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Recalling conditionally released prisoners in Germany

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Abstract:

In Germany there are diverse conditions for conditional release from prison or so-called measures for rehabilitation and security such as preventive detention or placement of mentally disturbed offenders in a psychiatric institution. Prisoners can be released early: in case of good prognosis, the remainder of the sentence is suspended conditionally. This article focuses on legal procedures which allow the revocation of this decision. Special emphasis is given to recall practices.

Keywords: Recall - Conditional release - Practice of recall – Prognosis - Statistics of the probation service

The system of early release in Germany

Early release in Germany is based on discretionary decisions and is always conditional.[2] The law provides several possibilities for an early release from prison or preventive detention. Which law has to be applied depends on different criteria, such as the age of the offender, the length of the prison sentence, the type of offender. The basic provision governing the early release of prisoners is s. 57(1) of the Penal Code. According to this provision, prisoners can be conditionally released from determinate prison sentences after they have served two thirds of their sentence. In exceptional cases (first time offenders; particularly good prognosis) they can be released after they have served half of their sentence (s. 57 (2) of the Penal Code). Life prisoners can be released after having served at least 15 years (s. 57a of the Penal Code). Conditional early release is granted to prisoners with good prognoses, but the exclusion of all risk is not required - a "justifiable" degree of risk is accepted. There are more detailed regulations for young inmates of youth prisons (aged 14-24): According to s. 88 of the Juvenile Justice Act they can be conditionally released under less strict conditions and – exceptionally – already after having served only one third of the sentence.[3] For those conditionally released from mental hospitals and preventive detention, special regulations for prognostic criteria and supervision are provided. The deciding judge must be convinced that

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2 For a deeper insight into the system of conditional release in Germany see Dünkel/Pruin 2010.

3 In practice conditional release regularly is provided after the offender has served at least two thirds or 5/8 of the youth prison sentence.

there is no danger that the offender will relapse into further crime. There are furthermore special regulations for those who start drug therapy after their release (s. 35 Narcotics Law)[4].

The competent authority for conditional release is always a judge (special chamber of the District Courts). Statistical data about conditional release are not very accurate[5] but, in practice, such release seems to have become less frequent over the last 10-15 years. A major law reform in 1998 provided more restrictive legal requirements for detainees in preventive detention and forensic psychiatric hospitals.

The system of early release can include supervision by the probation services. According to s. 56d of the Penal Code the court shall place the convicted person under the supervision and guidance of a probation officer for all or part of the probationary period, if this appears necessary to prevent him from committing offences[6]. Case loads are very high, with each probation officer being allocated about 70 clients on average at any one time. According to s. 57(3) of the Penal Code (read together with s. 56a(1)), the probation term is at least two years and no longer than five years. It shall not be less than the remainder of the sentence. Conditional release may be combined with so-called directives ("Weisungen") or obligations ("Auflagen"). Directives are imposed in order to influence the offender`s behaviour and living routines (see s. 56c of the Penal Code) and, in this way to prevent reoffending. They can consist of an instruction to avoid contacts with persons who might negatively influence the released offender or to avoid certain places, to try to find work or – with the offender´s consent – to undergo alcohol or other treatment (for details, see s. 56c(2), (3) of the Penal Code). Obligations are meant to fulfill the victim´s or society´s desire for satisfaction. According to s. 56b(2), the obligation can consist of compensating the victim, of a payment to a non-profit organization or the state, or of community service.[7]

Legal conditions for recall in Germany

Conditions for recall are prescribed by law in s. 56f of the Penal Code. According to legal doctrine, the recall procedure is seen as an opportunity for the Court to review the suspension of the sentence and the underlying prognosis (Ostendorf, 2010, section 56f, para 1). There is strong consensus between judges and scholars that a recall shall not be seen as a sanction for violating the conditions of probation (Groß, 2005, para 3 with further references) and should be only a last resort if changing or increasing directives are not seen as sufficient.

Reasons for a recall
A new offence

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4 See Dünkel/Pruin 2010

5 German prison statistics reveal a fairly consistent proportion of early releases (including pardons) of around 30 per cent during the last decades. However, these data are not usable as they refer to all persons who are released each year, among whom is an unknown number of released fine defaulters who are not eligible for conditional release, see Dünkel/Pruin 2010 p. 198.

6 Additionally, supervision by the Probation Service should be ordered when the offender has served at least one year of the sentence in prison. According to s. 88 of the Juvenile Justice Act in conjunction with s. 24 the Probation Service shall be called upon whenever an offender is conditionally released from youth prison.

7 Similar regulations for juvenile prisoners can be found in s. 23, 24 of the Juvenile Justice Act.

The suspension of the sentence can be revoked if the conditionally released offender commits an offence during the probation period[8] which shows that the Courts expectation on his good prognosis has been disappointed (s. 56 f (1) Penal Code or s. 26 Juvenile Justice Act). The interpretation of this rule is partly discussed controversially:
It is agreed that not every further offence will automatically disqualify an offender from remaining on conditional release. Most scholars are of the opinion that the new offence must indicate that the suspension of the sentence did not succeed in serving as a warning to the offender and that the offender will commit further offences if not subjected to the prison regime (Stree-Kinzig, 2010, section 56f, para 4). Petty further offences that have no connection to the offence for which the prison sentence was initially imposed will rarely be regarded sufficient to establish that a good prognosis was, in fact, wrong. Some scholars furthermore demand a criminological connection between the new offence and the offence that led to the first (and then later suspended) prison sentence (Stree-Kinzig, 2010, with further references).

Another ongoing discussion relates to the question whether the presumption of innocence requires that the probationer must have been finally convicted by a court for the new offence which justifies the recall. According to mainly older jurisprudence a new conviction by a court was not required. This interpretation led to a case before the European Court for Human Rights (Böhmer v. Germany). The Court decided (on 3rd October 2003) that the presumption of innocence requires a determination of guilt within an ordinary criminal procedure[9].
Since then, the German Constitutional Court has held that in general a recall requires a conviction for the new offence (BVerfG NJW 05, 817), and most district courts have followed this ruling. It is still under discussion whether the new conviction has to be legally binding (res iudicata). The broad consensus, however, is that the suspension can be revoked without a formal conviction by a court a court in instances where the offender has plausibly confessed to the new offence in question. The conditions under which the confession has to take place (in the presence of a judge or a defence lawyer etc.) are still subject to debate (Stree-Kinzig, 2010; Peglau, 2004 with further references).

Violation of directions

The suspension of the remainder of the sentence can furthermore be revoked if the released prisoner deliberately or persistently violates the Court´s instructions concerning his daily life (directives, see 1. above) or persistently evades the supervision and guidance of the probation officer and thereby gives cause for concern that he may commit new offences. A recall requires that the violations must be considerably serious. A preceding warning is not essential.

A violation of directives is defined as persistent if the probationer shows through his repeated actions or perpetual conduct (like e. g. escape) that he is not willing to follow the Court`s instructions (Stree-Kinzig, 2010, s. 56 f. para 6).

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8 The suspension of the sentence shall likewise be revoked if the offence was committed in the interim period between the decision suspending the sentence and its becoming final; it shall also apply in cases of the subsequent fixing of aggregate sentences if the offence was committed in the period between the decision on the suspension of a judgment included in the aggregate sentence and the date when the aggregate sentence became final.

9 ECHR, Böhmer v. Germany, Application no. 37568/97

An evasion of supervision and guidance is defined as persistent if the probationer is repeatedly or permanently not reachable by the probation officer. This requires more than resisting only single measures, and it must be observed that any probationer should have the right to disagree with the guidance in general. As long as the probationer does not refuse supervision in general at the same time, the conditions for a recall are not met (but the probation officer can ask the Court to impose other or further directives in this case, see Stree-Kinzig, 2010).

In both alternatives a recall requires that the violations and actions of the probationer give the court grounds to fear the commission of new (serious) offences. This means that the Court has to prepare a new prognosis that takes in to account the violations and the overall behaviour of the offender (Stree-Kinzig, 2010, para 7).

Violation of obligations concerning reparation
Conditional release can furthermore be revoked if the released person deliberately or persistently violates the obligations set up by the Court for reparation for the damage caused (see 1. above). The violation must reveal that the probationer is not willing to repair the damage. This is why the court has to investigate the reasons for the violation. If the probationer for example does not repair the damage because he is insolvent, a recall is usually not possible. In general a finding that a violation of an obligation set by a court was deliberate requires a preceding warning (Stree-Kinzig, 2010, para 8).

Principle of proportionality

Even if at least one of the reasons for a revocation exists, the Court is still not allowed to revoke the suspension of the rest of the sentence if it would be sufficient to issue new directives or obligations or to prolong the probation period (s. 56f (2) of the Penal Code). This condition is a specific application of the constitutional principle of proportionality (Ostendorf, 2010, s. 56f para 12).

The most relevant further directive or obligation is the requirement that an offender subjects himself to the supervision of a probation officer. In any case, obligations and directives can only be imposed for the duration of the probation period including any prolongations thereof. If the probation period is prolonged, the law allows for a probation period of up to 7.5 years (for cases in which the original probation period was 5 years) (Groß, 2005, section 56 f; Ostendorf, 2010, section 56 f, para 12).

Consideration of payments and other deductions

If the offender has paid money to fulfill obligations or directives the money will not be refunded. However, the court may credit those payments in case of a recall.

According to most scholars such crediting of payments is obligatory for constitutional reasons (Ostendorf, 2010 para 15, Kinzig-Spree, 2010 para 19 (because otherwise the payments could be defined as an additional sentence)). The procedure for granting such credits is not regulated any further. In one case, a court credited 120 hours of community service by shortening the remaining prison sentence by 20 days (Neubacher, 2002: 125).

Other forms of deductions, for example shortening the remaining sentence through a credit for the part of the probation period already served, do not exist.

Competent authority and procedure

According to ss. 453 and 462a of the Criminal Procedure Act a special chamber of the District Courts (responsible for the execution of sentences as well as for the conditional release of prisoners) is competent to decide about recall.[10] Local responsibility lies with the Chamber in whose district the penal institution is located where the probationer was being held before he was conditionally released.

Generally an oral hearing is not provided. If the court has to decide on revocation of suspension of sentence because of a violation of conditions or instructions, it must give the convicted person an opportunity to be heard orally. This provision was introduced later in order to decrease the proportion of recalls through better understanding of the factual background (BT-Drucks, 10/2720: 14). Where a probation officer has been appointed the court shall inform him. Both the probationer and the public prosecution service have the right to appeal against the decision.

The law does not prohibit another suspension of the remainder of the prison sentence after a recall has taken place. However, there are indications that a prisoner whose suspension was revoked will in practice not be granted conditional release again (Meier, 2006: 135 with further references).

Practice of recall in Germany

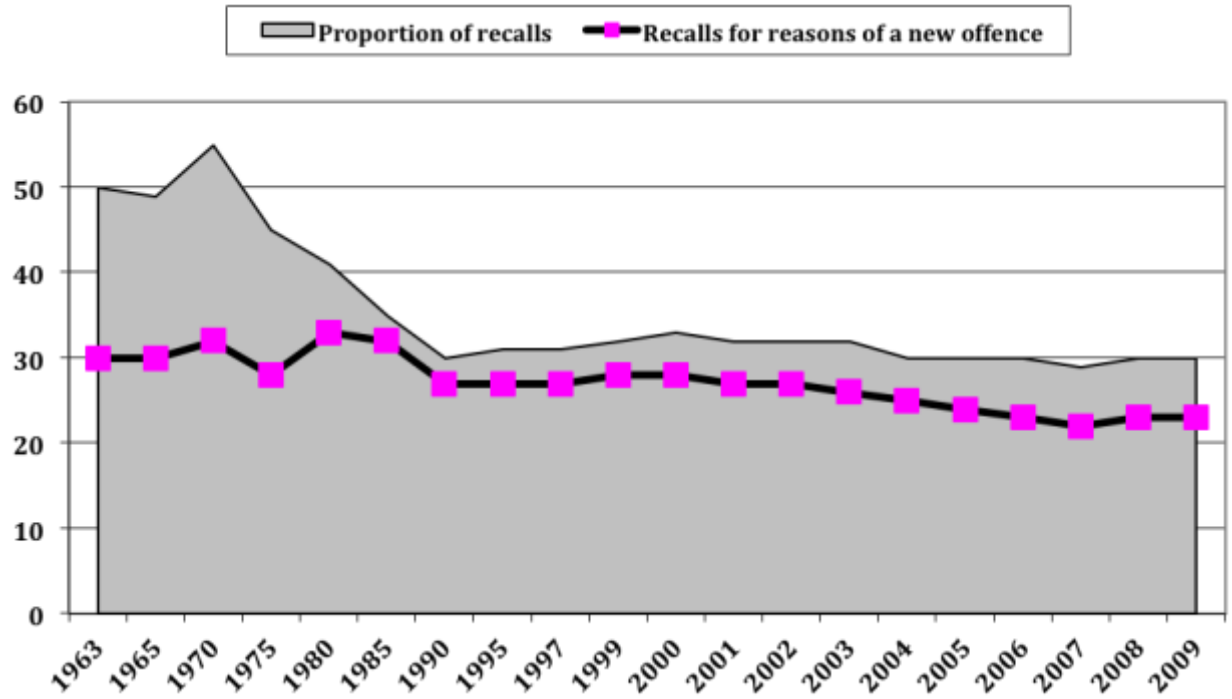
Data about the practice of recall is subject to several limitations. The existing statistics of the probation service only provide information about those probationers who are under supervision of the probation service. Furthermore, long-term developments are only measured for all probationers together – without indicating whether they were released conditionally or if the prison sentence was suspended from the start (without one day in prison, s. 56 of the Penal Code).[11]

Allowing for these limitations, the data appear nevertheless to show that the proportion of recalls has decreased and nowadays amounts to approx. 30% (diagramme 1). In the majority of all cases the recall is caused by a new offence. This means that the ratio of those whose suspension of the sentence is revoked for violations of directives or obligations is comparably small.

10 The question of competence is discussed. According to some scholars the court which is competent to decide about the new offence shall decide about the possible revocation of the suspension. See Neubacher, 2004 with further references.

11 Furthermore there are specific distortions of the evaluation of recall-rates, see Hermann 1983. Probation statistics are based on the output of the system of probation. These data neglect that the average time up to remission is greater than the average time until revocation. This causes a biased estimation of the revocation rates. Hermann concludes in his analysis that recall-rates are rather likely to be overestimated.

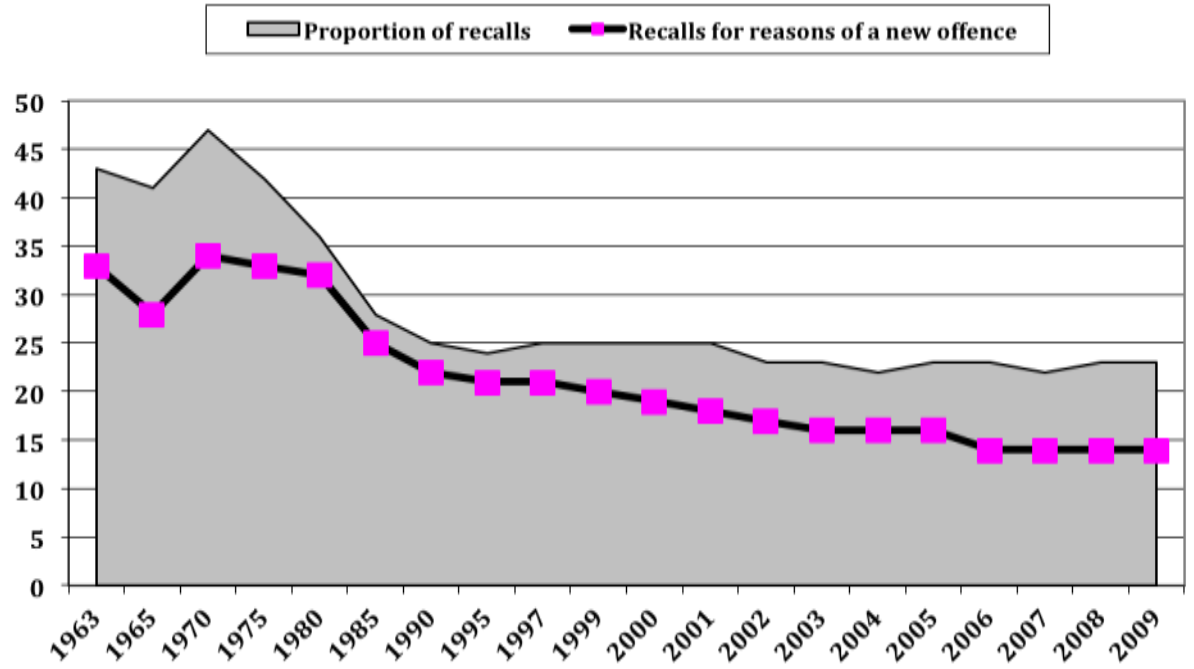
Diagramme 1: Proportion of recalls of suspended sentences under supervision (suspended sentences and early released prisoners together, s. 56, 57(1) and (3) of the Penal Code), 1963-2009



Source: Federal Bureau of Statistics 2010: Statistics of the Probation Service

Suspensions of juvenile prison sentences are revoked even less often (diagramme 2). The ratio of recalls has declined more strongly than that for adults. Furthermore, the analysis shows that violations of directives or obligations by comparison more frequently result in a recall than in adult cases.

Diagramme 2: Proportion of recalls of suspended sentences under supervision (suspended sentences and early released prisoners together, s. 21, 27 and 88 of the Juvenile Justice Act), 1963-2009



Source: Federal Bureau of Statistics 2010: Statistics of the Probation Service

Before 1992 the Statistics of the Probation Service allowed special analysis on the recall of conditionally released prisoners. Schöch (1992: 368) calculated continuously falling proportions for recalls of conditionally released adult prisoners for the years 1965-1989, finally settling down to approx. 30 %.

For the purpose of this article, the German Bureau of Statistics has provided data for the year 2007 which allows further analysis of the practice of recall of conditionally released prisoners. These data allow one to differentiate between whether a prisoner was conditionally released after two thirds of the sentence (s. 57 (1), see 1. above), after half of the sentence (s. 57 (2)) or from a juvenile prison sentence (§ 88 JGG). Data are only available for the old federal states of Germany, including Berlin. Hamburg and the new federal states were excluded from this analysis because they decided not to deliver the relevant data. Again the data refer only to those conditionally released prisoners who have been under the supervision of the probation service (according s. 57 Penal Code), whereas those released from youth prisons (s. 88 Juvenile Justice Act) are all placed under supervision and therefore included in the analysis.

Table 1: Recalls of conditionally released prisoners under supervision in the year 2007, old federal states and Berlin (without Hamburg)

Conditional release according to:		**s. 57 para. 1 PC**	**s. 57 para. 2 PC**	**§ 88 JJA**
Number of probationers under surveillance		10,326	901	2,668
thereof: number of recalls		2,737	185	719
in %		27%	21%	27%

according to gender	**Men**	26%	21%	27%
	Women	28%	18%	19%
thereof: recall after…	**< 12 months**	17%	13%	34%
	13-24 months	30%	31%	36%
	> 24 months	54%	55%	29%
thereof: recalls for reasons of a new offence:		81%	78%	68%

Source: Federal Bureau of Statistics (unpublished data), own calculations

The analysis shows that conditional release is most likely after offenders have served at least two thirds of the prison sentence (s. 57 (1) of the Penal Code). 27% of those conditionally released prisoners were recalled in 2007. This ratio is a bit lower than the ratio presented in Diagramme 1 (concerning all conditionally suspended sentences). The reason for this difference may be that those who are released conditionally are a positively selected group from the prison population and therefore may share a better prognosis.

The rates of recall do not differ much between women and men. They do, however, differ considerably according different offences: Whereas only 12% of all conditionally released offenders who were imprisoned for having committed an offence against sexual self-determination were recalled, relatively many (39%) conditionally released offenders who were imprisoned for having committed non-violent property offences shared the same destiny. The coherence to general data on recidivism is interesting: According to German analyses, severe forms of theft (which lead to prison sentences) often indicate relatively high reconviction rates whereas reconviction rates after sexual offences are comparably low (Jehle et al. 2010: 106 and 118).

In the majority of the cases a recall is reasoned by a new offence. Most probationers are recalled after more than 24 months.

For those released from prison after having served one half of the sentence (according to s. 57 (2) of the Penal Code) data show only few differences: The proportion of recalls is lower (21%), which could be due to the fact that the group of probationers released early is especially positively selected. Comparatively low recall rates for robbery and blackmail (17%) are interesting.

Considerable differences can, however, be found for those probationers who had been conditionally released from a youth prison sentence. The similarity to the general ratio of recalls for adult probationers is noticeable. The difference between the ratios for men and women might not be significant due to the small number of women (n=26).

The most interesting finding is that younger probationers are obviously recalled much earlier than adults: a comparably large ratio of probationers (34%) is recalled within the first 12 months after conditional release from a youth prison. Again the relation to recidivism rates is obvious: Recidivism studies show that younger released prisoners reoffend more quickly compared to older ones. Furthermore, for a comparatively large ratio of probationers the revocation of the suspension is not reasoned by a new offence (32%).

For the validation and further interpretation of these findings further research is necessary.

Discussion and Outlook

The analysis shows that the German system of revoking the conditionally suspended remainder of a prison sentence leaves some open questions.

From a doctrinal point of view a recall should not serve as a sanction for violating the conditions of probation. This is in line with the Council of Europe`s Recommendation on European Rules on Community Sanctions and Measures, (Rec(92)16, Rule 84). Moreover, the judge should review whether the original positive prognosis is still valid. However, it is doubtful that this target is always met in practice: Legal regulations for recall do establish a special obligation to behave „positively" during the probation period, and s. 56f of the Penal Code provides the opportunity to sanction (pure) violations of this obligation with a recall. Further research would be required to find out if and to what extent recalls are (unknowingly?) motivated by the judge´s intent to sanction this "failure" of the probationer.

Another issue is whether systematic questions (like the definition of a „new offence" in the light of the presumption of innocence or the question of the required quality of this offence, see 2.1) should not rather be answered by the law itself. This would avoid further confusion (Boetticher, 1991: 6.).

It is furthermore debatable whether an oral hearing should not be required for all cases of recall. The lawmaker himself argues that the reasons for "misbehaviour" can better be fathomed with the help of a personal interview.

These considerations coincide with the question about which court shall be competent to decide about the recall. According to some scholars the court which is competent to decide about the new offence shall also decide about the possible revocation of the suspension (Neubacher, 2004 with further references, Radtke 2001: 622). This could avoid conflicting prognoses (Radtke 2001: 613) and would possibly enable the court to investigate the reasons for a recall more deeply within the course of the oral hearing (which is obligatory within the judicial proceedings for the new offence).

German statistics about the practice of recall are uncommonly poor compared to the "traditional" German standard (Radtke, 2001; Boetticher, 1991). They only allow conclusions for the group of conditionally released prisoners under the supervision of the probation service.

Comparatively low ratios of recall (under 30%) might mirror the legislative efforts to prefer other alternatives (like the prolongation of the probation period etc., see 2.2 above) over recall. It should on the other hand be noticed that in Germany, due to the system of discretionary early release, only a particular and already positively selected group of prisoners can be subject to conditional release.

The ratios of recall show similarities to general analyses of recidivism rates. An open question is why younger probationers are clearly recalled sooner than those released from an adult prison sentence: Is it really the only reason that they reoffend earlier?

The majority is recalled after more than 24 months on probation. This raises the question as to whether the law should offer a possibility for crediting this comparatively long period of "good behavior" by reducing the remaining prison sentence (see for example the Council of

Europe`s Recommendation on European Rules for Juvenile Offenders Subject to Sanctions an Measures, Rec (2008)11, Rule 48.4).

The paper shows that further research is necessary to discover all facets of recall in Germany. International comparisons might lead to a stimulation of the German (reform?) discussion.

References:

Boetticher, A. (1991): Zum Widerruf der Strafaussetzung zur Bewährung. Neue Zeitschrift für Strafrecht 11 (1), 1-6.

Dünkel, F.; Pruin, I. (2010): Conditional release in Germany. In: Padfield, N.; van Zyl Smit, D. and Dünkel, F. (Eds.): Release from Prison: European Policy and Practice. Collumpton: Willan, 185-212.

Groß, K. H. (2005): Kommentierung zu § 56 f StGB. In: Münchener Kommentar zum Strafgesetzbuch Vol. 2/1, Munich: C. H. Beck.

Hermann, D. (1983): Die Berechnung von Erfolgs- und Mißerfolgsquoten der Bewährungshilfe. In: Monatsschrift für Kriminologie und Strafrechtsreform 66 (5), 267-277.

Jehle, J. M.; Albrecht, H. J.; Hohmann-Fricke, S.; Tetal, C. (2010): Legalbewährung nach strafrechtlichen Sanktionen. Eine bundesweite Rückfalluntersuchung 2004 bis 2007. Bundesministerium der Justiz: Forum Verlag Godesberg.

Meier, B. D. (2006): Strafrechtliche Sanktionen. Berlin, Heidelberg, New York: Springer.

Neubacher, F. (2002): Aus der Rechtsprechung in Strafsachen. Bewährungshilfe, Soziales, Strafrecht, Kriminalpolitik 49, 123-128.

Neubacher, F. (2004): Der Bewährungswiderruf wegen einer neuen Straftat und die Unschuldsvermutung, Zugleich Besprechung von EGMR, Urteil vom 3.10.2002, in: Goltdammer's Archiv für Strafrecht 151 (7), 402-417.

Ostendorf, H. (2010): Kommentierung §§ 56-56g StGB. In: Kindhäuser, U.; Neumann, U.; Paeffgen, H.-U. (Eds.): Strafgesetzbuch. Baden-Baden: Nomos.

Peglau, J. (2004): Bewährungswiderruf und Unschuldsvermutung. Neue Zeitschrift für Strafrecht 24 (5), 248-252.

Radke, H. (2001): Wechselwirkungen zwischen Widerruf der Strafaussetzung zur Bewährung und der Sanktionierung des Bewährungsbruchs. In: Britz, G. et al. (Eds.): Grundfragen staatlichen Strafens. Festschrift für Heinz Müller-Dietz zum 70. Geburtstag. Munich, 609-625.

Schöch, H. (1992): Bewährungshilfe und Führungsaufsicht in der Strafrechtspflege. In Neue Zeitschrift für Strafrecht 12, 364- 372.

Stree, W.; Kinzig, J. (2010): Kommentierung der §§ 56-67g StGB. In: Schönke, A.; Schröder, H. (Eds): Strafgesetzbuch, Kommentar. Munich: C.H. Beck München.