actual use of day fines, merely the implementation.<sup>138</sup>

### **B. Day Fines in Maricopa County: A Short-Lived Experiment**

Maricopa County is the most populous county in Arizona, encompassing Phoenix, the state capital and largest city.<sup>139</sup> In the 1990s, it administered a busy, modern court system that was facing similar challenges and caseloads to other large American cities.<sup>140</sup> At the time that Maricopa County Superior Court implemented the day fine program, the court was known as one of the most innovative and efficient in the United States.<sup>141</sup> Its character, caseload, and reputation is much the same today.<sup>142</sup> Day fines in Maricopa County, known then as Financial Assessment Related to Employability probation (FARE probation), ran in a limited fashion from 1991 to 1999.<sup>143</sup> Studies from the period show that it was successful on paper—but ran counter to the legislative agenda, had little public interest, and was hobbled by limited applicability.<sup>144</sup>

The American interest in day fines came as a response to the increasing public and political focus on retribution and deterrence in criminal justice.<sup>145</sup> The focus on punishment rather than rehabilitation led to increased strain on the corrections system nationwide, particularly in the form of overcrowded prisons.<sup>146</sup> The legal community saw day fines as a way to reduce the load on prisons and probation systems by introducing an intermediate punishment that was “unequivocally punitive”—yet retained the possibility of rehabilitation.<sup>147</sup> In essence, defendants would be sentenced to the community rather than prison or supervision.<sup>148</sup>

In Maricopa County, day fines were adopted with the immediate goal of reducing the expense of supervisory probation and to provide a means of equitably

---

<sup>138</sup> Wilde, *supra* note 17, at 350.

<sup>139</sup> MARICOPA CNTY., *supra* note 8.

<sup>140</sup> GREENE, *supra* note 8, at 9.

<sup>141</sup> *About the Judicial Branch of Arizona in Maricopa County*, JUD. BRANCH ARIZ. MARICOPA CNTY. (October 11, 2022, 9:27 AM), <https://superiorcourt.maricopa.gov/about/>.

<sup>142</sup> *Id.*

<sup>143</sup> GREENE, *supra* note 8, at 1, 8; Telephone interview with Mike Cimino, Chief Prob. Officer, Maricopa Cnty. Super. Ct. (Oct. 17, 2022); Telephone interview with Judge Ronald Reinstein (Ret.), *supra* note 18.

<sup>144</sup> Turner & Greene, *supra* note 18, at 19 (noting that 5.5% of defendants were sentenced to FARE probation and that the program “enabled the collection of a just and affordable monetary sanction . . . without increasing recidivism.”); See *infra* notes 176–85 and accompanying text (discussing increasing fees and the drive to fund criminal justice by extracting funds from defendants).

<sup>145</sup> Sarah T. Hillsman, *Fines and Day Fines*, 12 CRIME & JUST. 49, 51 (1990); GREENE, *supra* note 8, at 4–5.

<sup>146</sup> Hillsman, *supra* note 145, at 49, 50; Turner & Greene, *supra* note 18, at 1.

<sup>147</sup> Hillsman, *supra* note 145, at 50; Turner & Greene, *supra* note 18, at 1.

<sup>148</sup> Hillsman, *supra* note 145, at 50; Turner & Greene, *supra* note 18, at 1.



calculating financial penalties.<sup>149</sup> In explaining the experiment to the public, planners emphasized the fairness of day fines along with their ability to collect more money from defendants and, eventually, to relieve overcrowding in state prisons.<sup>150</sup> Planners also wished to avoid reducing the court's revenue stream from fines and fees.<sup>151</sup>

The Vera Institute designed the day fine system in conjunction with Maricopa County Superior Court to function as an intermediate sanction between unsupervised summary probation and standard supervised probation.<sup>152</sup> However, Arizona's mandatory fines, fees, and restitution constrained the day fine experiment.<sup>153</sup> To account for the various statutes setting minimums for fines along with restitution and fees, the planners designed the fine system to first calculate the total amount of the judgment (including fines, fees and restitution) according to the defendant's means and the specific offense, then parcel out the total sum according to statutory requirements.<sup>154</sup> This ensured the system was of actual, practical use to judges, who had expressed serious concerns about the usefulness of fines given the array of statutory minimums, restitution, and fees.<sup>155</sup> The result was complex, but workable.<sup>156</sup>

In practice, the FARE Probation appeared to produce good results.<sup>157</sup> The system worked as a viable alternative to resource-intensive supervised probation.<sup>158</sup> It increased the range of fines<sup>159</sup> imposed while maintaining the average dollar-amount assessed per defendant.<sup>160</sup> The experiment thus met the twin goals of preserving revenue while better tailoring fines to each defendant's crime and circumstances.

Maricopa County was able to incorporate the investigation of the defendant's income into their existing workflow. After the court found a defendant guilty or accepted a guilty plea, their case was sent to the Adult Probation Department.<sup>161</sup> There, an investigator would examine the defendant's criminal record, community connections, and financial resources.<sup>162</sup> If the defendant was deemed a good fit for FARE, the investigator would use information from the presentence investigation to determine the defendant's monthly income and

---

<sup>149</sup> Hillsman, *supra* note 145, at 50; Turner & Greene, *supra* note 18, at 1.

<sup>150</sup> Leonard, *supra* note 9, at B1.

<sup>151</sup> GREENE, *supra* note 8, at 37.

<sup>152</sup> *Id.* at 28.

<sup>153</sup> *Id.* at 12–13.

<sup>154</sup> GREENE, *supra* note 8, at 21, 26.

<sup>155</sup> *Id.* at 17.

<sup>156</sup> *See, e.g., id.* at 30–31, 42 (devising a point scale for 250 offenses with 14 severity levels and noting that in practice, “the pilot was meeting the planner's best expectations in many critical dimensions.”).

<sup>157</sup> *Id.*

<sup>158</sup> Turner & Greene, *supra* note 18, at 14.

<sup>159</sup> Fines are used here as shorthand for the total judgment imposed by the court, which included mandatory fees and often mandatory restitution. *Id.* at 6.

<sup>160</sup> *Id.* at 13.

<sup>161</sup> PILCHER & WINDUST, *supra* note 25, at 3.

<sup>162</sup> *Id.*

expenses.<sup>163</sup> In calculating the daily income, the investigator would take the stated income and divide it by the number of days in the pay period (for instance, \$189 per week would become \$27 per day).<sup>164</sup> The investigator would then use a table to lower the daily rate based on the number of people living on that income, including the defendant.<sup>165</sup> A defendant with an income of \$27 a day and two dependents would have a reduced daily rate of \$12.<sup>166</sup>

Calculating the number of units per offense was similarly straightforward. The Vera Institute planners created a detailed table assigning penalty units to offenses based on 14 severity levels derived from the severity of the criminal behavior.<sup>167</sup> The resulting penalties ranged from a minimum of 10 units for offenses like criminal trespass in the third degree, to a maximum of 350 for serious offenses like sexual exploitation of a minor.<sup>168</sup>

Despite detailed planning and relatively easy administration, day fines never really caught on with judges and prosecutors.<sup>169</sup> Even before the day fine experiment started, judges were reluctant to use fines because they believed they would be an impediment to the defendant's re-entry into society.<sup>170</sup> Only half of the judges in Maricopa County were trained on and participated in day fines, and the program itself was restricted to defendants that were eligible for probation,<sup>171</sup> were not a chronic offenders; did not pose a threat of danger to the community; and would not be forced to pay large restitution amounts.<sup>172</sup> This cut eligibility significantly. Further, only about a third of defendants eligible for FARE probation were sentenced to it, according to one estimate—perhaps because of judges' general aversion to fines.<sup>173</sup> Prosecutors showed little interest in the program too; they received funding from fees tacked on to fines, giving them an interest in higher fines.<sup>174</sup>

---

<sup>163</sup> PILCHER & WINDUST, *supra* note 25, at 3.

<sup>164</sup> *Id.* at 10.

<sup>165</sup> *Id.* at 10–11. Pilcher and Windust's work includes a sample worksheet explaining how to calculate a daily rate and directing the officer to refer to a table to calculate the appropriate rate based on the number of dependents the defendant has.

<sup>166</sup> *Id.* at 9.

<sup>167</sup> Turner & Greene, *supra* note 18, at 6.

<sup>168</sup> PILCHER & WINDUST, *supra* note 25, at 8 (*see* Table 2, Financial Assessment Units by Offense); Turner & Greene, *supra* note 18, at 6.

<sup>169</sup> Telephone interview with Mike Cimino, *supra* note 143; Telephone interview with Judge Ronald Reinstein (Ret.), *supra* note 18.

<sup>170</sup> Turner & Greene, *supra* note 18, at 5, 13.

<sup>171</sup> Probation-eligible offenses generally include possession of small amounts of drugs for personal use and non-dangerous crimes, except for more serious offenses involving children. *See generally Criminal Code 1994*, AZCOURTS.GOV, <https://www.azcourts.gov/Portals/0/CriminalSentencingCt/Criminal%20Code%20Sentencing%20Chart%201994.pdf> (last visited Feb. 22, 2023).

<sup>172</sup> *Id.* at 3–5.

<sup>173</sup> Turner & Greene, *supra* note 18, at 19.

<sup>174</sup> Rosenberg, *supra* note 9.

By the mid-to-late 1990s, FARE Probation was being squeezed from all sides by the Arizona legislature.<sup>175</sup> National public opinion during this period was increasingly hostile to criminal defendants, and many jurisdictions set out to force defendants to pay for their prosecution, conviction, and punishment<sup>176</sup>—“‘[n]o new taxes,’ [people] cried, while demanding that the government get tough on crime.”<sup>177</sup> This led to a further proliferation of fines and fees for criminal defendants: “Florida, for instance, added 20 categories of financial obligations for defendants going through its court system from 1996 to 2010.”<sup>178</sup> Once the funds began to flow, they became increasingly important to state budgets.<sup>179</sup>

Arizona was not immune to this trend: despite already having a variety of mandatory minimums and fees in 1993, the legislature added more during the day fine program’s run through the mid-to-late 1990s. In 1996, the Arizona Legislature added mandatory fines of \$1,000 for drug offenses.<sup>180</sup> In 1998, it added a \$250 minimum fine for DUI offenses.<sup>181</sup> Mandatory surcharges on all penalties also increased from 57% in 1993<sup>182</sup> to 70% in 1999.<sup>183</sup> This thirst for revenues was driven in part by a 1992 voter initiative requiring tax increases to be approved by a two-thirds majority of both houses of the legislature.<sup>184</sup> This resulted in a budgetary squeeze that persists to this day.<sup>185</sup>

The Adult Probation Department, which administered much of the program, shifted focus away from FARE Probation during the mid-to-late 1990s. Instead of financial penalties, the department emphasized reduced supervision for low-risk defendants.<sup>186</sup> In the department’s view, FARE Probation’s success was most likely driven by the reduced contact between the probation department and low-risk defendants.<sup>187</sup> Research has shown that increased contact with probation

---

<sup>175</sup> See *infra* notes 176–85 and accompanying text.

<sup>176</sup> See Kaiser-Schatzlein, *supra* note 6.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*; see also GREENE, *supra* note 8, at 36 (stating that a goal of the day fines experiment was to maintain or increase revenue).

<sup>180</sup> Crimes and Offenses—Fines for Drug Offenses, 1996 Ariz. Legis. Serv. Ch. 350 (West) (codified as Ariz. Rev. Stat. § 13-821).

<sup>181</sup> Driving Under the Influence of Alcohol or Drugs—Extreme Influence—Ignition Interlock Devices, etc., 1998 Ariz. Legis. Serv. Ch. 302 (West) (adding a \$250 mandatory minimum fine to A.R.S. § 28-1381).

<sup>182</sup> Courts—Fees and Assessments; Funds, 1993 Ariz. Legis. Serv. Ch. 243 (West) (§ 12-116.01 adds 46%, and § 12-116.02 adds an 11% surcharge on any penalty assessment).

<sup>183</sup> Crimes and Offenses—Criminal Case Proceedings—State Aid, 1999 Ariz. Legis. Serv. Ch. 346 (West) (§ 12-116.01 adds 47% and § 12-116.02 adds 13%); ARIZ. REV. STAT. ANN. § 16-954 (2012) (additional 10% surcharge for elections on all civil and criminal fines from January 1, 1999).

<sup>184</sup> *Supermajority Requirement for Raising Revenues Jeopardizes Arizona’s Economic Future*, ARIZ. CTR. ECON. PROGRESS (Jan. 1, 2020), <https://azeconcenter.org/supermajority-requirement-for-raising-revenues-jeopardizes-arizonas-economic-future%E2%80%8C/>.

<sup>185</sup> *Id.*

<sup>186</sup> Telephone interview with Mike Cimino, *supra* note 143.

<sup>187</sup> *Id.*

officers can actually produce worse outcomes for low-risk defendants.<sup>188</sup> New, nationally accepted practices for probation departments thus began centering on the individual recidivism risk of each parolee, designing interventions, and allocating resources rather than on calculating and collecting financial penalties.<sup>189</sup>

Maricopa County's day fine experiment ended around 1999 due to the decreasing applicability of the program; increasing pressure from the legislature to extract money from defendants; changing priorities at the Maricopa County Adult Probation Department; and lack of interest from judges.<sup>190</sup>

### **C. Politics and Practicalities: Day Fine Systems Compared**

Maricopa County's day fine experiment was inspired by robust, long-running systems in Western Europe, such as Germany's.<sup>191</sup> In practice, the political context, legal framework, and resulting design created different experiences, and eventually the end-of-day fines in Maricopa County. Despite being implemented 25 years later and thousands of miles away, FARE Probation shared important characteristics with the German system: they were applied to similar defendants, they produced similarly varied (but still quite high) fines, and they appear to have had similar effects on collections and recidivism.

#### **1. Origins and Stakeholders**

While Germany implemented day fines based on a consensus that short prison sentences were harmful and had to be avoided,<sup>192</sup> American interest in day fines during the 1980s and 1990s was largely academic and driven by a desire to avoid the excesses of "tough on crime."<sup>193</sup>

The criminal justice reform that led to day fines in Germany was debated at the highest levels. From 1952 to 1975, the more conservative committee and a coalition of progressive academics debated criminal justice reform and the precise shape and extent of day fines.<sup>194</sup> Neither faction debated the actual necessity of fines as a replacement; instead, they discussed how far fines could go, with progressives in the debate asserting that fines should take away all discretionary income but leave

---

<sup>188</sup> Jill Viglione & Faye S. Taxman, *Low Risk Offenders Under Probation Supervision: Risk Management and the Risk-Needs-Responsivity Framework*, 45 CRIM. J. BEHAV. 1809, 1811 (2018).

<sup>189</sup> This is referred to in literature as Risk-Needs-Responsivity and Evidence-Based Supervision. *Id.* at 1810.

<sup>190</sup> Telephone interview with Mike Cimino, *supra* note 143; Telephone interview with Judge Ronald Reinstein (Ret.), *supra* note 18.

<sup>191</sup> GREENE, *supra* note 8, at 6.

<sup>192</sup> Albrecht, *supra* note 44, at 85–86.

<sup>193</sup> GREENE, *supra* note 8, at 5–6; Hillsman, *supra* note 145, at 50; Turner & Greene, *supra* note 18, at 1–2.

<sup>194</sup> Krehl, *supra* note 102, at 424.

defendants with enough to survive on.<sup>195</sup> In the end, the conservative faction won out, and fines were able to reach all the income of the defendant, even what she might need for food and shelter.<sup>196</sup> Day fines in Germany have been defined by this political compromise ever since.<sup>197</sup>

In contrast, day fines in Maricopa County avoided the legislative process entirely. They were designed and implemented by academics and practitioners at the Vera Institute based on their own research, with support from other administrative or academic institutions like the RAND corporation, the State Justice Institute, the Bureau of Justice Assistance, and the U.S. Department of Justice.<sup>198</sup> Even as planning documents discuss issues that obviously concern voters and legislators like “the surging cost of the jail and prison population in the United States,” the authors focus only on convincing judges and “criminal justice policymakers” to change their practices.<sup>199</sup> In the “tough on crime” era, a research experiment formulated by academics and judges was simply unable to meet the political moment or spark a serious reform movement.<sup>200</sup>

The parallel tracks of the legislature’s criminal justice policy and the Vera Institute’s research make it clear that, unlike in Germany, legislators in Arizona did not know or care about day fines. Far from giving the judiciary more leeway to impose fines as they saw fit, the legislature increased minimum fines for DUIs and drug offenses and continued to add surcharges to all fines and fees throughout the 1990s.<sup>201</sup> Nor was the legislature interested in reducing incarceration through day fines. In 1990, the Vera Institute discussed in documents and in the media how day fines might eventually reduce incarceration rates.<sup>202</sup> In 1992, the Arizona Legislature responded to an incarceration crisis—in which prisoners convicted of DUI charges, among other offenders, were housed outdoors in tents—by increasing funding for prisons.<sup>203</sup> By 2002, Arizona had the ninth-highest incarceration rate in the United States.<sup>204</sup> In 2003, the legislature added more mandatory fees to DUI fines to cover prison construction costs.<sup>205</sup> In contrast, German legislators have repeatedly expressed their support for day fines, acting only to modify them.<sup>206</sup> In the 1980s, community service was added as an alternative to prison.<sup>207</sup> In 2009, the legislature raised the maximum daily rate in response to the public’s concerns that

<sup>195</sup> Wilde, *supra* note 17, at 353–54.

<sup>196</sup> *Id.*

<sup>197</sup> Nagrecha, *supra* note 14, at 32.

<sup>198</sup> Turner & Greene, *supra* note 18, at 4; GREENE, *supra* note 8, at 2–3.

<sup>199</sup> GREENE, *supra* note 8, at 4.

<sup>200</sup> *Id.*

<sup>201</sup> See *supra* notes 180–85 and accompanying text.

<sup>202</sup> GREENE, *supra* note 8, at 4; Leonard, *supra* note 9.

<sup>203</sup> Kim Sue Lia Perkes, *Director Assailed on Prison Crisis*, ARIZ. REPUBLIC, Apr. 22, 1992, at B2.

<sup>204</sup> FAMILIES AGAINST MANDATORY MINIMUMS, ARIZONA PRISON CRISIS: A CALL FOR SMART SOLUTIONS 6 (2004), <https://www.justicestrategies.org/sites/default/files/publications/AZbrieffinal3.pdf>.

<sup>205</sup> Correctional Facilities, 2003 Ariz. Legis. Serv. 2d Spec. Sess. Ch. 5 (West).

<sup>206</sup> Albrecht, *supra* note 44, at 95, 116.

<sup>207</sup> *Id.* at 116.

day fines would not be severe enough to punish top earners charged with white collar crimes arising out of corruption at large corporations.<sup>208</sup>

These different methods of reform produced radically different levels of stakeholder support and engagement within the criminal justice system. In Germany, judges and prosecutors in particular support the idea of the day fine system and the concept of fairness that it represents—perhaps because it has been a fixture of the national legal landscape for decades.<sup>209</sup> In contrast, judges and prosecutors in Arizona never really got on board with day fines.<sup>210</sup> And why should they have? Perhaps they foresaw the demise of a European-style system implemented on a trial basis in a busy American court system already enmeshed in a statutory scheme of ever-increasing mandatory fines and fees.<sup>211</sup>

In sum, the German reform movement was the result of political debate in the legislature, while the Maricopa County experiment came from academics and technocrats.<sup>212</sup> As a result, practitioners never felt as committed to day fines in Arizona as they did in Germany, where they quickly became a fact of life for key stakeholders from judges to defendants.

## 2. Objectives and Design

The goals and constraints of day fines in Germany and Maricopa County also differed, leading to varying designs of the respective systems. In Germany, day fines were created to replace harmful prison sentences and to ensure that defendants experienced the punitive effect of fines equally, regardless of their wealth—although political compromise preserved fines close to their pre-day fine amounts.<sup>213</sup> In contrast, FARE probation was aimed at providing an optional replacement for supervised probation within the bounds of existing judicial discretion.<sup>214</sup>

In Germany, the objectives of day fines and their basic principles are written in the national criminal code, setting forth a national policy with a strong presumption against incarcerating offenders for any crime for which a prison sentence of less than six months is appropriate, and for sentencing all such defendants to a day fine.<sup>215</sup> Offenses that fall within the purview of day fines include

---

<sup>208</sup> Albrecht, *supra* note 44, at 95.

<sup>209</sup> Nagrecha, *supra* note 14, at 80.

<sup>210</sup> Telephone interview with Judge Ronald Reinstein (Ret.), *supra* note 18; Rosenberg, *supra* note 9.

<sup>211</sup> See *supra* 174–79 and accompanying text.

<sup>212</sup> I do not mean to say that academics should not influence policy. I am only pointing out that it is hard for academics to run against public opinion on such a hot-button topic, and therefore, the legislature's moves that erased FARE Probation seem to be predictable in hindsight.

<sup>213</sup> Albrecht, *supra* note 44, at 85–87.

<sup>214</sup> Turner & Greene, *supra* note 18, at 4, 7.

<sup>215</sup> Strafgesetzbuch [StGB] [Penal Code] §§ 40, 47, [https://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p0216](https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0216) (Ger.).

drug possession and some drug trafficking charges, low-level theft and fraud, and driving under the influence.<sup>216</sup>

In contrast, FARE Probation sought to provide judges with an *optional* replacement for traditional supervised probation, all while complying with a complex system of mandatory fines, restitution, fees, and surcharges.<sup>217</sup> Because planners were creating a replacement for supervised probation, they explicitly excluded any offender who would be sentenced to incarceration.<sup>218</sup> The sorts of crimes covered by FARE Probation—such as theft and drug charges—are similar to those covered by day fines in Germany.<sup>219</sup>

Policymakers in both Arizona and Germany were concerned that day fines would result in excessively low penalties, although for slightly different reasons. In Arizona, planners were asked to maintain the revenue from fines during the implementation of FARE Probation.<sup>220</sup> This was likely because of budgetary concerns. In 1992, just after FARE Probation was implemented, Arizona voters passed Proposition 108, a constitutional amendment requiring a two-thirds majority in both state houses for any tax increases to pass.<sup>221</sup> This led to tax cuts passing with greater ease and frequency than tax increases, causing the state to rely on revenue from the criminal justice system.<sup>222</sup> It is likely that increasingly tight state budgets motivated the directive that FARE Probation not reduce the revenue from fines. In Germany, policymakers feared that day fines would lead to extremely low fines for poor and underemployed defendants.<sup>223</sup> Meager fines would be an ineffective deterrent, they reasoned, and judges would resort to prison sentences instead.<sup>224</sup> Germany was still experiencing close to full employment at the time, and lawmakers believed that unemployment was a result of poor morals and should not be rewarded with lower fines.<sup>225</sup> In any event, different concerns led to the same

---

<sup>216</sup> Nagrecha, *supra* note 14, at 71.

<sup>217</sup> See Hillsman, *supra* note 145, at 49, 51; GREENE, *supra* note 8, at 26–27.

<sup>218</sup> It seems that the planners did hope that FARE Probation would eventually reduce incarceration rates once it was shown to be effective. See Leonard, *supra* note 9.

<sup>219</sup> See *supra* 167–68 and accompanying text.

<sup>220</sup> Turner & Greene, *supra* note 18, at 7.

<sup>221</sup> *Supermajority Requirement for Raising Revenues Jeopardizes Arizona's Economic Future*, *supra* note 184.

<sup>222</sup> Because of Proposition 108, tax cuts have become more common than tax increases, squeezing the state budget. See *id.* A common consequence of tax cuts is an increase in state reliance on fines and fees to fund the criminal justice system. See also Jenice R. Robinson, *Punitive Fines and Fees Are an Invisible Cost of State Tax Cuts*, INST. TAX & ECON. POL'Y (Apr. 4, 2022), <https://itep.org/punitive-fines-and-fees-are-an-invisible-cost-of-state-tax-cuts/>. Arizona is no exception to this trend. See Megan Cassidy, *How a \$95 Phoenix Traffic Ticket Becomes \$243*, AZCENTRAL (Jan. 27, 2016), <https://www.azcentral.com/story/news/local/phoenix/2016/01/27/how-95-phoenix-traffic-ticket-becomes-243/79375008/>. It is not clear from the documents who exactly issued the directive that FARE Probation should not reduce revenue.

<sup>223</sup> Friedman, *supra* note 55, at 287; Nagrecha, *supra* note 14, at 29.

<sup>224</sup> Wilde, *supra* note 17, at 354–56.

<sup>225</sup> *Id.* at 355.

essential outcome: day fines would not be lower, at least on average, than the tariff fines they replaced.<sup>226</sup>

Germany and Maricopa County sought to maintain pre-day fine penalty amounts in different ways. Because FARE Probation planners were asked to preserve income from fines during the planning process, this requirement was baked into the design of the program.<sup>227</sup> FARE Probation offered detailed and precise tables for daily income deductions based on number of dependents and relatively narrow ranges of units for each offense.<sup>228</sup> This design tailored fines to individual circumstances while preserving the *average* penalty assessed per defendant.<sup>229</sup> German law, on the other hand, was modified at the last minute to preserve pre-day fine penalties by creating a preference for using the net daily income before deductions and allowing judges the discretion to continue imposing the sorts of fines they were accustomed to.<sup>230</sup> This last-minute change created a contradiction: the law allows judges the discretion to set daily income low as one euro, opening the door to extremely low fines for defendants on welfare who would have virtually no disposable income after subsistence expenses—yet the law expresses a preference for using net income, which is virtually guaranteed to be higher.<sup>231</sup>

Due process requirements also created major procedural differences between FARE Probation and German day fines. In Germany, summary proceedings allow prosecutors to calculate day fines based on information collected by the police at the time of arrest.<sup>232</sup> While German defendants are informed of their right to counsel in their initial interview by the police, German law provides no right for counsel to be present during this questioning, nor are defendants warned that this information will be used to sentence them.<sup>233</sup> Once prosecutors calculate the daily rate using information collected by the police—or estimate the rate if such information is unavailable—they send their recommendations to the judge.<sup>234</sup> Judges may then approve the fine and mail it to the defendant, and can enforce it if

---

<sup>226</sup> Nagrecha, *supra* note 14, at 86 (noting that day fines in Germany gravitate to their pre-reform amounts); Turner & Greene, *supra* note 18, at 7 (describing an explicit goal for planners of FARE Probation to retain the average pre-day fine amount).

<sup>227</sup> Turner & Greene, *supra* note 18, at 7.

<sup>228</sup> PILCHER & WINDUST, *supra* note 25, at tbls.1, 2.

<sup>229</sup> Turner & Greene, *supra* note 18, at 7.

<sup>230</sup> Wilde, *supra* note 17, at 356.

<sup>231</sup> *Id.*

<sup>232</sup> Police collect basic biographical information on a standard form, including occupation, address, and income. Nagrecha, *supra* note 14, at 11.

<sup>233</sup> *Id.*; Dr. Christian Fahl, *The Guarantee of Defence Counsel and the Exclusionary Rules on Evidence in Criminal Proceedings in Germany*, 8 GER. L.J. 1053, 1055, 1059 (2007).

<sup>234</sup> Police will provide defendants with a form to fill out which asks for their “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.” About 70% of the time, this information is used by the prosecutor in summary proceedings. Nagrecha, *supra* note 14, at 11.



the defendant does not respond within two weeks.<sup>235</sup> Alternatively, they may reject the recommendation and order a trial.<sup>236</sup>

Neither Arizona nor U.S. federal law allows this sort of abbreviated process. At the federal level, procedural protections go beyond simply reminding defendants of their right to counsel. To protect the defendant's Fifth and Sixth Amendment rights, the Supreme Court has affirmatively required police—including state actors—to stop an interview immediately if the defendant requests an attorney.<sup>237</sup> The Arizona Rules of Criminal Procedure require defendants to plead guilty in-person rather than by mail, by silence, or through an attorney.<sup>238</sup> Nor can felony defendants be sentenced without a hearing where they have the right to be heard and represented by counsel.<sup>239</sup> These requirements appear in the rules of procedure, but they have Constitutional roots in the Sixth Amendment right to confront witnesses and the due process clauses of the Fifth and Fourteenth Amendments.<sup>240</sup> Statutory and constitutional protections thus required FARE Probation defendants to enter a guilty plea in open court or be found guilty in open court before the probation department could conduct an investigation and recommend a day fine.<sup>241</sup> Defendants were also required to be sentenced in open court where they could exercise their right to be heard.<sup>242</sup> These procedural differences likely increased the administrative burden on Maricopa County Superior Court.

Once the fine was imposed, both jurisdictions used a broadly similar collections process. Germany and Maricopa County both allowed payment over time, although in Germany the default is a lump sum payment with installments only available if immediate full payment would be unreasonable based on the defendant's circumstances.<sup>243</sup> In practice, it seems that German day fines were almost always collected over time.<sup>244</sup> Both Germany and Maricopa County used repeated reminders and delinquency notices to encourage payment.<sup>245</sup> Collections personnel also had discretion: in Maricopa County, probation officers could issue an extension if they believed the delinquent defendant was making a good faith effort.<sup>246</sup> Similarly, in Germany, clerks responsible for collections may reduce the fine amount or issue an extension if the defendant has not yet paid, although it is

---

<sup>235</sup> Nagrecha, *supra* note 14, at 11; Strafprozessordnung [StPO] [Criminal Procedure Code], §§ 407, 410, <https://www.gesetze-im-internet.de/stpo/index.html> (Ger.).

<sup>236</sup> Nagrecha, *supra* note 14, at 11; Strafprozessordnung [StPO] [Criminal Procedure Code], §§ 407, 410, <https://www.gesetze-im-internet.de/stpo/index.html> (Ger.).

<sup>237</sup> *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966).

<sup>238</sup> *See* Ariz. R. Crim. P. 9.1; Fed. R. Crim. P. 43; *see, e.g., Diaz v. U.S.*, 223 U.S. 442, 455 (1912).

<sup>239</sup> *See* *Diaz*, 223 U.S. at 455–56.

<sup>240</sup> *See, e.g., Diaz*, 223 U.S. at 455.

<sup>241</sup> Turner & Greene, *supra* note 18, at 7–8.

<sup>242</sup> *See supra* notes 231, 233 and accompanying text.

<sup>243</sup> Albrecht, *supra* note 44, at 100; Turner & Greene, *supra* note 18, at 8.

<sup>244</sup> Albrecht, *supra* note 44, at 100.

<sup>245</sup> *Id.*; Turner & Greene, *supra* note 18, at 8.

<sup>246</sup> PILCHER & WINDUST, *supra* note 25, at 4.

unclear if they are required to do any investigation into the willfulness of nonpayment.<sup>247</sup>

At this point, collections processes diverge. In Germany, after an initial official warning, the senior judicial officer in charge of enforcing the fine may immediately begin the process of seizing personal and real property if a defendant fails to pay without any determination of willfulness—although in practice, this is used in less than 5% of cases.<sup>248</sup> In Arizona, FARE Probation policy did not include asset seizure as an enforcement option, although state law allowed it after 1995.<sup>249</sup> In any event, procedural protections in Arizona for asset seizure are greater than those in Germany. Arizona law requires a hearing where the defendant must show cause for nonpayment before the state can begin the process of seizing property or garnishing wages.<sup>250</sup> Conversely, in Germany, the senior judicial officer (essentially a public prosecutor responsible for enforcing fines) can begin the process unilaterally without a hearing before the sentencing judge.<sup>251</sup>

Both Germany and Maricopa County also threaten delinquent defendants with prison for nonpayment—but again, with different procedural protections for defendants. German senior judicial officers may move unilaterally and without court oversight to convert the fine to imprisonment if nonpayment appears to be willful and if asset seizure or wage garnishment has failed or would be futile.<sup>252</sup> In Germany, this conversion is allowed without input from the judge because it is expressly authorized by statute—and, at any rate, the conversion is included in the judge’s original sentencing order.<sup>253</sup> In the United States, the due process clause of the Fourteenth Amendment requires judges to hold a hearing to determine whether nonpayment is willful before a defendant can have their fine converted into incarceration.<sup>254</sup> In fact, it is possible that automatic conversion from a fine to imprisonment without a hearing would be unconstitutional in the United States under *Bearden v. Georgia*.<sup>255</sup> At any rate, Maricopa County did not have clear

---

<sup>247</sup> Friedman, *supra* note 55, at 284–85 n.63.

<sup>248</sup> Albrecht, *supra* note 44, at 100.

<sup>249</sup> PILCHER & WINDUST, *supra* note 25, at 4–5; Ariz. Rev. Stat. Ann. § 13-812 (allowing garnishment of wages and seizing funds and personal property of a defendant who does not pay after a hearing).

<sup>250</sup> § 13-812.

<sup>251</sup> Compare Rechtspflegergesetz [RPflG] [Act on Senior Judicial Officers] § 31(1), [http://www.gesetze-im-internet.de/englisch\\_rpflg/index.html](http://www.gesetze-im-internet.de/englisch_rpflg/index.html) (Ger.), with Ariz. Rev. Stat. Ann. § 13-812 (allowing garnishment of wages and seizing funds and personal property of a defendant who does not pay after a hearing).

<sup>252</sup> Strafprozeßordnung [StPo] [Code of Criminal Procedure] §§ 459c, 459e, [https://www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html#p2792](https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p2792) (Ger.).

<sup>253</sup> Strafgesetzbuch [StGB] [Penal Code] § 43, [https://www.gesetze-im-internet.de/stgb/\\_43.html](https://www.gesetze-im-internet.de/stgb/_43.html) (Ger.); Albrecht, *supra* note 44, at 101.

<sup>254</sup> *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983).

<sup>255</sup> See *id.* at 672 (holding that a hearing as to the reasons for nonpayment and a finding that the defendant was responsible for nonpayment was required before a person could be imprisoned for nonpayment of a fine).

guidelines on converting day fines to incarceration, leaving resentencing to the discretion of the presiding judge.<sup>256</sup>

### 3. Different Designs, Different Outcomes

These differing designs and constraints created different outcomes in Maricopa and Germany. In Germany, where legislators passed sweeping national reform aimed at reducing the incarceration rate and widening the scope of fines, day fines have been largely successful and resilient—although they have been excessively punitive to the poor by many accounts.<sup>257</sup> In Maricopa County, day fines were successful within the limited scope of the experiment, but they were not sustainable and failed to expand in scope and use.

German day fines are characterized by their intended use in place of short-term prison sentences. This preference has produced a unique situation: unlike almost any other European country using day fines, Germany applies them to over 80% of criminal defendants.<sup>258</sup> This rate has remained steady since 1975.<sup>259</sup> Because of this, day fines have been extremely successful at reducing the incarceration rate, which fell from 96 per 100,000 in 1968 to 76 per 100,000 in 1970.<sup>260</sup> It has remained relatively low since, peaking at 96 per 100,000 again in 2004 and then declining to 72 per 100,000 in 2020.<sup>261</sup> The basic goal of day fines has not changed over time, either.<sup>262</sup> Reforms have focused on expanding the usefulness of day fines: in 2009, the legislature raised the maximum daily rate from 5,000 euros to 30,000 euros to ensure that highly-paid executives charged with white-collar crimes arising out of the Mannesmann and Vodafone mergers would be sufficiently punished.<sup>263</sup> In 1980, community service was added as an alternative to incarceration for nonpayment.<sup>264</sup>

In contrast, the goals of day fines in Maricopa County reflect the general American interest, both past and present, in utilizing day fines as a way to fix the many ills of our regressive criminal justice system.<sup>265</sup> As a result, there was no observable decrease in incarceration rates in Maricopa County, even though planners seemed to hope that, with the growth of the program, this might occur.<sup>266</sup> The program was designed to exclude any defendant who would be eligible for a

---

<sup>256</sup> PILCHER & WINDUST, *supra* note 25, at 4–5.

<sup>257</sup> *See supra* note 116 and accompanying text.

<sup>258</sup> Nagrecha, *supra* note 14, at 70.

<sup>259</sup> *Id.*

<sup>260</sup> Albrecht, *supra* note 44, at 86.

<sup>261</sup> Germany, WORLD PRISON BRIEF, <https://www.prisonstudies.org/country/germany> (last visited Dec. 23, 2022).

<sup>262</sup> *See* Nagrecha, *supra* note 14, at 32.

<sup>263</sup> Albrecht, *supra* note 44, at 95.

<sup>264</sup> *Id.* at 101.

<sup>265</sup> *See, e.g.,* Rosenberg, *supra* note 9; Walsh, *supra* note 26; Kantorowicz-Reznichenko, *supra* note 13, at 333–35.

<sup>266</sup> Leonard, *supra* note 9; FAMILIES AGAINST MANDATORY MINIMUMS, *supra* note 204, at 14.

prison sentence; further, it covered a small fraction of defendants in the county and ran during a period of sustained growth in Arizona's prison population.<sup>267</sup>

In Arizona, planners pursued their goal by designing a replacement for supervised probation that would account for the defendant's financial condition without lowering collections or the total fine assessed and without increasing recidivism.<sup>268</sup> Because FARE probation planners were able to construct testing and comparison groups, creating a quasi-experimental design, the data collected is more credible than almost any other information collected about day fine programs.<sup>269</sup> Despite similar monthly income and similar offenses, defendants assigned to FARE Probation were more likely to make payments, paid more of their total fine, and were more likely to pay in full than defendants on standard probation.<sup>270</sup> Most strikingly, 21.4 % of defendants in FARE probation had paid in full after three months, compared to 0.7% of the defendants on standard probation.<sup>271</sup> The results were also positive from a victims' rights perspective; defendants who were assessed day fines paid more of their restitution.<sup>272</sup> In total, 89% of those sentenced to day fines paid in full.<sup>273</sup>

The strength of these results supports the idea that day fines improve outcomes because they create penalties that feel more subjectively fair and just to the defendants, with an achievable goal of paying the fine in full.<sup>274</sup> After 12 months, more than 50% of defendants sentenced to FARE probation had completed the terms of their probation, allowing them to exit the probation system entirely—compared to just 10% of the comparison group.<sup>275</sup> Those sentenced to day fines incurred probation violations less than 10% of the time, compared to over 20% for those in the comparison group.<sup>276</sup>

Comparison data for recidivism and collections in Germany is sparse. One study found that collections did not increase after day fines were implemented in the 1970s.<sup>277</sup> About 77% to 80% of defendants in Germany paid in full, which is

---

<sup>267</sup> Turner & Greene, *supra* note 18, at 4, 19; FAMILIES AGAINST MANDATORY MINIMUMS, *supra* note 204, at 14.

<sup>268</sup> Turner & Greene, *supra* note 18, at 4.

<sup>269</sup> *Id.* at 9.

<sup>270</sup> *Id.* at 13–14.

<sup>271</sup> *Id.* at 14.

<sup>272</sup> Turner & Greene, *supra* note 18, at 14.

<sup>273</sup> Kantorowicz-Reznichenko, *supra* note 13, at 346.

<sup>274</sup> Colgan, *supra* note 10, at 65–66.

<sup>275</sup> Turner & Greene, *supra* note 18, at 13.

<sup>276</sup> *Id.* at 15; Mike Cimino, Adult Probation Chief for Maricopa County Superior Court, pointed out that current probation best practices reflect the now-accepted fact that close supervision of low-risk defendants leads to more violations and worse outcomes. In his view, FARE probation's success with regard to recidivism is the result of lighter supervision, rather than the method of assessing fines. Telephone interview with Mike Cimino, *supra* note 143; Viglione & Taxman, *supra* note 188, at 1811.

<sup>277</sup> Albrecht, *supra* note 44, at 107.

less than the 89% in Arizona.<sup>278</sup> Recidivism held steady before, during, and after day fines were implemented.<sup>279</sup>

In sum, day fines in Arizona, like those in Germany, achieved what they were designed to: a replacement for supervised probation and short-term prison sentences, respectively. Based on these outcomes, it would be a mistake to think that day fines are the only way to get certain results or that they reliably produce certain outcomes. Rather, like any reform, the goal rather than the means is most likely to define the effects.

#### **D. Lessons for Day Fine Advocates**

Interest in day fines is rising again, and with good reason.<sup>280</sup> American jurisdictions are over-reliant on incarceration, and the prevalence of fines and fees to pay for the administration of justice puts ever-increasing pressure on the poor.<sup>281</sup> However, it is important not to repeat the mistakes of the past. This comparison of the resilient, long-running German system with the experiment in Maricopa County offers some guidelines for future reform. For new day fine programs to be successful, they must originate from the political process—the public, the legislature, or both. They must also deal with the underlying system of mandatory minimum fines and fees; otherwise, they will be constrained by the existing statutory framework and be of limited help. Finally, it is important for reformers to align on what exactly they expect day fines to do. Day fines can do many things: keep people out of jail, reduce the impact of fines on the poor, and improve collections. But it is too much to expect them to solve all our problems.

First, reform should come through the political process—otherwise it risks being snuffed out. One of the key reasons that day fines did not take hold in Arizona—but did so in Germany—is that they were implemented by academics and technocrats while essentially running counter to the existing state policy on crime.<sup>282</sup> If day fines are to succeed, they must be the result of public pressure, or at least win the support of legislators who believe the concept can be sold to constituents.<sup>283</sup> This could prove difficult: experience suggests that, for whatever reason, anglophone countries have difficulty with the concept of fairness that day fines represent.<sup>284</sup>

---

<sup>278</sup> Albrecht, *supra* note 44, at 107 n.70; Hillsman, *supra* note 145, at 68.

<sup>279</sup> Albrecht, *supra* note 44, at 111.

<sup>280</sup> See Walsh, *supra* note 26.

<sup>281</sup> *Id.*

<sup>282</sup> See discussion *supra* Part II.

<sup>283</sup> *Id.*

<sup>284</sup> This topic is beyond the scope of this note, but it is worth exploring. A local leader questioned the fairness of day fines in comparison to tariff fines during a debate on day fines in New York: “I’m just curious as to why would anybody want to increase [fines]? It’s almost like a penalty if you’re doing well. If the reality is, this is what I did, this [tariff fine] is what I should pay. It’s almost like . . . the intention is that we’re trying to raise more funds.”

Second, it is probably better to offer simple guidelines to avoid judges adjusting fines up and down at the extremes—while maintaining flexibility for system actors. Day fines in Arizona were successful in achieving their goal of more income-sensitive fines in part because they used detailed tables that included set deductions for dependents.<sup>285</sup> This also increased fairness and transparency.<sup>286</sup> However, judges should be given discretion to vary these amounts. Discretion ensures that judges will fill their traditional role in the justice system and, based on the German experience, may increase the likelihood that judges and prosecutors will buy-in to the system rather than resist it.<sup>287</sup>

Third, if we do not deal with the underlying cause of excessive fines in Arizona and other U.S. jurisdictions, new day fine programs (and many other reforms) will likely be stillborn. Day fines in Maricopa County were, by the planners' own goals, successful.<sup>288</sup> They even appeared to increase revenue for the county.<sup>289</sup> However, Arizona was committed to increasing fines and fees to pay for the justice system.<sup>290</sup> While the system that allowed FARE probation to account for fines and fees was effective and should be replicated, we cannot forget that those same fines and fees were instrumental in ending the program.<sup>291</sup> Day fines cannot survive if they exist in a system that is set on extracting more and more money from defendants.

Fourth and finally, it is important to select limited goals for day fines, rather than hoping that they will solve a broad array of issues. Much of the more recent writing on day fines touts their many benefits.<sup>292</sup> This is not to say that they cannot achieve these ends—rather, that we are likely to be disappointed if we expect day fines to achieve them all simultaneously. Day fines in Germany reduced the incarceration rate, but they were not effective at reducing fines for low-income defendants.<sup>293</sup> In Maricopa County, day fines were able to cut the fine to fit the defendant and increase collections, but they did not reduce the incarceration rate.<sup>294</sup> Advocates should be careful not to over-promise the benefits of day fines and should instead align around a politically viable goal.

---

*Establishing a Day-Fines Pilot Program in the Office of Administrative Trials and Hearings*, N.Y. CITY COUNCIL (Dec. 11, 2019), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4265946&GUID=CB87BD3F-CC74-4FD0-ACC4-5B0217281D1A>.

<sup>285</sup> See discussion *supra* Part III.C.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> See *supra* notes 157–60 and accompanying text.

<sup>289</sup> See *supra* notes 270–73 and accompanying text.

<sup>290</sup> See *supra* notes 180–84 and accompanying text.

<sup>291</sup> See *supra* notes 175–189 and accompanying text.

<sup>292</sup> See, e.g., Leonard, *supra* note 9, Walsh, *supra* note 26.

<sup>293</sup> Nagrecha, *supra* note 14, at 32.

<sup>294</sup> Turner & Greene, *supra* note 18, at 14; Leonard, *supra* note 9; FAMILIES AGAINST MANDATORY MINIMUMS, *supra* note 204, at 14.

## IV. CONCLUSION

What would have happened to the man that stole my wife's bike if Arizona had expanded day fines statewide instead of letting them wither on the vine? Day fines might have improved his outlook. He may have felt more engaged by the judicial process, and he may have felt he was treated more fairly.<sup>295</sup> His total financial penalty could well have been less. Perhaps he never would have stolen the bike in the first place—after all, the theft was just one item on a long criminal record, and evidence suggests that day fines might reduce recidivism.<sup>296</sup> But he would still have been subjected to a judicial system that incarcerates people at an alarming rate, and incarceration is extremely criminogenic.<sup>297</sup> It is extremely likely that he would have fared much better in Germany, where day fines are just a means to a far more effective criminal justice policy end: avoiding short term prison sentences.<sup>298</sup> The policy of avoiding short prison sentences is in large part responsible for the positive outcomes in Germany.<sup>299</sup> Day fines alone cannot deliver the outcomes that activists hope for. Excessive optimism may be an American trait, a symptom of our “lively faith in the perfectibility of man.”<sup>300</sup> Or perhaps it is the simple attraction to a (relatively) quick fix. Make no mistake, day fines are likely more fair and financially beneficial for the state.<sup>301</sup> But they probably will not fix the deep-seated issues in the criminal justice system.

---

<sup>295</sup> Colgan, *supra* note 10, at 66–67.

<sup>296</sup> Turner & Greene, *supra* note 18, at 15.

<sup>297</sup> See, e.g., Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, CRIM. J. & CRIM.: FAC. PUBL'NS & OTHER WORKS 1 (2017), [https://ecommons.luc.edu/cgi/viewcontent.cgi?article=1027&context=criminaljustice\\_facpubs](https://ecommons.luc.edu/cgi/viewcontent.cgi?article=1027&context=criminaljustice_facpubs).

<sup>298</sup> See discussion *supra* Part III.A.

<sup>299</sup> Albrecht, *supra* note 44, at 86.

<sup>300</sup> Jared Keller, *What Makes Americans So Optimistic*, ATLANTIC (Mar. 25, 2015), <https://www.theatlantic.com/politics/archive/2015/03/the-american-ethic-and-the-spirit-of-optimism/388538/>.

<sup>301</sup> Colgan, *supra* note 10, at 57–58.