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"No education, no job, no plan": An analysis of the relationship between social prognosis, nationality, race and sentencing in Germany

„Brak wykształcenia, brak pracy, brak planów". Analiza związku między prognozą społeczną, obywatelstwem, rasą a wyrokami skazującymi w Niemczech

Abstract: While courts assume the law does not allow biases based on race, the legal reality says otherwise. Non-nationals receive harsher sentences; in Germany this means more daily rates in penal fines, imprisonment rather than suspended sentences and longer prison terms. We know little about why this is so. This paper draws on data from courtroom observations and interviews with defendants from a project called "Performances and Manifestations of Institutional Racism in the Criminal Justice system". During 8 months of fieldwork, ethnographic data from more than 300 cases of low-level offences were gathered. The court's evaluation of the defendant's social circumstances – the so-called "social prognosis", is an important determinant in decision-making. We found that the factors which account for a positive assessment are often more difficult for marginalised groups to meet, resulting in more negative outcomes.

Keywords: institutional racism, stereotypes, prejudices, sentencing, court hearings, courtroom ethnography

Abstrakt: Chociaż sądy zakładają, że prawo nie dopuszcza uprzedzeń na tle rasowym, rzeczywistość prawna mówi co innego. Wobec osób niebędących obywatelami wydawane są surowsze wyroki. W Niemczech oznacza to wyższe stawki dzienne grzywien, kary pozbawienia wolności zamiast wyroków

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w zawieszeniu oraz dłuższe okresy pozbawienia wolności. Niewiele wiadomo o przyczynach takiego stanu rzeczy. Niniejszy artykuł opiera się na danych pochodzących z obserwacji sal sądowych i wywiadów z oskarżonymi przeprowadzonymi w ramach projektu „Przejawy i manifestacje rasizmu instytucjonalnego w systemie wymiaru sprawiedliwości w sprawach karnych". W trakcie badań terenowych trwających osiem miesięcy zebrano dane etnograficzne z ponad 300 spraw dotyczących przestępstw o niewielkiej wadze. Sądowa ocena sytuacji społecznej oskarżonego – tzw. „prognoza społeczna" – jest ważnym czynnikiem determinującym podejmowanie decyzji. Stwierdzono, że warunki determinujące pozytywną ocenę są często trudniejsze do spełnienia dla osób z grup marginalizowanych, co skutkuje bardziej negatywnymi wynikami prognoz.

Słowa kluczowe: rasizm instytucjonalny, stereotypy, uprzedzenia, orzecznictwo, rozprawy sądowe, etnografia sali sądowej

Introduction

One of the main reasons for oral proceedings in criminal trials is to allow judges and prosecutors to establish an impression of the defendant, in order to gain a comprehensive understanding of the circumstances surrounding the alleged offence and to assess the likelihood of reoffending based on the defendant's social circumstances. When the decision between a custodial sentence and probation is being considered, German criminal proceedings rely on the concept of "social prognosis" (*Sozialprognose*). According to the German Penal Code (*Strafgesetzbuch*), the criteria for the social prognosis include the defendant's personality, their criminal history (prior convictions and criminal behaviour), the circumstances of the offence (contextualisation of the crime committed) and post-offence behaviour (remorse, compensation to the victim or apologies). Although a positive/negative social prognosis is typically discussed in the context of allowing probation (instead of custodial sentences), these factors are relevant in any hearing. According to criminal prosecution statistics, 39% of convictions in Germany involve individuals without a German passport (Statistisches Bundesamt 2025), although they make up 16% of the population (Ausländerzentralregister 2025). This suggests that race and nationality play a significant role in criminal justice. With the increasingly multinational citizenry of many states, the question of them feeling represented touches on the foundation of the rule of law, democracy and societal peace. If, as in the case of Germany, one fourth of all citizens have a migration history and might face harsher sentences, mistrust in the judicial system becomes relevant, eroding the foundations of a democratic state. Building on this, this text addresses the research question of what role the social circumstances of defendants from migrant or minority backgrounds play in court decision-making. We first examine the criteria that are considered relevant in courts' decision-making. Drawing on ethnographic data from court observations and interviews with lawyers, we examine how these criteria are applied during hearings and might contribute to

disparities in sentencing. We focus on observable practices and interactions, as well as lawyers' accounts.

The data analysis, and the research project as a whole, are grounded in a critical race perspective that does not question the existence of racism, but takes it as a social reality. Alongside other systems of oppression, structural racism shapes societal power dynamics, operating on all levels. Matthew Clair and Jeffrey S. Denis define racism as follows:

> At root, racism is 'an ideology of racial domination' (Wilson 1999: 14) in which the presumed biological or cultural superiority of one or more racial groups is used to justify or prescribe the inferior treatment or social position(s) of other racial groups. Through the process of racialisation […], perceived patterns of physical difference […] are used to differentiate groups of people, thereby constituting them as 'races'; racialisation becomes racism when it involves the hierarchical and socially consequential valuation of racial groups. (Clair, Denis 2015: 857)

They argue that racism is not synonymous with racial discrimination or inequality, clarifying that racial discrimination refers to the unequal treatment of individuals based on race, while racial inequality is racially disparate outcomes (Clair, Denis 2015: 857). Although racism can influence both phenomena, they are not necessarily direct consequences of it. From this perspective, we understand institutions as part of the system whereby processes of racialisation[1] produce exclusion and disadvantage.

1. Legal background

Under German criminal law, sentencing follows a two-tier system, with legislation predisposing the general framework of the sentence and setting out a sentencing range that can be used discretionally. German criminal law entails the general framework for each particular offence; for example, theft can be punished with a fine or up to five years' imprisonment. The judge sets the sentence for an individ-

[1] Ethnographic research and analysis inherently involve processes of categorisation. This is especially true for our study, which examines the question of (institutional) racism. To identify and make visible the processes of racialisation – processes that are socially learnt – we repeatedly had to draw on and confront our own internalised racist knowledge. In this text, we refer to "Whiteness" in line with the dominant racialised knowledge in the German context in which this analysis was developed. We ascribe Whiteness primarily to individuals perceived as part of the dominant population because of their "typically" Central European appearance and/or "typically" German-sounding names. (In fact, we rarely encountered cases where White individuals were from other Central European countries.) By "racialised", we refer to individuals who, within this racist framework, are perceived as "others", "and therefore as not belonging to the dominant society. During our research, we often encountered the limitations of such (non-fixable) categories. A deeper exploration of these complexities, however, would go beyond the scope of this paper.

ual case at their discretion. In contrast to developments in common-law countries such as the United Kingdom, for example, there are no specific sentencing guidelines separating levels of culpability for each offence. Instead, there is only one general section in the penal code – section 46 – outlining a broad framework of factors to consider while determining a sentence for each offence. Section 46 of the German Penal Law obliges judges to consider two key aspects: the individual's guilt and the punishment's effect on the offender. The section states what judges must consider: how reproachable the offence is, the perpetrator's sentiments towards the victim or the degree of disregard for the law. Also, the personal and economic status of the offender and their past life are decisive, especially their criminal record, pace of recidivism, employment, living situation or relations with family members. By considering these factors, the judge decides what effect the sentence could have on the defendant.

If a judge elects to hand down a custodial sentence, they must consider probation, as stated in section 56 of the German Penal Law. In Germany, suspending a prison sentence with probation means the convicted individual will avoid imprisonment. The court determines the length of the probation period, which can include specific conditions. If the convicted person commits any offences during this time, the court has the authority to revoke the probation. Again, the key points to consider mirror judicial sentencing factors: the circumstances of the offence and the offender's personality, past life, behaviour after the offence and living situation. Aspects might include drug dependency, past criminal record, past volunteering, so-called stable living circumstances, job security or attending therapy. Marginalising factors such as unemployment or homelessness generally lead to a "negative" social prognosis, as the probability of future recidivism is rated higher. On both levels – sentencing and social prognosis – the decision depends largely on judicial discretion, exercised by both judges and the prosecution. Although the concept of "social prognosis" in a strictly legal sense refers only to a prison sentence being suspended on probation, we use it as an analytical lens for the broader social assessment of defendants. This includes evaluating their circumstances and estimating their likelihood of remaining crime-free in future. Our ethnographic observations suggest that, in judicial practice, the criteria used to assess the social prognosis are often the same as those used to evaluate a defendant's social background when determining other sanctions, including fines.

2. Literature review

2.1. Racism in the criminal justice system

Structural racism shapes the central institutions of a society, including the judiciary, which subsequently practices institutional racism. Decision-makers reproduce societal power relations (Murakawa, Beckett 2010; Henricks 2021) and laws are created within them. Qualitative research from different national contexts indicates that race plays a significant role in the criminal justice system. Though the law claims to be objective, it adopts a White position (Gonzàles Hauck 2022). People of colour (PoC) who attempt to address racism and racial discrimination in court struggle because of the dominance of White knowledge (e.g. Liebscher et al. 2017: 146). In courts, experiences of racism are trivialised and judicial staff tend to side with White people. Nevertheless, judicial staff are unaware of this, as they internalise their mandate to administer justice regardless of social or ethnic origins and consider it impossible to be biased. In a US interview study, Rebecca Richardson Dunlea (2022) showed how prosecutors assume they are "colour-blind", dismissing their role in reproducing racial disparities. This complicates "the discussion of racism beyond the societal self-satisfaction engendered by the appearance of neutral norms and formal inclusion" (Crenshaw 1988: 1384). In a study of US courts, Matthew Clair (2020) interviewed 63 defendants with different racial and social backgrounds and observed court proceedings. He found that underprivileged, racialised defendants distrust their lawyers and feel misunderstood and unrepresented. Racialised defendants more often give up, confess or accept the verdict. Court staff are often racially biased and decouple defendants' drug use and mental illness from the crime. Court experiences of privileged, White defendants are the exact opposite. The relationship with their lawyers, who they often hire themselves, is one of trust, bolstered by the fact that they have had few negative experiences with the authorities. This is seen as cooperative behaviour in court and usually has a positive effect on the verdict.

Ellen A. Donnelly (2022) examined sentencing disparities based on neighbourhood and race in the US-American state of Delaware, using attribution theory supplemented by the three macro-level perspectives of racial/ethnic threat, symbolic threat and prevalence theories. Using criminal processing records from Delaware's criminal justice information system, she tested the hypotheses – based on a three-level hierarchical generalised linear modelling approach – that a defendant's neighbourhood influences variations in the probability and length of their prison sentence beyond their individual characteristics and the circumstances of the case. These effects, she says, also vary with the defendant's race. The results show that defendants' residential community influences their chances of going to prison. Effects varied with the ascribed race of the defendant: when White defendants committed an alleged crime in an economically disadvantaged area,

it decreased their odds of incarceration and reduced the length of their prison sentences; for Black defendants, it increased their likelihood of going to prison and the length of their sentence. The study found that while the economic disadvantages of an area were associated with shorter sentences and criminal rates did not influence sentencing, the defendant's relationship with their neighbourhood was a factor.

Peter S. Lehmann and Anna I. Gomez (2020) examined the effect of offenders' race on split sentences in the USA; the results suggest that Black and Hispanic offenders, especially minority males, are less likely to receive split sentences relative to traditional prison terms. Celesta A. Albonetti (1991) examined how judges exercise discretion during sentencing; her data shows that criminal record, race, weapon use, pre-trial release status and the interaction between race and bail outcomes significantly impact sentencing severity. Albonetti concluded that when judges face uncertainty they rely on stereotypes and causal attributions, leading to disparities in sentencing outcomes. Using Spanish data on 2,673 convicts, Steven Kemp and Daniel Varonna (2022) found that non-Spaniards were more likely to be imprisoned during the proceedings – with nationality having no effect on sentence severity. Alexander Testa et al. (2023) investigated differences in the sentencing of racialised defendants in Brazil using a random sample of 786 people convicted of murder. While the racialisation of victim and perpetrator had no effect on the likelihood of conviction, sentence length varied: it was longer if the victims were White, but shorter if the defendants were White and the victims were Brown or Black. Overall, White defendants faced the shortest sentences.

It can be observed that race and citizenship play a role in the sanctioning of "others", not only in the US context. For instance, Michael Light's (2017) comparative study shows that while citizenship has a stronger impact on sentencing outcomes in the United States, significant differences in punishment between nationals and non-nationals can also be found in Germany. It is important to consider empirical findings on structural racism. For Germany, it is known that racialised individuals are over-represented in marginalised groups (cf. Salikutluk, Podkowik 2024). This affects all sides of structural inequalities (poverty, homelessness, citizenship, migration status, racialisation, health, etc.). Therefore, we see structural inequalities impacting individual assessment in many ways. And that may then lead to what criminology calls "cumulated disadvantages" – they add up when in contact with the criminal justice system (Kurlychek, Johnson 2019). For example, most people living on the street also have mental health disorders and/or drug problems (Knörle et al. 2022). At the same time, homelessness increases the likelihood of contact with the police (Müller 2006), which in turn increases the likelihood of ending up in court.

The following section examines in greater detail the findings related to the German criminal legal system.

2.2. Sentencing disparities between Germans and non-Germans

For the German context, there are mainly quantitative studies indicating that nationality and race are important determinants of prosecution and sentencing. Studies based on individual data from police and criminal prosecution statistics prove that non-Germans are three times more likely to be criminalised than Germans (Mansel, Albrecht 2008). This disparity results from an interplay of several factors: on the one hand, selective police control practices play a crucial role (Müller, Wittlif 2023), while on the other hand, studies suggest that racialised individuals are more likely to be reported to the police (Krieg et al. 2025: 90). Likewise, proceedings against non-Germans are more frequently discontinued by prosecutors due to insufficient evidence, supporting the theory of discriminatory reporting behaviour (Mansel 2008; Häßler, Greve 2012).

Non-nationals in Germany are much more present in the criminal justice system than nationals, as mentioned above. According to sanctioning research, non-nationals receive harsher sentences. This could be due to discretionary power that allows significant differences in individual sentences: defendants' social status influences sentencing if decision-makers assume that charges are usually correct for certain groups (Lautmann 2011 [1972]). Importantly, official statistics record nationality, but people are over- or under-recorded, as people with German citizenship can be racialised as much as people without German citizenship can be perceived as nationals. At the same time, studies may incorporate the products of racism into their models if they include prior convictions that were racially conditioned (cf. Murakawa, Beckett 2010). Judicial reservations against non-nationals and assumptions about the social marginalisation or integration of groups and their cultural practices are incorporated into decisions (Light 2017). In 2,470 crime records for theft among juveniles, Jörg Hupfeld (1999) found that sanctions were much more intrusive in comparable cases for non-nationals. Volker Grundies and Michael Light (2014) examined all convictions under general criminal law from 2004 to 2007; 20% of the data concerned non-nationals. They received longer sentences and had less chance of probation; this was independent of other factors and particularly true for offences with possible sentences of 5 years or more. The nationality effect was particularly strong for counterfeiting, receiving stolen goods, aggravated theft, narcotics and robbery. The authors attribute this to the search for domestic security and the assumed proximity of these offences to organised crime.

Interviews with judges revealed how they see crimes by non-nationals as abused hospitality and view a higher propensity to violence and crime as culturally anchored. Non-Germans are three times more likely to be remanded in custody, regardless of case-specific factors (Light 2016); citizenship also has an effect on the number of daily units for fines. Judicial treatment varies according to citizenship. Juvenile proceedings for theft, damage to property and bodily injury in two magistrate court districts led to harsher treatment of Turkish juveniles (Ludwig-Mayerhofer, Niemann 1997). Furthermore, the chances of being heard vary

with "the relative social power of those involved" (Feest, Blankenburg 1972: 19). "Crimmigration" is a form of interlocking criminal and migration law, especially in pre-crime, which increasingly restricts the protective rights and procedural guarantees of those affected (Graebsch 2019).

Court observations can record everyday practice without bias (Weischer, Gehrau 2017; Bögelein et al. 2022), providing a detailed look at the field. "Observers simply can see things in natural settings and interactions that will not show up on surveys, and this is not only owing to deceptiveness on the part of participants, but also to the contextual representations presented" (Sandberg 2010). While ethnographic research on racism in the courtroom is established in the English-speaking world (e.g. Van Cleve 2016; Clair 2020), few studies in German-speaking countries have worked with court observations (mainly Lautmann 2011 [1972]). Activist researchers have investigated specific cases (Schlüter, Schoenes 2016; Allianz Gegen Racial Profiling 2022). Justizwatch has monitored court proceedings since 2014, together with organisations such as ReachOut and KOP. Justice Collective, an NGO and our partner institution in this research project, identified three drivers for systemic injustice: racist policing practices, the criminalisation of poverty and courts acting to enforce borders. They point to courts routinely failing to hold police accountable for discriminatory behaviour and controlling practices, judges showing little understanding of defendants' structural circumstances and people facing pretrial detention due to their foreign citizenship (Justice Collective n.d.).

Against this backdrop and the many findings on the discrimination of non-nationals and racialised groups, our project investigates how institutional racism manifests in German courts.

3. Method and data

The project "Performances and Manifestations of Institutional Racism in the Criminal Justice System" consists of two subprojects. The one presented here was carried out at the Institute of Criminology of the University of Cologne, Germany. The project explores the role of racialisation in the judicial context, especially institutional racism in criminal courts (Bögelein, Rezene 2023). The ethnographic data was gathered and analysed by the research team through courtroom observations. We focussed on minor everyday crimes such as theft, fraud and fare dodging, which are judged by single judges at magistrate courts. The observations were of main hearings concerning mass offences, which largely consisted of petty crimes. These make up the majority of cases tried in local (district) courts and thus constitute the core workload of such courts. It is important to note that most minor offences are either dismissed or processed through the so-called written summary proceedings (*Strafbefehlsverfahren*), in which the verdict is sent to the

defendant by mail without a court hearing. The court proceedings we were able to observe therefore represent only that portion of minor criminality in which the court decided to bring formal charges. These cases nevertheless offer valuable insight into how the judicial handling of mass offences can contribute to reproducing the effects of racialisation.

The court observations were conducted over more than 8 months in a magistrate court in Germany; the hearings were non-participatory and open (Weischer, Gehrau 2017). The observed hearings were usually adjudicated by a single judge. In many instances, the defendants either had no legal representation or were assigned a court-appointed public defender. Most proceedings resulted in a fine. The observed trials typically lasted between 20 and 60 minutes and were open to the public. The data was collected in the form of non-standardised trial observation protocols and, in most cases, recorded by two individuals to ensure inter-subjectivity. Field notes were compiled into observation protocols in a non-standardised and anonymised way. Protocols were used for analysis, which took place in interpretation groups in various constellations. Our sample consists of 304 cases involving a total of 326 defendants. The cases were selected based on the type of offence rather than the defendants' race. Of the cases analysed, 113 involved defendants identified as White and 190 as non-White. Of these defendants, 247 were male, 61 were female and one was transgender. In the remaining cases, the defendants did not appear in court. In some instances, only the defendants' names were mentioned, allowing us to make assumptions about whether they were likely to be racialised or not.[2]

In addition to the ethnographic data, which constitutes the main body of our data set, we also conducted expert interviews with legal professionals (defence lawyers, prosecutors, judges and legal trainees). In this text, the analysis of four semi-structured interviews with defence lawyers offer supplementary insights, while the ethnographic data is the primary focus of our analysis. The data was analysed gradually using grounded theory methodology (Strauss, Corbin 2010) through regular joint evaluation sessions with teams of at least four researchers. The aim was to develop a theory-generating approach built on Strauss and Corbin's grounded theory methodology (Strauss, Corbin 2010). The multi-level approach by Nicole Bögelein, Kerstin Eppert, Viktoria Roth and Anja Schmidt-Kleinert (2022) informed this analysis.

3.1. Limitations of the research

Our analysis has some limitations, which we want to point out here to give readers the opportunity to contextualise our findings. A quantitative and qualitative li-

[2] Our assumptions regarding racialisation are not arbitrary, but stem from the shared common-sense knowledge about race that circulates within a given society. Consequently, the researchers' assumptions about who is perceived as racialised are likely to align with those of other court actors.

mitation in the interview data is the relatively small number of expert interviews. Most likely, the lawyers who made time to speak to us about racism in the criminal justice system were aware of the issue. Another methodological limitation to consider is that ethnographers observe their subjects from an external position. Thus, the things we can see depict only a part of a much broader process, whose beginning goes far back and whose details cannot be traced by the observer. Also, since observation is never objective, it is essential for researchers to critically reflect on how their own positionality shapes their interpretations. For this reason, a substantial part of our data analysis was conducted collaboratively in group settings, where we were continuously required to articulate and justify our perspectives to one another. Ethnographic research about racism in institutions is complicated, as it cannot be done without reproducing racism. Using these constructions includes the constant reproduction and reconstruction of these ascriptions via a racist way of thinking. As researchers, we must consider this complexity.

4. Findings: Constructing the social assessment of a defendant

The research question against which this section is to be read is what role the social circumstances play in court decision-making when the court faces a defendant ascribed to a migrant or minority group. As outlined above, we do not limit our understanding of *Sozialprognose* (social prognosis) to its narrow legal definition. Instead, we propose a broader conceptualisation that assesses a defendant's character and social circumstances as part of a general "social assessment". This broader notion is relevant when suspended prison sentences are handed down, in the context of minor sanctions such as fines and in determining whether proceedings are discontinued altogether. Section 5.1 focusses on specific cases in which a custodial sentence was suspended. However, the other sections also draw on proceedings with less severe penalties, such as fines or case dismissals. This broader perspective is essential, given that the majority of criminal cases in Germany are resolved through fines (up to 90% of sentences) or discontinuation rather than imprisonment. In our results we examine which criteria are relevant in courts' decision-making and look into how these criteria are taken up during hearings.

4.1. Social prognosis – imprisonment versus probation

In this section we point out cases in which a custodial sentence was considered and therefore the "social prognosis" was determined. Major factors in assessing a defendant's eligibility for a suspended sentence were mostly congruent with what was pointed out above as legal provision, namely past criminal record, probation, employment, family and social environment and therapy. However, how these

factors were considered and weighed varied in every case. One factor mentioned in nearly every hearing was the defendant's criminal record, which was generally considered negative. Criminal records appeared to be the crucial factor in the judge's explanatory statements on the grounds of their assessment. Sometimes, the defendant's criminal record led to judges assessing a sort of naturalisation of criminality, seeing the defendant as "incurable" of their ascribed criminal tendency.

> Judge: 'You have a problem with impulse control.' He argues this would be unchallenged by 'everybody else in the room'. The judge goes through the criminal record again 'robbery, extortion… ' and says this would support his statement […]. 'I don't want to unpack all of the old stuff, but…', he states, 'the defendant's past would show a definite proclivity.' (Case 158)

Judges assumed a natural tendency towards crime, always deriving a negative social prognosis that resulted in a custodial sentence without suspension. Other factors considered negatively for the social prognosis were the accused having committed the crime while on probation, or if the crime occurred a short time after prior court proceedings.

Factors leading to a positive prognosis were employment, promising future prospects and positive outside influences, such as therapy or contact with family members. If defendants did not fulfil this image of an "upright citizen", the court again assumed a negative social prognosis. In Case 229 the prosecutor argued that the custodial sentence should not be suspended because of poor future prospects: she stated the defendant had "no education, no job and no plan". Another reason for a negative outcome would be an "unsteady lifestyle" (Case 186). Family members could be considered either way. They were taken to be a positive influence on the defendant's rehabilitation and a factor that can prevent recidivism for fear of involuntary separation by incarceration. However, association with family members was considered negative when the judge and prosecutor deemed them a negative or criminal influence (Case 229). We found another factor to be key when it came to judges' discretion to overrule an otherwise negative social prognosis – we call it the "promise of amendment". While defendants mostly assured the court that the offence had been their last and that they would become law-abiding citizens, judges only considered it in their favour in certain cases. The decision for or against suspending the custodial sentence, when the social assessment factors were otherwise negative, depended on whether or not the judge believed the word of the defendants. When judges believed the promise, they "allowed one last chance", even when all other legal factors of social assessment were not in their favour.

The credibility of the defendant seems to be decisive for a custodial sentence and suspension. Being mostly based on judicial discretion, the opinion of the judge and the defendant's behaviour in court are deciding factors. We found that the lawyer advocating for the defendant and being engaged in the case might be relevant to the probability of judges deciding in their client's favour (section 5.5), but social circumstances are also a very basic factor for determining the social prognosis, as we demonstrate below.

4.2. The impact of marginalisation

What became apparent in our observations was the impact of marginalisation on the court's assessment. The following examples demonstrate how race and class intersect in the context of criminal prosecution (Rezene et al. 2024). Living on the street is an aggravating factor, not only for being heard in court, but also regarding the likelihood of being reported to the authorities in the first place. As described above, many people who live on the street suffer from mental health problems (Knörle et al. 2022) and homelessness increases the likelihood of contact with the police (Müller 2006). How this leads to ending up in court is explained below.

> Defence lawyer: 'He was probably checked at the station.' Defendant: 'I was beaten.' He now speaks to the interpreter in Slovakian. Interpreter: 'They pulled me to the ground. I was without clothes and that violated my privacy!' (Case 216, pos. 22)

The accused felt exposed and harassed by the officers' actions, but this played no role in the proceedings. Only rarely did we see the defence citing such behaviour as a justification or mitigating factor for the alleged crime, even though the way police officers treat PoC often leads to court proceedings (cf. KOP, 2016).

In all hearings, living conditions were addressed. Some hardships are only faced by non-nationals, namely housing in refugee accommodation (e.g. Case 90). This has a more negative outcome, as it is not recognised by the administration as proper accommodation.

Another factor that judges assess is a person's education. This proved to be more disadvantageous for people who had not gone to school or completed a formal apprenticeship in the national system, as they often did not meet the judge's expectations. In many cases interpreters had to go back and forth and explain what was meant, how there was no certified school diploma for certain jobs or a typical need for professional education. Judges then tried to fit this into their understanding of which German certificate it would equate to. If an accused person states they are unemployed or only work occasionally, it can be perceived negatively by the court – as illustrated in the example above (Case 229), where the prosecutor argued against suspending a prison sentence on the grounds of a lack of stable employment. Financial security was another common topic. When inquiring about income, financial obligations to one's family in the face of irregular work were considered (Case 293). In one case it became obvious that the court expected lower incomes from racialised defendants. In Case 74 the defendant had a good salary:

> The prosecutor states it would be disadvantageous of him to admit to a higher salary than he actually would get. The judge supports the prosecutor. The defendant shrugs and says, this was what he was earning.

The topic of health was also discussed often, whether mental illness, as in Case 81, or addiction. Specifically, the use and abuse of illegal drugs, medication and alcohol were a recurring theme. This was subject to an assessment of the case

(e.g. driving under the influence [Case 36]) or, as shown below, if the person was inclined to drink, which could be a mitigating factor. Judges also always asked about family; if there were children, they wanted to know whether they lived in the same household and how old they were (e.g. Case 83).

While one could say all these factors are the same for either nationality – and may be more connected to classism – previous racialisation processes also negatively impacted racialised defendants' financial security, housing, health and education. Racialised people were therefore also more likely to have issues within the class-based categories of social prognosis. Moreover, some crimes, such as illegal entry or residence, can only be committed by foreign nationals, thereby increasing the likelihood of criminal record entries that contribute to a negative social prognosis. One disadvantage in this area is that, even though these offences are treated as criminal matters, most criminal judges fail to consider the impact of the penalties on the residence of asylum seekers, as one defence lawyer stated:

> The Foreigners' Registration Office, as it is unfortunately called, is then … notified of the corresponding entries or assessments. … [T]here are real problems with your residence status. (Lawyer 4)

4.3. How defendants' impressions shape judicial perception

As mentioned above, the criteria used for sentencing are broadly outlined in the Penal Code. German law grants judges a margin of discretion, which is significant in the case of everyday offences:

> Rational court actors are forced to make predictions about an offender's future positive or negative behaviour based on the nature and scope of a particular crime, as well as legal (i.e. prior record), and sometimes, extra-legal factors (i.e. family history). (Munoz, Freng 2008: 31)

The court collaborates to create a shared image of the defendant; all actors in the room (judges, prosecutors and defence lawyers) contribute to how the defendant is perceived. In this context, race is one of the factors shaping the process (cf. Tata 2020). The processes at play likely begin well before the defendant enters the courtroom, but for an empirical approach working with data, this is our first glimpse. Also, for the judicial staff, the defendant becomes a person (not just a file) once they enter the room. Their appearance includes their voice, articulation, entrance into the courtroom and the way they are seen by others.

What becomes apparent from the start is whether the defendant is accompanied by someone. For instance, an interpreter signals a lack of understanding and may be framed as a lack of integration (cf. Berk-Seligson 2017; Bögelein, Rezene forthcoming). Alternatively, a legal representative may accompany the defendant. They may communicate for the defendant (in Case 161 the legal representative informed the judge that the defendant was not coming because of a headache). We got the

impression that legal representatives are trusted. When it comes to assessing the accused's social circumstances, representatives also imply there are people in the person's social environment who take care of them and their charges, which is viewed positively. Their assessment of their clients – the accused – can therefore be all the more consequential, as in Case 81, where the legal representative claimed that he and the defendant had already discussed how it would be preferable to go to prison instead of paying a fine.

One point often considered by court actors was the perceived "emotionality" of racialised defendants. Sometimes, defendants would act differently than culturally expected. While a courtroom requires "rational" and non-emotional action, we noted that when racialised people show any emotions, it is often seen negatively by the court. In Case 270, while the lawyer took his defendant outside to consult with him, the prosecutor tried to confide in the judge that "they" will often swear on "their mother's eyesight" and be very wordy, alluding to the racist image of orientalised migrants who lie and swear on everything just to get away with it. This was a rare occasion where stereotypes were expressed so openly. One aspect we found important was the impression management performed by the defendants. They often presented themselves as remorseful (e.g. Case 36). The importance of this is underscored by their lawyers, who tell the witness how sorry their defendant is (e.g. Case 140). In any case, they always encouraged the defendant not to say much, but let them speak.

Having a lawyer also adds to what we call the power to complain and be heard. Many defendants had a hard time understanding what was happening; some asked in the time between the final words and the verdict whether they were done and could leave (although the very essential event of the day had not yet happened). Also, sometimes they did not understand why they were in court in the first place, as in Case 7, where the defendant wondered why he had been summoned to court but others' charges had been dropped. One lawyer stated that too many cases were happening without a lawyer, which had a very negative effect on the defendants' power to make themselves heard: "My client didn't understand that it wasn't okay until I told him it wasn't okay" (Lawyer 4). Another thing that makes court cases much more existential for non-nationals is the fact that they are three times more likely to face pre-trial detention than nationals (Light 2016) because of the alleged risk of flight. One lawyer pointed out that it seemed that "having a brother of one's brother-in-law in Morocco" would suffice, even if the accused had spent all his life in Germany (Lawyer 4).

While all of these factors not only mark institutional racism but also intersect with classism, we found specific racialised prejudices, which are presented next.

4.4. Stereotypes, othering and the court's assessment of credibility

When observing cases of theft, we often realised it was no coincidence that this person's theft was discovered. While most acts of shoplifting remain unregistered

(one study estimates that only 1.6% are registered [EHI 2023]), witnesses – often shop detectives – would point out how they were focussing on this person because of a certain outer appearance (cf. Case 74). They would then focus on them and view them taking goods without paying. This means that "racial profiling" is a matter of other policing professions in addition to the police – and therefore what we see in registered crime is not equal. In the case of benefit fraud, being a non-national seems to influence certain ideas, i.e. that people only come into the country to receive benefits. In one such case, 276, the judge asked for the reasons for the defendant's alcohol addiction. The lawyer assumed it was because of his hopes of living a better life here: "He thought we would come to Germany and be welcomed with arms wide open" – but in fact he was living on the street today. In general, alcohol, and how people handle it, also influence prejudices; in Case 285 a common stereotype surfaced, when the court assumed that the defendant from an Eastern European country "needed to steal" two small bottles of alcohol, reasoning that drinking was what he and his friend did. Othering was a recurring pattern we witnessed. Othering means a group or a person differentiating themselves from another group by describing the "other" group as different and foreign. Mostly, this entails a power imbalance; those described as different are affected by discrimination and have few opportunities to defend themselves. The emotionality of others (see above) is one point.

Our data also shows how stereotypical representations of the lifestyles of racialised groups can influence the process of defining and legitimising deviance. When debating shoplifting by a Roma woman, the defence lawyer based his defence on how shoplifting children's clothes was due to a supposed Roma culture "These people have lots of children, you know" (Case 184).

In this case, the defendant was held responsible for her social role; the judge appealed to the defendant to think about her children before stealing next time – so she would not face a custodial sentence. While a defendant's gender is more often addressed with women than with men, it seemed to be even more important when the female defendant was a PoC. Roma women faced additional prejudices, as they were usually considered part of a group of thieves. The court would often suspect an organised, collaborative approach to stealing, as in Case 74, where the judge appeared to find it unlikely that a Romanian woman could have been in the shop at the same time as two others without being connected to the group involved in the theft. The case of these three prosecuted women was based on the fact that all three spoke the same language and were in the shop at the same time. These examples illustrate how stereotypes can negatively influence the perceived credibility of racialised defendants. On the other hand, we often observed that when defendants explicitly stated their intention to return to their country of origin, this was often viewed as a positive factor in their social prognosis. Some defence lawyers even incorporate this aspect into their defence strategy: "the defence lawyer says she wanted to use the money from the loot to get a bus back home" (Case 74).

Regarding other offences, we saw how some crimes seemed to fit certain stereotypes perfectly – violence, for example. In Case 89 the defendant had allegedly

threatened and insulted a craftsman. Strong words were used, and the defendant used the word "respect", which signals a connection to racialised people. This framing of PoC as dangerous arose on several occasions. One witness said:

> he was very afraid when the three of them approached him, and he thought that if something happened, he would become a nursing case, because one would hear a lot in the media. (Case 89)

The stereotype of the "dangerous other" can directly shape the court's assessment of how a defendant is likely to behave in future and, consequently, the conclusions drawn about appropriate sentencing. This perception plays a role not only in decisions between a prison sentence and probation, but also in determining the amount of a fine.

4.5. The role of representation in the court's assessment

Every day, defendants fail to appear for hearings, as individuals charged with low-level offences are disproportionately affected by poverty, and some do not have a fixed abode that summons can be served at. When defendants do not show up, a penal order is often issued. In cases where imprisonment is a potential outcome, a public defender is appointed. This defender is obliged to file an objection to the penal order if they cannot reach the defendant, which leads to a full hearing. If the defendant also fails to appear, the penal order becomes legally binding. Much depends on the individual engagement and capacity of the defence lawyer, and how many resources they use to contact their client. We met one lawyer in the hallway of the court who told us she was waiting for a defendant who had received a penal order; but as he would not appear there was nothing she could do (Case 94). Penal orders can also be issued when defendants fail to appear for a scheduled hearing, and the absence of information about their personal and financial circumstances often leads to higher daily rates. The judge determines the daily rate, which can result in significant disparities between cases.

> The judge calls the defendant, no-one appears. … She flicks through the file and says that his criminal record contains burglary and drug offences. Then she looks at the prosecutor: 'Would you like to issue a penal order?' Prosecutor: 'Yes. I would say 60. Is that too much?' The judge looks at the file: 'It's hard to say… it's clear he has no fixed abode. There may not be much money there.' Prosecutor: '€10.' (Case 38)

The defendants' absence also works against the defence. One lawyer told us about a case where he had invested considerable effort on behalf of his client, a man who had been deeply traumatised by experiences of persecution and flight.

> It was all quite bizarre, … he admitted it to me after all, and then I had already made an announcement to the court to read out his confession. But then he stayed away and then it couldn't be introduced and it couldn't actually be taken into account in

> mitigation of the sentence, because then a judgment in absentia was issued against him, in which my lawyer statement was smoke and mirrors unless he confirmed it as his statement. And then we had a goodwill agreement with the court behind the scenes, so to speak, to actually treat him like the defendants around him who had confessed. (Lawyer 1)

The lawyer had negotiated a more lenient sentence in exchange for a confession. But when the court date came, the client failed to appear. Only later did the lawyer learn the defendant had panicked for fear of being imprisoned again and had fled. Although the lawyer was ultimately able to secure a suspended sentence, he admitted this was a stroke of luck. Since a defence lawyer's explanation carries little weight without the defendant's confirmation in court, a defendant's failure to appear can be seen as a lack of cooperation. In such cases, especially when the accused does not hold German citizenship, this absence is often taken as evidence of an assumed flight risk.

The most significant advantage for defendants is that lawyers usually see it as their responsibility to have the most important documents translated, arrange for interpreters and say what the court needs to hear as mitigating factors. They organise for the defendant to understand and be understood, contributing to a positive assessment. The lawyer is like the defendant's mouthpiece. One lawyer explained that, as a general rule, she does not allow her clients to speak in court. Another described his "compensation strategy", which he applies particularly to individuals with limited German language skills – but also to those who are fluent:

> to take the floor before a statement by my clients and to put things into words that I know fit into the communicative channels of the judges. (Lawyer 1, pos. 25)

Lawyers possess the knowledge and linguistic repertoire to positively influence the court's assessment of the defendant, which can give defendants with committed legal representation a real advantage. Some lawyers appear to have a "protective instinct" towards their clients, which is evident during hearings – in the way they communicate with judges and prosecutors, and in how they present themselves alongside their clients.

Whether defendants are able to present themselves well in court is often a matter of eloquence. However, most individuals involved in proceedings do not speak the legal language of the court. For those facing language barriers or relying on interpreters, there is even less expectation – from the court and their lawyer – that they will be able to express themselves in a way that leads to the best possible outcome. This is reflected in how rarely defendants who do not speak German are directly addressed by judges, or in instances where lawyers actively silence their clients. This form of control is exercised from multiple directions: by the court, whose authority lies in its ability to compel individuals who have violated the law to account for their actions, and by the lawyer, since the defendant is, to varying degrees, under their control during the hearing. The asymmetrical power dyna-

mic between legal professionals and defendants is not resolved by the presence of a lawyer. Still, legal representation almost always leads to more lenient sentences, which works in the defendant's favour. Defenders point out that working for a person not born and raised in Germany makes it harder for them, as they need to explain more.

> With non-German clients, … I really try to explain to them over the course of several meetings. I try to explain the German criminal proceedings to them at a high altitude and in layman's terms, how they work, how the individual stages of the proceedings proceed, which is much more than with my German clients, well, actually just more than with my German-speaking clients. (Lawyer 3, pos. 10)

Lawyer 3 elaborated that being legally represented means one's story is heard, in a way that is appropriate and understandable by the prosecutor and judge. He highlighted the importance of language and money in being legally represented – things that defendants often do not have.

Discussion and conclusion

We addressed the question of what role social circumstances play in court decision-making – specifically when judging people ascribed to a minority group, i.e. that of non-German nationals. Courtroom observations and interviews with defence lawyers showed that racialisation (including citizenship, legal status, language skills, etc.) plays a substantial role in the processes that influence the social assessment of a defendant. While, in theory, the latter should be formally assessed irrespective of their background, nationality or language skills, in practice these factors shape the decision-making process. "No education, no job, no plan" – the quote we used for the title of this paper – exemplifies how the very factors that contribute to a defendant's social marginalisation lead courts to a negative assessment of their social circumstances. As a result, this may adversely affect the sentencing outcomes. Defendants' criminal records are often interpreted by judges as signs of "ingrained criminality". This came up in cases involving undocumented individuals who rely on petty theft to survive. Homeless people's contact with police would lead to them being taken to court (cf. Müller 2006). Individuals were framed as having a "criminal energy" or a lack of impulse control, overlooking the fact that their offences are rooted in poverty, addiction and/or mental health issues (cf. Knörle et al. 2022). This is largely a result of the framework against which a "positive social prognosis" is measured, namely an idealised image of the "law-abiding German citizen" whose belonging is unquestioned. This image, as in many European contexts, is implicitly linked to Whiteness and middle-class norms. It becomes evident in the courtroom's emphasis on education, training and

current employment status as indicators of stability and the ascribed potential to reintegrate into society. While the fundamental idea is that incarceration should not unnecessarily disrupt the lives of those who are stably employed, this ignores the reality of individuals working in precarious, informal or undocumented employment. Reasons to take on such jobs are manyfold, e.g. a lack of opportunities or legal barriers to employment (such as the ban on work for people seeking asylum), as well as the reality of people living on the streets.

In addition to the so-called "hard facts" (e.g. prior convictions), a defendant's demeanour plays a crucial role in the court's assessment. How people perform in front of a court is influenced by a person's knowledge of how to present themselves – what to say, what not to say, when to speak. As demonstrated above, certain displays of "emotionality" may unintentionally reinforce racial stereotypes, which can undermine a defendant's credibility (e.g. Case 270). This is especially consequential given that expressing genuine remorse is often associated with more lenient sentencing outcomes. This knowledge requires a form of familiarity with courtroom norms that most defendants in these types of proceedings do not possess. As a result, defendants with representation are more likely to receive lenient sentences. Lawyers have the legal knowledge and rhetorical skills to frame the facts in ways that align with the court's expectations and increase the likelihood of a favourable outcome. Racist prejudices play a role in multiple ways. As we have shown, they often begin long before a courtroom appearance: certain individuals are more likely to be "caught" in the first place because societal stereotypes mean they are more frequently subjected to police stops and controls (e.g. Cases 74 and 216). These dynamics create a vicious cycle that continuously reinforces and reproduces structural racism within society.

Since racism produces forms of structural disadvantage, the intersection with classism also plays a significant role in these proceedings, another instance where disadvantages accumulate. As shown by the case of a racialised defendant with a relatively high income, courts often assume racialised individuals are poor. This prejudice is rooted in the judiciary's daily experience, where the majority of defendants appearing in their courtrooms are socioeconomically disadvantaged. The criminal justice system thus perpetuates a cycle in which individuals who are already privileged because of their nationality, education or social status are both less likely to become entangled in the system and more likely to leave with minimal consequences. Another argument where being a non-German national proves to be a particular disadvantage is the practice of when pretrial detention is enforced. For non-nationals, and even for racialised German citizens with family ties outside Germany, this is very often the case, the reason being that family ties abroad would lead to a flight risk.

All things considered, we see that while the criteria for evaluating the social circumstances appear to be applied uniformly, their implementation is shaped by normative assumptions that systematically disadvantage already marginalised defendants. The findings highlight how race and citizenship, especially when

compounded by other structural disadvantages, can lead to the accumulated disadvantages (Kurlychek, Johnson 2019) of marginalisation. Structural racism disadvantages people of colour in all important aspects of life (poverty, housing, wages, health, etc.; cf. Salikutluk, Podkowik 2024). These structural inequalities then play out negatively in courts' individual assessment – which viewed from a wider perspective are not so much individual but shaped by structural factors. This leads to what criminology calls "cumulated disadvantages" (Kurlychek, Johnson 2019) adding up when in contact with the criminal justice system. Our analysis shows that the interplay of social prognosis, nationality, race and sentencing is most often disadvantageous to racialised people.

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