

4-1-1990

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Recommended Citation

Peter G. Farrell, *The Day-Fine Comes to America*, 38 Buff. L. Rev. 591 (1990).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol38/iss2/7>

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COMMENTS

The Day-Fine Comes to America*

INTRODUCTION

There is something new and unique happening in the Richmond Criminal Court located in Staten Island, New York.¹ The court is no longer imposing fines based on the traditional "tariff" system² but instead has adopted the day-fine³, whose basic premise is to tailor the fine based upon the defendant's ability to pay.⁴ The day-fine is computed by an innovative two-step process which first assigns a number of units to the crime committed based upon its severity, and secondly, assigns a dollar value to each unit based upon the defendant's income.⁵ The product of these two independent steps constitutes the day-fine. Thus, the degree of punishment resulting from the day-fine is proportionate to the seriousness of the crime and theoretically imposes an equivalent level of hardship on defendants of differing means.⁶

* The author would like to thank the Vera Institute of Justice for the opportunity to be involved with the implementation of the day-fine, and in particular, Judith A. Greene and Sally T. Hillsman, for their assistance with the research of this Comment. I would further like to express my thanks to Professor Paul I. Birzon, for his insight and critique in the preparation of this Comment. Finally, I would like to extend a special thank you to Vaughn Jackson, without whose help this Comment would not have been possible.

1. Richmond County is also called Staten Island, a borough of New York City.

2. Tariff systems are informal understandings that fixed fine amounts will be imposed on all defendants convicted of a particular offense. See *infra* notes 27-30 and accompanying text.

3. "The fines are called "day-fines" because they are figured as multiples of the offender's daily net income." *'Day Fines' Being Tested in a New York City Court*, 19 CRIM. JUST. NEWSLETTER 4, Sept. 1, 1988 [hereinafter NEWSLETTER].

4. Hillsman & Greene, *Tailoring Criminal Fines to the Financial Means of the Offender*, 72 JUDICATURE 38 (June-July 1988) [hereinafter Hillsman].

5. For an in-depth explanation of how the day-fine is actually computed, see *infra* notes 53-69 and accompanying text.

6. See S. HILLSMAN, FINES AS A CRIMINAL SANCTION 6, (Oct. 4, 1988) (available from the Vera Institute of Justice); "Chicago" economists would probably disagree with this theory and "argue that the size of the penalty for an offense should reflect the extent of the costs that it is likely to impose. The size of the fine may then be readily calculated, but should not be either raised or lowered in order that it better match the offender's pocket." Morgan & Bowles, *Fines: The Case for Review*, 1981 CRIM. L. REV. 203.

The day-fine will enable judges to use the fine in a wider variety of cases, whereas previously the fixed fine would have been inadequate to meet sentencing goals.⁷ The day-fine is a welcome sentencing alternative in light of the severe shortage of jail space, the overcrowding of prisons, and the heavy financial burden placed on the State in housing convicted offenders.⁸

This Comment focuses on the mechanics of the day-fine as it is currently being implemented in Staten Island, assesses the advantages of the day-fine over the fixed fine, and considers the likelihood it has for becoming a viable alternative to incarceration.⁹ In so doing, several areas will be examined. These include: (1) the past and present use of the fine; (2) the history of the day-fine itself; (3) why Richmond Criminal Court was chosen as the project site; (4) an in-depth examination of how the day-fine is computed; and (5) an exploration of the benefits of the day-fine. Next, the focus will shift to three areas that are crucial to the day-fine's success: (1) the gathering of information about the defendant's income; (2) the collection process;¹⁰ and (3) enforcement if the defendant fails to pay. Finally, this author will discuss current limitations on the day-fine under present New York law and the steps being taken to overcome them, as well as the performance of the project to date. The final determination of the day-fine's success will have to wait until the pilot project has ended and all the data is sorted, but the preliminary analysis favors the day-fine's chances of becoming an alternative sentence.

7. For a discussion of sentencing goals, see *infra* notes 82-98 and accompanying text. The wider use of the day-fine over fixed fines can be illustrated in two examples. The less affluent offender, who could not afford the fixed fine, is incarcerated, yet a lower fine would have achieved sentencing goals, namely deterrence; and for the more affluent offender, the fixed fine was not high enough to have a punitive impact so the judge is forced to incarcerate the offender.

8. Over 500,000 prisoners are currently held in custody by federal and state prisons. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, 1987 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 493 (1988). In 1986, 12,025 prisoners were housed in jails due to overcrowded state facilities. *Id.* at 453. Jails were 96% full to capacity in 1986 while in 1983 they were only 85% full to capacity. *Id.* at 481. A strong inference can be drawn that judges are influenced by their knowledge of the crowded jail and prison facilities and this adversely affects their sentencing practices by limiting the number of offenders that they would otherwise imprison.

9. In Richmond, the day-fine program is currently being employed as a substitute for short-term incarceration. The two main themes of this comment focus on the probability of success that the day-fine has in serving as an alternative to short-term incarceration in light of sentencing goals and the benefits of the day-fine over the fixed-fine. It is important to keep in mind that the two work in conjunction with each other in that every benefit that the day-fine has over the fixed fine in turn helps the day-fine in becoming a viable sentence in lieu of incarceration. See *infra* notes 70-82 and accompanying text.

10. The day-fine program emphasizes the collection aspect of the fine and is one of the reasons the system is likely to succeed. See *infra* notes 110-127 and accompanying text.

I. PAST/PRESENT USE OF THE FINE AS A CRIMINAL SANCTION

The fine is one of the oldest forms of punishment,¹¹ and if properly employed, the fine has been found to be less drastic, far less costly to the public, and perhaps more effective than imprisonment.¹² Unfortunately, the fine is underutilized by American courts and has not attained its maximum potential for two reasons: (1) the assumption that offenders cannot pay fines; and (2) the belief that fines allow more affluent offenders to buy their way out of punitive sentences.¹³

In addition, few judges currently use the fine as a sole sentence if an offender has a prior record or the offense is moderately serious.¹⁴ When a case does involve a first time offender, judges tend to use a fine as the sole sanction only when an offender has a known ability to pay.¹⁵ Since judges often lack adequate financial information concerning an offender,¹⁶ fines as the sole sentence are used even to a lesser degree.¹⁷ These factors, coupled with inadequate enforcement procedures, have prevented the use of the fine from becoming a viable alternative in criminal sentencing as a means to reduce the current burden on the court and prison systems.

However, when fines are used in conjunction with other forms of punishment, the percentage of cases in which they are instituted increases sharply.¹⁸ The low percentage of cases in which fines are used alone, compared with the rather extensive use of fines in combination with other sanctions is striking.¹⁹ It appears that one reason for this is the judges' inability to set fines commensurate with the punitive impact sought. This condition is brought about due to American courts' use of the "tariff," structure, in which fixed amounts are set for specific

11. The fine predates the codes of Hammurabi, of the time of the first dynasty of Babylon. S. HILLSMAN, B. MAHONEY, G. COLE, & B. AUCHTER, *FINES AS CRIMINAL SANCTIONS* (Sept. 1987) (National Institute of Justice-Research in Brief) [hereinafter *Research in Brief*]; see Cole, Mahoney, Thornton, & Hanson, *The Use of Fines by Trial Court Judges*, 71 *JUDICATURE* 325,326 (Apr.-May 1988) [hereinafter *Cole*].

12. Carter & Cole, *The Use of Fines in England: Could the Idea Work Here?*, 63 *JUDICATURE* 154, 155 (1979) citing NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, *REPORTS ON CORRECTIONS* 570 (Government Printing Office 1973).

13. Hillsman, *supra* note 4, at 38.

14. See S. CASALE & S. HILLSMAN, *THE ENFORCEMENT OF FINES AS CRIMINAL SANCTIONS: THE ENGLISH EXPERIENCE AND ITS RELEVANCE TO AMERICAN PRACTICE* (National Institute of Justice, Washington, D.C. 1986).

15. See Cole, *supra* note 11, at 327.

16. Financial information such as the defendant's income, employment, or assets. Cole, *supra* note 11, at 330.

17. See *Research in Brief*, *supra* note 11.

18. See Cole, *supra* note 11, at 326.

19. *Id.* at 327.

offenses.²⁰

Tariff systems are informal understandings that fixed fine amounts will be imposed on all defendants convicted of a particular offense.²¹ These amounts are generally based on what can be paid by the poorest offenders, and therefore depress fine amounts well below statutory limits.²² Since no consideration is given to the financial means of the offender, the judge's ability to adjust the fine amount is limited.²³ As a result, fines are set fairly low at fixed amounts, and judges tend to use them less often as the sole sanction as they would not carry a punitive "sting" to more affluent offenders.²⁴ Tariff systems thus place a significant limit on the broad usefulness of fines for crimes of varying degrees of seriousness. Consequently, tariff systems leave sentencing judges with few punitive sanctions other than imprisonment.²⁵

This is in sharp contrast to sentencing practices in some Western European countries where the fine is widely employed as a sole penalty for most offenses, and where fines are imposed as the major alternative to short-term jail sentences.²⁶ The day-fine is the reason behind the success of these systems.²⁷ This is due in part to the day-fine's two step process which gives judges greater flexibility over the amount of the fine issued.²⁸ This new flexibility brought about two major changes in European courts that employed the day-fine: (1) fine amounts increased significantly; and (2) the fine's usefulness as a sanction was broadened.²⁹

West Germany, for instance, began to use day-fines in lieu of one day to six month prison sentences with the goal of lowering the prison

20. See Hillsman, *supra* note 4, at 39.

21. Research in Brief, *supra* note 11, at 3.

22. See, e.g., M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 139 (1979).

23. See Research in Brief, *supra* note 11, at 3-4; see also Hillsman, *supra* note 4, at 39.

24. See Hillsman, *supra* note 4.

25. Alternative sanctions need to be enforceable. See *infra* note 79 and accompanying text.

26. See *infra* notes 32-35 and accompanying text. In England fines have been made "the most common disposition in criminal cases, and they authorize fines for almost every offense except murder." Carter & Cole, *The Use of Fines in England: Could the Idea Work Here?*, 63 *JUDICATURE* 154, 155 (1979) [hereinafter Carter].

27. Day-fine systems were first employed in Finland in 1921. Finland was followed by Sweden (1931), Cuba (1936), Denmark (1939), Austria (1975), and West Germany (1975). Albrecht & Johnson, *Fines and Justice Administration: The Experience of the Federal Republic of Germany*, 4 *INT'L J. COMP. AND APPLIED CRIM. JUST.* 3, at 6 (1980). The day-fine systems developed in Sweden and West Germany are the most sophisticated to date and are the basis for the project in the Richmond court. S. HILLSMAN, *supra* note 6 at 47.

28. Hillsman, *supra* note 4, at 41. See *infra* notes 53-69 and accompanying text.

29. The conclusion has been drawn that this reflected just punishment for more affluent offenders. Albrecht & Johnson, *supra* note 27, at 3.

population.³⁰ The result was that the prison population dropped from 113,000 in 1969 to 10,000 in 1976.³¹ This was accompanied by an increase in the issuance of fine-alone sentences from 63 percent to more than 80 percent.³² An overall assessment of the West German day-fine system reveals that it accomplished the goal of substituting fines for incarceration "without either a significant cost in terms of higher rates of crime or incarceration for fine default."³³ This same type of success is present in Sweden, where the day-fine constitutes more than 70 percent of all criminal sanctions.³⁴ Additionally, Sweden employs a uniform method of calculating the defendant's ability to pay, which in turn, has helped the program achieve its success.³⁵

The day-fine system which has been adopted in the Richmond Criminal Court is based on a combination of the systems in Sweden and West Germany.³⁶ The day-fine has proven its success in becoming an

30. N.Y. Times, Sept. 17, 1988, at 29, col. 1. *Id.* at 34, col. 6. The first law reforming the Penal Code, effective September 1, 1969, provided that prison terms of less than six months were to be replaced by fines or probation in all but exceptional cases. Gillespie, *Fines as an Alternative to Incarceration: The German Experience*, FED. PROBATION, 20 (Dec. 1980). "Although the shift from short-term imprisonment to the use of fines and suspended sentences began in 1969, the reform law that implemented the day-fine system in West Germany went into effect in 1975." *Id.* at 22.

31. This was coupled with a total rise in the rate of convictions. *See* Gillespie, *supra* note 30, at 21.

The data show that fines are used extensively for a wide range of offenses, including many which would be considered from moderately serious to serious in nature. Of all convictions for crime against the person, 66 percent were disposed of by a fine; for all theft and embezzlement convictions, 76 percent were disposed of with a fine; finally, of all fraud, fencing, and forgery convictions, 77 percent were disposed of with a fine. These three categories comprise 88 percent of all convictions tabulated. . . . Within these three major categories it is noteworthy that theft offenses involving force or violence, breaking and entering and robbing, were dealt with to a lesser extent with fines than with incarceration. However, these two sub-categories account for only 8 percent of all convictions in the three categories discussed.

Id. at 23.

32. *Id.* at 21.

33. *Id.* at 24. Fines have also been shown to prevent recidivism. *See* Carter, *supra* note 26, at 159. Conversely, some say this is highly questionable. *Id.* at 160; *see, e.g.*, Bottoms, *The Efficacy of the Fine: The Case for Agnosticism*, CRIM. L. REV. 543-551 (Sept. 1973).

34. N.Y. Times, *supra* note 30, at 29, col. 1; Hillsman, *supra* note 4, at 39.

35. This method has been promulgated by the Prosecutor General's Office. *See* Hillsman, *supra* note 4, at 40.

36. [T]he West German system, for example, is more punitive than the Swedish system, reflecting a direct exchange for days in custody. . . . The Swedish system values the units in a precise manner which results in an amount that is about one-third the offender's daily discretionary income, adjusted for significant expenditures. Because the maximum number of day-fine units that can be imposed under the Swedish system is 120, the highest fine which can be imposed is 120,000Kr (or about \$20,000). This amount may be viewed as properly reflecting the original intent of the Swedish parliament in authorizing

alternative sentence to incarceration abroad, and the opportunity to achieve those same results in the United States has begun in the Richmond Criminal Court.

II. RICHMOND CRIMINAL COURT CHOSEN AS PROJECT SITE

The day-fine is currently being tested in a pilot project conducted by the Vera Institute of Justice in the Richmond Criminal Court.³⁷ The project was implemented in August of 1988 and is the first of its kind in the United States.³⁸ A central purpose of the Richmond project is to develop a structure that will enable judges to set fines in relation to the severity of the offense so that they will be able to use fine sentences as an alternative to some current prison sentences.³⁹

Traditionally, lower courts in the United States are the primary users of fine sentences, both alone and in combination with other penalties.⁴⁰ It was important therefore to select a lower court, such as the Richmond Criminal Court, for the implementation of this test program due to this court's familiarity and frequent use of fines. In addition, since such a court was accustomed to working with various sentencing options,⁴¹ it was assumed to be more flexible and likely to use the day-fine as an alternative sanction.

An equally important factor in selecting the Richmond Criminal Court was the community's economic and social base. Richmond County resembles many moderately sized American communities, with a high

the day-fine as the normal sanction for lesser criminal cases, although it permits day-fines to be used in practice as a sanction across a broader range of crimes.

In contrast, the West German system establishes the day-fine unit's value as the offender's net daily income (which is more roughly calculated and generally not discounted). To substitute the day-fine for imprisonment, West Germany uses a scale with a maximum of 360 units. By statute the highest value for a single unit is 10,000DM (about \$6,000); day-fine sentences, therefore, can total over \$2 million. Following this statutory lead, West German courts generally use a day's-wage-for-a-jail-day exchange system by valuing the day-fine unit at or near an offender's daily net take-home pay. The resulting fine amounts are very high in comparison, for example, to Sweden.

Hillsman, *supra* note 4, at 44.

37. The Vera Institute of Justice is working in close cooperation with the district attorney's office of Richmond County in the implementation of the day-fine project. The pilot project is funded by a \$250,000 grant from the National Institute of Justice and was scheduled to be completed by the end of 1989. N.Y. Times, *supra* note 30, at 29, col. 1.

38. See N.Y. Times, *supra* note 30, at 34, col. 6.

39. Staten Island Register, Sept. 15, 1988, at 9.

40. See Cole, *supra* note 11; see Hillsman, *supra* note 4.

41. The Richmond Criminal Court judges have a repertoire of sanctions available to them that include supervised restitution, community service, probation sentences, unconditional discharges, and terms of imprisonment of up to one year. Hillsman, *supra* note 4, at 41.

rate of offenders either employed or having steady income.⁴² The results of the project will therefore have widespread application.⁴³ In addition, and perhaps even more importantly, was the strong interest Richmond County's judges and district attorney's office showed in the day-fine program.⁴⁴

The current project in Richmond Criminal Court is aimed at cases involving minor offenses, consisting of misdemeanors and violations, in an attempt to reduce jail overcrowding by substituting the fine for short term jail sentences.⁴⁵ It originally was important to establish the day-fine as a viable alternative to incarceration in cases involving less serious crimes, so that if it is eventually attempted as an alternative sentence in more serious cases it will have the necessary element of credibility.⁴⁶ Although the day-fine is not currently being employed in more serious offenses,⁴⁷ at the end of the one year test period, the project will be evaluated and necessary adjustments will be made. Perhaps at that point it will be feasible to examine the possibility of the day-fine being used in the lower range of felony cases where appropriate.⁴⁸

The Richmond Criminal Court also handles a variety of cases which

42. Staten Island is characterized by relative affluence, combined with a small but significant poverty population. Hillsman, *supra* note 4, at 41.

43. Staten Island is representative of a majority of the communities in the United States. See *Id.* at 41. The day fine also appears capable of succeeding in highly urbanized communities as it is able to function on any steady stream of income including welfare. See *infra* notes 63, 74, 111-113 and accompanying text.

44. *Id.* at 42.

45. N. Y. Times, *supra* note 30, at 34, col. 6.

46. If we reverse the application, this point becomes even more clear. If the day-fine had been instituted in a higher court which handled more serious crimes, how would the judge and public react to the fact that an alternative is being tested to replace incarceration in felony cases, when in misdemeanor and violation cases, offenders are going to jail for less serious crimes. Hillsman, *supra* note 4, at 41.

47. Section 60.01 (3)(b) of New York's Penal law permits the use of a fine for any felony, but prohibits the use of a fine as the sole sanction in the case of any class B felony or any narcotic felony. In these cases the fine has to be coupled with probation, supervision, or imprisonment. N.Y. PENAL LAW § 60.01(3)(b) (McKinney 1987). The day-fine would not be appropriate for violent crimes where the defendant is a threat to the community, but might perhaps be useful in felony cases involving non-violence, such as a gambling conviction. N. Y. Times, *supra* note 30, at 29, col. 1.

48. Although involved only with misdemeanor and violation cases, the Richmond Criminal Court project will provide a good perspective on how the program might work in more serious cases, especially those involving the lower spectrum of felony offenses. This perspective will be provided since the Richmond Court arraigns all criminal cases brought in the borough, whether misdemeanors or felonies, and a majority of these felonies are plea bargained down to misdemeanors. These felonies include, for example, assault, robbery, grand larceny, reckless endangerment, and fraud. In 1986, the court calendared about 7,000 cases, of which more than 2,000 were felonies; two-thirds of these cases remained in the lower court. Hillsman, *supra* note 4, at 42 (views of Rose McBrien, Judge of the New York City Criminal Court).

will allow the day-fine to be implemented in conjunction with an array of other sanctions.⁴⁹ In cases where the judge feels it is appropriate, the day-fine can be used where a set fine, community service work, probation, or incarceration may have been previously imposed.⁵⁰ Furthermore, the program will test how broadly judges use the fine in misdemeanor and violation cases once they are freed from the constraints of a fixed fine system.⁵¹ It is believed by some commentators that once the constraints are removed and judges become confident in the day-fine's punitive and retributive capabilities, the fine will be used in a wider range of cases.⁵²

III. HOW THE DAY-FINE IS ACTUALLY COMPUTED

Before examining the possibility of success of the day-fine system, it is important to understand exactly how the day-fine is determined. The day-fine system is designed to produce monetary penalties that are proportionate to the gravity of the crimes, but equivalent in punitive impact for offenders with different financial resources.⁵³ The day-fine achieves this goal by using a two step approach to determine the amount of the fine.⁵⁴ The judge first sentences an offender to a certain number of fine units. The number of units reflects the severity of the crime and the seriousness of the offender's prior record.⁵⁵ The judge is guided by a set of scales of day-fine units (Table 1), related to the common penal law offenses disposed in the Richmond Criminal Court, ranked according to their gravity.⁵⁶ Table One consists of seventy-one misdemeanor and vio-

49. These alternative sanctions will become important in cases involving indigents. *See infra* notes 140-158 and accompanying text.

50. *See, e.g.,* Ragona & Ryan, *Misdemeanor Courts and the Choice of Sanctions: A Comparative View*, 8 JUST. SYS. J. 199, 200-01 (1983) (This article discusses the benefits and drawbacks of these types of alternative sentences).

51. *See* Staten Island Register, *supra* note 39, at 9.

52. Ragona & Ryan, *supra* note 50, at 203-04. For an explanation of the goals of retribution and punishment in general, see T. HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS (1969).

53. Hillsman, *supra* note 4, at 39.

54. *Id.*

55. Research in Brief, *supra* note 11.

56. Rankings were achieved by Vera Institute of Justice planners in conjunction with Richmond County judges, prosecutors, and defense attorneys. Hillsman, *supra* note 4, at 42.

Beginning with the 70 [sic] most common offenses for which sentences are imposed in the Richmond Criminal Court, all penal law misdemeanors and violations were sorted according to the relative degree of seriousness of the specific criminal behaviors typically involved. These rankings were adjusted where necessary to reflect the current sentencing norms of the court.

This process resulted in a classification framework of six severity levels, representing an upper and lower band for each of the three offense groups (high, medium and low

lation offenses with the scale running from a low of five units for the most minor offenses, to a high of one-hundred and twenty units for the most severe.⁵⁷

Further, each offense has a presumptive number accompanied by a discount and premium number. The discount and premium numbers represent 15 percent variations from the presumptive number to give the judge additional flexibility to account for mitigating or aggravating circumstances which may be present in an individual case.⁵⁸ For instance, the absence of prior convictions might warrant a discount, while a criminal record of exceptional length would support an increase of the unit value toward the premium number.⁵⁹

An illustrative array of charges has been excerpted from Table One,⁶⁰ ranging from class A misdemeanors down to violations, to give the reader an idea of the number of units assigned to particular offenses.

severity). The classification system includes lesser victimizing crimes, drug and contraband offenses, offenses involving obstruction of legal process, offenses involving breaches of public decorum and community standards of behavior, as well as the more serious victimizing offenses that are frequently charged by prosecutors as felonies, but disposed as misdemeanors. This six-level structure allows for a more refined grading system than the three general classes of offenses found in the New York State Penal Law (A misdemeanors, B misdemeanors, violations).

Id. at 42.

57. The West German day-fine system operates with a range of 1 to 360 units, roughly reflecting up to 1 year's imprisonment. This system was adapted, in part, in the Richmond Criminal Court in anticipation that a full scale of 360 units would offer sufficient flexibility for the complete range of offense charges appearing in the New York State criminal code. A scale for misdemeanors and violations was then established with ranges from 5 to 120 units. With a floor of 5 units, offenses would not become trivialized, and a ceiling of 120 units reflects the less serious nature of the cases disposed in the criminal court. It also reserves the upper two-thirds of the scale for felony offenses should the system be applied to that range of cases. Hillsman, *supra* note 4, at 43.

58. NEWSLETTER, *supra* note 3, at 4, 5.

59. Hillsman, *supra* note 4, at 44.

60. These offenses and corresponding unit values are the same that are being used in the Richmond Criminal Court. Table 1 and Table 2, contained in full, are in the Day-Fine Workbook. (Provided by the Vera Institute of Justice located at 377 Broadway, N.Y., N.Y. 10013).

ILLUSTRATION OF SELECTED OFFENSES FROM TABLE 1

PI Conviction Charge	Type of Offense	Number of Day-fine Units Discount-PRESUMPTIVE-Premium
130.60AM	Sexual Abuse 2	85-100-115
221.40AM	Sale of Marijuana	42-50-58
165.09AM	Auto Stripping	8-10-12
245.00BM	Public Lewdness	25-30-35
145.14BM	Criminal Tampering 3	17-20-23
190.05BM	Issuing a Bad Check	4-5-6
240.25vio	Harrassment	13-15-17
240.35vio	Loitering	4-5-6

Table One further provides subcategories to delineate conduct for offenses in which there are differing degrees of culpability. The following two examples in Figure 1, Assault 3rd degree and petit larceny, illustrate this point.

FIGURE 1: DAY-FINE BENCHMARKS⁶¹

Discount-Presumptive-Premium

Offenses involving harm to persons

Assault 3rd degree

Range of 20-95 day-fine units

Substantial injury 81-95-109

Stranger to stranger; or where victim is known to assailant, he/she is weaker, vulnerable.

Minor injury 59-70-81

Stranger to stranger; or where victim is known to assailant, he/she is weaker, vulnerable; or altercations involving use of weapon.

Substantial injury 38-45-52

Altercations among acquaintances; brawls.

Minor injury 17-20-23

Altercations among acquaintances; brawls.

61. Hillsman, *supra* note 4, at 44. See also, Day-Fine Workbook, *supra* note 60.

Discount-Presumptive-Premium

Property and theft offenses

Petit Larceny

Range of 5-60 day-fine units

\$1,000 or more	51-60-69
\$700-999	42-50-58
\$500-699	34-40-46
\$300-499	25-30-35
\$150-299	27-20-23
\$50-149	8-10-12
\$1-49	4-5-6

In the second step, the value of the single day-fine unit is determined based on the financial means of a particular offender. The unit value is derived from Table Two which cross-references the offender's daily net income with the offender's number of dependents.⁶² Daily net income is computed by dividing the total amount of an income payment (take-home pay, unemployment compensation, welfare allotment, etc.) by the number of days in a payment period.⁶³ The number of dependents is all those for whom the defendant is financially responsible, including himself.⁶⁴

Table Two provides for two adjustments in its structure. First, the table accounts for the offender's family support responsibilities (dependents) by reducing the daily net income figure by a factor of fifteen percent for the offender's self-support, fifteen percent for the needs of each of the first two dependents, ten percent for each of the next two, and

62. Day-Fine Workbook, *supra* note 60. The offender's daily net income and number of dependents is usually calculated in the pre-arraignment interview. See *infra* notes 99-100 and accompanying text. The value of the single day-fine unit is thus determined and provided to the judge. However, should the offender's circumstances change between the interview and sentencing, the judge is provided with Table Two, enabling a quick calculation to be performed to determine the value of the day fine unit.

63. *Id.*

64. *Id.* The workbook defines "dependents" as persons who derive sole support from the offender. However, if the offender is a dependent, such as a student or homemaker, then the number of dependents includes the head of the household and each supported family member, including the offender.

Examples given in the workbook to clarify how the number of dependents (i.e. family size) is determined are: an offender who supports a wife and two children has a family size of four; a homemaker who is supported by her husband and cares for two children, has a family size of four; and a young man who supports himself from employment income while living with his parents and brother has a family size of one.

five percent for each additional dependent.⁶⁵ The second adjustment which has been built into the structure of Table Two is a two-tiered discount rate to help ensure that the day-fine amounts will be affordable.⁶⁶ The dollar figure values have been discounted by a rate of one-third for those offenders whose incomes are above the federal poverty income guidelines, and this discount has been increased to one-half for those who fall below the poverty level guidelines.⁶⁷ This is reflected in Table Two (in bold) where there is a sudden incremental jump in the unit value as the poverty line is crossed.

The illustration below is a reprint of a portion of Table Two⁶⁸ set forth to help explain what has been stated above. It also shows the minimum and maximum amounts that a day-fine unit can be valued at under current implementation. These figures are \$3 and \$100 respectively.

ILLUSTRATION OF PART OF TABLE TWO

Net Daily Income(\$)	<u>Number of Dependents (Including Self)</u>							
	1	2	3	4	5	6	7	8
\$3	\$1.28	1.05	0.83	0.68	0.53	0.45	0.37	0.30
11	4.68	3.85	3.03	2.47	1.93	1.65	1.37	1.10
12	5.10	4.20	3.30	2.70	2.10	1.80	1.50	1.20
13	5.53	4.55	3.58	2.93	2.28	1.95	1.62	1.30
14	7.85	4.90	3.85	3.15	2.24	2.10	1.75	1.40
15	8.42	5.25	4.13	3.38	2.63	2.25	1.87	1.50
18	10.10	6.30	4.95	4.05	3.15	2.70	2.25	1.80
32	17.95	14.78	11.62	9.50	5.60	4.80	4.00	3.20
59	33.10	27.26	21.42	17.52	13.63	11.68	9.73	7.79
100	56.10	46.20	36.30	29.70	23.10	19.80	16.50	13.20

Figure 2 illustrates several hypothetical cases to explain how the dollar amounts in Table 2 were reached.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

FIGURE 2: RICHMOND DAY-FINE VALUATION:
HYPOTHETICAL CASES⁶⁹

Household status	Annual gross	Income Annual net	Daily net	Family support discount	Total day fine value (two-tiered discount of 1/3 or 1/2)
Welfare mother, 3 children	\$6,176	\$6,176	\$18	50%	\$5
Single man	9,000	7,150	20	15%	11
Single father, 3 children	12,500	10,218	28	50%	7
Single woman	13,000	9,932	27	15%	15
Single father, 1 child	15,000	11,622	32	30%	15
Married man, wife, 3 children	15,000	12,974	36	65%	7
Married man, wife, 1 child	18,000	13,520	37	45%	13
Single woman	28,500	18,928	52	15%	29
Single woman	35,000	21,502	59	15%	33
Single father, 1 child	37,500	23,764	65	30%	31

IV. BENEFITS OF THE DAY-FINE: A VIABLE SUBSTITUTE FOR INCARCERATION?

Among the many advantages of the day-fine is that it is punitive in its aim. Because of this it can deprive offenders of ill-gotten gains, can be self-sustaining,⁷⁰ and can be used in a manner which does not further destroy an offender's ties to family and community.⁷¹ This in turn will help alleviate judges' reliance on the already overcrowded prison system when sentencing for minor offenses since it will simultaneously punish offenders while enabling them to remain in the community, allowing them to keep their jobs and support their families.⁷²

The day-fine is intended to make penalties imposed on the rich and

69. Hillsman, *supra* note 4, at 45.

70. Numerous commentators have noted the cost effectiveness of the fine. "[F]ines offer manifest economic benefits. Relatively simple and cheap to administer, fines produce a "net profit" for the criminal justice system whereas all other penalties involve substantial net costs." Morgan & Bowles, *supra* note 6, at 3. Incarceration, however, reduces the total economic output of society by immobilizing the labor resources of the offender, and societal resources are needed to enforce the sentence. When fines are substituted for incarceration, more resources become available for economic production and an economic gain is realized. Gillespie, *supra* note 30, at 25.

71. Hillsman, *supra* note 4, at 41.

72. N.Y. Times, *supra* note 30, at 29, col. 1. Prison tends to sever social ties and pushes offend-

poor more egalitarian in their impact, thus allowing the fine to be used in a broader range of cases while achieving a punitive effect.⁷³ Although in many cases the court will be dealing with offenders of moderate means, the day-fine is believed to be workable even if the defendant is poor, or a recipient of welfare payments, as long as there is a steady stream of income.⁷⁴

Another major benefit of the day-fine is that it will save the state the cost of jailing offenders and will actually generate revenue for the state.⁷⁵ As one of the judges in Richmond Criminal Court stated:

[t]o keep someone in jail costs at least one-hundred dollars a day . . . so it makes humanistic and economic sense to deprive a person of their disposable income for 10 days rather than putting them in jail. It would have the same effect as a cell while saving the taxpayers a tremendous amount of money.⁷⁶

In addition, collection procedures are able to rely on existing agencies,⁷⁷ the cost for which can be incorporated into the fine itself, thereby making fines inexpensive to administer. Under the day-fine system, offenders would literally be paying a debt to society instead of contributing to the existing burden on state resources.⁷⁸

Since other so called alternatives are overburdened and prove to be unsatisfactory as sole sanctions in replacement of incarceration,⁷⁹ the day-fine could be used where other alternatives are not appropriate. In so doing, the day-fine may be able to relieve some of the burden on those alternative sentences, thereby making them more effective.⁸⁰ Similarly, where a judge decides that one alternative sanction by itself is not appropriate, the day-fine could be combined with any number of non-custodial

ers toward more serious criminal behavior. See N. MORRIS, *THE FUTURE OF IMPRISONMENT* 8 (1974).

73. See N.Y. Times, *supra* note 30, at 29, col. 1. See also Hillsman, *supra* note 4, at 41.

74. NEWSLETTER, *supra* note 3, at 5.

75. N.Y. Times, *supra* note 30, at 29, col. 1.

76. Judge Brennan as quoted in the N.Y. Times, *supra* note 30, at 34, col. 6. Judge Brennan is a judge in the Staten Island Criminal Court and one of the judges exposed to the day-fine system when it was first introduced. Incarceration can sometimes drain a tax system for up to \$35,000 for each convicted person per year. Research in Brief, *supra* note 11, at 1.

77. See Research in Brief, *supra* note 11, at 4-5.

78. Research in Brief, *supra* note 11, at 1.

79. The need for a viable substitute for short term incarceration is great. Probation resources tend to be very scarce in lower courts, and where they do exist, they are often overtaxed so that they lose credibility. Conditional discharges are hard to monitor and are not viewed as having a strong punitive effect. Other types of alternatives such as restitution and community service often target a narrow group of offenders to ensure success. Hillsman, *supra* note 4, at 40-41.

80. See Research in Brief, *supra* note 11, at 2.

sanctions to meet multiple sentencing goals.⁸¹ In either case, whether by itself or with another alternative sentence, the day-fine can be employed more effectively than fixed fines and has the capability of reducing the court system's reliance on incarceration.

The day-fine's main goal, as it is being employed in the Richmond Criminal Court, is to replace short term incarceration. Considering the advantages of the day-fine,⁸² it is likely to succeed as an alternative to incarceration if the fine is able to meet the same goals of other forms of punishment, such as incarceration.

Punishment is generally designed to achieve one or more of five goals. The goals are retribution, specific and general deterrence, rehabilitation, and incapacitation.⁸³ Retribution can be achieved by either a fine or incarceration.⁸⁴ The fine is retributive in that it penalizes the offender while appeasing the community and the victim.⁸⁵

Deterrence is attained by making the punishment outweigh the benefits of the crime. A fine that deprives an individual of vital assets can have a deterrent effect especially when the fine is tailored to the crime as well as the affluency of the offender.⁸⁶ Some commentators even believe that fines may actually deter more than incarceration for certain offenses.⁸⁷

The day-fine is also more beneficial to offenders with regard to its rehabilitative nature than incarceration. One of the judges of the Richmond Criminal Court noted:

81. One example of this alternative sanction is the combination of the day-fine with drug or alcohol rehabilitation. Hillsman, *supra* note 4, at 43 (views of Rose McBrien, Judge of the New York City Criminal Court); see Research in Brief, *supra* note 3, at 2.

82. See *supra* notes 70-81 and accompanying text.

83. Incapacitation and deterrence are oriented to the interests of society in public safety and crime reduction. Rehabilitation and specific deterrence are for the benefit of the offender. See P. NARDULLI, *THE STUDY OF CRIMINAL COURTS: POLITICAL PERSPECTIVES* 234 (1979). See also H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968).

84. Retribution means that the punishment suits the crime and not the individual. Thus, the same penalty may be repeated for the same offense. See P. NARDULLI, *supra* note 83, at 235.

85. Retribution, also known as "just desserts," serves community values and individual spiritual needs, but is not meant to accomplish social betterment or personal improvement. See P. NARDULLI, *supra* note 83, at 213.

86. See *supra* notes 53-64 and accompanying text.

87. A heavy fine may be more of a deterrent than imprisonment for cases of housebreaking and larceny. See Bradbury, *Fines-Are They a Deterrent?*, 119 *NEW L.J.* 466 (1969). The fine is viewed as being a meaningful deterrent. See Carter, *supra* note 26, at 155. See also Gillespie, *supra* note 30 (incarceration deprives one of freedom while fines deprive one of property). If the goal is not to deter or deprive, then a fine may not be the appropriate sentence. See *supra* notes 80-81 and accompanying text.

[t]he question for me is how much good a sentence of a few months does to rehabilitate an offender convicted of a misdemeanor, particularly when we recognize that this offender is going to serve his time in a New York City jail, housing a large number of more serious and hardened inmates.⁸⁸

In the long run, a prison sentence may serve to be more detrimental to society and have very little rehabilitative quality for the offender.⁸⁹ In fact, the Supreme Court has recently upheld a statute which declares that rehabilitation is not a goal of imprisonment.⁹⁰ The Court's decision is consistent with a current trend in society to move away from rehabilitation as a goal of punishment.⁹¹

The primary distinction between the fine and incarceration is that only the latter can achieve incapacitation.⁹² If incapacitation is the desired outcome, then the fine is inappropriate.⁹³ Under the present conditions of the jail system, it may be desirable to limit incapacitation to cases in which the offender poses a serious threat to society.⁹⁴ Where this is not the case, the day-fine may very well be the answer to a short supply of jail space.⁹⁵

88. Judge McBrien quoted in NEWSLETTER, *supra* note 3, at 4. Judge Rose McBrien is one of the judges who is actively involved with the day-fine project.

89. NEWSLETTER, *supra* note 3, at 4-5. Some commentators offer the claim that imprisonment does not achieve the goal of deterrence, and in addition, may also be detrimental. See Bradbury, *supra* note 87, at 466. In Germany there was a shift in sentencing philosophy from "retributive justice" towards "resocialization." This movement was accompanied by a move away from short-term incarceration in favor of the day-fine. Interestingly, two distinct viewpoints supported the day-fine. One side viewed prisons as "schools of crime" and thus not only incapable of effecting resocialization, but even counter-productive in achieving this goal. The other view professed faith in the possibility of resocialization under appropriate conditions of incarceration. These conditions include uncrowded prisons, and incarceration coupled with treatment for an extended period. See Gillespie, *supra* note 30, at 20-22. In both cases the day-fine achieves the desired goals.

90. The Supreme Court upheld the Sentencing Reform Act of 1984 which rejected rehabilitation as a goal of imprisonment. *U.S. v. Mistretta*, 488 U.S. 361 (1989). The Reform Act states that punishment should serve retributive, educational, deterrent, and incapacitative goals. 18 U.S.C. § 3553(a)(2) (1985).

91. "Fines are unequivocally punitive, designed to deter, a significant attraction now that the treatment/rehabilitation ideal has fallen from grace." Morgan & Bowles, *supra* note 6, at 203. Rehabilitation as a sound penological theory has been questioned. See N. MORRIS, *supra* note 72, at 26.

92. Incapacitation deprives offenders of their freedom and removes them from society so they cannot commit further crimes. See H. PACKER, *supra* note 83.

93. See *supra* notes 79-83 and accompanying text.

94. Some commentators support imprisonment only when absolutely necessary. This theory, known as parsimony, promotes employing "the least restrictive (punitive) sanction necessary to achieve defined social purposes." N. MORRIS, *supra* note 72, at 59. Other commentators point out that "to fine a major drug dealer would probably prove to be of little impact. In cases involving violence against persons, it would be difficult to place a cash value on the injuries of the victim." Carter, *supra* note 12, at 161.

95. There are a great number of property offenses and some types of white collar crimes where

It would then appear that the day-fine has its best chance of success in cases where petty offenders who typically receive short terms of incarceration for repeat criminal behavior, but who do not present a danger to public safety,⁹⁶ require some measurement of credible punishment.⁹⁷ Consequently, the day-fine has the potential for freeing up jail space for more serious offenders, for imposing equitable punishment based upon financial means, and providing judges with the impetus to fine higher for those who can afford it. This in turn gives the day-fine greater potential to be used in cases where a fixed fine would have been ineffective or where incarceration would have been imposed.⁹⁸ The day-fine is therefore capable of overcoming some of the major drawbacks that have prevented the fine from becoming a viable sentencing option.

V. GATHERING INFORMATION ABOUT THE OFFENDER'S INCOME

Currently two Vera Institute of Justice employees interview defendants before they appear before a judge for sentencing.⁹⁹ A questionnaire is completed in which a representative of the project asks defendants about employment, number of dependents, and other sources of income. The Vera employees interview only defendants with Desk Appearance Tickets (DAT's) while all other arrestees are interviewed by New York City's pretrial services agency in Staten Island prior to arraignment.¹⁰⁰

No major problems have been encountered thus far in obtaining information about defendants' employment or income.¹⁰¹ Offenders tend to provide the information voluntarily,¹⁰² and the court has been satisfied

the fine would be a successful substitute for incarceration. See Carter, *supra* note 26, at 161. The day-fine could eventually be employed in felony cases where the defendant proves to be non-dangerous, for example, in cases involving forgers and gamblers.

96. Research in Brief, *supra* note 11, at 2.

97. This discussion of benefits is focused on the day-fine's impact on less severe offenses, although there may be some carry over for possible use in felony cases. See Hillsman, *supra* note 4, at 41.

98. Staten Island Register, *supra* note 39, at 9, 14.

99. Vaughn Jackson is the on-site project director, and he is assisted by another Vera employee in conducting interviews. After the pilot project is complete, it is intended the interviewing will be performed by court officials. The small administrative cost incurred by the court to perform the interviewing should be easily recovered by the program's efficiency and enforcement of the day-fine.

100. This enables the Staten Island judges to have the basic elements to value the day-fine at the time of sentencing, even if this should happen to coincide with the arraignment. See S. HILLSMAN, *supra* note 6, at 65.

101. Interview with Project Director Judy Greene, Director of Court Programs at the Vera Institute of Justice (Nov. 12, 1988).

102. In Europe, there is a great reliance on self-reported information. The courts in Europe have found that relying on defendants to provide information about their economic status is not a barrier to the wider imposition of fines. See Research in Brief, *supra* note 11, at 4. A brief discussion with

that the information is generally accurate.¹⁰³ If a judge has doubts in a particular case, he can order the information to be verified.¹⁰⁴

The judge can also exercise discretion in determining whether the information provided by the offender is accurate. For example, in one actual case where the defendant had claimed no current income, it was clear he possessed substantial assets.¹⁰⁵ To verify his suspicion the judge asked the defendant to bring in his latest tax return, to which he complied.¹⁰⁶ The judge was then able to determine the unit amount of the day-fine based upon the financial information provided.¹⁰⁷ If the defendant had refused, the judge could have sentenced him to a different sanction which was equivalent in punitive effect.¹⁰⁸

Another alternative open to the court if the information provided appears questionable is for the judge to request a presentence report in order to obtain financial information. These reports are currently required when a sentence of imprisonment or probation is to be instituted.¹⁰⁹ One drawback with this approach, however, is that a defendant's financial circumstances may change from the time the report is taken until sentencing. It may therefore be necessary to inquire of defendants in court, at the time of sentencing, as to their financial disposition.

the defendant's lawyer at arraignment or sentencing to verify, clarify, or supplement information when necessary has sufficed for Richmond's judges to set day-fine amounts without difficulty. See S. HILLSMAN, *supra* note 6, at 65.

103. See Research in Brief, *supra* note 11, at 4.

104. Verification can currently be carried out by the Vera Institute of Justice or the probation department. The probation department, which traditionally performs pre-sentence reports in cases where incarceration or probation are to be imposed, will be well equipped if necessary to perform the task. However, "[i]t is recognized that for many high volume, minor routine offenses it would be impractical, and perhaps even wasteful, to expend a great deal of resources on an accurate determination of the offenders income." Gillespie, *supra* note 30, at 22. In any event, this is not normally necessary. See *supra* notes 102-103 and accompanying text; see *infra* notes 105-109 and accompanying text.

105. One indication of this was that he had hired a very reputable lawyer on Staten Island who charged a substantial fee.

106. In West Germany, a defendant is under no obligation to cooperate with the court and does not have to disclose tax information. This has not prevented that program from becoming a success. Gillespie, *supra* note 30, at 23.

107. See *supra* note 62. The judge would have previously decided the severity of the offense and assigned the number of units applicable thereto.

108. See *supra* note 41 for alternatives. When a defendant is faced with the choice of producing his financial data or receiving one of the alternative sanctions listed in note 41 *supra*, it is likely that he will produce whatever the judge requests.

109. See *supra* note 104 and accompanying text.

VI. THE COLLECTION PROCESS

Rigorous collection procedures have been established for the pilot project in an attempt to achieve the highest collection rate possible. These procedures include providing defendants with payment schedules, and with notification letters one week prior to a payment's due date.¹¹⁰ Offenders are urged to make full payment at the time of sentencing if possible, but are allowed to make installment payments.¹¹¹

Installment payments¹¹² are very useful with offenders who are less affluent because they allow the offenders to pay the fine over a period of time. Offenders fined less than five-hundred dollars are given two months to pay, while those fined five-hundred dollars or more are given four months.¹¹³ The deadlines can be extended if an investigation indicates that an offender has the potential and willingness to pay, but needs more time.¹¹⁴ For example, if the offender was forced to use his disposable income due to an emergency and was unable to make the installment payment, the program is flexible enough to make a minor adjustment in the payment schedule to collect the fine rather than have the offender default.¹¹⁵ On the other hand, if an investigation shows that a defendant is willing but has become unable to pay, it is recommended that the judge resentence the defendant, preferably to an alternative sentence such as community service hours.¹¹⁶ In addition, if a defendant fails to make a payment on time, the judge has several options available. The judge can adjust the term of the payment, lower the amount of the fine, or revoke the entire sentence imposed and resentence the defendant.¹¹⁷

If defendants are delinquent in their payments, letters are sent out warning of subsequent measures that include liens against property and wage garnishments.¹¹⁸ These follow up letters attempt to coerce defendants to pay before the actual threats have to be enforced.¹¹⁹ Upon a de-

110. N.Y. Times, *supra* note 30, at 29, col. 1; The Vera Institute of Justice monitors payments and notifies the court of scofflaws. Once the pilot project has ended, it is intended that the court clerk's office will assume this role and should do so without difficulty.

111. N.Y. CRIM. PROC. LAW § 420.10(1) (a)-(c) (McKinney 1970).

112. Installment payments serve as a constant reminder that the defendant is being punished.

113. NEWSLETTER, *supra* note 3, at 4-5.

114. *Id.*

115. Not only would the adjustment help collect the fine, but would also save the court the cost of initiating enforcement procedures.

116. NEWSLETTER, *supra* note 3, at 4-5. See *infra* notes 140-158 and accompanying text (discussion of enforcing fines against indigents).

117. 35 N.Y. JUR. 2D *Criminal Law* § 2950 (1984).

118. See *infra* notes 133-135 and accompanying text.

119. Prompt notification to an offender that payments are in arrears tend to have positive re-

defendant's default of an installment payment, the entire unpaid balance of the fine becomes due, and the person sentenced may be imprisoned for failure to pay the fine.¹²⁰ Upon such default, the court can either issue an order to put a lien on the defendant's property or garnish the defendant's salary.¹²¹ It must be remembered that the intention of the program is to reserve incarceration as the last option following a vigorous attempt to collect the fine.¹²²

The successful collection of fines will be a major determinant in the success of the program. The fine carries with it the advantage of reimbursing the public treasury, but the collection rate will have to be high for the public to view the day-fine as a credible method of just punishment.¹²³ The day-fine has an advantage in meeting this goal since it has been found that collection is best achieved when the amount of the fine is set at a level the offender is able to pay, with limited installments, and over a relatively short period of time.¹²⁴ If collection rates are high, the resulting punishment may then have widespread retributive value and deterrent consequences.¹²⁵ Conversely, because the fine is a court order, if the fine is not paid the credibility of the court is called into question.¹²⁶

The day-fine project's collection procedure, consisting of its careful tracking of payments, swift notification by letter, and coercive tactics avoid problems of credibility by providing an effective and efficient collection process.¹²⁷

VII. ENFORCEMENT OF THE DAY-FINE UPON DEFENDANT'S FAILURE TO PAY

In cases where the threats of the collection process have failed to force payment, it is necessary to carry out those threats if the day-fine system is to remain a viable sentencing tool.¹²⁸

In the past, enforcement of fines was lax with no one particular per-

sults. Full payment occurs in many cases without further, more coercive and costly actions. See Research in Brief, *supra* note 11, at 5.

120. 36A C.J.S. *Fines* § 11 (1961).

121. See *infra* notes 133-135 and accompanying text.

122. NEWSLETTER, *supra* note 3, at 4-5.

123. Research in Brief, *supra* note 11, at 5. A system that lacks respect is bound to fail. See Bradbury, *supra* note 87, at 466.

124. Research in Brief, *supra* note 11, at 5.

125. *Id.*

126. As witnessed in England, fine defaulters can become a real problem if collection procedures are not carried out properly and effectively. See Morgan & Bowles, *supra* note 6, at 212, 213.

127. Research in Brief, *supra* note 11, at 5.

128. See *supra* notes 110-127 and accompanying text.

son responsible for collection.¹²⁹ Thus, no one was held accountable if enforcement broke down. Courts found it easier to pass the responsibility of collection onto other agencies, such as the police via an arrest warrant.¹³⁰ To overcome these problems, the day-fine project has assigned employees who monitor payments and generate warning letters via a computer.¹³¹ This provides for enforcement actions that are immediate and personal, with a steady progression of responses which creates pressure on defendants to meet their fine payments.¹³²

The program is exploring the use of wage garnishment and seizure of property to enforce payments if defendants fail to respond to the rigorous collection process.¹³³ Until recently in New York, it appeared that a fine could only be enforced by imprisonment and that an execution of property could not be issued against the defendant.¹³⁴ Today, though, regardless of whether or not the defendant is imprisoned for failure to pay a fine, a fine may be collected in the same manner as a judgment in a civil action.¹³⁵ This shift in the law will benefit the day-fine tremendously in its credibility as an enforceable sanction, and promotes it as a viable alternative to incarceration.

If the collection process fails to yield results with a particular offender, the next step in enforcing punishment is the imposition of an alternative sentence¹³⁶ or imprisonment.¹³⁷ The threat of imprisonment

129. Research In Brief, *supra* note 11, at 5.

130. The practice and authority to have a defendant committed until the fine is paid is authorized in many states. 36A C.J.S. *Fines* § 11 (1961); *see, e.g.*, *People v. Harris*, 153 Misc. 390, 274 N.Y.S. 171, (1934).

131. *See supra* note 99 and accompanying text.

132. *See supra* notes 112-119 and accompanying text.

133. NEWSLETTER, *supra* note 3, at 5.

134. *People ex rel. Gately v. Sage*, 13 A.D. 135, 136-37, 43 N.Y.S. 372, (1897); *Colon v. Lisk*, 13 A.D. 195, 204-05, 43 N.Y.S. 364, (1897); 36A C.J.S. *Fines* § 9 (1961).

135. N.Y. CRIM. PROC. LAW § 420.10(6) (McKinney 1970); 35 N.Y. JUR. 2D *Criminal Law* § 2951 (1984); This provision makes it clear that for the first time a fine can be collected from an individual by a civil proceeding. *See Kane v. People*, 8 Wend. 203, 215 (N.Y. 1831).

136. Probation and community service are examples.

137. A defendant can be resented and a prison term issued in lieu of a fine. N.Y. CRIM. PROC. LAW § 420.10(2) (McKinney 1970). It should be emphasized that this is the last option the day-fine program wants to employ as it is self-defeating. In Germany, "in the event of default, incarceration may be substituted in the ratio of one day of incarceration for each unpaid day-fine. . . . In fact, however, the use of incarceration as an enforcement mechanism is relatively rare. It is reported that only 2.7 percent to 4 percent of all cases involve incarceration." Gillespie, *supra* note 30, at 22, 23. It is a logical extension from these facts that the day-fine program's collection process and alternative enforcement procedures are performing their function of collecting fines without relying on imprisonment. Additionally, even if incarceration is used in a limited number of cases, it does not mean that the day-fine system is not a successful alternative.

alone may be enough to coerce payment.¹³⁸ In the event of default, however, the sanctions imposed (e.g. jail time) would be the same for other offenders convicted of the same crime because the sentence would be based on the number of units of punishment, not the dollar amount assigned to each unit.¹³⁹

However, a legal problem arises in the form of a Fourteenth Amendment equal protection clause violation if the defendant is an indigent and is jailed for failure to pay a fine.¹⁴⁰ In *Williams v. Illinois*,¹⁴¹ the defendant was given the maximum sentence for theft under Illinois law, which was one year's imprisonment and a \$500 fine (plus court costs of \$5). The judgment, as permitted by statute, provided that if the defendant did not pay off the fine plus court costs by the end of his one year prison term, he had to remain in jail to work the fine off at a rate of \$5 a day, totaling an additional 101 days of imprisonment. Williams was unable to make payment since he was an indigent. Both the sentencing judge and the Illinois Supreme Court rejected Williams claim that the state statutory provision violated the right to equal protection of the law.¹⁴²

The Supreme Court vacated the lower courts decisions and held that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status."¹⁴³ However, the Court went on to limit it's holding by stating that it is not a violation of the Equal Protection Clause solely because an indigent may be imprisoned for a longer time than a non-indigent convicted of the same offense.¹⁴⁴ In addition, the Court specifically noted that the holding did not pertain to cases where the offender was impris-

138. This has come to be known as the "miracle of the cells" which suddenly makes a defendant or his family come forward with the money to pay the fine. See S. HILLSMAN, J. SICHEL & B. MAHONEY, *FINES IN SENTENCING: A STUDY OF THE USE OF THE FINE AS A CRIMINAL SANCTION* 113 (Washington D.C.: National Institute of Justice, 1984).

139. Research in Brief, *supra* note 11, at 6. The equal protection clause of the 14th amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status. It is permissible to sentence a defendant to 30 or 30 days, but it is not permissible to convert failure to pay into extra jail time. See *Tate v. Short*, 401 U.S. 395 (1971).

140. See *Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971); *Bearden v. Georgia*, 461 U.S. 660 (1983); *supra* notes 135-139 and accompanying text; *infra* notes 141-156 and accompanying text.

141. 399 U.S. 235 (1970).

142. *Id.* at 237-238.

143. *Id.* at 244.

144. *Id.* at 243.

oned for nonpayment of a fine when the sentence was "\$30 or 30 days."¹⁴⁵ The narrow construction of the holding in *Williams* is best displayed by the Courts statement "[w]e hold *only* that a state may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine."¹⁴⁶ (emphasis added).

The next case to test the issue of imprisoning an indigent for failure to pay a fine was *Tate v. Short*.¹⁴⁷ In *Tate*, the defendant was convicted of traffic offenses and fined a total of four-hundred and twenty-five dollars.¹⁴⁸ The Texas statute provided that the sole sanction for such offenses be a fine, but required persons unable to pay to be incarcerated at the rate of \$5 per day.¹⁴⁹ The defendant was an indigent and unable to pay which meant he had to serve an 85 day prison term.¹⁵⁰ The state courts denied *Tate's* petition for habeas corpus.¹⁵¹

The Supreme Court reversed based on its decision in *Williams*,¹⁵² and held that "it was a denial of dual protection to limit punishment to payment of a fine for those who are able to pay it but to convert the fine into imprisonment for those who are unable to pay it."¹⁵³ Again, just as it had in *Williams*, the Court qualified its holding by stating "[n]or is our decision to be understood as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case."¹⁵⁴ It is important to note that the Court promoted the use of employing alternative sanctions to avoid imprisoning an indigent for nonpayment, just as it had in *Williams*.

The Court gave its most conclusive and informative decision on the issue in *Bearden v. Georgia*.¹⁵⁵ The Court held that

[i]f the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment . . . If the probationer could not pay despite sufficient bona fide efforts to acquire the re-

145. *Id.*

146. *Id.*

147. 401 U.S. 395 (1971).

148. *Id.* at 396.

149. *Id.* at 396-397.

150. *Id.* at 397.

151. *Id.*

152. 399 U.S. 235(1970).

153. 401 U.S. 395 (1971).

154. *Id.* at 400, 401.

155. 461 U.S. 660 (1983).

sources to do so, the court must consider alternative measures of punishment other than imprisonment.¹⁵⁶

Based on the Court's decisions, it is clear that when the offender is an indigent, the court will have to employ alternative sentences and avoid imprisonment except in the most extreme cases.¹⁵⁷ The day-fine will be able to avoid many of the problems associated with indigents since it inquires into an offenders financial background before sentencing.¹⁵⁸ It will only be in the case where the defendant becomes indigent after sentencing that the constitutional issues revolving around imprisonment will be raised. Even when this does occur, the day-fine program promotes the use of alternative sentences, such as community service. In the end, therefore, it appears the day-fine will be able to overcome any problems the indigent offender poses.

VIII. WILL THE CURRENT LIMITS ON FINE AMOUNTS PREVENT THE DAY-FINE FROM BEING EFFECTIVE?

The day-fine system in Staten Island is set up so that fines can range from twenty-five dollars(\$25) to four-thousand dollars(\$4000).¹⁵⁹ Under the current structure in New York State, a fine for a class A misdemeanor is not to exceed one-thousand dollars(\$1000),¹⁶⁰ a class B misdemeanor five-hundred dollars(\$500),¹⁶¹ and a violation two-hundred and fifty dollars(\$250).¹⁶² These limits may pose the single greatest obstacle to the day-fine reaching it's maximum potential as an alternative sanction since they take away a substantial portion of the fine range that the day-fine could operate within.¹⁶³ These restrictions may lessen the bite of the

156. The Court concluded that "[t]o do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Id.* at 672, 673.

157. "Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay." *Id.* at 672.

158. If the offender is not indigent, there will be no constitutional problems of wealth discrimination in setting the amount of the fine or, if necessary, enforcing payment by imprisonment. Tate v. Short, 401 U.S. 395, 400 (1971).

159. *Newsletter, supra* note 3, at 5.

160. N.Y. PENAL LAW § 80.05(1) (McKinney 1965).

161. N.Y. PENAL LAW § 80.05(2) (McKinney 1965).

162. N.Y. PENAL LAW § 80.05(4) (McKinney 1965).

163. If the day fine was going to be implemented in felony cases, the current law states that a sentence to pay a fine for a felony is to be a sentence to pay an amount, fixed by the court, not exceeding the higher of \$5,000 or double the amount of the defendants gain from the commission of the crime. N.Y. PENAL LAW § 80.00(1) (McKinney 1965).

program on affluent offenders and reduce the day-fines' effectiveness as an option to incarceration.

One of the goals of the pilot project is to gather a statistical base to show that if the court had greater fining capability, the amount of the fine imposed would be higher.¹⁶⁴ Thus, the revenue for the state would increase and the punitive effect on those particular offenders would be greater. This data can then be used to design a legislative proposal to raise the maximum amounts.¹⁶⁵ An alternative to this broad proposal of raising the caps state-wide is for the caps to be raised only in cases that impose day-fines. This would prevent the problem of judges inflicting higher fines on offenders who could not pay in cases where the day-fine is not being employed.

On the other hand, if the current statutory caps remain in place, the day-fine's chances of being a successful alternative is not necessarily foreclosed. The early data gathered from the project shows an increase in the total dollar amounts ordered by the court under the day-fine system.¹⁶⁶ Thus, the day-fine system can still be advantageous should the legislature fail to raise the statutory caps. However, in order for the day-fine to reach its maximum potential, the statute needs to be updated to reflect modern society's needs.¹⁶⁷

CONCLUSION

The Vera Institute of Justice is currently conducting a comprehensive evaluation of the day-fine project. Unfortunately, the results of this evaluation were not yet available at the time of this Comment and will take several months to complete. However, some speculative conclusions can be drawn from the preliminary data compiled.

164. See Hillsman, *supra* note 4, at 45.

165. The current caps on fine amounts set by statute have not been raised since 1965. N.Y. PENAL LAW § 80.05 (Consol. 1965). It might be argued that maximum fine limits cause wealth discrimination by protecting the rich in that it allows them to escape harsh punishment. On the other hand, if we did away totally with the fine limits, jurisdictions where day-fines had not been implemented might start imposing higher fines on defendants who could not pay.

166. Project planners collected basic data from court calendars for all Penal Law cases which resulted in fixed sum fines during a six-month period shortly before the implementation of the day-fine project. The total amount ordered in the pre-test period averaged \$19,705 per quarter for an annualized estimate of \$78,818. The total dollar amount ordered during the one-year pilot project was \$98,078. These statistics are taken from, Preliminary Data Report, Day-Fine Pilot Project 2, 3 (Nov. 1989) (available at the Vera Institute of Justice, *supra* note 60).

167. The fine limits have not increased since 1965 while inflation has increased dramatically thus putting the court system and the day-fine system at a disadvantage in carrying out their respective functions.

The day-fine was imposed in 267 cases which constituted 70 percent of all fine sentences.¹⁶⁸ It would thus appear from this high percentage that the basic features of the day-fine system are functional and workable as designed for the pilot project. In addition, as the day-fine system is refined and the court becomes more familiar with its application, the day-fine should be able to replace fixed fines completely.

Average fine amounts increased from \$226 to \$246 with the institution of the day-fine system. Although the increase appears modest, the increase occurred with the State's statutory fine maxima still set well below the day-fine's upper operating range. Due to these limits, ninety-three of the two-hundred and sixty-seven day-fines had to be "capped" at the statutory maximums and were unable to be imposed at their true higher value.¹⁶⁹ If the statutory limits were set to allow the day-fine to flow freely within its full range of fining capability, the average fine would have been \$372, a 65 percent increase over the averaged fixed fine in the pre-test period. This increase in the average fine amount, coupled with the slight increase in the use of the fine as a sanction,¹⁷⁰ would have generated an increase in the total dollar amount of court ordered fines by 79 percent.¹⁷¹ These figures show the tremendous impact the day-fine could have on fine revenues if it were able to reach its full potential. In order for this to occur the statutory fine limits must be raised.

Another positive indication from the preliminary data is that day-fine amounts have been spread over a wider range of values than fixed fines had been in the pre-test period. Fixed fines tended to cluster at a limited number of specific dollar amounts whereas the day-fine has been

168. Fixed fines constituted 30 percent of the fines imposed during the day-fine project for several reasons: (1) court papers that did not clearly identify the fine as a day-fine were counted as fixed fines for statistical purposes; (2) plea bargaining negotiations resulted in specific fine amounts; (3) Brooklyn judges who were assigned to the Staten Island bench for short intervals tended to use fixed fines as they were unfamiliar with the new system; (4) offenders who were convicted on Penal Law charges not yet given benchmark scales were given fixed fines; (5) and Penal Law offenses which were imposed in conjunction with Vehicle and Traffic Law offenses were given fixed fines as the day-fine system has not been extended to cover VTL cases. Preliminary Data Report, *supra* note 166, at 1 n.2.

169. Ten cases of class A misdemeanor convictions were capped at the \$1000 limit, nine cases of class B misdemeanor convictions were capped at the \$500 limit, and eighty-four cases of violations were capped at the \$250 limit. *Id.* at 3.

170. There was a slight increase in the total number of fines imposed under the day-fine system compared to the pre-test period. Fine sentences were imposed in 379 Penal Law cases during the first year of the day-fine project which averages ninety-five cases per quarter compared to eighty-eight Penal Law cases per quarter during the six-month pre-test period. *Id.* at 2.

171. Fine amounts would have increased from a pre-test average of \$19,705 per quarter to \$35,281 per quarter during the pilot year. *Id.* at 3. See *supra* note 166 and accompanying text.

more disperse with less clustering. It therefore appears that the day-fine is tailoring the fine to the offender's ability to pay thus accomplishing its basic premise.

Other data appears to be less conclusive. The day-fine does not appear to have had a significant effect on the charge severity of offenses receiving the fine as a sanction. In both the pre-test period and the day-fine period a majority of the cases receiving the fine were arraigned as class A misdemeanors.¹⁷² Meanwhile, modest gains were made in the number of offenders receiving a fine who were arraigned on felony charges and on class B misdemeanors.¹⁷³ Although there has been no substantial increase of fine sentences across severity classes, the rates of distribution of fine sentences demonstrates that the court is employing the day-fine in the full range of criminal cases that previously received fixed-fines.

Based upon the preliminary data, the day-fine has proven itself as a viable sentencing option and shown its numerous advantages over the fixed fine. If the court were to make a deliberate policy shift in its sentencing practices to increase the employment of the day-fine across charge severity classes, the day-fine has the potential to be a significant alternative to incarceration in appropriate cases. To the extent that the day-fine has a chance of becoming a viable alternative to incarceration it deserves widespread support.

Ultimately, the success of the day-fine in replacing short term jail sentences will depend on how widely across the spectrum of offenses judges choose to apply it, the rate of collection, and how effective a deterrent it proves to be. In the end, if defendants are paying to society rather than society paying for defendants, the program is successful.

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172. Arraigned class A misdemeanor charges constituted 71 percent during the pre-test period and 62 percent during the day-fine period. *Id.* at 8.

173. All classes of arraigned felonies constituted 25 percent during the pre-test period and 31 percent during the day-fine period, and arraigned class B misdemeanors constituted 1 percent in the pre-test period and 6 percent in the day-fine period. *Id.* at 12.

