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**Equitably Shifting the Burden:  
European Day Fines as an Alternative  
to Imprisonment for Drug Offenses**

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**ABSTRACT**

*The United States incarcerates a staggering number of people, a significant number of whom are serving time for drug offenses. The current incarceration scheme for drug offenses costs taxpayers millions every year to keep low-level offenders incarcerated, and financial punishment measures for drug crimes fail to impact different social classes evenly and perpetuate a cycle of crime. Often the poor are disproportionately affected by financial punishment while the rich can easily pay the same fines and effectively dodge accountability.*

*Other countries have had great success in adopting penal schemes specifically to avoid these problems. Income-based fines used in Germany, Finland, and Sweden lessen the incarceration rate and ensure that violators are affected by punishments equally. Borrowing the European day-fine model to punish low-level drug offenses in the United States would reduce mass incarceration, ensure equal enforcement of the law across social classes for similar crimes, ease the burden carried by taxpayers, and satisfy the criminal justice aims of deterrence and retribution.*

*This Note will define the problems resulting from the current treatment of drug offenders, review the different pecuniary justice schemes in place across several European jurisdictions, analyze their benefits and drawbacks, and present a methodology for implementing a day-fine system in the United States. It will also address counterarguments to using a day-fine system, including concerns about the constitutionality of income-based fines, the issue of indigent defendants with no income receiving income-based fines, the ethical dilemma posed by the state collecting from offenders with illegal income, general difficulties estimating income accurately, and the judicial discretion used in sentencing.*

**INTRODUCTION**

**I**ncome-based financial sanctions called “day fines” are used across the world to punish nonviolent, lesser offenses. Day fines balance the severity of an offense against the offender’s ability to pay.<sup>1</sup> By contrast, in the United States, fixed fines and short-term prison sentences are commonly used for the types of offenses punished by day fines in Europe, one of which is drug possession. These antiquated U.S.

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<sup>1</sup> Edwin W. Zedlewski, *Alternatives to Custodial Supervision: The Day Fine*, NAT’L INST. JUST. 1, 1 (2010), <https://www.ojp.gov/pdffiles1/nij/grants/230401.pdf> [<https://perma.cc/P5EN-TANL>].

policies lag behind other developed nations' drug policies and lead to inflated prison populations, disparate impacts across socioeconomic statuses, and unnecessary societal costs. Borrowing the European day-fine model to punish low-level drug possession offenses would reduce mass incarceration, ensure equal enforcement of the law across social classes for similar crimes, and ease the burden carried by taxpayers, while satisfying the criminal justice aims of deterrence and punishment.

Part I of this Note will discuss the history and status of mass incarceration in the United States today, the impact of drug-related prison sentencing, the extent of income inequality, and the disparate effects of criminal financial sanctions in U.S. courts. Part II will provide an overview of day fines by examining the Finnish, Swedish, and German monetary sanctions regimes, as well as limited U.S. experimentation with the idea. Part III proposes a method for applying day fines in the United States in a drug possession context. Part IV discusses counterarguments to a day-fine system.

## I

### DEFINING THE PROBLEM

#### *A. Mass Incarceration in America: Drug Offenses*

The United States is a world leader on many fronts, including for its staggering prison population. Despite substantial decreases in the national incarceration rate and prison population in the past decade, the United States still has the highest overall prison population of any country at 1,808,100 prisoners.<sup>2</sup> Further, the United States has the sixth highest incarceration rate of any country at 531 people in prison for every 100,000 people.<sup>3</sup> Despite the United States comprising only 5% of the world's population, its prison population makes up more than 20% of imprisoned people worldwide.<sup>4</sup> Of that massive incarcerated population, roughly 350,000, or one-fifth of prisoners in America, are

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<sup>2</sup> *Highest to Lowest – Prison Population Total*, WORLD PRISON BRIEF, <https://www.prisonstudies.org/highest-to-lowest/prison-population-total> [https://perma.cc/Y39C-5A3K] (last accessed Dec. 14, 2024).

<sup>3</sup> *Highest to Lowest – Prison Population Rate*, WORLD PRISON BRIEF, [https://www.prisonstudies.org/highest-to-lowest/prison\\_population\\_rate?field\\_region\\_taxonomy\\_tid=All](https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All) [https://perma.cc/EWF8-QSTB] (last accessed Dec. 14, 2024).

<sup>4</sup> *Mass Incarceration*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/issues/smart-justice/mass-incarceration> [https://perma.cc/KB2P-88ZR] (last visited Apr. 14, 2025).

incarcerated for a drug offense.<sup>5</sup> Of those prisoners, 95,000 are in state prisons and local jails for simple drug possession.<sup>6</sup>

The surge in drug offense convictions began with the War on Drugs in the 1970s, which brought about radical change to drug sentencing policy.<sup>7</sup> Mandatory minimums and three-strike rules caused the average prison sentence for a drug conviction to jump from two years in 1986 to seven years in 2005.<sup>8</sup> As a result, the number of drug offenders in U.S. prisons skyrocketed.<sup>9</sup> Unsurprisingly, the policies have had a starkly disproportionate impact on people of color, even earning the policies the nickname “The New Jim Crow Laws.”<sup>10</sup>

However, societal priorities and attitudes regarding criminal punishment have changed in the past decade. The percentage of Americans who believe the criminal justice system is “not tough enough” has fallen from 83% in 1992 to 41% in 2020, while the portion who believe it is “too tough” rose from 2% to 21% in that same time.<sup>11</sup> This societal shift is reflected in the decrease of overall prison populations in the past decade and, more specifically, drug offender prison populations, though data is still clouded from the effects of the COVID-19 pandemic.<sup>12</sup> The Fair Sentencing Act of 2010, which decreased the sentencing disparity between crack cocaine and powder cocaine from 100:1 to 18:1, and the First Step Act of 2019, which applied the Fair Sentencing Act retroactively to help 4,000 prisoners, represent some of the policies enacted after the turn of the century to

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<sup>5</sup> Wendy Sawyer & Pete Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL’Y INITIATIVE (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html#:~:text=Drug%20offenses%20still%20account%20for,of%20the%20federal%20prison%20system> [https://perma.cc/2K7D-ECGS].

<sup>6</sup> *Id.*

<sup>7</sup> ASHLEY NELLIS, THE SENTENCING PROJECT, MASS INCARCERATION TRENDS, THE SENT’G PROJECT 6 (May 21, 2024), <https://www.sentencingproject.org/app/uploads/2024/05/Mass-Incarceration-Trends.pdf> [https://perma.cc/CS9G-WPBN].

<sup>8</sup> *Id.*

<sup>9</sup> DRUG POL’Y ALL., THE DRUG WAR, MASS INCARCERATION AND RACE (June 2015), [https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA\\_Fact\\_Sheet\\_Drug\\_War\\_Mass\\_Incarceration\\_and\\_Race\\_June2015.pdf](https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf) [https://perma.cc/6HR4-NL4E].

<sup>10</sup> Graham Boyd, *The Drug War Is the New Jim Crow*, AM. CIV. LIBERTIES UNION (July 31, 2001), <https://www.aclu.org/documents/drug-war-new-jim-crow> [https://perma.cc/JWA8-GSZC].

<sup>11</sup> Megan Brenan, *Fewer Americans Call for Tougher Criminal Justice Systems*, GALLUP (Nov. 16, 2020), <https://news.gallup.com/poll/324164/fewer-americans-call-tougher-criminal-justice-system.aspx> [https://perma.cc/2RVG-FK2Z].

<sup>12</sup> NELLIS, *supra* note 7, at 2.

make a dent in America's shocking prison population.<sup>13</sup> Additionally, many states have instituted alternative punishment methods to reduce prison populations like diversion programs, drug education classes, substance abuse treatment, and community service.<sup>14</sup>

Nonetheless, the fact remains that the United States is still one of the most incarcerated countries in the world, and drug offenders make up a significant portion of all prisoners, costing the U.S. taxpayers billions every year.<sup>15</sup> For example, in 2015, North Carolina spent \$70 million to incarcerate offenders for simple drug possession.<sup>16</sup>

Moreover, prisoner populations in the United States and the resulting costs to taxpayers are exacerbated by courts imprisoning those who cannot pay their fines and often assessing offenders' ability to pay fines only at the point when they've fallen behind and face incarceration, if they do so at all.<sup>17</sup> Data on failure-to-pay imprisonment is difficult to find, but one 2023 study found that, between 2005 and 2018, an average of 38,000 people in Texas and 8,000 people in Wisconsin were jailed each year for failing to pay a fine.<sup>18</sup> Five percent of the underlying offenses that landed these people in prison after failing to pay their fine were found to be possession of marijuana or other petty drug offenses.<sup>19</sup> By simulating the financial effects of incarceration using income-based fines that allow offenders to continue to earn and contribute to society instead of languishing in prison, the United States can continue the trend of decarceration and meet the rate of incarceration in other developed nations.<sup>20</sup>

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<sup>13</sup> *Id.* at 6.

<sup>14</sup> *Drug Possession Laws: 50-State Survey*, JUSTIA, <https://www.justia.com/criminal/offenses/drug-crimes/drug-possession-laws-50-state-survey/#connecticut> [<https://perma.cc/W9V9-AUPK>] (last reviewed Sept. 2024).

<sup>15</sup> Sawyer & Wagner, *supra* note 5.

<sup>16</sup> BETSY PEARL, CTR. FOR AM. PROGRESS, ENDING THE WAR ON DRUGS: BY THE NUMBERS 1, 2 (June 27, 2018), <https://www.americanprogress.org/wp-content/uploads/sites/2/2018/06/EndingTheWarOnDurgs-factsheet.pdf> [<https://perma.cc/W9NP-XMZC>].

<sup>17</sup> NATIONAL CENTER FOR ACCESS TO JUSTICE, *Fines and Fees in American Courts* 10 (May 2021), <https://ncaj.org/sites/default/files/2021-05/Fines%20and%20Fees%20in%20American%20Courts.pdf> [<https://perma.cc/5XBG-BRU5>].

<sup>18</sup> Johann D. Gaebler et al., *Forgotten but Not Gone: A Multi-State Analysis of Modern Day Debt Imprisonment*, 18 PLOS ONE 1, 1 (2023).

<sup>19</sup> *Id.* at 12.

<sup>20</sup> Finland, Germany, and Sweden have incarceration rates of 52, 68, and 96 respectively. *Highest to Lowest – Prison Population Total*, *supra* note 2.

***B. Income Inequality and Unequal Impact  
of the Current Pecuniary Punishment Scheme***

The United States is the richest country in the world by total wealth,<sup>21</sup> gross domestic product,<sup>22</sup> and financial assets,<sup>23</sup> but it cannot be said that every citizen shares the benefits of America's financial prosperity evenly. Income disparity runs rampant in the United States, with the richest 1% making 139 times the income per year of the bottom 20%—\$22,500 versus \$3,126,400.<sup>24</sup> Approximately 10% of families live below the poverty line.<sup>25</sup> As such, the fixed monetary sanctions that are prevalent in the U.S. justice system cannot impact all offenders evenly. These sanctions rarely if ever take an offender's ability to pay into consideration, typically dishing out a statutorily fixed dollar amount or "up to" some dollar limit that is entirely infeasible for most offenders.<sup>26</sup> As such, the poorest Americans are often unable to pay the fines the justice system imposes, thereby trapping them in a cycle of debt and criminality, while the richest Americans effectively dodge accountability using their deep pockets.<sup>27</sup> The adage about the U.S. justice system continues to prove true: if the penalty for a crime is a fine, then that law exists only for the lower class.

The Constitution commands that no excessive fines may be levied,<sup>28</sup> but low-income criminal defendants unsurprisingly feel that clause has not been interpreted fairly, despite recognizing that their infractions are deserving of punishment.<sup>29</sup> Further, the consequences of failing to pay these relatively excessive fines include incarceration, suspension of voting rights and driver's licenses, and denial of record expungement.<sup>30</sup>

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<sup>21</sup> See CREDIT SUISSE AG, A UBS GRP. CO. 1, GLOB. WEALTH REP. 2023, at 42 (2023), <https://www.ubs.com/global/en/family-office-uhnw/reports/global-wealth-report-2023.html#executive> [<https://perma.cc/ZM6Y-MSBS>].

<sup>22</sup> GDP (current US\$), WORLD BANK GRP., [https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?most\\_recent\\_value\\_desc=true](https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?most_recent_value_desc=true) [<https://perma.cc/J2ZA-3KTV>].

<sup>23</sup> Allianz Global Wealth Report 2021, ALLIANZ RSCH. 1, 3 (2021), [https://www.allianz-trade.com/content/dam/onemarketing/aztrade/allianz-trade\\_com/en\\_gl/erd/publications/pdf/2021\\_10\\_07\\_Global-Wealth-Report.pdf](https://www.allianz-trade.com/content/dam/onemarketing/aztrade/allianz-trade_com/en_gl/erd/publications/pdf/2021_10_07_Global-Wealth-Report.pdf) [<https://perma.cc/K82X-TYGX>].

<sup>24</sup> *Income Inequality in the United States*, INEQUALITY.ORG, <https://inequality.org/facts/income-inequality/> [<https://perma.cc/H99E-LXJ5>] (last visited Feb. 27, 2025).

<sup>25</sup> *Id.*

<sup>26</sup> *Drug Possession Laws: 50-State Survey*, *supra* note 14.

<sup>27</sup> Mary Pattillo & Gabriela Kirk, *Pay unto Caesar: Breaches of Justice in the Monetary Sanctions Regime*, 4 UCLA CRIM. JUST. L. REV. 49, 55, 62 (2020).

<sup>28</sup> U.S. CONST. amend. VIII.

<sup>29</sup> Pattillo & Kirk, *supra* note 27, at 65.

<sup>30</sup> NATIONAL CENTER FOR ACCESS TO JUSTICE, *supra* note 17.

A 2018 study on people with court debt in three Illinois cities found that between 62% and 72% of people in each city had foregone basic necessities like food and rent to pay their monetary sanctions.<sup>31</sup> These financial penalties can even further the cycle of criminality, like in the case of one Illinois woman who was assessed fines because she had stolen food to feed her children.<sup>32</sup> Her initial run-in with the law left her with \$500 in fines and costs, which was roughly equal to her total reported income of \$500 to \$750 per month.<sup>33</sup> This left her in an even worse financial situation: she was saddled with new debt and still unable to afford basic necessities.<sup>34</sup> Her story is sadly not unique when evaluating the impact of financial sanctions on low-income individuals in the United States and illustrates the need for change when levying fines against relatively poor defendants.<sup>35</sup>

Conversely, fines as a punishment against wealthier Americans fail to satisfy the basic aims of U.S. criminal law: “to treat like offenders alike, punish the deserving, and encourage respect for the law.”<sup>36</sup> Consider the circumstances of a person making \$250,000 a year who is convicted of General Possession in Florida for two grams of cocaine, a Schedule II drug,<sup>37</sup> and the most common drug offense in the state.<sup>38</sup> Possession of a Schedule II drug is a second-degree felony in Florida punishable by up to fifteen years imprisonment or a maximum fine of \$10,000.<sup>39</sup> Even facing the maximum financial penalty, this person would hardly feel the effects of the punishment while another offender who had committed the same crime but had been earning just enough to pay for basic necessities may be driven further into poverty and debt.

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<sup>31</sup> Pattillo & Kirk, *supra* note 27, at 63.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See MATTHEW MENENDEZ ET AL., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES (2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines#:~:text=One%20study%20found%20that%20about,such%20as%20food%20and%20housing> [<https://perma.cc/D35A-GMHE>].

<sup>36</sup> Alec Schierenbeck, *The Constitutionality of Income-Based Fines*, 85 UNIV. CHI. L. REV. 1869, 1869 (2018).

<sup>37</sup> FLA. STAT. § 893.03 (2023).

<sup>38</sup> UNITED STATES SENT'G COMM'N, STATISTICAL INFORMATION PACKET FISCAL YEAR 2022 STATE OF FLORIDA 2 (2022), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2022/fl22.pdf> [<https://perma.cc/4NK2-B2G8>].

<sup>39</sup> FLA. STAT. § 893.13 (2023); FLA. STAT. § 775.083 (2023); FLA. STAT. § 775.082 (2023).

Ultimately, when analyzing deterrence and retribution resulting from pecuniary punishment, “the wealthier is the person, the more attractive it is for him to ‘purchase the pleasure’ of violation,”<sup>40</sup> and in the context of recreational drugs specifically, the literal “pleasure of violation” is an even more relevant motivation to offend in the first place. It follows that rethinking the “purchasing price” of that pleasure should be one of the most important factors to consider in drafting legislation to adequately punish and deter high-income earners from committing drug offenses. The current fixed-fine scheme leaves much to be desired regarding equality of impact, and any system that tolerates such a punitive disparity favoring the wealthy offender has failed to accomplish the aims of the justice system or enforce the law equally.

In an effort to address the disparate impact of financial punishment on low-income earners, some state legislatures have enacted policies to reform financial sanctions by incorporating some form of ability-to-pay analysis, but the federalism system in the United States has left a patchwork of varying degrees of fine reform.<sup>41</sup> Only twelve states have enacted a mandatory ability-to-pay analysis, and sixteen states have laws mandating that the government prove that a failure to pay any fine was willful.<sup>42</sup> In most states, however, failure to pay a fixed fine automatically triggers short prison sentences, thus exacerbating prison populations and further harming rehabilitation prospects for those who can’t afford the fine.<sup>43</sup> Though attitudes toward drug crime punitive measures have changed, causing states to adopt alternatives to incarceration, fines remain pervasive at all levels of offenses resulting in radically disparate impacts across economic classes.<sup>44</sup> Therefore, any drug offense reform effort that aims to reduce incarceration rates while maintaining the necessary punitive goals of criminal law must take the criminal’s ability to pay into account. Punitive methods used in Europe provide helpful models to analyze and accomplish these ends.

## II THE SOLUTION

Widely used in Europe and Latin America, “day fines” are fines tailored to simulate a specific offender missing one day of work. In

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<sup>40</sup> Elena Kantorowicz-Reznichenko & Maximilian Kerk, *Day Fines: Asymmetric Information and the Secondary Enforcement System*, 49 EUR. J.L. & ECON. 339, 340 (2020).

<sup>41</sup> See NATIONAL CENTER FOR ACCESS TO JUSTICE, *supra* note 17.

<sup>42</sup> *Id.*

<sup>43</sup> See Gaebler et al., *supra* note 18, at 1.

<sup>44</sup> *Drug Possession Laws: 50-State Survey*, *supra* note 14.

practice, the term generally refers to any fine that takes the offender's financial circumstances into account.<sup>45</sup> The concept grew out of the idea that offenders with fewer means were disproportionately impacted by static fines while offenders with wealth hardly felt a slap on the wrist.<sup>46</sup> Day fines in their most basic form are calculated according to two factors: the gravity of the offense and the offender's income.<sup>47</sup> Once the appropriate fine value has been determined based on the offender's socioeconomic status, it is multiplied by the number of units or "days" the offender received for the seriousness of his crime.<sup>48</sup> Examining income-based fine systems in Finland, Germany, Sweden, and even experimentation in small jurisdictions in the United States can shed light on the different ways of approaching such an individualized punitive scheme.

### *A. Finland*

Finland was the first country to adopt income-based fines in 1921.<sup>49</sup> Finland is well known for using the system, as its large fines occasionally make international news, like in June 2023 when a Finnish multimillionaire was fined \$129,400 for driving twenty miles per hour over the speed limit.<sup>50</sup> Day fines are used liberally in Finland as a means of keeping the number of custodial sentences low.<sup>51</sup> They are imposed for nearly all low-level offenses rather than imprisonment.<sup>52</sup> Prior to using day fines, Finland's incarceration rate was 250 prisoners for every 100,000 people.<sup>53</sup> After enacting day fines, Finland's current incarceration rate sits at 51 prisoners for every 100,000 people, about one-tenth of the U.S. incarceration rate.<sup>54</sup>

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<sup>45</sup> ZEDLEWSKI, *supra* note 1.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 2.

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

<sup>49</sup> *Id.* at 3.

<sup>50</sup> Amanda Goh, *A Businessman in Finland Was Slapped with a \$129,400 Fine for Driving Over the Speed Limit*, BUS. INSIDER (June 6, 2023, 10:10 PM), <https://www.insider.com/finland-businessman-slapped-with-expensive-speeding-fine-2023-6> [<https://perma.cc/7ST6-THTG>].

<sup>51</sup> Raimo Lahti, *Day Fines in Finland, Summary*, in DAY FINES IN EUROPE 24 (Elena Kantorowicz-Reznichenko & Michael Faure eds., 2021).

<sup>52</sup> *Id.*

<sup>53</sup> Section IV: *Global Comparisons – Finland*, PRISON POL'Y INITIATIVE (Apr. 2003), <https://www.prisonpolicy.org/prisonindex/finland.html> [<https://perma.cc/4RQS-N8CW>].

<sup>54</sup> *Finland*, WORLD PRISON BRIEF, <https://www.prisonstudies.org/country/finland> [<https://perma.cc/BC5A-QC7V>] (last visited Dec. 14, 2024).

The Penal Code of Finland mandates that offenders can be sentenced to a minimum of one unit and a maximum of 120 units.<sup>55</sup> The value of the unit is equal to one-sixtieth of an offender's monthly income or one-third of that individual's daily income after taxes.<sup>56</sup> The offender's income is determined by examining their tax records.<sup>57</sup> Failure to pay two units results in one day of imprisonment.<sup>58</sup> Possession or use of a narcotic is punishable by day fines or up to two years imprisonment—though imprisonment is rare, while aggravated narcotic offenses (large quantities or trafficking) are punishable only by short terms of imprisonment.<sup>59</sup> Finnish judges are instructed to mete out sentences that are “in just proportion to the damage and danger caused by the offence and to the culpability of the offender manifest in the offence.”<sup>60</sup> Using this command and sentencing recommendations, judges impose an appropriate sentence for a drug offender.

For example, the sentencing guidelines for cannabis, the most commonly seized substance in Finland, vary the punishment according to the amount seized with which the person is caught.<sup>61</sup> Less than 15 grams is punished by five to 20 day fines, 10 to 50 grams is punished by 20 to 50 day fines, and 50 to 100 grams is punished by 50 to 80 day fines.<sup>62</sup> Thus, in the case of an offender caught with 32 grams of marijuana, a Finnish judge would begin by reviewing the sentencing recommendation of 20 to 50 day fines and then decide what specific number of units is in just proportion to the crime and offender culpability. Imagining that offender makes the average monthly income in Finland of €3,957, and the judge found no reasons to elevate the number of units, the offender would be sentenced to pay 20 day fines valued at €65.96 each.<sup>63</sup> The same principles apply to all outlawed

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<sup>55</sup> ZEDLEWSKI, *supra* note 1, at 3.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Chapter [Ch.] 50 Narcotics Offenses 1993/1304 (Fin.).

<sup>60</sup> Ch. 6 Meting Out Sentences 1976/466 (Fin.).

<sup>61</sup> EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION, FINLAND COUNTRY DRUG REPORT 2019, at 23 (2019), <https://www.emcdda.europa.eu/system/files/media/publications/documents/11336/finland-cdr-2019.pdf> [<https://perma.cc/C8DC-4GAG>].

<sup>62</sup> *Finland – Cannabis*, NORDIC ALCOHOL & DRUG POL'Y NETWORK, <https://www.nordicalcohol.org/finland-cannabis> [<https://perma.cc/EUY4-VW2D>] (last visited Dec. 14, 2024).

<sup>63</sup> J. Clausnitzer, *Average Monthly Earnings in Finland from 2013 to 2023, by Sector*, STATISTA (June 25, 2023), <https://www.statista.com/statistics/529917/finland-average-monthly-earnings-by-sector/> [<https://perma.cc/8GAN-4T65>].

substances, as the type of narcotic does not change the penalty for possession or use beyond consideration of waiving the charges in some cases.<sup>64</sup> If an offender has repeatedly violated the same law in a manner “apparently heedless of the prohibitions and commands of the law,” the number of units may be increased with each violation.<sup>65</sup> There is no statutory maximum for the value of fines.<sup>66</sup>

### *B. Sweden*

Building on a rich history of legal idea sharing between the Nordic countries, Sweden has operated a day-fine system since 1931.<sup>67</sup> The intent behind instituting income-based fines was to decrease the number of incarcerated persons and establish equity of impact from pecuniary punitive measures.<sup>68</sup> The basic methodology of imposing a day fine in Sweden is very similar to Finland—weigh the severity of the offense against the offender’s socioeconomic status—but there are some other key differences between the two systems.<sup>69</sup> First, unlike Finland, the number of units imposed does not increase for repeat offenses of the same kind in Sweden.<sup>70</sup> Second, the offender is sentenced to imprisonment for nonpayment of day fines only if it’s established that they failed to pay a fine *intentionally*.<sup>71</sup> Lastly, unlike some day-fine countries where summary proceedings are mandatory, offenders in Sweden must agree to summary proceedings with the prosecutor conducted through writing rather than a formal in-person proceeding such as trial.<sup>72</sup> About 75% of offenders agree to summary proceedings.<sup>73</sup>

Much like Finland, Sweden punishes minor drug possession with day fines, while more serious drug offenses like trafficking are

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<sup>64</sup> Ch. 50 Narcotics Offenses 1993/1304 (Fin.).

<sup>65</sup> Tapio Lappi-Seppälä, *Imprisonment and Penal Policy in Finland*, 54 SCANDINAVIAN STUD. L. 334, 355 n. 20 (2009).

<sup>66</sup> Ch. 6 Meting Out Sentences 1976/466 (Fin.).

<sup>67</sup> Nicole Bögelein & Mitali Nagrecha, *Money as Punishment: A Review of Day Fines in Europe*, 3 KRIMINOLOGIE 428, 430 (2021) (reviewing ELENA KANTOROWICZ-REZNICHENKO & MICHAEL FAURE, DAY FINES IN EUROPE: ASSESSING INCOME-BASED SANCTIONS IN CRIMINAL JUSTICE SYSTEMS (2021)).

<sup>68</sup> *Id.*

<sup>69</sup> ZEDLEWSKI, *supra* note 1, at 2–3.

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

<sup>71</sup> Bögelein & Nagrecha, *supra* note 67.

<sup>72</sup> ZEDLEWSKI, *supra* note 1, at 3; Lappi-Seppälä, *supra* note 65, at 337.

<sup>73</sup> ZEDLEWSKI, *supra* note 1, at 3.

punished with imprisonment up to 18 years.<sup>74</sup> However, simple possession made up the vast majority of drug offenses in 2017 at roughly 91%.<sup>75</sup> Under Swedish law, drugs are defined as any health-hazardous goods with addictive properties and euphoric effects.<sup>76</sup> Cannabis, cocaine, and MDMA are the most commonly used illicit drugs in Sweden.<sup>77</sup> Penalties for possession and use in Sweden do not vary for drug type or quantity officially, but they are considered in evaluating whether the offending behavior is classified as a petty offense or a narcotic drug offense (sale and trafficking).<sup>78</sup> As of January 2023, Sweden's incarceration rate sits at 82 prisoners for every 100,000 people, which is about 85% lower than the United States' rate.<sup>79</sup> Moreover, Sweden has one of the lowest recidivism rates in the world at just 29% reoffending compared to about 68% of offenders reoffending within three years in America.<sup>80</sup>

### C. Germany

The German day-fine system is much the same as Sweden and Finland in principle, though it differs somewhat significantly from Sweden and Finland in practice. Day fines were introduced in Germany in 1975 amongst concerns that short prison sentences were becoming too common and perpetuating criminogenic behavior.<sup>81</sup> They now account for 80% of criminal punishments in Germany.<sup>82</sup> Germany operates under a "net income principle" for calculating an offender's day-fine value, which essentially means fewer deductions than most

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<sup>74</sup> Fredrik Tiberg & Johan Nordgren, *Ordinary People, Criminals, Addicts and Recreational Users: Swedish Court of Law Descriptions of Persons Sentenced for Online Drug Purchases*, 39 NORDIC STUD. ALCOHOL & DRUGS 225, 227 (2022).

<sup>75</sup> EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION, SWEDEN COUNTRY DRUG REPORT 2019, at 5 (2019), [https://www.emcdda.europa.eu/publications/country-drug-reports/2019/sweden\\_en](https://www.emcdda.europa.eu/publications/country-drug-reports/2019/sweden_en) [<https://perma.cc/KQG4-CRBK>].

<sup>76</sup> 8 § NARKOTIKA STRAFFLAG (Svensk författningssamling [SFS] 1968:64) (Swed.).

<sup>77</sup> EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION, *supra* note 75, at 6–7.

<sup>78</sup> 1 § NARKOTIKA STRAFFLAG (SFS 1968:64) (Swed.).

<sup>79</sup> *Sweden*, WORLD PRISON BRIEF, <https://www.prisonstudies.org/country/sweden> [<https://perma.cc/9F28-RQ44>] (last visited Dec. 14, 2024).

<sup>80</sup> Josefina Hedstrom, *The American and Swedish Justice System: A Comparative Study* 2, 6 (May 2018) (M.A. thesis, East Tennessee State University).

<sup>81</sup> Bögelein & Nagrecha, *supra* note 67.

<sup>82</sup> Mitali Nagrecha, *The Limits of Fairer Fines: Lessons from Germany*, HARV. L. SCH.: CRIM. JUST. POL'Y PROGRAM 104 (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) [<https://perma.cc/768H-FXU3>].

other countries.<sup>83</sup> Unlike Sweden and Finland, which both use an offender's tax records and a concrete formula to assess fines, Germany relies on an offender's self-reported monthly income, nonuniform deductions across different jurisdictions, and judicial discretion.<sup>84</sup> Monthly income is divided by thirty to reach an offender's daily income and then select deductions are applied via judicial discretion.<sup>85</sup> While Finland and Sweden make deductions for life necessities like food and transport, Germany does not, limiting deductions to things like dependents and sometimes rent and debts.<sup>86</sup> The German day-fine system has been criticized for inconsistent sentencing, excessive reliance on judicial discretion, and an ineffective impact on monetary sanction equity.<sup>87</sup>

Nonetheless, Germany remains one of the most pervasive users of day fines, and drug possession is no exception. Drug use is not a crime in Germany, but drug possession is punishable by up to five years imprisonment or day fines depending on factors such as whether the offender's guilt is minor, whether there is a public interest in the offense, and whether the drugs were intended only for personal use.<sup>88</sup> Penalties do not change based on the kind of drug, but certain small quantities of recreational drugs will not be prosecuted.<sup>89</sup> Drug possession made up about 79% of the 325,102 drug offenses in 2017,<sup>90</sup> though it's likely that very few of these offenders ever saw prison time, as "the number of offenders in prison for relatively minor drug offenses is small."<sup>91</sup> Germany's incarceration rate is 67 prisoners for every 100,000 people.<sup>92</sup>

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<sup>83</sup> Bögelein & Nagrecha, *supra* note 67.

<sup>84</sup> Nagrecha, *supra* note 82, at 10, 31, 37, 39; Bögelein & Nagrecha, *supra* note 67.

<sup>85</sup> Nagrecha, *supra* note 82, at 46.

<sup>86</sup> Ten percent reductions are applied to the fine for each dependent. *Id.* at 10, 31, 37, 39.

<sup>87</sup> *Id.* at 4.

<sup>88</sup> Betäubungsmittelgesetz [Narcotics Act], July 31, 1981, BUNDESGESETZBLATT [BGBL I] at VI § 31a (Ger.).

<sup>89</sup> EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION, GERMANY COUNTRY DRUG REPORT 2019, at 4 (2019), [https://www.emcdda.europa.eu/publications/country-drug-reports/2019/germany\\_en](https://www.emcdda.europa.eu/publications/country-drug-reports/2019/germany_en) [<https://perma.cc/QZ4R-RZ4K>].

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

<sup>91</sup> RAM SUBRAMANIAN & ALISON SHAMES, VERA INSTITUTE OF JUSTICE, SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES 14 (2013), <https://www.vera.org/downloads/publications/european-american-prison-report-v3.pdf> [<https://perma.cc/F8C5-DS8V>].

<sup>92</sup> *Germany*, WORLD PRISON BRIEF, <https://www.prisonstudies.org/country/germany> (last visited Dec. 14, 2024).

### *D. U.S. Experimentation*

Day fine usage is not entirely foreign to U.S. courts.<sup>93</sup> Several small U.S. jurisdictions have experimented with day fines as punishment for criminal offenses, but the concept was most notably trialed in Staten Island, New York, in 1988 and Maricopa County, Arizona, in 1991.<sup>94</sup> Polk County, Iowa, also ran a pilot program in the early nineties that included drug possession as one of the primary day-fine crimes.<sup>95</sup> Despite success and efforts to continue the program, lawmakers continued advancing tough-on-crime policies, ultimately refusing to enact day fines on a permanent basis.<sup>96</sup> The Staten Island experiment used day fines as an intermediate sanction for misdemeanors, while the Maricopa County experiment applied to felony offenders who needed little or no supervision.<sup>97</sup> In keeping with other systems, these schemes balanced the gravity of the offense and corresponding number of units against the offender's socioeconomic status.<sup>98</sup>

Like Germany, each of the U.S. experiments utilized self-reporting to calculate offenders' income because current U.S. law forbids the IRS from sharing tax records with the court, though things like an offender's employer could be easily verified.<sup>99</sup> In Staten Island, the court already had access to offenders' background information as they had to complete pretrial interviews as part of routine custody procedure.<sup>100</sup> Maricopa offenders filled out a form with their basic financial information that asked, "If a financial assessment is imposed how much could you afford to pay each month?"<sup>101</sup> Both systems allowed deductions for self-support and dependents, and the Staten Island experiment gave a 50% deduction for offenders below the poverty line.<sup>102</sup> During the State Island experiment, the average fine

<sup>93</sup> ZEDLEWSKI, *supra* note 1, at 5–6.

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

<sup>95</sup> Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 107 (2017).

<sup>96</sup> *Id.* at 107–09.

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

<sup>98</sup> *Id.* at 56.

<sup>99</sup> DOUGLAS C. McDONALD ET AL., NATIONAL INSTITUTE OF JUSTICE, DAY FINES IN AMERICAN COURTS: THE STATEN ISLAND AND MILWAUKEE EXPERIMENTS 26 (1992), <https://www.ojp.gov/pdffiles1/Digitization/136611NCJRS.pdf> [<https://perma.cc/8QQ6-XCRS>]; Colgan, *supra* note 95, at 61–62.

<sup>100</sup> McDONALD ET AL., *supra* note 99.

<sup>101</sup> MARICOPA COUNTY ADULT PROBATION DEPARTMENT, DAY FINE DEMONSTRATION PROJECT (FARE PROBATION) 9 (1991), <https://www.ojp.gov/pdffiles1/Digitization/134626NCJRS.pdf> [<https://perma.cc/MKM9-ZNRK>].

<sup>102</sup> Colgan, *supra* note 95, at 77–78.

value increased by 25%, and full-payment rates rose from 76% to 85%, though payment did take longer to collect on average.<sup>103</sup> During the Maricopa County experiment, offenders sentenced with day fines were more likely to pay and far less likely to receive a drug violation or arrest during the follow-up period than the control group.<sup>104</sup>

Though some drug possession offenses were eligible for day fines rather than imprisonment, the pilot program in Staten Island saw a slight overall decrease in the number of fines given for drug offenses.<sup>105</sup> The number of fine sentences imposed on drug offenders under the program would have likely been greater if not for lawmakers' efforts to crack down on drug offenders at that same time.<sup>106</sup> A similar scenario unfolded in the Maricopa County experiment. Drug offenses were included in the list of crimes that may be punished by day fine, but mandatory minimum fines and surcharges for drug offenses made incorporating all economic sanctions (restitution, court fees, etc.) into a single day-fine value difficult.<sup>107</sup> These experiments showed great promise but succumbed to political pressure of the time calling for lawmakers to enact tougher laws on drugs as well as periodic staffing changes since the experiments began making lasting change difficult to enact.<sup>108</sup>

### III

#### APPLYING THE SOLUTION

##### *A. Analyzing and Predicting the Optimal Model to Apply in the United States*

Day fines have proven a valuable and effective alternative to imprisonment and have leveled the playing field for financial punishment in jurisdictions around the globe. In countries that use income-based pecuniary punishment schemes, there are lower incarceration rates despite similar crime rates.<sup>109</sup> Further, they are well

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<sup>103</sup> SUSAN TURNER & JOAN PETERSILIA, NATIONAL INSTITUTE OF JUSTICE, DAY FINES IN FOUR U.S. JURISDICTIONS 10–11 (1991), <https://www.ojp.gov/pdffiles1/pr/163409.pdf> [<https://perma.cc/H2FQ-5PZ2>].

<sup>104</sup> *Id.* at 34–35.

<sup>105</sup> McDONALD ET AL., *supra* note 99, at 6, 23.

<sup>106</sup> *Id.*

<sup>107</sup> Colgan, *supra* note 95, at 105–06.

<sup>108</sup> *Id.* at 106.

<sup>109</sup> The United States crime rate is 47.81, while the Finnish, Swedish, and German crime rates are 27.59, 48, and 35.79, respectively. *Crime Rate by Country 2023*, WORLD

sued for drug crimes in particular because drug crimes generally don't involve a specific victim or specific harm to the community, and they complement nicely with other harm reduction techniques while still punishing those offenders without substance abuse problems. But, implementing such a system in the United States for low-level drug crimes requires careful consideration of several factors, including the method of assessing income, the deductions available to defendants, the cause of a failure to pay, and the maximum fine value for the wealthiest offenders.

First, the process of estimating income would have to rely on self-reporting, like in Germany. Confidentiality laws forbid the IRS from sharing taxpayers' information with any third parties unless the tax information is relevant to "the guilt or liability of a party,"<sup>110</sup> and probing matters related to sentencing would likely not fit that description. There are, however, certain circumstances when the court would be able to procure offender tax documents through a subpoena served upon an accountant or attorney. But given the more narrowly tailored requirements of doing so, namely ensuring compliance with the right against self-incrimination, it would be more feasible to rely on another method for most cases.<sup>111</sup>

Barring a change in the law allowing tax disclosures from the IRS to the court, self-reporting is the most efficient and accurate method available. Though tax record access, like in Finland and Sweden, would likely be a more accurate method of estimating income, studies have shown self-reporting to be highly reliable, and offenders earning money illegally actually tend to overestimate their income.<sup>112</sup> Random veracity checks could be put in place as a means of keeping the process efficient while also deterring false reporting. Random enforcement is a proven and widely used method of ensuring compliance in areas like

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POPULATION REV. (2023), <https://worldpopulationreview.com/country-rankings/crime-rate-by-country> [<https://perma.cc/D6U2-4XWX>].

<sup>110</sup> U.S. DEP'T OF JUST., Criminal Resource Manual § 509 (1997); I.R.S. Publ'n 1, Your Rights as a Taxpayer (2017).

<sup>111</sup> Schierenbeck, *supra* note 36, at 1889–90.

<sup>112</sup> Colgan, *supra* note 95, at 63.

food safety,<sup>113</sup> working conditions,<sup>114</sup> airport safety,<sup>115</sup> and tax compliance.<sup>116</sup> These random checks could be accomplished through the aforementioned tax record subpoenas in cases where the government did not compel the creation of the relevant documents and where having possession of the documents themselves is not plainly incriminating.<sup>117</sup> Documents that do not fall into one of those two categories would likely be accessible by the court barring some other protection.<sup>118</sup>

Additional potential financial penalties should be imposed to punish offenders misrepresenting income or personal assets to deter wealthier offenders from lying about their means and ensure the integrity of the system. After all, without meaningful consequences, rationally behaving wealthy reporters are always incentivized to underreport their means.<sup>119</sup> One promising model for this secondary enforcement system suggests a meta solution of levying a “secondary day-fine [that] depends on several elements: (1) the wealth of the offender (the daily unit), (2) the magnitude of one’s misreporting, and (3) the severity of the primary fine.”<sup>120</sup> This model shifts the costs of offender misreporting from the state to the offender.<sup>121</sup> Facing a secondary income-based fine that depends on how greatly an offender misrepresents their wealth, convicted offenders would have to choose between paying a higher primary fine or risking the consequences of a larger secondary fine.<sup>122</sup> While it might not ensure total accuracy, this secondary enforcement system would heavily incentivize offenders to report an income closer to the truth, thus solving the problem of

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<sup>113</sup> See Jenni Kaskela et al., *Efficacy of Disclosed Food Safety Inspections in Restaurants*, 123 *FOOD CONTROL* 1, 9 (2021).

<sup>114</sup> Elizabeth Norton, *It’s Official: Random Inspections Improve Workplace Safety*, *SCI.* (May 17, 2012), <https://www.science.org/content/article/its-official-random-inspections-improve-workplace-safety> [<https://perma.cc/VDM2-3K8R>].

<sup>115</sup> See Lori Aratani, *TSA to Require Additional Screening Step for Some Travelers at Airports*, *WASH. POST* (July 12, 2023, 6:00 AM), <https://www.washingtonpost.com/transportation/2023/07/12/tsa-airport-screening-clear-checkpoints/> [<https://perma.cc/ZKQ4-3YBV>].

<sup>116</sup> Kantorowicz-Reznichenko & Kerk, *supra* note 40, at 348.

<sup>117</sup> Schierenbeck, *supra* note 36.

<sup>118</sup> *Id.*

<sup>119</sup> Kantorowicz-Reznichenko & Kerk, *supra* note 40, at 340.

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

<sup>121</sup> *Id.* at 348.

<sup>122</sup> *Id.* at 350.

“asymmetric information,” where offenders are the only ones who know their true financial circumstances.<sup>123</sup>

It is also important to note that personal wealth and assets should be included in self-reported fine calculations. Most countries that use day fines include assets in their calculations, though Finland does not.<sup>124</sup> If the system seeks to punish wealthy offenders appropriately, it is unrealistic to rely solely on net income. U.S. households had over \$113 trillion in assets in 2018,<sup>125</sup> and, as discussed above, this figure is not distributed evenly across all criminal offenders. Wealthy offenders should not be allowed to present only their employment earnings when assets represent five times the amount of goods and services sold in a single year in the United States.<sup>126</sup> This could be realistically accomplished by adapting to use the Swedish practice of including any personal assets above a certain value, disregarding paltry assets like bicycles or televisions.<sup>127</sup> Self-reported asset ownership can also be easily verified at random through public records, a process that is already used extensively by law enforcement, private businesses, and creditors.<sup>128</sup> Misrepresentation of asset ownership or value could also be punished through the secondary enforcement system.

Second, deductions should mirror the Swedish philosophy of paying only what you are “able to dispense on a daily basis without being deprived of the necessities in life”<sup>129</sup> or the Finnish system of levying “reasonable” fines.<sup>130</sup> Doing so would be in keeping with United States’ implementation of day fines thus far, and more consistent with the goal of easing the burden of financial sanctions on low-income offenders, while still allowing fairly substantial discretion to increase fines for the wealthy.

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<sup>123</sup> *Id.* at 340, 349.

<sup>124</sup> Elena Kantorowicz-Reznichenko, *Day-Fines: Should the Rich Pay More*, 11 REV. L. & ECON. 481, 486, 494 (2015).

<sup>125</sup> Isabel V. Sawhill & Christopher Pulliam, *Six Facts About Wealth in the United States*, BROOKINGS INST. (June 25, 2019), <https://www.brookings.edu/articles/six-facts-about-wealth-in-the-united-states/#:~:text=Wealth%2C%20or%20net%20worth%2C%20is,over%20%24113%20trillion%20in%20assets> [https://perma.cc/LL46-PQZ5].

<sup>126</sup> *Id.*

<sup>127</sup> MCDONALD ET AL., *supra* note 99, at 28.

<sup>128</sup> See *Everything You Need to Know About Asset Searches*, COURTHOUSEDIRECT.COM (Mar. 4, 2020), <https://info.courthousedirect.com/blog/everything-you-need-to-know-about-asset-searches> [https://perma.cc/U4VL-P57L].

<sup>129</sup> Bögelein & Nagrecha, *supra* note 67.

<sup>130</sup> § 4a Punishments 1976/650 (Fin.).

An effective way to act on that philosophy is making the base fine calculation one-half of an offender's daily income, like in Finland, rather than one whole day's worth of income, like in Germany.<sup>131</sup> The German method of judicial discretion over deductions and blindness to people's financial realities regarding the everyday cost of living<sup>132</sup> is insufficient to accomplish the aims of enacting a day-fine system if starting from scratch. One-third of daily income plus the threat of imprisonment upon failure to pay has been effective at encouraging payment in Finland, as evidenced by their low incarceration rate.<sup>133</sup> Conversely, it also provides an adequate deterrence from criminal activity in the first place, as Finland has the lowest crime rate of any of the countries discussed here.<sup>134</sup> While this may be due to a plethora of factors, punishment for offense cannot be overlooked as a contributor to low criminal activity.

Estimating the value of necessities could still be accomplished using the Maricopa County methodology of asking offenders the cost of their rent/mortgage, utilities/insurance, loans/credit cards, food/clothing, transportation, medical/dental, and other expenses.<sup>135</sup> This would undoubtedly result in lower fines for low-income defendants and, therefore, concerns about less revenue collection through fines. But probation officers in Maricopa County who participated in the experiment noted that letting people pay what they are able to motivates them to make more of an effort to pay, and revenue generation via day fines did not substantially decrease government revenue.<sup>136</sup>

Moreover, current fines and fees are an inefficient form of revenue collection for states anyway because of the collection and enforcement costs of nonpayment offsetting the revenue from paid fines.<sup>137</sup> Setting realistic values for low-income defendants will result in fewer offenders defaulting and being imprisoned, therefore saving the taxpayer money and decreasing prison populations.

Critics of the German system argue that expansive judicial discretion and a lack of standardized deduction practice make fines difficult to

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<sup>131</sup> Kantorowicz-Reznichenko, *supra* note 124, at 486.

<sup>132</sup> Nagrecha, *supra* note 82, at 7.

<sup>133</sup> Finland, *supra* note 54.

<sup>134</sup> *Crime Rate by Country 2023*, *supra* note 109.

<sup>135</sup> MARICOPA COUNTY ADULT PROBATION DEPARTMENT, *supra* note 101.

<sup>136</sup> Colgan, *supra* note 95, at 65–66.

<sup>137</sup> MENENDEZ ET AL., *supra* note 35.

pay for low-income earners and unduly burdensome.<sup>138</sup> Thus, ideally, deduction methodology and final fine computation should be standardized and uniform across the United States, with some discretion for different jurisdictions to enact policies reflective of their local beliefs, like a slightly lower deduction for a dependent or a higher deduction for food.

Third, again borrowing from Sweden, failure to pay should result in imprisonment only if nonpayment is determined to be intentional. As mentioned above, some states have already enacted laws requiring a willfulness determination, but most have not.<sup>139</sup> The United States Supreme Court has ruled that hearings to determine willfulness are a fundamental right under the Fourteenth Amendment, but, in practice, that ruling is mostly ignored because the Court did little to define “willful.”<sup>140</sup> In this sense, mandating a legitimate willfulness analysis for failure to pay income-based fines nationwide would be consistent with what the Court has already determined fundamentally fair to criminal offenders in America.<sup>141</sup> Additionally, when states impose static fines, the need for such hearings will surely be greater than if they imposed sanctions that were manageable depending on the particular circumstances of the defendants.<sup>142</sup> It follows that ignoring the Supreme Court’s mandate for fear of the costs of such hearings actually increases overall criminal justice spending due to the costs of imprisoning defaulters.<sup>143</sup>

Fourth, ideally there should not be a statutory limit on the value of a day fine for wealthy offenders, much like the unique Finnish system. Current U.S. law dictates that a fine is excessive only if it is “grossly disproportional” to the severity of the offense.<sup>144</sup> But, what is grossly disproportional to the severity of the offense cannot be the same across different socioeconomic levels, and what results is a half-baked

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<sup>138</sup> See Colgan, *supra* note 95.

<sup>139</sup> See generally NATIONAL CENTER FOR ACCESS TO JUSTICE, *supra* note 17.

<sup>140</sup> Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014, 5:01 AM), <https://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons> [<https://perma.cc/VG4Z-D2CW>].

<sup>141</sup> *Bearden v. Georgia*, 461 U.S. 660, 661 (1983) (“But if the probationer has made all reasonable bona fide efforts to pay the fine and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the probationer are available to meet the State’s interest in punishment and deterrence.”).

<sup>142</sup> Colgan, *supra* note 95, at 72.

<sup>143</sup> *Id.*

<sup>144</sup> *United States v. Bajakajian*, 524 U.S. 321, 324 (1998).

monetary sanction regime that disregards proportionality to the specific perpetrator of the offense. Returning to the earlier hypothetical of a wealthy offender caught with two grams of cocaine in Florida, is the resulting \$500 fine not grossly disproportionate in the sense that the offender is not meaningfully punished and unlikely to be deterred by the financial consequences of a violation in the future?<sup>145</sup> Extending that same logic, is it not grossly disproportionate that low-income offenders might forego necessities or default on fines resulting in imprisonment and cycles of criminality for the very same violation?

Unfortunately, many states have imposed fine ceilings dependent on the categorization of offense severity that would stand in the way of day fines high enough to truly impact the wealthiest offenders.<sup>146</sup> The only way past these ceilings is for state legislatures to repeal or continue to increase the ceilings more drastically.<sup>147</sup> Though a truly equitable system would not have upper limits on fine amounts, and lawmakers should consider whether these ceilings run contrary to the spirit of income-based fines and under-deter the high-income offenders while drafting such legislation,<sup>148</sup> most countries operate with limits to their day-fine systems with great success, and, in the absence of legislative action to the contrary, a system with upper limits on unit value would still be a step toward equalizing financial burdens from punishment and reducing the number of prisoners in the United States.

In sum, an optimal day-fine system in the United States would rely on self-reporting, incorporate assets, start at one-third of an offender's daily income, and offer deductions for life necessities. Further, nonpayment should not be punished with imprisonment unless the failure to pay is intentional, and lawmakers should consider removing fine ceilings if they pursue further income-based fine experimentation.

### ***B. Drawing the Line: What Level of Drug Offense Severity Can Be Effectively Punished by Day Fines?***

Enacting an income-based fine system to reduce the number of offenders serving short-term imprisonment sentences for drug offenses in state prisons and local jails still leaves open the question of what drug crimes should be punished with day fines. States should adopt the

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<sup>145</sup> See *supra* Section II(B).

<sup>146</sup> BUREAU OF JUST. ASSISTANCE, HOW TO USE STRUCTURED FINES (DAY FINES) AS AN INTERMEDIATE SANCTION 12 (1996), <https://www.ojp.gov/pdffiles/156242.pdf>.

<sup>147</sup> *Id.*

<sup>148</sup> Kantorowicz-Reznichenko, *supra* note 124, at 494.

Nordic countries' drug policies whereby low-level possession and petty sale of narcotics are punished with day fines, and more serious offenses like trafficking can still be punished by imprisonment.<sup>149</sup>

There are several bases for borrowing the Nordic model of drug criminalization for application in the United States. First, drug usage is prohibited in the United States and the Nordic countries for the same reasons, those being the inherent hazard to the health of users, the effect it has on behavior, and the broader criminal offenses associated with trafficking and sale.<sup>150</sup> In other words, both systems are informed by the same motivations while drafting their narcotic legislation, so they both seek the optimal way to achieve the same ends. Second, as evidenced by current statutory schemes in place, both the Nordic countries and the United States share a belief that possession (and to some extent petty sale) is a lesser crime than trafficking that therefore deserves a lesser punishment. If both schemes loosely mirror one another in terms of punishment relative to the seriousness of the offense, it follows that day-fine usage can be substituted as punishment for whatever "petty" offense parallels exist in the U.S. jurisdiction of relevance.

Take Texas, for example, where fines for drug possession can go up to \$10,000, and accompanying prison sentences range from six months to two years.<sup>151</sup> Texas jails and prisons held 10,478 individuals for a drug possession offense during 2022.<sup>152</sup> Applying the Nordic model, many of the individuals in prison or on probation following prison would not have spent any time incarcerated and would instead have stayed nearer to their community and support systems. In the absence of any specific victim or specific harm to the community, there doesn't appear to be much value to imprisoning these offenders, though the costs are large. It costs \$18,538 to imprison a person for one year in Texas and another \$474.50 a year to keep someone on probation.<sup>153</sup> Multiplying the per year cost to imprison by the number of people who

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<sup>149</sup> Ch. 50 Narcotics Offenses 1993/1304 (Fin.); 1 § NARKOTIKASTRAFFLAG (SFS 1968:64) (Swed.).

<sup>150</sup> DRUGS & CRIME DATA CENTER & CLEARINGHOUSE, FACT SHEET: DRUG-RELATED CRIME 1 (1994), <https://bjs.ojp.gov/content/pub/pdf/DRRC.PDF> [<https://perma.cc/8TPX-TEJ2>].

<sup>151</sup> *Drug Possession Laws: 50-State Survey*, *supra* note 14.

<sup>152</sup> *Statistical Report Fiscal Year 2022*, TEX. DEP'T OF CRIM. JUST. 9 (2022).

<sup>153</sup> *Corrections Budgets and Prison Operations*, TEX. PUBLIC POL'Y FOUND. (Nov. 15, 2012), <https://www.texaspolicy.com/corrections-budget-prison-operations-3/#:~:text=Prisons%20cost%20Texas%20taxpayers%20%2450.79,cost%20of%20%241.30%20per%20day> [<https://perma.cc/Y8VQ-QD38>].

spent time incarcerated equals \$194, 241,164 a year to incarcerate drug possession offenders. Though the math is not perfect, and there are certainly some other variables to consider, this basic example shows that this cannot be the most efficient and effective means of tackling drug abuse. The Nordic model applied to these same facts or similar statistics in another state would cost taxpayers a fraction of what they currently spend, generate revenue for the state while doing it, and seek the same ends as the current scheme.

Given that both the United States and the Nordic countries addressed here have the same motivations to criminalize drugs and the same beliefs about the variable levels of harm to society caused by different illegal drug activities, and these Nordic countries have significantly less bloated prison systems, it would make sense to adopt their day-fine guidelines regarding lower-level drug punishment in the United States. In particular, like in Germany, Sweden, and Finland, possession below a certain level that suggests personal use or very low-level drug trafficking should be punished via day fine.

U.S. states differ significantly in their attitudes toward drug possession punishments, so enactment of a day-fine system would likely look different in the various jurisdictions. For example, Oregon experimented with decriminalizing possession of small amounts of most recreational drugs, while, at that same time, possession of less than two grams of cocaine or methamphetamine in Arkansas carries a maximum sentence of six years imprisonment and up to a \$10,000 fine.<sup>154</sup> In Oregon and similarly progressive states, day fines should not be used to expand the scope of punitive measures where other progressive alternative methods are being employed successfully.<sup>155</sup> However, applying the Nordic punishment scheme—day fines rather than imprisonment and fixed fines—to the same crime in Arkansas or any similar tough-on-drug-crime states would accomplish the same equitable goals it does in the Nordic countries while bringing down the overall U.S. incarceration rate closer to theirs.

Moreover, overdose rates will likely decline by replacing short-term imprisonment with day fines in jurisdictions where imprisonment for drugs is common because incarceration has been linked to increased mortality from overdose.<sup>156</sup> Offenders in their first two weeks after

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<sup>154</sup> OR. REV. STAT. § 475.752 (2021); ARK. CODE ANN. § 5-64-419 (2020).

<sup>155</sup> Nagrecha, *supra* note 82, at 101.

<sup>156</sup> PEARL, *supra* note 16, at 1.

release from prison are thirteen times more likely to die than the general public, and overdoses are the leading cause of death among prisoners recently released.<sup>157</sup> As such, foregoing a prison sentence in favor of a day fine would ameliorate the danger drug users face to themselves upon reentry to society following a prison sentence. While the obvious objection would be that such a course would keep them closer to their drugs and more likely to use in the short term, surely this is preferable to death from accidental overdose following release, and drug treatment and rehabilitation can coexist with a punitive day-fine scheme as public health measures to treat addicts.

Given that criminal law and penalties for drug offenses are left to the discretion of state legislatures in the United States, it is up to voters at the state level to embrace income-based fines and determine how they believe the system should best be implemented specifically. However, day fines are an important tool for legislatures and voters to consider when seeking reform, as they provide a more equitable alternative to incarceration.

#### IV THREATS TO DAY-FINE IMPLEMENTATION

For all the potential good that day fines could accomplish, there are some potential objections and difficulties to their implementation. These include the ethical dilemma posed by the state collecting from offenders with illegal income, concerns about the constitutionality of income-based fines, and the issue of indigent defendants with no income receiving income-based fines.

##### *A. Illegal Proceeds*

The issue of incorporating illegal proceeds into income evaluation is less so a critique of day fines and more an inevitable philosophical question when examining a criminal defendant's income for the purpose of determining the value of criminal sanction: does the state have any business profit sharing from illegal industries? Would the court fining a prostitute's actual daily income reduce the court's role to a "state pimp," as some of the Staten Island judges believed during its experiment with day fines?<sup>158</sup> Questions regarding illegal income are particularly relevant here, as it is foreseeable that many of those who are convicted of drug crimes and sentenced to day fines might have a

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

<sup>158</sup> MCDONALD ET AL., *supra* note 99, at 31.

revenue stream related to their drug conviction. Some suggest collecting from these offenders' illegal incomes might motivate and condone further crime and erode the integrity of the court.<sup>159</sup> There are several replies to such concerns, and within the contexts of the ideas presented in this Note regarding drug offenses in particular, illegal income should be used in income calculations and collected upon to ensure fines accurately capture an offender's financial circumstances.

First, criminals should not benefit from violating the law by having their rewards made untouchable, much like how illegal income must be reported in tax law.<sup>160</sup> While it is true there is evidence that economic sanctions can motivate further crime to pay the sanctions off,<sup>161</sup> so too would letting criminals earn illicit proceeds with impunity. Second, illegal work is work all the same, and to categorize it as something else would demean those people engaged in off-the-books work.<sup>162</sup> To do so would cast too wide a net capturing people doing otherwise licit work illegally, like under-the-table childcare or food sales.<sup>163</sup> Finally, and most importantly, "treating all forms of income the same supports the underlying goal of the law," which is to levy fines that people are actually able to pay and accurately reflect their financial circumstances.<sup>164</sup>

Ultimately, there is no readily apparent just and ethical answer on this issue and ten different people might have ten different proposals, which is why the planners of the Staten Island experiment left the question of whether and how to assess illegal income up to individual judges.<sup>165</sup> They reasoned that approximating the income of a petty drug dealer would not present a problem for an experienced criminal court judge; after all, the process of estimating an offender's income from illegitimate proceeds is not unlike the judicial discretion used to set bail.<sup>166</sup>

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<sup>159</sup> Colgan, *supra* note 95, at 93–95.

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

<sup>161</sup> *Id.*

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

<sup>163</sup> *Id.*

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

<sup>165</sup> *See id.*

<sup>166</sup> *See id.* at 93.

***B. Addressing Constitutional Concerns of Implementing  
Day-Fine System***

Some argue that day fines, which by nature discriminate according to socioeconomic class, implicate several Constitutional rights. However, none of the issues critics raise pose an insurmountable hurdle.<sup>167</sup> First, some have raised concerns that day fines may violate the equal protection clause because, by nature, income-based fines discriminate between citizens on the basis of class. But equal protection jurisprudence will not be an impediment to implementation because socioeconomic class is not a suspect class and, therefore, laws discriminating on that basis are subject to only rational basis review, the lowest form of judicial review. Governmental policies that discriminate based on class, like progressive tax or income assessment for benefits, suggest that means-based punitive measures do not run afoul of the equal protection clause.<sup>168</sup> It follows that a punitive scheme that adjusts financial sanctions according to income is likewise rationally related to a legitimate government interest, the hallmark question of rational basis review.

Further, income-based fines are actually more in keeping with the spirit of the equal protection clause than the current scheme because, as discussed above,<sup>169</sup> static financial sanctions do not impact every offender equally, and income-based fines ensure offenders feel the effects of punishment similarly across the income gap.

Second, some have argued that the Fifth Amendment right against self-incrimination may make income assessment difficult as offenders might be hesitant to disclose their true income and raise the value of their fine or reveal illegal sources of income.<sup>170</sup> But the right against self-incrimination does not protect against the production of preexisting incriminating documents, so requiring offenders to provide potentially incriminating documents, like pay stubs for fine calculations, would not be protected under the Constitution. Further, past U.S. experimentation relied on self-reported income to calculate fines and the results there showed high compliance and accuracy.<sup>171</sup>

Third, there is concern that the scale of day fines for wealthy offenders could trigger the Sixth Amendment right to jury trial, which

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<sup>167</sup> Schierenbeck, *supra* note 36, at 1885.

<sup>168</sup> *Id.* at 1886.

<sup>169</sup> *See supra* Section II(B).

<sup>170</sup> Schierenbeck, *supra* note 36, at 1889–90.

<sup>171</sup> *Id.* at 1890.

could make the system far less efficient.<sup>172</sup> As it stands now, the right to trial by jury is required only for “serious” offenses, and not “petty” offenses.<sup>173</sup> The distinction depends upon the maximum statutory penalty.<sup>174</sup> Typically, “serious” offenses are those punishable by at least six months imprisonment, but the Supreme Court has been clear that fines could potentially trigger the right to trial by jury if they are in the tens of millions.<sup>175</sup> Drug possession and low-level drug peddling prison punishments are typically not that large, and day fines, even at their apex, are unlikely to rise to such a level triggering the right to jury trial.<sup>176</sup> Further, under the current fine ceilings, day fines cannot reach values even close to the pecuniary sanctions that trigger the right to jury trial.<sup>177</sup> Finally, the Court has suggested at times that the relevant issue is not the nominal burden of the fine but the relative burden.<sup>178</sup>

### *C. Indigent Offenders*

One of the most obvious concerns when discussing the efficacy of an income-based fine regime is the offender with no income, many of whom may be habitual drug offenders by nature. This category of offender is troubling in an income-based punitive scheme because there is no daily income from which to take, and some might fear this person goes unpunished. Most day-fine systems tackle this problem by setting a minimum fine that is more favorable to the destitute than the fixed fines U.S. jurisdictions are currently using.<sup>179</sup> The majority of European countries set a minimum daily value somewhere between €1 to €4.<sup>180</sup> Such a modest figure sets a realistic expectation about what indigent offenders can pay while still deterring and punishing drug crimes. Adding on alternative sentencing methods that some states have been incorporating like addiction treatment, diversion programs, and community service, day fines would serve as a modest method for society to be made whole again by the indigent defendant while doing more to stop criminal behavior cycles than the current system.

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<sup>172</sup> *Id.* at 1892–93.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *See id.* at 1893.

<sup>176</sup> *Id.* at 1892–94.

<sup>177</sup> *Id.* at 1894.

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

<sup>179</sup> *See* Kantorowicz-Reznichenko, *supra* note 124, at 487–88.

<sup>180</sup> *See id.* at 486.

Furthermore, as noted above, realistic sanctions motivate offenders to make their best effort at repayment, likely because the task seems less daunting and more attainable, so they feel less suffocated by their mistakes.<sup>181</sup> Society will ultimately bear the cost of indigent drug users, but it is counterintuitive and unproductive to set unrealistic financial punishments that frequently go unpaid, thereby perpetuating high numbers of defaulters in prisons and criminogenic behaviors. In short, larger fines cost society more than the revenue that will be lost from lower financial sanctions.<sup>182</sup> As for where the minimums should be set, the determination should be left to local lawmakers using comprehensive research on the typical local indigent defendant.

### CONCLUSION

Ultimately, drug possession and petty selling offenders make up a fairly small portion of incarcerated persons in the United States at just 95,000 in state prisons and local jails. Nonetheless, meaningful criminal justice reform and progress require focus on the details. Ideally, day fines will be used for all sorts of crimes in the future, but progress is slow, and it can be beneficial to take things one step at a time. Civilized society has deemed drugs to be an evil worth prosecuting, but the means by which we do it are, simply put, insufficient. Drug offender populations in prison remain high, and the current static fine system cannot accomplish what would be expected of an alternative intermediate sanction on its own. Using pieces from the Scandinavian day-fine models and our own past experimentation to punish low-level drug possession offenses would continue to reduce mass incarceration, ensure equal enforcement of the law across social classes for like crimes, ease the burden carried by taxpayers, and satisfy the criminal justice aims of deterrence and punishment.

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<sup>181</sup> Colgan, *supra* note 95, at 65–66.

<sup>182</sup> MENENDEZ ET AL., *supra* note 35, at 5.