

Comparing Criminal Justice and Prisons in Germany and the United States

I traveled to Germany in July of 2016 to try to understand what was different about the German criminal justice system. Specifically, I wanted to know how Germany managed to incarcerate so many fewer people than the United States does. I also wanted to compare the existing prison system with the one in the US, looking at not just population size, but also at other factors. In what ways did Germany outperform the US? Were there also things that Germans were not doing better than the Americans?

For the previous 7 years I had worked as part of the Harvard Prison Legal Assistance Project to provide legal help to prisoners, getting to know the US criminal justice system intimately. I came away from this experience with a few key beliefs: prison in the United States is not working for prisoners, is not promoting public safety, and it is expensive. Incarcerating fewer people, treating prisoners more humanely, and spending less money on prisons should be priorities.

Why is Germany a good candidate for comparison?

The United States incarcerates about 666 people per 100,000 in its population. (This is a low estimate, because many more people are under correctional supervision, meaning they are on parole, on bail, or on probation, and not counted in this total.) Germany incarcerates about 77 people per 100,000, or about one-eighth of the US rate.

The United States is an incredible outlier, and has essentially the largest verifiable per capita incarceration rate in the world. The Seychelles is slightly higher, but with a population of less than 100,000 and a significant number of pirates incarcerated in their prisons, the island nation is not particularly comparable with the U.S. or Germany.

Germany sits in the low middle of the European incarceration rate spread. Poland, Hungary and the United Kingdom (England and Wales) are on the higher end, clocking in at 193, 184, and 146 incarcerated per 100,000, respectively. At the low end we find Sweden and Finland, both at 57, and Iceland at 38.¹

Yet more than Poland, Hungary or the UK, Germany lends itself to lesson learning for those interested in decreasing U.S. incarceration rates. Like the United States, Germany is large (about 80 million people) and has a complicated and fraught relationship with both racism and immigration. Smaller Scandinavian countries could more easily be compared to a small U.S. state in terms of size and racial homogeneity. But Germany stands up to a country-to-country comparison with significant regional differences and a diversity of religions and languages.

¹ http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All

Both the U.S. and Germany are respected democracies with robust economies, distinguishing them from German neighbors Russia and Greece. Both also are considered countries with a high regard for civil and human rights, unlike China and other authoritarian nations.

What did I compare?

To have a place to start, I worked with topics that are considered important to people working on incarceration issues in the United States. How does Germany handle issues that the U.S. struggles with? Were there lessons to be learned or cautionary tales?

1. Size of the prison population
 1. Why is there such a difference in size? I looked at the total number per capita, but also at the length of sentences, and the rate of incarceration compared with sentenced “offenders.”
2. Conditions of Confinement
 1. What are the prisons like – both physically and in terms of the relationships with staff and prisoners?
 2. What facilities are provided or required in prisons?
 3. What is the status of solitary confinement? Can prisoners be held in isolation? Under what circumstances and for how long? What are the results of those policies?
 4. What rights do prisoners have while incarcerated? What rights do they have after incarceration? Can they vote? Do they have freedom of speech? Can they work?
 5. Are there furloughs? Visits? Research shows that maintaining contact with family and friends who are not in prison is a key to successful reintegration into life outside prison and to preventing a return to prison
3. Sentencing
 1. The length of sentences
 2. Alternatives to incarceration in sentencing (probation, fines, etc.)
 3. The possibility of parole
 4. the possibility of a “natural life sentence”
 5. the presence of the death penalty
4. Racism and Xenophobia
 1. The disparity in incarceration rates between white people and people of color in the United States is significant.
 2. Does Germany have a significant disparity in incarceration rates based on race, ethnicity, or immigration status?
 3. Are there other salient categories of discrimination or disparity in the German criminal justice system? Do those categories reproduce oppressive structures

present in German society to the same degree that the U.S. prison system does?
Are there measures in place to decrease those effects?

What did I learn?

1. Size of the prison population

German prison sentences are rarely over five years long and average 12-24 months. U.S. prison sentences average 63 months.² This means that even if Germany punished people with prison sentences at the same rate that the U.S. did, it would still have a much smaller per capita prison population.

Germany does not do that, however. Instead only about 5% of people who are sentenced to be punished for a crime in a German court serve a prison sentence. About 12% are issued suspended sentences: they don't have to serve their sentence if they are not convicted of another crime during a certain period. Most of the remainder are issued fines.³

At least theoretically, fines in Germany are related to the person's ability to pay, since they are meant to serve as a deterrent. This is not true in the US, where only in a few small pilot projects do judges consider ability to pay when setting fees. Parking and traffic tickets are common examples of fines issued in the U.S. based on standard price points. An issue in many cities in the United State is confusion about the purpose of the fines (are they to deter behavior or are they to raise money for the city?) that results in the incarceration of people who have not committed further crimes but are not able to pay the fines.

One of the complaints of the people who protested in Ferguson, Missouri in 2014 was that the police in the town, and in nearby cities, were using the fines, not to prevent criminal and unsafe behavior, but as a revenue production center for the cities. Black residents of these towns reported in the 2017 documentary *Whose Streets?* altering their driving behavior in extreme ways (such as driving the long way to work to avoid a certain neighborhood, driving very slowly, etc.) to avoid being targeted by police who were later determined by the United States Justice Department to have been engaging in racial profiling.⁴

In Ferguson as well as in other cities and towns in the US people who were subsequently unable to pay their fines often had their driver's licenses taken away and/or were sent to jails or prisons.⁵ As a result, many people lost their jobs, making them unable to pay the fines and leading to a cycle of incarceration, driving without a valid driver's license, and lost work

² <http://www.justicepolicy.org/uploads/justicepolicy/documents/sentencing.pdf>

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https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Criminal_Justice_Germany_en.pdf?__blob=publicationFile

⁴ https://www.nytimes.com/2015/03/04/us/justice-department-finds-pattern-of-police-bias-and-excessive-force-in-ferguson.html?_r=0

⁵ <https://www.justice.gov/opa/pr/justice-department-files-brief-address-automatic-suspensions-driver-s-licenses-failure-pay>

From what I could gather, in Germany one does not risk incarceration because of an inability to pay a fine. In addition, judges are supposed to consider the ability to work when they issue their sentences.

Two other notes in this section: the German criminal court system operates in a fundamentally different way from that in the United States. U.S. courts are designed to be adversarial. This means that each side (the prosecution and the defense) presents only the arguments that best serve their client. The Judge is supposed to be the only neutral party, weighing the zealous arguments of each side.

In German courts, the prosecutor, the judge, and the two lay judges (German courts do not have juries, but certain lay-people are appointed to serve as advisors to the judge as she or he makes a decision) are all supposed to consider what the best outcome is for everyone involved. The trial and sentencing are generally a collaboration between the prosecution, the defense, and the judge. Rather than a negotiation where the prosecutor proposes the worst punishment legally possible and the defense advocates for the most lenient sentence, all sides are asked to try to look at what is reasonable.

2. Conditions of Confinement

Physical conditions and location. My first visit to a German prison – to Heimsheim near Stuttgart, was surprising to me. The surprise was in how similar the facility was to prisons I had visited in Massachusetts. I had expected a wide open space, no fences, and good access to public transport for visitors. Instead, this men’s facility for people serving longer (for Germany) sentences, had high walls topped with barbed wire, and I had to rent a car to make the journey from Stuttgart, the closest city.

Access. During my visit to Heimsheim I wore slacks, left my cell phone in the car, and was carrying my passport. I did this because those were the things that in the U.S. I would have done to give myself a good chance of being admitted to the prison. In Massachusetts, male visitors are prohibited from wearing jeans to men’s prisons, and female visitors are prohibited from wearing jeans to women’s prisons. (The theory is since some prisoners wear jeans it could confuse a guard as to who was the prisoner and who was the visitor.) The elaborate dress codes prohibiting tight clothing, double layers of clothing, ties, boots, the list goes on, often created problems for the students I worked with in Massachusetts who were trying to visit their clients in prison to conduct their legal work. My students were often harassed because of their clothing on arrival to the prison. Female students in particular were often turned away based on specious claims of clothing being “too tight” or “too revealing.”

Visitor supervision. At Heimsheim, I waited for a while in the guard house before being sent to walk across the courtyard to the main building when some other people came in to start their shift. I was not escorted by anyone. When I got to the main building, I was greeted by the superintendent of the prison. She was wearing jeans (in contrast with my more formal outfit) and had a casual rapport with both the staff and the prisoners we encountered during my tour.

Training for disciplinary staff. Heimsheim's superintendent is a lawyer. German regulations require that the prisons have lawyers on staff to adjudicate disciplinary issues in the prisons. This is a contrast with U.S. prisons where staff with very little training are often in charge of disciplining the adult prisoners they oversee. This has led to the widespread perception (and in many cases the reality) that prison disciplinary processes are unfair to the prisoner.

Prisoner privacy. I was given a tour of Heimsheim, but the tour explicitly excluded the prisoner housing areas. The explanation was that this was a private area where people lived, and so of course it would be disruptive and a violation of their privacy to have visitors get tours. In the U.S. there is rarely, if ever, an attitude of respect for prisoners' privacy.

A good demonstration of this is toilet facilities in prisoners' cells. In the United States, where most people are incarcerated in prison cells with another person or people, toilets are almost inevitably in the cell, with no partition or privacy provided. By contrast, in Germany it was explained to me during a tour of Tegel Prison in Berlin, that an entire prison building was no longer used to house prisoners because the cells were not at an appropriate standard, specifically because there were toilets in the cells.

I should note that when I visited the Helsinki Committee in Hungary in January 2017 and discussed prison conditions with the prison monitoring staff there, I was surprised to learn that while Hungarian prisons are known for their poor conditions, toilets are still generally private facilities with doors or partitions. This demonstrates that the U.S. standards for a prisoner's right to privacy and dignity are incredibly low.

Voting. Prisoners in Germany are provided with the opportunity to vote, unless that opportunity has been explicitly taken away from them by the courts. In the United States prisoners cannot vote by default, and in many U.S. states a felony conviction suspends one's right to vote for many years, if not for life.

Solitary confinement. A major concern around the world about incarceration is the use of "solitary confinement." The United Nations Special Rapporteur on Torture made a report in 2011 recommending that solitary confinement be banned in most cases.⁶ However, in the United States reportedly between 80,000 and 100,000 people are being held in solitary confinement at a time⁷. Germany, on the other hand, has made significant efforts to reduce the practice.

During my visit to Tegel prison, I visited a solitary confinement cell. The man giving the tour explained that staff only use it in disciplinary cases where no other solution can be found or when a prisoner poses a credible threat of self-harm. For disciplinary cases the prisoner is not held for more than two weeks, and in the case of threats of self-harm a doctor is present next to the cell the entire time someone is held there.

Family visits. In the United States furloughs and other community access during incarceration used to be quite common. However, due at least in part to the connection between politics and the criminal justice system in the U.S., the ability to leave the prison to visit family and friends

⁶ <http://www.un.org/apps/news/story.asp?NewsID=40097>

⁷ www.solitarywatch.com/facts/faq/

or to work is now rare in the U.S. In Germany furloughs still play a major role in incarceration, and are considered critical to maintaining the connections with the community that prevent recidivism and assist with reintegration into society upon release.

Potential for politicization of prisoner well-being. Elected officials in the United States are expected to “take responsibility” for criminal acts that occur during their tenure if a relationship can be found to policies they voted for or against that might have enabled or prevented the criminal activity. For example, many credit Michael Dukakis’ loss when running for president in the late 1980s to campaign ads run by allies of future President Bush discussing the case of William (called Willie in the ads) Horton.

Horton was serving a life sentence without the possibility of parole for murder in Massachusetts. He was released from prison as a part of a weekend furlough program that Dukakis had some involvement with preserving. Horton did not return to prison after his weekend furlough, and was later convicted of rape and other violent crimes committed in Maryland when he was supposed to have been in prison in Massachusetts.

Incidents such as these create an environment where programmatic risk taking and evidence-based rehabilitation programming in prisons and in criminal justice are heavily discouraged. Even one incident where a prisoner in an otherwise successful program commits a crime can doom the political futures of anyone involved in the program.

In Germany, the officials charged with creating prison policy are generally not elected and are considered bureaucrats, not politicians. As a result, prison and criminal justice policy is somewhat insulated from the vagaries of elections and campaigns.

3. Sentencing

I’ve already addressed the relative length of the average sentence in Germany and the U.S. Aside from the differences in the average sentence, the difference in maximum length of sentences in the U.S. and Germany is significant.

In the United States you can be sentenced to life in prison with or without the possibility of parole, to hundreds of years in prison, and even to be killed by the state. None of these things is possible in Germany. German prisoners can be sentenced to “life in prison” but they must have a parole hearing after 15 years, and parole is often granted. Prisoners can be held after a sentence has ended if they are deemed to be a danger to society, but they must have periodic re-evaluation by a judge, and the prison must meaningfully attempt to rehabilitate the prisoner so that they have a chance at release.

In Germany, as discussed, most sentences for crimes involve fines instead of prison time. Germany does not have the death penalty or permit sentences of life in prison without the possibility of parole.

4. Racism and Xenophobia

Unlike the other sections of this report, I am not able to produce accurate comparisons of German and U.S. approaches to race and racism in the criminal justice and prisons systems. Instead, I explore why I was not able to conduct that comparison.

Racism in the U.S. In the United States prisons are one of the most glaring examples of the continuing scourge of racism that has characterized European interaction with the Americas from the beginning in the form of colonization and slavery. It would be irresponsible and incomplete to discuss prisons and criminal justice in the United States without a discussion of the racial disparities that are evident at every stage of the system. These disparities include economic devastation in racially segregated U.S. neighborhoods where the majority of men are incarcerated for some period of their lives. They include racial profiling in citizen reporting and policing, increasing the likelihood that a crime will be reported or an arrest made based on the perception of the purported offender or suspect's race. These disparities include racially correlated differences in prison conditions, sentence length, and the imposition of the death penalty.

Given the incredible impact of racism on the U.S. criminal justice system, I was excited to find out whether Germany had a better approach. I hoped that the country's approach to facing its Nazi history head-on in education and politics had resulted in fewer racial disparities in their criminal justice system. I also wondered what populations might be experiencing the effects of prejudice and discrimination in Germany. In the United States Black, Hispanic/Latino, and Native American people are all significantly more likely to experience incarceration than white or Asian/Pacific Islander people.⁸ What made someone more likely to experience incarceration in Germany?

Availability of data. In prison and elsewhere, statistics on race in the United States are widely available. Generally, race is self-reported: the count relies on the person's own racial self-definition. Questions about racial identity exist on the U.S. census, and the criminal justice and prison surveys nearly always count the race of prisoners.

None of these things is true in Germany. Even the word "race" in German – "Rasse" is taboo. The word is only used to discuss breeds of animals, and to refer to Nazi practices.

As a result, I was unable to locate statistics on race and incarceration in Germany. I was not able to discover whether people of color are arrested, convicted or incarcerated at disproportionately high rates because neither data about the number of people of color in the prison population or in the German population exists. Of course the term "people of color" is an English-language term that is not used in Germany, but I use the English shorthand because I found no data on race or ethnicity in the prisons or compiled by the government at either the state level or federal level.

Discussing "race" in Germany. The taboo on the word race, and on categorizing people by race generally, comes from a rejection of racist Nazi ideology. Race, says German political and popular culture, is a construct and a fiction – there is no way to determine genetically, visually, or otherwise what race someone is, or even to define race at all. Germans have embraced the idea

⁸ <http://www.sentencingproject.org/publications/addressing-racial-disparities-in-incarceration/>

that race is made up, and that acknowledging its existence encourages racism and discrimination, and creates distance and difference between humans where none should exist.

Thus, the German census does not ask any questions about race. There are no statistics regarding race for prisons or criminal justice policies in Germany. While in the United States it's common for a human resources questionnaire at a new job to include optional questions about race and ethnicity, this would be viewed as an incredible violation in Germany. I spoke with more than one German who had spent time working in the United States. They were appalled at being asked questions about race by their new workplaces. At the same time, it's common to list your religion, date of birth, whether you are single, and the number of children you have on your CV. Interestingly a photograph is considered mandatory with a German job or academic application. All of these things are considered an invitation to discrimination in the U.S., and you are not permitted to ask someone about these things in a job interview.

Migrationshintergrund. While Germans do not acknowledge race as a category in their statistics, they have attempted to create a proxy. That proxy is called "Migrationshintergrund" or "immigration background." There is a legal definition of this term, and it's rather complicated and changes occasionally. The crux of it is that a person is considered to have an immigration background if they or any of their parents or grandparents were not born with German citizenship. There are some complexities involving people who come from German families living in other parts of the world – particularly in the Former Soviet Union, and also there have been changes in what year (1949, 1955) the last familial migration has to have happened after in order to be considered the basis for Migrationshintergrund. A very large swath of Germans is considered to have Migrationshintergrund: in 2015 21% of Germans, or 1 in 5, were reported to have this status.⁹ These statistics would include a person who immigrated to Germany from Nigeria in 2015 and someone born in Germany to German parents, with three grandparents born in Germany and one grandparent born in Poland, Austria, or Latvia.

The focus on immigration status leads to a situation where people who may experience racism in Germany are not accounted for by the law. There are many half-German half-American children in Germany who were born to German mothers and U.S. soldier fathers. Many of these U.S. soldiers were African-American. Because they have a foreign-born parent all of these German children, regardless of the race of their parents, are considered to have Migrationshintergrund. But there are also Afro-Germans or Black Germans who do not have Migrationshintergrund. Germany attempted to colonize several parts of Africa through the early 1900s, and Africans were brought to Germany as slaves and servants, but also came to Germany for education and to work. The descendants of these Germans do not fall under the definition of Migrationshintergrund. Regardless of their immigration background, according to a forthcoming report from the United Nation, Black people in Africa are afraid to go to many parts of Germany, and they are discriminated against in schools and have diminished educational opportunities.¹⁰

Former Guest Worker populations experience discrimination. In the second part of the twentieth century both East and West Germany instituted so-called Guest Worker Programs which encouraged immigration from other countries to meet German labor needs. Although the

⁹ <http://www.zeit.de/news/2016-09/16/bevoelkerung-jeder-fuenfte-hat-einen-migrationshintergrund-16093203>

¹⁰ <https://www.thelocal.de/20170228/un-experts-in-germany-there-are-no-go-areas-for-black-people>

guest workers came and lived in Germany, often for many years, they were expected by the government to return to their home countries at some indeterminate point in the future. In East Germany women were prohibited from becoming pregnant if they were guest workers. Because of the policy expecting guest workers to eventually leave Germany, little effort was made to encourage integration, and most guest workers and their children born in Germany had no citizenship or voting rights. There have been reforms in the last fifteen years providing avenues to citizenship for guest workers and their children, but cultural, geographic, and linguistic segregation remain prevalent. About six percent of the population in Germany is of Turkish descent, and there are pockets of Vietnamese, Italian, and other immigrants in various parts of Germany because of the guest worker programs.

Despite the segregation and discrimination that guest workers and their families have faced in Germany, it is difficult to gather statistics on the treatment of minorities. While the descendants of many white immigrants have been successfully integrated in to German society, immigrants and the descendants of immigrants who are identifiably “not-German” probably face discrimination and a lack of opportunity that their white immigrant-descendant counterparts don’t. But while many report feeling discriminated against¹¹, without statistics, these reports are anecdotal, and it is difficult to create systemic change based on the individual reports of the disempowered.

Immigrants in prisons. Refugees and migrants touch every part of society in Europe, and especially in Germany since the so-called refugee “crisis” began a few years ago. Germany, unlike the United States, does not hold asylum-seekers or other immigrants in detention while they await a hearing on their fate. While there is considerable public debate about how much and what kind of support to provide to migrants in Germany, the latest wave of migration has had a major impact on the country. However, as the immediate crisis passes, the lack of data collection in Germany around race and ethnicity will likely create considerable difficulty in determining whether or not migrants are more involved in the criminal justice system, and whether that has to do with their ethnicity or their migrant status.

In November 2016, Dr. Simone Strohmayr, a member of the SPD and the Bavarian parliament, asked the prison system in Bavaria to produce a document detailing the Migrationshintergrund of each person incarcerated in Bavaria.¹² The newspaper *Wochenblatt* suggested that this request illuminated the question of whether refugees committed more crimes than other people. The article expressed surprise that the answer seemed to be “no” given the very low number of Syrians in the prisons.¹³ The Justice Ministry’s reply to Dr. Strohmayr’s question does make clear, however, that the prison system in Bavaria (and presumably in the rest of Germany) does not actually know how many prisoners have Migrationshintergrund.

¹¹ <https://qz.com/1078032/can-germany-combat-inequality-when-it-has-no-data-on-race/>

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https://www.bayern.landtag.de/www/ElanTextAblage_WP17/Drucksachen/Schriftliche%20Anfragen/17_0014836.pdf

¹³ <http://www.wochenblatt.de/news-stream/regensburg/artikel/179758/fluechtlinge-spielen-in-bayerns-gefaengnissen-keine-rolle-auslaender-kriminalitaet-schon>

The Justice Ministry explained in their answer that they were only able to give the countries of citizenship of the prisoners. There were prisoners with foreign citizenship who were not immigrants, and that there were also German citizens with Migrationshintergrund who are only represented as “German” in the tables provided.

As migrants from around the world integrate into life in Germany, many will eventually gain German citizenship, and their children will likely have a claim to it as well. Unless the German government starts collecting data on the specific identities of its residents, it will be difficult to know whether or not Germany has done a good job of integrating migrants into its society. If migrants and their families are profiled and as a result are more likely to be arrested or incarcerated, Germany will not have a way to track that.

What are my conclusions?

The U.S. could learn about criminal justice from Germany. Germany’s prison and criminal justice systems are far more humane than those in the United States. They also have better results from a cost perspective. Incarcerating fewer people is less expensive, and people who are not incarcerated can participate in the economic activity in the country. Key factors for these good results are the reliance on fines over prison sentences, a court system that is not adversarial, and prioritizing contact with the community for everyone involved in the criminal justice system through suspended sentences, furloughs, conjugal visits, and parole. Keeping criminal justice policy divorced from the political system encourages evidence-based practices over fear-based policies.

Neither the U.S. nor Germany has effectively addressed racism. Like any structural system, Germany’s criminal justice system reflects the society’s prejudices and structural inequities. While there are no statistics to support the allegation that the criminal justice system in Germany treats people of non-German descent differently than ethnic Germans, there is no reason to suppose this is not true, since it’s clearly the case in all other parts of German society.

Implementing U.S.-style multicultural reforms will not work in Germany. Indeed, it’s clear that anti-racism and multiculturalism have not succeeded in the United States, and so far, those failures are in many ways most evident in the criminal justice system in the U.S. The American obsession with racial categorization and statistics has certainly not prevented the U.S. from creating a country where one in three Black men can expect to be incarcerated in their lifetime. However, Germany’s opposite approach – obsessively refusing racial categorization, has not been effective either.

Incarceration is not a solution. In both the United States and in Germany immigrant communities are under threat while the countries’ governments can’t decide whether they are welcoming or hostile. Immigration has long been a contentious issue in both countries, but the intense politicization of migrants fleeing war and terror and the accompanying increase in public discrimination against Muslims is frightening. Both countries should resist the urge to criminalize Muslims and immigrants, and to reject incarceration as a “solution” to migration –

whether the direct detention of people because they are immigrants or the indirect targeting of immigrants.

Germany may struggle to assess how migrants and their families are faring, especially in involvement with the criminal justice system. Just as with the guest workers and their descendants, Afro-Germans, and other non-ethnic Germans living in Germany, a hesitation to collect ethnic and racial identity data can have real consequences for groups who are likely struggling. Germany must know about persecution and the resultant over-representation of those groups in prisons if it wants to help solve those problems.

Going forward. Germany's history must be taken into account when proposing solutions for dealing with problems of racism and anti-immigrant discrimination and animus. The vitriolic resistance on the part of German society to categorizing people by race perhaps presents an opportunity to create new approaches to dealing with racism. Current German approaches to race rely heavily on repudiating Nazi propaganda and methodology. That focus gives power to those ideas, and prioritizes their repudiation over the suffering of actual disempowered human beings.

In the United States, the incredible success of the Black Lives Matter movement indicates that, at least for now, racial identity remains an important source of strength for stigmatized minorities, especially African-Americans. Grassroots organizing against overincarceration, racist sentencing, and police misconduct will continue to center leaders of color in the United States as long as people of color are disproportionately negatively affected by criminal justice policy.