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## Criminal-Legal System Actors' Practices and Views on Day Fines<sup>1</sup>

To date, no empirical studies have examined how judges and prosecutors set day fine amounts in the German criminal-legal system. Day fines provide a systematic way to set monetary sanctions with the intended result of more equality among people with different incomes; this is because the fine is based on the nature of the offense and the financial circumstances of the person being sentenced. To fill this research gap, we conducted focus groups with judges and prosecutors to learn their practices for sentencing day fines, including what financial information they have about people and how they calculate the fine. We also asked interviewees about their views of the system's fairness. In this paper we discuss our findings about how judges and prosecutors set the amount of the daily unit, that is, the unit calculated to tailor fines to people's financial circumstance. We show that judges and prosecutors frequently lack information about people's financial circumstances and instead estimate the daily rate. These estimates vary by person and place, as does the way decision makers account for people's circumstances via deductions from their gross income to arrive at a daily rate. These inconsistencies result in daily rates that do not reflect people's financial circumstances and have a profound effect on those who are being fined. We then focus on one explanation as to why judges fail to exercise discretion to set fines that truly account for people's circumstances: We found that judges and prosecutors fail to grasp the implications of poverty and therefore set fines that are too high. In our conclusion, we raise questions about the implications of this research for reform in Germany and for guiding U.S. jurisdictions about day fines as a possible solution for their issues of high fees and fines.

Keywords: day fines; daily units; daily rate; sentencing; decision-making; inequality

### Festsetzung von Geldstrafen – Zum Umgang mit dem Tagessatzsystem in der Praxis

Bislang gibt es keine empirische Studie darüber, wie genau Richter\*innen und Staatsanwält\*innen die Tagessätze für Geldstrafen im deutschen Rechtssystem berechnen. Tagessätze sind ein System der Geldstrafenberechnung, die mehr Gleichheit für Menschen mit unterschiedlichen Einkommen erzielen soll, weil sie die wirtschaftlichen Umstände des Einzelnen in den Blick nimmt. Wir haben die Praxis der Geldstrafenzumessung und die Einschätzung der Akteur\*innen bezüglich der Gerechtigkeit des Systems in Gruppendiskussionen erfragt. Dieser Aufsatz erläutert, wie Richter\*innen und Staatsanwält\*innen die Tagessatzhöhe, deren Betrag sich an der finanziellen Leistungsfähigkeit der Verurteilten orientiert, festlegen. Den Akteur\*innen fehlt häufig jegliche Information über die Umstände der Angeklagten und so schätzen sie. Diese Schätzungen variieren ebenso nach Ort und Person wie die gemachten Abzüge. Das führt zu erheblichen Inkonsistenzen für Verurteilte, da die Tagessatzhöhen so nicht ihre finanzielle Lage widerspiegeln. Wir fragen anschließend, warum es Richter\*innen und Staatsanwält\*innen schwer fällt, die finanziellen Umstände der Angeklagten einzuschätzen. Sie scheinen Schwierigkeiten mit der Erfassung von Armut zu haben und setzen daher die Tagessätze zu hoch an. In unserer Schlussfolgerung fragen wir, was die Ergebnisse für Reformen bedeuten und für Überlegungen, das Tagessatzsystem als Ansatzpunkt für das US-amerikanische System zu sehen, die dortigen hohen Geldstrafen und Gebühren zu senken.

Schlagwörter: Geldstrafe; Tagessatzsystem; Tagessatzhöhe; Strafzumessung; Ungleichheit

<sup>1</sup> This paper presents some of the core findings from the authors' research. A full discussion of this project and its findings will be provided in a forthcoming report from the Criminal Justice Policy Program at Harvard Law School. See Mitali Nagrecha, *Day Fines in Germany: Considerations for Implementation in the U.S.* (forthcoming 2020, Criminal Justice Policy Program, Harvard Law School).

## 1. Introduction

Over the past year, the Criminal Justice Policy Program (CJPP) at Harvard Law School in the United States and the Institute of Criminology at the University of Cologne, Germany (Cologne), researched how judges and prosecutors sentence day fines in Germany. This essay presents the first descriptive findings of the project, “Calculating the Fine: Front-End Legal Practice.”<sup>2</sup> To date, there has been little research on fines<sup>3</sup> as a criminal sanction (see Harris, 2016; Wilde, 2016; O'Malley 2009; Young, 1987; Bottoms, 1983). Even less empirical research has examined the everyday decision-making processes of judges and prosecutors in setting fines, particularly day fines. Our project fills this gap, and we present here preliminary results.

In jurisdictions that use day fines, criminal fines are set based on both the nature of the offense and the individual's financial circumstances. The total fine amount is the product of two figures: (1) the number of “units” or “days” assessed by the court, based on a fact-specific inquiry about the nature of the offense and the person being sentenced; and (2) the “daily rate,” or the amount of an individual's income that must be paid per “unit” or “day” assessed. More than 30 countries in Latin America and Europe use the day fines model to assess fines in criminal cases. In the United States, criminal fines do not follow this model. Rather, fines are typically “flat”: the criminal code provides a fixed fine, or a fixed-fine range, for each offense, and the ability to pay is not always considered in setting the fine amount (Brett & Nagrecha, 2019). Proponents of day fines argue that such fines are fairer and more equitable than flat fines, as the fines assessed are proportionate to a person's financial circumstances.

In recent years, U.S. policymakers and researchers have become increasingly interested in day fines as a policy reform to address the problem of excessive and arbitrary criminal fines and fees. In addition to setting flat fines that do not account for people's ability to pay, courts in the United States frequently impose other monetary sanctions that are not tailored to individual financial circumstances.<sup>4</sup> Even in the rare jurisdictions that require judges to consider a person's financial situation when imposing monetary sanctions, judges have wide discretion in setting amounts. Judges also vary greatly in how and whether they make adjustments to the amounts owed based on a person's financial circumstances. As advocacy in recent years has shown, when individuals are inevitably unable to pay disproportionate monetary sanctions, they face further entrapment in criminal-legal systems, including additional monetary sanctions, court hearings, warrants, incarceration, and driver's license revocation (Brett & Nagrecha, 2019). These practices often target low-income communities and disproportionately affect people of color (Brett & Nagrecha, 2019). The hope in the United States is that day fines

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<sup>2</sup> The University of Cologne received no third-party funding. CJPP's research has been supported by the John and Laura Arnold Foundation.

<sup>3</sup> Fines are typically used as a sanction for minor offenses, often labeled as misdemeanors. German law makes a purely formal distinction between misdemeanors and felonies on the basis of the legal consequence (§ 12 Paragraph 1, 2 German Criminal Code). Felonies are unlawful acts punishable by a minimum sentence of one year's imprisonment; misdemeanors are punishable by less than a year of imprisonment, or by a fine.

<sup>4</sup> Such sanctions include fees, surcharges, and costs. Although these are labeled as something other than fines, people experience them as punitive sanctions, just as they experience a fine. And the consequences of nonpayment are typically the same as if they did not pay their fines. Fees, surcharges, and costs might be assigned to cover the costs of their court-appointed attorney, nights they are required to spend in jail, various court functions, as well as surcharges to pay for other government functions. In any given case, people may face dozens of monetary sanctions totaling in hundreds — if not thousands — of dollars in debt (Brett & Nagrecha, 2019).

would result in people being able to pay their monetary sanctions and avoid additional punishment. For that reason, advocates<sup>5</sup> and policymakers have expressed interest in day fines as a model,<sup>6</sup> and scholars have turned their attention to assessing how day fines may fit into U.S. courts practices or have mentioned them as a solution (Colgan, 2019; Colgan, 2017; Martin, 2018; Harris, 2018).

Considering people's financial circumstances and tailoring financial sanctions accordingly, as required by day fines systems, therefore seems like a reasonable solution. Yet it is unclear whether and to what degree day fines actually reduce the disproportionate impact of fines on lower-income people. In Germany, those who are able to pay their fines do not face additional consequences. About 75 % of people pay these fines, some through payment plans (Bögelein, 2016, p. 87).<sup>7</sup> But data show that approximately 4,500 people are imprisoned on any given day for "default of payment," meaning nonpayment of fines (Statistisches Bundesamt, 2019). Research shows that the people who are incarcerated for default of payment usually have lower incomes, have often been unemployed for long periods, receive social benefits, have experienced recent homelessness, and/or face mental health or other health problems, including addiction (see below, cf. Lobitz & Wirth, 2018; Bögelein, Ernst & Neubacher, 2014; Müller-Foti et al., 2007; Dubielczyk, 2002; Dolde, 1999; Villmow, 1998; Albrecht, 1980). Despite these findings, limited empirical studies have examined the causes of these disparate impacts, including whether front-end sentencing practices may contribute to these back-end outcomes. As researchers from different criminal-legal systems (the United States and Germany), our team approached this project with different yet complementary research motivations. The Harvard team wanted to understand how, if at all, day fines may help address the problems of high fees and fines in the United States, and what lessons Germany may provide for how courts should define and assess ability to pay upfront in every case. The Cologne team wanted to research whether front-end sentencing practices in Germany contributed to back-end results. Although some people may still be unable to pay a fine that is adjusted downward to account for their financial circumstances, it may also be that judges' and prosecutors' policies and practices are not accurately capturing each individual's circumstances, and are therefore resulting in fines that are too high. Both project partners shared an interest in how decision makers in Germany consider the personal and financial circumstances of each person (cf. section 40, German Criminal Code) — if at all — to assure that day fines are calculated individually. To do this, we developed a study that closely examined the decisions of judges and prosecutors, including how they implement day fines on a daily basis in their jurisdictions and their perspectives on day fines' functionality and purpose. To our knowledge, this is the first empirical study that examines system actors' implementation of day fines. This research fills an important gap because as a leading scholar on German day fines has explained:

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<sup>5</sup> See e. g., Criminal Justice Solutions: Model State Legislation, The Brennan Center for Justice (2018) (proposing day fines), available at <https://www.brennancenter.org/our-work/policy-solutions/criminal-justice-solutions-model-state-legislation>.

<sup>6</sup> See e. g., New York City Council proposed bill "Establishing a day fines pilot program in the office of administrative trials and hearings." Details available at <https://legistar.council.nyc.gov/MeetingDetail.aspx?ID=742985&GUID=CFFF378E-F0D3-44E9-81BD-1BCE80FCC873&Options=info&Search=> (December 17, 2019).

<sup>7</sup> A study based on analysis of case files and surveys across Germany found that 77 % of fines were settled by payment and 8.5 % through community service. 14 % resulted in imprisonment for nonpayment (Jehle, Block & Feuerhelm, 1990).

Determination “of the amount of a daily rate in accordance with the economic circumstances is from the outset so extremely obvious and convincing. Its success depends, crucially, on how the legislator implements this daily rate system and how it is put into practice.” (Grebing, 1976, emphasis added)

In this paper, we discuss how in each case judges and prosecutors decide the daily rate — the component of the day fines calculation that accounts for each person’s financial and personal circumstances. We examined how both judges *and* prosecutors make these decisions because both of these actors can influence the amount imposed on a person, depending on the process used to resolve the case.<sup>8</sup>

Our interviews with 54 judges and prosecutors across Germany reveal that the day fine calculation is not as precise as its proponents would hope. In calculating the daily rate, judges and prosecutors often do not have any relevant information about a person’s financial circumstances, and they do not routinely carry out additional investigations. Instead, system actors tend to “estimate” the daily rate, and this often means that they set the daily rate at a default amount, unrelated to the person before them. For example, jurisdictions may have a practice to set the daily rate at 35 euros when they lack information. When judges and prosecutors base their determinations on information about people’s financial circumstances, they vary in how they make deductions from a person’s income to account for expenses. Some judges exercise their discretion to reduce the daily rate for people who receive public benefits, but others do not. Judges and prosecutors also differ in whether they reduce the daily rate for other expenses. These inconsistencies make a profound difference for people being fined — and overall, they result in daily rates unrelated to each person’s ability to pay. Confronted with these results, we focus in this essay on one explanation as to why judges fail to exercise discretion to set fines that truly account for people’s circumstances. Our interviews revealed that judges and prosecutors often fail to grasp or acknowledge the realities of poverty, and therefore set fines that are too high for many people to pay. In our conclusion, we raise questions about the implications of this research for reform in Germany and in guiding U.S. jurisdictions as to whether day fines may be a solution for their issues of high fees and fines.<sup>9</sup>

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<sup>8</sup> In the German day fines system, judges are technically the primary decision makers, in that they sign off on fine sentences. But prosecutors can recommend resolving a case by “penal order,” which is an expedited summary proceeding wherein day fines cases are adjudicated by mail, without an in-person trial. If prosecutors recommend resolution of the case through summary proceedings, they also recommend the number of units and amount per unit that a judge should impose, via a summary proceedings order. Judges review the order and must either agree to the prosecutors’ recommended sentence or set the case for trial. Under German law, judges cannot amend this order (section 408 German Criminal Procedure Code, StPO), and in practice, judges challenge the prosecutors’ recommendations only in exceptional circumstances. If a judge signs off, the penal order is mailed to the person and it becomes final and enforceable if they do not object within two weeks (§ 407, § 411 German Criminal Procedure Code, StPO). More than 70 % of fines are decided by “penal order” (cf. Bögelein, Ernst & Neubacher, 2014, p. 28).

<sup>9</sup> As noted earlier, CJPP was interested in day fines because of disproportionate fines and fees in the United States. The day fines system speaks to how U.S. courts may reform how they impose fines as sentences for an offense. Day fines should not be used to add fees or costs to people’s sentences. Still, some of the lessons from Germany’s experiences with upfront ability to pay are relevant to jurisdictions considering reform of the fees they impose.

## 2. Background: Individuals Who Do Not Pay in Germany Have Low Incomes and Face Other Challenges

The German system heavily relies on fines as punishment. Today, Germany has one of the lowest incarceration rates in Europe, and the vast majority of people involved in criminal cases in Germany are punished with day fines. In 2017, 84 % of all cases (approximately 552,000 cases) were sentenced to fines (Statistisches Bundesamt, 2018).<sup>10</sup>

Though Germany has a low incarceration rate on the front end, thousands of people are imprisoned for default of payment of fines. In 2003, the last year for which such data are available, 56,000 people were incarcerated for failure to pay (Bundesministerium des Innern & Bundesministerium der Justiz, 2006, p. 620). At any given time in 2018, approximately 10.5 % of people in prison in Germany were there for failure to pay fines (Statistisches Bundesamt 2019a). Because many people serve short jail sentences for failure to pay, the total number of people incarcerated per year is likely much higher.<sup>11</sup>

Research has shown that individuals incarcerated for failure to pay fines simply do not have the money to pay, and many are experiencing mental health and other life difficulties (Müller-Foti et al., 2007; Dubielczyk, 2002). One study found that, in 2017 in North Rhine-Westphalia (NRW), Germany's largest state, 77 % of people incarcerated for failure to pay had been unemployed in the period before their imprisonment, and half of them had been unemployed long term. 60 % had never had any vocational training or higher education. 16 % of people in the study did not have any sources of income and less than 15 % had incomes other than social welfare benefits (Lobitz & Wirth, 2018). A large percentage of individuals incarcerated for default of payment had original offenses that were "poverty offenses," or offenses that suggest that the behavior was linked to having a lack of resources to secure basic necessities. One study showed that of all the people incarcerated for default of payment, 36 % were originally convicted of theft and 24 % were convicted of fare evasion—two offenses that are usually tied to lack of wealth.<sup>12</sup> Another study in NRW showed that from 2010 to 2012, people convicted of fare evasion were most likely to be unable to pay fines, with one in seven eventually incarcerated for default of payment (Bögelein, Ernst & Neubacher, 2014, pp. 29 and 145).

## 3. Data & Method

We conducted this research from the end of 2018 through the end of 2019, with data collection from October 2018 through February 2019. During that period, we collected data in eight German jurisdictions within four states ('Bundesländer'). Though federal statutes govern day fines, research shows that each of Germany's states has different legal cultures, which affect outcomes for people who come before their courts (Grundies, 2018). Accordingly, we selected a diversity of states according to the following criteria: (a) the percentage of people imprisoned

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<sup>10</sup> In 1882, only 22 % of those convicted were fined. In the 1930s, that climbed to 70 %. During the Second World War the rate declined, but remained consistently above 50 %. Since the 1970s, the rate has to more than 80 % (cf. Heinz, 2014, pp. 70).

<sup>11</sup> A recent study in the German state of Mecklenburg-Western Pomerania found that from 2014 to 2017, approximately 40 % of all prison intakes involved people who failed to pay their day fines (Bögelein et al., in print). Another study showed that many people incarcerated for fine-default were homeless and did not have friends or family to support them (Dolde, 1999).

<sup>12</sup> The rest of the offenses were as follows: traffic offenses (13 %), fraud (12 %), violations of the law against drugs (9 %), bodily harm (8 %; the rest are others, see Lobitz & Wirth, 2018).

for failure to pay; (b) punitiveness of sentencing practices; (c) disparities within the state in sentence severity; and (d) state size. We arrived at the following sample:<sup>13</sup>

*Table 1.* Sampling Criteria – Selection of Jurisdictions

	<b>(a) Rate of imprisonment for Default of Payment 2017 (German average: 10.6 %)</b>	<b>(b) Sentencing Practice</b>	<b>(c) Sentencing Disparities Within State</b>	<b>(d) Size of State</b>
<b>State A</b>	Average (9.7 %)	strict	different	large state
<b>State B</b>	below average (8.4 %)	strict-mixed	similar	middle-large
<b>State C</b>	average (10.1 %)	mixed	similar	large state
<b>State D</b>	well above average (13.5 %)	mixed	similar	smaller state

For the first criterion, incarceration rate for default of payment, we selected two states with close-to-average incarceration rates, one with an above-average rate, and one with a below-average rate. For the second criterion, sentencing practice, we used Grundies's (2018) findings and selected one "strict" state (a state with higher than average sentence lengths), one that is a strict/mixed state (more strict than lenient), and two that are mixed. For the third criterion, sentencing disparities within a state, we wanted to select two jurisdictions within each state for our focus group discussions. In selecting jurisdictions to focus on, we considered the punitiveness of different judicial districts within the selected states. Volker Grundies from the Max-Planck-Institute, Freiburg, prepared in-depth analysis of the data he had used in his publication mentioned above (Grundies, 2018) to assist us in selecting jurisdictions.<sup>14</sup> These data enabled us to determine the judicial district with the strictest sentencing practices in that state and the one with the most lenient sentencing practices.<sup>15</sup>

We chose focus group discussions as our method to encourage group discussion about the decision-making processes for setting the daily rate. Especially in penal order proceedings, this process occurs behind closed doors, at the sole discretion of the individual prosecutor. And although some cases are decided in open court, we thought group discussion would be an appropriate and useful instrument to help us learn about and explore how judges and prosecutors make decisions about the daily rate. The exchange that occurs in focus groups produces a so-called "share and compare" situation for participants: Memories are stimulated and different experiences or approaches may be discussed (cf. Przyborski & Wohlrab-Sahr, 2010, p. 146). We conducted group discussions with 21 judges and 33 prosecutors, for a total of 54 interviewees.

We conducted each focus group discussion with members of either a prosecutorial office or a judicial chambers – and not mixed, so that we could understand the procedures and attitudes within each institution. We facilitated eight group discussions with prosecutors and six group discussions with judges; most of these were conducted in person. Groups ranged from two to

<sup>13</sup> In all of the states, a total of six hours of community service is equivalent to one day of fines. None of the states offered the day-for-day program, in which people who are incarcerated for nonpayment can "pay off" their fines faster by doing community service inside prison.

<sup>14</sup> We are grateful to Volker Grundies for his support.

<sup>15</sup> If representatives of a judicial district would not agree to participate, we would move to the next one.

seven participants and one discussion was a one-on-one telephone interview. The group discussions lasted 47 to 96 minutes. In total, we facilitated 1,116 minutes — almost 19 hours — of conversations among the decision makers.

In each group discussion, we asked questions to understand (1) how judges learn about and factor in individual circumstances when calculating fines; (2) how judges determine the daily rate; (3) how the number of units for each offense is set; (4) whether judges think day fines are fair; and (5) how, if at all, the current day fines system could be reformed. All interviews were audio-recorded and transcribed, according to the transcription rules in Dresing and Pehl (2011). Each discussion was also translated into English by a professional interpreter.

For this part of the research process, we sought to understand the practices of the decision makers, employing a content analysis following Mayring (2014). We used MaxQDA for qualitative coding of the group discussions (Kuckartz, 2014) and developed a coding template using a deductive methodology of determining our coding structure before engaging with the interviews (Mayring, 2014, p. 96). As guided by the methodology, we then applied the coding system to the data and added and amended the codes based on the reconciliation to arrive at a final structure.<sup>16</sup>

## 4. German Law and Practice for Setting the Daily Rate

### 4.1 Background: German Law for Setting the Daily Rate

As mentioned earlier, day fines are the product of two numbers. First, prosecutors or judges determine the number of “units” for an offense. Decision makers have wide discretion in setting the number of units. The number of units assigned to each offense are typically based on sentencing factors (such as the nature of the offense) and the person’s individual characteristics (including, for example, the potential impact of the sentence on the person’s “future life in society” [section 46, German Criminal Code]). Setting the number of units involves a fact-specific inquiry. Once the number of units is set, the decision maker must calculate the “daily rate,” the amount of the person’s income they will be required to pay for each unit assessed.

The defendant’s net income anchors the daily rate calculation. German law states that the court shall “*typically* base its calculation on the *actual one-day net income* of the offender or the average income he could achieve in one day” (section 40, sentence 2 German Criminal code, emphasis added). Net income is typically understood as a person’s full “take-home pay” after payroll deductions such as tax and social security contributions; net income is not net of the person’s expenses.<sup>17</sup>

Under German law, judges and prosecutors have discretion and may consider “other relevant assessment factors” and the “personal and financial circumstances of the offender” to add to or subtract from the person’s net income to arrive at the daily rate (cf. section 40, sentence 3 German Criminal Code). As a commentary<sup>18</sup> explains, the guiding principle should be for

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<sup>16</sup> The Harvard and Cologne teams developed a joint coding system and also had additional codes for their individual work. Each researcher coded the interviews independently first and then did a sample survey on the coding to reconcile and understand differences, a process that included debating cases and text passages.

<sup>17</sup> See e. g., MüKoStGB/Radtke, 3rd edition 2016, StGB § 40 Rn. 57-58.

<sup>18</sup> Commentaries are a “hybrid primary/secondary source”. In addition to the statutory law, “commentary also provides interpretation and analysis of the statute by leading scholars (secondary material). This secondary material often cites relevant judicial decisions, other statutes, and other secondary sources.”

judges to exercise this discretion to achieve equality, with an eye toward the person's rehabilitation. Fines should have some financial impact on a person but not lead to "misery or poverty". Courts should therefore give closer scrutiny — and allow for deductions — for people with limited incomes (Kindhäuser & Neumann, margins 19-23). Germany commentaries and case law suggest some common deductions from net income, including deductions for support of dependents, reductions from a strict net-income principle for low-income people, and occasional reductions for rent or debts that would impact a person's daily income on an ongoing basis. These deductions, which have developed in German law and practice over time, reduce the daily rate in part, but do not fully account for a person's cost of living.

Overall, these statutes and commentaries provide broad principles that leave considerable discretion to judges and prosecutors when setting the daily rate. It is because of this discretion that we gathered primary data to understand how that discretion is exercised.

## 4.2 Calculating the Daily Rate in Practice

In this section, we discuss our findings about how judges and prosecutors set the daily rate. We start by examining the sources of information judges and prosecutors use to set the daily rate, including how they estimate net income when they have limited or no information about the person's financial circumstances. We then turn to how they calculate net income and what, if any, deductions they apply.

### 4.2.1 Sources of Financial Information for Setting the Daily Rate

To set the daily rate, courts must obtain information about the individual's financial circumstances. In Germany, the way this information is obtained depends on whether the case is processed via summary proceedings or trial. In both summary proceedings and at trial, judges and prosecutors rely on people's self-reported statements in response to a short ability-to-pay questionnaire on police intake forms. For cases that go to trial, judges also sometimes ask follow-up questions regarding people's financial circumstances through a colloquy.<sup>19</sup> As noted above, summary proceedings make up more than 70 % of fine cases (result for North-Rhine-Westphalia, Bögelein, Ernst & Neubacher, 2014, p. 28). In those cases, the daily rate is entirely dependent on the information provided on the police intake form.

The police intake form asks questions such as the individual's address; partner's name, address, and occupation; number and ages of children; profession and employer; income at the time of the offense; income at present; if unemployed, length of unemployment; and criminal record. People are not notified as to how that information will be used or why it may be important to provide details. People do not have access to counsel or other guidance when filling out the form.

Not surprisingly, given these gaps in procedural protections when people complete the form, our interviewees suggested that they often did not have sufficient financial information about people when setting fines for summary judgment. Under German law, judges and prosecutors have the authority to investigate people's financial circumstances by making inquiries at the

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<sup>19</sup> Some interviewees noted that there is more investigation and document review in white collar or similar fraud cases in which determining income is more complex and financial punishment more central to the case.

Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, short: BaFin) or by otherwise investigating, including by asking the person follow-up questions. Yet our research suggests that this rarely happens, even if judges and prosecutors have insufficient information from the intake form. “*Investigations into economic circumstances are hardly ever carried out by the police, and we hardly ever do them either, I have to say if I’m honest*” (prosecutor, discussion 2\_5, 107). Judges and prosecutors suggest that they do not conduct additional investigation because fines are not serious sanctions (as compared to incarceration or a suspended sentence), and so efficiency and speed are prioritized in sentencing fine cases:

“A trial is always better than summary proceedings. But we can’t do so many trials, for [our] own sake. Even the judges would be completely overwhelmed. For the smaller matters, for speedier procedure, we simply have summary proceedings.” (prosecutor, discussion 10\_4, 39)

When asked how long setting the daily rate took, judges and prosecutors made it clear that the process was not long. One said, “*as long as it takes me to hit two keys*” (prosecutor, discussion 10\_4; 223), and another more precise answer from a judge was that it took “*30 seconds*” (judge, discussion 4\_4, 354).

#### 4.2.2 Estimation

When courts and prosecutors do not have information about people’s financial circumstances from the police intake form, they rely on their authority under German law to estimate people’s net income. Though the commentaries suggest that courts need some factual basis for the estimate,<sup>20</sup> in practice, judges and prosecutors relied on jurisdiction-wide or individual default daily rates. The use of default daily rates arose in all of our discussions. In some jurisdictions, the public prosecution offices have an internal agreement about how to set net income when they have limited financial information or none. In other jurisdictions, the default rates are determined by the individual judge or prosecutor, rather than by the prosecution office for the entire jurisdiction. This led to variations – and disagreement – within a court regarding an appropriate default daily rate:

“If there’s no information in the file, it’ll always be 40 euros because that’s 1,200 euros average income. B1: Honestly, I personally think that’s so low, I think that’s really bad.” (judge in discussion 4\_4, 27)

The default rates also vary significantly across jurisdictions. Compare the default daily rate provided by these two interviewees:

##### *Interviewee 1:*

“Well, we assume 50 euro. 50 euro, well, mostly 50 to 60 euro....1,500 net, divided by 30 gives you the day fine amount. And this 50 euro, when you look at it, every average-income earner is well above that.” (prosecutor, discussion 2\_5, 112)

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<sup>20</sup> Schönke, Schröder, & Kinzig (2019), StGB § 40 marginal 21 (explaining that judges may estimate if an individual “makes no or only insufficient (or unbelievable) statements about his economic circumstances...and if exact determinations of the bases of assessment are not possible or cause disproportionality great difficulties”).

*Interviewee 2:*

“At the Landgericht in [Mid-sized Town], it is currently 25 euro. In other words, one assumes a net income of 750 euro per month, which would be at the lowest limit for someone in employment. And those who actually earn less have to come forward and say that they do.” (prosecutor, discussion 11\_2, 49).

One interviewee summed up their perspective on the problem with using default rates as follows:

“For those where I have no indication of income...the law says, ‘Estimate!’ and then I have to estimate. And here, again, the basis of estimation differs from colleague to colleague. And that’s why there are different results in terms of amounts as well.” (prosecutor, discussion 10\_4, 29)

Judges and prosecutors applied different default rates if they had indications that the person was receiving public benefits. Recipients of Germany’s most common social benefit, “Hartz IV,”<sup>21</sup> which is available to people who have been unemployed for more than one year (with various regulations and restrictions), receive around 430 euros per month in cash benefits. The daily rate for people receiving Hartz IV ranged from 7 to 20 euros. The variability in the default rates for Hartz IV recipients in one jurisdiction was explained by a prosecutor:

“The current Hartz IV rate is 409, I think, euros. If you convert that, we’re already at 14 euros. Round about. Now...and this is being considered, being discussed internally within our agency—do we now go from 10 euros to perhaps 15 euros? Or to 12 euros?... We don’t usually do that. Well, we generally apply 5-euro steps.” (prosecutor, discussion 8\_2, 53).

Some interviewees set the default rate for people who had not signed up for benefits — for example, people who are homeless and were unable to complete the paperwork — at 5 euros per day. Others set it higher: One judge reported that he used the amount of monthly public benefits payments to calculate the daily rate, even for people who were not signed up for such benefits, because those *could* sign up and receive that amount:

“Well, homeless people, who are actually also entitled, as it were, to benefits and who...if they have no understandable reason for not filing an application — and up to the present day I’ve never really heard one — they are treated as if they did apply.” (judge in discussion 14\_4; 123-4)

### 4.2.3 Net Income and Deductions

The starting point to setting the daily rate is net income. How the daily rate is set depends on whether the prosecutor or judge has information about the person’s net income. When the court has information, net income is the person’s monthly take-home pay divided by 30 (days). Our interviews did not indicate that decision makers asked people about their other finances when determining net income, such as investment income, assets, or other factors.

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<sup>21</sup> The proper term for this social benefit is Arbeitslosengeld II, but it is commonly referred to as Hartz IV. Named after Peter Hartz, the head of the committee dealing with certain parts of the Agenda 2010, Hartz IV is the unemployment payment someone receives if they have been unemployed for more than 12 months — sometimes 18 months — or have not worked before at all.

Judges and prosecutors have broad discretion to consider the “personal and financial circumstances” of the person (see above, cf. section 40, sentence 3, German Criminal Code), and reduce the daily rate to account for cost of living and other expenses. Exercise of this discretion varies by prosecutor, judge, and jurisdiction, and German law does not provide any guidance about how such discretion should be exercised. If applied broadly, these deductions would make a considerable difference in calculating the daily rate for many people. But practices of applying deductions for other debts and expenses vary greatly. One judge we interviewed described their practices for deductions to net income as the “*infamous ‘ballpark deductions,’*” referring to how the court makes rough calculations rather than engaging in precise analysis (judge, discussion 4\_4, 365).

*Dependents.* All interviewees reported that the judges and prosecutors consistently deduct an amount from the daily rate to account for dependents, often called a “maintenance” deduction. Some judges and prosecutors said they typically reduce the daily rate by a certain percentage for a dependent spouse and child (“*The rule of thumb I have come across so far is 25 % for the nonworking wife and 15 % per child. That’s actually what every judge usually applies*”: prosecutor, discussion 5\_4, 111). Deductions for each child were between 10-15 % and deductions for support of a partner were between 10-43 %. Interviewees were not clear or consistent about whether they deducted maintenance from default daily rates — in addition to other reductions — or whether they reduced the rate for family support if there was other household income.

*Rent and other debts.* Some interviewees reported that they deduct rent costs from the daily rate for all individuals; others reported that they do so only for those with less money. Still others add welfare recipients’ noncash housing benefits to their income before setting the daily rate. As one judge explained, “*The gray area starts when people owe money. [T]here are different degrees of generosity when it comes to accommodating people’s financial burdens. The lower my income, the more likely [rent or paying off a home] will be taken into account.*” (judges, 9\_4, 47-53). As a result, people who have the same limited means but live in different jurisdictions — or are heard in the same jurisdiction by different individuals — are assessed significantly different fines.

In summary, prosecutors and judges do not usually exercise discretion to conduct a fulsome review of people’s circumstances before setting the daily rate, and instead rely on defaults or generalities. When prosecutors and judges lack information about people’s circumstances, they do not follow up to learn more. Rather, these decision makers use default daily rates that often overestimate how much money people with lower incomes may have available to pay fines. Decision makers appear to exercise their authority to account for people’s costs and other limitations in narrow, piecemeal ways. This arbitrariness means that people who have the same financial circumstances face vastly different fines depending on the jurisdictions they are in and who hears their case within that jurisdiction.

A hypothetical example may help here. A first-time fare evasion case is often assessed at approximately 20 day units. In a jurisdiction that uses a default rate of 20 euros per unit for a recipient of Hartz IV, that is a fine of 400 euros. This person would owe nearly an entire month of benefits for this low-level offense. In a different jurisdiction, the same offense may be fined at the default rate of 7 euros, resulting in a total of 140 euros. It is still a high fine, but one third of the fine sentenced in the other jurisdiction.

### 4.3 Considering Poverty/Inequality

In the previous section, we examine the wide discrepancies in how judges and prosecutors calculate daily rates. But another central question for our research focuses on why these discrepancies exist. Judges and prosecutors have expansive authority to investigate the circumstances of each person and adjust net income accordingly — so why don't they use this authority to more accurately calculate the daily rate? Our research indicates that judges and prosecutors neglect to do so in part because they fail to understand the experiences of people living in poverty and how to be responsive to the challenging realities that they face. (Another set of explanations involves system actors' motivations to work efficiently rather than fairly; these findings will be discussed in our other forthcoming work.)

Before understanding these findings, it is important to know that the judges and prosecutors we interviewed openly acknowledged the disproportionate impact that day fine amounts have on poorer individuals. They were also aware that most people coming into criminal-legal systems have low incomes. For example, interviewees stated:

“If you consider the burden for the individual Hartz IV recipient, that's, of course, not comparable to someone who has something like 3,000 euros income and then pays 100 euros per day. I mean, that's obviously a completely different dimension in terms of financial burden. That has to be said.” (prosecutor, discussion 4\_4, 181)

“So it always hits those who have little. That's just the way it is. For them, 400 euros is a lot of money. It just is.” (prosecutor, discussion 10\_4, 165)

“I think that, to some extent, the fines hit lower-income groups all the harder.... If they can't even afford a ticket for 2 euros...and now they have to pay off this fine, then they'll lack this money month after month. And then it's even more of a stretch for them. And someone who simply earns a lot of money: it's no problem for him at all, or not to the same extent as for someone who has so little income at his disposal.” (prosecutor, discussion 3\_4, 70)

Despite this awareness, judges and prosecutors reported that they rarely make a point of reducing daily rates. We discuss four rationales that judges used to explain why they didn't exercise their discretion to reduce daily rates to account for poverty. These perspectives suggest that day fines systems do not adequately reflect the economic circumstances of lower-income people, and therefore may fall short in achieving equality.

#### 4.3.1 Judges and Prosecutors Rely on Stereotypes When Thinking About How Low Incomes Affect One's Life

Judges and prosecutors often appear to be unfamiliar with the realities of living in poverty and what poverty looks like in a wealthy society like Germany. One plain example of this is a judge who reported in our interview that they evaluate whether or not someone is poor based on their appearance or speech:

“Let's say you have people who...[let's] say I'm on Hartz IV. No one checks that, okay? So that's just the basis we use for them. Of course, that's nonsense if someone comes in a suit, has normal manners and speaks good German. In that case, you [base the daily rate on] what someone like him could do [for a living] and you would also try to justify that.” (prosecutor, discussion 10\_4, 92)

Another interviewee said, “*No one in Germany has so little money left that they are forced to evade fares*” (judge, discussion 9\_4, 182). But evidence suggests that a large percentage of people who receive a fine for fare evasion end up in prison for default of payment (cf. Bögelein, Ernst & Neubacher, 2014). That is at least one indicator that some people are riding the trains without paying out of financial necessity.

#### **4.3.2 In Deciding Whether a Total Fine is Proportionate to the Person’s Financial Circumstances, Decision Makers Apply Personal Standards About What Sounds Too High or Too Low**

Judges and prosecutors often explained that they view the total fine amount through the perspective of their own financial situation — and they make judgments on the fairness of the total amount based on whether *they* could afford the fine. Because they compare the total fine to what they can afford, decision makers are hesitant to set high daily rates that would be out of reach for them. As one judge explained,

“To be honest, ... [w]e’d flinch a little if the day fine amount was somewhere north of 100 or 150 euro, even if it tallied with the income, on paper. Possibly there is, subconsciously — it plays a role that one’s own money then somehow.... *You use your own financial situation as a benchmark* and then say, ‘Yes, anything ... above 200 day fine units ... cannot be right.’” (judge, discussion 9\_4, 54)

Similarly, a prosecutor said, “it is noticeable; let’s say when you cross the 100 or 200 euros mark, you get scruples”: prosecutor, discussion 13\_5, 39). On the other end of the spectrum, many judges and prosecutors we interviewed stated that they do not feel that low daily rates are adequate punishment for the offenses they are sentencing; in this way, they assess the appropriateness of the total fine by ignoring the impact such a fine would have on a person with limited financial means. Because of their own life circumstances, these judges may not have been able to see that someone — especially someone with no income — could not afford to pay more.

“Well, who’s it supposed to affect? If we suddenly only have 3 euro — or, for prisoners, it’s 1 euro a month. Down to 1 euro — you have got to be kidding! That’s not a punishment.” (prosecutor, discussion 10\_4; 169)

These statements contradict the inherent structure of day fines systems, which are meant to avoid subjective assessments such as the ones discussed in this section.

#### **4.3.3 Judges and Prosecutors Rely on Neoliberal Notions of People Not Trying Hard Enough to Pay, Despite Contrary Evidence**

Another recurring theme in the discussions was that judges and prosecutors strongly believe people should take responsibility, try hard, and pay their fines. Most judges and prosecutors saw two reasons why people may fail to pay a fine: because they did not try hard enough or because they willfully refused to pay. One participant commented, “*I’ve never seen anyone go to jail, as long as he’s willing [to try to pay]*” (prosecutor, discussion 5\_4, 254). To judges and

prosecutors, nonpayment is always a “choice” because the system allows people payment plans (section 42 German Criminal Code, StGB) and community service as an alternative (section 293 Introductory Act to the German Criminal Code, EGStGB). As interviewees said:

“Well, I always assume that people aren’t stupid enough to go to prison for — yes, nonpayment of a fine....I do assume anyone can manage that. You only have to communicate, ultimately you just have to get in touch and you always have the possibility to extend the term of payment, to convert it into installments and so on. That’ll always work. And going to prison for that — I just expect people to get their act together.” (prosecutor discussion 2\_5, 140)

“The person who is willing to pay, okay, he is given so many chances, okay. Even if he cannot pay, because if I know he is willing, he will be given so many opportunities, including, later on, community service which he can do. ... Because if you don’t want to go to jail, ... I’ve never seen anyone go to jail, as long as he’s willing.” (prosecutor discussion 5\_4, 240)

But the evidence is to the contrary (see research findings introduced above). Indeed, many judges and prosecutors did not know how often people in Germany are incarcerated for nonpayment. We often heard statements assuming that incarceration on the back end was not common, as in this interview with a prosecutor: “*It’s actually rare that someone serves an alternative-imprisonment sentence, I think*” (prosecutor, discussion 14\_4, 288).

#### 4.3.4 False Equality

Judges and prosecutors often justified denying further reductions to people with the lowest incomes — such as people on Hartz IV, asylum seekers, or those experiencing homelessness — by arguing that they had to be fair to people living right above the poverty line. Their argument was that they could not, for example, reduce the daily rate for Hartz IV recipients because then their daily rate would be much lower than for people right above the income threshold to qualify for such public benefits. Rather than reduce the daily rate for both groups, judges and prosecutors suggested they would make day fines “fairer” to people right above the poverty line by being stricter with people receiving benefits:

B1: “So the people who have both feet on the ground, hairdressers and so on. What do I know.”  
 B2: “He has this income. Okay, and in this case I’d say that I’d actually be granting the other, the Hartz IV recipient, a bit of an advantage by applying 10 euros.” (prosecutor, discussion 8\_4; 56+7)

The consequence of this reasoning may be that deductions are made less often than necessary given people’s financial circumstances.

## 5. Discussion and Conclusions

Germany is less punitive overall than the United States. On the issue of fines, the judges and prosecutors in our interviews strongly believed in the importance of considering financial circumstances upfront and scaling fines accordingly. They explained that they could not imagine a fairer system than their own for setting fines. This buy-in for proportionate fines serves as an

important lesson for U.S. policymakers and judges who often argue that scaling penalties is overly burdensome or unfair to those with means.

But the success of the German day fines system has been uneven. The system fails to capture people's actual ability to pay, as it ties the daily rate to an individual's daily take-home pay without requiring adequate deductions for the cost of living. The failure to systematically deduct cost-of-living expenses results in fines that are unpayable and disproportionately impact poor people. Unsurprisingly, people sentenced to prison for nonpayment in Germany are only low-income – and in almost all cases face additional challenges.

Our research in Germany suggests that reforms based on ability to pay have significant limitations. The success of day fines models depends primarily on the parameters for setting the daily rate, which are largely determined not by policy but by politics and the culture of the decision makers. Socioeconomic differences between those before the court and those with the authority to set the daily rate or pass laws affects whether fine amounts are set in a manner that is truly proportionate.

Although the day fines model presents a structure to encourage proper ability-to-pay determinations, it will require a significant shift in judicial culture and political will to implement strong daily-rate policies in the United States. Without such policies, judges and prosecutors will easily exercise their discretion in ways that ensure that the day fines model is not meaningfully distinct from the current arbitrary and uneven system of criminal fines used in the United States.

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