LIFTING THE BAN ON WOMEN'S NIGHT WORK IN EUROPE—A STRAIGHT ROAD TO EQUALITY IN EMPLOYMENT?*

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I. INTRODUCTION

The ban on employing women at night has been a longstanding tradition in European employment law.[1] In today's member states of the European Community, it was first instituted in the mid-19th century: 1844 in England, 1919 in the Netherlands, 1892 in France,[2] 1911 in Belgium,[3] 1912 in Greece,[4] and as late as 1931 in Portugal.[5] The Nordic countries never enacted anything like the ban.[6] In Germany, the 1871 reenactment of a trades law (*Gewerberordnung*) delegated powers to issue a ban on women's night work for some trades to the Labor Ministry. The Worker Protection Code of 1891 contained a general ban on employing women workers at night, except in businesses employing fewer than

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1 Gertraude Krell traces its origins to restrictions on women's paid work in the Middle Ages. GERTRAUDE KRELL, DAS BILD DER FRAU IN DER ARBEITSWISSENSCHAFT 18f (1984), with further references. She argues that men had always criticized women working for payment when paid employment in general became scarce; *see also* Dobberthien, *Kritik des Frauenarbeitsschutzes*, ZEITSCHRIFT FÜR RECHTSPOLITIK 288 (1984). This is said to be the reason for excluding women from the guilds when craftsmen's earnings were on the decline in the 14th and 15th centuries; *see also* Wolf-Graaf, *Die verborgene Geschichte der Frauenarbeit* 72-82 (1983). Krell observes a continuity between this type of limitation on women's work and limitations on women working at night.

2 *See* International Labor Conference 76th Session 1989 Report V (1) Night Work, 1989, at 21 ff.

3 Blanpain, *Report on Belgium, in* LEGAL AND CONTRACTUAL LIMITATIONS OF WORKING TIME IN EUROPEAN COMMUNITY MEMBER STATES 93 ff. (Blanpain & Köhler eds., 1988). The ban was extended to cover men in 1971, Lois sur le Travail of 16 Mar. 1971, *see* Jurae Europae Belgium 20.30 at 1.

4 Kourtakis, *Report on Greece, in id.* at 237.

5 Pinto, *Report on Portugal, in id.* at 353.

6 *See* Ruth Nielssen, *Special Protective Legislation for Women in the Nordic Countries*, ILREV 39 ff, 44.

ten people.[7] The 1938 Working Time Regulation,[8] issued by the Nazi government, extended the ban to all businesses. The ban on women's night work was also a subject of the first international labor law conventions. At the first international conference on labor issues in Berlin in 1890, delegates from fourteen States agreed to make the ban a principle of international labor law, and in 1906 the first international agreement on the question was reached.[9] In 1919 and 1948, the International Labour Conference (ILC) dealt with women's night work. This led to International Labour Organisation (ILO) Convention No. 4 of 1919, which was replaced by ILO Convention No. 89 in 1948. Both contain bans on women's employment at night.[10]

With state laws that reduced working hours of children and women as the first step, protective labor legislation became the basis of what is known in Europe today as employment law.[11] But

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7 The 1891 *Arbeiterschutzgesetz*—also called "Lex Berlepsch" after its "father," Hans Freiherr von Berlepsch, Bismarck's successor as Prussian Secretary of Commerce from 1843 to 1926—was an important milestone in the development of German employment law. It contained minimum hours, a prohibition on Sunday work, a minimum age for workers, and an obligation on every employer to institute work regulations, after a hearing of the workers. It also expressly provided that freedom of contract could be restricted by federal statutes where labor contracts were concerned. *See* Richardi, *Staatliche Gesetzgebung zum Arbeitnehmerschutz, in* MÜNCHENER HANDBUCH DES ARBEITSRECHTS § 2 marginal notes 20 to 28 (Richardi & Wlotzke eds. vol. 1, 1992).

8 Of 30 Apr. 1938, *Reichsgesetzblatt I*, at 447.

9 *See* Ramm, *Epilogue: The New Ordering of Labour Law 198 -1945*, THE MAKING OF LABOUR LAW IN EUROPE 277, 279 (Hepple ed., 1986). The Convention on Women's Night Work of 1906 is published *in* Reichsgesetzblatt 1911, at 16. This Convention was the first international labor convention.

10 Convention No. 89 was supplemented by a protocol in 1990 (77th ILC). The 77th ILC also adopted a convention on night work that set general, gender-neutral standards for health protection for people employed at night (ILO Convention No. 171 on Nightwork). However, it has not yet been ratified by a single ILO member. ILO Conventions are not automatically binding on all ILO members, but only on those who specifically ratify it. Convention No. 89 was never ratified by all member states of the European Communities, but only by Belgium, France, Greece, Ireland, Italy, Luxemburg, The Netherlands, Portugal, Spain, and Austria. All member states have withdrawn from the ILO Convention No. 89. As withdrawal from Convention No. 89 takes effect only after ten years, Austria and Belgium are still bound by the Convention (*see* International Labour Conference 76th Session 1989 Report V (1) Night Work, 1989; Adamy, Bobke & Lörcher, *Einleitung zum Recht der Internationalen Arbeitsorganisation, in* INTERNATIONALE ARBEITS- UND SOZIALORDNUNG, 177 ff. (Däubler et al. eds., 1994); and Martina Csillag & Julia Eichinger, *Frauennachtarbeitsverbot und Gleichbehandlung im EG-Raum*, ZEITSCHRIFT FÜR ARBEITS- UND SOZIALRECHT (ÖSTERREICH) 17-24, 23 (1992)).

11 These developments cannot be understood without taking into account the general issue of reducing working time through national laws, an important element of European employment law. Protective legislation on working time was and is seen as a progressive development in employment law. As an important part of worker protection legislation, statutory working time regulations in Germany are public law. Thus they are enforceable not only by court order, which can be obtained by a party to the employment contract in question, but also by order of the Trade Supervisory Offices (on the state and local level). In addition, violation of working time regulations is a criminal offense. It is believed—and this belief is shared by the author—that working time regulation is fundamental as much

even if working time regulations and protective labor legislation are seen as a step toward improved working and living conditions in general, it is remarkable that progress was much more rapid on the issue of women's night work than on other problems related to working time. We may therefore conclude that the motives for the ban on women's night work were somewhat mixed.[12] Real concern for women's health undoubtedly played a role,[13] as well as

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for employees' health as for a rational balance between employment and other occupations in everyday life. As the labor market is characterized by a structural imbalance unfavorable to the interests of employees, it cannot be assumed that employees are in a position to negotiate working time according to their own interests. Working time regulation is held to be an essential framework for freedom of contract between employer and employee. Because the ideology of deregulation is not restricted to the British Isles, the extent to which state regulation of working time remains necessary is being debated today. Nevertheless, it is believed that some regulation is still required. *See* Commission of the European Community, *Begründung des Vorschlags einer Richtlinie* (Reasons for a Proposed Directive on Working Time Issues), Official Journal of the European Community (OJ EC) C of 9 Oct. 1990, Federal Government of Germany, *Begründung des Entwurfes des Arbeitszeitgesetzes* (Reasons for a Draft Proposal for a Working Time Law), *reprinted in* ROGGENDORF, ARBEITSZEITGESETZ 19 ff., 21-24 (1994).

12 DAGMAR SCHIEK, NACHTARBEITSVERBOT FÜR ARBEITERINNEN - GLEICHBERECHTIGUNG DURCH DEREGULIERUNG 40 (1992) (The Ban on Nightwork by Female Manual Workers—Deregulation as a Road to Equality).

13 At the time the night work ban for women workers was instituted, inhuman conditions in general made limitations of working hours imperative. Daily life in early-capitalist factories was characterized by long days and nights under terrible hygienic and climatic conditions. Conditions for women and children were often worse than those of men; *see* contemporary quotes in AUGUST BEBEL, DIE FRAU UND DER SOZIALISMUS 257, at n.1 and n.261 (1906, *reprinted* 1981) (published in English as WOMEN UNDER SOCIALISM (Daniel DeLeon trans., 1971)). Women were also burdened with housework and child care, which had increased significantly; while in the late Middle Ages, household activity for the lower classes was limited to mixing gruel, generally eaten cold, and washing clothes only twice a year (*see* Barbara Duden & Gisela Bock, *Arbeit aus Liebe—Liebe aus Arbeit,* FRAUEN UND WISSENSCHAFT 132 (1977)), now a "home" had to be made (*see* Bebel, *supra,* at 128). These conditions led to a catastrophic worsening in the health of workers, seen especially in increased infant and child mortality, *see* Hildegard Demmer et al., *Frauenarbeitsschutz: Gesundheitsschutz oder Ideologie? in* 9/10 BEITRÄGE ZUR FEMINISTISCHEN THEORIE UND PRAXIS 24, 24 (1983). Thus protective measures for women workers can be seen as a reaction to the infant and child mortality rate, as night work in fact contributed to a greater risk of miscarriage.

There is general agreement today in the field of occupational medicine that night work is harmful to health. The reason involves the circadian (day and night) rhythm of essential bodily functions such as heartbeat, circulation, breathing, and various digestive functions. These peak during the daytime hours of 8 and 12 a.m. and 5 and 8 p.m., and reach an absolute low point between 12 midnight and 4 a.m. While these rhythms are subject to individual variations, the basic fact remains the same. If the body operates antirhythmically because of night work, two basic sets of problems result: the pressure to perform during a biologically-conditioned point of low energy leads to recuperative deficiencies, and after only two night shifts the body can no longer catch up. Also, the body's increased ability to perform during the day means that daytime sleep is less restorative than nighttime sleep. The combination of greater demands on the body and reduced recuperation through sleep wears the body down. Night work significantly increases the risks of gastrointestinal disease. Night workers also complain of exhaustion, nervousness and depression, and other emotional disturbances that can turn into actual illness. *See Bundesanstalt für Arbeitssicherheit und Unfallforschung* (Federal Agency for Labor Safety and Accident Research), GESUNDHEITLICHE AUSWIRKUNGEN DER NACHT- UND SCHICHTARBEIT (1985); JOSEF RUTENFRANZ ET AL. (1987) (comparative presentation of various studies on occupational

concern that they be able to carry out their so-called familial duties; but it has also been suggested that an important motivation was to improve men's position in the labor market.[14] The latter theory is given weight by the fact that the ban was acknowledged by international labor law conventions shortly after World War I[15] and enforced soon after World War II,[16] a time when officials were concerned to give returning soldiers back "their" jobs—jobs that had been filled quite efficiently by women while the men waged war.[17]

The only logical response to the ban on women's night work, in the language of equality, seemed to be its complete repeal, with no thought given to the possibility of similar, but gender-neutral, regulation of night work. Notwithstanding this apparently simple response to the issue, the problem deserves a closer look. Despite its rather specialized nature, it touches upon two interesting questions relating to sex equality and law. First, it is remarkable that legal essays on the matter have discussed, at great length, whether biological differences between men and women call for differential treatment under working-hours law.[18] This leads to the question of how far protection from sex discrimination extends if biological differences between the sexes can justify differential treatment.[19] Second, the question whether the ban furthers substantial equality

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medicine); Günther Hildebrandt & Ludwig Pöllmann, *Arbeitsphysiologische und chronobiologische Gesichtspunkte der Gestaltung der Arbeitszeit, in* ARBEITSRECHT DER GEGENWART 49 ff. (1989); REGINE ELSNER, NACHTARBEIT (1992). However, all the studies cited agree that the circadian rhythms lying at the heart of health problems caused by night work show no gender-specific differences. Still, pregnant women run a particular risk of spontaneous abortions. RUTENFRANZ ET AL., at 49; A.N. COPSEY & C. CORLETT, REVIEW OF EUROPEAN FOUNDATION RESEARCH INTO SHIFTWORK 99 (1985).

14 The following quote, for example, is from the chairman of the International Cigarette Makers' Union, at the time of the second ILO Convention on Night Work: "We cannot drive the females out of the trade, but we can restrict their daily quota of labor through factory laws." ILO, 76th ILC 1989, Report V (1) on Nightwork, at 22. For references and further details *see* SCHIEK, *supra* note 12, at 39-43.

15 *See* ILO Convention No. 4 of 1919.

16 *See* ILO Convention No. 89 of 1948.

17 Nielssen, *supra* note 6, at 44.

18 *See* WOLFGANG GITTER, FRAUENARBEITSSCHUTZ UND GLEICHBERECHTIGUNGSGEBOT, 161 ff. (1981); DIETER GAUL, DAS NACHTARBEITSVERBOT FÜR GEWERBLICHE ARBEITNEHMERINNEN, BB 1662 ff. (1987); HEIDE PFARR & KLAUS BERTELSMANN, DISKRIMINIERUNG IM ERWERBSLEBEN 153 f. (1989). This argument is also central to the decisions of the ECJ, ECJ Judgment of 1991, Stoeckel, ECR I-4047, and the Federal Constitutional Court, *see* decision of 28 Jan. 1992, 85BVerfGE 191, which are discussed *infra.*

19 It should be noted that, from a German point of view, protective legislation for pregnant women is not necessarily special treatment, as all workers who are pregnant are covered by this law (this view is adopted by Manfred Gubelt *in* GRUNDGESETZ KOMMENTAR at 19 marginal note 87 on Art. 3 of the Basic Law ("GG") (v. Münch & Kunig eds. vol. 1 4th ed., 1992)). Even if it is regarded as a prima facie violation of the anti-discrimination principle of the Constitution (Art. 3 (2) and (3); this appears to be the dominant opinion in German constitutional law, *see* Hans D. Jarras *in* JARRAS & PIEROTH, GRUNDGESETZKOMMENTAR marginal note 58 on Art. 3 GG with further references (3d ed. 1995)), it can always be justified by the protection of mothers principle, which is part of the Constitution along

in the workplace despite prevailing societal differences between the sexes spotlights the limits of a formal concept of legal equality.

In these discussions, it is interesting to examine the differences between the legal debates in Germany and Austria. Both countries have strong traditions of social dialogue among unions, employers' associations and the government. Germany is one of the founding members of the European Union ("EU"), while Austria only recently became a member on 1 January 1995. The constitutional courts of both countries have issued contrasting rulings on women's night work. Whereas the German Constitutional Court (*Bundesverfassungsgericht*) has outlawed the ban and added a parliamentary obligation to adopt general legislation to protect night workers' health, Austria's constitutional court has upheld the ban.

This essay shall focus on how the problem is addressed in these two countries and what their differences can tell us about the development of feminist legal though in each country.

II. The Ban in Germany and Austria before Reform

A. *Legal Situation*

Before European equality law[20] was enacted, the national laws of Germany and Austria both contained special statutory provisions regulating night work by women.

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with the anti-discrimination principle (Art. 6 (4), *see* Jarras, *supra* marginal note 61 on Art. 3 GG, with further references).

20 The European Community ("EC"), of which both Austria and Germany are members, is a supranational body with legislative powers (*see* ECJ Judgment of 1963, Case 26/62, Van Gend en Loos v. Nederlandse Administratie van de Belastingen, ECR 1). These powers where used to create a substantive body of sex equality law. EC law consists of the EC Treaty and so called secondary EC legislation. EC equality law is contained in the EC Treaty as well as in Council directives, a special form of secondary EC legislation. Directives oblige the EC member states to integrate certain principles into their national laws within a period of time specified in the directive (*see* Art. 189, EC Treaty). In case of failure on the part of a member state to implement a directive completely or correctly within the specified period of time, individuals and legal persons may have legal claims against that member state. *See* ECJ Judgment of 1986, Case 152/84, Marshall v. South Hampton Area Health Authority, ECR 723 and ECJ Judgment of 1984, Case 12/83, Harz v. Deutsche Tradax GmbH, ECR 1921. Both cases deal with the Equal Treatment Directive. The latest decision on this matter is ECJ Judgment of 1994, Case 92/91, Faccini Dori v. Recreb, ECR I-3325.

In this way, the European Court of Justice ("ECJ") gains jurisdiction over proper implementation of directives and interpretation of concepts contained in directives, because under Art. 177 of the EC Treaty national courts can ask for a preliminary ruling on any provisions of EC law. This means that European equality law has a direct effect on the legal systems of the member states. Art. 119 of the EC Treaty provides that "each Member State shall . . . maintain the principle that men and women should receive equal pay for equal work." Though this has no direct effect on the question of women's night work, it shows that sex equality in the labor market is of major concern to the EC. The question of special protective legislation for women is addressed by Directive 76/207/EEC (*in* the Official Journal of the EC (OJ-EC) 1976 L 39/40), the Equal Treatment Directive. It embodies the

In Germany, § 19 of the Working Hours Regulation[21] excluded women factory workers from gainful employment between 8 p.m. and 6 a.m., or between 10 p.m. and 6 a.m. or 11 p.m. and 7 a.m. if they were employed in shifts. This regulation was upheld after World War II in an early decision by the Constitutional Court.[22]

In Austria, the Working Hours Regulation[23] was replaced by several statutes. Here § 3 of the Women's Night Work Act[24] prohibited all female employees from working during the same periods of time as Germany's § 19 AZO. Special provisions covered female employees in bakeries[25] and other trades.[26]

In both countries there were (and are) many exceptions to the ban. In Germany, it did not apply to non-manual employees at all; also, manual workers employed in transport, hotels, restaurants and bars, hospitals, agriculture and many other trades where "women's labor (was) traditionally so much used that it [could] not be done without," as a leading German commentary summarized,[27] were exempted from its protections. In addition, exceptions to the ban could be made by order of state (*Land*) authorities. The AZO did not apply in East Germany, where the ban had been abolished in the fifties; the official explanation for this was the new concept of the "socialist woman," a picture into which discrimination did

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principle of equal treatment of women and men in all aspects of gainful employment. Among other things, it obliges member states to review protective legislation that differentiates between men and women to determine whether it is no longer justified. Art. 5 (2)(c), Dir. 76/207/EEC). Art. 2 (3) Dir 76/207/EEC states that "provisions for the protection of women, especially those connected to pregnancy and motherhood," are not contrary to the equal treatment principle, but as an exception to the principle of sex equality, this provision is to be interpreted narrowly (ECJ Judgment of 1986, Case 222/84, Johnston v. Chief Constable of the Royal Ulster Constabulary, Case 222/84, ECR 1652). For an English introduction to European Community law, *see* Weatherill & Beaumont, EC Law (1993); an English survey on European sex equality law is provided by EVELYN ELLIS, EUROPEAN COMMUNITY SEX EQUALITY LAW (1991) (it should be noted that Ellis argues from a primarily liberal position, with little attention to feminist debates).

21 *Arbeitszeitordnung* (AZO), replaced by the Working Hours Law (*Arbeitszeitgesetz* (ArbZ)) in 1994. Working Hours Law of 6 July 1994, BGBl (Germany) I, at 1170.

22 Constitutional Court decision of 25 May 1956, 1 BvR 53/53, 5 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS (official compilation of Constitutional Court decisions) [hereinafter BVERFGE] 9 (12).

23 Nazi Germany included Austria; thus the Working Hours Regulation applied to today's Austria as well.

24 *Frauen-Nachtarbeitsgesetz* of 25 June 1969, BGBl (Austria) 64. Stück Nr. 237, revised most recently by Law of 20 Apr. 1993, BGBl (Austria) Nr. 257.

25 Section 9 *Bäckereiarbeitszeitgesetz* (Bakery Working Time Law) 1955, BGBl. (Austria) No. 69.

26 For details *see* JULIA EICHINGER, DIE FRAU IM ARBEITSRECHT 42 and 152-58 (1991).

27 J. DENECKE & DIRK NEUMANN, ARBEITSZEITORDNUNG, marginal note 11 on § 19 AZO (11th ed. 1991).

not fit. However, some western economists believe that labor shortages contributed much to this workplace equality.[28]

In Austria, §§ 4 to 4 b of the Women's Night Work Act contain general exemptions for employees in religious, social and health services, as well as for persons employed to work with perishable goods. The 1993 changes to the Act[29] allow for shorter nights (from 12 p.m. to 5 a.m.) for female shift workers, contingent on a special permit from the federal Ministry of Labor. Also, most non-manual workers may now work until 10 p.m.

Austria also has general legislation addressing shift work, the Heavy Work at Night Act.[30] This law contains regulations on additional breaks, better working conditions, medical examinations, additional holidays, supplementary pension[31] and other extras for persons covered by it. It protects night workers in special categories of employees (miners above and below ground level and specialized construction workers for heating equipment) and those working under conditions posing particularly serious health risks, such as heat, cold, noise impact, concussions, inhalation of toxic fumes, work with computer monitors, or hard manual labor. The act has been criticized for primarily addressing employment sectors that are clearly male dominated.[32] In the 1992 reform, a special clause was added covering nurses, though it did not allow for extra breaks and extra pensions for this group. Nevertheless, it has been noted that special health problems typical of female dominated employment sectors, such as repetitious work, are still ignored in its definitions.[33] If the critics are right, it could be said that, roughly speaking, the Austrian Women's Night Work Act protects women from the risks of night work much more consistently than the German ban, because in Austria the ban also applies to non-manual employment, which is not male dominated. The majority of Austrian men engaged in heavy shift work are protected by the Heavy Work at Night Act, which provides for appropriate organization of work and supplementary pensions for night workers; in spite of its

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28 For details *see* Schiek, *supra* note 12, at 28-31.

29 Act of 20 Apr. 1993, BGBl (Austria), No. 257.

30 *Nachtschwerarbeitsgesetz* of 28 July 1981, BGBl (Austria), 142, Stück Nr. 354, most recently revised by Law of 4 Aug. 1992, BGBl (Austria), No. 473.

31 The supplementary pension (*Sonderruhegeld*) is paid three years earlier than the old age pensions to which employees are entitled under Austrian social security law. This means that night workers can retire earlier than their colleagues.

32 *See* Christine Heindl, personal (dissenting) opinion appended to the Parliament Committee Report on the 1992 reform of the Heavy Work at Night Act, Beilage 629 zu den Protokollen des Nationalrates XVIII GP, at 10-11.

33 *See* EICHINGER, *supra* note 26, at 156f.

gender-neutral wording, it has practically no effect on female employment.

B. General European Situation

In 1991—before the European Court of Justice or the constitutional courts of either Germany or Austria had dealt with the ban—both countries found themselves midway between the other member states of the European Community.[34]

The highest level of regulation of night work existed in Belgium and the Netherlands, which forbade night work altogether for women and men alike, providing a wide range of exemptions that distinguished between the sexes. The factual situation was similar in Denmark, where, in the absence of legislation, shiftwork was and still is regulated by a national agreement covering most night workers. This agreement provides, among other things, a right to three hours' time off for every four hours an employee works at night. In addition, employees are entitled to financial bonuses of about 30% an hour for each hour of night work.

A lower level of regulation existed in Greece and Portugal, which—like Germany and Austria—still adhered to the ban without adopting general legislation on night work. In Italy and France, women were subject to a ban on manual night work, which could be derogated by national collective agreement, to which the Ministry of Employment had to consent. The lowest level of protection was provided in Ireland, Luxemburg, Spain and the United Kingdom, where the ban was abolished and no general protective legislation had been implemented.

III. Discussion of the Ban under European Equality Law

A. Commission of the European Community and European Court of Justice

In its report on protective legislation for women in the European Community, the Commission of the European Community[35]

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34 For references *see* Schiek, *supra* note 12, at 327-43 and Commission of the European Community, Protective Laws for Women in the Community (1985) COM (87) 105 fin. These also contain cites to the relevant statutes, which are not reprinted here as they do not refer to the present situation. Today the ban is not upheld by most of the EC member states. The scope of protective legislation addressing health problems connected with night work is being surveyed by the European Commission, but results have not yet been published.

35 The Commission of the European Community consists of seventeen commissioners from all the member states and is a "curious hybrid of a legislature, an executive and a law enforcer" (Weatherill & Beaumont, *supra* note 20, at 58). Its main function is to advise

considered abolition of the ban to be the most logical response to demands for equality. The Commission acknowledged that the ban addressed the special needs of female workers created by their social role, which involves sole responsibility for housework and children, and that legislation protecting night workers against health detriments was also desirable. However, it held the discriminatory effects of the ban to be more significant and thus voted for its abolition in member states where gender-neutral general protective legislation against the hazards of night work could not be established.

This view was adopted by the European Court of Justice ("ECJ") in 1991.[36] It held that the ban, which it said could not be justified by biological differences between the sexes, violated Art. 5 of the Equal Treatment Directive.[37] The ECJ argued that the special dangers engendered by women's greater involvement in unpaid work in the family should not be addressed by employment law; the same was said of the dangers of sexual and other attacks at night, to which women workers on their way to and from night shifts could be more vulnerable than men.

This decision has been said to demonstrate the formal view of women's discrimination that the ECJ had adopted in earlier cases.[38] The Court cannot be said to have adopted an anti-discrimination principle. It preferred instead an approach requiring equal treatment in a strictly formal sense, which can be derived from its orientation towards market equality and protection of fair competition.[39]

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the EC Council and prepare its decisions (*see* Art. 155 and subsequent articles of the EC Treaty). The EC Council is more or less the government of the EC and issues most EC legislation. However, the Commission has an exclusive right to take initiatives on all types of EC legislation. Sometimes even the European Parliament has a say in legislative matters; *see* Art. 189 to 192 EC Treaty. For details on the functioning of Commission, Council and Parliament and EC legislation, *see* WEATHERILL & BEAUMONT, *supra* note 20, at 36-114 and at 115-31 (which explains the role of these bodies in EC legislation). One of the EC Commission's functions is to "formulate recommendations and deliver opinions on matters dealt with in the EC Treaty . . . if [it] considers it necessary" (Art. 155 of the EC Treaty). This is the basis for papers such as the one referred to here. Also, the Second Action Program on equal opportunities (Com (85) 801 fin) asked for a study on protective legislation for women that would give special consideration to the question of night work.

36 ECJ Judgment of 25 July 1991, Case 345/89, Stoeckel, ECR I-4047.

37 Dir 76/207/EEC, *supra* note 20.

38 Thomas Blanke & Helga Diederich, *Das Ende des Nachtarbeitsverbots*, ARBUR 165 (1992).

39 A thorough examination of the ECJ's case law on sex equality would go beyond the scope of this article. To provide a rough picture of the problem addressed, sex equality is not the only equality principle governing EC law. Much more important is the prohibition against discrimination on grounds of nationality deriving from Art. 6 EC Treaty, as well as from the fundamental freedoms of the EC Treaty (free movement of goods, persons, services and capital, *see* Art. 3 letter c and Art. 7a (2) of the EC Treaty), which are addressed in Art. 30 (free movement of goods), Art. 48 and 52 (free movement of workers and freedom

The ECJ's case law on sex equality law has not been unaffected by the notion of fair competition. The decision in McCarthy v. Smith[40] is an example. Ms. Smith launched an equal pay claim before an English industrial tribunal because McCarthy paid her less than her male predecessor on the same job. McCarthy lost the case before the industrial tribunal and the Employment Appeal Tribunal. He took the case to the Court of Appeal, which asked for a 177 ruling by the ECJ.[41] In arguing that Ms. Smith's claim be upheld, the advocate general[42] (Mr. Capotorti of Italy) said: ". . . if an undertaking replacing its male employees with female employees could by that fact alone pay lower wages, that would result in its having an unfair competition advantage over undertakings which contemporaneously employ men and women to carry out the work in question."[43]

This is only one indication that the ECJ favors a market orientated approach to sex equality in the workplace. Such an approach is compatible with formal equality, while "substantial equality demands not merely that persons should be judged on individual merit, but that the real situation of many women which may place them in a weaker position in the market should be addressed."[44] Thus businesses that must comply with substantive equality stan-

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of business establishment, which grants a right to free movement to the self-employed), Art. 59 EC Treaty (free movement of services) and Art. 73b (free movement of capital). These provisions all contain an anti-discrimination principle. Arts. 48 and 52 also confer an individual right not to be discriminated against on grounds of nationality, which is now completed by EU citizenship (Art. 8 to Art. 8 f EC Treaty). Though freedom of movement for workers and freedom to establish a business have been considered individual rights since the establishment of EU citizenship; *see* Jochen Streil, *Vom freien Personenverkehr zum europäischen Bürgerrecht, in* EURPOAISCHE UNION - RECHTSORDNUNG UND POLITIK 312 f. (Bengt Beutler et al. eds., 1993)). The main purpose of the prohibitions on discrimination contained among the fundamental freedoms is the creation of a single internal market through the operation of market forces (*see* Art. 7a EC Treaty). The free market is best encouraged by a formal approach to equality.

40 ECJ Judgment of 27 Mar. 1980, Case 129/79, ECR 1275.

41 Art. 177 of the EC Treaty provides that courts of the EC member states can ask the ECJ for a preliminary ruling on any question concerning EC law if the case the court has to decide demands clarity on such questions. These preliminary rulings are called "177 rulings."

42 According to Art. 166 of the EC Treaty, the advocate general shall assist the court "acting in complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court of Justice." The Court is not bound by the submissions of the advocate general (AG), but it quite often follows their reasoning. If the ECJ does follow the AG's submission—as it did in McCarthy's case—their reasoning can be cited as the ECJ's reasoning. As the ECJ's decisions themselves do not provide substantive grounds, the AG's opinions are an important source to be consulted on relevant case law and other considerations underlying the decisions.

43 Capotorti, AG, submissions in McCarthy's (1980) ECR 1275 (1293).

44 *See* Helen Fenwick & Tamara Hervey, *Sex Equality in the Single Market: New Directions for the European Court of Justice,* COMMON MARKET L. REV. 443, 445 (1995).

dards may find their success hampered if they compete with other businesses that need not do so.[45]

In a later decision, the Court held the above-cited Belgian law valid. This law distinguishes between the sexes in its range of exemptions from the general ban on night work. The ECJ held that Belgium could argue it was bound by ILO Convention 89, from which it had withdrawn, though the withdrawal had not come into effect at the time.[46]

To summarize: under European equality law, member states are obliged to abolish all distinctions between women and men. While a country is bound by ILO Convention No. 89, withdrawals from which have no immediate effect, the ban on women's night work may be upheld until the member state is no longer bound by its provisions. If the ban is upheld on other grounds, the ECJ will rule it unlawful. Thus European equality law encourages abolition of the ban, even if it does not hold inclusion of the male work force in the protective law to be unlawful.

B. Responses in Germany and Austria

1. Germany

a) Decisions of the Constitutional Court

In 1951, the constitutionality of the ban on women's night work was scrutinized under the constitution's equality clause. In this decision, the Court held the distinction between men and women to be valid because of their biological and functional differences.[47] The new decision of 1992 stated, on the contrary, that the ban violated Art. 3 (3) of the German constitution (the Basic Law or *Grundgesetz*) [hereinafter GG].[48]

(1) Content. This decision, along with three other decisions,[49] represented a milestone on the road to a new understanding of Art. 3 (2) and (3) GG. For the first time, the Court recognized a substantial difference between the first sentence of Art. 3 (2) ("*Männer und Frauen sind gleichberechtigt*"— men and women have

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45 Fenwick & Hervey believe that substantial equality in itself is "severely disruptive of market forces," *id.* at 446, but I believe this is going too far.

46 ECJ Judgment of 3 Feb. 1994, Case 13/93, Minne, ECR I-378. The problems with withdrawing from ILO Convention No. 89 are explained *supra* note 10.

47 Constitutional Court decision of 25 May 1956, 1 BvR 53/53, 5 BVERFGE 9 (12).

48 Constitutional Court decision of 28 Jan. 92, 1 BvR 1625/82 u.a., 85 BVERFGE 191 (207)—Nachtarbeit.

49 Constitutional Court decision of 7 July 1992, 1 BvL 51/86 u.a., 87 BVERFGE 1 (42)—"Trümmerfrauen"; Constitutional Court decision of 16 Nov. 93, 1 BvR 258/86, 89 BVERFGE 279 (285f)—Schlosserin; and Constitutional Court decision of 24 Jan. 1995, NJW 1733 (1995)—Feuerwehrabgabe.

equal rights) and the first sentence of Art. 3 (3) ("*Niemand darf wegen seines Geschlechts . . . benachteiligt oder bevorzugt werden*"—no one may be detrimentally or preferentially treated because of sex).[50] According to the court, Art. 3 (3) referred only to differential treatment,[51] whereas 3 (2) embodied an equal rights principle that is to be instilled into social reality.[52] Thus the Court held that Art. 3 (2) could justify differential treatment of women and men when the legislature believes such treatment is necessary "to balance factual detriments which arise only for women in the majority of cases."[53] But this is not the only exemption from the ban on discriminatory treatment that the Court accepts. Differential treatment is also justified where it is "imperative to solve problems which arise only for men or only for women due to the nature of the problem."[54]

Thus the Court addresses the two basic questions, mentioned above, that must be faced when considering the problem of non-discriminatory working time regulations: (1) whether differential treatment may be justified by gender differences—which addresses the fundamental issue of whether or not to follow the Aristotelian principle of equality; and (2) whether legislation may differentiate between the sexes to meet factual differences. To answer the first question, the Court looks only to Art. 3 (3) GG; for the second, it takes Art. 3 (2) into account.

On the first question, the Court held[55] that it is still possible for biological differences between the sexes to justify differential treatment. Consequently, the Court spent a great deal of time on the question whether night work involves greater risks for women because of their nature, concluding that this is not so because night work is damaging to everyone's health; its greater detrimental effect on women is due to their extra labor in the home. Thus the Court did not see any "problems which arise only in men or women due to their nature" that the ban aimed to correct.[56]

On the second question, the Court took into account two contradictory factors: on the one hand, the discriminatory ban's negative effect on the employment status of women; on the other, the

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50 The section then goes on to name other characteristics for which preferential or detrimental treatment is unconstitutional. These are race, native language, country of origin and family or social background, faith, religious or political belief.

51 Constitutional Court decision of 28 Jan. 1992, 1 BvR 1625/82 u.a., 85 BVerfGE 191 (209).

52 *Id.* at 207.

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.* at 207-09.

burden of "work in the home" still borne by women without significant male assistance, and the risks to health of combining this burden with night work. However, the Court concluded the latter was due to a social tradition that might become even more entrenched if women enjoyed fewer employment opportunities. Thus it did not view the ban as aimed to diminish detriments to women.[57]

The Court held the ban invalid for violating European and constitutional law. It also instructed parliament to replace it with reasonable legislation to protect the health of night workers. This conflicted with the views of the National Union of Employers' Associations (*Bundesvereinigung der Arbeitgeberverbände*), which had argued that no health problems were necessarily caused by night work. The Court also said such protective legislation could address the special needs of parents, but could not discriminate against women as a result.

(2) Views of Employers Associations, Unions and Lobbyists for Women. Unusual coalitions formed over the course of litigation before the Court.[58] Among those calling for abolition of the ban were the National Union of Employers' Associations and the National Association of German Industry (*Bundesverband der Deutschen Industrie*), the Women Lawyers Association (*Deutscher Juristinnenbund*) and the "*Deutsche Frauenring*";[59] whereas the federal government, the German Federation of Trade Unions (*Deutsche Gewerkschaftsbund*), the Federal Supreme Court (civil and criminal jurisdiction) and the regional appeals courts (civil and criminal jurisdiction)[60] argued that the ban should remain in force. It should be noted, however, that the arguments made by employers and those made by lobbyists for women differed quite remarkably.

Employers[61] called for a lifting of the ban in order to cope with serious labor shortages in night shifts in various industries and trades. The textile industries, with their below-average wages, appear to have been particularly hard-hit by the ban. Employers observed that "it is often impossible to find male employees prepared to work nights only," and that "even the willingness of foreign male

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57 *Id.* at 209 f.

58 Ninon Colneric, *Konsequenzen der Nachtarbeitsverbotsurteile des EuGH und des BverfG*, NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 393 (1992).

59 This is an umbrella organization of various women's organizations, like the Women Lawyers Association, and the women's sections of political parties and unions. It is heard on all legal and legislative matters concerning women and represents some 1.4 million female members of these organizations.

60 Criminal courts had been asked to submit expert opinions because any violation of the ban by employers was a criminal offense under § 25 AZO.

61 The expert opinion written on their behalf by Professor Loritz of the University of Würzburg is *published in* ZEITSCHRIFT FÜR ARBEITSRECHT 607 (1991) [hereinafter ZfA].

employees to work nights only is declining."[62] Thus they feared that, should the scope of the ban be widened to include the eastern German textile industry, female workers, who made up 75 % of the entire workforce, would "have to be dismissed, without any possibility of replacing them with male workers."[63] The situation was similar for bakeries. "Here the ban's effects are especially serious due to an acute shortage of labor."[64] The employers were not fighting for equality in the workplace, as evidenced by their argument regarding the situation in the car tire industry. There they wished to open up only 50% of the available positions to women and men alike.[65]

On the question as to whether persons with family responsibilities should be exempted from night work, the employers' brief concluded that any health problems in the families of night workers could not be considered the result of night work. They distinguished among three types of families: the double-income-no-kids-marriage, the double-income-with-kids-marriage, and the "half-family with kids."[66] Statistics show that at least 90% of the housework is done by women, with no remarkable differences among the "family types."[67] For their first type, the employers concluded that, if any double burden existed, it was due to the fact that the "housekeeping spouse" was also employed.[68] With respect to the second type of families, they admitted that wives who work nights and also care for children might experience a considerable workload, which might well be damaging to their health. However, they said, this was not a result of night work, but simply a result of the wife's employment.[69] For the third type of family, they found that employment would be impossible for many single parents were no night work available. Thus the health of single parents could be protected from the detriments of a combination of nighttime employment and daily housework only by eliminating any possibility of employment.[70] In sum, the employers were saying that women's

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62 *Id.* at 611.

63 *Id.* at 612. The full quote reads, "[t]he spinning, weaving and knitting mills employ some 75% female labor, which, if a night work ban were imposed, would have to be dismissed without any possibility of replacing them with male workers."

64 *Id.*

65 *Id.* at 610.

66 This refers to single parents and their children.

67 STATISTISCHES BUNDESAMT, ZEITREPORT (1994); for detailed information *see* SIGRID METZ-GÖCKEL & BRIGITTE MÜLLER, DER MANN (1985).

68 Loritz, *supra* note 61, at 631.

69 *Id.*

70 *Id.* at 632.

night work would be no problem at all if mothers and "housekeeping spouses" would only stay out of paid employment.

The Women Lawyers Association and the *Frauenring* argued that the ban negatively affected women's employment opportunities, but also protected mothers from pressure to take on employment at night so as to leave the day free for housework and child care. Like the trade unions, they pointed to statistics showing that mothers working at night slept very little.[71] These women's organizations asked that the ban be upheld in the interim period, allowing time for the passage of gender-neutral protective legislation for all night workers before it was abolished. They opposed the Court's solution, arguing that lifting the ban with no legislation to replace it would only lead to further risks to women's health in the name of equality.

b) The New Working Time Law

The ban was abolished in 1994 through the Working Time Law.[72] The Constitutional Court's demand for protective legislation governing night work has been met by two legislative provisions. First, night work must be organized to conform to the most up-to-date standards of occupational medicine. Second, persons caring for children and/or others in need of special care are entitled to daytime employment, though only if no one else in their family or household can take over this care.

2. Austria

a) Constitutional Court Decisions

In Austria, the Constitutional Court (*Verfassungsgerichtshof*) adopted a totally different view of the problem.[73] It upheld the ban in 1988 and 1992, saying it had responded adequately to the double work load imposed on most employed women by family and employment.

Like the German Constitutional Court, the Austrian *Verfassungsgerichtshof* views equal treatment as the main principle of the anti-discrimination clause of the Austrian Constitution, but it does

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71 In 1963, Adelheid Stein found that night working mothers of infants slept two hours a night. ADELHEID STEIN, ZUR FRAGE DER BELASTUNG BERUFSTÄTIGER FRAUEN DURCH NACHTARBEIT (1963). *See also* RUTENFRANZ ET AL., *supra* note 13, which found the amount to be 4.8 hours in 1987.

72 *Arbeitszeitgesetz* (Working Time Law), 6 June 1994, BGBl. I, at 1170.

73 Decision of 30 June 1988, B 806/87, 11, EuGRZ 370 (1992); Decision of 12 Mar 1992, G 220/91 et al., EuGRZ 367 (1992).

not believe this principle to be valid without exception.[74] However, the *Verfassungsgerichtshof* 's definition of permissible exemptions from equal treatment has evolved over time. In the past,[75] it had held that the "nature of woman" was the only reason for departure from the equal treatment rule that did not violate the anti-discrimination principle. It then went on to view objective characteristics—also referred to as the "nature of both the sexes"—as reasons to justify differential treatment. In a decision on different ages for men's and women's pension eligibility,[76] the Court added the requirement that differential treatment of women and men should help decrease (societal) distinctions between the sexes. Where differential treatment helped promote such societal distinctions, it violated the constitutional principle of anti-discrimination. In the pension-ages decision, the Court also ruled that legislation may be targeted at average persons and normal cases, even if this could cause individual hardship in exceptional cases—for example, for women whose husbands do their fair share of housework.[77]

In both its decisions on women's night work,[78] the Court interpreted this rule to allow differential treatment with respect to the societal role of women. It argued that, while true partnership might slowly develop, in the majority of families the additional work created by children and the daily needs of other family members was done by women. It was women, therefore, who found themselves under pressure to take on nighttime employment, in order to make more time for unpaid housework during the day.[79] The Court held that the special health risks flowing from this double burden on women working in shifts made discriminatory restrictions on night work permissible, even if some women did not suffer from these health risks because work was shared in their families.[80] The Court argued that these women, who already lived in more favorable circumstances, could be expected to put up with the ban's detrimental effect on their employment opportunities out of solidarity with the majority of women. It pointed out that in protective labor law, general prohibitions were usually the only way to ensure proper protection of health and safety.[81]

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74 *See* Decision of 6 Dec. 1990, G 223/88 et al, EuGRZ 1991, 484 (485).

75 This is described in detail *in* Martina Berger, *Gleichheitsprinzip in der österreichischen Verfassung*, EUROPÄISCHE GRUNDRECHTSZEITUNG (EuGRZ), 614, 619 (1983).

76 Decision of 6 Dec. 1990, *supra* note 74, at 485f.

77 VfGH decision of 12 Mar. 1992, EuGRZ 367, 369 (1992).

78 *Supra* note 73.

79 Decision of 30 June 1988, *supra* note 73, at 371.

80 Decision of 12 Mar. 1992, *supra* note 73, at 368f.

81 *Id.*

It is interesting to note that the Court failed to examine whether the ban would help reduce societal differences between the sexes, in line with its arguments in the pension-ages decision. The most remarkable feature of the night work decisions, however, is that the Court did not feel obliged to close its eyes to the reality of women's lives in the name of equality. This may have been motivated by a patriarchal instinct to protect women as the weaker party to the labor contract, but should nevertheless be kept in mind when discussing solutions to the problem of equality in protective labor legislation.

b) Legislation being Debated

As mentioned earlier, the approach taken by the Austrian *Verfassungsgerichtshof* is no longer available to the Austrian legislature, which must now respond to the requirements of European equality law. For this reason, a debate is currently underway regarding the future of the Women s Night Work Act.

In Austria, there have also been those who view the ban only as a detriment to women's employment situation.[82] But in the main, stress has been laid on the double burden to which women are exposed, leading to demands that the scope of the ban be broadened to include men, or that it be replaced by reasonable protective legislation.[83] For the time being, the ban as incorporated in the Women's Night Work Act has not been lifted, and has even been facilitated by the 1993 amendments.[84] This is due to the fact that Austria is still bound by ILO Convention No. 89,[85] which cannot be repealed before 5 October 2001.[86] As mentioned earlier, this allows the ban to be upheld under European law.[87] This leaves time to enact protective legislation for both sexes, which is now being debated.

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82 *See* Margareth Wiederschwinger, Zur beschäftigungsdiskriminierenden Wirkung des Frauenarbeitsschutzes (1985).

83 *See* Csillag & Eichinger, *supra* note 10.

84 *See supra* note 29.

85 BGBl (Austria) 1950, Nr. 229, amended by BGBl. (Austria) 1964 Nr.39. Germany was never bound by this convention but only by its predecessor, the 1906 Convention, which allowed for more exceptions. *See supra* notes 9-10 and accompanying text.

86 *See* Csillag & Eichinger, *supra* note 10, at 23 with further references.

87 ECJ Judgment, Case 13/93, Minnie, *supra* note 46 and accompanying text.

IV. Women and Protective Labor Law—Deregulation as the Road to Equality?

A. Aristotle and Biology

In the discussion on women's night work in Germany and Austria, it has been taken for granted that biological differences between the sexes in their reaction to night work are an acceptable reason to make distinctions in legislation covering night work. This assumption must be examined more closely.

It appears contradictory for the German Constitutional Court to argue, on the one hand, that differences between the sexes can no longer be regarded as valid arguments for distinction, because law acknowledges men and women as equals despite natural differences,[88] and on the other hand to declare that, of course, this does not apply where biological differences exist.[89] Is it not true that biological differences between men and women—whether or not they actually exist—have always been cited to justify differences in treatment, to the detriment of women? If these arguments are still accepted by law, protection from discrimination will not go very far.[90]

The use of biological differences to justify differential treatment can be traced back to the Aristotelian concept of equality: Equality is not to be granted to everyone, but only to equals.[91] It must be kept in mind that this concept was rooted in a hierarchical society, in which not even personal freedom was granted to all men and women. Thus the Aristotelian concept of equality does not allow the leveling of hierarchies. It calls for differential treatment of unequals; slaves and Greeks, women and men, were entitled only to their fair share, not to equality.

This approach to equality cannot be taken if law is not to further gender hierarchies. It must be replaced by a different approach. I have argued elsewhere that differential treatment of women and men is justified under German constitutional law only

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88 Constitutional Court decision of 14 Jan. 1954, 1 BvR 409/53, 3 BVerfGE 255 (240-41), established practice.

89 *Id.* at 242.

90 Similar arguments are put forward by Ute Sacksofsky, *in* Grundrecht auf Gleichberechtigung 50-51 (1991).

91 *See* Aristotle, Politik 9 (1280a) (E. Rolfes trans. vol. 3, 1922) (German version of Aristotle, Politics (Trevor J. Saunders trans. 1995)): "Thus, for example, one takes this right for equality, and it is, but equality only for equals, not for all. And thus one also takes inequality for right, and it is, but not for all, but only for unequals"; Aristotle, Nikomantische Ethik, 6 (1131 a) (vol. 5) (German version of Aristotle, Nichomachean Ethics (Hippocrates 6, Apostle trans. 1984)); *see also* Plato, Laws 757 (vol. 6). This is discussed in detail *in* Ute Gerhard, *Bürgerliches Recht und Patriarchat*, *in* Differenz und Gleichheit—Menschenrecht haben kein Geschlecht 188, 190-92 (Gerhard et al. eds., 1990).

where differential treatment is necessary to protect constitutional rights or to further equalize gender distinctions.[92]

When this approach is applied to protective labor law, biological differences cannot in themselves justify differential treatment. Where biological differences between the sexes appear to call for special protection, it must be asked whether working conditions cannot be changed in such a way that biological differences—where they exist—no longer matter. For example, a German statute forbade women from working in trucks in which drivers' seats did not protect women from certain injuries.[93] Even if it is true that women suffer more from such injuries due to their physical ability to give birth,[94] this statute could only be valid if it were impossible to adopt a statute forbidding any employment on trucks without special drivers' seats.

If this view is applied to night work, the questions to be asked change. The issue is no longer whether it is women or men who suffer more from night work. Instead, it becomes important whether certain groups of employees suffer more from night work than others, and whether night work can be reduced and/or regulated in such a way that no employees suffer health risks.

B. "Familial Duties" and Working Hours Regulations—An Insoluble Dilemma?

Medical experts, however, have agreed that night work is no more dangerous to women than to men.[95] If women suffer any special health risks, these are due to their additional work in the family, especially caring for children. It should be noted that German mothers are under considerable pressure to look after their children themselves during the day. Care by professionals or unskilled nannies is considered detrimental to children's development, which is believed to be properly promoted only by constant contact with a female blood relative.[96] In addition, or perhaps as a

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92 *See* Schiek, *supra* note 12, at 149-61.

93 Section 2 of the Women's Employment on Vehicles Order, BGBl. 1971, at 1777.

94 Medical research indicates women may risk uterine damage when they suffer certain types of injuries. For the argument presented here, it is irrelevant whether this risk really does exist; obviously, if it does, the risk only affects women.

95 RUTENFRANZ ET AL., *supra* note 13.

96 A representative sociological study in Germany, the United States and Great Britain found that 61.8% of German women believed mothers of preschool children should not be employed at all. This view was held by only 39.3 % of women in the U.S. and 54.4 % of British women. Even when children attend school, 26 % of German women believe their mother should not be employed (4.2 % of American women and 3.4 % of British women.) *See* Duane Alwin et al., *The Separation of Work and the Family: Attitudes towards Women's Labour Force Participation in Germany, Great Britain and the United States*, EUROPEAN SOCIOLOGICAL REV. 13-25 (1992).

result of this, child care facilities are very scarce: in 1991 only 2.7 % of all infants below three years of age could be provided with day care.[97] Thus many mothers of small children find they can only work at night, because they would rather look after their children during the day or because they cannot find an alternative. These women often sleep less than two, or most commonly four, hours between night shifts.[98] They will inevitably suffer health problems.

Obviously, these special health risks are not due to biological differences between the sexes, but to the fact that women do most of the unpaid work necessary to meet the daily needs of adults and children. It might be desirable for men to take on their share of these duties, but it seems they resist this.[99] A world in which adults can care for themselves and their offspring without relying on the unpaid work of other adults remains utopian.

To respond to the social reality in which women live, law should protect them from night work; this is the view propounded by the Austrian Constitutional Court. It has been argued that laws of this sort, while protecting women, also serve to entrench both the division of labor between the sexes within the home and women's weak employment position.[100]

This argument is based on two assumptions. First, that protective labor laws influence the division of labor within families; second, that women's weak employment position is caused by protective labor law. Both are questionable. While it can be said that protective labor laws that respond only to women "familial duties" are a small contribution to the massive ideology of a woman's

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97 Statistisches Bundesamt, FuR 118 (1993).

98 *See supra* note 71.

99 There is statistical evidence that women are disproportionately burdened with housework. Women working full-time in West Germany in 1985 spent three hours a day on housework; woman working part-time, six hours. CHRISTOPH BÜCHTEMANN & JÜRGEN SCHUPP, ZUR SOZIOÖKONOMIE VON TEILZEITBESCHÄFTIGUNG 36 (1986). Mothers working full time spent somewhat more time on housework—four hours. Men, in contrast, themselves reported spending 1.5 hours per work day on housework, regardless of the number of children. *Id.* Men's estimates tended to overestimate their own contribution. SIGRID METZ-GÖCKEL & BRIGITTA MÜLLER, DER MANN 47 f. (1985). Particularly astonishing was the extent to which men delegated their own housekeeping to women; 80% of fathers freely admitted that they never washed their own underwear. *Id.* at 45-66. Apparently, developments in "men's work" in the home have been stagnating for some time. In 1963, Adelheid Stein found the exact same figures regarding the burden of housework on women: 2 hours, 42 minutes for the full-time employed, 4 hours, 54 minutes for women working part time. *See* STEIN, *supra* note 71, at 81. The situation has not improved since unification. The so-called Schering Study (FRAUEN IN DEUTSCHLAND. LEBENSVERHÄLTNISSE, LEBENSSTILE, ZUKUNFTSERWARTUNGEN (Institut für Demoskopie Allensbach ed., 1993)) reached the same conclusions. *See* CLAUDIA PINL, DAS FAULE GESCHLECHT 18 f. (1995).

100 Marliese Dobberthien, *Kritik des Frauenarbeitsschutzes*, ZRP 136-43 (1976); Anja Meulenbelt, *Die Wahl zwischen Regen und Traufe - Frauennachtarbeitsprobleme, in* FEMINISMUS—AUFSÄTZE ZUR FRAUENBEFREIUNG (1982).

place being in the home, it surely cannot be assumed that families read labor laws before deciding how to divide the labor. More likely, they respond to custom and economic pressure. As long as women's jobs do not pay enough to support a family, women are more likely to take on unpaid work.[101] Thus women's employment status appears to be the main area in which protective labor law influences the family arena.

However, the conclusion that protective labor laws are the cause of discrimination against women in the workplace has also been questioned. A sociological study of the barriers to women's employment in "men's jobs" concluded that the special protective legislation that might be seen as such a barrier was unfamiliar to those who decided whether or not to employ women for these jobs.[102] Even if this is so, it must be admitted that with the ban in existence, no reasonable employer will employ women for night shift work as long as he or she can find men for the job.

What are the consequences of this? Does the issue of night work leave only the choice between the frying pan and the fire? As I pointed out earlier, from a medical point of view people caring for small children should not be employed at night. The same applies to people who have to do their own housework , as researchers on night work stress.[103] This means that the situation in which most women live—having no one to rely on to do housework for them—does not allow for night work. Medical experts advise creating special child care units and allowing more days off after night shift periods to meet the special needs of people who do their own housework[104]—as provided for by Eastern German labor law[105] before unification.

In response to these suggestions, employers argued that it should be left up to parents whether to ask for transfer from night work to day shifts.[106] But such a system would do little for women's

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101 *See* Notburga Ott & Karin Rinne, *Was können ökonomische Theorien zur Erkläring der geschlechtsspezifischen Arbeitsteilung beitragen in* FRAUEN-FRAGEN, FRAUEN-PERSPEKTIVEN 141-82 (Donhauser et al. eds., 1994).

102 Claudia Born, *Frauenarbeitsschutz im gewerblich-technischen Bereich, Forschungsbericht der Bundesanstalt für Arbeitsschutz und Gesundheitsforschung Nr.* 228, 288-91 (1981).

103 *See* RUTENFRANZ ET AL., *supra* note 13, with further references.

104 *Id.* at 92-96.

105 Under § 228 of the East German Labor Code, businesses were required to provide hot meals for night and shift workers. Under § 6 the Directive on Recuperative Vacations shift worker received between three and six extra vacation days. In addition, mothers of two children who worked in shifts received two extra days of basic vacation; mothers of three or more children, or at least one child in need of special care, received three extra days.

106 This is now provided for in § 6 (4) of the German working time law. For Austria, *see* Csillag & Eichinger, *supra* note 10, at 24.

employment opportunities. It is common knowledge that the right to be excused from work because of parenthood is taken advantage of almost exclusively by women.[107] This means employers could expect workers to ask to be switched to daytime shifts only if they hire women for night shifts. If men can be found for these jobs—that is, where night work is not at the bottom of the job hierarchy— they will be given preference. A parental right to avoid night work is likely to "solicit discrimination" and could therefore be seen as discriminatory in itself. For similar reasons, the new Law on Working Hours in Germany is likely to be at least indirectly discriminatory. Under this law, the parental right to avoid night work is granted only to parents who cannot rely on other persons to care for their offspring. Such parents will most often be female, rendering the results even more serious.

A different method would be to create protective laws that really apply to all parents, as has been unsuccessfully proposed by the state of Hesse in the German debate on new work time regulations.[108] The proposal was based on the following ideas.

To be non-discriminatory, protective laws responding to societal differences between women and men should follow the same course as laws responding to biological differences. If societal differences make special protections necessary, working conditions should be changed so as to protect even the weakest workers. As night work cannot be abolished altogether, it should at least be limited by a general ban allowing exceptions for health, social and cultural reasons. Only an overall reduction in night work can make room in the organization of working time to allow additional regulations for parents of young children, who should be protected against night work without loss of earnings. As everywhere in protective labor law, this protection can only be afforded by a ban on

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107 This is shown by statistics on gender-neutral parental rights to a three year "child-raising leave" in Germany; only 1.6 % of the applicants were male. *See* Bundesregierung, Report on the *Erziehungsgeldgesetz*, BT-DS 11/8517; for detailed information, *see* INSTITUT FÜR ENTWICKLUNGSPLANUNG UND STRUKTURFORSCHUNG, HANOVER, BETRIEBLICHE WIRKUNGEN DES ERZIEHUNGSURLAUBS (1991); INSTITUT FÜR ENTWICKLUNGSPLANUNG UND STRUKTURFORSCHUNG, HANOVER, ERZIEHUNGSGELD UND ERZIEHUNGSURLAUB ALS BESTANDTEIL DER SOZIALEN MARKTWIRKTSCHAFT (1991); INSTITUT FÜR ENTWICKLUNGSPLANUNG UND STRUKTURFORSCHUNG, HANOVER, SITUATION ERZIEHUNGURLAUB, ERZIEHUNGSGELD - ZUR LAGE ALLEINERZIEHENDER (1991). The situation is similar in Sweden, where between 5 and 8 % of all "child-raising leaves" were taken by men. This is especially discouraging for women hoping for male involvement in the family, as in Sweden 80% of one's earnings continue to be paid during "child-raising leaves" (in Germany, parents on "child-raising leave" can claim a maximum of 600 marks a month, a sum on which it is impossible for a parent and child to survive)—thus economic motives cannot be the reason for male abstinence (CLAUDIA PINL, DAS FAULE GESCHLECHT at 98, 112 (1992).

108 *See* Dagmar Schiek, *Eckpunkte für ein Nachtarbeitsschutzgesetz*, SOZIALE SICHERHEIT 15 (1992).

night work for parents of children up to a certain age (e.g,. four years). If this applies to women and men alike, the economic risks of parenthood—from an employer's perspective—would no longer lie with women, but with women and men alike.[109] This would work only if fathers were covered by protective legislation whether or not they live with their child—otherwise they could take different accommodations to avoid the risks. Again, this means that mothers should be entitled to name third parties who actually help them with child care, and should thus also be entitled to exemption from night work.

It has been said that this would lead to discrimination against parents in the workplace.[110] However, the probability of becoming a parent is so high that employers could not possibly exclude all potential parents from desirable jobs. Once subject to parental protection, parents could be protected against dismissal as pregnant women are today—by restrictions on firing, which requires special permission from the Trade Supervisory Office.[111]

Of course, these ideas did not become law; they were fought by employers, who deny any health problems connected with night work and acknowledge no way of reducing it, and by unions, because such ideas did not conform to their views of gender politics. Those who generally side with unions argued that young fathers wished to support their families financially, and that they should not be forced to rely on statutory earnings guarantees because of laws forbidding them to work nights until their children were three or four years old.[112] They further argued that such a legal arrangement would make no sense, as mothers would anyway insist on doing the actual work of caring for their children.[113] Thus "reform" of the ban ended in pure deregulation.

The mere abolition of the ban on women's employment at night will not lead to equality in the work place, as Germany's ini-

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109 Of course, this view could be adopted in maternity legislation as well. Why not have paternity leave for men for the same period of time as women have maternity leave ? It might give them time to reorganize the household in preparation for the baby—this involves work which is much too heavy for pregnant women, after all—and to learn the basics of child care and household work.

110 Colneric, *supra* note 58, at 393.

111 In Germany, Trade Supervisory Offices supervise the observance of protective labor legislation. This includes the power to grant permission to dismiss mothers and severely disabled persons, who are specially protected against dismissals. Trade Supervisory Offices also grant permission for night work by pregnant women in cases where their doctors certify it will not be hazardous to their health.

112 *See* Brigitte Stolz-Willig & Hartmut Seifert, *Nachtarbeit sozialverträglich gestalten*, WSI-MITT 158, 162-63 (1992).

113 *Id.*

tial experience has proven. For example,[114] a medium-sized pharmaceutical products firm introduced gender separation when their production line was technically upgraded. Before the upgrade, women and men had worked side-by-side on the production line in two shifts, one from 6 a.m. to 2 p.m., the other from 2 p.m. to 10 p.m; women and men also worked on a different line where products were packaged (packing line). Workers on both lines were paid at piecework rates.[115] To lower the costs of upgrading, management decided to add a night shift to the production line. Because of the ban (this was the official reason given by management), only men were employed there; the women were all removed to the packing line. There, the women were still paid piecework rates. The technical improvement of the production line, however, left only light supervisory work, which could not be paid for at piecework rates because production speed was not controlled by the employees. To protect the men's incomes, employees were guaranteed an average wage, which was 120% of the basic hourly wage. Now the men working on the production line enjoyed piecework rate earnings without the stress of real piecework, plus night shift allowances every third week when they worked nights. In addition, working conditions on the new equipment were better.

When the ban was lifted, several women applied to return to their old jobs in production. These applications were turned down by management; instead, a third shift was introduced on the packing line. For this shift, no night shift allowances were paid, but employees were entitled to extra days off after night shifts. In addition, some mothers were employed on part-time contracts to work nights only, to allow extra days off for the permanent workers. As a result, the women now work nights without allowances and at piecework rates, whereas the men work under better and less stressful conditions, earning better money due to shift allowances.

This case is not unique. It shows that employers rely on gender segregation in the workplace because it allows pay differentials without violating the equal pay principle—and because it is traditional. The existence of the ban and other protective laws is only a

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114 I observed the process described here while employed at the Hesse Ministry for Women's Affairs, Labor and Social Policies as deputy head of the Department for Women. A member of my staff drafted an affirmative action program for women in middle-sized firms, and in the process found out about the situation described here.

115 Piecework rates are composed of a combination of basic hourly wage and piece bonuses; the piece bonus depends on output and is expressed as a percentage of the basic hourly wage.

justification for, not the cause of, gender segregation. To ensure equal opportunity in the workplace, discriminatory protective legislation must be reformulated. But if this happens by deregulation, women are likely to lose protection without gaining equality.

V. Conclusion

Of course, the ban on night work for women might have acted as a final barrier to the hypothetical employer willing to give women a fair chance. But it can by no means be seen as a fundamental cause of women's weak employment position. If this is true, equality in the workplace cannot be expected as the logical result of the abolition of the ban. The only result of the abolition of the ban may be worsened working conditions for women working nights—a rather bumpy road to equality, which may ultimately turn out to be a dead end.

In this light, the Austrian road may be more winding but less bumpy. If women and men alike are protected by the Heavy Work at Night Law against the worst health risks of night work, lifting the ban might not affect women as seriously. If the ban remains in force as long as possible, this could give parliament enough time to create adequate protective legislation for both sexes. The German experience shows that repeal of the ban with no protective legislation in place leaves no protection at all. It is doubtful whether competition between women unprotected by working time laws and men protected by full-time housewives who do not need to earn money can be considered fair competition between the sexes in the labor market.