PROSTITUTION AND THE LAW IN GERMANY

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I. INTRODUCTION

Prostitution is a reality that has existed throughout history; and throughout history, although without success, those in charge have striven to ban this reality. Today, prostitution still contravenes prevailing wishful thinking on morality and order, but is an economic factor that outdistances other branches of the economy. "Over a million men a day in the Federal Republic [of Germany] seek out prostitutes. They buy 250 million sexual services of all types per year and spend at least 12.5 billion DM. Two-thirds of all men have contact with prostitutes—are patrons."[1] While there are no exact figures, prostitution unquestionably makes up a considerable portion of the gross national product, and the extent to which it is practiced is determined by men's demand for sexual services.

Nevertheless, prostitution continues to be denied legal recognition. The current situation in Germany is highly contradictory. The courts and legislature tie themselves in knots to grant prostitutes as few rights as possible and as many as necessary, simultaneously imposing duties on them if the public profits from it.

The practice of prostitution is legal—that is, not punishable. However, those who organize the prostitution of others or make it possible in certain forms can be prosecuted. On the one hand, prostitution is not recognized as a profession under law; it is considered an "immoral and in many respects anti-social activity."[2] Women who work as prostitutes have few rights. If they provide sexual services in advance, they have no right to payment by the patron. Prostitutes who work in brothels may not enter into normal employment contracts, with their attendant benefits such as health and pension insurance. On the other hand, they are considered businesspeople for tax purposes and must pay income and turnover tax. Moreover, they are required to undergo health tests

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[1] These figures are from a bill introduced by the Green Party on 16 May 1990 "to eliminate legal discrimination against prostitutes" and are based on estimates by prostitute self-help groups for West Germany as it existed until 3 Oct. 1990. *See* Bundestagsdrucksache (Bundestag Publication) 11/7140.

[2] BVERWG, MDR 170 (1981).

of varying strictness, depending on region, far more rigorous than ordinary health inspections (in the restaurant business, for example).[3]

This contradictory treatment of prostitution by the authorities has a long history. For the last 2,000 years, prostitution has been alternately tolerated, permitted, regulated, licensed, prohibited and—most of the time—fought. Over the years, liberalization and regulation have followed a wave-like pattern: prostitution does not fit common conceptions of morality and is battled unsuccessfully; under pressure of facts, prostitution is liberalized, thus becoming visible and fertile ground for moral indignation; the liberalization is rescinded; prostitution continues to exist underground, and the disadvantages of hidden prostitution (criminality and health dangers) become visible. To deal with these evils, it is liberalized again; moral indignation takes hold; the liberalization is rescinded, and so on.

This is a rough, but not incorrect, description of the progression. I will trace the steps in this progression in the following historical overview.

II. History of Prostitution in German Criminal and Regulatory Law[4]

Until the early Middle Ages, sources are few. From those that exist, we may conclude that prostitution was not tolerated in the first few centuries following the birth of Christ, and was fought by means of the criminal law. Common physical punishments were also applied in prostitution cases—primarily, it seems, against women, while less so against the men who were equally involved.

In Teutonic criminal law, all sex outside marriage was considered whoring. Women who thus "dishonored themselves" were subject to legal punishment by the head of the household or tribe:

Before the eyes of her relatives, the man cuts off the hair of the adulteress, tears her clothes from her, drives her out of the

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[3] Germany has a significant prostitutes' movement that has fought against such discrimination and for prostitutes' rights. For details, *see* Beruf: Hure (1988) (a compilation of texts and interviews on prostitution in Germany, published by the Berlin prostitutes' project "Hydra"); P. Biermann, Wir sind Frauen wie anderen auch (1980).

[4] This article can provide only a superficial overview of this history, as practice and legislation on the territory under German law varied from region to region over the centuries and was so diverse in its details that a complete presentation would go beyond the present framework. This presentation is limited to treatment of prostitution under criminal and police law, because society's treatment of prostitution is most clearly revealed in these areas of law.

house and, beating her with a rod, chases her through the entire village. A women who surrenders her chastity finds no mercy.[5]

Punishment of public whores is not expressly mentioned in sources on Teutonic law. Carl Brinitzer informs us that they were probably punished like adulteresses.[6] The first criminal law provision aimed specifically at prostitutes is found in the Visigoth legal code. It punished prostitution with whipping, and subsequent offenses with banishment from the city. When prostitution occurred with the knowledge of the prostitute's parents, they could also receive a whipping.[7]

A further source is the royal statutes of the Carolingian dynasty.[8] Palace officials were required to be on the lookout for prostitutes working for wages. Anyone who encountered one was to bring her to the market place and administer a whipping. Anyone acting counter to this command was also to be whipped. Further, anyone who provided quarters to a wage-earning prostitute could be placed in confinement.[9] In the military, too, regulation of prostitution played an early role. In the laws of war of Emperor Friedrich I Barbarossa in 1158 we find the following criminal provision:

No one is to have a woman in his quarters. Anyone who nevertheless dares to keep one, his armor shall be taken away and he shall be considered excommunicated. But the woman's nose shall be cut off.[10]

In subsequent centuries society changed, as did the legislature's attitude towards prostitution. Peasant villages and artisans' settlements became cities; serfs became citizens and business people. The blossoming of the cities attracted men and changed the ratio of the sexes. With increasing wealth in the cities, sexual life and sexual morality changed; the ascetic tendencies prevailing in the early Middle Ages disappeared. The Scholastic theories of the Middle Ages supported this development; Thomas Aquinas (1224-1272), for example, considered prostitution ineradicable, as a function of original sin. Citing St. Augustine (354-430), he demanded tolerance of prostitutes.[11] One might almost say that the golden

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5 GERMANIA TACITUS, *quoted in* CARL BRINITZER, STRAFRECHTLICHE MAßNAHMEN ZUR BEKÄMPFUNG DER PROSTITUTION 7 (1933). Tacitus was a Roman historian who lived from 55 to 116 A.D.

6 *See* BRINITZER, *supra* note 5, at 7.

7 FELIX DAHN, WESTGOTISCHE STUDIEN 233 (1874). The Visigoths lived, on varying territory, approximately 376-711.

8 *Id.* at 751-911.

9 BRINITZER, *supra* note 5, at 9.

10 DR. W. HABERLING, DAS DIRNENWESEN IN DEN HEEREN UND SEINE BEKÄMPFUNG. EINE GESCHICHTLICHE STUDIE 28 (1914).

11 BRINITZER, *supra* note 5, at 11.

age of prostitution had begun, if not for the fact that we also know of discriminatory regulations. This seems to indicate that prostitution, while extensively tolerated, was not really welcome and ultimately, even in this period, met with disapproval.

Words used to refer to prostitutes held positive associations;[12] they included "free daughters" and "fancy ones" (*Hübschlerinnen*).[13] Prostitution was recognized as a "guild business"subject to city administration and jurisdiction. Only prostitution by minors was forbidden. The victim was punished—with caning and banishment from the city, according to a document from Würzburg, and physical punishment if she returned before reaching majority.[14] Many cities had "women's houses," also known as "secret houses," "houses with free daughters," or "meretricious huts" (*Meretrizenbuden*), run by "women's innkeepers" and subject to government oversight.[15]

Legal codes of this period with extra-regional applicability, such as the *Sachsenspiegel*[16] or the *Schwabenspiegel*,[17] do not mention prostitution. Often, city law of the time granted privileges to state-supervised women's houses and their operators. Favorite forms of organization were "communal brothels,"[18] urban women's houses set up using public funds and run by "women's innkeepers" who were employees of the state, duty-bound to promote the city's honor and benefit and avoid dishonor.[19] Married persons and priests were prohibited under penalty of law from visiting the women's houses.[20] These houses were specially-controlled "pacified houses" (*befriedete Häuser*). Violations of decency and order in such a house, for example through swearing or even physical acts, were threatened with "double" penalty.

This might seem a paradise, had regulations not also existed that made it clear that prostitutes were far from achieving recogni-

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12 *E.g.*, in comparison with "dissolute womenfolk" in § 999 of the General State Law for the Prussian States, 1794.

13 GEORG LUDWIG VON MAURER, GESCHICHTE DER STÄDTEVERFASSUNG IN DEUSCHLAND 111 (vol. 3, 1870).

14 BRINITZER, *supra* note 5, at 14.

15 VON MAURER, *supra* note 13.

16 Written in the years 1224-25.

17 Written in the years 1274-75.

18 This model is under discussion again today, and is even considered desirable by many communities; however, existing criminal law prevents introduction of such brothels, as the city operators could be prosecuted for promoting prostitution (§ 180 (a) (1) of the Criminal Code) and pimping (§ 181 (a) (1) (2) of the Criminal Code), *see infra* notes 79 and 82.

19 *See* CARL JÄGER, ULMS VERFASSUNGS, BÜRGERLICHES UND COMMERCIELLES LEBEN IM MITTELALTER 546 (1831).

20 BRINITZER, *supra* note 5, at 13.

tion as equal members of society. Thus under Augsburg's City Law of 1276, *Hübschlerinnen* were subject to the authority of the judge and were forbidden—on pain of having their noses cut off—to be in the city during the fourteen-day fasting period before Easter. They were also forbidden to enter the city on Saturday nights, "except when gentlemen are here."[21]

In order to separate "honorable, pious" women from the "common" or "secret women" and protect the former from the latter, cities adopted clothing rules that obliged prostitutes to mark their veils or head scarves with yellow or green-colored bands, did not permit them to wear certain articles of clothing (fur, silk dresses) and jewelry, and prohibited them from standing near the "pious" women in church.[22] Women who worked as prostitutes in private women's houses or on the street were required to live and work on remote side-streets.

Thus prostitution, in its free and state-licensed guises, at least occupied a firm position in society for some three centuries. Not until the beginning of the 16th century was government acceptance of prostitution abandoned. Syphilis spread through Europe and influenced the relationship between the sexes.[23] At the same time, the Reformation brought a new doctrine of morality that no longer comported with toleration of prostitution. Martin Luther summarized his views in 1543 as follows in a warning to his students:

> [A]nyone who does not want to live without whores, he may go home and wherever he wants to go; this is a Christian church and school, because one should learn God's word, virtue and discipline. Anyone who wishes to be a whorer, he can do so elsewhere. Our merciful Lord did not create this university for whore chasers and whorehouses, you will know to act accord-

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21 *Id.* at 12. "Gentlemen are here" was apparently to be understood to mean that male travelers were in the city.

22 *Id.* at 15-17 (for further cites).

23 *See* GEORG STICKER, ENTWURF EINER GESCHICHTE DER ANSTECKENDEN KRANKHEITEN, IN HANDBUCH DER HAUT UND GESCHLECHTSKRANKHEITEN (1931). Wolzendorff, *in* DR. KURT WOLZENDORFF, POLIZEI UND PROSTITUTION n.20-21 (1911), denied that syphilis was the reason for measures against prostitution:

> If syphilis gave the police grounds for consideration, this could only have been, in my opinion, of a 'morals police' nature. The 'disease of lust' was seen as Heaven's punishment for licentiousness, and thus there was a desire to assist heavenly justice through its worldly arm, the morals police, by attempting in general to suppress unchastity, especially paid unchastity. What they were trying to suppress was not a source of illness, but immorality.

Id.

> ingly. . . . If I were a judge, I would have such a French whore broken on the wheel.[24]

Sanctions on prostitutes were comprehensive. They were aimed at the women, their patrons, and go-betweens. In the 16th and 17th centuries, numerous criminal law provisions emerged in various territories and cities aimed at the acts of living together without marriage and procuring. In most cases, the behavior of both women and men was made punishable.[25] At the same time, however, not all codifications contained criminal penalties. The most important inter-regional criminal codifications[26] of the time do not mention "simple licentiousness" and the corresponding "simple procuring." Only adultery and qualified procuring (procuring married women and children) were punished.

Supplementary morality provisions were created. The Reich Police Orders of 1533, 1548 and 1577[27] provided that "the spiritual and worldly authorities" were to ensure that "any living together outside of God-given marriage" be "seriously punished" and not tolerated. Further, in order to distinguish "honorable" from "dishonorable" women, strict clothing requirements were adopted.

Under pressure of the "repressive system, working with bloody harshness, of the frenzied morals police,"[28] women's houses were gradually shut down. All this had only one consequence: a "tre-

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24 *Cited in* Brinitzer, *supra* note 5, at 30.

25 Police and State Order for Mecklenburg-Schwerin of 2 July 1572: "[w]e hereby forbid any living together out of wedlock, procuring, whoring and similar vices, on penalty of the stocks, flogging, and banishment from the state . . . "; Decrees and Constitutions of Elector August von Sachsen of 21 Apr. 1572: ". . . [t]hus we decree and establish that the common woman be publicly expelled and the man thus having to do with her be punished with prison or fine"; State Law of the Duchy of Prussia of 1620: Penal Order of 13 May 1605, outlining how in the future, in the duchy of Zweybrücken, whoring and licentiousness among unmarried and married persons is to be punished:

> If . . . an unmarried man . . . practices whoring . . . with an easy unmarried woman of bad reputation, the same man should be kept for many days in prison and be fed on water and bread, or otherwise punished, but the easy woman of bad reputation, depending on opportunity and circumstance and frequency of the licentiousness, be punished either with imprisonment, or be placed publicly in the stocks and banned from the principality temporarily or forever, and thrown out of it.

All of the above *quoted in* BRINITZER, *supra* note 5, at 34-38 (with sources).

26 The religious reform was accompanied by reform in the area of criminal law—the reception of foreign criminal law, developed by late medieval Italian jurists. The Bamberg Rules of the Court of Capital Offenses, the "Constitutio Criminalis Bambergensis" (CCB) of 1507, established the substance of German criminal law reform and became the basis of the first German "Reich Criminal Law Code," the criminal laws of Emperor Charles V of 1532, the "Constitutio Criminalis Carolina" (CCC). Neither code mentions "simple licentiousness" or "whoring," or the associated "simple procuring" or "whoring business."

27 *See* the excerpts *reprinted in* BRINITZER, *supra* note 5, at 31-33.

28 WOLZENDORFF, *supra* note 23, at 20-21.

mendous increase in secret prostitution, with all its dangers for public safety and morals."[29]

The 18th century was a time of transition in Germany, without sharp breaks with the past. In the course of the century, a change gradually became apparent from the rigorous late-medieval combating of prostitution to the earlier system of tolerance and regulation. At first, criminal law failed to reflect the spirit of the Enlightenment. If the courts wished to put into practice the ideas of the Enlightenment, they had to "attempt to bridge the gap between the threatened punishments of the positivist laws—felt to be outdated—by starting on the basis of natural law."[30] Thus there was little fundamental change in the laws aimed at prostitution. The realization grew that corporal punishment for prostitution and other infractions was "in most cases counterproductive."[31] Doctors called for tolerance of prostitution in order to supervise prostitutes' health and in this way combat the spread of syphilis through official measures.[32]

This view was reflected first in Prussian practice, and only later in Prussian law. While the Prussian Improved State Law of 1721 threatened women who "make their bodies common in immorality" with banishment or imprisonment in spinning mills, and prohibited brothels on pain of punishment,[33] in Berlin brothels were already tolerated by the mid-18th century.[34] With the legal situation unchanged, prostitutes in Berlin were required to undergo regular medical examinations beginning in 1769.[35]

Toward the end of the 18th century, even the legislature began to realize that prostitution was an ineradicable "necessary evil" and that its greatest danger was to the population's health. With the brothel regulations of 2 February 1792,[36] Berlin returned to what had been the norm in the early Middle Ages: brothels and the whores who worked there, as well as whores who organized themselves and worked out of homes, were tolerated. Instead of (vainly)

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29 *Id.* at 21.

30 EBERHARDT SCHMIDT, EINFÜHRUNG IN DER GESCHICHTE DER DEUTSCHEN STRAFRECHTSPFLEGE 246-47 (1983).

31 JOHANN JAKOB CELLA, BER VERBRECHEN UND STRAFE IN UNZUCHTSFÄLLEN 77 (1787).

32 JOHANN PETER FRANK, SYSTEM EINER VOLLSTÄNDIGEN MEDICINISCHEN POLIZEY, MANNHEIM 16 (vol. 2 1780) and additional cites *in* BRINITZER, *supra* note 5, at 70-73.

33 BRINITZER, *supra* note 5, at 60.

34 *Id.* at 73.

35 Hans Haustein, *Prostituierte und Geschlechtskrankheiten in Berlin um 1700, in* FESTGABE FÜR GEORG STICKER 82 (1930).

36 *Verordnung wider die Verführung junger Mädchen zur Bordelle und Verhütung der Ausbreitung venerischer bel* (Directive against Seduction of Young Girls into Brothels and Prevention of the Spread of Venereal Evil).

battling prostitution, the attempt was made to maintain control over the accompanying health risks and punish violations of health regulations.[37] Unlike the situation in the Middle Ages, working the streets was not tolerated; "street whores wandering in the darkness" were threatened with six to twelve months' imprisonment.[38]

The General State Law for the Prussian State of 1794 (APL)[39] further tightened the regulation of prostitution. The legislature returned again to the model of brothels as state concessions and attempted to limit prostitution exclusively to these institutions.

Under § 999 APL, "dissolute womenfolk" who wished to "do business" with their bodies were required to work in "tolerated whorehouses under state supervision." Prostitutes who worked without police supervision were punished under §§ 1023-1024 APL.[40]

Regulated prostitution also had its bitter opponents; state licensing of brothels soon became the focus of criticism. Prussian minister Count Dohna wrote the police chief of Berlin from Königsberg on 8 May 1809 stating, "In any event, it remains unseemly and harmful to license them [brothels]. . . ; instead, everything possible should be done to impress upon them quite noticeably, in all possible respects and at every opportunity that arises, the deserved stamp of the deepest degeneracy and disgracefulness."[41]

This correspondence with the Berlin police chief ultimately led, on 17 October 1810, to a resolution by the ministry in which the fight against prostitution found expression in the following regulations: brothel keepers were not allowed to become owners, and "wage whores" living separately were no longer tolerated; they were to be accommodated in brothels or banished, or kept in workhouses until they could prove they had honorable employment. Existing brothels were to be moved to remote streets. The number of brothels could no longer increase; instead, "all possible means" were to be used to decrease them. In existing brothels, the number of women was to remain at current levels.[42]

These rigorous measures would be watered down again thirty years later. In 1829, the brothel laws of 1792 were revised; the "Di-

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37 *See* §§ 11, 13, 18 of the regulations, *reprinted in* BRINITZER, *supra* note 5, at 76.

38 Section 20 of the regulation, *reprinted in* BRINITZER, *supra* note 5, at 76.

39 *Allgemeines Landrecht für die Preussischen Staaten*, Part II, Title XX, section 12, §§ 999-1027, under the heading "General Whoring" [hereinafter APL].

40 *See also* §§ 999-1026, which contain some interesting rules, such as how to proceed if a women is pregnant and bears a child in a women's house.

41 *Quoted in* BRINITZER, *supra* note 5, at 89 (with additional cites).

42 DR. J. BEHREND, DIE PROSTITUTION IN BERLIN UND DIE GEGEN SIE UND DIE SYPHILIS ZU NEHMENDEN MAßREGELN 57 (1850).

rective against Seduction of Young Girls into Brothels and Prevention of the Spread of Venereal Evil" again tolerated wage-earning whores living alone, as long as they worked with special police permits. A new feature was that brothel keepers were now also obligated, under penalty of fifty thalers, to take in only women whom they had police permission to accept.[43] "Street whoring" was punishable by six months in a workhouse, and if "the arrested whore is infected with venereal disease," with up to twelve months in a workhouse.

Even the issuance of these regulations in 1829 did not bring peace. The battle against prostitution continued, and more and more the realization took hold that brothels did not guarantee the hoped-for protection against *Winkelhurerei* (street protitution, roughly translatable as "whoring in dark corners"). But instead of accepting the reality, or attempting at least to influence it structurally, officials again hoped that prohibiting brothels would solve the problem. On 1 January 1846, brothels were completely banned in Berlin.[44] Brothels in the Prussian countryside outside Berlin were required, on 31 October 1845, to close within three years.[45]

Thus arose a contradictory legal situation that continued until the beginning of the 20th century. With the prohibition of brothels, § 999 APL[46]—tolerance of state-supported brothels—could not be implemented. But § 1023 APL punished only those whores who worked without "expressly placing themselves under the particular supervision of the police." Thus prostitution under police supervision continued to be permitted. Police supervision aimed primarily at banning prostitutes from the streets and sending them into brothels or requiring them to work from homes.[47] Thus the ban prohibited brothels, while prostitution in brothels (under police supervision) was permitted—a situation that would later occupy the courts, and, of course, led to contradictory treatment of the ban on brothels.[48]

The criminal provisions of the APL were replaced by the Penal Code of the Prussian State of 14 April 1851 (StGBfP).[49] The contradictory legal situation now continued at the legal level rather

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[43] *Id.* at 250.

[44] *Id.* at 154.

[45] BRINITZER, *supra* note 5, at 94.

[46] *See supra*, text accompanying notes 39-40.

[47] Gotthold Bohne, *Kuppelei, in* FESTGABE FÜR REINHARD VON FRANK, 441, 446 (vol. 2, 1930).

[48] According to Behrend, closing the brothels had the opposite effect from what had been hoped. Behrend observed a significant increase in "*Winkelhurerei*" and an unusual spread and increase in syphilis. *See* BEHREND, *supra* note 42, at 206.

[49] RGBl. 1851, at 101, 131, 132 [hereinafter StGBfP].

than decree. Section 146 threatened "women" who conducted prostitution in contravention of police regulations—including assignment to brothels—with up to eight weeks' imprisonment. Section 147 of the StGBfP made running a brothel punishable as procuring. The laws continued to be applied with complete inconsistency in practice; in some cases, running a state-licensed brothel went unpunished.[50] Despite the existence of § 147 StGBfP, the Prussian government granted licenses to brothel-keepers.[51] At the same time, brothel-keepers were punished by Prussian courts for procuring.[52]

The muddy legal situation continued with the creation of the penal code for the North German Union in 1870[53] and in the Reich Penal Code of 16 April 1871 (RStGB).[54] Section 361 numeral 6 RstGB provided for imprisonment of those who practiced prostitution in contravention of police regulations. Sections 180 and 181 continued to punish procuring or creating opportunities for prostitution in various circumstances.

A debate emerged as to whether prostitution outside of police supervision was to be punishable as a general principle, or only if subject to police supervision but practiced in contravention of it. This vagueness was eliminated by a revision of law on 26 February 1876, which clarified the fact that prostitution conducted without police supervision was illegal,[55] as had earlier been the regulation under § 1023 APL. If free prostitution had been temporarily possible up to that point, it was unmistakably forbidden as of February 1876.

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50 *See, e.g.,* the views of the state prosecutor, *quoted in* G A f. Preuß., at 394 (vol. 1); the view of the Prussian Minister of Justice published in 1853, in which he speaks of impunity for women who have been taken in by "police-licensed brothels," *cited in* BRINITZER, *supra* note 5, at 96.

51 *Id.* at 98.

52 Decision of the Prussian Supreme Tribunal of 6 May 1853, GA 1, at 395; GA 10 (1862), at 369; GA 15 (1867), at 82; Dalcke zu Elbing, a public prosecutor, characterized the legal situation as follows:

> The common view of law will never be able to grasp that the procurer who drives a blameless virgin into the arms of a libertine is identical, in terms of culpability, to the brothel keeper who keeps prostitutes working for money with the permission of the police authorities; and a law that does not particularly emphasize the former case, but instead expresses the fundamental equality of both . . . earns no approval.

Dalcke zu Elbing, *Beiträge zur Revision des preußischen Strafrechts,* 17 ARCHIV FÜR PREUßISCHES STRAFRECHT 398-99 (1869).

53 RGBl. 1870, at 231, 265, 266.

54 RGBl. 1871, at 162, 197, 198; following the founding of the German Reich, the penal provisions of the Penal Code of the North German Union were adapted unchanged in the RGStGB.

55 RGBl. 1876, at 112.

However, great controversy continued on the question of whether, despite a broadly-conceived prohibition of brothels in the laws on procuring, brothels licensed by the police were or were not permissible.[56] The Reich Court took the view that even running a brothel with state permission fell under § 180 StGB.[57] In the opinion of the Reich Court, even renting a dwelling for the purpose of "indecency" fell under § 180 StGB, even if the renter had a police license to run a brothel.[58] Other views were found on the part of the authorities, where, for example, the Hamburg public prosecutor refused to prosecute a police-licensed brothel on 16 August 1871, arguing that the operation did not fall under § 180 StGB.[59]

This decision followed a dispute between the Reich Chancellor's Office and the Hamburg Senate, in the course of which all German law faculties were asked to present their views on the issue in question: did licensed brothels fall under § 180 StGB? Responses to this question diverged, with some faculties answering yes and others no to the question.[60] For local police administrations, this legal situation led in practice to a "system of half-measures, cover-ups, dishonest behavior on the part of the state police functionaries."[61]

Nevertheless, in 1900 there was a change in the treatment of morals crime: punishment for pimping[62] was reintroduced, while the defintion of the crime of prostitution remained unchanged. The provisions of § 181(a) StGB targeted a specific type of offender, described as follows: "As a rule, the pimp uses the prostitute, with whom he is linked by her need for protection or affection, as a source of income. He knowingly partakes of the in-

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56 *See* Blaschko, *Vorschläge zur Neuregelung des Prostitutionswesens, in* DEUTSCHE STRAFRECHTSZEITUNG 508-10 (1915).

57 RGSt. 1, at 88-90.

58 GA 39, at 227.

59 BRINITZER, *supra* note 5, at 118.

60 Schmölder, ZstW 13, at 538-540; HALDY, DIE WOHNUNGSFRAGE DER PROSTITUIERTEN (KUPPELEIPARAGRAPH UND BORDELLWIRT) 43-44 (1914).

61 HALDY, *supra* note 60, at 65. An anonymous writer described the situation as follows in an 1886 essay:

> Since the mid-fifties, Berlin has not had brothels . . . especially as people in Berlin cling desperately to the belief that these institutions are incompatible with the provisions of § 180 RGStGB. . . . Other large cities are not as fearful and conscientious on this point. In Hamburg and Leipzig, for example, a large number of brothels continue to exist that are known to the police, regulated by the police, strictly supervised and generally seen as beneficial institutions. Only if, in one or another, activity should become too extreme do the police intervene and supply the prosecutor with material to bring charges for procuring; after punishment is achieved and sentence served, everything goes back to the way it was.

ZstW 6, at 257-58.

62 Reichstag III 1924/27 BT-DRUCKS Nr. 3390, at 151.

come she earns through prostitution, in order to lead a life devoted to idleness and pleasure."[63] The prostitute was viewed as a victim in need of protection from the role of the "sole earner."

Only under increasing pressure due to communicable venereal diseases was prostitution as such finally legalized in the Law to Combat Venereal Diseases of 22 February 1927, and the principle that prostitution was legal under police supervision and otherwise prohibited was abandoned.[64]

This crucial change coincided with efforts to view prostitution more from the point of view of health and less from the penal angle.[65] On the legislature's motives, the director of the state court in Potsdam, Dr. Hellwig, wrote:

> It was, rather, sober considerations of expediency that led the legislature to declare prostitution as such legal, in the realization that, at least in larger cities in which circumstances are difficult to supervise, combating prostitution through criminal law has failed completely and must fail in the future, and based on the conviction that the law's health-related duties could be far more effectively fulfilled in regard to prostitution if prostitutes were no longer acting illegally by practicing their disreputable business.[66]

The so-called *Kasernierungsverbot* (prohibition on quartering in barracks-like accommodations) was introduced (§ 17), and in a supplement to the former § 180 (procuring), it was made clear that running a brothel was illegal, but simply renting a room to a prostitute over 18 years of age was not punishable. Provisions forbidding "encouragement of prostitution" were created. Also new was the fact that criminal regulations were no longer directed exclusively against women, but against everyone.

The usefulness of the prohibition on quartering was controversial; advocates of the ban believed that crowding many prostitutes together in specific places gave the appearance of a large-scale operation that might act as an attraction. In addition, eliminating quartering could make it easier for prostitutes to leave the business.[67]

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[63] Section 181 a StGB, RGBl. 1900, at 302.

[64] Reichstag explanation of § 181 (a) StGB, *cited in* RGSt 73, at 184.

[65] RGBl. I, at 61-63, especially §§ 16, 17.

[66] DR. ALBERT HELLWIG, GESETZ ZUR BEKÄMPFUNG DER GESCHLECHTSKRANKHEITEN VOM 18. FEBRUAR 1927, at 10; on the motives, *see also* Hanack, *Empfiehlt es sich, die Grenzen des Sexualstrafrechts neu zu bestimmen? in* VERHANDLUNGEN DES 47. DEUTSCHEN JURISTENTAGES, marginal note 249 (vol. 1 part A).

[67] HELLWIG, *supra* note 66, at 23.

Thus at this point, the same basic principles that characterize the penal treatment of prostitution today had been established: management of prostitution was illegal, while prostitution as such was legal.

During the Nazi period, § 361 (6) and (6)(a) of the criminal code were changed only slightly by a law of 29 May 1933.[68] The Directive to Change the Law to Combat Venereal Diseases of 21 October 1940 repealed the prohibition on quartering.[69] Despite official condemnation of prostitution by the fascist leadership, official brothels apparently did exist in addition to brothels tolerated by the police. State-organized prostitution also occurred outside of any legal framework in the concentration camps, where women were forced into prostitution against their will.[70]

West Germany[71] at first adopted existing prostitution laws almost unchanged.[72] But post-war practice proved to be influenced very little by the state of the law. Brothels continued to exist, adapted in type and form to modern realities; they generally violated § 180 (II) StGB,[73] but were tolerated by the police. Despite § 180 (III) of the criminal code, there continued to be "bad" utilization of room rentals to prostitutes that went largely unpunished.[74]

Not until the early 1970s, with the Fourth Law for the Reform of Criminal Law,[75] was the law on sex crimes revised; it included regulations involving prostitution. In the debate accompanying the reform, controversy arose over whether or not to retain punishment of prostitution management through criminal sanctions. In an Alternative Draft Penal Code, a group of criminal law professors

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68 RGBl. 1933, at 297.

69 RGBl. 1940, at 1459.

70 *See* Sabine Gless, *Obrigkeit und Hurenwirt*, ZRP 441 (1994).

71 The situation in East Germany from 1945-1990 is not discussed here. Section 123 of the East German Penal Code of 12 Jan. 1968, in the version of 14 Dec. 1988, made the exploitation or promotion of prostitution for the purpose of earning income illegal; this provision was also aimed at the prostitutes themselves.

72 The Fifth Law to Change the Penal Code of 24 June 1960 created the authority to set up prohibited zones (*see infra*, notes 103-107 and accompanying text) and reintroduced the prohibition on quartering in barracks-like accommodations, BGBl. 1960 part I, at 477; later, minor changes were made in the rules on prohibited zones, *see* Introductory Law to the Penal Code in its version of 7 Apr. 1970 BGBl. 1970 part I, at 313; Second Penal Code Reform Law BGBl. 1969 I, 717, at 10. Law to Change the Penal Code, BGBl. 1970, at 313.

73 *See* Hanack, NJW 5 (1974), marginal note 253, which points out that brothels in the traditional sense, with a dependency that involves all aspects of the prostitute's life, no longer exist.

74 *Id.* at marginal note 255.

75 *Viertes Gesetz zur Reform des Strafrechts* (4th StrRG), BGBl. 1973 part I, at 1725.

proposed lifting the ban on brothels and brothel-like businesses,[76] as well as eliminating any criminal sanctions on pimping.[77]

The legislature made a different decision. It concluded that preventing dangers arising from prostitution made it necessary to view it as a crime, and felt the police could only keep a "foot in the door" of the prostitution business if they were able to supervise adherence to the penal regulations.[78]

As a result of this assessment, the reform brought no essential changes for prostitution. The brothel prohibition was essentially retained.[79] The "monster crime"[80] of procuring, which had punished any encouragement of extramarital sexual activity, independent of prostitution, was eliminated.[81] Managing prostitution, in the form of pimping, continued to be a punishable offense, in modified form.[82] A new crime of trafficking in human beings was intro-

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76 ALTERNATIV-ENTWURF EINES STRAFGESTZBUCHS (1968).

77 *Id.* at 55; elimination of the crime of pimping was also recommended by the 47th Jurists' Congress, *see* Horstkotte, JZ 88 (1974).

78 Horstkotte, *supra* note 77.

79 Section 180 (a) StGB:

180 (a): Encouragement of Prostitution

(1) Anyone who runs or heads a business in which people perform prostitution and

1. these people are kept in personal or economic dependency; or

2. prostitution is encouraged through means going beyond simple assurance of apartments, accommodations or a stay, and the usual secondary benefits accompanying this will be subject to up to three years' imprisonment or fine.

(2) Also subject to punishment is anyone who

1. Guarantees to a person under 18 years of age, for the purpose of practicing prostitution, an apartment, business accommodations or business stay; or

2. Encourages someone to whom he gives an apartment for prostitution to practice prostitution or exploits that person in this direction.

80 Hanack, *supra* note 73.

81 *See* BUNDESTAGSPROTOKOLLE (Bundestag proceedings), 6th electoral period, at 1636 (Horst ed.).

82 Section 181 (a) (1) and (2) StGB:

181 a: Pimping

(1) Anyone who

1. Exploits someone else who practices prostitution, or

2. Oversees his property advantages in someone else's practice of prostitution, determining the place, time, extent or other circumstances of the practice of prostitution, or taking measures meant to keep the other from giving up prostitution, and with a view to this maintains a relationship with this person going beyond single incidents will be punished with from six months to five years' imprisonment.

(2) Anyone who encourages someone else in the commercial practice of prostitution by arranging sexual intercourse, and with a view to this maintains a relationship with the other going beyond single incidents will be punished with up to three years' imprisonment or fine.

duced[83] as a "necessary element in combating international crime."[84]

This brings us essentially up to date on the current legal situation.

III. Current Legal Situation

The legal situation today is defined by the belief that prostitution is immoral. Prostitution is legal in all its forms. There are no medieval clothing requirements; yet disapproval is expressed in a different form—in the punishment of every type of prostitution management[85] and in discriminatory, unequal treatment of prostitute's activity at all levels of law. Specifically, these include the following.

A. Criminal Law

Regulations concerning brothels and other organized forms of prostitution[86] have remained unchanged since 1973. The protective goals of these norms were defined in 1973 as follows:

> [P]rotecting the individual from the danger of being drawn into prostitution. The bill . . . proceeds on the assumption that prostitution is a social evil for those conducting it. It takes into consideration the observation that a certain loss of freedom generally accompanies prostitution activity. They . . . are also made offenses in order to protect personal freedom.[87]

The women affected, however, find themselves not so much protected, as prevented from conducting their activities under acceptable working conditions.[88] The more pleasant a brothel operator makes the prostitutes' workplace, the more likely he or she is to violate § 180 (1). The decisive criterion for illegality is the question "whether the overall state of the business is geared toward keeping the prostitutes in prostitution and tying them to it even more closely."[89] According to the court, this is the case, for exam-

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83 Section 181 StGB.

84 Horstkotte, *supra* note 77.

85 Sections 180 (a) (1) and (2); 181 (a) StGB.

86 Sections 180 (a) (1) and (2) and 181 (a) StGB. Under the 26th Law to Change the Criminal Law of 14 July 1992 (BGBl. I 1992, at 1255), § 180 (a) StGB (old version) was separated from (3), regarding trafficking in human beings; trafficking in human beings was modified and made illegal in §§ 180 (b) and 181 StGB.

87 Horstkotte, *supra* note 81, at 1637.

88 *See* Draft Law on Legal and Social Equality of Prostitutes with other Workers, *Prostitution, Job, Beruf, Arbeit* (German Whores' Movement, 1996), at 17 ff (brochure in the author's possession).

89 Federal Supreme Court (Bundesgerichtshof, BGH), decision of 17 Sept. 1985, NJW 596 (1986).

ple, where particularly favorable working conditions exist, such as "creation of a sophisticated, discrete atmosphere," "exclusion of undesirable, less well-off clients uninterested in sex for pay,"[90] or "free transportation of the prostitutes to the apartments rented to them to conduct their prostitution."[91]

Thus all that remains legal is operation of so-called "Eros Centers": the operator rents rooms to prostitutes, who conduct prostitution at their own expense. The women must bear the risks of independent status, generally pay very high rents, and have no connection to a business, which could provide a certain degree of social and financial security.

Section 181 (a) (1) (2) also stands in the way of the women's desire for secure workplaces. Actions that would be perfectly normal in dealing with dependent employees in other sectors, such as supervision or establishment of place and time of activity by a single individual seeking to make a profit from such management, are subject to six months to five years' imprisonment when they involve prostitution. The consequence for the prostitute is that, outside of street prostitution, she must work almost automatically in a criminal milieu.

Section 181 (a) (2) StGB is aimed at heads of call-girl operations and professional "touts," or pimps.[92] This crime was not included in the original government bill for the fourth criminal law reform. However, in the course of the debates there were increasing calls for punishment of organizers of call-girl operations.

Although it was acknowledged in the discussions that call-girl operations could be the form of prostitution "least likely to entangle the prostitute in loss of freedom and also least likely to degrade her,"[93] the legislators accepted the view relating to the welfare of those at risk, which went as follows:

> [C]all-girl activities [are] very problematic, for the danger that girls in this field will be drawn into prostitution is particularly great, since call-girl activity has a certain touch of respectability and the threshold to prostitution that is branded negative by society is barely perceptible. If girls allow themselves to be roped into a call-girl operation, they often retain the illusion that they have not become real prostitutes, but simply achieved financial results with their attractiveness.[94]

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90 *Id.*
91 KG, decision of 10 May 1979, file no. (4) Ss 121/78 (17/19).
92 Horstkotte, *supra* note 77, at 89.
93 Horstkotte, *supra* note 81, at 1640.
94 *Id.*

The image of a girl whom the legislator must protect from doing what she wants[95] pervades the entire discussion on criminal sanctions. While the victim's agreement is considered a waiver of legal protection for numerous other offenses, so that the act cannot be illegal,[96] the woman's wishes are ascribed no importance when prostitution is involved. Businesslike "management of others' sexuality"[97] is punishable even if the women working in the business completely accept the measures taking by the business managers.

On the decision not to accept women's agreement as justification, the bill explains,

> This occurs primarily in the interests of the personal freedom of the person involved [expressed in German using the masculine pronoun]. For given the typical personality structures of prostitutes and future prostitutes, and considering the multifaceted pressures surrounding prostitution, in most cases one can hardly say that the step into prostitution and the continuation of this activity is based on free choice.[98]

Thus as late as 1993 the Federal Supreme Court determined that "[t]he fact that, in regard to her profession, a prostitute subjected herself of her own free will to the influence and decisions of another does not necessarily stand in the way of conviction under this regulation."[99]

Still, some signs of a softening have recently been observed, after years of uniform jurisprudence. Some judges are themselves advocating recognition of prostitution as an occupation in accordance with Art. 12 of the Basic Law (Germany's constitution),[100] and have acted on this view—contrary to the jurisprudence of higher courts—in their decisions. Thus in a decision of 30 June 1992, the Münster Trial Court found unconstitutional the criminal code provisions prohibiting encouragement of prostitution and employ-

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95 In practice, § 181 (a) (2) StGB has proved an obstacle to women joining together to make house calls by telephone appointment. Anyone who arranges house calls for herself or others ("keeping the records for a call-girl operation," Horstkotte, *id.* at 1642) can be prosecuted for pimping under § 181(a) (2) StGB.

96 *See* DREHER & TRÖNDLE, STRAFGESETZBUCH UND NEBENGESETZE, marginal notes 3a, 3b before § 32 (1995).

97 Hanack, NJW 6 (1974).

98 BT-DRUCKS 6/1552, Sachgebiet 45, at 25.

99 BGH, decision of 21 July 1993, StV 482 (1994). The regulation referred to is § 181 (a) (1) (1) of the criminal code, exploitative pimping.

100 Art. 12 ensures Germans the "right freely to choose their trade, occupation, or profession, their place of work and their place of training."

ment of prostitutes,[101] saying they violated the basic right to choose one's career as a club operator or prostitute.[102]

In any case, the actual situation differs from what one would expect from the criminal law regulations. German cities have "red-light districts" and streets with one quite obvious brothel after another. In no other area is the law on the books so far removed from actual practice—have criminal sanctions failed on such a broad scale—as in the area of prostitution. It is an obvious example of the hypocritical treatment of a subject that has been unpopular for centuries.

B. Public Order Law (Ordnungswidrigkeitenrecht)

1. Prohibited Zones

The "morals police" supervision today takes place by way of prohibited zones. Prohibited zones are established in Prohibited Zone Regulations that ban prostitution, in whole or in part, regionally and/or at specific times of day. Prohibited zones can be traced back to § 361 (6) (a) of the Criminal Code,[103] introduced under the Law to Combat Venereal Diseases of 18 February 1927, which, while "decriminalizing" prostitution, also made it illegal in certain locations.

In Germany, most larger cities[104] have established prohibited zones.[105] Their prohibited-zone ordinances often consist of many different regulations relating to the form of prostitution (street-walking, brothel or apartment prostitution) and actions such as ini-

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101 Sections 180 (a) (1) (2) (defines encouragement of prostitution as running a business in which prostitution takes place and "prostitution is encouraged through means going beyond simple assurance of apartments, accommodations or a stay, and the usual secondary benefits accompanying this") and 181 (a) (1) (2) (defines illegal pimping as "overseeing one's property advantages in someone else's practice of prostitution, determining the place, time, extent or other circumstances of the practice of prostitution, or taking measures meant to keep the other from giving up prostitution").

102 Unpublished decision of the LG Münster of 30 June 1992, file no. 7 Kls 39/91. In a decision of 7 Mar. 1994, file no. 2 BvL 69/92, the Constitutional Court rejected the Münster trial court's referral as inadmissable and did not consider the issues of unconstitutionality it contained. At this time, there exists no Constitutional Court decision on this issue. *See also infra* note 161 and accompanying text.

103 RGBl. 63 (1927).

104 In Berlin, introduction of prohibited areas has been discussed at the parliamentary level, so far without results; *see* petition by Senate Administration for Internal Affairs to enact a "Prohibition on Prostitution in the Schöneberg and Tiergarten Districts of Berlin," 2 May 1995, Senatsverwaltung für Inneres III B 1-0333/04.

105 Art. 297 StGB is the authority upon which these regulations are based; repeated violation of a prohibited zone regulation—that is, conducting prostitution in a prohibited zone—can be punished with a fine or up to a year's imprisonment. This is also true, under certain circumstances, of prostitution in the neighborhood of schools and similar facilities (§§ 184 a and 184 b StGB). A single violation of a prohibited-zone regulation can be punished as a misdemeanor (§ 120 (1) (1) OWiG (Public Order Law)).

tiating or conducting prostitution, with different actions allowed on different streets. For example, Munich's prohibited-zone ordinance includes twenty-seven different prohibited zones with differing regulations.[106]

Prostitutes criticize the establishment of prohibited zones[107] because they necessarily lead to a reduction in work sites; they also favor the activities of pimps, since women who are "offered protection" have no way of avoiding it.

2. Advertising

Advertising prostitution is not permitted.[108] As a result, advertising is covert, using phrases such as "model," "hostess," or "massage," although this is also prohibited under current jurisprudence.[109]

Administrative authorities are not required to act against forbidden advertising; they may tolerate violations when it seems appropriate, and as a rule, they do so. Every day, the tabloid press publishes many pages of ads offering sexual services in concealed form.

The disadvantage of resorting to secretive advertising is that it is not possible to link it with AIDS prevention measures, such as publicly advertising that condoms must be used.

C. Police Law

Existing police law reflects the discriminatory treatment of prostitution. In the police laws of most of the German states,[110] police power to intervene depends exclusively on the fact that legal prostitution is conducted in a particular place. In such places, anyone may be subject to identity checks. Searches of persons and their possessions are also possible. Some states provide for special authority to act in dwellings protected under Art. 13 of the Basic Law (which guarantees inviolability of the home): dwellings in which prostitution takes place may be entered by the police *at any*

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106 *See* BUNDESMINISTERIUM FUR FRAUEN UND JUGEND, DOKUMENTATION ZUR RECHTLICHEN UND SOZIALEN SITUATION VON PROSTITUIERTEN IN DER BUNDESREPUBLIK DEUTSCHLAND 269 (1993) [hereinafter DOKUMENTATION].

107 *See* DRAFT LAW ON LEGAL AND SOCIAL EQUALITY OF PROSTITUTES WITH OTHER WORKERS, *Prostitution, Job, Beruf, Arbeit*, supra note 88, at 7-8.

108 Section 120 (1)(2) OWiG.

109 *See* OLG Karlsruhe, NJW 61 (1978); OLG Stuttgart, NStZ 77 (1982); OLG Hamburg, MDR 319 (1985).

110 Police law falls under the legislative jurisdiction of the states.

time—even at night—to prevent a compelling or significant danger.[111]

Simply because of their profession, prostitutes may be the subjects of data-collection by police. Prostitutes are automatically thought to have contact with, or to accompany, people suspected of criminal activity. Thus they are among those people whose personal data may be checked for purposes of preventive crime fighting. Long-term observation and use of technical methods such as photos or films are also generally permitted against prostitutes.[112]

D. Restaurant and Small Business Law

The authorities are required to refuse or revoke a license to operate a bar or club if "the owner sets up or runs his establishment in such a way that it affords favorable conditions for initiation of sexual relations between prostitutes and clients," and the owner thus "encourages immorality."[113] If a town clerk knowingly tolerates the operation of such an establishment, he or she may be prosecuted for abetting the encouragement of prostitution through his or her failure to intercede.[114]

Nevertheless, in every normal German city, one encounters a number (depending on the size of the city) of clubs and bars in which favorable conditions for initiation of prostitution have been created or which directly adjoin brothels. In many cases, local authorities are aware of this; whether they take action depends on considerations of political expediency and is treated very differently in different regions.

Striptease shows and the showing of pornographic films are permissible under business law.[115] However, peep-shows are impermissible. Under the small business code, a license to operate such shows must be denied because it would offend public morality.[116] This violation of morality is explained by the Federal Administrative Court as arising from the fact that a peep show makes a particularly crass impression of depersonalized marketing of the woman and a lack of social control over the viewer, who is alone in the cubicle.

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111 *See* the detailed description of the police laws of the various states *in* DOKUMENTATION, *supra* note 106, at 43-46.

112 *Id.* at 46, 47.

113 BVERWG, decision of 14 Nov. 1990, NVWZ 373 (1991).

114 BGH, NJW 199 (1987).

115 *See* 71 ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS (Decisions of the Federal Administrative Court) [hereinafter BVERWGE] 29.

116 Sections 15 (2), (33a) of the *Gewerbeordnung* (Small Business Code). *See* 64 BVERWGE 274 and 84 BVERWGE 314.

Here, too, the woman's wishes are immaterial; according to the court, the fact that a woman voluntarily performs in a peep show does not alter the fact that her human dignity is violated in this situation, because human dignity is an objective, inviolable value that the individual may not effectively waive.[117]

E. Health Care Law

Prostitutes also face discrimination under health care laws, in comparison with other occupational groups. Today's Law to Combat Venereal Diseases[118] continues the tradition of the 1927 law of the same name, which was created expressly to supervise prostitutes' health.[119] Although the law does not expressly mention prostitution, it is used mainly for the supervision of prostitutes. Even without concrete reasons for suspicion in individual cases, they are classified overall as people strongly suspected of having, and spreading, sexually-transmitted diseases.[120]

The obligation to present a certificate of health[121] may be enforced; prostitutes may be taken by the police for examinations and treatments, and may be committed to a hospital for observation and treatment.[122]

Health supervision is up to the discretion of the health authorities, and is implemented very differently from region to region. In some cities, prostitutes are required to undergo regular check-ups for certain sexually-transmitted diseases and may be subject to compulsory measures if they do not keep their appointments (in Munich, for example). Other cities (Berlin, for example) require no compulsory exams, and instead rely solely on education and the prostitutes' own sense of responsibility.[123]

Additional health measures may be taken under the Federal Epidemics Law.[124] That law[125] requires that prostitutes use condoms during sex. To this day, only women are considered when the theme of "condom use" comes up, although they are not the ones who "use" condoms. A Commission of Inquiry of the 11th German Bundestag on "Dangers of AIDS and Effective Ways to

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117 64 BVERWGE 279.

118 *Gesetz zur Bekämpfung der Geschlechtskrankheiten* (GeschlKG) of 23 July 1953, BGBl. I at 700, in the version following the latest revision of 19 Dec. 1986, BGBl. I at 2555.

119 *See supra* note 64 and accompanying text.

120 Section 4 GeschlKG.

121 *Id.*

122 Anyone who attempts to escape compulsory hospitalization may be imprisoned for up to a year or fined under § 18 GeschlKG.

123 *See* DOKUMENTATION, *supra* note 106, at 288-89.

124 *Bundesseuchengesetz* (BSeuchG).

125 Section 34 BSeuchG.

Contain Them" therefore proposed that the governments of the German states enact a general condom-use requirement for patrons of prostitutes, in the form of an addition to the Epidemics Law.[126]

Under the Epidemics Law, a prostitute may be required to take an AIDS test at specified intervals.[127] An infected prostitute may be forbidden to continue practicing her profession.[128] There is disagreement over whether prostitutes may be banned from continuing in their occupation (the so-called *Berufsverbot*) under the law, since conducting prostitution is not generally recognized as an "occupation." Alternatively, a ban on prostitution may be based on other clauses of the Epidemics Law.[129] Anyone suffering a loss of income as a result of a *Berufsverbot* under the Epidemics Law receives compensation under the law.[130] The prevailing view is that this does not apply to prostitutes, because their income is not considered worthy of protection.[131]

F. Social Welfare Laws

In Germany, employment, by law, is always accompanied by pension and health insurance. Half the insurance premiums are paid by the employer and half by the employee. Prostitutes are excluded from this system because they have no opportunity to enter into a legal employer-employee relationship. Contracts between brothel operators and prostitutes are null and void; no effective employment relationship, with pension and health insurance obligations, can be based on them. Even recognition of a so-called de facto employment situation, from which a claim to salary and vacation might arise, is impossible because of the "immoral" nature of the activity.[132]

Thus the prostitute's only choice is to buy health insurance as a self-employed worker, which requires higher payments than insurance within the framework of an employment relationship.[133]

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126 Final report of commission of inquiry of the 11th Bundestag on dangers of AIDS and effective ways to contain them [hereinafter *Final Report, AIDS Inquiry Commission*], 13 ZUR SACHE 346 (1990). However, this point of view is controversial and has not yet, as far as can be ascertained, been put into practice in any state.

127 Section 36 (1) BSeuchG.

128 Section 38 BSeuchG.

129 Section 34 BSeuchG.

130 Section 49 BSeuchG.

131 *Final Report, AIDS Inquiry Commission, supra* note 126, at 346-47, 360.

132 *See* decision of the Federal Labor Court in 28 ENTSCHEIDUNGEN DES BUNDESARBEITSGERICHTS (Decisions of the Federal Labor Court) [hereinafter BAGE] 83.

133 In an employment situation, health insurance payments depend on the size of the salary; if the need for medical services remains constant, health insurance payments will be lower for those with lower wages than for those with higher wages. Health insurance pay-

Prostitutes are generally forced to hide their actual occupation, as public health insurance companies refuse to accept prostitutes because of the immorality of their occupation, and private insurance companies may require significant risk premiums.[134]

G. Tax Law

Prostitutes are required to pay income tax. Because of the immorality of their occupation, their income is taxed as "other income"[135] under income tax law.[136] The Federal Finance Court justifies this classification with the argument that the occupation of prostitute "does not involve participation in general economic intercourse." The disadvantage of this type of taxation is that business expenses such as makeup, special clothing, and the like may not be deducted. However, this practice is not uniform. Prostitutes report that some tax offices are willing to consider business expenses in computing their taxes.

Prostitutes are also required to pay turnover tax. Although they supposedly do not "participate in economic intercourse,"[137] in this case—where they may be required to pay—these women are considered businesspeople whose income is subject to general turnover tax.[138]

H. Foreigners' Law

Foreign prostitutes are also affected by this judgment of immorality. They have no chance to practice legal prostitution. They may not work as prostitutes with a tourist visa, because they would no longer be tourists. In this case, prostitution is seen as gainful employment, for which a special visa must be granted.[139] However, no such visa may be issued for gainful employment as a prostitute, because prostitution is not a legally-recognized occupation. If foreign prostitutes work without the theoretically-required visa, they

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ments for the self-employed depend only on the services to be insured, not on the income of the self-employed person.

134 *See* SCHWULE IM RECHT, marginal notes 27.22 (1994).

135 Sections 2 (1) no. 7, (22) no. 3 EStG (income tax law). This contrasts with income from "self-employment," "small business," or "non-self-employed work," § 2 (1) no. 2-4 EStG.

136 Federal Tax Court (Bundesfinanzhof, BFH) decision, NJW 79 (1965).

137 *Id.*

138 Section 12 (1) of the Turnover Tax Law (Umsatzsteuergesetz, UstG). *See* 150 ENTSCHEIDUNGEN DES BUNDESFINANZHOFS (Decisions of the Federal Tax Court) 192; in practice, the turnover tax requirement means that, with a current turnover tax of 15%, the tax office receives 13.04 DM for every 100 DM earned.

139 BGH, NJW 2207 (1990).

are violating the visa requirements of the Foreigners' Law,[140] and can be deported.[141]

Prostitutes from countries in the European Union, meanwhile, are denied an "EU residency permit" (for purposes of employment in an EU member state). In this situation, prostitution does not count as gainful employment as defined in the residency laws of the European Economic Community.[142]

I. Private Law

Prostitution is an economic sector that involves numerous private-law relationships. There are no private law norms dealing expressly with prostitution. Legal interpretation of its private-law relationships arises exclusively from judicial decisions.

The most frequent transaction, the contract between prostitute and patron exchanging sex for money, is considered immoral[143] under the prevailing view, and therefore null and void[144] and imposing no obligations.[145] Prostitutes must collect their fees in advance, because they have no retrospective claim against the client. A client who cheats the prostitute out of the agreed-upon payment is not liable for fraud; the prostitute is not considered to have suffered any damages, as sex has "no value under law that can be estimated in monetary terms."[146]

Prostitutes' only security is in obtaining actual ownership of the money they receive for their services. Once she holds it in her hands, the prostitute need not give it back, despite the fact that there was no legal basis for its payment. The payment of money is considered value-neutral and is not subject to the judgment of immorality.

Judicial opinion has varied in regard to other transactions involving sex work. A rental agreement between landlord and prostitute is legally valid.[147] The Federal Supreme Court explained this from the point of view of results: recognition of a rental contract establishes a certain order and is in the public interest because it makes improved supervision possible. Using a similar explanation,

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140 Section 92 of the Foreigners' Law (Ausländergesetz, AuslG).
141 Section 46 (2) AuslG.
142 BVerwG, MDR 170 (1981).
143 Judicial decisions consider a legal transaction immoral if it offends the sense of decency of all proper and just-thinking people, Palandt, Bürgerliches Gesetzbuch 1b on § 138.
144 Under § 138 (1) of the Civil Code.
145 67 BGHZ 122; 6 BGHSt 378.
146 4 BGHSt 373, decision of 9 Oct. 1953, which remains the prevailing view.
147 BGH, NJW 1179 (1970).

the court acknowledged the validity of brothel leases: if the lessee does not exploit the "whores," limit their independence, or coerce them into conducting their activities, legal recognition of the brothel lease is reasonable in the interests of efficient health supervision.[148]

In a decision of 15 March 1990, the Supreme Court again laid out the limits of immorality. All legal transactions that serve to promote actions forbidden under § 180 (a) StGB are immoral; this applies to rental agreements and leases with prostitutes, business agreements involving the operation of brothels that violate § 180 (a) StGB, and loan agreements to finance brothels.[149]

Additionally, anyone renting to a brothel enters into an uncertain position with regard to other people. Under certain circumstances, a tenant can demand that the landlord eliminate a brothel-like operation in the building.[150] He or she may terminate the lease without notice if prostitution is taking place in another apartment in the same building.[151] Apartment owners in a cooperatively-owned building need not tolerate a brothel in an apartment in the common building.[152]

There is disagreement over the legal validity of contracts for telephone sex. Some courts have rejected suits against telephone sex customers for payment of the agreed-upon fee, with the explanation that the basic contract is immoral.[153] Other courts have denied its immorality.[154]

There is also disagreement on the validity of contracts between newspapers and prostitutes or telephone sex providers for publication of advertisements. In the opinion of the supreme courts of Hamburg, Frankfurt and Stuttgart,[155] such contracts are valid. Conversely, the Bonn trial court believes that an advertising contract is null and void under the Civil Code because it violates the advertising prohibition in § 120 of the Public Order Law (OWiG).[156]

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148 63 BGHZ 365.

149 BGH, NJW RR 750 (1990).

150 AG Hamburg-Wandsbek, *cited in* WOHNUNGSWIRTSCHAFT UND MIETRECHT 280 (1984).

151 LG Kassel, *cited in* WOHNUNGSWIRTSCHAFT UND MIETRECHT 122 (1987).

152 KG, *cited in* WOHNUNGSWIRTSCHAFT UND MIETRECHT 286 (1986).

153 *See, e.g.*, OLG Düsseldorf, NJW-RR 246 (1991); OLG Hamm, NStZ 342 (1990); AG Essen, NJW 3162 (1989).

154 AG Düsseldorf, NJW 1856 (1990); AbrG Berlin, Az. 3 Sa 15/90; AG Offenbach, NJW 1097 (1988).

155 OLG Hamburg, MDR 319 (1985); OLG Frankfurt, NJW-RR 243 (1991); OLG Stuttgart, NJW 2899 (1989).

156 LG Bonn, NJW 2544 (1989).

If a prostitute suffers a loss of income due to some harmful incident (for example, a traffic accident in which she was not at fault), she does not receive compensation to the same extent as victims with other occupations. According to the Federal Supreme Court, a prostitute's compensation claim is limited. Regardless of the prostitute's actual income, the person responsible for the harm must pay her only the "amount of a basic living wage, which experience shows any healthy person may earn even in simple circumstances."[157]

J. Deviations from the Prevailing Opinion

Although prevailing legal opinion continues to judge prostitution as immoral, there have been scattered attempts to grant prostitution legal recognition. Thus, for example, the administrative court of the state of Hesse criticized the Federal Administrative Court decision cited in this article's introduction,[158] declaring it doubtful that the majority of citizens today morally condemns prostitution or considers legal sanction necessary.[159] In a 1991 decision,[160] the Berlin social welfare court determined that the occupation of prostitution counted as time worked, as defined under labor law, meaning prostitutes were eligible for financial support from government labor offices.

More recently, a decision by a court in the Lichtenberg district of Berlin caused a stir. In a decision of 27 October 1995, the presiding judge ignored the prevailing opinion and upheld a prostitute's suit against a client for payment of her agreed-upon fee.[161]

IV. PROSPECTS

The development of the bill by the Green Party in Parliament "to eliminate legal discrimination against prostitutes" of 16 May 1990 was accompanied by a feminist debate on the question of whether self-determined prostitution by women was possible (as

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157 67 BGHZ 129. The court "reluctantly" recognized this compensation only because the prostitute would receive welfare and become a burden on the public if, because of the disreputability of the occupation, the person responsible for the harm were not required to pay.

158 *See supra* note 2.

159 VGH Hessen, INFAUSLR 148 (1989).

160 Decision of Berlin Social Welfare Court, file no. S 66 Ar 923/90.

161 Decision of Labor Court (Arbeitsgericht, AG) Lichtenberg, file no. 4 C 358/95. The decision did not include an opinion. In conversation with the plaintiff following the decision, the judge explained that he had intentionally decided against the prevailing view because he believed the contract between a prostitute and client was not immoral. *See also* BERLINER ZEITUNG, 29 Nov. 1995, at 21; DIE TAGESZEITUNG, 28 Nov. 1995, at 21.

the prostitutes' movement believes),[162] or whether women who sell themselves do so only as victims of men (the feminist position). In the course of the debate, feminist projects and institutions learned to respect the standpoint of the prostitutes' movement, and were ultimately willing to support the bill, which aims to promote self-determined prostitution. Since then, feminist battles over the issue of prostitution have largely ceased. Some still see the prostitute as victim, but this view does not enjoy widespread support. One example of such a view is a draft program for the feminist party *Die Frauen*,[163] which takes the view that recognition of prostitution as an occupation would mean recognizing women as goods.[164] In this view, calls for recognition of the occupation are wrong; therefore, the party works to eliminate prostitution. At the same time, however, the program states that it would support "self-organization by prostitutes."[165] It is difficult to see how these contradictory positions can be seriously reconciled.

On other, more significant, fronts there has been movement toward recognizing prostitution as an occupation. In a decision of 29-30 June 1995, the Conference of All Women's Affairs Ministers[166] called on the federal government to "take measures to improve the legal and social status of prostitutes."[167] The ministers suggested making it clear at the federal legislative level that the service contract between client and prostitute is not immoral, and that criminal law (§§ 180 ff. StGB) should be reformed to no longer interfere with the interests of women who practice prostitution.

The prostitutes' movement has also declared, "The time has come!"[168] At the 19th nationwide prostitutes congress, the prostitutes' movement passed a Draft Law on Professional and Social Equality of Sex Workers with Other Gainful Employment calling for an alteration in existing laws. This was presented to politicians from all parties. The goal is recognition of prostitution as a service and its placement on an equal footing with other occupations, with

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162 *See generally* BERUF: HURE, *supra* note 3.

163 Draft program for the feminist party "*Die Frauen*," presented in Kassel on 10-11 June 1995. The party has no role at the general political level; it is not represented in any state parliament or the federal parliament and is largely unknown to the public.

164 *Id.* at 17 (ch. 2.9).

165 *Id.* at 18.

166 A regular meeting of the ministers for women's affairs of all 16 German states.

167 5th GFMK, 29-30 June 1995, TOP 14: Measures to Improve the Social and Legal Position of Prostitutes. The decision was passed by the overwhelming majority of ministers for women's affairs; the vote was 13 to 1, with 2 abstentions.

168 First line in *Presseerklärung* (press release) by prostitutes' movement, 17 Jan. 1996 (in the author's possession).

no special regulation.[169] Meanwhile, the Green Party has revised its 1990 bill and intends to use the latest 1995 version in a new campaign "to eliminate legal discrimination against prostitutes."[170]

Thus it may be hoped that concrete steps will be taken before the end of this century to reform prostitution law in Germany, that the ancient fight against prostitution will finally end, and that women will be granted legal status in keeping with a modern society.[171]

169 *Id.*

170 The draft law, in its 18 Aug. 1995 version, is in the author's possession; however, it has not yet been published.

171 The demand for real equality for women recently gained force through a constitutional amendment. Art. 3 (2) of the Basic Law, in its new version of 27 Oct. 1994, states: "Men and women possess equal rights. The state shall promote the real equality of women and men and work to eliminate existing disadvantages." BGBl. I, at 3146.