

A Modern Debtors' Prison? Imprisonment for Unpaid Fines and Socioeconomic Inequality (Morten Boe)



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Morten Boe*

Ever wanted to set a prisoner free? In Germany, it is easier than you would expect. No need to plot a jailbreak, just be ready to send some cash. The *Freiheitsfonds* (Freedom Fund), which presents itself in aesthetics inspired by the gaming franchise Grand Theft Auto, will process your money hassle-free, having already helped to avoid 156 years of imprisonment by paying fines

totaling €750,000. To release a specific person just provide their name and case number. Offers start at as low as 1 Euro per day of freedom from incarceration. [1] And the best thing? It is 100% legal.

What sounds like a cynical advertisement takes advantage of a peculiar feature of the current German sanctions system, the so-called *Ersatzfreiheitsstrafe* (EFS), which converts criminal fines into imprisonment in case of non-payment. The above-mentioned release scheme is made possible because fines – and by extension the EFS – are not considered *personal* punishments. The German state has no interest in who pays a criminal fine, as long as it is paid. [2]

Why are initiatives like *Freiheitsfonds* challenging the EFS and working to free inmates by paying their fines? The EFS increasingly has been perceived as a form of poverty punishment. After operating in the shadows for decades and being conceptualized as a last resort to implement the German criminal fine system, troubling aspects of the EFS have been brought to light. [3] The EFS – or at least its current application in practice – is now being criticized as a form of socioeconomic discrimination because economic differences seem to determine penal outcomes: People are being imprisoned not because they have committed an offense, but rather because they are unable to pay their fines.

On October 1, 2023, legislative amendments to the EFS will come into force, [4] which *inter alia* change the conversion rate between fines and default imprisonment. Two (unpaid) daily rates now correspond to one day of imprisonment, instead of two. While the German Justice Minister celebrated this change as a “historical reform” aimed at substantially reducing the number of default imprisonment sentences, others point to the superficial character of the changes and argue for a general abolition of the EFS: In their view reducing the number of default imprisonment sentences merely cures a symptom, not the disease. In the following, I will discuss the main arguments in the German debate to stimulate reflection on the long-troubled relationship between punishment and welfare.

Law in the Books: The German Fine System and *Ersatzfreiheitsstrafe*

The sanction system in Germany revolves around two main types of punishment, day fines and imprisonment. Fines are calculated on the basis of a daily rate system (*Tagessatzsystem*), also used in many other European states and famously Scandinavia. The system follows a two-step procedure: In the first step, the number of daily rates (between 5 and 360) is set in accordance with the severity of the offense and the culpability of the offender. In the second step, the fine’s daily rate is assessed with regard to the offender’s personal and financial circumstances. The daily rate is (typically) based on the average net income that the offender earns or could earn in one day (§ 40 I, II German Criminal Code). The total fine results from multiplying the number of daily rates and the amount of a daily rate. If a fine is not paid in time, default imprisonment is imposed:

If a fine cannot be recovered, it is to be substituted by imprisonment. One daily rate corresponds to one day of imprisonment. The minimum term of default

imprisonment for failure to pay a fine is one day.[5]

The German fine system has long been celebrated as a successful reform to avoid short-term prison sentences, especially for misdemeanors and minor crimes. Since its introduction in 1969 (fines as principal punishment for minor crimes) and 1975 (daily rate system), Germany has experienced a significant decrease in prison population.[6] The day fine system is based on the idea that the punitive effects of fines – the pain of punishment – should be experienced equally. The aim was to improve socioeconomic fairness by considering defendants' economic situation during the sentencing stage.

Law in Practice: The Downfall of the EFS

The recent debate surrounding the EFS suggests, however, that the German fine system no longer aligns with the original aspirations once associated with its implementation. It is estimated that roughly 10% of the German prison population is being imprisoned under the EFS scheme.[7] The rate of fines resulting in an EFS has roughly doubled from 5% in the 1970s to 10% in 2017. For a system in which more than 80% of all offenses are sentenced by fine,[8] this increase is troubling. Studies furthermore suggest that today “typical” fine defaulters are socioeconomically marginalized individuals, who are disproportionately affected by unemployment, mental illness, substance abuse, homelessness, or poverty.[9]

What happened?

First, critics have pointed to the criminalization of poverty and substance-abuse related crimes, such as petty theft, fare evasion, and drug offenses. Those offenses are considered of minor severity and are regularly punished with fines of a low number of daily rates. However, a significant rate of these fines is later transformed into short-term imprisonment.

Second, they point to the “managerialization” of the criminal justice system for the above-mentioned offenses and low-level misdemeanors more generally, which account for a large part of the justice system's overall caseload. In 2018, 42% of all fines included thirty daily rates or fewer.[10] This produces a strong incentive to process these cases through alternate proceedings that avoid a lengthy trial. Therefore, in practice, many EFS imprisonments are based on “summary penalty orders,” written penal orders issued by a judge on the basis of the case file, without a trial.[11] The judge affirms that sufficient grounds exist to suspect the defendant of having committed an offense and informs the defendant that they will receive the specified sentence unless they object within two weeks, in which case the matter will proceed to trial.[12] If the ordered fine is not paid in time, the transformation into an EFS is ordered by the prosecution (§ 495a(1) German Criminal Procedural Code). While, in theory, an EFS can be avoided through community service, payment plans, and civil debt collection, these options are rarely used in practice.[13] From 2004 to 2021 only 5% of fines were replaced by community service and the rate is decreasing.[14]

This multi-step process assumes not only that defendants can understand and navigate complex bureaucratic procedures but also that they have a mailing

address where they can reliably receive official letters. Socioeconomically marginalized individuals are therefore less likely to object to a penal order. The current system also heavily relies on self-reporting of financial information. Where information is missing, the prosecution will simply estimate the defendant's net income.^[15] In addition, a more structural issue comes into focus. The German fine system's way of calculating the daily rate so far has not accounted for the existential costs of living. When the daily rate system was established in the 1970s, a provision that automatically would have deducted the subsistence level from net income was rejected to ensure an effective threat of punishment also in relation to low-income defendants.^[16] This arguably allowed for daily rates to be set at a level where some defendants were unable, and not merely unwilling, to pay the fine. In the case of the actual inability to pay the fine, an EFS not only amounts to a criminalization of typically non-criminal behavior – not paying financial debts – but to a criminalization of poverty.

Amendments and Open Questions

In sum, criminalizing poverty, limiting the full criminal process to cases of serious crime, and dealing with mass offenses in a managerial manner resulted in a practice that threatens central constitutional guarantees. Concerns have been raised about potential violations of the principle of equal treatment and the right to a fair trial. Since the enforcement of an EFS is ordered by the prosecution, the guarantee enshrined in Art. 104(2) German Basic Law that only a judge may rule upon the permissibility or continuation of any deprivation of liberty also might be affected. Furthermore, the Federal Constitutional Court has ruled in a non-criminal context that the protection of human dignity includes a fundamental right to the guarantee of an existential minimum.^[17]

Against this background, the German parliament has decided to amend the EFS by inserting the following clause into the provision regulating the calculation of the daily rate: "It [the Court, M.B.] also ensures that the offender retains at least the minimum subsistence income."^[18] Besides the already mentioned conversion rate change (1:1 to 2:1), the amended provisions also require the defendant to be proactively informed about options to avoid imprisonment through payment plans, community service, or court support staff (*Gerichtshilfe*) before an EFS is ordered.^[19] While these are significant changes, the legislator stopped short of abolishing the EFS altogether or limiting its use to cases of proven unwillingness to pay a fine – a model adopted in Sweden, with the result that only thirteen default imprisonments were imposed there in 2019.^[20] Instead, the main structure of the EFS as imprisonment for non-payment and the underlying dynamics between the criminalization of mass offenses and procedural managerialism will remain unchanged.

Ersatzfreiheitsstrafe continues to be emblematic of the unsolved challenges of modern criminal law, which similarly have surfaced in the Anglo-American debate on bail reform.^[21]

First, the current German debate makes plain that not only imprisonment for non-payment of fines but also the relationship of fines and imprisonment more

generally deserve further scrutiny: How do (impersonal) fines fit into punishment theories that focus on communicating community censure, proportionate retribution, or preventive deterrence? Can fines even be considered a “punishment” if it is practically impossible to ensure that a fine is paid by the offender and thereby has a personalized effect?[22] Especially the discussions about the calculation of the daily rate and the appropriate conversion rate between daily rates and imprisonment – between the loss of income and the loss of freedom – challenge our traditional assumptions about the proportionality of punishment, both with regard to different types of punishment and to the “sensitivity to punishment” (*Strafempfindlichkeit*) of different offenders.

From this perspective, the paradox of the EFS seems to lie in the fact that personal and impersonal forms of punishment are mixed and transformed into each other. If the EFS is just one tool to recover fines from debtors, alternative options (e.g., civil debt collection) should always take precedence due to the constitutional principles of necessity and proportionality. Otherwise, the state would indeed operate its own debtors’ prison, an institution normally associated with the distant past. Instead, it is often assumed that criminal fines extend beyond mere financial obligations to the state; that fines and by extension the EFS are real punishments. However, as long as fines are not considered and enforced as personal punishments, this claim is not fully convincing.

Second, the discussion around the EFS also invites the more general question of whether and to what extent criminal justice systems engage in socioeconomic discrimination by criminalizing and punishing the poor. In the German debate, some have vehemently denied this allegation, arguing that the criminal law just happens to operate in an unequal setting; namely in a society, which is characterized by socioeconomic inequality. They imply that it is not the task of criminal law to improve society and to compensate for socioeconomic inequalities. There might be some truth to this – either realistic or pessimistic – position in that it draws attention to the difficult question of which (limited) role criminal law can or should play in the wider sociopolitical make-up of a given society.

Third, the debate about imprisonment for non-payment of fines suggests an arguably even more troubling insight. The (old) legal framework of the fine system and EFS already granted wide discretion, which – in theory – would have allowed judges and prosecutors to take the socioeconomic situation of offenders into account while calculating the daily rate and to (proactively) avoid imprisonment by informing the offender about alternatives. In this sense, much of the upcoming legislative reform is clarificatory in nature. One reason why judges and prosecutors did not use their discretion to account for socioeconomic hardship may have been that they lacked the cultural competence to understand poverty and the hardships of socioeconomic exclusion because of their own (relatively) privileged socioeconomic position. They implicitly assume that the failure to pay a fine is a conscious decision; not an issue of ability, but of will.[23] Maybe it is not the law, but its agents and enforcers, we should talk about. Then again, lower solidarity is just another

feature of unequal societies. In any case, it is probably fair to say that the German criminal justice system and its actors were at least not doing enough to prevent socioeconomic inequalities generating secondary discrimination in the legal sphere. It remains to be seen how the system implements the legislative changes into its day-to-day practice.

Conclusion

In the current discussion about *Ersatzfreiheitsstrafe* in Germany, many foundational challenges of modern criminal law converge. Stepping back from the domestic debate allows us to recognize the deep structural challenges criminal justice systems face in times when socioeconomic inequality is on the rise and social support systems crumble. Any criminal legal system that employs monetary fines as its primary sanction, and especially those that use a daily rate system based on net income, must pay close attention to socioeconomic developments. At the same time, scholars and practitioners should reconsider the relationship between punishment and welfare in theory and in practice. Finally, it is essential to cultivate sensitivity within the justice system toward the possibility that offenders may be subjected to harsher treatment not because they committed a more serious crime, but because they belong to a marginalized socioeconomic group.

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[1] The lowest legally possible daily rate is €1, the highest €30,000, § 40 II German Criminal Code.

[2] More specifically, according to the jurisprudence of the Federal Court of Justice, paying another person's fine does not amount to "obstruction of prosecution or punishment," § 258 German Criminal Code.

[3] Especially a bestselling book by lawyer and journalist *Ronen Steinke*, *Vor dem Gesetz sind nicht alle gleich: Eine neue Klassenjustiz*, 2022 stimulated a public debate.

[4] Gesetz zur Überarbeitung des Sanktionenrechts – Ersatzfreiheitsstrafe, Strafzumessung, Auflagen und Weisungen sowie Unterbringung in einer Entziehungsanstalt vom 26.07.2023, BGBl. 2023, I/203.

[5] § 43 German Criminal Code (until October 1, 2023).

[6] *Albrecht*, Day Fines in Germany, in *Kantorowicz-Reznichenko/Faure* (eds.), *Day Fines in Europe*, 2021, 85, 102.

[7] *Nagrecha*, *The Limits of Fairer Fines: Lessons from Germany*, 2020, 74

[8] *Albrecht*, *supra* note 6, at 86, 102.

[9] *Id.* at 109-110.

[10] *Nagrecha*, supra note 7, at 72.

[11] Cf. §§ 407 et seq. German Criminal Procedure Code.

[12] For a more detailed description of penal orders in the German criminal procedural system, cf. *Dubber*, Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure, 46 *Stanford Law Review* (1997), 547, 559-560.

[13] *Nagrecha*, supra note 7, at 69.

[14] *Albrecht*, supra note 6, at 109.

[15] *Nagrecha*, supra note 7, at 54-60.

[16] *Id.* at 29-30.

[17] BVerfG, Judgment of the First Senate of 5 November 2019 – 1 BvL 7/16.

[18] § 40 II (2) German Criminal Procedural Code (new version) [my translation].

[19] § 459e II German Criminal Procedural Code (new version); § 463d Nr. 2 German Criminal Procedural Code (new version). The main task of court support staff is to arrange and supervise community service in lieu of fines, and to assist in determining the personal circumstances of the accused.

[20] Cf. *Bögelein/Wilde/Holgrem*, Fine and Imprisonment for Non-Payment in Sweden – A Comparison with the German System, 105 *Monatsschrift für Kriminologie* 2021, 102-112 (English abstract).

[21] See, e.g., Nicole Zayas Manzano, [The High Price of Cash Bail](#), American Bar Association (Apr. 12, 2023) (last accessed Sept. 24, 2023).

[22] Cf. *Coca-Vila*, What's Really Wrong with Fining Crimes?, 16 *Criminal Law & Philosophy* (2022), 395–415.

[23] *Nagrecha*, supra note 7, at 86-89.