

## DAY FINES: REVIVING THE IDEA AND REVERSING THE (COSTLY) PUNITIVE TREND

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*“Pecuniary punishments should always be regulated by the fortune of the offender. The relative amount of the fine should be fixed, not its absolute amount. . . .”*<sup>1</sup>

### INTRODUCTION

For more than four decades, the United States has operated under “tough on crime” policies. This approach has led to the well-known prison crisis. Over the years, the number and costs of prisons in the United States has increased, the overcrowding problem has expanded, and court orders mandating the release of prisoners have become a common practice.<sup>2</sup> In the last four decades, imprisonment became the “ordinary sanction.”<sup>3</sup> Consequently, in 2015, the United States witnessed an astonishing rate of 666 prisoners per 100,000 of the national population.<sup>4</sup> This expedited growth in incarceration led to the absurd situation where Americans constitute five percent of the global population, yet detain twenty-five percent of the world’s prisoners.<sup>5</sup> This is a costly policy for the American taxpayer. For example, in 2015, California spent over 8.5 billion dollars on prisons alone,<sup>6</sup> or approximately twenty-three million dollars per day.<sup>7</sup>

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1. JEREMY BENTHAM, *THEORY OF LEGISLATION* 353 (R. Hildreth trans., Kegan Paul, Trench, Trübner & Co. 1891).

2. *See, e.g., Brown v. Plata*, 131 S. Ct. 1910 (2011). In this case, the Supreme Court ordered the State of California to reduce prison overcrowding from around 200% of its designed capacity to 137.5%. *Id.* at 1924. For more information on the extent of prison overcrowding, see Reid Wilson, *Prisons in These 17 States Are Over Capacity*, WASH. POST (Sept. 20, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/20/prisons-in-these-17-states-are-filled-over-capacity/>; *see also* Howard Bodenhorn, *Prison Crowding, Recidivism, and Early Release in Early Rhode Island*, 59 *EXPLORATIONS ECON. HIST.* 55 (2016).

3. James Q. Whitman, *Equality in Criminal Law: The Two Divergent Western Roads*, 1 *J. LEGAL ANALYSIS* 119, 148 (2009).

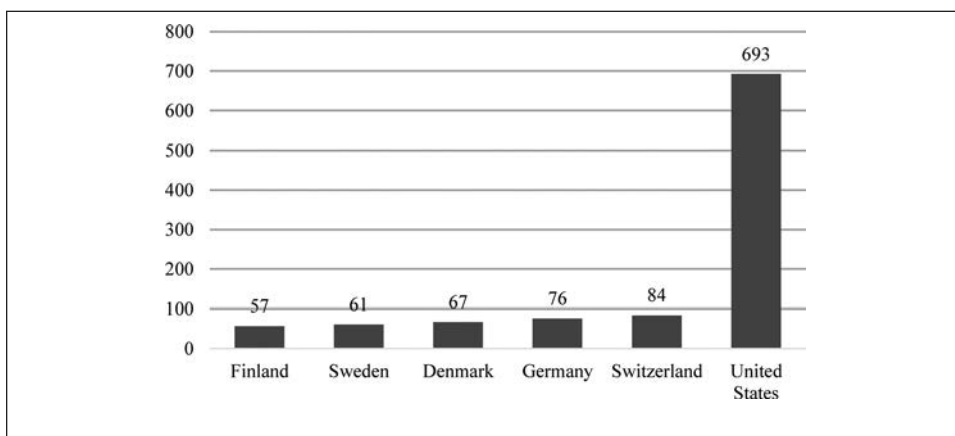
4. *United States of America World Prison Brief*, INT’L CTR. FOR PRISON STUD., <http://www.prisonstudies.org/country/united-states-america> (last visited Nov. 5, 2017).

5. SUZANNE M. KIRCHHOFF, CONG. RESEARCH SERV., R41177, *ECONOMIC IMPACTS OF PRISON GROWTH* 9 (2010).

6. CHRIS MAI & RAM SUBRAMANIAN, VERA INST. OF JUSTICE, *THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS, 2010–2015*, at 8 tbl.1 (2017).

7. *Id.*

**Figure 1. Prison Population per 100,000 inhabitants—2014 (Selected Countries)**



Source: Own figure based on data from: Int'l Ctr. for Prison Stud., <http://www.prisonstudies.org/world-prison-brief-data> (last visited Jan. 6, 2018).

In the same period, some Western European countries had the reverse trend. For instance, following substantial reforms in 1969 and in 1975, Germany began significantly reducing its prison population.<sup>8</sup> As a result, in 2017, only seventy-seven individuals per 100,000 in population were incarcerated in Germany.<sup>9</sup> Prison sentences are rarely used in Germany and they constitute only five percent of all sentences imposed by the courts. The most widespread sanction in Germany is a fine, used in more than eighty percent of the criminal cases dealt with by the courts.<sup>10</sup> While the United States continues to build more prisons, Germany has a surplus of correctional institutions, and the new practice is to sell them to private investors who convert the prisons to use for other purposes.<sup>11</sup> Figure 1 compares the prison population in the United States with the prison population of several Western European countries.<sup>12</sup> A common feature of the presented European jurisdictions, as well as some other countries in Europe, is the use of day-fines.<sup>13</sup> The United States, on the other hand, mainly applies fixed-fines as a pecuniary sanction.

In recent years, U.S. policy makers have been rethinking “tough on crime” policies. There is a growing understanding that harsh sanctions might not always

8. Robert W. Gillespie, *Fines as an Alternative to Incarceration: The German Experience*, 44 FED. PROB. 20, 20–22 (1980).

9. *Germany World Prison Brief*, INT'L CTR. FOR PRISON STUD., <http://www.prisonstudies.org/country/germany> (last visited Nov. 17, 2017).

10. See, e.g., STATISTISCHES BUNDESAMT [FEDERAL STATISTICAL OFFICE], RECHTSPFLEGE: STRAFVERFOLGUNG FACHSERIE 10 REIHE 3, at 90 tbl.2.3 (2012) (Ger.).

11. Stephan Degenhardt, *Investors Remake Germany's Disused Prisons*, DER SPIEGEL (Ger.) (Dec. 3, 2013), <http://www.spiegel.de/international/germany/disused-prisons-in-germany-turned-into-hotels-and-apartments-a-936949.html>.

12. See *supra* Figure 1.

13. See *infra* Part I.A., Table 2.

be the proper response to law breaking, as they impose excessive costs on society, and their effectiveness is unclear. For instance, three-strike laws place many offenders who commit relatively light crimes in prison for excessive terms. Considering the severity of the crimes, as well as the resources spent on keeping those offenders behind bars, these costs may be unjustified.<sup>14</sup> This situation calls for a change and a revision of the American sanctioning system.<sup>15</sup> European countries impose shorter and fewer prison sentences, and yet their crime rates and victimization levels are not necessarily higher than in the United States.<sup>16</sup>

Day-fines are one method to expand the use of alternative sanctions and to reduce the prison population. The fine is both adjusted to the severity of the crime and the blameworthiness of the offender, and it is influenced in a systematic way by the socio-economic status of the delinquent. Therefore, this form of fine allows imposing an equal *relative* burden of punishment on all offenders regardless of their wealth. Furthermore, this model of a pecuniary sanction increases the ability of offenders to comply with the punishment, thus reducing the need to imprison fine-defaulters.

In the late 1980s, U.S. policymakers considered day-fines and conducted experiments to test their applicability to the American criminal justice system.<sup>17</sup> However, day-fines never gained popularity and thus, the practice is still significantly limited in the United States.<sup>18</sup> One possible explanation for the failure of the United States to adopt day-fines during this period is the political environment—it was the wrong time for such a change. Instead, between the 1970s and 1990s, there was an increase in punitive measures such as the death penalty,<sup>19</sup> a loss of confidence in the rehabilitative idea,<sup>20</sup> leading experts in the 1990s predicting that

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14. These costs are especially high due to the increase in the life expectancy of the American population. For a review of the development of life expectancy through American history, see Eldar Haber, *The Meaning of Life in Criminal Law*, 68 RUTGERS U. L. REV. 763, 768–71 (2016).

15. See Erik Eckholm, *In a Safer Age, U.S. Rethinks Its 'Tough on Crime' System*, N.Y. TIMES (Jan. 13, 2015), [http://www.nytimes.com/2015/01/14/us/with-crime-down-us-faces-legacy-of-a-violent-age-.html?\\_r=0](http://www.nytimes.com/2015/01/14/us/with-crime-down-us-faces-legacy-of-a-violent-age-.html?_r=0); Matt Ferner, *Americans Are Sick of the 'Tough On Crime' Era*, HUFFPOST (Feb. 12, 2016), [http://www.huffingtonpost.com/entry/federal-justice-reform-poll\\_us\\_56be1a95e4b08ffac124f71e?section=crime](http://www.huffingtonpost.com/entry/federal-justice-reform-poll_us_56be1a95e4b08ffac124f71e?section=crime); Scott Michels, *Rethinking 'Tough on Crime'*, CRIME REP. (June 28, 2012), <http://www.thecrimereport.org/news/inside-criminal-justice/2012-06-rethinking-tough-on-crime>.

16. JUSTICE POLICY INST., FINDING DIRECTION: EXPANDING CRIMINAL JUSTICE OPTIONS BY CONSIDERING POLICIES OF OTHER NATIONS 10 (2011).

17. For an extensive discussion on the American experimentation with day-fines, see Sally T. Hillsman, *Fines and Day Fines*, 12 CRIME & JUST. 49 (1990).

18. See EDWIN W. ZEDLEWSKI, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, NCJ 230401, ALTERNATIVES TO CUSTODIAL SUPERVISION: THE DAY FINE 10 (2010).

19. *32 States with the Death Penalty and 18 States with Death Penalty Bans*, PROCON.ORG <http://deathpenalty.procon.org/view.resource.php?resourceID=001172> (last updated Dec. 9, 2016).

20. This followed, among others, the publication of a famous study by Robert Martinson, who concluded that there was no empirical evidence supporting the idea of rehabilitation. See Robert Martinson, *What Works?: Questions and Answers About Prison Reform*, PUB. INT., Spring 1974, at 22, 22; see also FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* 7–9 (1981).

crime would ‘explode’,<sup>21</sup> and the reintroduction of punitive forfeiture.<sup>22</sup> During the 1980s, every state introduced laws with minimum sentences, believing that harsher punishments would reduce crime. Moreover, different states enacted “three-strike” laws that imposed a life sentence for certain third-time felons.<sup>23</sup> In general, politicians ran on promises to be tougher on crime and supported harsher punishments.<sup>24</sup> Therefore, it should come as no surprise that an initiative that promoted reduced custodial sentences, like day-fines, failed to gain traction during that period.

Nevertheless, the right time has come to revive the discussion about day-fines. Frustration regarding the increasing prison population in the last several decades has led the American public to doubt the correctness of the strict punitive approach.<sup>25</sup> The “tough on crime” approach is falling out of favor as “smart on crime” policies gain popularity.<sup>26</sup> This new strategy supports, among other reform efforts, the efficient use of limited enforcement resources and a fairer criminal justice system.<sup>27</sup> Under these circumstances, day-fines might now receive public support in the U.S. and could begin reversing the costly and punitive trend.

In this Article, I do not suggest that American imprisonment rates can be reduced to the European level. There are inherent differences that might impede such a goal. For example, even if only prisoners who committed murder or rape were incarcerated, U.S. prisons would still have a higher number of prisoners than the European prison population.<sup>28</sup> Therefore, this Article only discusses the

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21. See JAMES ALAN FOX, TRENDS IN JUVENILE VIOLENCE: A REPORT TO THE UNITED STATES ATTORNEY GENERAL ON CURRENT AND FUTURE RATES OF JUVENILE OFFENDING 3 (1996); John Dilulio, Jr., *Help Wanted: Economists, Crime and Public Policy*, 10 J. ECON. PERSP. 3, 7–8 (1996); Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163, 169–70 (2004); see also STEVEN RAPHAEL & MICHAEL A. STOLL, WHY ARE SO MANY AMERICANS IN PRISON? 1 (2013) (asserting that the growth in prison population was a political response to the public’s demand for just deserts rather than a rational policy).

22. In 1970, Congress reintroduced the English common law practice of punitive forfeiture. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 943 (1970) (codified as amended at 18 U.S.C. § 1963 (2012)); Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 408, 84 Stat. 1236, 1265 (1970) (codified as amended at 21 U.S.C. § 848(a) (2012)).

23. See MICHAEL TONRY, SENTENCING MATTERS 3–4 (1996). For instance, the federal Violent Crime Control and Law Enforcement Act of 1994 contained such a three-strike provision, extended the death penalty to more offenses, and authorized an eight billion dollar budget to build more state prisons. *Id.* at 4.

24. *Id.* at 3–4.

25. See, e.g., *Jailhouse Nation*, ECONOMIST (June 20, 2015), <https://www.economist.com/news/leaders/21654619-how-make-americas-penal-system-less-punitive-and-more-effective-jailhouse-nation>; see also Eckholm, *supra* note 15.

26. See GARRICK L. PERCIVAL, SMART ON CRIME: THE STRUGGLE TO BUILD A BETTER AMERICAN PENAL SYSTEM (2016).

27. See, e.g., *The Attorney General’s “Smart on Crime” Initiative*, U.S. DEP’T JUST., <https://www.justice.gov/ag/smart-on-crime/ag-smart-on-crime-fact-sheet.pdf> (last visited Jan. 6, 2018); see also Robert Weisberg, *How Sentencing Commissions Turned Out to Be a Good Idea*, 12 BERKELEY J. CRIM. L. 179, 181 (2007) (“If it remains risky for politicians to appear to express sympathy for criminal defendants, it has ceased to be politically *suicidal* for them to discuss—even to advocate and carry out—some pragmatically justified reductions in criminal penalties.”).

28. *Jailhouse Nation*, *supra* note 25.

possibility and the advantages of replacing fixed-fines with day-fines. This would enable the American criminal justice system to punish a larger range of categories of offenses with fines rather than imprisonment<sup>29</sup> and contribute to decreasing the prison population.

Despite their potential, day-fines did not receive scholarly attention in the United States after the experimentation period of the 1980s and 1990s. To the best of my knowledge, there has only been one report by the National Institute of Justice addressing this model of fines since that time.<sup>30</sup> This Article attempts to fill this gap and to reopen the discussion among legal scholars and practitioners in the United States. This is also the first article to provide a comparative and exhaustive depiction of the different day-fine models that are applied in Europe.<sup>31</sup> Furthermore, this Article analyzes the main challenges for transplanting day-fines into the U.S. criminal justice system. In this context, this Article focuses on the American understanding of uniformity in sentencing and whether a day-fine model fits this approach. It also analyzes the potential of day-fines to violate the Excessive Fines Clause of the Eighth Amendment.<sup>32</sup> Finally, this Article addresses the problem of limited access to financial information of the offender as a general challenge to wealth dependent fines. To date, the Excessive Fines Clause and the American concept of uniformity in sentencing<sup>33</sup> have not been discussed with respect to day-fines despite their clear relevance.

Parts I and II of this Article describe day-fines in general, discuss their development and structure in Europe, provide an overview of the short experience the United States has had with this model of pecuniary sanctions, and demonstrate their core advantages. Part III analyzes three major challenges for transplanting the European model of day-fines into the U.S. criminal justice system: the American ‘uniformity revolution,’ the Excessive Fines Clause and the limited access to financial information.

## I. DAY FINES

Wealth dependent fines were present as early as the 13th century in England, where pecuniary sanctions were larger for wealthier offenders.<sup>34</sup> Later on, wealth dependent fines were mentioned in the writings of Montesquieu in the 18th century<sup>35</sup>

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29. See *infra* Part I.

30. See ZEDLEWSKI, *supra* note 18.

31. See *infra* Table 1.

32. U.S. CONST. amend. VIII.

33. The ideal of equality in criminal law, which is closely related to uniformity in sentencing, is not the same in the United States as it is in Europe. See, e.g., Whitman, *supra* note 3. Therefore, this analysis is important to understand whether day-fines are consistent with the unique American approach.

34. Note, *Fines and Fining — An Evaluation*, 101 U. PA. L. REV. 1013, 1024 (1953).

35. See MONTESQUIEU, *THE SPIRIT OF LAWS* 108 (Thomas Nugent trans., Batoche Books 2001) (1748) (“And might not pecuniary penalties be proportioned to people’s fortunes?”).

and by Jeremy Bentham in the 19th century.<sup>36</sup> The term ‘day-fines’ was coined by Swedish professor Johan C.W. Thyrén at the beginning of the 20th century<sup>37</sup> and stands for the modern expression of a pecuniary sanction that systematically accounts for the offender’s wealth. Day-fines are imposed in a two-step procedure. First, the court decides the number of days that the fine will last, depending on the severity of the offense. Therefore, in theory, the number of days should be equal for all offenders who committed the same crime.<sup>38</sup> Second, the court assesses the financial situation of the offender, and based on this information, it sets the daily unit for the fine.<sup>39</sup> In some jurisdictions, the daily unit is a fixed fraction of the offender’s daily income.<sup>40</sup> Basic expenses are usually deducted from the daily unit.<sup>41</sup> The total fine is then the number of days multiplied by the daily unit. In this type of a system, two offenders who committed the same crime, yet differ in their socio-economic situation, would bear an equal relative burden but pay a different nominal fine.

To illustrate the way day-fines are calculated, we can examine a day-fine calculation under the Finnish model. Assume two offenders, X and Y, committed theft of an equal value. Both individuals have similar characteristics, such as criminal record, but differ in their level of income. Offender X earns an average daily income of 100 euros<sup>42</sup> while offender Y earns a daily income of ten euros. In 2016, the average number of days imposed for theft in Finland, which expresses the severity of crime, was forty-seven days.<sup>43</sup> So, we can assume for our purposes that both offender X and Y receive forty-seven days of fine (the number of days is equal since both offenders committed the same crime). According to the *Criminal Code of Finland*, the daily amount of the fine should equal 1/60 of the offender’s

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36. See BENTHAM, *supra* note 1, at 353.

37. Tapio Lappi-Seppälä, *Fines in Europe*, in *ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE* 1637, 1640 (Gerben Bruinsma & David Weisburd eds., 2014).

38. Other factors, such as the offender’s criminal record, might also influence the number of days imposed, similar to the way it would affect the length of a prison sentence.

39. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, NCJ 156242, *HOW TO USE STRUCTURED FINES (DAY FINES) AS AN INTERMEDIATE SANCTION* 19–20 (1996); Albin Eser, *Germany*, 21 *AM. J. COMP. L.* 245, 256 (1973).

40. For example, the daily unit equals roughly 1/60 of the offender’s monthly income in Finland and 1/1000 of the offender’s yearly income in Sweden. See SUOMEN RIKOSLAKI [CRIMINAL CODE] ch. 2a § 2(2) (Fin.); ÅKLAGARMYNDIGHETEN, RIKSÅKLAGARENS RIKTLINJER: BERÄKNINGEN AV DAGSBOTSBELOPPET VID STRAFFÖRELÄGGANDE [PROSECUTOR-GENERAL’S GUIDELINES: THE CALCULATION OF A DAY-FINE AMOUNT IN CONNECTION WITH CRIMINAL PROCEEDINGS] 3 (2007) [hereinafter PROSECUTOR-GENERAL’S GUIDELINES] (Swed.).

41. See *infra* Part I.A.

42. The gross national income per capita in Finland was 34,700 euros in 2016, which is approximately 100 euros (95 euros) per day. See *Real GDP per Capita*, EUROSTAT (Jan. 6, 2018), <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&pcode=teina080>.

43. *Rangaistumääräykset ja sakkotuomiot ensimmäisessä oikeusasteessa päiväsakon luku, 2014-2016* [Penalties, District Courts and the Courts of Appeal in the First Instance, 2014–2016], TILASTOKESKUS [STATISTICS FINLAND], [http://pxnet2.stat.fi/PXWeb/pxweb/fi/StatFin/StatFin\\_\\_oik\\_\\_syyttr/?tablelist=true](http://pxnet2.stat.fi/PXWeb/pxweb/fi/StatFin/StatFin__oik__syyttr/?tablelist=true) (last visited Jan. 7, 2018) (Fin.).



average monthly salary after taxes and other deductions.<sup>44</sup> This is approximately fifty percent of the offender's daily net income.<sup>45</sup> Under these circumstances, offender X would be required to pay a fine of  $100 \times 0.5 \times 47 = 2,350$  euros. On the other hand, the fine imposed on offender Y is only  $10 \times 0.5 \times 47 = 235$  euros. Consequently, the relative burden of the fine is the same for the two offenders, i.e. fifty percent of their forty-seven days' income, yet the nominal amount differs.

In order to understand this system better, the following section explains the development of day-fines in Europe and the different models that are applied there.

### A. Day-Fines in Europe

Although other Scandinavian countries were already discussing day-fines at the beginning of the 20th century,<sup>46</sup> Finland became the first European country to introduce this system in 1921.<sup>47</sup> Finland introduced day-fines to cope with high economic inflation at the time, since this model of fines is less sensitive to depreciation in the value of money as compared to fixed-fines.<sup>48</sup> Sweden (1931) and Denmark (1939) soon followed suit in adopting day-fine systems.<sup>49</sup> However, it was not until the second half of the 20th century<sup>50</sup> and the beginning of the 21st century that other European countries adopted day-fines.<sup>51</sup> England and Wales also introduced day-fines in 1991; however, the practice was opposed by judges and was eventually abolished.<sup>52</sup> Although the basic model of day-fines is the same for different jurisdictions that apply it, there are some differences. A survey of European countries that adopted day-fines up to the year 2016 and the differences in their structure is provided in Table 1 below.

44. SUOMEN RIKOSLAKI [CRIMINAL CODE] ch. 2a § 2(2) (Fin.).

45. Tapio Lappi-Seppälä, *Imprisonment and Penal Policy in Finland*, 54 SCANDINAVIAN STUD. L. 333, 336 (2009).

46. Lappi-Seppälä, *supra* note 37, at 1640.

47. *Id.* at 1643–44.

48. Hans-Jörg Albrecht, *Post-Adjudication Dispositions in Comparative Perspective*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 293, 306 (Michael Tonry & Richard S. Frase eds., 2001).

49. See Hans Thornstedt, *The Day-Fine System in Sweden*, 1975 CRIM. L. REV. 307, 307.

50. See LORENA BACHMAIER & ANTONIO DEL MORAL GARCÍA, CRIMINAL LAW IN SPAIN 164 (2010); Hans-Jörg Albrecht, *Sanction Policies and Alternative Measures to Incarceration: European Experiences with Intermediate and Alternative Criminal Penalties* 28, 33–34 (2009), [www.unafei.or.jp/english/pdf/RS\\_No80/No80\\_07VE\\_Albrecht.pdf](http://www.unafei.or.jp/english/pdf/RS_No80/No80_07VE_Albrecht.pdf).

51. There are several countries outside Europe that adopted the model of day-fines through the years: Peru (1924), Cuba (1936), Brazil (1969), Costa Rica (1972), Bolivia (1972). See Hans-Jörg Albrecht & Elmer H. Johnson, *Fines and Justice Administration: The Experience of the Federal Republic of Germany*, 4 INT'L J. COMP. & APPLIED CRIM. JUST. 3, 6 (1980). Day-fines are also practiced in Macau. See CÓDIGO PENAL [PENAL CODE] ch. 2, art. 45 (Mac.).

52. ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 330–31 (5th ed. 2010).

**Table 1. Day-Fines in Europe (in euro)**

Country	Year	Max. No. Days	Min. No. Days	The Daily Unit Limit	Result of Default	Ratio Fines to Prison	Scope of Wealth	Legal Source <sup>53</sup>
Finland	1921	120	1	—	Prison	3:1	Income	Chapter 2(a), Sec. 1-3, 4-5 CC
Sweden	1931	150	30	5–106	Prison	—	Wealth and income	Chapter 25 CC
Denmark	1939	60	1	0.27–	Prison	1:1	Income and wealth	Arts. 51, 54 CC
Germany	1975	360	5	1–30,000	Prison	1:1	Income and assets	Arts. 40, 42, 43 CC
Austria	1975	720	2	4–5,000	Prison	2:1	Economic capacity	Arts. 19 CC
Hungary	1978	540	30	3–1,610	Prison	1:1	Income and “financial situation”	Sections 50-51 CC
France	1983	360	1	–1,000	Prison	1:1	Income	Arts. 131-5 CC
Portugal	1983	360	10	5–500	Prison	1:2/3	Economic and financial conditions	Arts. 47, 49, 48 CC
Liechtenstein	1988	360	2	9–917	Prison	2:1	Economic capacity	Arts. 19 CC
Spain	1995	730	10	2–400	Prison	2:1	Financial situation incl. assets	Arts. 50, 53 CC
Poland	1997	540	10	2–468	Prison	2:1	Income and assets	Arts. 33 CC; 46 EPC
Croatia	1998	360	30	3–1,332	Prison	1:1	Income and assets	Arts. 42, 43 CC
Slovenia	1999	360	30	Total fine limit	Prison	2:1	Income	Arts. 47, 53, 87 CC
Switzerland	2007	360	1	–2,752	Prison	1:1	Income and capital	Arts. 34, 36 CC
Czech Republic	2009	730	20	4–1,848	Prison	—	Income and assets	Arts. 68, 69 CC
Romania	2014	400	30	2–112	Prison	1:1	Financial status	Arts. 61, 63 CC

Source: Created by the Author based on national criminal codes.<sup>54</sup>

53. The abbreviation ‘CC’ refers to ‘Criminal Code’; ‘CPC’ refers to ‘Executive Penal Code’. For the full names of the national codes, see *infra* Appendix.

54. For a list of notes concerning Table 1, see *infra* Appendix.



The German criminal justice system also provides an interesting example of a day-fines model, due to the structure of its sentencing system. The German criminal sentencing system mainly consists of two sanctions: fines and imprisonment (conditional and unconditional).<sup>55</sup> In the grand reform of 1969, the German sanctioning system was amended, and short-term imprisonment penalties were restricted.<sup>56</sup> Then in 1975, day-fines were introduced.<sup>57</sup> These reforms expanded the application of pecuniary sanctions to offenses such as theft, fraud, battery,<sup>58</sup> embezzlement and forgery,<sup>59</sup> and crimes against persons, which were previously dealt with by a custodial punishment.<sup>60</sup> The number of prison sentences less than six months fell significantly in the aftermath of the new reform. While in 1969 a total of 64,073 offenders were sentenced to short-term custody, by 1976 this number dropped to 10,704 individuals.<sup>61</sup> Nowadays, a prison sentence of up to six months is the exception, whereas fines are the default sanction.<sup>62</sup> This trend might explain the high rate of fined convicted offenders and the astonishingly rare usage of incarceration as a punishment, as demonstrated in Figure 2.<sup>63</sup>

According to the German Penal Code, the number of days that a person may be required to pay fines ranges from 5 to 360.<sup>64</sup> While this range has remain unchanged since the introduction of day fines in Germany, the upper limit of the daily unit was increased from around 5,000 euros (10,000 Deutsche Marks)<sup>65</sup> to 30,000 euros.<sup>66</sup> The German Penal Code does not detail the portion of the offender's wealth used to calculate the fine, as in Finland, but only states that it should be based on "the actual average one-day net income of the offender or the average income he could achieve in one day."<sup>67</sup> Furthermore, the German Code allows courts to account for assets and other financial assessments when calculating the daily unit.<sup>68</sup> Thus, the ultimate fine is not based solely on the offender's income. The idea behind the German day-fine is to impose on the offender the "costs of day of freedom." In this way, fines are made equivalent to imprison-

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55. Hans-Jörg Albrecht, *Sentencing in Germany: Explaining Long-Term Stability in the Structure of Criminal Sanctions and Sentencing*, 76 *LAW & CONTEMP. PROBS.* 211, 215 (2013).

56. Joachim Herrmann, *Sanctions: German Law and Theory*, 24 *AM. J. COMP. L.* 718, 719, 725 (1976).

57. *Id.* at 730.

58. Gary M. Friedman, Comment, *The West German Day-Fine System: A Possibility for the United States?*, 50 *U. CHI. L. REV.* 281, 286 (1983).

59. See Gillespie, *supra* note 8, at 23 tbl.1.

60. Friedman, *supra* note 58, at 286.

61. Gillespie, *supra* note 8, at 21.

62. STRAFGESETZBUCH [StGB] [PENAL CODE], § 47, [https://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html](https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html) (Ger.).

63. See *infra* Figure 2. Consequently, the German *Länder* introduced the practice of selling unused prisons to private investors to convert them to other facilities. See Degenhardt, *supra* note 11.

64. StGB § 40(1) (Ger.).

65. Gillespie, *supra* note 8, at 22.

66. StGB § 40(2) (Ger.).

67. *Id.*

68. *Id.* § 40(3).

ment.<sup>69</sup> Nevertheless, the rule holds that the fine may not deprive the offender and his or her family of basic subsistence.<sup>70</sup> When accounting for all the legal restrictions on the size of the fine it appears that the highest possible total day-fine currently permitted in Germany, is 10,800,000 euros (360 days multiplied by 30,000 euros). In practice, German courts do not utilize the wide range of the number of days. In forty-five percent of the fine cases, courts impose only up to thirty days of fine, and in forty-eight percent of the cases they impose between thirty-one and ninety days.<sup>71</sup>

Following the introduction of day fines in Germany, studies were conducted to assess their effectiveness.<sup>72</sup> The findings demonstrated that fines performed better than probation and imprisonment in terms of reconviction rates.<sup>73</sup> These results apply to offenses such as theft and fraud, but not for career criminals. However, no differences were found in reconviction rates for traffic offenses.<sup>74</sup> Another important finding was that day-fines increased the rate of payment. Following the introduction of this fine, only around 4% of the offenders defaulted on the payment of the fine.<sup>75</sup> If the rate of compliance is high, and fines have at least as good of a deterrent effect as other more restrictive sanctions, fines ought to be preferred due to their lower costs of administration.<sup>76</sup>

Finally, it is also interesting to look at the Swedish system of day-fines, as Sweden has the most detailed guidelines for calculating the fine. As mentioned earlier, Sweden was the second European country to introduce this model of pecuniary punishment.<sup>77</sup> There were two stated reasons for introducing day-fines: the perceived inequality between wealthy and poor offenders created by fixed-fines, and the inefficiency of fixed-fines in deterring rich offenders.<sup>78</sup>

Starting in 1948, Swedish prosecutors could impose day-fines—at the time, limited to fifty days for one offense and up to sixty days for two offenses.<sup>79</sup> Since then, prosecutors imposed a large number of day-fines, leading the Prosecutor-General of Sweden to try to achieve uniformity across prosecutors in sentencing.<sup>80</sup> Thus, in 1963, the Prosecutor-

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69. See Lina Eriksson & Robert E. Goodin, *The Measuring Rod of Time: The Example of Swedish Day-Fines*, 24 J. APPLIED PHIL. 125, 125–26 (2007).

70. Friedman, *supra* note 58, at 288.

71. See STATISTISCHES BUNDESAMT, *supra* note 10, at 194 tbl.3.3.

72. The studies compared different groups of offenders, and the researchers controlled for a variety of factors in order to overcome the selection bias.

73. See, e.g., Albrecht & Johnson, *supra* note 51, at 12–13.

74. *Id.*

75. Hans-Jörg Albrecht, *Fines in the Criminal Justice System*, in DEVELOPMENTS IN CRIME AND CRIME CONTROL RESEARCH 150, 159–161 (Klaus Sessar & Hans Jürgen Kerner eds., 1991); Friedman, *supra* note 58, at 297.

76. See Albrecht & Johnson, *supra* note 51, at 10.

77. See *supra* note 49 and accompanying text.

78. Eriksson & Goodin, *supra* note 69, at 129.

79. Thornstedt, *supra* note 49, at 307.

80. *Id.* at 308.

General issued guidelines for calculating the fine. Beyond guiding prosecutors, those guidelines were also studied and used by the courts.<sup>81</sup>

According to the recent prosecutorial guidelines issued by the Swedish Prosecutor-General, the basis for the daily unit is the offender's gross annual income at the day of sentencing.<sup>82</sup> However, in order to compensate for Sweden's progressive tax system, a portion is deducted from the daily unit once the income exceeds a certain threshold.<sup>83</sup> "Income" is treated broadly and includes unemployment benefits, scholarships, economic aid, and housing allowance.<sup>84</sup> In fact, the entire wealth of the offender is accounted for in the daily unit. Thus, the daily unit also includes pension, interest, and annuities.<sup>85</sup> However, some deductions are made for dependents.<sup>86</sup> The daily unit of the fine is 1/1000 of the calculated wealth according to the abovementioned criteria.<sup>87</sup> This constitutes approximately thirty percent of the person's daily income (wealth).<sup>88</sup>

Sweden and Germany's practice of including an offender's entire wealth in the calculation of the daily unit has an advantage from a deterrence perspective. Considering only employment income might cause under-deterrence. For instance, if a major portion of the offender's wealth is revenue from assets or dividends, a daily unit based solely on his or her employment income would lead to a small fine and under-deterrence. The fine would constitute a "proper" portion of his income but not his wealth, therefore setting the expected costs of crime too low.<sup>89</sup>

Different European criminal justice systems vary in the extent for which they use day-fines. Furthermore, prison sentences, although less frequent than in the United States, are not uniform across the countries that apply day-fines. A comparison of selected countries is provided in Figure 2 below. Recent data on the distribution of sanctions in the United States is hard to find. Nevertheless, data on sentencing practices from 1995 to 2000 demonstrates that prison sentences were used in almost seventy percent of cases, whereas fines were imposed in only around twenty percent of cases.<sup>90</sup>

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81. *Id.*

82. PROSECUTOR-GENERAL'S GUIDELINES, *supra* note 40, § 1.1; *see also* Eriksson & Goodin, *supra* note 69, at 129–30.

83. PROSECUTOR-GENERAL'S GUIDELINES, *supra* note 40, § 1.2.

84. *Id.* § 1.1.

85. Thornstedt, *supra* note 49, at 309.

86. *See* PROSECUTOR-GENERAL'S GUIDELINES, *supra* note 40, § 1.3.

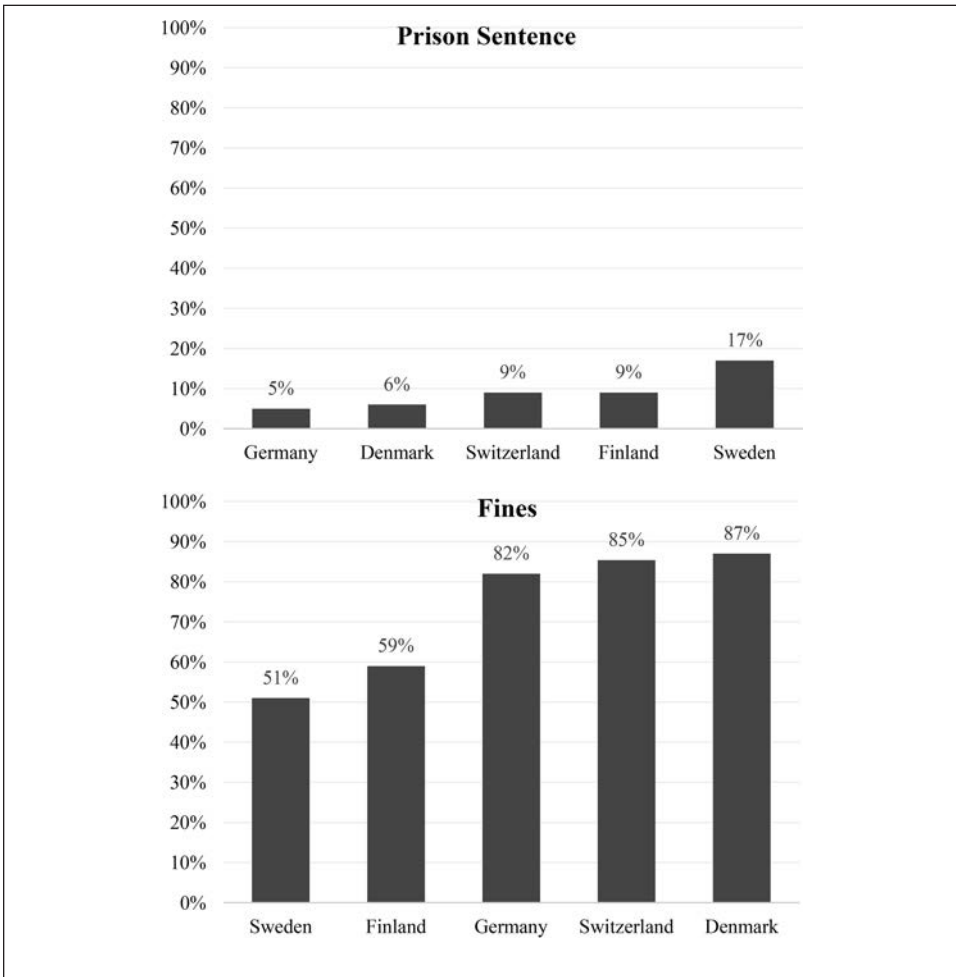
87. *See id.* at 3.

88. For example, if a person's annual income is \$100,000, the daily unit—which is 1/1000 of the annual income—would be equal to \$100. The number of working days in Sweden in 2017 is 251. *See Working Days in Year 2017 in Sweden*, WORKING DAYS, [http://www.workingdays.se/workingdays\\_holidays\\_2017.htm](http://www.workingdays.se/workingdays_holidays_2017.htm) (last visited Jan. 3, 2018). This means the daily income of this person is  $100,000/251 = \$398.4$ . Since there are different deductions from the daily income, the final amount of the daily unit (\$100) is around thirty percent of the daily income (\$400 minus some deductions).

89. This was also the justification for using entire wealth, rather than just employment income, as the basis for the daily unit in Sweden. *See* Eriksson & Goodin, *supra* note 69, at 130.

90. JUSTICE POLICY INST., *supra* note 16, at 21.

**Figure 2. Portion of Prison Sentences and Fines out of all Court Sentences - Selected European Countries (2012)**



Source: Based on data collected from Statistic Offices of the mentioned counties.

### *B. American Experience with Day-Fines*

The advantages of day-fines were already recognized in the United States during the 1980s.<sup>91</sup> In the United States, fines are imposed on convicted offenders regardless of their financial capacity.<sup>92</sup> As a result, the fines are simultaneously too low to deter people with high incomes and too high for poorer offenders to pay

91. In the American context, the term “structured fines” was also used interchangeably with “day-fines.” See BUREAU OF JUSTICE ASSISTANCE, *supra* note 39.

92. JUSTICE POLICY INST., *supra* note 16, at 21.

them.<sup>93</sup> The consequence of defaulting on a payment is imprisonment.<sup>94</sup> Recognizing this problem, some U.S. counties began to experiment with day-fines during the 1980s and 1990s in order to understand whether the European model of day-fines may be applied in the United States.

The first American experiment was conducted in the Criminal Court of Richmond County (Staten Island), New York, from 1987 to 1989.<sup>95</sup> In that experiment, the maximum number of *days* of a fine was set at 120, and a benchmark table for ranking common offenses was prepared.<sup>96</sup> The recommended number of days for the most minor offense was five days, while 120 days was recommended for the most severe offenses.<sup>97</sup> In this experiment, the daily unit was based on a net income but could also be calculated from sources such as welfare benefits and unemployment payments.<sup>98</sup> Funds for some basic needs were protected by deducting amounts from the daily unit. Acknowledging that an equal portion of the net income would impose harsher burdens on the poorest offenders, additional deductions were permitted.<sup>99</sup> The final daily unit for each offender was about two-thirds of his or her net daily income after deductions.<sup>100</sup>

In order to evaluate the effect of day-fines, this experiment compared the payment rates before and after the introduction of day fines. In addition, it assessed the average size of the imposed fine. The researchers concluded that the implementation of day-fines in an American court was a success.<sup>101</sup> Judges found the process of setting the fine to be easy; the average amount of the fine rose by 25%, the revenue from fines increased by 14%,<sup>102</sup> and despite the higher fines, the collection rates of day-fines were somewhat higher (though not statistically significant). Furthermore, only six percent of all fined offenders, as compared to 22% from the year prior to the experiment, did not pay any portion of the fine.<sup>103</sup> Nevertheless, the collection period was longer for day-fines than for fixed fines. This is not surprising, due to the higher average fines imposed during the experiment.<sup>104</sup>

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93. VERA INST. OF JUSTICE, STRUCTURED FINES: DAY FINES AS FAIR AND COLLECTABLE PUNISHMENT IN AMERICAN COURTS 5 (1995).

94. JUSTICE POLICY INST., *supra* note 16, at 65.

95. LAURA L. WINTERFIELD & SALLY T. HILLSMAN, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, 138538, THE STATEN ISLAND DAY-FINE PROJECT 1 (1993).

96. DOUGLAS C. McDONALD ET AL., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, 136611, DAY FINES IN AMERICAN COURTS: THE STATEN ISLAND AND MILWAUKEE EXPERIMENTS 21–22 (1992).

97. *Id.* at 22.

98. *Id.* at 29.

99. *Id.* at 27.

100. *See id.* at 28.

101. *See id.* at 6.

102. WINTERFIELD & HILLSMAN, *supra* note 95, at 5. This is a conservative estimate of the average size of fines and the increase in revenue, since there is a statutory cap on the total size of fines. However, the authors in this study estimated that without this cap the average amount of the fine would have risen by 84% and the increase in revenue would have risen by 67%. *Id.*

103. *Id.*

104. *See id.* at 5.

Other American counties conducted pilot programs that followed the Staten Island experiment. Like the Staten Island experiment, these programs also proved successful as the rate of payments increased. In Polk County, Iowa, the level of full payment rose from 32% (fixed fines) to 72% (day-fines).<sup>105</sup> Furthermore, the percentage of offenders who repaid at least part of the fine increased from 45% to 85%.<sup>106</sup> Although the average imposed amount of fines slightly decreased, the average fine amount collected increased by over 80%.<sup>107</sup> In Maricopa County, Arizona, 89% of offenders who were sentenced to day-fines paid in full.<sup>108</sup> In Milwaukee, Wisconsin, although violators punished by day-fines were only somewhat better in complying with the sentence than those who were sentenced to fixed-fines (with a 59% non-compliance rate for day-fines compared to 61% for fixed-fines), they tended to pay the entire amount more often.<sup>109</sup>

Despite the experimentation with day-fines during the 1980s and the 1990s, this practice did not become widespread in the United States. Even the courts that experimented with the practice of day-fines did not retain them.<sup>110</sup> Although this model of pecuniary sanctions may be found nowadays in some states,<sup>111</sup> the practice is still significantly limited. One explanation might be related to bad timing. The 1970s to 1990s was an era that took a punitive turn in the United States.<sup>112</sup> In such an environment, it is almost impossible for politicians to begin a discussion about the expansion of a fine system. Nevertheless, this punitive trend seems to be coming to an end,<sup>113</sup> and the American public might be finally ready to adopt day-fines as a partial solution to the exploding prison population.

## II. POSSIBLE ADVANTAGES OF DAY-FINES OVER FIXED-FINES

The first significant advantage of day-fines is their ability to deter individuals from committing crimes, regardless of the wealth of the individual. Fixed-fines are equal for all offenders committing similar crimes. Since wealth is not uniform across offenders, fines need to be adjusted either to low-income offenders or to high-income offenders. Fines that are adjusted to low-income offenders might not be sufficient to deter wealthier offenders from committing crimes that benefit them. On the other hand, setting the fines higher in order to deter high-income

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105. See VERA INST. OF JUSTICE, *supra* note 93, at 15.

106. *Id.*

107. See *id.* at 16.

108. *Id.* at 15–16.

109. McDONALD ET AL., *supra* note 96, at 6–7. Notably, the subjects were first-time violators who were fined for lower-level criminal offenses, which were regarded as a mere ordinance disturbance instead of being prosecuted criminally for crimes such as carrying concealed weapons, vandalism, and theft from retail shops. See *id.* at 61.

110. ZEDLEWSKI, *supra* note 18, at 10.

111. See, e.g., ALA. CODE § 12-25-32(2)(b)(8) (2017); OKLA. STAT. tit. 22, § 991a(A)(1)(y) (2017).

112. See *supra* notes 19–24 and accompanying text.

113. See, e.g., Mary Fainsod Katzenstein & Mitali Nagrecha, Policy Essay, *A New Punishment Regime*, 10 CRIMINOLOGY & PUB. POL'Y 555 (2011).

offenders places the poorer offenders in prison for defaulting on the payment of the fine. Thus, uniform fines for offenders with different levels of wealth pose several problems. For example, uniform fines limit the scope of offenses that can credibly be dealt with by fines, discriminate against poorer offenders by creating different de facto sanctions for the rich and the poor,<sup>114</sup> and enable wealthy offenders to ‘buy’ the right to commit crimes. All these problems can potentially be solved with a day-fine. Setting the daily unit independently from the severity of the crime enables the court to impose on every offender similar relative burdens of punishment. In theory, such fines would result in an equal distribution of fine-defaulters across different levels of wealth.<sup>115</sup> Furthermore, standardizing the burden of punishment for all offenders increases the “punitive bite” of this sanction, and in turn, allows expanding its application to other offenses that were previously punished by incarceration. Germany serves as a good example, due to the variety of offenses that are dealt with by fines rather than by short-term imprisonment.<sup>116</sup>

A second advantage of day-fines is their potential to generate higher revenues for both federal and state governments. Adjusting the fine based on the offender’s financial status can, on the one hand, increase the level of compliance because it closely relates to an individual’s ability to pay. On the other hand, wealth-dependent fines can increase the average of the imposed fines, due to wealthier offenders. Both predictions were realized in the American experiments with day-fines described in Part I.B. Furthermore, enhanced compliance with imposed fines reduces the rate of fine defaulters. This means that less people are placed in custody, and fewer resources need to be spent on imprisonment, thus reducing the general costs of the sentencing system. Therefore, the introduction of day-fines could increase the cost-effectiveness of the American sentencing system.

A third advantage of day-fines is the expressive function in this form of punishment. In American society, a common philosophical approach to criminal law is that punishment must convey blame.<sup>117</sup> However, when the decision regarding the severity of the fine is not systematically separated from the consideration of wealth (i.e. fixed-fines), the total amount of the fine does not always reflect the true severity of the crime. For instance, under a fixed-fine system, two equal fines might be imposed on a poor offender committing a severe offense and on a wealthy offender committing a petty crime. Day-fines avoid this problem by setting the number of days solely based on the severity of the crime. That way, regardless of the total amount of the fine, the number of days always

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114. This is an actual problem in the United States, where the current fining system has collateral consequences for offenders who are unable to pay their debt. See Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 284–95 (2014).

115. Ken Pease, *Community Service Orders*, 6 CRIME & JUST. 51, 74 (1985).

116. See *supra* Part I.A.

117. See Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUST. 55, 69 (1992).



reflects the severity of the crime and thus actually conveys blame. For example, in Sweden, when the media reports a sentence of a day-fine, it reports the number of imposed days.<sup>118</sup>

Imposing fines in days as an expression of the severity of the offense turns this penalty to a “time punishment” similar to most other criminal penalties. Custodial sanctions are imposed in months or years, as are probation and electronic monitoring. Community service is imposed (in Europe) in hours. Driver’s licenses are also revoked for a certain period of time. On the other hand, fixed-fines are imposed in money, whereas the severity portion of day-fines is imposed in days. The day-fine system makes it simpler to translate fines to any other punishment in the event the offender defaults on payment. The day-fine can easily be translated to a number of community service hours or prison days. Therefore, imposing day-fines might increase uniformity across the criminal justice system.<sup>119</sup>

Finally, day-fines create a more transparent sentencing system by introducing clear guidelines for calculating fines that limit judicial discretion<sup>120</sup> and allow for meaningful review of sentencing decisions. Unlike the fixed-fine system, where the judge decides how to express the financial situation of the offender, under the day-fine system the law may explicitly specify the portion of wealth that should be considered (as done in Finland and Sweden).

### III. DAY-FINE SYSTEM IN THE U.S.—POTENTIAL CHALLENGES

Previous sections presented various advantages of day-fines. The European experience suggests this form of sanctioning may play an important role in the sentencing choices of the criminal justice system. Nevertheless, this model is not free of problems and each legal system has its own particularities that pose challenges to transplanting reforms from other countries. The current section addresses three of the main challenges for the U.S. in implementing a day-fine sentencing system.

#### A. *Uniformity in Sentencing*

The structure of day-fines may raise a question of equality between offenders or uniformity in sentencing. The purpose of uniformity is to eliminate “unwarranted sentencing disparities” and to promote warranted disparities.<sup>121</sup> In other words, different offenders should be treated differently and similar offenders should be

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118. Eriksson & Goodin, *supra* note 69, at 131. For instance, in 2015 a person was convicted for two minor drug offenses (use of amphetamine) and a DUI. The media reported his sentence as seventy days of a fifty kronor fine. See Matilda Ermeland, *Dagsböter för Knarkbrott*, SUNDSVALLS TIDNING (Swed.) (Nov. 17, 2015) <http://www.st.nu/medelpad/ange/dagsboter-for-knarkbrott-4>.

119. For a detailed discussion on the uniformity argument, see *infra* Part III.A.

120. See Eriksson & Goodin, *supra* note 69, at 131.

121. See PAUL J. HOFER ET AL., U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 11 (2004).

treated similarly.<sup>122</sup> Based on this rule, one could argue that, *prima facie*, imposing different nominal amounts of fines on offenders who committed similar crimes goes against the principle of uniformity in sentencing. This argument is especially relevant in light of 28 U.S.C. § 994(d), which explicitly instructs the sentencing commission to disregard the socioeconomic state of offenders when establishing sentencing guidelines.<sup>123</sup> Uniformity plays a significant role in the American criminal justice system.<sup>124</sup> As one American professor for comparative and foreign law phrased it: “Americans seem deeply committed to the proposition that all offenders who commit comparable offenses ought to suffer, to the extent possible, comparable punishments.”<sup>125</sup> Therefore, it is important to understand whether day-fines challenge this principle or reinforce it.<sup>126</sup>

There are two types of uniformity: “uniformity of outcome” and “uniformity of process.”<sup>127</sup> The former means that the absolute sentence should be the same for similar offenses, regardless of the special characteristics of the offender.<sup>128</sup> Under this rule the sentences are based on strict guidelines that inhibit judicial discretion.<sup>129</sup> One commentator termed this approach “uniformity as predictable sentencing.”<sup>130</sup> Thus, the emphasis is on the ability of the offender to predict his potential punishment.<sup>131</sup> The latter approach, on the other hand, refers to consistency in the process by which the court imposes sentences, rather than the final outcome.<sup>132</sup> This approach was also termed “uniformity as purpose-driven sentencing,” signifying that the sentence should advance a particular purpose of criminal punishment. In other words, sentences should be chosen based on a rational and analytical process.<sup>133</sup> As explained in Part III.A.1 below, while the first approach was the dominant one for several decades, more recent court decisions reveal a shift away from this approach.<sup>134</sup>

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122. *Id.*

123. This provision provides: “The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and *socioeconomic status of offenders.*” 28 U.S.C. § 994(d)(11) (2012) (emphasis added).

124. *See infra* Part III.A.1.

125. Whitman, *supra* note 3, at 120.

126. Due to the limited scope of this Article, the focus of this Section is on uniformity in federal sentencing. Nevertheless, the uniformity revolution and the introduction of sentencing guidelines also occurred in individual states. For a review of sentencing guidelines at the state level, see NEAL B. KAUDER & BRIAN J. OSTROM, NAT’L CTR. FOR STATE COURTS, *STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM* (2008). The federal sentencing discussion suffices to illustrate the potential challenge of uniformity to the introduction of day-fines because federal sentencing guidelines apply to all states.

127. Colgan, *supra* note 114, at 349.

128. *See id.*

129. *Id.*

130. Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 792 (2006).

131. *Id.* at 792–793.

132. *See* Colgan, *supra* note 114, at 349.

133. O’Hear, *supra* note 130, at 791–792.

134. *See* U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 3–4 (2012).

### 1. A Brief History of the “Uniformity Revolution”

For most of the 20th century, uniformity in sentencing was not a concern in the United States. The main purpose of sanctions was the rehabilitation of the offender, and the whole sentencing system facilitated individualized punishment.<sup>135</sup> Sentences were largely indeterminate, consisting solely of statutory maximums. Judges essentially chose between imposing probation or imprisonment on the offender, and the probation service decided when the offender was ready to be released (early release was usually allowed after a certain period served).<sup>136</sup>

In the 1970s, rising concern over the rehabilitative ideology<sup>137</sup> coincided with a rising concern over the significant lack of uniformity in sentencing. In his influential book *Criminal Sentences: Law without Order*, District Court Judge Marvin Frankel called for the introduction of federal sentencing guidelines. Frankel’s argument was that the sentencing system at the time allowed for too much judicial discretion. As a result, the type of punishment and its magnitude often depended on the presiding judge. Forasmuch as the sentence was based on the individual offender rather than on the offense he committed, similar cases were treated differently. Frankel heavily questioned this approach for undermining fundamental principles of criminal law such as equality before the law, predictability, certainty, and objectivity.<sup>138</sup> The purpose of his book was to call for federal sentencing guidelines that would state the objectives of the criminal punishments (e.g. deterrence, retribution, and incapacitation), provide ranges of sentences, and state the factors that should be accounted for when deciding on a punishment.<sup>139</sup> In addition, Frankel urged the legislators to introduce appellate review for sentencing (which was not in place until the 1980s), asserting that this would increase uniformity across sentences.<sup>140</sup>

Following Frankel’s book, several states introduced sentencing commissions.<sup>141</sup> Only a decade later, Congress enacted the Sentencing Reform Act 1984 (SRA).<sup>142</sup> As Frankel also suggested, the SRA stated four objectives of criminal sentencing: retribution, deterrence, incapacitation and rehabilitation, each equal to the other.<sup>143</sup> A criminal sentence was meant to be “sufficient, but not greater than necessary,”<sup>144</sup>

135. ALLEN, *supra* note 20, at 5–7.

136. TONRY, *supra* note 23, at 6.

137. For a discussion of the decline of the rehabilitative ideal, see ALLEN, *supra* note 20.

138. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5–10 (1973).

139. *See id.* at 105–23.

140. *Id.* at 115.

141. For a short review of the characteristics of the different sentencing guidelines that were established by the sentencing commissions, see Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 *JUDICATURE* 173 (1995).

142. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C. (2012)). For the events that led to the adoption of the SRA, see KATE SITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 38–77 (1998).

143. *See* 18 U.S.C. § 3553(a)(2) (2012).

144. *Id.* § 3553(a); *see also* U.S. SENTENCING COMM’N, *supra* note 134, at 13.

and the guidelines were expected to increase proportionality and consistency of punishments. In order to assure uniformity in sentencing, and relying on the (negative) experience of states with non-mandatory guidelines, Congress made sentencing guidelines mandatory.<sup>145</sup>

In 1987, following the SRA, the Federal Sentencing Commission was established and the first guidelines were introduced. A major goal of the guidelines was to assure proportionality between the punishment and the severity of the offense.<sup>146</sup> However, no clear objectives of criminal sentencing were chosen (such as retribution, deterrence, incapacitation or rehabilitation). Instead, the commission adopted an empirical approach to set the sentencing guidelines, thus basing the sentences on past practices. The guidelines left only a small possibility for judges to deviate from the stated ranges of punishment, significantly limiting judicial discretion. Furthermore, apart from the criminal history of the offender, individual characteristics were not supposed to play a role in sentencing.<sup>147</sup> In 2003, the Feeney Amendment was introduced to further strengthen the centrality of punishment, as well as to increase its severity.<sup>148</sup> The goal of this amendment was to minimize downward departures from the sentencing guidelines by more heavily restricting the application of individual characteristics.<sup>149</sup> For instance, with the purpose of promoting uniformity and harsher sentences, the PROTECT Act (2003) restricted the ability of judges to deviate from the guidelines in cases of sexual offenses against minors.<sup>150</sup> In this Article, these reforms are referred to as the “uniformity revolution.”

Upon their introduction, the Federal Sentencing Guidelines attracted a great deal of criticism due to the perceived rigidity of the sentences’ ranges.<sup>151</sup> Moreover, the Guidelines barred the consideration of relevant factors such as individual circumstances, the sentences were sometimes imposed based on unproven facts, and punishments became harsher due to the political trend at the time, resulting in circumventing tactics by judges and prosecutors.<sup>152</sup> The overemphasis on criminal history while ignoring other individual differences reduced

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145. U.S. SENTENCING COMM’N, *supra* note 134, at 14.

146. O’Hear, *supra* note 130, at 778–79.

147. *Id.* at 780–81. After the introduction of the Federal Sentencing Guidelines, multiple studies attempted to assess empirically whether the goal of uniformity was achieved. *See, e.g.*, Celesta A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses*, 31 LAW & SOC’Y REV. 789 (1997); Nicole Leeper Piquero & Jason L. Davis, *Extralegal Factors and the Sentencing of Organizational Defendants: An Examination of the Federal Sentencing Guidelines*, 32 J. CRIM. JUST. 643 (2004).

148. *See* O’Hear, *supra* note 130, at 784–90.

149. Tom Feeney, *Reaffirming the 1984 Sentencing Reforms*, 27 HAMLINE L. REV. 383, 383 (2004).

150. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act, Pub. L. No. 108-21, § 401, 117 Stat. 650, 667 (2003).

151. Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 9 (2010).

152. *See* TONRY, *supra* note 23, at 11–13; Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1018 (2004); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1719–1720, 1725–1727 (1992).

unwarranted disparities, but failed to provide warranted disparities.<sup>153</sup>

After almost three decades of mandatory Federal Sentencing Guidelines, the Supreme Court reversed course in *United States v. Booker*, holding that the guidelines are “effectively advisory.”<sup>154</sup> The Court held there was a conflict between the Guidelines’ “real conduct” rule (meting a punishment based on real facts) and the Sixth Amendment right to a trial by jury (punishment based on proven facts before jury).<sup>155</sup> In addition, the Supreme Court ruled that appellate courts should assess the “unreasonableness” of the sentence on appeal, rather than a strict fit into the Guidelines range.<sup>156</sup> Overall, *Booker* changed the course of the “uniformity revolution” by expanding judicial discretion in sentencing.

A series of post-*Booker* Supreme Court decisions demonstrated the trend away from strict outcome uniformity. In *Gall v. United States*<sup>157</sup> the Supreme Court considered the question of appellate review of outside-range sentences. A judge in the Southern District of Iowa departed downward from the Federal Sentencing Guidelines, giving significant weight to the offender’s self-motivated rehabilitation after the offense.<sup>158</sup> The Court of Appeals reversed the sentence, and the Supreme Court granted certiorari on the appropriate standard of appellate review for sentences.<sup>159</sup> The Supreme Court repeated its holding from *Rita v. United States*,<sup>160</sup> holding that the presumption of “reasonableness” when a sentence is within the range of the guidelines does not mean that there is a presumption of “unreasonableness” when a sentence deviates from the guidelines.<sup>161</sup> In addition, the Supreme Court in *Gall* stated that sentences should be reviewed under the “abuse-of-discretion standard,” taking into account the procedural correctness of the decision and the substantive reasonableness based on all the individual circumstances.<sup>162</sup>

In 2011, the Supreme Court once again supported a downward departure from the Guidelines range based on individual circumstances. *Pepper v. United States* concerned an offender who was convicted by the District Court for the Northern

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153. TONRY, *supra* note 23, at 14; *see also* Lynn Adelman & Jon Deitrich, *Marvin Frankel’s Mistakes and the Need to Rethink Federal Sentencing*, 13 BERKELEY J. CRIM. L. 239 (2008) (challenging Marvin Frankel’s idea rather than the implementation of the Guidelines). *But see* Weisberg, *supra* note 27 (demonstrating that, despite the criticism of the Guidelines, there is a “consensus” regarding the advantages of a flexible set of guidelines).

154. *United States v. Booker*, 543 U.S. 220, 245 (2005).

155. *Id.* at 250–58. In the dissent, however, Justice Stevens argued that because Congress did not anticipate that judges could create sentencing uniformity, the majority’s decision was not justified. *Id.* at 296–97 (Stevens, J., dissenting).

156. *Id.* at 264–65 (majority opinion).

157. 552 U.S. 38 (2007).

158. *Id.* at 43–44.

159. *Id.* at 40, 45.

160. *Rita v. United States*, 551 U.S. 338, 354–55 (2007).

161. *Gall*, 552 U.S. at 47.

162. *Id.* at 51–52. The Court also stated that if the Guidelines were still mandatory, the punishment at hand would be rejected. However, since the Guidelines were no longer mandatory, they became only one factor to be considered when setting a punishment. *Id.* at 59.

District of Iowa for conspiracy to distribute methamphetamine.<sup>163</sup> The District Court judge departed significantly downward from the guidelines.<sup>164</sup> During the appellate review period, the defendant completed his initial sentence and went through a substantial rehabilitation process, including a drug rehabilitation program, enrolling in a college, and finding employment.<sup>165</sup> The question on review was whether the resentencing court was allowed to consider post-sentencing rehabilitation when the original sentence was set aside.<sup>166</sup> The Court of Appeals voiced a concern that this was prohibited by the Guidelines and that it could lead to unwarranted disparities.<sup>167</sup> Nevertheless, the Supreme Court stressed the importance of treating offenders as individuals and not focusing solely on the offense, thus rendering post-sentence rehabilitation a relevant factor that can be taken into consideration in a pre-sentencing stage.<sup>168</sup>

The cases described above demonstrate a move from the strict outcome-uniformity approach and towards a uniformity-in-process method. It appears that the Supreme Court reintroduced the emphasis on individual characteristics and the circumstances of each case. Some support for this claim can be found in an empirical investigation of disparities between individual federal judges in Boston after *Booker*.<sup>169</sup> This study found significant variation between judges with respect to length of the prison sentences and the rate of below-range departures.<sup>170</sup>

## 2. *Uniformity in Sentencing and Day-Fines*

One of the main goals of the “uniformity revolution” was to create sentencing uniformity that eliminated unwarranted disparities between offenders and promoted warranted differences.<sup>171</sup> Federal Sentencing Guidelines were believed to promote this goal by providing narrow ranges of sentences for each category of offense and limiting the factors courts could consider when deciding on the appropriate sentence. A closer look at the goal and the substance of the uniformity reform, as opposed to its form, suggests not only that day-fines are not an obstacle to the uniformity principle, but can actually enhance it.

Day-fines can be first analyzed conservatively by examining whether they would ‘survive’ the pre-*Booker* era. For two decades, since the enactment of the

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163. *Pepper v. United States*, 562 U.S. 476, 481 (2011).

164. *Id.* at 483.

165. *Id.* at 482.

166. *Id.* at 487.

167. *Id.* at 483–84.

168. *Id.* at 487–90. To support its claim, the Court referred to a “pre-uniformity revolution” case, *Williams v. New York*, 337 U.S. 241 (1949), a reference that might signal a move toward more individualized sentencing in general.

169. *See* Scott, *supra* note 151.

170. *See id.*

171. *See* 28 U.S.C. § 994(f) (2012); *United States v. Booker*, 543 U.S. 220, 264–65 (2005); HOFER ET AL., *supra* note 121, at 79.

SRA,<sup>172</sup> the Federal Sentencing Guidelines were mandatory for courts to follow when imposing a sentence. In addition, Congress enacted a strict appellate review process that required appellate judges to review district court sentences for compliance with the prescribed ranges.<sup>173</sup> As illustrated in the previous section, the emphasis for setting the sentencing ranges was on the severity of the offense and the criminal history of the offender.<sup>174</sup> Other statutory considerations such as § 1883<sup>175</sup> were meant to assist the judge to decide on the punishment (mitigating and aggravating circumstances).<sup>176</sup>

**Table 2. Federal Sentencing Guidelines - Fine Ranges (2015)**

Offense Level	A Minimum	B Maximum
<b>3 and below</b>	<b>\$200</b>	<b>\$9,500</b>
<b>4-5</b>	\$500	\$9,500
<b>6-7</b>	\$1,000	\$9,500
<b>8-9</b>	\$2,000	\$20,000
<b>10-11</b>	\$4,000	\$40,000
<b>12-13</b>	\$5,500	\$55,000
<b>14-15</b>	\$7,500	\$75,000
<b>16-17</b>	10,000	\$95,000
<b>18-19</b>	\$10,000	\$100,000
<b>20-22</b>	\$15,000	\$150,000
<b>23-25</b>	\$20,000	\$200,000
<b>26-28</b>	\$25,000	\$250,000
<b>29-31</b>	\$30,000	\$300,000
<b>32-34</b>	\$35,000	\$350,000
<b>35-37</b>	\$40,000	\$400,000
<b>38 and above</b>	\$50,000	\$500,000

Source: U.S. Sentencing Guidelines Manual § 5E1.2(c)(3) (U.S. SENTENCING COMM'N 2016).

One special concern that existed before the enactment of the SRA was the under-deterrence of white collar crimes. At the time, white collar criminals were receiving extremely low fines and almost no prison sentences, thereby providing

172. More precisely, since the implementation date of the first Federal Sentencing Guidelines on November 1, 1987.

173. See O'Hear, *supra* note 130, at 788.

174. See *supra* Table 1 (consisting of criminal history on the horizontal axis and offense level on the vertical axis).

175. 18 U.S.C. § 3553 (2012).

176. Although the focus in case law is on incarceration ranges, the Federal Sentencing Guidelines also provide fine ranges attached to different categories of offenses. See *infra* Table 2.



little deterrence. These offenses practically became business transactions.<sup>177</sup> Setting ranges of fines proportional to the severity of the offense was seen as a proper solution.<sup>178</sup> In addition to those ranges, however, the Commission instructs courts to consider both the financial state of the offender and his ability to pay, and also to assure the fine is sufficiently punitive.<sup>179</sup> Since there are wealth disparities across offenders, those two considerations might be conflicting. For instance, if two offenders committed a level 4 offense, the fine may range from \$500 to \$9,500.<sup>180</sup> Such a range might avoid unwarranted disparity between two offenders that committed a similar offense. However, it will not promote warranted disparities if in effect the burden the fine imposes on the two offenders is significantly different due to variation in wealth. In other words, a fine within such a range might be very punitive for a low-income offender, but only marginally punitive for a wealthy offender. Furthermore, although the maximum fine in this table is \$500,000, higher statutory limits exist that can exacerbate the problem of different effectiveness of the fine for wealthy and low-income offenders. For instance, 21 U.S.C. §§ 841(b) and 960(b) set a maximum fine of ten million dollars (for individuals) and fifty million dollars (for “other than an individual”) for manufacturing or distributing certain controlled substances.<sup>181</sup> This raises the question of whether fixed-fines can impose the same “suffering” on all criminals who committed comparable crimes.<sup>182</sup>

Day-fines offer a sentencing model that can better capture both aims of uniformity—treating similar cases alike and different cases differently. In addition, in the context of federal sentencing, it might better promote the objectives of sentencing, as stated in 18 U.S.C. § 3553(2).<sup>183</sup> Fixed fines can reflect the seriousness of the offense, but if the offender is wealthy, they lack the necessary deterrent effect. On the other hand, if the fines are increased to deter wealthy offenders, they might oblige low-income offenders to serve their punishment through alternative ways, like community service or imprisonment, thus not making it a “just” punishment for low-income offenders.<sup>184</sup> Furthermore, this difference in sentencing between rich and poor (see Section 3) might harm the respect for the law. Contrarily, if the fixed-fine model were replaced with day-fines, more emphasis would be placed on the relative burden the punishment imposed on

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177. U.S. SENTENCING COMM’N, *supra* note 134, at 13.

178. *See id.*

179. U.S. SENTENCING GUIDELINES MANUAL § 5E1.2(d) (U.S. SENTENCING COMM’N 2016).

180. *See supra* Table 2.

181. 21 U.S.C. §§ 841(b), 960(b) (2012).

182. *See Whitman, supra* note 3, at 143–47.

183. I refer here only to 18 U.S.C. § 3553(2)(A)–(B), since incapacitation (C) and rehabilitation (D) usually cannot be addressed by fines.

184. *See Whitman, supra* note 3, at 125–26 (stating that some individual differences are “relevant to the question of just treatment”).

the offender. This way, the fine would be both a deterrent and just.<sup>185</sup>

The model of day-fines can be adjusted to the Sentencing Guidelines in order to enhance uniformity. Instead of stating the nominal ranges of the fine, the Guidelines table can match the offense level to the number of days. Therefore, a similar table to the sentencing table can be constructed.<sup>186</sup> For illustration, see Table 3 below.

**Table 3. Day-Fine Sentencing Table—an Illustration**

Criminal History Category (number of past convictions)						
Offense level	I (0)	II (1)	III (2)	IV (3)	V (4)	VI (5)
1	0–10	10–20	20–30	30–40	40–50	50–60
2	10–20	20–30	30–40	40–50	50–60	60–70
3	20–30	30–40	40–50	50–60	60–70	70–80
4	30–40	40–50	50–60	60–70	70–80	80–90
5	40–50	50–60	60–70	70–80	80–90	90–100
6	50–60	60–70	70–80	80–90	90–100	100–110
7	60–70	70–80	80–90	90–100	100–110	110–120

Source: Author's own table.<sup>187</sup>

Similar to the prison sentencing table, the day-fines sentencing table can account for the criminal history of the offender and the severity of his offense. The portion of the daily unit can be fixed in the law (e.g., thirty percent of the offender's daily wealth or income). In this manner, the same number of days can be imposed on offenders with comparable criminal histories who commit similar offenses. The range allows for a variation in sentencing with respect to other factors. This would provide equal treatment of similar cases. However, the amount of the fine would be determined based on the income or wealth of the offender.<sup>188</sup> At the same time, the sentencing system would treat different offenders differently. For example, consider the following hypothetical: Offender X is a nineteen-year-old man with two

185. See *supra* Part II.

186. A table that provides benchmark number of days for different offenses was already suggested during the 1980s American day-fine pilots. See McDONALD ET AL., *supra* note 96, at 23 tbl.1. However, it did not include the criminal history of the offender.

187. The underlying assumption in the Table is that the statutory limit of days is 120, as in the Staten Island experiment. The offense levels are randomly selected and are not corresponding to the offense levels of the federal sentencing table as presented in the Sentencing Guidelines. This is simply to illustrate that the category of offenses can be divided into offense levels ranging from the lightest offense (1) to the harshest offenses (7). The ranges have also been selected arbitrarily to illustrate the potential to construct such a table.

188. "Income" refers to the personal income from employment (or welfare benefits). "Wealth," on the other hand, includes all types of proceeds (e.g. assets, stocks, etc.). Whether the daily unit should include only personal income or the entire wealth is a policy choice. The advantage of including entire wealth is discussed in Part I.A.

prior misdemeanor convictions that did not result in an imprisonment sentence and a daily income of \$50. Offender Y is a thirty-five-year-old man, also with two prior misdemeanor convictions, but with a daily income of \$200. Assuming they both committed an assault of a stranger with minor resulting harm—a level 4 offense according to Table 3—their sentencing range lies between fifty and sixty days. The court could account for the young age of offender X and impose on him fifty-two days. And offender Y could receive fifty-seven days. Combining all the information, the fines can now be calculated:

$$\text{Offender X: } 0.3 \times 50 \times 52 = \$780$$

$$\text{Offender Y: } 0.3 \times 200 \times 57 = \$3,420$$

If uniformity of outcome is strictly interpreted as the absolute amount of the fine (similarly to equal length of imprisonment), one might contend that day-fines do not comply with this approach. However, uniformity can instead be understood in terms of the relative burden the fines impose on offenders. Since the goals of the uniformity revolution were to achieve certainty in sentencing, more effective deterrence, and a just system, a broader interpretation of outcome uniformity should be considered. Creating a system of wealth-dependent fines increases the “punitive bite” of fines for the wealthy and introduces a more proportional sanction for the poor. Uniformity-in-outcome, in this sense, would be the equal portion of wealth, which is “surrendered” under day-fines.

The justification for introducing the day-fines model in the United States becomes easier when analyzing it in light of the post-*Booker* approach. As illustrated in the previous section, the Supreme Court since *Booker* has moved away from strict outcome-uniformity and towards a uniformity-in-process approach. Although uniformity remains an important goal of the sentencing system, nowadays individual characteristics should play a more important role in determining the “right” sentence. The Guidelines’ sentencing range provides a presumptively reasonable punishment, but it can be overlooked in light of other important factors. For example, at the present time, the sentencing courts are required to follow a certain procedure in order to guarantee consistent sentences for all offenders. As the Supreme Court said in *Gall*:

[The appellate court] must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range. Assuming that the district court’s sentencing decision is procedurally sound, the appellate court

should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.<sup>189</sup>

Day-fines offer a systematic and structured sentencing process that potentially guarantees better uniformity than a fixed-fine system. Many countries that still apply fixed-fines instruct courts to account for the offender's financial state.<sup>190</sup> Although wealth disparities are not ignored, without systematic calculation instructions, it is very difficult to maintain uniformity between the sentencing agents.<sup>191</sup> In the American context, the criticism of fixed-fines is intensified due to the wide discretionary power of American judges to impose "legal financial obligations," or fines and fees, combined with neglecting the offenders' ability to pay.<sup>192</sup> Such practice is believed to raise concerns of fairness and justice of the sentencing system.<sup>193</sup> In his dissenting opinion in *Booker*, Justice Stevens stressed that mistrust in the ability of judges to secure uniformity led Congress to choose certainty of punishment when enacting the SRA.<sup>194</sup> Day-fines are more suitable than fixed-fines to provide a predictable punishment system. The lack of instructions about how to calculate fixed-fines opens the door for subjective evaluations, and in turn, potential disparities between judges. In a day-fine system, on the other hand, once the number of days is determined based on severity and culpability, the court can have clear instructions about how to account for the offender's wealth. Under such a system, an offender is in a better position to predict his expected sentence. Consequently, the day-fine model offers a sentencing process that promotes equality before the law, predictability, certainty, and objectivity.

The statutory restriction against accounting for the socioeconomic status of the offender, 28 U.S.C. § 994(d)<sup>195</sup>—or the neutrality rule—should not be viewed as a challenge to introducing day-fines in the United States. In its 2004 assessment of the sentencing guidelines, the Sentencing Commission explained that not all group disparities are unwarranted and that the neutrality rule intended to prevent discrimination. According to the Commission:

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189. *Gall v. United States*, 552 U.S. 38, 51 (2007).

190. This is also true outside the United States. For instance, in the Netherlands, even though the main factor for setting the fine is the severity of the offense, the law requires courts to consider also the offender's socio-economic state. See Art. 1:24 WETBOEK VAN STRAFRECHT [SR] (Neth.); Peter J. Tak, *Sentencing and Punishment in the Netherlands*, in *SENTENCING AND SANCTIONS IN WESTERN COUNTRIES* 151, 161 (Michael Tonry & Richard S. Frase eds., 2001); PETER J. TAK, *THE DUTCH CRIMINAL JUSTICE SYSTEM* 115–116 (2008). Similarly, in England and Wales, the Criminal Justice Act 2003 obliges judges to receive financial information from the convicted offender in order to adjust the fine to it. See Criminal Justice Act 2003, c. 44 § 164 (Eng.).

191. See ASHWORTH, *supra* note 52, at 332; Hillsman, *supra* note 17, at 65–66.

192. Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 *CRIMINOLOGY & PUB. POL'Y* 509, 509 (2011).

193. *Id.* at 509–10, 522.

194. *United States v. Booker*, 543 U.S. 220, 292 (2005) (Stevens, J., dissenting).

195. 28 U.S.C. § 994(d)(11) (2012).

Discrimination may reflect intentional or conscious bias toward members of a group, or it may result from a distortion of rational judgment by unconscious stereotypes or fears about a group or greater empathy with persons more similar to oneself. Whatever the cause, discrimination is generally considered the most onerous type of unwarranted disparity and sentencing reform was clearly designed to eliminate it.<sup>196</sup>

Clearly, day-fines do not discriminate in the sense of the given definition. This model of pecuniary sanction treats individuals differently based on their socio-economic state, but not due to biases or stereotypes. This is a policy choice to equalize the financial burden of fines on offenders.

The underlying objective of the Congress with the neutrality rule was to protect groups from discrimination based on irrelevant facts. Income of the offender can be relevant for the absolute size of his or her fine. This conclusion is supported by the existing sentencing guidelines that instruct the courts to assess the offender's ability to pay when determining the sentence.<sup>197</sup> Any other interpretation would prohibit all judges from considering the offender's economic capacity.

Furthermore, upon taking a closer look at the existing fining system in the United States, it seems that the current law is not *de facto* neutral to the socio-economic state of the offender. When the goal of the sentencing system is uniformity, there is a tendency to increase the harshness of sentences in order to capture all offenders.<sup>198</sup> Consequently, the law becomes blind to the person's ability to pay and creates two different systems of sanctioning: fines for the rich and imprisonment for the poor who cannot afford the fine.<sup>199</sup> Therefore, fixed-fines might actually be the model that violates the neutrality principle stated in 28 U.S. Code § 994(d). Day-fines, on the other hand, offer a pecuniary model that treats all wealth groups the same relatively.

Even though at first glance, day-fines seem to lead to sentencing disparities between offenders because there are different absolute amounts of fines, in practice they have the potential to enhance uniformity in a legal sense. The model of day-fines provides an objective system of determining fines that would fit the crime and the criminal. Therefore, this model can offer important advantages to the U.S. system, where disparities in the relevant burden of fines are widespread.<sup>200</sup>

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196. HOFER ET AL., *supra* note 121, at 113.

197. See U.S. SENTENCING GUIDELINES MANUAL § 5E1.2(a) (U.S. SENTENCING COMM'N 2016). The statutory obligation to consider the offender's financial capacity can be found in 18 U.S.C. § 3572(a) (2012). Similar provisions can also be found in state laws. See, e.g., N.Y. PENAL LAW § 80.00(1) (McKinney 2016); ALA. R. CRIM. P. 26.11(b).

198. Whitman, *supra* note 3, at 149.

199. See, e.g., Editorial, *Return of Debtors' Prisons*, N.Y. TIMES (July 13, 2012), [http://www.nytimes.com/2012/07/14/opinion/return-of-debtors-prisons.html?\\_r=2](http://www.nytimes.com/2012/07/14/opinion/return-of-debtors-prisons.html?_r=2).

200. See Colgan, *supra* note 114, at 290–95.

### B. Eighth Amendment: Protection from Excessive Fines

The Eighth Amendment to the U.S. Constitution states that “[e]xcessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishments inflicted.”<sup>201</sup> The focus of both the academic literature and the practical implications of this amendment is often the “cruel and unusual punishment” clause, as it relates to the death penalty.<sup>202</sup> “Excessive fines” have received relatively little consideration.<sup>203</sup> In fact, even the First Congress paid little mind to the topic of excessive fines.<sup>204</sup> The framers left the question of interpretation of the term “excessive fines” to the courts.<sup>205</sup>

The majority of court cases dealing with the Excessive Fines Clause have concerned forfeiture of money or property. There has been little discussion of “regular” fines.<sup>206</sup> In the limited number of cases where the Excessive Fines Clause was raised in the context of such fines, the court usually dismissed it.<sup>207</sup> This finding should not come as a surprise in light of the maximum limit on a fine for most, if not all, offenses.<sup>208</sup> However, the special structure of day-fines may potentially trigger protection under the Excessive Fines Clause. As explained throughout the article, the total fine depends not only on the severity of the crime, but also on the financial state of the offender. The financial element of the day-fine is separated from the severity of the crime. Thus, in rare occasions, where the offender is particularly wealthy, this system may lead to significantly high fines imposed for minor violations.<sup>209</sup> This concern is especially true for the Finnish model of day-fines where there is no limit on the daily unit of the fine.<sup>210</sup> Consequently, analyzing

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201. U.S. CONST. amend. VIII (emphasis added).

202. For a review of different Supreme Court cases on the topic, see Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978).

203. See Margaret Meriwether Cordray, *Contempt Sanctions and the Excessive Fines Clause*, 76 N.C. L. REV. 407, 422 (1998).

204. See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264–65 (1989).

205. See 1 ANNALS OF CONG. 782 (1789) (Joseph Gales ed., 1834) (“What is understood by excessive fines? It lies with the court to determine.”).

206. Just as an illustration, out of the first 100 cases dealing with the Excessive Fines Clause in a Westlaw search, sixty-six are related to forfeiture. Only around fourteen cases concern “regular” criminal fines. For the purpose of this search, I have entered the search term “excessive fines clause” and went through the first 100 relevant cases. I have excluded seventeen cases that mentioned the clause in a different context (e.g. citing the Eighth Amendment for the purpose of dealing with cruel and unusual punishment protection).

207. See, e.g., *Collins v. SEC*, 736 F.3d 521, 526–27 (D.C. Cir. 2013) (civil penalty); *Newell Recycling Co. v. EPA*, 231 F.3d 204, 210 (5th Cir. 2000) (administrative penalty); *Byrd v. Hunt*, 136 F. Supp. 2d 511, 516–17 (M.D.N.C. 2001) (seat belt law fine); *Gordon v. State*, 139 So. 3d 958, 964 (Fla. Dist. Ct. App. 2014) (criminal fine); *Utah Air Quality Bd. v. Truman Mortensen Family Tr.*, 8 P.3d 266, 273–74 (Utah 2000) (civil fine). *But see Commonwealth v. Eisenberg*, 98 A.3d 1268, 1270, 1278 (Pa. 2014) (holding fine was unconstitutionally excessive because the minimum prescribed penalty was 375 times larger than the value of the stolen money).

208. See, e.g., TEX. PENAL CODE ANN. § 12.21 (West 2017); 101 PA. CONS. STAT. § 15.66(b) (2017); CAL. PENAL CODE § 19 (West 2014).

209. See the Finnish example mentioned *infra* Part III.B.2.

210. See SUOMEN RIKOSLAKI [CRIMINAL CODE] ch. 2a (Fin.).

the Excessive Fines Clause is important for understanding the challenges in introducing day-fines into the American criminal justice system.

The following sections briefly review the main U.S. case law on the constitutional prohibition of Excessive Fines. Subsequently, rules that were developed by U.S. courts with respect to the Excessive Fines Clause are applied to day-fines. This in turn allows for recommendations on the way to adjust the day-fine model to the U.S. criminal justice system.

### 1. *The Development of the Excessive Fines Clause in the U.S.*

One of the first cases in which the U.S. Supreme Court mentioned the Excessive Fines clause was *Ex parte Watkins* in 1833.<sup>211</sup> The court explained that the Eighth Amendment serves as a limitation on the courts' discretionary power in criminal cases. However, the Justices declined to exercise jurisdiction and did not discuss the matter further.<sup>212</sup> Several decades later, in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, the Supreme Court discussed for the first time the definition of "fines."<sup>213</sup> In particular, the Court dealt with the question of whether the Excessive Fines Clause was applicable to punitive damages in civil cases between private parties.<sup>214</sup> In the absence of guidelines from the First Congress, the Court reviewed the history of the clause in order to derive the legislators' original intent. They concluded that the aim of the Excessive Fines Clause was to limit "the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends."<sup>215</sup> Therefore, the Supreme Court held that the Excessive Fines Clause did not apply to civil cases in which the government was not the prosecutor or did not have a claim to receive part of the damages.<sup>216</sup>

The Excessive Fines Clause has also been discussed in the context of forfeiture. One of the leading Supreme Court cases in this field, *Austin v. U.S.*, defined the type of forfeiture that falls under the Eighth Amendment's protection.<sup>217</sup> In that case, the defendant was convicted for possession and intent to distribute cocaine.<sup>218</sup> In addition to his conviction, the United States filed *in rem* action to forfeit the defendant's property, asserting it was to be used for drug-related crimes.<sup>219</sup> First, the Court established that the Excessive Fines Clause "limits the

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211. 32 U.S. 568, 573–74 (1833).

212. *Id.* at 574. The Court added that there is no jurisdiction even if the fine were excessive, which was not the case here. *Id.*

213. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). This was an antitrust case between two private parties where the defendant raised an Excessive Fines Clause challenge to a \$6 million punitive damages jury award.

214. *Id.*

215. *Id.* at 267.

216. *Id.* at 264.

217. *Austin v. United States*, 509 U.S. 602, 604 (1993).

218. *Id.* at 604.

219. *Id.* at 604–05.



government's power to extract payments, whether in cash or in kind, as punishment for some offense."<sup>220</sup> Following this statement, the Court held that it does not matter whether the nature of the forfeiture at hand is civil or criminal. Instead, it is the purpose of the forfeiture that is detrimental for the application of the Excessive Fines Clause.<sup>221</sup> If the forfeiture is meant to serve as a punishment, even just in part, then it must go through Eighth Amendment scrutiny.<sup>222</sup> Nevertheless, the Court left open the question of how to assess whether the forfeiture at hand was excessive under the Eighth Amendment, stating that sentencing is the lower courts' prerogative.<sup>223</sup>

In 1998, in *United States v. Bajakajian*,<sup>224</sup> the U.S. Supreme Court finally sought to define an *excessive* fine under the Eighth Amendment. There, the respondent and his wife made an attempt to leave the United States without reporting the fact that they were transporting \$357,144 in cash.<sup>225</sup> This violated the requirement in 31 U.S.C. § 5316(A)(1)(a) to report transportation of above \$10,000.<sup>226</sup> After his conviction, the defendant was sentenced to three years' probation and \$5,000 fine.<sup>227</sup> In addition, the Government sought to forfeit the entire unreported amount under 18 U.S.C. § 982(A)(1).<sup>228</sup> The Supreme Court explained that the basic principle of the Excessive Fines Clause is proportionality. There must be a connection between the severity of the committed crime and the imposed sanction. Therefore, the Court held that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."<sup>229</sup> However, the Court did not provide further definition of what the standard "grossly disproportional" generally means.

The proportionality principle was first constitutionalized in *Weems v. United States*,<sup>230</sup> in the context of the "cruel and unusual punishment" prohibition of the Eighth Amendment. Generally, the principle requires that "a punishment which is grossly or excessively severe in relation to the gravity of the crime charged must be struck down by the courts as violative of the eighth amendment."<sup>231</sup> For seven decades since *Weems*, the proportionality of a sentence was successfully chal-

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220. *Id.* at 609–10.

221. *Id.* at 610.

222. *Id.*

223. *Id.* at 622–23.

224. 524 U.S. 321 (1998), *superseded by statute on other grounds as recognized by* United States v. Del Toro-Barboza, 673 F.3d 1136, 1154 (9th Cir. 2012).

225. *Id.* at 324–25.

226. *Id.*

227. *Id.* at 326.

228. *Id.* at 321.

229. *Id.* at 334.

230. 217 U.S. 349, 367 (1910).

231. William Hughes Mulligan, *Cruel and Unusual Punishments: The Proportionality Rule*, 47 *FORDHAM L. REV.* 639, 639 (1979).

lenged mainly in the context of capital punishment.<sup>232</sup> The death penalty was perceived as a unique type of punishment, due to its irreversibility, which justified judicial intervention in legislative decisions.<sup>233</sup> However, in 1983, the Supreme Court for the first time reversed a prison sentence on the grounds of gross disproportionality in the case of *Solem v. Helm*.<sup>234</sup> The court clearly stated three objective factors, which should be examined in a proportionality review: (1) the severity of the offense and the gravity of the penalty; (2) sentences imposed on more severe crimes in the same jurisdiction; (3) sentences imposed on similar offenses in other jurisdictions.<sup>235</sup>

Even though the Supreme Court in *Bajakajian* explicitly referred to the above-mentioned cases, it did not strictly follow the criteria put forward for the proportionality review.<sup>236</sup> Instead, the Court assessed the excessiveness of the forfeiture based on only two factors: (1) the maximum penalty as stated in the Sentencing Guidelines for the particular offense; and (2) the harm caused by the offense. The Court concluded that since the maximum penalty was significantly lower than the unreported amount (\$5,000 fine and six months imprisonment); and the harm was only the deprivation of information from the government (the money itself was not connected to any offense); forfeiture of the entire amount was grossly disproportionate and violated the Excessive Fine Clause.<sup>237</sup> Consequently, *Bajakajian* became the first case in the American history where the Court struck down a fine due to its excessiveness.<sup>238</sup>

The lack of guidance from the Supreme Court regarding the proportionality review generated disparity in the selection of relevant factors for the determination of “excessiveness” by the lower courts.<sup>239</sup> This problem is exacerbated by the fact that a typical review needs to be applied to different types of “fines,” such as forfeiture, restitution, civil penalty and regular fines, thus requiring consideration of different factors. As a result of this lacuna, circuit courts developed a wide range of relevant factors, some of which were considered in *Bajakajian*, but others that

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232. *Rummel v. Estelle*, 445 U.S. 263, 272 (1980).

233. *See, e.g., Coker v. Georgia*, 433 U.S. 584, 598 (1977); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 287 (1976); *Furman v. Georgia*, 408 U.S. 238, 286 (1972).

234. 463 U.S. 277, 303 (1983). It should be noted that the reviewed sentence in *Weems v. United States* was also imprisonment. However, in that case incarceration was combined with hard and painful labor, life-time surveillance, loss of pension and other restrictive conditions. *Weems*, 217 U.S. at 364–65.

235. *Solem*, 463 U.S. at 290–92.

236. *See United States v. Bajakajian*, 524 U.S. 321, 336 (1998) (referring to *Solem* and *Rummel* to justify the adoption of the gross proportionality principle), *superseded by statute on other grounds as recognized by United States v. Del Toro-Barboza*, 673 F.3d 1136, 1154 (9th Cir. 2012).

237. *Id.* at 339–40.

238. *See id.* at 344 (Kennedy, J., dissenting).

239. Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 834 (2013).

were not, including: caused harm;<sup>240</sup> gravity of the offense;<sup>241</sup> whether the given fine was in the statutory/Sentencing Guidelines range;<sup>242</sup> culpability;<sup>243</sup> potential profit from the crime;<sup>244</sup> whether the offender falls into the intended target population of the law;<sup>245</sup> and whether the forfeiture money was related to other offenses.<sup>246</sup> In some cases, the court considered even the motivation of the offender as a relevant factor for the excessiveness of the fine.<sup>247</sup> The disparity in the application of the “gross proportionality” standard derives from the fact that different courts choose different combinations of factors to consider.

However, the most interesting development in the circuit courts in the context of the current Article was the consideration of the offender’s ability to pay, or the possibility of depriving his livelihood, as an important factor when assessing the excessiveness of the fine.<sup>248</sup> In one case, it was stressed that financial consideration is especially important in the context of regular fines.<sup>249</sup> Furthermore, the 1st Circuit asserted in *United States v. Levesque* that the importance of the offender’s livelihood for the ‘gross proportionality’ standard can be read from *Bajakajian*.<sup>250</sup> The court stressed “[t]he Supreme Court has made it clear that the notion that a forfeiture should not be so great as to deprive a wrongdoer of his or her livelihood is deeply rooted in the history of the Eighth Amendment.”<sup>251</sup> The Supreme Court in *Bajakajian* even stated that the offender did not raise the claim about his limited ability to pay.<sup>252</sup> This might suggest that the Supreme Court left open the possibility to include the offender’s ability to pay in the excessiveness review. A similar approach was advocated by recent commentators, who relied on a more extensive review of historical sources in order to demonstrate that the drafters might have had a broader understanding of the Excessive Fine Clause.<sup>253</sup>

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240. See *United States v. Zakharia*, 418 F. App’x 414, 422 (6th Cir. 2011); *United States v. 3814 NW Thurman St.*, 164 F.3d 1191, 1197–98 (9th Cir. 1999), *superseded by statute on other grounds as recognized by* Transbay Auto Serv., Inc. v. Chevron USA Inc. 807 F.3d 1113, 1120 (9th Cir. 2015); *United States v. Dubose*, 146 F.3d 1141 (9th Cir. 1998).

241. See *Vasudeva v. United States*, 214 F.3d 1155, 1161 (9th Cir. 2000); *United States v. Dicter*, 198 F.3d 1284, 1292 (11th Cir. 1999).

242. See *Newell Recycling Co. v. EPA*, 231 F.3d 204, 210 (5th Cir. 2000); *United States v. 817 NE 29th Drive*, 175 F.3d 1304, 1309–10 (11th Cir. 1999).

243. See *United States v. Smith*, 656 F.3d 821, 828–29 (8th Cir. 2011); *United States v. Sabhnani*, 599 F.3d 215, 262 (2d Cir. 2010); *United States v. Mackby*, 339 F.3d 1013, 1019 (9th Cir. 2003).

244. See *Balice v. U.S. Dep’t of Agric.*, 203 F.3d 684, 698–99 (9th Cir. 2000).

245. See *United States v. Heldeman*, 402 F.3d 220, 223 (1st Cir. 2005); *Mackby*, 339 F.3d at 1017.

246. See *United States v. Varrone*, 554 F.3d 327, 332 (2d Cir. 2009).

247. See *United States v. Malewicka*, 664 F.3d 1099, 1104 (7th Cir. 2011).

248. See *United States v. Levesque*, 546 F.3d 78, 83–84 (1st Cir. 2008); *United States v. Jose*, 499 F.3d 105, 113 (1st Cir. 2007); *United States v. Lippert*, 148 F.3d 974, 978 (8th Cir. 1998).

249. *Lippert*, 148 F.3d at 978.

250. *Levesque*, 546 F.3d at 83–84.

251. *Id.*

252. *United States v. Bajakajian*, 524 U.S. 321, 340 n.15 (1998), *superseded by statute on other grounds as recognized by* *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1154 (9th Cir. 2012).

253. See, e.g., Colgan, *supra* note 114, at 319–36; McLean, *supra* note 239.

It should be noted that the judgment in *Bajakajian* was given in a pre-*Booker* period, when the Federal Sentencing Guidelines were still mandatory and more emphasis was placed on uniformity in outcome. Since then, courts have moved closer to individualization in sentencing.<sup>254</sup> This might partially explain the trend of some courts in the last decade to include ability to pay into the assessment of excessiveness of the fine.<sup>255</sup>

## 2. *The Excessive Fine Clause and Day-Fines*

Occasional high fines for minor offenses that can be produced by the day-fine system, prima facie, violate the constitutional Excessive Fines Clause. For instance, we can apply the *Bajakajian* gross proportionality test to the Finnish case where a wealthy driver received a fine of more than \$100,000 for speeding. The potential harm is fatality or injury to other users of the road. Although it is a severe outcome, it is merely a risk and not a direct consequence of the offense. Hence, paying such a high fine for this offense might be viewed as grossly disproportionate. We can also consider the statutory maximum for speeding and see that the permitted maximum fines for this kind of offense are much lower.<sup>256</sup> Nevertheless, a deeper analysis of the purpose of the constitutional protection and the aims of day-fines ought to be analyzed in order to assess the excessiveness of such fines.

The above brief review of U.S. Supreme Court cases on the Excessive Fines Clause demonstrates that courts place a great emphasis on the historical background of the clause and the rationale behind it. The current Excessive Fines Clause is a descendant of the English Bill of Rights and the Magna Carta. Both documents meant to limit abuse of powers and the arbitrary application of sanctions by rulers.<sup>257</sup> This goal was translated to the contemporary circumstances where the Constitution serves as a restraining mechanism for “the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends.”<sup>258</sup> Therefore, the main intention of the Excessive Fines Clause is to avoid arbitrary sanctions that have no hold in the law.

The day-fine model offers a system where the fine is carefully tailored to the offense and the offender. It is far from arbitrary. The process of calculating the fine is uniform across all offenders. Most importantly, the model aspires to impose an equal relative burden of punishment. In other words, when we look to the proportionality of the sanction, we should not ignore its effect on the individual offender. In the words of William Blackstone, “value of money itself changes from a thousand causes; and, at all events, what is ruin to one man’s fortune, may be

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254. See *supra* Part III.A.2.

255. See *supra* note 248.

256. For instance, in New York, the maximum fine for speeding more than thirty miles per hour above the permitted limit is \$600. N.Y. VEH. & TRAF. LAW § 1180(h)(1)(iii) (McKinney 2016).

257. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 270–72 (1989).

258. *Id.* at 267.

matter of indifference to another's."<sup>259</sup> Taking the Finnish example, the high fine was a result of multiplying fourteen days of fine (expressing the severity of the crime) by fifty percent of the offender's daily income. While the nominal amount of the fine was high (around \$130,000), it constituted a very small fraction of the offender's income. As suggested by the former Chief Justice of the Supreme Court of Pennsylvania, Ronald Castille, in his dissenting opinion in *Commonwealth v. Carela-Tolentino*, "the one-size-fits-all mandatory approach . . . violates constitutional prohibitions against excessive fines."<sup>260</sup>

The Supreme Court in *Weems* stressed that the interpretation of the Constitution must be adjusted to allow wider application over time.<sup>261</sup> On another occasion, the Supreme Court asserted that a constitutional protection "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>262</sup> Therefore, when considering individual justice, day-fines might better fit the proportionality principle than a one-size-fits-all fine. The link between the severity of the crime and the harshness of the fine may still be maintained through the scrutiny of the number of (fine) days. However, in the words of Jeremy Bentham, "[t]he relative amount of the fine should be fixed, not its absolute amount. . . ."<sup>263</sup> Namely, there should be a statutory proportion of person's wealth or income set as the daily unit. In this manner, the fine will impose similar "suffering" on all offenders regardless of their wealth.

To illustrate the argument of consistency between a humane and proportionate sentencing system, we can look at the country that applies the most 'extreme' model of day-fines, Finland. At the same time, this country has also one of the most humane sanctioning systems in the world. Starting in the 1960s, the Finnish criminal justice system went through extensive reforms that were labeled "humane neo-classicism."<sup>264</sup> Among others, these reforms reintroduced proportionality as one of the fundamental values, thus limiting excessive penalties.<sup>265</sup> Since then, Finland reduced its prison population and stressed that a prison sentence is not meant to impose suffering on the offender, but only to restrict his liberty while maintaining other rights.<sup>266</sup> Although life imprisonment exists as a sentence, most life prisoners do not serve more than fourteen years.<sup>267</sup> Around twenty-five percent

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259. 4 WILLIAM BLACKSTONE, COMMENTARIES \*378.

260. *Commonwealth v. Carela-Tolentino*, 48 A.3d 1221, 1222 (Pa. 2012) (Castille, C.J., dissenting).

261. *Weems v. United States*, 217 U.S. 349, 373 (1910).

262. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

263. BENTHAM, *supra* note 1, at 353.

264. Tapio Lappi-Seppälä, *Changes in Penal Policy in Finland*, in 1 PUNITIVITY: INTERNATIONAL DEVELOPMENTS 251, 255–57 (Helmut Kury & Evelyn Shea eds., 2011).

265. *Id.*

266. See Lappi-Seppälä, *supra* note 45, at 342.

267. Tapio Lappi-Seppälä, *Criminology, Crime and Criminal Justice in Finland*, 9 EUR. J. CRIMINOLOGY 206, 219 (2012).

of prisoners are held in open prisons that have no walls or fences<sup>268</sup> and some of those inmates can work outside the prisons during the day.<sup>269</sup> Evidently, in Finland, the humane approach and the proportionality principle go hand in hand with the unlimited daily unit. The reason for this is the Finnish aspiration to impose “equal severity” of fines regardless of the offenders’ income or wealth.<sup>270</sup> Therefore, the idea of introducing day-fines in the United States while preserving the proportionality principle is not unachievable.

Furthermore, it should be kept in mind that the potential cases of high fines for minor offenses would be very rare in the U.S. The majority of sanctioned offenders are low-income individuals.<sup>271</sup> Therefore, introducing the day-fine model can actually assist in solving the opposite problem—imposing significantly higher fines on indigenous delinquents that cannot afford paying them. Day-fines can introduce a fairer system where the penalty expresses not only the severity of the crime, but also the relative burden borne by the offender.

Nevertheless, if there remains a concern that the Excessive Fines Clause would constitute a significant impediment to the implementation of day-fines in the United States, certain adjustments can be made. First, an exception can be introduced. In Sweden for instance, the Prosecutor General’s Guidelines, which are used for calculating the daily unit, provide a possibility to reduce the daily unit in exceptional cases where the fine, considering all the facts, seems to be excessively high.<sup>272</sup> Alternatively, the U.S. criminal justice system may follow the more common practice of placing a general cap on the daily unit.<sup>273</sup> This option is not optimal because it would reduce the fines for the wealthiest offender. Nevertheless, it is expected that it would minimize the risk of violating the Excessive Fines Clause. Forasmuch as wealthy offenders do not constitute a large portion of all offenders, this choice would not have a large impact on the overall effectiveness of the system (notably if the cap on the daily unit was sufficiently high).

### C. Access to Financial Information of Convicted Offenders

Financial information is the key element for the effectiveness of a day-fine. Without this information, the choice of a daily unit would be arbitrary. Consequently, a day-fine without adequate access to financial information of the offender might result in the same problems characterizing fixed fines. This constitutes a

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268. *Id.*

269. RIKOSSEURAAMUSVIRASTO [CRIMINAL SANCTIONS AGENCY], SUOMALAISTEN VANKILOIDEN TURVALLISUUS [SECURITY OF FINNISH PRISONS] 129 (2008), [http://www.rikosseuraamus.fi/material/attachments/rise/julkaisut-risenjulkaisusarja/6KNhTwqb1/5\\_2008\\_turvallisuus\\_SUMMARY\\_IN\\_ENGLISH.pdf](http://www.rikosseuraamus.fi/material/attachments/rise/julkaisut-risenjulkaisusarja/6KNhTwqb1/5_2008_turvallisuus_SUMMARY_IN_ENGLISH.pdf) (Fin.).

270. Lappi-Seppälä, *supra* note 45, at 336.

271. *See* Colgan, *supra* note 114, at 290.

272. *See* PROSECUTOR-GENERAL’S GUIDELINES, *supra* note 40, § 2.

273. *See supra* Table 1.



problem since, unlike in some European countries, the law in the United States limits the availability of such information, even for criminal courts and investigation agents.<sup>274</sup>

The right to privacy is a fundamental principle in the United States, especially when it concerns freedom from state interference in a person's personal life. Even though it is not mentioned explicitly, privacy is protected under the Fourth Amendment to the U.S. Constitution.<sup>275</sup> Furthermore, different state and federal laws explicitly limit access to a person's financial data. For instance, financial institutions such as banks are not allowed to provide such information without the individual's consent or a court's subpoena.<sup>276</sup> Even the individual tax return information collected by the IRS is confidential and can only be disclosed to courts and criminal enforcement agencies under specific conditions.<sup>277</sup> This is very different from the practice in some of the European countries that implement day-fines. In those countries, there is wide access to the financial information of the offender, which is occasionally also provided in the criminal code itself.<sup>278</sup> For example, the Swiss and Danish criminal codes state the general obligation of the relevant authorities to provide the courts with financial information for the purpose of setting the day-fine.<sup>279</sup> In Finland, the courts are instructed to use the most recent tax report in order to calculate the daily unit of the fine.<sup>280</sup> Moreover, in Sweden, Norway and Finland, tax returns are available online.<sup>281</sup>

The best way to solve this problem is to adjust U.S. privacy provisions in a way that accommodates the effective implementation of a day-fine. In other words, it would require expanding the access of courts and investigation authorities to the financial information of convicted offenders when it is necessary for setting a day-fine. As a reminder, under current state and federal law, courts are in some circumstances allowed to issue a subpoena to access financial information, demonstrating that informational privacy is not an absolute right. However, courts normally need to have a cause. Naturally, this solution expects to face objections from supporters of the right to privacy. However, in the current American reality of prison overcrowding, accurate and reliable day-fines have the potential to partially substitute for custodial sanctions. Furthermore, day-fines lead to fewer fine-

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274. See Hillsman, *supra* note 17, at 77.

275. See *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring).

276. See 12 U.S.C. § 3402 (2012); 205 ILL. COMP. STAT. 5/48.1(c) (2017). For a review of State and Federal laws on the matter, see ROBERT ELLIS SMITH, COMPILATION OF STATE AND FEDERAL PRIVACY LAWS 7–8 (2013).

277. 26 U.S.C. § 6103(i)(1)–(4) (2012).

278. See, e.g., SCHWEIZERISCHES STRAFGESETZBUCH, CODE PÉNAL SUISSE, CODICE PENALE SVIZZERO [STGB, CP, CP] [CRIMINAL CODE] Dec. 27, 1937, SR 311, art. 34(3) (Switz.); Lappi-Seppälä, *supra* note 37, at 1641.

279. StGB, CP, CP, art. 34(3) (Switz.); STRAFFELOVEN [CRIMINAL CODE] § 51(4) (Den.).

280. SUOMEN RIKOSLAKI [CRIMINAL CODE] ch. 2a § 2(3) (Fin.).

281. See Lars Bevanger, *Norway: The Country Where No Salaries Are Secret*, BBC (July 22, 2017), <http://www.bbc.com/news/magazine-40669239>; *Two Rights, Wrong Policy*, ECONOMIST (Apr. 16, 2016), <http://www.economist.com/news/leaders/21696939-push-publish-peoples-tax-returns-pits-transparency-against-privacy-which-should-win-two>.



defaulters in jail.<sup>282</sup> Under these circumstances, the question of expanded access to financial information refers to a trade-off between the offender's right to privacy and his right to *freedom*, rather than the court's need for information. Framing this problem in such a way might assist in overcoming the political barriers in adjusting privacy laws.

However, even if the call for the adjustment of American privacy provisions is not justified by the benefits of day-fines, the possibility of introducing this model of fines in the United States is still worth discussing. For example, Germany is one of the criminal justice systems that utilizes a large proportion of day-fines. As illustrated by Figure 2, more than 80% of court cases in Germany result in fines.<sup>283</sup> And yet this system does not seem to lead to high levels of criminal behavior.<sup>283</sup> German courts face similar problems to U.S. enforcement authorities, since they do not have access to financial information of the offender, and they may not require the offender to provide this information. Police and the prosecution may, however, investigate the financial state of the offender (without accessing financial documents such as tax records) and call for witnesses to establish the offender's income.<sup>284</sup> One German study investigated the type of information on which German courts based the daily unit. The authors found that in approximately 54% of the cases where a day-fine was imposed, the courts had no information regarding the income of the offender.<sup>285</sup> In more than 75% of the day-fine cases, the courts had no information regarding the offender's wealth.<sup>286</sup> Moreover, courts and/or prosecutors attempt to supplement the record through additional investigation in only 1.7% of the cases.<sup>287</sup> Where financial information is lacking, key factors for determining the fine unit include profession and marital status.<sup>288</sup>

Although this limitation impedes the possibility to impose an "optimal" day-fine, German courts developed a second best solution. In order to compensate for the limited access to financial information, the German justice system allows judges to make estimations based on the information that is available to them and use their best judgment for setting the daily unit.<sup>289</sup> Officials from this system report that offenders who have higher income, are self-employed, and are businessmen tend to underreport their income.<sup>290</sup> This would suggest that the problem is

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282. Friedman, *supra* note 58, at 297.

283. See, e.g., Horst Entorf & Hannes Spengler, *Crime, Prosecutors, and the Certainty of Conviction*, 39 EUR. J.L. & ECON. 167, 190 (2015) (demonstrating the low effect that punishment severity has on deterrence). More specifically, the authors demonstrated that in Germany, the use of unconditional imprisonment does not have a better effect of deterring violent crimes as compared to conditional imprisonment or fines. *Id.*

284. See Gillespie, *supra* note 8, at 23.

285. See Friedman, *supra* note 58, at 295–96

286. *Id.*

287. *Id.*

288. *Id.* at 296.

289. See Albrecht, *supra* note 75, at 157–58.

290. McDONALD ET AL., *supra* note 96, at 25.

not tremendous, since the majority of offenders are low-income offenders.<sup>291</sup> Therefore, even in case privacy laws in the United States are not adjusted to implement the most effective day-fines, some lessons might be learned from Germany.

#### CONCLUSION

Fines are perceived as a desirable method of sanctioning from the legal perspective, as well as for the purpose of creating a more cost-effective system. First, fines involve lower administrative costs than other sanctions. Second, fines are transferred to the state budget and increase its revenue. Third, this sanction avoids the negative effects that prison causes. And finally, fines may reduce prison overcrowding and thus improve prison conditions. However, a question remains concerning what the proper fine would be and how to use it. The aim of this Article is to re-open the discussion about day-fines in the United States. This model offers various advantages, such as enhancement of the deterrent effect of fines, reduction of the use of imprisonment, increased uniformity and transparency, improvement of the expressive function of a pecuniary punishment, and enlarged revenues for the country. In general, these advantages may create a more just and cost-effective sentencing system. The European experience with day-fines is long and diverse, thus providing a good reference point for the United States to implement a day-fine system. Furthermore, the fact that some American counties piloted the day-fine model and adjusted it to the American criminal justice system in the past reduces the costs of its introduction. For instance, following the experiment with day-fines in different jurisdictions, the U.S. Department of Justice prepared guidelines on how to structure a day-fine system in the United States.<sup>292</sup> This report includes instructions on how to develop a scale for the daily unit, rank the severity of different offenses, calculate the daily unit, and choose collection methods.<sup>293</sup>

Like with any legal transplant from a foreign jurisdiction, day-fines are not free of challenges. However, there are ways to address the potential problems. Moreover, when taking a closer look at the American sentencing system and its objectives, it seems that a wealth-dependent fine can promote these aims (deterrence and just punishment) more effectively than the current fixed-fine system. The day-fine model offers a middle ground between seemingly contradicting goals—a uniform sentencing system on the one hand and individualized sanctions on the other hand. The former is important in order for the law to be predictable and respected by the public. The latter is necessary in any democratic society that respects its citizens as individuals. The two elements of the punishment in the day-fine system are able to achieve both objectives at the same time. The number

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291. See Colgan, *supra* note 114, at 290.

292. See BUREAU OF JUSTICE ASSISTANCE, *supra* note 39.

293. *Id.* at iii.

of days expresses the severity of the offense and can be uniform for similar offenders who commit comparable crimes. At the same time, the daily unit assures proper consideration of a relevant difference—the offender’s financial capacity. Those two elements produce a pecuniary sanction that is expected to impose a comparable burden of punishment on all offenders regardless of their wealth.

After the short-term interest in day-fines during the 1980s and 1990s, they vanished from the scholarly discussion. However, a look at the recent academic debate as well as media reports suggests that now might be the right moment to discuss the advantages of day-fines in the United States. The financial burden on American taxpayers imposed by the punitive turn is evident, and yet the effectiveness of long and frequent imprisonment sentences is not clear. Therefore, the U.S. criminal justice system needs to search for methods to expand its sentencing spectrum in order to make the system more cost-effective. Day-fines can be one such alternative.

#### APPENDIX

##### **Notes for Table 1: Day-Fines in Europe (in euro)**

<sup>a</sup> When the national currency differs the daily unit is converted to euro (on August 11, 2016) using the website <http://themoneyconverter.com/> and the amounts are rounded.

<sup>b</sup> Austria: in the Austrian Penal Code, the statutory maximum of number of days is not specified in the general article. Specific limits on the number of day-fines are provided in the offense-provisions. For instance, Section 105 specifies a maximum of one-year imprisonment or 720 daily rates (days of fine) for an offense of “dangerous threat.” *Strafgesetzbuch [StGB] [PENAL CODE] § 105(1)*,

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002296>. An insult may be punished by up to three months imprisonment or maximum 180 daily rates. *Id.* § 115(1). Damage to property is punishable by up to six months imprisonment or maximum 360 days of fine. *Id.* § 125. However, it seems that the maximum possible number of days according to the specific provisions is 720.

<sup>c</sup> Spain: Article 50 to the Spanish Penal Code makes a distinction in the main day-fine provision between fines in the regular context and fines for “legal persons” (e.g. corporations). *CÓDIGO PENAL [C.P.] [CRIMINAL CODE] art. 50(3)–(4)*. For legal persons, the maximum length is five years and daily unit is 30 to 5,000 euros. *Id.* With the consent of the offender the court may convert the unpaid fine to community service. In that case, one day-fine is converted to one day of community service. *Id.* art. 53.

<sup>d</sup> Poland: Although the maximum number of *day-fines* for ordinary crimes is 540, it is raised to 3000 days for certain offenses. *KODEKS KARNY [CRIMINAL CODE] art. 277b, art. 309*. In case of default, first the offender is given the opportunity to perform community service. Only if all other measures are ineffective, the fine-defaulter is sent to prison. *KODEKS KARNY WYKONAWCZY [EXECUTIVE PENAL*

CODE] art. 46.

<sup>e</sup> Croatia: The upper limit of the number of day-fines may be raised up to 500 days for certain offenses. KAZNENI ZAKON [CRIMINAL CODE] art. 42(1). If the offender agrees, the un-paid day-fine may be replaced by a community service punishment. *Id.* art. 43(2). Then one day-fine equals four community service hours. *Id.*

<sup>f</sup> Slovenia: The number of days can go up to 1,500 days in case of greed offenses KAZENSKI ZAKONIK [CRIMINAL CODE] art. 47(1). A limit for the daily unit is not specified. However, in case of cumulative sentences, the total fine may not exceed the specified fine for the single offense or 15,000 euros. *Id.* art 53(4). In cases of greed offenses, the maximum fine cannot exceed 50,000 euro. *Id.*

<sup>g</sup> Czech Republic: the court may also convert the unpaid fine to community service or house arrest. ZÁKON TRESTNÍ ZÁKONÍK [CRIMINAL CODE] art. 69.

<sup>h</sup> Romania: If the offender does not pay the fine in bad faith, his fine may be converted to imprisonment punishment. CODUL PENAL [PENAL CODE] art. 63. If, on the other hand, the convicted person cannot pay the fine due to reasons independent of his will, his sentence may be converted, with his consent, to community service. *Id.* art 64. In that case, one day-fine equals one community service day. *Id.*

#### **The national criminal codes (Table 1):**

- Finland: SUOMEN RIKOSLAKI [CRIMINAL CODE] (Fin.).
- Sweden: BROTTBALKEN [BRB] [PENAL CODE] (Swed.).
- Denmark: STRAFFELOVEN [PENAL CODE] (Den.).
- Germany: STRAFGESETZBUCH [StGB] [PENAL CODE], [https://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html](https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html) (Ger.).
- Austria: STRAFGESETZBUCH [StGB] [PENAL CODE] (Austria).
- Hungary: BÜNTETŐ TÖRVÉNYKÖNYV [BE.] [CRIMINAL CODE] (Hung.).
- France: CODE PÉNAL [C. PÉN] [PENAL CODE] (Fr.).
- Portugal: CÓDIGO PENAL [PENAL CODE] (Port.).
- Liechtenstein: STRAFGESETZBUCH [StGB] [CRIMINAL CODE] (Liech.).
- Spain: CÓDIGO PENAL [C.P.] [CRIMINAL CODE] (Spain).
- Poland: KODEKS KARNY [CRIMINAL CODE]; KODEKS KARNY WYKONAWCZY [EXECUTIVE PENAL CODE] (Pol.).
- Croatia: KAZNENI ZAKON [CRIMINAL CODE] (Croat.).
- Slovenia: KAZENSKI ZAKONIK [CRIMINAL CODE] (Slovn.).
- Switzerland: SCHWEIZERISCHES STRAFGESETZBUCH, CODE PÉNAL SUISSE, CODICE PENALE SVIZZERO [StGB, CP, CP] [CRIMINAL CODE] Dec. 27, 1937, SR 311, art. 34(3) (Switz.).
- Czech Republic: ZÁKON TRESTNÍ ZÁKONÍK [CRIMINAL CODE] (Czech).
- Romania: CODUL PENAL [PENAL CODE] (Rom.).