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Source Citation in Legal Bibliography and Its Impact on Research: A Comparative Examination of Criminal Sentencing Discretion Law and Practice in California and Germany (Pre-Publication Final Draft)

Jennifer Allison

JALLISON@LAW.HARVARD.EDU

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Jennifer Allison[1]

This Article describes a comparative research project studying judicial discretion in criminal sentencing in California and Germany. Both jurisdictions have statutory provisions that permit trial court judges to exercise discretion in calculating the length of sentences in criminal cases. However, to best understand how this discretion works in practice, researchers must look beyond legal secondary sources and refer to judicial decisions that illustrate these discretionary limits. This is standard practice for a common law jurisdiction like California. However, surprisingly, this method also applies to Germany, a civil law jurisdiction. Furthermore, for the German portion of this research, a practice-oriented treatise proved to be a superior resource to statutory commentaries because it offered a comprehensive, illustrative list German case law citations that included sentencing examples.

[1] Librarian for Foreign, Comparative, and International Law and Instructional Design, Harvard Law School Library. B.A. (English and German), Pacific Lutheran University; J.D., Pepperdine Law School; M.L.I.S., San Jose State University; LL.M. (German Law), Universität Würzburg. Special thanks to my HLSL colleagues Gail Fagerstrom and Theresa Knapp for encouraging me and being excellent proofreaders, and to Professor Alexa Chew for graciously providing some needed final editing, especially on Christmas Day (!). Reported numbers of search results from Westlaw, Lexis, and Beck-Online represent searches that were performed in November 2020. All German-to-English translations, and errors, are my own.

Disclaimer (with thanks to Professor Etienne C. Toussaint for suggesting this language): As a white cis-gender woman who has never been subjected to police brutality, arrested, convicted of a crime, or incarcerated, I recognize my privilege in being in a position to write about carceral law in a purely academic manner.

JALLISON@LAW.HARVARD.EDU

JALLISON@LAW.HARVARD.EDU

INTRODUCTION

Ever since my first German class as a 14-year-old high school freshman, I have been fascinated by the country and its language. My appreciation of the German legal system began as an exchange student at the University of Augsburg during my 2L year and grew as I worked toward an LL.M. in German law at the University of Würzburg, which I completed in 2018.

Despite my exposure to German law and my work as a Foreign, Comparative, and International Law (FCIL) librarian at the Harvard Law School Library, I am largely self-taught when it comes to German legal research. Specifically, I am often unsure how to engage with German judicial decisions during the research process. Germany is a civil law jurisdiction and the decisions of its courts do not carry the same universal precedential weight as cases in a common law system,[2] so should I just ignore them? Or should I actively seek them out as instructive on how the law works in practice?

A symposium on the impact of citation in legal research was an ideal opportunity to explore this issue further. This Article presents the findings of my comparative research project studying judicial discretion in criminal sentencing in California and Germany. Both jurisdictions have statutory provisions that permit trial court judges to exercise discretion in calculating sentence length in criminal cases. However, to understand how such discretion works in practice, I discovered that researchers should refer to judicial decisions that illustrate these discretionary limits. While this is standard practice for a common law jurisdiction like California, it was surprising that this method proved to also be applicable for Germany. Furthermore, for the German portion of this research, a practice-oriented treatise, rather than statutory commentaries, proved to be a superior resource for this because it offered a comprehensive, illustrative list of sentencing examples from German case law.

[2] For more about the binding applicability of decisions issued by Germany's highest court, the Federal Court of Justice (*Bundesgerichtshof*), *see infra* notes 48-52 and accompanying text.

RESEARCHING JUDICIAL DISCRETION IN SENTENCING UNDER CALIFORNIA LAW

In the American common law legal system, judicial opinions interpret statutory law and declare binding legal principles, so American legal research centers finding, analyzing, and citing relevant cases reported in writing.[3] Legal secondary sources, including treatises, practice guides, legal encyclopedias, and legal periodical articles, are useful finding aids for this purpose.

HISTORICAL BACKGROUND OF JUDICIAL DISCRETION IN SENTENCING

In the common law, the exercise of judicial discretion at sentencing goes back to eighteenth-century England, when judges could impose a non-death sentence of "transportation" to anyone convicted of a capital crime "without benefit of the clergy."[4] These judges believed this power derived directly from the "royal prerogative" and exercised it broadly.[5]

In the early history of the United States, criminal punishment was doled out harshly and publicly to maintain societal order.[6] By the nineteenth century, punishment had become a means for people convicted of crimes to become rehabilitated, and judges used their discretion to "individualize" sentences.[7] Additional reforms, including establishing a formal sentencing structure with mandatory sentencing ranges,[8] were encouraged by increased research in the field of criminology, which determined that criminal

[3] Originally, cases were "reported" by people who would sit in the court room, write down what had happened during the proceedings, and then publish their account in their own case law reporter, which would sometimes lead to conflicting reports if multiple reporters reported on the same case. *See* Patti Ogden, *"Mastering the Lawless Science of Our Law:" A Story of Legal Citation Indexes*, 85 L. LIB. J. 1, 9-11 (1993).

[4] WILLIAM J. CHAMBLISS & ROBERT B. SEIDMAN, LAW, ORDER, AND POWER 453 (1971).

[5] *Id*. at 454. This practice was not curtailed in England until criminal law reforms in late nineteenth century, driven in part by the reformers' desire to "formalize the sentencing structure" and punish criminality according to the rule of law, rather than the discretionary whims of the aristocracy or judges. *Id*.

[6] *See* Jalila Jefferson-Bullock, *The Time is Ripe to Include Considerations of the Effects on Families and Communities of Excessively Long Sentences*, 83 UMKC L. REV. 73, 78 (2014).

[7] *Id*. at 79.

[8] CHAMBLISS & SEIDMAN, *supra* note 4, at 454.

punishments should be adjusted according to the circumstances of the crime rather than the discretion of a judge not trained in penological theory.[9]

Eventually, mechanisms to prevent inconsistencies caused by discretionary sentencing were established. Appellate courts gained the power to review and adjust sentences issued by trial judges,[10] and a system allowing judges to share information about sentencing decisions was established.[11] However, the American criminal justice system regularly doles out excessively lengthy punishments,[12] not only harming individual defendants,[13] but also wreaking havoc on too many American families and communities.[14]

JUDICIAL DISCRETION IN THE CALIFORNIA PENAL CODE

In the United States, criminal sentencing represents an exercise of the judgment of both the legislature and the judiciary.[15] In California, statutory law empowers judges to exercise discretion at sentencing, and judicial decisions explain and advise judges on how this discretion works.

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[9] *Id*. at 455.

[10] *Id*.

[11] *See* Ryan W. Scott, *The Skeptic's Guide to Information Sharing at Sentencing*, 2013 UTAH L. REV. 345 (2013). Theoretically, this kind of system can reduce judge-to-judge disparity at sentencing that "results from a lack of information about what other judges have done in similar cases." *Id*. at 357. Its drawbacks include how much information would have to be collected, and whether judges would voluntarily submit information to it due to concerns about workload and defendant privacy. *Id*. at 347. Also, it has not definitively been shown that the availability of such data actually reduces sentence length disparity from judge to judge. *See id*. at 348.

[12] In 1995, judge Morris Hoffman sentenced a teenager convicted of armed robbery to 146 years in prison, and this case haunted him throughout the rest of his career. Morris Hoffman, *A Judge on the Injustice of America's Extreme Prison Sentences*, WALL ST. J., Feb. 7, 2019, https://www.wsj.com/articles/a-judge-on-the-injustice-of-americas-extreme-prison-sentences-11549557185 [https://perma.cc/YZ8P-52LS]. He is clear about his judicial philosophy: "I don't punish people primarily to cure them or to deter others. I punish them mainly because those who intentionally harm others deserve to be punished." *Id*. However, he argues, that the way we use prisons is "extreme," and represents a criminal justice system that has "lost [its] moral grounding." *Id*.

[13] "While a term of incarceration certainly assists in diminishing crime, studies support a conclusion that lengthier sentences directly lead to increased recidivism rates, have negative effects on efforts to rehabilitate prisoners, and are currently considered unfair and undeserved for most, if not all, of the examined offenses." Jefferson-Bullock, *supra* note 6, at 76.

[14] *See generally id*.

[15] U.S. v. Bajakajian, 524 U.S. 321 (1998). While "judgments about the appropriate punishment for an offense belong in the first instance to the legislature," the judiciary is also empowered to make "determination[s] regarding the gravity of a particular criminal offense," which are bound to be "inherently imprecise." *Id*.

Section 17 of the California Penal Code, enacted in 1872, defines a felony as a crime punishable by death, imprisonment in the state prison, or by imprisonment in a county jail, and a misdemeanor as every criminal offense not classified as a felony or an infraction.[16] Shortly after its enactment, Section 17 was amended to clarify that, if the defendant is convicted of a crime punishable by imprisonment either in the state prison or in a county jail, and if the judge chooses the latter, it would be considered a misdemeanor.[17] This category of crimes came to be known as "wobblers,"[18] and the circumstances under which they can be reduced from a felony to a misdemeanor are outlined in Section 17(b):

> (b) When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:
> (1) After a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170.
> (2) When the court, upon committing the defendant to the Division of Juvenile Justice, designates the offense to be a misdemeanor.
> (3) When the court grants probation to a defendant and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.
> (4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint.[19]

Section 17 does not define the factors that judges should or must consider in exercising this discretion, but it does refer to California Penal Code Section 1170, the state's Determinate Sentencing Law,

[16] CAL. PENAL CODE § 17(a) (West 2020).

[17] *Id.*; *see also* CLINTON L. WHITE & WILBUR F. GEORGE, CRIMINAL LAW, PLEADING AND PRACTICE IN THE COURTS OF THE STATE OF CALIFORNIA 10-11 (1881).

[18] That these statutes are called "wobblers" is a researcher's dream come true. Essentially, nothing else in California law is referred to by this unique word, and using it as a search term returns highly relevant results with few false positives.

[19] CAL. PENAL CODE § 17(b) (West 2020).

enacted in 1976.[20] Section 1170 provides a framework for felony imprisonment terms,[21] and introduces limits to judicial discretion in sentencing for cases involving wobbler statutes.[22]

Understanding the Scope of California Penal Code's Section 17(b) Judicial Discretion: Exploring the Case Law

In 1997, the California Supreme Court provided guidance on how to exercise Section 17(b) discretion in *People v. Superior Court (Alvarez)*.[23] It ruled in this case that trial court judge Sheila F. Pokras had exercised appropriate discretion in reducing an offense from felony drug possession to a misdemeanor, and explained why.[24] Although it is not the first time judicial discretion at sentencing has been addressed by the California Supreme Court,[25] *Alvarez* has emerged as the leading case on this topic.[26]

Alvarez states that "the statute sets a broad generic standard" for judicial discretion in wobbler cases,[27] which is "neither arbitrary nor capricious, but is ... guided and controlled by fixed legal principles,

[20] CAL. PENAL CODE § 1170 (West 2020).

[21] This framework includes three tiers: lower, middle, and upper. *Id*. Of these options, it empowers to the trial court to, at their discretion, "select the term which ... best serves the interests of justice." *Id*.

[22] Essentially, if the crime is a wobbler, the judge has three options at sentencing: (1) sentencing the defendant to county jail for 16 months to three years; (2) sentencing the defendant to county jail for one year without granting probation, or (3) granting probation on the condition that the defendant serve up to one year in county jail. *Id*.

[23] 928 P.2d 1171 (Cal. 1997).

[24] *Id*. at 1174. The defendant was found with drug paraphernalia and 0.41 grams of powdered methamphetamine, a criminal violation of California Health and Safety Code § 11377. *Id*. at 1173. This criminal violation is a wobbler and can be charged and sentenced as either a felony or a misdemeanor. The defendant had "four prior serious felony convictions within the meaning of the three strikes law," meaning that being convicted of this crime as a felony would result in a lengthy prison sentence. *Id*. The trial court judge reduced the charge to a misdemeanor, even though it had been charged as a felony, and sentenced the defendant to probation on the condition that he serve a year in the county jail. *Id*. at 1174. The state appealed, claiming that the judge's exercise of discretion in this case, by "declining to punish the defendant as a recidivist under the three strikes law," exceeded her authority. *Id*.

[25] *See, e.g.*, In re Anderson, 447 P.2d 117, 126 (Cal. 1968) ("Many sections of the Penal Code vest in the trial court discretion to sentence defendants convicted of [either felonies or misdemeanors] to state prison or to jail, without mention of standards for exercise of that discretion.").

[26] *Alvarez* has 3,399 citing references in Westlaw (1,818 cases, 1 administrative decisions & guidance, 88 secondary sources, 1,353 appellate court documents, and 139 trial court documents) and 2,426 citing references in Lexis (1,828 citing decisions, 575 court documents, 17 law reviews, 4 treatises, and 2 statutes).

[27] *Alvarez*, 928 P.2d at 1176 (Cal.).

to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice."[28] In *Alvarez*, the court recognized that the case law provided few criteria for exercising this discretion.[29]

Alvarez directs judges to consider contextual factors, "including 'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidence by his behavior and demeanor at trial.'"[30] It also suggested that, "when appropriate, judges ... consider the general objectives of sentencing," as outlined in Rule 410 of the California Rules of Court.[31] To conclude, the *Alvarez* court admonishes, "[E]ven under the broad authority conferred by section 17(b), a determination made outside the perimeters drawn by individualized consideration of the offense, the offender, and the public interest 'exceeds the bounds of reason.'"[32]

Subsequent case law explains how the sentencing discretion factors defined by *Alvarez* should be applied in wobbler cases. Legal researchers have several options for finding these cases: look at *Alvarez*'s citing references, create digests of relevant cases, explore the annotations to the relevant statutory provisions, and browse secondary sources.

[28] *Id*. (internal citations omitted).

[29] *Id*.

[30] *Id*. (internal citations omitted).

[31] *Id*. These eight factors, which are provided in a footnote, are as follows: "(a) Protecting society. (b) Punishing the defendant. (c) Encouraging the defendant to lead a law-abiding life in the future and deterring him from future offenses. (d) Deterring others from criminal conduct by demonstrating its consequences. (e) Preventing the defendant from committing new crimes by isolating him for the period of incarceration. (f) Securing restitution for the victims of crime. (g) Achieving uniformity in sentencing." *Id*. at n.5.

[32] *Id*. (internal citations omitted).

CITATORS

American legal research relies heavily on citators, including Shepard's in Lexis and KeyCite in Westlaw. Citators list other cases, statutes, court filings, and secondary sources that cite the case being considered, and provide an informed indication as to whether the case is still good law.[33]

Analyzing the cases that cite *Alvarez* is difficult because there are so many of them.[34] It can help to limit this corpus by searching within it for a specific crime, such as cases citing Penal Code section 273.5, a wobbler statute that punishes "willful infliction of corporal injury" on someone with whom the defendant has a certain relationship.[35] This allows a judge presiding over a similar case to see how other judges handled a decision like this. There are more than 150 cases that (a) cite *Alvarez*, and (b) include "273.5" in the text, which, while still a large number, is more manageable that nearly 2,000.[36]

The ATLEAST operator, available in both Lexis and Westlaw, is also a helpful tool for limiting a list of citing cases by relevance. For example, search within all the cases citing *Alvarez* using this variable: *ATLEAST5(nature /5 circumstances)*. The resulting list will have only those cases that (a) cite *Alvarez*, and (b) have the phrase "nature and circumstances" at least five times, which means the case likely gives this part of the analysis more than just a passing mention.

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[33] In both KeyCite and Shepard's, these indications are assigned by human editors who read the citing cases and determine their impact on the case being considered. When teaching research to law students, I characterize this as "crowdsourcing" your research: you consider what the crowd gives you, but in the end, you must make your own determination.

[34] *Alvarez* has been cited in nearly 2,000 California cases.

[35] CAL. PENAL CODE § 273.5 (West 2020). People who have any of these relationships with the defendant are protected under this statute: spouse or former spouse; cohabitant or former cohabitant; fiancé, fiancée, someone to whom the defendant is or was engaged, or someone whom the defendant is or was dating; or mother or father of the defendant's child. *Id*. at (b)(1) – (b)(4). This statute is also known by various other names, including the domestic violence statute or the spousal battery statute. *See, e.g.*, People v. Vargas, 2004 WL 2030234, at 8 (Cal. App. 2004).

[36] Some of those cases are irrelevant to an analysis of judicial discretion in § 273.5 cases, since the discretionary decision involved a different offense altogether. *See, e.g.*, People v. Robinson, 2014 WL 2703155 (Cal. App. 2014) (crime at issue in the § 17(b) discretion analysis was possession of methamphetamine; defendant was convicted of a § 273.5 felony earlier in his criminal career and this conviction was mentioned in the case's three-strikes discussion).

CASE LAW DIGESTS

American legal researchers have long relied on case law digests, which are lists of cases by subject. They were developed to address what, in its 1910 report, the American Bar Association's Committee on Law Reporting and Digesting characterized as the "intolerably large" volume of judicial opinions released by American courts that lawyers had to comb through when doing legal research.[37]

Both Lexis and Westlaw add headnotes to their editorial content for cases, which include excerpts or summaries of the opinion's important concepts. Headnotes are classified by subject, indicated as hyperlinked topics and sub-topics (the latter of which are called "key numbers" in Westlaw). To generate a digest of cases by subject, all the researcher must do is click a relevant topic or subtopic.[38]

In Westlaw, the topic and key number assigned to the headnote in *Alvarez* that discusses section 17(b) discretion is *110 Criminal Law > I. Nature and Elements of Crime > K27 Felonies and Misdemeanors*. A digest of California cases for this key number includes nearly 400 items. In Lexis, the topic assigned to the section 17(b) discretion text in *Alvarez* is much broader: *Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors*. While a digest of California decisions for this topic returns nearly 9,000 cases, searching within that list for "17(b)" limits it to only 89.

[37] *Report of the Committee on Law Reporting and Digesting*, 33 ANN. REP. A.B.A. 531, 532 (1910).

[38] Digests are not a perfect tool. For example, a digest will have duplicate entries of the same case because some cases have multiple headnotes that have the assigned key number. Furthermore, California Court of Appeals cases are depublished (and, therefore, not citable). *See* Cal. Rules of Court 8.1105 (West 2021); *see also* University of San Francisco Dorraine Zief Law Library, *Depublication of California Cases*, https://legalresearch.usfca.edu/depublication [https://perma.cc/G8ES-NQP3]. While depublished California Court of Appeal cases still appear in both Lexis and Westlaw, they will not include headnotes if they have not been given editorial treatment. Therefore, relying on a digest alone may not provide the fullest picture of the case law on the topic.

ANNOTATED CODE

Annotated codes are available in both Westlaw and Lexis. After displaying the statute, they list cases, journal articles, treatises, and other materials that cite and explain the statute. These citations are one of the most helpful tools available for federal and state statutory research in U.S. law.

A search of the term "wobbler" in the annotated California Penal Code in Westlaw returns more than 100 results, many of which are occurrences of that term in the Notes of Decisions of various statutes.[39] This case-finding methodology has a built-in method for breaking the research down into more digestible parts. For example, only two cases in Westlaw's Notes of Decisions for Section 11368,[40] which criminalizes forging or altering prescriptions, include the word "wobbler." In one, *People v. Gollardo*,[41] the reasons that the judge denied the defendant's Section 17(b) motion are listed in its Notes of Decisions description: "extensive gang-related history and poor performance on probation and parole."[42]

SECONDARY LITERATURE

Of course, legal research projects should start in the secondary literature, which includes plain-language descriptions of what a wobbler is, as well as citations to Section 17(b) and *Alvarez*. However, it is also helpful to go back to secondary sources later in the research, especially after reading the cases that analyze the rule and its application. As the researcher gains more expertise in this topic, they can better

[39] Westlaw's "Notes of Decisions are annotations written by attorney editors that summarize important cases interpreting a statute or regulation, giving you a more complete picture of how the law has been applied." Thomson Reuters, *Westlaw Tip: Use Notes of Decisions to Quickly Find Relevant Cases Interpreting a Statute or Regulation*, Sept. 4, 2019, https://legal.thomsonreuters.com/blog/westlaw-tip-of-the-week-use-notes-of-decisions-to-quickly-find-relevant-cases [https://perma.cc/3TY3-2MEQ]. Lexis has an identical feature in its annotated codes with a similar name: "Notes to Decisions." However, a search of "wobbler" in Lexis's Deering's California Codes Annotated only returns 46 results.

[40] CAL. PENAL CODE § 11368 (West 2020).

[41] 225 Cal. Rptr.3d 666 (Cal. App. 2017).

[42] CAL. PENAL CODE § 11368 (West 2020) (citing, in the Notes of Decisions, People v. Gollard, 225 Cal Rptr.3d 666 (Cal. App. 2017)).

appreciate more nuanced discussions of it in treatises and journal articles and find relevant passages in cases that they may have overlooked in earlier readings.

The Witkin treatises are a leading secondary source for California law. Bernard Witkin's 1928 mimeographed bar exam preparation outline has grown into a collection of materials that exhaustively cites California cases and themselves have been cited in California judicial opinions thousands of times.[43] The current edition of *Witkin California Criminal Law*,[44] which I returned to frequently throughout the course of conducting this research for both its explanatory content and its case citations, discusses § 17(b) judicial discretion for wobbler offenses in its introductory chapter on crimes,[45] and its chapter on punishment, under the section describing California's Three Strikes Law.[46]

RESEARCHING JUDICIAL DISCRETION IN SENTENCING UNDER GERMAN LAW

In accordance with Germany's civil law legal tradition, the power to create law is held by the legislature, not by the judiciary.[47] Therefore, while case law can indicate how a statute should be

[43] Adam Badawi, *Introduction to the Bernard Witkin Oral History*, 4 CAL. SUP. CT. HIST. SOC'Y Y.B. 95, 95 (1998-99). Witkin's vision for these works was influenced by his work as a permanent clerk to the California Supreme Court, where he established his goal to "integrat[e] individual cases with the law as a whole," and did this by creating "a review of the current law that was selective, practical, comprehensive, and readable," while also being "analytical and critical, rather than mere recitation and compression." *Id*. at 96, 103. After Witkin left his position with the court, he continually revised and expanded his collection of treatises. *Id*. at 102-03. Given his view of the development of California's common law, he had a staff of attorneys to assist him by "track[ing] California decisions and incorporat[ing] them into subsequent editions of his books." *Id*. at 103. The Witkin treatises are regularly updated and are available in Westlaw.

[44] "From arrest through trial, appeal, and postconviction review, California Criminal Law offers the most efficient method for approaching all aspects of criminal law and procedure in California." WITKIN CALIFORNIA CRIMINAL LAW, *Scope Information: Contents*, Westlaw.

[45] *Felony-Misdemeanor Test*, 1 WITKIN CAL. CRIM. LAW 4TH INTRO--CRIMES § 88 (2021).

[46] *Felony-Misdemeanors ("Wobblers")*, 3 WITKIN CAL. CRIM. LAW 4TH PUNISHMENT § 437 (2021).

[47] In the literature, this is characterized as in keeping with a tradition that goes back to ancient Rome, in which the function of the judge, rather than to create law, is to "merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union." JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 36 (3rd ed. 2007).

interpreted, judicial opinions from German courts, including the Federal Court of Justice (*Bundesgerichtshof*, hereinafter BGH), do not create binding law in the same sense that court decisions in a common law system do.[48]

However, German judicial opinions share some features of common law opinions. For the sake of legal consistency, German courts not only "pay serious attention" to the decisions issued by the country's top court,[49] but also engage in the practice of "decid[ing] similar cases similarly."[50] Additionally, it is not uncommon for German judicial opinions to cite other cases in a manner that suggests they have precedential value.[51] Furthermore, in some areas of law, such as the law of obligations, the German courts have "create[d] an immense body of new law" and "developed working attitudes toward case law that are much more like common law courts[.]"[52]

What kind of impact does this have on legal research? While cases may be important, they clearly do not have the same status as cases in a common law jurisdiction. Therefore, German legal researchers may first consult other sources to learn how statutory law should be interpreted, including statutory

[48] Specifically, the principle of *stare decisis*, as it is practiced in common law courts, does not exist in the civil law system. *See id.* at 148. However, if a case is remanded by the Federal Court of Justice back to the trial court, the higher court's decision regarding any procedural or substantive error in that case is binding on the lower court in its disposition. See PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 398 (2004).

[49]Such attention is paid because Federal Court of Justice decisions are viewed as indicators of how similar controversies might be resolved in the future. *Id.* Furthermore, the Federal Court is Justice gives own decisions "considerable deference in the interest of maintaining the consistency and predictability of the law," even though they are not expressly bound by them. *Id.*

[50] MERRYMAN & PEREZ-PERDOMO, *supra* note 47, at 148.

[51] *See generally* Roland Wagner-Döbler & Lothar Phillips, *Präjudizien in der Rechtsprechung: Statistische Untersuchungen Anhand der Zitierpraxis Deutscher Gerichte [Precential Cases in Judicial Opinions: Statistical Survey of the Citation Practice of German Courts]*, 23 RECHTSTHEORIE 228 (1992) (presenting the results of a study of the number and types of citations to case law in decisions by German courts, focusing on the years 1980, 1984, and 1988).

[52] MERRYMAN & PEREZ-PERDOMO, *supra* note 47, at 53.

commentaries,[53] *Lehrbücher* (textbooks),[54] and law journal articles.[55] In this project, research in statutory commentaries eventually led to an unexpectedly valuable resource: a very helpful practice-oriented treatise with a clear explanation of how judges should actually exercise this discretion.

HISTORICAL BACKGROUND OF JUDICIAL DISCRETION IN SENTENCING

Judges have long had discretion over sentencing in the region we know as Germany today. For example, in the Kingdom of Saxony, judges could select an appropriate punishment "under the circumstances of the case and in accordance with the particular nature of the wrongful act and the degree of malice displayed by the perpetrator."[56] Modern German criminal law also centers the assessment of criminal punishment on the guilt of the offender,[57] and a criminal sentence is only proportional and just if the court considers all relevant factors, including those both favorable and unfavorable to the offender.[58]

[53] Statutory commentaries are discussed at length later in this section. *See infra* notes 62-76 and accompanying text.

[54] A *Lehrbuch* is a short paperback book with has a pedagogical focus and, in general, much easier language than statutory commentaries. I used *Lehrbücher* to prepare for lectures and exams as an LLM student in Germany.

[55] Legal periodicals (*juristische Zeitschriften*) include accessible, brief introductions to complicated topics. Many German law journals are published by legal publishers rather than law schools. One widely-read law journal is *JuristenZeitung (JZ)*, which is published every two weeks by the Mohr Siebeck publishing house and "presents articles dealing with foundational questions and current developments in legal scholarship and practice." C.H. Beck Verlag, JuristenZeitung (JZ), https://www.beck-shop.de/JuristenZeitung-JZ/product/22095 [https://perma.cc/MWW3-KLJJ] („Die JuristenZeitung greift in Aufsätzen namhafter Autoren grundlegende Fragestellungen und aktuelle Entwicklungen in Rechtswissenschaft und -praxis auf.").

[56] AUGUST OTTO KRUG, COMMENTAR ZU DEM STRAFGESETZBUCHE FUER DAS KOENIGREICH SACHSEN VOM 11. AUGUST 1855 UND DEN DAMIT IN VERBINDUNG STEHENDEN GESETZEN [COMMENTARY ON THE CRIMINAL CODE FOR THE KINGDOM OF SAXONY OF AUGUST 11, 1855 AND WITH IT THE RELATED LAWS] Art. 72 (1855) ("...unter Berücksichtigung der dabei eintretenden besonderen Verhältnisse festzusetzen, welche den Schuldigen nach der besonderen Beschaffenheit der zu bestrafenden Handlung und nach dem Grade der dabei gezeigten Böswilligkeit...").

[57] MÜNCHENER KOMMENTAR ZUM STRAFGESETZBUCH (MÜKOSTGB) (MUNICH COMMENTARY ON THE CRIMINAL CODE) § 46 rn. 1 (Bernd von Heintschel-Heinegg ed., 3rd/4th ed. 2019-20), https://beck-online.beck.de/ [hereinafter MÜKOSTGB].

[58] *Id.*

JUDICIAL DISCRETION IN THE GERMAN CRIMINAL CODE (*STRAFGESETZBUCH*)

German legal research begins in the codes: here, the Criminal Code (*Strafgesetzbuch*, hereinafter *StGB*).[59] StGB § 46 addresses judicial discretion in sentencing.

Strafgesetzbuch § 46:	**Criminal Code § 46:**
(1) Die Schuld des Täters ist Grundlage für die Zumessung der Strafe. Die Wirkungen, die von der Strafe für das künftige Leben des Täters in der Gesellschaft zu erwarten sind, sind zu berücksichtigen.	(1) The guilt of the perpetrator is the basis for the determination of the punishment. The expected effects of the punishment on the perpetrator's future life in society are to be considered.
(2) Bei der Zumessung wägt das Gericht die Umstände, die für und gegen den Täter sprechen, gegeneinander ab. Dabei kommen namentlich in Betracht:	(2) In making this determination, the court is to balance the circumstances that weigh in favor of and against the perpetrator. In doing so, the following are to be considered:
die Beweggründe und die Ziele des Täters, besonders auch rassistische, fremdenfeindliche oder sonstige menschenverachtende,	the motivations and goals of the perpetrator, especially those that are racist, xenophobic, or otherwise inhuman,
die Gesinnung, die aus der Tat spricht, und der bei der Tat aufgewendete Wille,	the attitude expressed by the offense, and the intention exercised in the commission of the offense,
das Maß der Pflichtwidrigkeit,	the measure of negligence,
die Art der Ausführung und die verschuldeten Auswirkungen der Tat,	the way in which the offense was committed and the guilt-invoking effects of the offense,
das Vorleben des Täters, seine persönlichen und wirtschaftlichen Verhältnisse sowie	the perpetrator's prior life, his personal and economic circumstances, as well as
sein Verhalten nach der Tat, besonders sein Bemühen, den Schaden wiedergutzumachen, sowie das Bemühen des Täters, einen Ausgleich mit dem Verletzten zu erreichen.	his behavior after committing the offense, especially his efforts to repair any damage, as well as the efforts of the perpetrator to come to a settlement with the victim.
(3) Umstände, die schon Merkmale des gesetzlichen Tatbestandes sind, dürfen nicht berücksichtigt werden.	(3) Circumstances that are already factored under the criminal statute may not be considered.[60]

Understanding the Scope of StGB Section 46 Discretion: Statutory Commentaries

Although the German judicial discretion statue is more detailed than California's statute, it does not explain how judicial discretion works in practice. Therefore, exploring the treatment of StGB § 46 in

[59] STRAFGESETZBUCH (STGB) (CRIMINAL CODE) (Ger.).

[60] *Id*. at § 46. Criminal sentences can also be reduced under StGB § 46a (if the offender and the victim participate in mediation, or if the offender pays compensation) and StGB § 46b (if the offender voluntarily provides information that prevents other crimes).

statutory commentaries would be critical to a research project like this. A statutory commentary[61] is "any text that is structurally based on another text (primary text, base text, reference text) and provides a continuous explanation of it."[62] In both structure and function, they are based on glosses, ancient Roman legal text that re-emerged and, in the Middle Ages, were taught to aspiring lawyers and legal scholars who came from throughout Europe to study at the University of Bologna.[63]

The primacy of statutory commentaries in German legal research cannot be understated:

> A continental European lawyer confronted with a legal question will immediately look for legal rules that may apply. In doing so, he or she will, almost instinctively, first turn to statutory provisions. Once they are identified, the lawyer will then explore how these provisions have been interpreted by courts and scholars. If no blackletter rules can be found, the lawyer will try to locate other authority, especially pertinent court decisions. A German-style *Kommentar* is geared exactly toward this analysis.[64]

However, the literature is clear: while commentaries are widely influential, they do not have an enforceable "interpretive power"[65] and only the statutory text should be considered to be "the law."[66]

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[61] As this section explains, German statutory commentaries are weightier than annotated codes in U.S. law, in that they center content that analyzes the code in a scholarly, doctrinal way. That said, there are some code-centered treatises among American legal secondary sources that function in a similar way to German commentaries, such as *Nimmer on Copyright*, which includes the text of the Copyright Act of 1976 in an appendix and whose content generally follows the outline of the statutory provisions.

[62] "Kommentar ist demnach jeder Text, der sich strukturell an einen anderen Text anlehnt (Primärtext, Basistext, Referenztext) und diesen fortlaufend erläutert." DAVID KAESTLE-LAMPARTER, WELT DER KOMMENTARE: STRUCKTUR, FUNKTION UND STELLENWERT JURISTISCHER KOMMENTARE IN GESCHICHTE UND GEGENWART [WORLD OF COMMENTARIES: STRUCTURE, FUNCTION, AND IMPORTANCE OF LEGAL COMMENTARIES IN HISTORY AND MODERNITY] 9 (2016).

[63] *See id*. at 30-38; *see also* Thomas Henne, *Die Prägung des Juristen durch die Kommentarliteratur – Zu Form und Methode einer juristischen Diskursmethode [The Formation of the Lawyer Through the Commentary Literature – On the Form and Method of a Legal Discourse Methodology]*, BETRIFFT JUSTIZ no. 87, at 352, 352-53 (Sept. 2006).

[64] Mathias Reimann, *Legal "Commentaries" in the United States: Division of Labor*, *in* JURISTISCHE KOMMENTARE: EIN INTERNATIONALER VERGLEICH [LEGAL COMMENTARIES: AN INTERNATIONAL COMPARISON] 277, 292 (David Kästle-Lamparter, Nils Jansen & Reinhard Zimmermann eds., 2020).

[65] "The commentary does not have interpretive "power," but its word is heard everywhere" ("[D]er Kommentar verfügt zwar über keine Interpretationsmacht, aber sein Wort wird überall gehört"). Peter Lerche, *Maunz/Dürig, Grundgesetz*, *in* RECHTSWISSENSCHAFT UND RECHTSLITERATUR IM 20.JAHRHUNDERT: MIT BEITRÄGEN ZUR ENTWICKLUNG DES VERLAGES C.H. BECK [LEGAL SCIENCE AND LEGAL LITERATURE IN THE 20TH CENTURY: WITH CONTRIBUTIONS ON THE DEVELOPMENT OF THE PUBLISHER C.H. BECK] 1019, 1025 (2007).

[66] Taking the commentary as a whole, "the statute, and its text only, is declared to be important. Customary law, legal history, comparative law, and legal philosophy must take a back seat" *("Das Gesetz, und nur dessen Wortlaut,*

Each commentary section is written by one or more authors under the direction of a general editor[67] and covers one portion[68] of the code. The statutory text is followed by the author's commentary on it, organized by numbered paragraphs.[69] This commentary interprets, clarifies, and substantiates the statutory text, offering the reader an explanatory lens through which to view and understand it.[70] It also cites other secondary sources and judicial opinions.[71]

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wird für wichtig erklärt. Gewohnheitsrecht, Rechtsgeschichte, Rechtsvergleichung und Rechtsphilosophie müssen in die zweite Reihe treten."). Henne, *supra* note 63, at 353.

[67] Many German commentaries are known by the name(s) of their original or early author(s) or editor(s), a problematic convention when the commentary is named after lawyers who were prominent during the National Socialist period. For example, a leading commentary on the German Civil Code was named after Otto Palandt, the head of the law student examination board in the administration of the Third Reich. Initiative Palandt Umbennen [Initiative to Rename the Palandt], *Rename the Palandt: English Version*, https://palandtumbenennen.de/english-version/ [https://perma.cc/PUV3-V5AB]. In July 2021, legal publisher Verlag C.H. Beck announced the renaming of several of its commentaries that were named after these lawyers, including the *Palandt*. Rone Steinke, *Verlag Beendet Ehrung von Nazis [Publisher Ends its Honoring of Nazis]*, SÜDDEUTSCHE ZEITUNG, July 27, 2021, https://www.sueddeutsche.de/politik/justiz-nationalsozialisten-beck-verlag-ehrung-1.5364430 [https://perma.cc/9L7X-ECQH].

[68] The use of "portion" here is deliberate. The terminology is confusing when translated from German to English. In American legal writing, the "§" symbol in the statutory context indicates a "section." However, in German, the portion of a code or a statute indicated by the § symbol is called either a "section" (German: "Abschnitt" or, confusingly, "Paragraph") or an "article" (German: "Artikel"). *See Paragraph*, CREIFELDS KOMPAKT RECHTSWÖRTERBUCH [CREIFELDS COMPACT LEGAL DICTIONARY] (3rd ed. 2020), https://beck-online.beck.de/ ("'Paragraph' ist ein fortlaufender nummerierter kleiner Abschnitt eines Gesetzes, der mit dem Zeichen § gekennzeichnet wird." ["'Paragraph' is a consecutively numbered small portion of a law, which is indicated by the § symbol."]. The text within an article of a German code or statute is further broken down into smaller units. In English, these are a "paragraph" in English (German: "Absatz," abbreviated "Abs."), and a "sentence" (German: "Satz").

[69] The numbering system used for descriptive paragraphs in German statutory commentaries is comprised of "margin numbers" (German: "Randnummern," abbreviated "Rn."). "Margin numbers" are sometimes called "marginals." in English texts citing German commentaries. Some authors who write for American legal publications replace "Rn." with a paragraph symbol ("¶") when citing these descriptive paragraphs, given that the Bluebook does not specify how to do so.

[70] *See* KAESTLE-LAMPARTER, *supra* note 62, at 12-13.

[71] Historically, some commentaries, especially those that were written more to serve practitioners than academics, have cited a lot of judicial decisions. *See id*. at 280-281. There were mixed feelings about this practice: while some called the trend "terrible," it was also recognized that such commentaries were "valuable aids" to practicing attorneys. *Id.*

Statutory commentaries are available both in print and in subscription electronic databases. Print commentary research is done by having several of them open to the same code section at once, allowing the researcher to consider them in turn. This would have been my preference for this project. However, because my library was closed due to the COVID-19 pandemic,[72] I used Germany's Beck-Online subscription database, in which I consulted the following works: (1) *Beck'sche Online-Kommentar Strafgesetzbuch* (hereinafter *BeckOK StGB*);[73] (2) *Lackner/Kühl Strafgesetzbuch Kommentar* (hereinafter *Lackner/Kühl StGB*);[74] (3) *Schönke/Schröder Strafgesetzbuch Kommentar* (hereinafter *Schönke/Schröder StGB*);[75] and (4) *Münchener Kommentar zum Strafgesetzbuch* (hereinafter *MüKoStGB*).[76]

[72] I worked on this article throughout 2020 and 2021. In March 2020, the Harvard Law School Library closed in response to the COVID-19 global pandemic and reopened in July 2021. Our library's print German commentaries are classified as primary sources and do not circulate. I could have arranged to bring them home, but I wanted to experience this project as if I were a library user who had to deal with the closure.

[73] BECK'SCHE ONLINE-KOMMENTAR STRAFGESETZBUCH (BECKOK STGB) (BECK'SCHE CRIMINAL CODE ONLINE COMMENTARY) (Bernd von Heintschel-Heinegg ed., 48th ed., 2020), https://beck-online.beck.de/ [hereinafter BECKOK STGB]. The publisher describes this as the "commentary for the 21st century." C.H. Beck Verlag, *BeckOK – Kommentierung für das 21. Jahrhundert*, https://rsw.beck.de/digital/beckok [https://perma.cc/SA4G-X8W7]. Updated every three months, it provides the most current commentary on important German codes and laws in an online-optimized format and has information that lawyers need for effective practice. *Id.*

[74] STRAFGESETZBUCH KOMMENTAR (CRIMINAL CODE COMMENTARY) (Kristian Kühl & Martin Heger eds., 29th ed. 2018), https://beck-online.beck.de/ [hereinafter LACKNER/KÜHL STGB]. This is described by the publisher as "the compact commentary" on the criminal code that provides a "reliable overview of the important and current highest court rulings and literature." Beck-Shop.de, *Lackner/Kühl Strafgesetzbuch Kommentar Product Description*, https://www.beck-shop.de/lackner-kuehl-strafgesetzbuch-stgb/product/21921738 [https://perma.cc/U8EW-RMVF].

[75] STRAFGESETZBUCH KOMMENTAR (CRIMINAL CODE COMMENTARY) (Albin Eser et al. eds, 30th ed. 2019), https://beck-online.beck.de/ [hereinafter SCHÖNKE/SCHRÖDER STGB]. Its publisher describes its explanation of the criminal code is "thorough and practice-oriented" and its organization and presentation as optimal for use by practicing attorneys. Beck-Shop.de, *Schönke/Schröder Strafgesetzbuch Kommentar Product Description*, https://www.beck-shop.de/schoenke-schroeder-strafgesetzbuch-stgb/product/17285246 [https://perma.cc/3QSU-FH7F].

[76] MÜKOSTGB, *supra* note 57. The Munich StGB commentary consists of eight volumes that are updated on a staggered schedule. The content for § 46 StGB is in volume 2, the fourth edition of which was published in 2020.

BECKOK STGB: INTRODUCTION OF THE "ROOM-TO-PLAY THEORY" AND ITS THREE-PART FRAMEWORK

I started with the *BeckOK StGB*, thinking it would be optimized for online research. Its 165 paragraphs of explanatory information for Section 46 included "Steps for Determining Punishment According to the Governing Room to Play Theory (Federal Court of Justice)."[77]

This theory was established by a 1954 BGH decision giving judges "room to play" when calculating criminal sentences, since "which punishment is appropriate for which crime cannot be determined exactly."[78] Upper and lower limits are "established by those sentences already handed down and those yet to be handed down."[79] However, while the judge has leeway in this situation, the sentence cannot be too long to be considered inappropriate. Instead, the judge must decide where within this "room to play" to situate the punishment.[80]

According to *BeckOK StGB*, room-to-play has a three-part framework:

1. STEP ONE: determine of the scope of statutory criminal punishment.[81]
2. STEP TWO: place the offense in the scope of criminal punishment,[82] which involves five considerations: (1) orientation toward punishment goals;[83] (2) determination of factors related

[77] „C. Schritte der Strafzumessung nach der herrschenden Spielraumtheorie (BGH)." BECKOK STGB, *supra* note 73 at § 46, rn. 3-6.

[78] Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 11, 1954, 5 StR 476/54, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 190, 191, 1955 (Ger.) („Welche Strafe schuldangemessen ist, kann nicht genau bestimmt werden.").

[79] *Id*. ("Es besteht hier ein Spielraum, der nach unten durch die schon schuldangemessene Strafe und nach oben durch die noch schuldangemessene Strafe begrenzt wird. Der Tatrichter darf die obere Grenze nicht überschreiten.").

[80] *Id*. ("Er darf also nicht eine Strafe verhängen, die nach Höhe oder Art so schwer ist, dass sie von ihm selbst nicht mehr als schuldangemessen empfunden wird. Er darf aber nach seinem Ermessen darüber entscheiden, wie hoch er innerhalb dieses Spielraumes greifen soll."). In this case, the BGH held that the trial court correctly refused to reduce the defendant's sentence from life imprisonment for murdering his young daughter, and had exercised its discretion, under the "room to play" theory, properly. *See id*.

[81] "Erster Schritt: Ermittlung des gesetzlichen Strafrahmens." BECKOK STGB, *supra* note 73 at § 46 rn. 3.

[82] "Zweiter Schritt: Einordnung der Tat in den Strafrahmen." BECKOK STGB, *supra* note 73 at § 46 rn. 4.

[83] *Id*. at rn. 6 ("Ausrichtung an den Strafzwecken").

to guilt and prevention;[84] (3) establishment of sentencing factors that have exacerbating and mitigating effects;[85] (4) balancing of the relevant circumstance against one another;[86] and (5) determination of the concrete punishment.[87]

3. STEP THREE: place the offense in the scope of criminal culpability, considering type and length of punishment.[88]

This framework explains how German trial court judges should exercise sentencing discretion. Step one is easy: look at the mandated sentence range in the section of the code defining the crime.[89] Steps two and three, however, are more complicated and require further clarification: consider the offense, how it was committed, and the demeanor of the offender during and after its commission.

EXPLORING THE ROOM-TO-PLAY THEORY IN OTHER COMMENTARIES

Using **spielraum 46 StGB** as a keyword search in Beck-Online and limiting the search to commentaries returned 76 results. These materials provided a holistic view of the scholarly discussion surrounding the room-to-play theory, especially problems related to its lack of precision, and introduced additional terms of art for future searches.

According to the *MüKoStGB*, discretionary decisions, which are only reviewable on appeal in limited circumstances, create "valuation problems" for courts of appeals and the Federal Constitutional

[84] *Id*. ("Ermittlung der schuld- und präventionsrelevanten Faktoren").

[85] *Id*. ("Festlegung der strafschärfenden oder -mildernden Wirkung von Strafzumessungstatsachen").

[86] *Id*. ("Abwägung der relevanten Umstände gegeneinander").

[87] *Id*. ("Bestimmung der konkreten Strafe").

[88] "Dritter Schritt: Einordnung der Tat in den Schuldrahmen hinsichtlich Strafart und Strafhöhe." BECKOK STGB, *supra* note 73 at § 46 rn. 4.

[89] For example, the statutory range of punishment for arson (*Brandstiftung*) is incarceration for one to ten years, reduced to six months to five years in "less serious cases" *("minder schweren Fällen*"). STGB § 306 (Ger.).

Court (*Bundesverfassungsgericht*).[90] Furthermore, the case law rejects any attempt to "mathematize" the process for determining sentences.[91] In the end, the scope of the room to play must be large enough to provide sufficient room to value and weigh all the relevant factors.[92]

According to *Lackner/Kühl StGB*, the room-to-play theory, also known as the "framework" theory ("*Rahmentheorie*"),[93] is a "substantial part of the sentencing process."[94] However, the theory has its critics, some of whom call for a process reflecting a more precise connection between the crime and the offender's guilt.[95] They believe the lack of precision is problematic because, even if the judge "observes all principles defined by statutory law, case law, and legal scholarship, [the judge's] result, due to the complexity of the determinative considerations, can never authoritatively be shown as the only 'proper' decision."[96]

Schönke/Schröder StGB[97] illustrated the room-to-play theory's imprecision by highlighting the lack of uniformity of its description in the literature: depending on who articulates the test, it has three, five, or

[90] MÜKOSTGB, supra note 57, at § 46 rn. 3 ("Dieser ist im Rahmen des Rechtsmittelsystems nur eingeschränkt überprüfbar und hat zu einer Fülle von Wertungsproblemen in der Rechtsprechung der Revisionsgerichte und des Bundesverfassungsgerichts geführt).

[91] *Id*. at rn. 199 ("Die Rechtsprechung [hat] eine Absage erteilt wie weiter gehenden Versuchen zur Mathematisierung des Strafzumessungsvorgangs.").

[92] *Id*. at rn. 168 (Der Richter muss einen echten Spielraum haben, "in dem er die Strafzwecke und -tatsachen gegeneinander abwägen kann. Der Spielraum muss so groß sein, dass die Umstände des Falles und die Strafzumessungsfaktoren in ihm gewürdigt und abgewogen werden können.").

[93] LACKNER/KÜHL STGB, *supra* note 74, at § 46 rn. 24.

[94] *Id*. ("Der dadurch entstehende Spielraum ist vom Richter für die Verfolgung der anerkannten Strafzwecke auszunutzen; deren Berücksichtigung in diesem Rahmen ist also substantieller Bestandteil der Strafzumessung.").

[95] *See id*. at § 46 rn. 25a.

[96] *Id*. at § 46 rn. 50 ("Ob und wieweit damit Ermessensausübung verbunden, dh dem Richter ein Rechtsfolgeermessen in dem Sinne eingeräumt ist, dass er zwischen mehreren „richtigen" Strafen wählen darf, ist umstritten und nicht zuletzt auch von der Bestimmung des Ermessensbegriffs abhängig.").

[97] Helpfully, *Schönke/Schröder StGB* has a subject index after the statutory text for each code portion. The index for § 46 indicates that judicial discretion in criminal matters ("*Ermessen, strafrichterliches*") is covered in paragraphs 7 and 65-68. Paragraph 7 discusses balancing the circumstances in determining a sentence. It cites a 2005 BGH decision, which states that trial court judges must assess, measure, and balance the relevant exonerating and detrimental facts, and that this determination can only be overturned on appeal if it is inherently erroneous, contradicts recognized criminal punishment goals, or if the punishment imposed is too high or too low to properly punish the perpetrator. SCHÖNKE/SCHRÖDER STGB, *supra* note 75, at § 46 rn. 7 (citing Bundesgerichtshof [BGH]

eleven phases.[98] A common phase in every test, however, is considering preventative goals of sentencing: not only repaying society for the wrong committed, but also reducing the sentence if necessary to ensure the offender has a place in society in the future.[99]

DECIPHERING THE COMMENTARIES' CITATIONS TO SECONDARY SOURCES

All the commentaries cite numerous secondary sources. However, without some knowledge of German language and legal bibliography, it can be difficult to figure out exactly what is being cited.

Many citations include the letters "FS." This stands for *Festschrift*, a volume of essays celebrating the honoree's scholarly work and career.[100] Here is an example of this, provided in the *MüKoStGB*: *"Mosbacher, Der Spielraum des Tatrichters bei Wertungs- und Wahrscheinlichkeitsurteilen, FS Seebode, 2008, 227."* If this were cited according to the (American) Bluebook's rules, it would be easier to understand what it is and where to find it:

> Andreas Mosbacher, *Der Spielraum des Tatrichters bei Wertungs- und Wahrscheinlichlkeitsurteilen [The Judge's Room to Play in Evaluation and Likelihood Judgments]*, *in* FESTSCHRIFT FÜR MANFRED SEEBODE ZUM 70. GEBURTSTAG AM 15. SEPTEMBER 2008 (Hendrik Schneider et al. eds., 2008).

Article citations may also give researchers who are inexperienced with German legal bibliography trouble. *Lackner/Kühl StGB* includes this citation: *"Meier, Licht ins Dunkel: Die richterliche Strafzumessung, JuS 05, 769."* The Bluebook would require this law journal article to be cited as follows:

[Federal Court of Justice] June 29, 2005, 1 StR 149/05, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 2006, 568 (Ger)).

[98] SCHÖNKE/SCHRÖDER STGB, *supra* note 75, at § 46 rn. 3.

[99] *Id.* at § 46 rn. 5 (internal citations omitted) („[D]ie Wirkungen, die von der Strafe für das künftige Leben des Täters in der Gesellschaft zu erwarten sind, [sind] zu berücksichtigen. Soweit es sich vertreten lässt, ist die Strafe daher so zu bemessen, dass sie einen bisher sozial eingeordneten Täter nicht aus der sozialen Ordnung herausreißt.").

[100] Some *Festschriften* are indexed in the Index to Foreign Legal Periodicals in HeinOnline, which is helpful.

Bernd-Dieter Meier, *Licht ins Dunkel: Die richterliche Strafzumessung [Light in the Dark: The Judicial Criminal Penalty Determination]*, 2005 JURISTISCHE SCHULUNG (JuS) 879 (2005).

Citations to treatises can be especially mysterious, as illustrated by this example from *Lackner/Kühl StGB*: *"Kaspar, 2014."* A reasonable guess is that Kaspar is the author's last name. Since a title to the work is not provided, hopefully someone named Kaspar wrote a book on this topic in 2014 and a library bought it and cataloged it. Fortunately, this happened: I believe this citation refers to Johannes Kaspar's 2014 book *Verhältnismäßigkeit und Grundrechtsschutz im Präventionsstrafrecht [Proportionality and Protection of Basic Rights in Preventative Criminal Law]*.

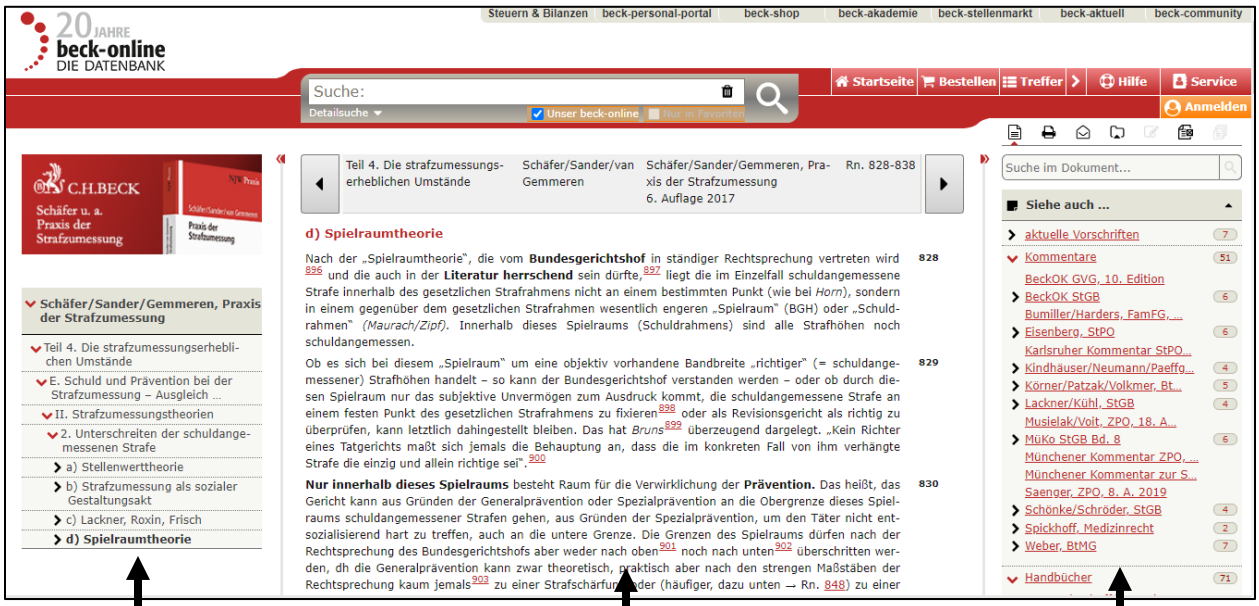
It is most important to remember that citations in statutory commentaries are packed with treasures for someone willing to do the work to puzzle through them. For example, I frequently saw citations to a treatiese called *Praxis der Strafzumessung [Practice of Criminal Punishment Calculation]*.[101] In fact, it was cited so often that I felt compelled to look at it; fortunately, it is included in the Beck-Online database. This treatise turned out to be imminently readable, and so helpful in understanding how sentencing discretion worked in practice that I wished I had consulted it earlier in the process.

Practice-Oriented Treatise: Praxis der Strafzumessung

Beck-Online's practice-oriented treatise on criminal punishment calculation, *Praxis der Strafzumessung*, has a simple, clear description of the three-part *Spielraum* theory, with shorter paragraphs and easier language than the commentaries.[102] Its section on this topic is cited often, as indicated in the citator on the right side of the screen (shown below).

[101] GERHARD SCHÄFER ET AL., PRAXIS DER STRAFZUMESSUNG (6th ed. 2017), https://beck-online.beck.de. In print, this book is 786 pages long, and is described by the publisher as a critical resource for criminal defense attorneys who need exact knowledge of how sentencing determination works when crafting a defense and drafting filings. Beck-Shop.de, *Praxis der Strafzumessung Product Description*, https://www.beck-shop.de/schaefer-sander-van-gemmeren-praxis-strafzumessung/product/14840779 [https://perma.cc/LL4U-PF99].

[102] *See* SCHÄFER ET AL., *supra* note 101, at rn. 828-38.



After reading about the room-to-play theory in *Praxis der Strafzumessung*, I started to question whether a non-native speaker who knows nothing about this topic should, in fact, start a research project like this here, rather than with the commentaries.

SIMPLE DESCRIPTION OF THE ROOM-TO-PLAY THEORY

This section begins by stating that the room-to-play framework was established by the Federal Court of Justice and is the "leading" (*"herrschend"*) theory in the literature.[103] It then discusses its advantages and disadvantages. For example, judges can use it to further societal crime prevention goals,[104] and to issue sentences that will not jeopardize an individual defendant's future in society.[105] Furthermore, the framework offers judges extreme flexibility to craft appropriate sentences, although this flexibility can

[103] *Id*. at rn. 828.

[104] *Id*. at rn. 830.

[105] *Id*.

also be drawback because "it is seldom possible to determine, with universal validity, the entire spectrum of the judge's room to play or the whole range of the perpetrator's guilt."[106]

ILLUSTRATIONS OF ROOM-TO-PLAY IN PRACTICE: CASES FROM THE FEDERAL COURT OF JUSTICE

The true value of this treatise revealed itself in the paragraphs that followed, each of which listed, described, and cited BGH cases in these four categories:

- Cases in which the sentence was found to be unacceptably high[107]
- Cases in which the sentence was not found to be unacceptably high[108]
- Cases in which the sentence was found to be unacceptably low[109]
- Cases in which the sentence was not found to be unacceptably low[110]

In some cases with unacceptably high sentences, the BGH found that the upper sentencing limit in the criminal statute for the offense had been exceeded, including some cases involving violent crimes in which children were the victims.[111] In one of them, the BGH ruled that a sentence of nine years in prison for a perpetrator having raped his 15-year-old stepdaughter was, *amazingly*, *unacceptably high*.[112] The opinion clarified the circumstances that led to this holding: because the perpetrator was a first-time offender

[106] *Id*. at rn. 832 ("[Es ist] kaum möglich, die Breite des Spielraums oder des Schuldrahmens allgemeingültig zu bestimmen.")

[107] *Id*. at rn. 834.

[108] *Id*. at rn. 835.

[109] *Id*. at rn. 836.

[110] *Id*. at rn. 837.

[111] *Id*. at rn. 834. For example, in two of the cases listed, sentences of between four and five years were unacceptably high for child sexual abuse ("Sexueller Missbrauch eines Kindes"). Note, however, that there were other cases in this same category that were deemed to have sentences that were unacceptably low. *See id.* at rn. 836.

[112] *Id*. ("Vergewaltigung in Tateinheit mit sexuellem Missbrauch der 15 Jahren Stieftochter … soll … zu hoch sein.") (emphasis in text added).

and had confessed in part, he was no longer eligible, under the criminal sexual offense law, to receive a sentence of that length.[113]

Being a first-time offender does not always mean you will get a break, however. In a case in the "not unacceptably high" category, the BGH allowed a sentence of eleven years and eight months to stand as punishment for a defendant without a prior record who had committed an assault resulting in the victim's death.[114]

The BGH has also considered cases in which age was a factor. In another case of an assault in which the victim died, a juvenile offender was sentenced to nine years.[115] This sentence exceeded the maximum allowable punishment for juvenile offenders in cases with certain mitigating factors, as had happened here, and the BGH deemed it to be unacceptably high, despite the trial court judge's stated intention to "educate" the perpetrator by issuing a sentence of that length.[116] Advanced age, however, does not necessarily merit giving perpetrators a pass: a 72-year-old woman who stole 72 Euros worth of cat food received a sentence of 14 months probation, which the BGH deemed acceptable as it was comparable to sentences for similar offenses in other cases.[117]

In one case in which the sentence was found to be too low, the BGH stressed that the nature of the perpetrators as people should have figured more prominently in determining the sentence. The perpetrators, repeat offenders who were intoxicated when they committed the crime, each received 10 months in jail for

[113] Bundesgerichtshof [BGH] [Federal Court of Justice], Feb. 4, 1991, 2 StR 434/91 (Ger.).

[114] SCHÄFER ET AL., *supra* note 101, at rn. 835 ("Körperverletzung mit Todesfolge durch einen nicht vorbestraften Täter").

[115] *Id*. at rn. 834 („Einheitsjugendstrafe wegen Körperverletzung mit Todesfolge bei beachtlichen Milderungsgründen. Die obere Grenze schuldangemessenen Strafens dürfe auch aus erzieherischen Gründen nicht überschritten werden.").

[116] *Id*.

[117] *Id*. at rn. 835 ("Diebstahl von Katzenfutter für 72,46 € durch 72 Jahre alte Frau; allerdings innerhalb der Bewährungszeit wegen vergleichbarer Taten.").

assaulting a teenage victim.[118] The attack took place on public transportation, during which the victim suffered serious injuries from "numerous blows to the head with a rubber nightstick" in the presence of fifteen passengers.[119] The BGH remanded the case, and was clearly disgusted with these defendants, declaring "Germany doesn't need guys like this."[120]

The final case cited was one of several in the list involving drug-related offenses and reflects a myriad of applicable considerations. The defendant had received five years and three months in prison for trafficking 4.5 kilograms of crystal meth.[121] The BGH did not find this sentence to be unacceptably low, ruling that, despite the large amount of the drug that the defendant was trying to sell, this sentence was appropriate because the defendant, a first-time offender who was HIV-positive, would be especially susceptible to the harms of incarceration.[122] This case, perhaps more than any other, shows that a judge can be thoughtful when considering the defendant's difficult circumstances, and that this thoughtfulness is supported by the higher court.

CONCLUDING OBSERVATIONS

> The next task in practice of the legal comparativist is to provide a critical evaluation of [their] comparative research. Otherwise, no one will do this work anymore, and comparative law will become, in accordance with Binder's harsh words, "a collection of building blocks in a heap, in which they continue to lay, unused."[123]

[118] *Id*. at rn. 836.

[119] *Id*. ("Körperverletzung mit erheblichen Verletzungen über einen längeren Zeitraum durch zahlreiche Schläge ua mit einem Gummi-Schlagstock auf den Kopf des jugendlichen Opfers in einem öffentlichen Verkehrsmittel in Anwesenheit von über 15 Fahrgästen[.]).

[120] *Id*. („Deutschland braucht solche Typen nicht.").

[121] *Id*. at rn. 837.

[122] *Id*. ("Handeltreiben mit 4,5 kg Crystal Meth – trotz der großen Menge nicht unvertretbar niedrig, da umfassendes Geständnis, nicht vorbestraft und durch HIV-Infektion besonders haftempfindlich.").

[123] KONRAD ZWEIGERT & HEIN KÖTZ, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG [INTRODUCTION TO COMPARATIVE LAW] 46 (3rd ed. 1996) (citing JULIUS BINDER, PHILOSOPHIE DES RECHTS [PHILOSOPHY OF LAW] 948 (1925)).

I am not a criminal law scholar, and I did not undertake this exercise to provide an in-depth analysis of which system of judicial discretion is better, or more likely to ensure justice for criminal defendants. That criminal sentencing reforms, especially in the United States, followed advances in the field of criminology, a subject about which I know little, indicates that it would not be appropriate for me to provide anything more than a superficial assessment.

That said, I believe the two systems are, by and large, not that different. Both consist of a framework with factors that allow judges to consider the circumstances of each case in determining a fair and just sentence. While neither system is perfect, each offers important flexibility to an expert in the facts and the law, rather than placing the entire power of sentencing decisions squarely in the legislature. A one-size-fits-all sentencing system cannot offer that kind of outcome. I imagine, however, given my knowledge of cultural and societal norms of both places, the system is more likely to be exercised with heightened compassion and in greater furtherance of resocialization of those convicted of crimes in Germany than in California.

Although I am not a criminologist or a carceral law scholar, I *am* a legal research expert, and the results of this project were very educational to me regarding comparative law research. For California, I knew how best to research how this discretion works in practice: find and read cases cited in jurisdiction-specific secondary sources. For the German research, however, I lost sight of this objective. Given what I believed to be the near-canonical status of statutory commentaries in Germany's legal literature, I assumed I would find all the answers I needed in them. Instead, the most valuable of the German resources for me, a researcher who is trained in the common law and is proficient in German, were in the commentaries' cited

references. Unfortunately, I basically ignored citations under much later in the project because they were difficult for me to read and understand due to both their content and their size.[124]

That so many commentaries cited *Praxis der Strafzumessung*, a practice treatise targeted not toward academics, but defense lawyers, should have made me aware much earlier on of how helpful it might be and truly was. Its section on the room-to-play theory in made me feel as if I were on very solid footing because its format called to mind an *American Law Reports (ALR)* annotation[125] that cites and describes examples from the case law for several possible judicial discretion outcomes. I was so happy to find this material, especially because ALR is one my go-to resources when researching American law. Given Germany's status as a civil law jurisdiction and its rejection of the *stare decisis* doctrine, as a common-law-trained researcher, it was an unexpected joy to find a resource like this.

The primary lesson learned here is that case law may be the key to understanding how the law works in practice, both for common law AND civil law jurisdictions. Before this research project, I had never looked at a practice-oriented treatise for German law before. After seeing how helpful they can be, especially those that cite cases in an illustrative, comparative way, I will never underestimate their potential value again.

[124] Regarding the challenges in deciphering citation formats, *see supra* note 100 and accompanying text. There were also practical challenges associated with reading commentaries in Beck-Online. The database uses the Verdana font, 9 points in size for the main text and 8 points for the footnotes. I avoided reading footnotes unless it was absolutely necessary, partly because their font size was uncomfortably small. For contrast, the article on wobblers in *Witkin California Criminal Law* in Westlaw is 13.5 points in size, with inline citations and no footnotes.

[125] American Law Reports is a secondary source published by West and available in the Westlaw database. Each ALR article, called an annotation, "is a complete research brief that summarizes all caselaw relevant to a specific legal point." Thomson Reuters Legal, *American Law Reports (ALR)*, https://legal.thomsonreuters.com/en/products/westlaw/american-law-reports [https://perma.cc/6WUQ-XEQX]. ALR annotations also "analyze distinctions among cases to give an objective analysis of both sides of an issue." *Id.*