



JUSTICE COLLECTIVE

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In recent months, Germany's FDP Justice Minister Marco Buschmann has made a number of surprising "soft-on-crime" statements. He has announced reviews into whether certain low-level criminal offenses should be downgraded into ordinance violations, and into whether the federal government could adopt policy changes to reduce incarceration for low-level cases.

Minister Buschmann's proposals address the approximately 550,000 cases sentenced with fines each year, most of them low-level. If people do not pay their fines, after some time, they are jailed. In 2017, approximately 55,000 people, many of them lower income, were incarcerated for this reason—a staggering rate twice as high as 40 years ago. It is this incarceration (called Ersatzfreiheitstrafe) the Minister has said the federal government will "try to contribute" to reducing. On the table for downgrading to ordinance violations are fare evasion (riding public transportation without a ticket) and marijuana possession.

These would be first steps, but even if passed, they will not move the needle nearly enough. Ersatzfreiheitstrafe, jailing people in cases where the court first held fines were sufficient punishment, is always unjust. Downgrading offenses is not full legalization, and these two common offenses would, as today, continue to justify police surveillance and racial profiling. What is more, ordinance violations may still result in high fines, and even incarceration. That's why for truly transformative change, we have to go much further than the reforms currently on the table.

Unequal Before the Law

Germany spends considerable resources for a system that is, in significant part about sentencing offenses related to poverty. This "law-and-order" approach is justified by the need to hold individuals accountable for their actions and to preserve the rule of law.

But when it comes to the wrongdoing of corporations and their managers German courts looks the other way. The recent scandals in the automotive industry and the Wirecard case immediately come to mind as examples. In the latter case, the state had planned for a [deliberately small budget](#) for the German Financial Reporting Enforcement Panel, which was also financed by the same companies that this "accounting police" was supposed to scrutinize. When the *Financial Times* presented overwhelming evidence of fraud by Wirecard, the German Federal Financial Supervisory Authority filed a [complaint](#) with the Munich prosecutor's office against the British journalists who had written the article.

The author Ronen Steinke is therefore right [when he writes](#) that "not everyone is equal before the law." However, this class justice is not really new. Moreover, it is not only based on the unequal application or implementation of the law, or on the fact that rich defendants can buy the best defense. Rather, the criminal law is designed to reproduce an economic system that creates and constitutes inequality. Those who make profits are seen as supporting society, and those who are poor are under constant surveillance.

Poverty and Structural Racism

What the state punishes is a political decision that reflects the distribution of power in society. [Inequality in Germany has skyrocketed](#) over the last thirty years. It is, therefore, unsurprising that a significant percentage of Germany's low-level criminal legal system punishes offenses that are symptoms of poverty.

Petty theft and fare evasion together account for about 20 percent of cases each year. People are punished for not being able to afford transportation, household necessities, or food. People may also be criminalized for receiving welfare benefits. As a result of neoliberal reforms in the 2000s, job centers regularly reduce already-low benefits amounts with "sanctions", including if a person does not update the job center about changes to their financial situation, misses appointments, or does not accept an offered job. Job center sanctions can also escalate into criminal punishment. In 2017, 49,769 cases were handed over to prosecutors' office because of allegations of fraud in people's receipt of public benefits. But research shows job centers often have [little or no evidence of wrongdoing or intent](#).

One way people receiving benefits are criminalized is for working to supplement their low benefits income. Such efforts are heavily policed and punished—people face high fines or administrative proceedings, and they may be flagged as committing criminal fraud when job centers learn of outside income, even if the person had not intended to hide the information. Even though the [Ampel government recognizes](#) the need to make it easier for people to earn additional money, criminalization persists.

All of these offenses—fare evasion, petty theft, and benefits fraud—are allegations of theft, theft that, if it occurred at all, is often the result of actual need. As Harald Thomé, director of the aid organization Tacheles, says, "The problem of crime in Hartz IV is: people have too little money.

And if they have too little money, they have to see how they can get money." He explains that as a result some will turn to theft, others to riding the train without a ticket, and others to working under the table.

When the state criminalizes poverty, it helps perpetuate our current economic order, in much the same way as looking the other way in cases like Wirecard. Punishing poverty shifts blame to the individual—so that the public focuses outrage on the individual, rather than on the underlying economic injustices and the state's failure to remedy them.

Hartz IV sanctioning is not the only area of law in which the state punishes, though other social policies would be fairer and more effective. For example, drug possession (30,947 cases in 2020) is often not harmful to the general public and punishment is actually counterproductive.

Punishment practices are also structurally racist. Through constructs such as "clan criminality," racialized and migrant groups are labeled as criminal, and therefore suspicious. Accordingly, law enforcement police them more, by racially profiling and by designating areas associated with migrants as "high-crime", justifying more police presence and powers. Because people from racialized groups are disproportionately policed and stopped, more frequently than average, they are also disproportionately fined for low-level offenses: over 35% percent of fines are imposed against non-German nationals. Data also show that non-German citizens are fined more harshly than German citizens.

These realities are neither the result of chance, nor the fault of individual judicial officers. Rather, it is an effect of the structural racism that is embedded in our society: Non-white people are also disproportionately fined for poverty-related offenses because people with an immigrant background are overrepresented in poverty statistics. According to [data from the Federal Statistical Office's microcensus](#), the risk of poverty among people with a migration background is 27.8 percent, more than twice as high as among people without a migration background (11.7 percent). Germany is by no means an outlier: all over the world, capitalism and racism together produce our socio-economic relations of oppression.

We may hope that the courts serve as a check on these inequities, but this is not the case. On the contrary, the more than 50 interviews I conducted with judges and prosecutors throughout Germany showed that this dynamic is reinforced in court. In theory, people are sentenced with "day fines" or fines set to their financial circumstances. By tailoring fines to the person, fines should impact—and deter—rich and poor alike. Despite the on-the-books promise of day fines, in reality, fines are too high for people with lower incomes to pay.

Judges often set fine amounts based on their own estimates. In one interview, judges said they usually assume the defendant receives a salary of around 600 – 900 euro per month. A judge in the focus group later acknowledged that an estimated 80% of people sentenced lived on public benefits, which would suggest first judge's estimates should be far lower.

According to my research, the sentences for crimes of poverty—fare evasion, petty theft, and benefits fraud—are harsh. A person on long-term unemployment benefits (often referred to as “Hartz IV”) may pay 150-400 euro for a charge of fare evasion, or about one-third to almost all of their monthly cash benefits of about 430 euro/month. Fines are unpayable for many, leading to stress, indebtedness, and a loss of freedom.

Even if judges considered people’s ability to pay, socioeconomic differences between them and the people sentenced make it so that they set fines too high. One judge we spoke to, for example, was firmly convinced that “no one in Germany has so little money to spare that they would be forced to travel [without a ticket]”. Such inaccurate views among the bench have severe consequences for many punished people. What’s more, these views cannot be corrected by changes to court procedure. No matter the procedure, judges will retain discretion, and how they do so reflects ideology and social power relations.

Management of companies such as Wirecard, however, have had a completely different experience with institutions of justice: In the case of Wirecard, they were so close to the government that the former Bavarian police president even lobbied on their behalf. When accusations of massive fraud at Wirecard was already in the air, Karl-Theodor zu Guttenberg, as a Wirecard lobbyist, promoted a planned takeover to Angela Merkel. Merkel then personally lobbied in China for the transaction on behalf of Wirecard.

Reform Proposals

While it is a positive step that the Ampel government is reviewing over-criminalization and incarceration, the amendments currently on the table may do little to end these injustices. That the coalition agreement commits to so little is also a bad sign: Even on eliminating Erstazfreiheitsstrafe (the jailing of people for failing to pay a fine) the parties promise only a review, with the Greens the only coalition partner with a platform calling for such a change.

Both the proposed reforms to strengthen supervision of financial markets and the changes to Germany’s system of low-level punishment are insufficient to really change the status quo. The judiciary will continue to be geared toward punishing poverty and protecting profits.

Alternatives exist, but they require a new way of thinking. Here we can learn much from abolitionist approaches, in whose vision of a classless society the abolition of punitiveness is a central element. For many of the offenses punished today, we can simply legalize the behaviors. For some others, such as cases of interpersonal harm or offenses such as driving while intoxicated, we can find ways to truly achieve accountability and repair, including through restorative justice and alternatives to policing.

Abolishing the criminal legal system for minor offenses altogether would be a big leap in that direction. Reforms such as the abolition of the alternative custodial sentence are small steps on the way to this ambitious but achievable goal.

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