



**JUSTICE
COLLECTIVE**

**PUNISHMENT IN EUROPE
A SNAPSHOT**

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What does “justice” in Europe’s criminal legal systems look like? Below is a snapshot of some of the issues.ⁱ

- **Migration.** People seeking to move to Europe are detained for wanting to enter the continent, and are surveilledⁱⁱ as they wait for decisions about whether they will be welcomed to Europe. People are criminally sanctioned solely for their immigration status.ⁱⁱⁱ More broadly, the fear of migration and migrants contributes to punitive politics.
- **Criminalisation.** Decisions about what states define as offenses and where they spend enforcement resources are political. Those politics mean that today, across Europe, racial, ethnic, and other differences are met with criminalisation and punishment; inequality is reinforced with punishment, too. We respond to harm with prison rather than repair.

A few examples. People who cannot afford public transportation are punished rather than provided free access to this public good.^{iv} Interpersonal harm is “solved” by incarceration, often against the wishes of victims.^v People are also punished for trying to survive by begging, a practice recently held unconstitutional by the European Court of Human Rights.^{vi}

Taken together, criminalisation serves current unequal, racialized social and economic systems.

- **Pretrial detention.** One in five people in prison in Europe are held in pretrial detention, pending their case and before any finding of guilt. The UN Committee on the Elimination of Racial Discrimination has raised concerns about racial disparities in pretrial detention rates globally,^{vii} and this concern applies in Europe. Additional research confirms the disparities. One study showed that more than half of people jailed pretrial in Austria, Germany, and Belgium are “foreign nationals”—people who have not been granted citizenship in the country.^{viii} Another study in France found that a person born outside of France was three times as likely to be held pretrial than someone born in France.^{ix} Sometimes “foreign nationals” are held because the court assumes the person will return home if released pretrial.^x In other cases, decisionmakers apply stereotypes or otherwise misunderstand people’s lives in their analysis.^{xi} For example, a lack of an address, being from a low-income place, or poverty are used to support decisions that people will not come to court—assumptions for which there is no evidence.
- **Fines.** The vast majority of people racially profiled, stopped, and interrogated by the police are unlikely to face serious criminal charges. Many will also not walk away free: police often charge people with low-level offenses. These charges are often sanctioned with fines, which have serious consequences for the people impacted. Given policing practices, patterns of criminalization, and policing priorities, it is no surprise that the harms of misdemeanor punishment systems are not distributed equally throughout the population.

A case study. In Germany, about 550,000 people are sentenced with fines every year.^{xii} The vast majority of cases sentenced to fines in Germany are for very low-level offenses: courts impose 90 units (or three months) of punishment^{xiii} or less in 90% of cases. A shocking 25% of all fine cases are for two offenses, fare evasion and petty theft. Both of these offenses are referred to by researchers as “crimes of poverty”, or offenses criminalize behavior linked to a person lacking resources—thereby warranting societal resources outside of the criminal legal system, such as free access to public transportation. Data show that low-level sentencing is targeted at people without resources, and every year an estimated 50,000 people are jailed for failing to pay fines. They most likely cannot afford to do so. What’s more, in 2018, nearly 200,000 of 500,000 criminal fines were against people counted as

“foreigners and stateless persons” in the German data.^{xiv} Justice is not blind in Germany.

- **Sentencing.** Not only does Europe punish far too much and often, racialized people face worse outcomes in their cases. In some cases, they face disparate outcomes because of intersecting societal reasons: People with more limited resources or social capital have a harder time accessing non-custodial alternatives to prison such as community service, as one study in France found.^{xv} People from racialized groups are also more likely to be sentenced. In Bulgaria, a report found that “minorities” (the term used for people who self-identified as an ethnic group other than Bulgarian), including Roma, were 17.5% of the total number of people identified as suspects in Bulgaria in 2015, but “minorities” were sentenced at a much higher rate: Data for the same year shows that people who self-identified as Roma accounted for more than 50% of new arrivals in prison.^{xvi} In other cases, systemic bias means that racialized people face longer sentences. In the Netherlands, a study looking at all cases sentenced in a given year found that first-generation Antilleans and first-generation Turkish people received sentences 8 and 11 % longer, respectively, than other people sentenced that year.^{xvii}
- **Surveillance.** Concerns over policing are heightened as law enforcement turns to artificial intelligence and other surveillance technologies, many of which reinforce past bias.^{xviii} In Amsterdam, Netherlands, under a program called “Top 600”, the police and prosecution identify and surveil young people they have determined are at risk of committing “high impact” crimes—presumably referring to serious offenses. Law enforcement make decisions about who to track based on prior arrests and the person’s economic circumstances, thereby baking inequities into their future policing actions.^{xix}
- **Visions of Justice.** Even in the face of clear evidence of problematic policing, states are doubling down on law enforcement as social policy. France, for example, has recently increased its police budgets.^{xx}

ENDNOTES

- i Justice Collective takes inspiration from the initiative *Knas* [] which explained, “We do not consider prison in isolation as a function of criminal law, but ask about its social effects. Our protest is therefore not only directed against the exclusion and disciplining of the incarcerated through the prison system, but in general against the neoliberal production and management of delinquency.” (translated from German). Learn more at <https://entknastung.org/about/>.
- ii See e.g., E Tendayi Achiume, Sarah Chander, and Petra Molnar, *Technology is the new border enforcer, and it discriminates*, Al Jazeera, Nov. 23, 2020, available at <https://www.aljazeera.com/opinions/2020/11/23/technology-is-the-new-border-enforcer-and-it-discriminates>.
- iii See e.g., Crime and Criminal Justice 2020, Switzerland Federal Statistical Office, available at <https://www.bfs.admin.ch/bfs/en/home/statistics/crime-criminal-justice.assetdetail.17145512.html> (Almost 14,000 people in 2020 were sentenced under the Foreign Nationals and Integration Act, which criminalizes people based on migration status).
- iv Mitali Nagrecha, *The Limits of Fairer Fines: Lessons from Germany*, Harvard Law School Criminal Justice Policy Program (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3759196. (noting that seven percent of all cases fined in Germany are for failure to buy a public transportation ticket, and research shows that people who are sentenced for fare evasion simply cannot pay their fares). For example, available data from 2016 show that in that year 7,600 people ultimately went to prison for being unable to pay their fines. *Id.*
- v See generally, *What Really Makes Us Safe*, <https://www.whatreallymakesussafe.com>.
- vi *Lacatus c Suisse*, 14065/15 Eur. Ct. H.R 1 (2021). The European Court of Human Rights struck down the blanket criminalization of begging, finding that people have the right to human dignity, and that this right includes supporting oneself, including through begging.
- vii Committee on the Elimination of Racial Discrimination, *General Comment 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System* preamble and paragraph 1.III.2, quoted in The Justice Initiative, *A Global Campaign for Pretrial Justice Report: The Socioeconomic Impact of Pretrial Detention* (2011) <https://www.justiceinitiative.org/uploads/84baf76d-0764-42db-9ddd-0106dbc5c400/socioeconomic-impact-pretrial-detention-02012011.pdf> (The UN warns that “persons held awaiting trial include an excessively high number of non-nationals” and “persons belonging to racial or ethnic groups, in particular non-citizens—including immigrants, refugees, asylum-seekers, and stateless persons—Roma, indigenous peoples, displaced populations, persons discriminated against because of their descent, as well as other vulnerable groups which are particularly exposed to exclusion, marginalization, and non-integration in society.”). The UN notes a worldwide concern—its statement very much applies to Europe)
- viii Walter Hammerschick, et al, *DETOUR: Towards Pre-trial Detention as Ultima Ratio Comparative Report* (2017).
- ix Virginie Gautron & Jean-Noël Retière, *La décision judiciaire : jugements pénaux ou jugements sociaux?*, 88 *Mouvements* 11, 11-18 (2016).
- x European Union Agency for Fundamental Rights, *Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers* (2016).

ENDNOTES

- xi See e.g., Walter Hammerschick, et al, *DETOUR: Towards Pre-trial Detention as Ultima Ratio Comparative Report* (2017) (describing how judges' evaluation of "social ties" may negatively impact people originally from outside of the jurisdiction, even when they may not have ties to their home country).
- xii Statistisches Bundesamt (Destatis), Fachserie 10, Reihe 3, Rechtspflege: Strafverfolgung 2018 (2019), https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Strafverfolgung-Strafvollzug/strafverfolgung-2100300187004.pdf?__blob=publicationFile [<https://perma.cc/2K45-9GBW>].
- xiii Under the day fines system in both Germany and Switzerland, prosecutors or judges sentence offenses to a number of units based on their assessment of the severity and nature of the case. The number of units correspond to the number of days of punishment the person faces. For each day, the person would pay an amount tailored to their financial circumstances, or serve time in prison.
- xiv Statistisches Bundesamt (Destatis), Fachserie 10, Reihe 3, Rechtspflege: Strafverfolgung 2018 (2019), https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Strafverfolgung-Strafvollzug/strafverfolgung-2100300187004.pdf?__blob=publicationFile [<https://perma.cc/2K45-9GBW>].
- xv Virginie Gautron & Jean-Noël Retière, *La décision judiciaire : jugements pénaux ou jugements sociaux?*, 88 *Mouvements* 11, 11-18 (2016).
- xvi Bulgarian Helsinki Committee, *Written Comments of the Bulgarian Helsinki Committee Concerning Bulgaria for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 92nd Session* (March 2017), available at https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/BGR/INT_CERD_NGO_BGR_27032_E.pdf.
- xvii Hilde Wermink et al., *Studying Ethnic Disparities in Sentencing: The Importance of Refining Ethnic Minority Measures*, Handbook on Punishment Decisions, 239-264 (2019), available at https://openaccess.leidenuniv.nl/bitstream/handle/1887/71899/Wermink_Wingerden_2018_T.pdf?sequence=1.
- xviii City of Amsterdam, *Top 600*, available at <https://www.amsterdam.nl/wonen-leefomgeving/veiligheid/top600/#h87a00c6d-a600-453e-aa2d-5298a596f56e> (last visited Jan. 27, 2021) (local government website describing the program).
- xix See also Patrick Williams and Eric Kind, *Data-Driven Policing: The Hardwiring of Discriminatory Policing Practices Across Europe*, European Network Against Racism (2019), <https://www.enar-eu.org/IMG/pdf/data-driven-profiling-web-final.pdf>; European Data Rights Initiative et al., *Open letter: Civil society for the introduction of red lines in the upcoming European Commission proposal on Artificial Intelligence* (Jan. 12, 2021), <https://edri.org/wp-content/uploads/2021/01/EDRi-open-letter-AI-red-lines.pdf>.
- xx <https://www.dw.com/en/france-to-implement-harsh-penalties-for-violence-against-police/a-57500662>.