The New German Law on Sexual Assault and Sexual Harassment

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Abstract

In 2016, the German parliament changed the law on sexual assault and rape (Sect. 177 StGB). The new law assumes a "no-means-no"-model, while the old law required coercion as a necessary feature of rape and other forms of sexual assaults. In addition, two new offense descriptions were introduced: sexual harassment (Sect. 184i StGB) and offenses out of groups (Sect. 184j StGB). In this Article, I describe the deficiencies of the old law, the process of law reform, and the newly enacted prohibitions.

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A. Introduction

Rape, sexual coercion, and sexual assault form the core of sexual offenses. How legislatures should define these offenses, and particularly how the threshold between legal and illegal sexual conduct should be drawn, tends to be a matter of intense discussions. German law underwent a major change in 2016 with the reform of Section 177 German Criminal Code (Strafgesetzbuch, StGB), and the introduction of a new criminal offense on sexual harassment, Sect. 184i StGB.[1] Despite the fact that no attempt was made to re-structure the whole chapter on sexual offenses,[2] the recent German reform is of major importance. It involves a genuine shift of paradigms because it departs from the traditional coercion model that deemed it a necessary condition that offenders coerce victims with violence or similar pressure. Under the new law, sexual acts cross the threshold towards criminal conduct if the other person has expressed rejection. Sect. 177 StGB now acknowledges that "no" means no. Coercion was downgraded from a *necessary condition* to an *aggravating circumstance*.

B. German Law Before 2016

Until November 2016, the crime called "sexual coercion; rape" was defined in the following way:

> **Sect. 177 Strafgesetzbuch (StGB, old Version): Sexual Coercion; Rape**
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> (1) Who coerces another person
> 1. by force,
> 2. by threat of imminent danger to life or limb, or
> 3. by exploiting a situation in which the victim is unprotected and at the mercy of the offender,
> to suffer sexual acts by the offender or a third person or to engage in sexual activity with the offender or a third person, will be punished with imprisonment of not less than one year.[3]

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[1] *See* Fünfzigstes Gesetz zur Änderung des Strafgesetzbuches—Verbesserung des Schutzes der sexuellen Selbstbestimmung,, BUNDESGESETZBLATT, Teil I [BGBL I] [Federal Law Gazette], Nov. 4, 2016, at 2460.

[2] For a much more comprehensive example of reform, see the English Sexual Offences Act 2003, c. 42 (Eng.).

[3] Offense descriptions in the STRAFGESETZBUCH [STGB] [PENAL CODE] either prescribe lower and upper limits for sentencing ranges or set a lower limit. In the latter case, the upper limit is always the general maximum of fifteen years imprisonment. *See* STRAFGESETZBUCH [STGB] [PENAL CODE] § 38 (2). Life sentences are rare in the StGB—they are only applicable if the victim is killed. For sexual offenses, see STRAFGESETZBUCH [STGB] [Penal Code] §§ 176b, 178 (Austria).

> (2) In especially serious cases the punishment will be imprisonment of not less than two years. An especially serious case typically occurs if
> 1. the offender performs sexual intercourse with the victim or performs similar sexual acts with the victim or makes the victim perform acts with him that degrade the victim, particularly if they entail penetration of the body (rape), or
> 2. the offense is committed jointly by more than one person.
> (3) The punishment will be imprisonment of not less than three years if the offender
> 1. carries a weapon or another dangerous instrument,
> 2. carries another instrument or other means for the purpose of preventing or overcoming the resistance of another person through force or threat of force, or
> 3. puts the victim in danger of serious harm to health.
> (4) The punishment will be imprisonment of not less than five years if the offender during the commission of the offense
> 1. uses a weapon or another dangerous instrument,
> 2. (a) seriously physically abuses the victim, or
> (b) puts the victim in danger of death.
> (5) In less serious cases under subsection (1) the punishment will be imprisonment from six months to five years, in less serious cases under subsections (3) and (4) imprisonment from one to ten years.

The old version of Sect. 177 (1) StGB only applied if the offender had coerced the victim with force, threats, or exploitation of an unprotected situation. The traditional definition of rape, which can be traced back to medieval law,[4] was based on the coercion model. The *Reichsstrafgesetzbuch* (German Criminal Code from 1871) continued this tradition. The nineteenth-century Code has been substantially modified and amended in many parts. In the portions addressing sexual offenses, the historical roots of the code remained pertinent until 2016. Some features were modernized in 1997,[5] by describing offenders and victims in a gender-neutral way and excluding the former marital rape exception. But the foundations

[4] *See Constitutio Criminalis Carolina* (1532), *in* ISABEL KRATZER-CEYLAN, FINALITÄT, WIDERSTAND, "BESCHOLTENHEIT": ZUR REVISION DER SCHLÜSSELBEGRIFFE DES § 177 STGB 81–84 (2015); for a similar definition in WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *see* KEITH BURGESS-JACKSON, *A History of Rape Law, in* A MOST DETESTABLE CRIME: NEW PHILOSOPHICAL ESSAYS ON RAPE 15, 17 (Burgess-Jackson ed., 1999).

[5] Strafrechtsänderungsgesetz, July 1, 1997, BGBL. I at 1607.

of the law were not revised. Traditional rape law with its coercion model assumed that victims must resist physically. Over time, the rule that victims must resist physically has been softened. The 1871 *Reichsstrafgesetzbuch* acknowledged that, besides overpowering violence, the threat of violence was a good enough reason not to attempt physical resistance. In 1997, "exploitation of a situation in which the victim is unprotected and at the mercy of the offender" became an alternative to violence and threats. The idea was to cover implicit threats, situations can be so intimidating and hopeless that offenders do not need to explicitly announce physical harm. But until the recent reform, there was no provision in the Code that recognized the victim's express "no" as a sufficient condition for a sexual offense.

The courts' interpretation of Sect. 177 (1), number 3 StGB exacerbated the problems. Reading the unprotected situation clause, one might think that this should cover many cases of sexual attacks. But the Federal Court of Justice (*Bundesgerichtshof*, *BGH*) gave it a very narrow scope of application. First, the Court required that it was objectively impossible to escape the scene or to call third persons for help, a victim's subjective perception to be unprotected was irrelevant.[6] The Court demanded that victims use even the slightest chance of obtaining assistance, such as calling small children for help[7] or requiring assistance from strangers at a parking lot in the middle of the night,[8] and acquitted offenders if the victims had not done so. Second, the Court only applied Sect. 177 (1), number 3 StGB if the victim remained passive because he or she feared serious physical injury or death by the offender.[9] This excluded many cases. Fear of bodily injury or death is just one of many explanations why persons freeze rather than escape or shout for help. In another important group of cases, the decisive factor explaining victims' passiveness was not fear, but other emotions such as surprise, shock, or embarrassment,[10] perhaps also combined with personality traits such as shyness. Other victims had feared serious harm other than bodily injury.[11]

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[6] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 25, 2006, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1146 [hereinafter *Judgment of Jan. 25, 2006*].

[7] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 26, 2005, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 2006, 165 [hereinafter *Judgment of Aug. 26, 2005*].

[8] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 14, 2005, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 2006, 380 [hereinafter *Judgment of Feb. 14, 2005*].

[9] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 4, 2007, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2341, 2343 [hereinafter *Judgment of Apr. 4, 2007*].

[10] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] June 2, 1982, NEUE JURISTISCHE WOCHENSCHRIFT [NJW], 1982, 2264 [hereinafter *Judgment of June 2, 1982*]; Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 8, 2011, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 2012, 268 [hereinafter *Judgment of Nov. 8, 2011*].

[11] *Judgment of Apr. 4, 2007*.

Considered together, the courts' interpretation of the old version of Sect. 177 StGB took a ridiculously demanding view of victims' obligations. It protected only those who were coerced by violence or threats for life and limb or who feared serious bodily injuries from the offender and had not even the slightest chance to escape or alarm others. Victims who were caught off guard, or did say no but did not show the highest degree of prudence and courage with regard to escape routes, were told that no criminal wrong had been done to them.

A case that the Federal Court of Justice decided in 2015[12] demonstrates the loopholes in the old law. The defendant was a case manager at the state's employment agency, and the victim was a young female client with no personal relationship to the defendant. The ruling describes the victim as "very sensitive and not very assertive." During an appointment in his office, the defendant complimented and kissed the surprised victim and asked her to perform oral sex on him, which she refused. He nevertheless opened his pants and guided his penis into her mouth while she remained sitting on the visitor's chair. After that, he masturbated standing next to her. The defendant was sentenced for the masturbation part, which qualified as exhibitionism.[13] The Federal Court of Justice confirmed that despite her express refusal, the penetration was not a criminal offense, as none of the circumstances in Sect. 177 (1) were present. Presumably, she could have alarmed other employees by shouting loud enough.

Besides "sexual coercion; rape," the German Criminal Code contained, and still contains, a second group of offenses labeled "sexual abuse." Such crimes do not require coercion, and consent is irrelevant. The idea is that, under certain conditions, sexual activities must be prevented *tout court*, independent of violence or threats, and even if the other person did in fact consent. Sexual abuse offenses protect children (persons under 14 years), and, in a less comprehensive way, juveniles, 14 to 18 years. The norms protecting minors[14] have not been addressed by the recent reform. Under very narrow circumstances, adults can become victims of sexual abuse, too. The law lists circumstances of enhanced vulnerability, such as being imprisoned or institutionalized, being a suspect in a criminal case involving police officers and prosecutors, or being a patient in medical treatment or counseling involving doctors and psychotherapists.[15] The 2016 reform did not modify these prohibitions, but another traditional sexual abuse offense underwent change. Sect. 179 StGB covered sexual acts with victims who were physically ill or handicapped and thus could not resist physically, as well as sexual acts with unconscious or seriously mentally handicapped persons. The

[12] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 29, 2015, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 337 [hereinafter *Judgment of Jan. 29, 2015*].

[13] *See* STRAFGESETZBUCH [StGB] [PENAL CODE] § 183 (Austria).

[14] *See id.* §§ 174, 176–76b, 180, 182.

[15] *See id.* §§ 174a–74c.

reform abolished this norm and integrated parts of it into the new version of Sect. 177 StGB.[16]

C. The Course of the Reform

The 2016 reform adopted a "no-means-no" model and overcame the traditional dichotomy of either sexual abuse or sexual coercion. The crucial step was to introduce a new offense labeled sexual assault (*sexueller Übergriff*) in Sect. 177 StGB.[17] Two factors promoted the change of thinking. One factor was pressure by NGOs and women's organizations. An illuminating study, commissioned by German organizations providing services for the victims of rape, collected many cases in which prosecutors and judges concluded, often with sincere regret, that a sexual assault was not punishable under German law.[18] The Association of Female Lawyers and the German Institute for Human Rights organized effective public campaigns in favor of changing the law.[19] A few legal scholars also argued that the law was in need of reform,[20] though not very many. German legal scholars tend to neglect sexual offenses. Until today, these offenses are excluded from the state exams and the curriculum at German law schools. Susceptibility to status quo biases also plays a role, as well as the fact that the overwhelming majority of legal scholars in Germany are male and not interested in what might be considered feminist issues.[21]

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[16] *See infra* Part C.

[17] *See infra* Part C.

[18] *See* KATJA GRIEGER, CHRISTINA CLEMM, ANITA ECKHARDT & ANNA HARTMANN, WAS IHNEN WIDERFAHREN IST, IST IN DEUTSCHLAND NICHT STRAFBAR: FALLANALYSE ZU BESTEHENDEN SCHUTZLÜCKEN IN DER ANWENDUNG DES DEUTSCHEN SEXUALSTRAFRECHTS (2014).

[19] *See* Dagmar Freudenberg & Ramona Pisal, *Stellungnahme zum Entwurf eines Gesetzes zur Änderung des Strafgesetzbuches—Umsetzung europäischer Vorgaben zum Sexualstrafrecht des Bundesministeriums der Justiz und für Verbraucherschutz* (BMJV) (Deutscher Juristinnenbund eds., July 25, 2014), https://www.djb.de/Kom-u-AS/K3/14-14/; HEIKE RABE & JULIA NORMANN, SCHUTZLÜCKEN BEI DER STRAFVERFOLGUNG VON VERGEWALTIGUNGEN: MENSCHENRECHTLICHER ÄNDERUNGSBEDARF IM SEXUALSTRAFRECHT (Deutsches Institut für Menschenrechte eds., 2014), http://www.institut-fuermenschenrechte.de/fileadmin/_migrated/tx_commerce/Policy_Paper_24_Schutzluecken_bei_der_Strafverfolgung_von_Vergewaltigungen.pdf; TATJANA HÖRNLE, MENSCHENRECHTLICHE VERPFLICHTUNGEN AUS DER ISTANBUL-KONVENTION. EIN GUTACHTEN ZUR REFORM DES § 177 STGB (Deutsches Institut für Menschenrechte, eds. 2015), http://www.institut-fuer-menschenrechte.de/fileadmin/_migrated/tx_commerce/Menschenrechtliche_Verpflichtungen _aus_der_Istanbul_Konvention_Ein_Gutachten_zur_Reform_des_Paragraf_177_StGB.pdf.

[20] Tatjana Hörnle, *Warum § 177 Abs. 1 StGB durch einen neuen Tatbestand ergänzt werden sollte*, 7 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK [ZIS] 206 (2015), http://zis-online.com/dat/artikel/2015_4_913.pdf; Tatjana Hörnle, *Wie § 177 StGB ergänzt werden sollte*, 162 GOLTDAMMER'S ARCHIV FÜR STRAFRECHT [GA] 313 (2015); Osman Isfen, *Zur gesetzlichen Normierung des entgegenstehenden Willens bei Sexualdelikten: Ein Beitrag zu aktuellen Reformüberlegungen*, 7 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK [ZIS] 217 (2015); Lara Herning & Johanna Illgner, *"Ja heißt Ja"—Konsensorientierter Ansatz im deutschen Sexualstrafrecht*, 17 ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 77 (2016).

[21] *See infra* Part C.

The other crucial factor behind the reform was international law. The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) from 2011[22] demands in Article 36 (1) that non-consensual acts of a sexual nature must be criminalized. Initially, the German Government took the stance that ratification of the Istanbul Convention would not require a change of the Criminal Code. In 2015, after growing public awareness of the many gaps in the German law and pressure by members of both parties of the Coalition (social-democrats and conservatives), the Ministry of Justice finally came forward with a draft to amend the StGB. This draft did not question the traditional coercion model in principle, but added an additional prohibition to cover surprise cases and extended the range of coercive threats to threats with serious evils beyond bodily injury.[23] A new offense that focuses directly on absence of consent rather than on intimidation and suddenness was not seriously considered.

In 2016, dissatisfaction with the restrained stance of the Ministry of Justice grew among female members of the German Parliament (*Bundestag, BT*). They managed to reach an agreement across all political parties to base the reform on a "no-means-no" model rather than updating the coercion model. They also came up with a draft of their own.[24] This is unusual for law making in Germany. The political parties who support the government normally rely on the drafting expertise of the civil servants in the ministries. From the viewpoint of legal sociology, one could also interpret this legislative process as a sign for decreasing trust in experts. On July 7, 2016, Parliament voted for the new version of Sect. 177 StGB without a single dissenting voice.[25]

From a political perspective, it is understandable that this reform was pushed forward quickly. From a legal point-of-view, the hastiness is regrettable. It would have been preferable to strive for a comprehensive reform, based on a careful examination of the entire Sect. on sexual offenses in the StGB, which encompasses many more offenses than Sect. 177. In 2015, the Minister of Justice installed a commission of legal scholars and criminal justice experts to evaluate *all* sexual offenses This Reform Commission presented its report in July 2017, one year after the changes in Sect. 177.[26] It is not likely that this report

[22]*See* Eur. Consult. Ass., *Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence*, No. 210 (May 11, 2011) https://rm.coe.int/168008482e.

[23]*See* Parlamentsarchiv [Parliamentary Documents], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 18/8210 (Ger.).

[24]*See* Beschlussempfehlung und Bericht des Ausschusses für Recht und Verbraucherschutz [Recommendations and Report by the Committee on Legal Matters and Consumer Protection], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 18/9097 (Ger.).

[25]*See* Plenarprotokoll [Parliament, Protocols of Plenary Sessions], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 18/183, 18015 (Ger.).

[26] *See* Heiko Maas, *Reformkommission Sexualstrafrecht übergibt Abschlussbericht,* BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ (July 19, 2017), https://www.bmjv.de/SharedDocs/Artikel/DE/2017/071917_Bericht

will inspire new legislation in the near future. Police, prosecutors, courts and defense counsels need time to adjust to the new, rather complicated Sect. 177. Yet another reform in the area of sexual offenses would meet serious resistance.

While the German Parliament unanimously opted for the "no-means-no" model, the preceding public discussions were much more controversial. Many were critical of this move. Some predicted a sharp rise in false accusations. The journalist Sabine Rückert wrote a long article in *DIE ZEIT*—generally regarded as a serious, left-to-liberal, and influential weekly newspaper—with the title "The bedroom as a dangerous place." According to her view, the bedroom is not a dangerous place for women, but will be a highly dangerous place for men once the reform is passed, because women will flock to the prosecutors' offices with the false claim of having said no.[27] Among lawyers, the psychological status quo effect proved to be surprisingly powerful.[28] Practitioners often assume that concepts such as sexual assault and rape are inextricably forged to violence, threats, and other coercive circumstances. Historical traditions are conflated with indispensable necessities because lawyers lack both imagination and comparative knowledge.[29] And there is a powerful myth that surrounds the reform of sexual offenses in Germany in the 1960s and 1970s. During this period, the StGB was scoured from moralistic prohibitions, such as adultery, sodomy, and homosexual acts.[30] As a result, the myth goes, a perfect, liberal criminal law was created and subsequent expansions of sexual offenses are to be regarded as deterioration.[31] This is, however, not an adequate description. While it was undeniably an achievement to abolish victimless crimes that protected morality, it would be an exaggeration to claim that the legislators in the 1960s and the 1970s had a clear understanding of sexual autonomy. One has to keep in mind that the idea of sexual autonomy, particularly for women, is a rather new idea, historically. In the

Reformkommission Sexualstrafrecht.html (suggesting new implementations to protect the individual's sexual self-determination right). The author was a member of this commission, but presents her own views in this Article.

[27] *See generally* DIE ZEIT 39 (June 30, 2016), http://www.zeit.de/2016/39/index.

[28] For a defense of the former legal status quo, see MONIKA FROMMEL, *Muss Der Tatbestand Der Sexuellen Nötigung/Vergewaltigung—§ 177 StGB—Reformiert Werden? in* FESTSCHRIFT FÜR HERIBERT OSTENDORF ZUM 70. GEBURTSTAG, 321–338 (J. Brüning, T. Rotsch & J. Schady eds., 2015); Thomas Fischer, *Noch einmal: § 177 und die Istanbul-Konvention*, 7 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK [ZIS] 312 (2015); Markus Löffelmann, *Erziehung durch Strafe*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ] 6 (July 21, 2016); Elisa Hoven/Thomas Weigend, *„Nein heißt Nein" – und viele Fragen offen. Zur Neugestaltung der Strafbarkeit sexueller Übergriffe*, 72 JURISTENZEITUNG 182 (2015).

[29] The Sexual Offences Act 2003 in the UK shows that consent-based laws are not pipe dreams of crazy feminists..

[30] Tatjana Hörnle, *Penal Law and Sexuality: Recent Reforms in German Criminal Law*, 3 BUFF. CRIM. L. REV. 639–40 (1999–2000).

[31] For a version of this narrative, see Felix Herzog, *Sex wider Willen—Anmerkungen zu dem Grund und den Grenzen der Strafbarkeit von nicht konsensual verlaufendem Geschlechtsverkehr*, 98 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT [Kritv] 18 (2015); JOHANNES BRÜGGEMANN, ENTWICKLUNG UND WANDEL DES SEXUALSTRAFRECHTS IN DER GESCHICHTE UNSERES STGB: DIE REFORM DER SEXUALDELIKTE EINST UND JETZT 490–516 (2013).

post-war era, it took decades until the right to decide autonomously in sexual matters and the right that others respect expressions of one's will were firmly anchored.

Another strand in the debate concerns matters of evidence. Critics of consent-based law[32] argue that proof becomes too complicated if the crucial element of the crime consists in communication between two persons, typically without third persons as witnesses. This argument presupposes that requiring coercive conduct in substantive law alleviates evidentiary problems. If, for instance, violence leaves traces, then doctors' statements, photos, etc. could corroborate victims' statements. But it is a fallacy to expect a marked difference between traditional coercion-based law and consent-based law. Traditional systems have to grapple with substantial evidentiary problems, too. Threats typically do not leave traces and neither does violence in all cases. Even if hard evidence is presented, it can turn out to be useless. In Germany, two prominent cases showed that photos of bruises on the victim's thighs—the trial against Jörg Kachelmann, a former TV weather presenter[33]—and a video of the sexual acts with the victim saying no and "stop it"—the case of *Gina Lisa Lohfink*[34]—only lead to new evidentiary problems. Whatever the details of the substantive criminal law are, it is not decisive when it comes to proving the crime. The main task will always be to assess the credibility of witnesses' narratives and their compatibility with factual details surrounding the events.

D. The Changes in Sect. 177 StGB

Since 2016, the offense descriptions in Sect. 177 StGB are formulated in the following way:

> **Sect. 177 StGB: Sexual Assault; Sexual Coercion; Rape**
>
> (1) Who, against the recognizable will of another person, performs sexual acts with this person or makes her act sexually or induces the other person to suffer sexual acts by a third person or to perform sexual acts with a third person, will be punished with imprisonment between six months and five years.

[32] *See supra* note 29 and accompanying text.

[33] His ex-girlfriend accused him of rape, but the suspicion arose that she had inflicted the bruises on herself. Kachelmann was acquitted. He is now busy waging a war of revenge—by means of civil suits—against the media and his ex-girlfriend. *See Jörg Kachelmann,* WIKIPEDIA, https://en.wikipedia.org/wiki/Jörg_Kachelmann (last visited Oct. 10, 2017).

[34] In this case, the prosecutor dropped the case against two men who participated in the video, arguing that Lohfink's saying stop it referred to the men filming her with their mobile phones—not the sex—and that other circumstances were not compatible with her version of the events. Lohfink was sentenced to a fine for making a false accusation.

(2) In the same way will be punished who performs sexual acts with another person or makes her act sexually or induces the other person to suffer sexual acts by a third person or to perform sexual acts with a third person, if
1. the offender exploits that the person is not able to form an adverse will or to express it,
2. the offender exploits that the person, due to her physical or mental state, is severely restricted in forming or expressing her will, unless he has assured himself of the other's approval,
3. the offender exploits a moment of surprise,
4. the offender exploits a situation in which the victim in the case of resistance has to expect a serious evil, or
5. the offender has coerced the person to perform or suffer the sexual act by threatening a serious evil.
(3) The attempt is punishable.
(4) The punishment is imprisonment of not less than one year if the inability to form or to express an adverse will is caused by disease or disability.
(5) The punishment is imprisonment of not less than one year if the offender
1. applies force against the victim,
2. threatens the victim with imminent danger to life or limb, or
3. exploits a situation in which the victim is unprotected and at the mercy of the offender.
(6) In especially serious cases the punishment will be imprisonment of not less than two years. An especially serious case typically occurs if
1. the offender performs sexual intercourse with the victim or lets intercourse be performed or performs similar sexual acts with the victim that degrade the victim or makes the victim perform such acts, particularly if they entail penetration of the body (rape), or
2. the offense is committed jointly by more than one person.
(7)-(8) [identical to old version, concerning weapons and other aggravating circumstances]
(9) In less serious cases under subsections (1) and (2), the punishment shall be imprisonment from three months to three years, in less serious cases under

> subsections (4) and (5) punishment from six months to ten years, in less serious cases under subsections (7) and (8) imprisonment from one to ten years.

As is immediately visible, Sect. 177 StGB is now considerably longer than the version effective before 2016. One of the changes concerned the kind of prohibited sexual acts. The previous law applied only in the case of bodily contact between the victim and the offender or a third person. Now it is also prohibited to make the victim act sexually even if this did not involve touching another person's body.

The circumstances that transform a sexual act into a sexual assault (*sexueller Übergriff*) are described in no less than six variations, one in subsection 1 and five in subsection 2. Methodologically, the attempt to cover many scenarios in the text of the code—instead of a more general offense description to be specified in its application by the courts—pays homage to a German constitutional provision. Article 103 (2) Basic Law (*Grundgesetz*) demands "definition by law." The variety of offense descriptions might at first appear confusing, but there is an inherent logic. The victim's expression of refusal is a sufficient condition for punishability. The central prohibition therefore is Sect. 177 (1) StGB, "against the recognizable will". But to have said "no" is not a necessary condition. Under certain circumstances, it is either impossible to express refusal,[35] or it would be unreasonable to demand this from the victim.[36]

I. Sect. 177 (1) StGB (Against the Recognizable Will)

The decision for a "no-means-no" model or veto model was the important anchoring point for the subsequent decisions on how to formulate offense descriptions. The phrase "no-means-no" is more than a convenient summary. It also refers to victims' obligations, that is, the obligation to express refusal if sexual conduct is unwanted. Every law on sexual offenses and other interpersonal crimes presupposes standards on how both sides of an interaction should communicate and act. Legislators are not always clearly aware of this, but in the 2016 reform, the legislative materials document a conscious choice of a "no-means-no" model and the awareness that this implies a victim's obligation to communicate.[37]

The most demanding concept of victims' obligations is the physical resistance rule behind the traditional coercion model. This premise has serious problems. It demands too much of the victims and physical resistance can further endanger the attacked person. The "no-means-no" or veto model is based on a much more moderate view of victims'

[35] *See* STRAFGESETZBUCH [STGB] [PENAL CODE] § 177 (2), No. 1, 3 (Austria).

[36] *See id.* at No. 2, 4–5.

[37] *See* case cited *supra* note 24, at 22–23.

obligations. It only assumes that, as a rule, one must communicate in words or gestures, if sexual proposals or touchings are unwanted. The third model is expressed with the phrase "only-yes-means-yes" or affirmative consent. The discussion about affirmative consent can only scratch the surface here.[38] Whether affirmative consent is the desirable standard for criminal law—a different matter than campus rules or other educational contexts—depends on the test case of an ambiguous situation. In ambiguous situations, one person remains passive and silent and an observer familiar with the context would be unsure whether the whole situation points to approval on both sides or not. Under such conditions, moral or educational judgments can blame the other person for not dissolving ambiguity with a simple question. But a potentially life-destroying criminal conviction as a sex offender is too strong a response to the failure to deal appropriately with ambiguity. The veto model is preferable. It protects sexual autonomy adequately and does not set the standards for victims' obligations too high. Any sign of refusal, for whatever personal motive, is sufficient. It is not unreasonable or too demanding to require a sign of disapproval in ambiguous situations.[39]

Regarding the wording of Sect. 177 (1) StGB, one of the questions that will likely occupy German courts in the coming years is what "recognizable" (*erkennbar*) means. In my own proposal for the re-drafting of Sect. 177 (1) StGB, I opted for the phrase "against the *declared* will,"[40] and the Federal Council (*Bundesrat*, the chamber of representatives of the 16 German states) adopted this in its statement to the draft presented by the Government.[41] On a broad interpretation of the word "recognizable," all kinds of circumstances would be considered to decide whether "the victim could not have possibly wanted this." On a narrow reading, only the victim's words, gestures, and conduct matter. If one reads the legislative materials, it is evident that the narrow approach was intended. All examples refer to the victim's communication, including gestures and behavior such as crying.[42] The most plausible explanation why recognizable was preferred to "declared" is that the latter might be misunderstood as requiring a verbal statement.

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[38] *See* Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1 (2015) (discussing how sexual agency can close the gap between how the criminal justice system treats non-stranger rape and modern conceptions of sex); Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940 (2016) (discussing that campus adjudication of sexual assault under the affirmative consent standard should be supported, while unique procedural protections for those accused and mandatory punishments for those found guilty should be opposed). For my criticism of affirmative consent as the standard in criminal law, *see* Hörnle, *supra* note 20, GOLTDAMMER'S ARCHIV [GA], at 319–22.

[39] As a rule, *see infra Sections* II–IV (showing exemptions to the rule).

[40] Hörnle, *supra* note 19, at 17; Hörnle, *supra* note 20, GOLTDAMMER'S ARCHIV [GA] 326.

[41] BUNDESRAT DRUCKSACHEN [BR] 162/16, 2 (Ger.).

[42] *See* case cited *supra* note 24, at 22–23.

II. Sect. 177 (2), Number 1 StGB (The Offender Exploits That the Person is Not Able to Form an Adverse Will or to Express It); Sect. 177 (2), Number 3 StGB (The Offender Exploits a Moment of Surprise)

If it is impossible to express one's adverse will with words, gestures, or conduct, the law obviously cannot rely on the veto model. Sect. 177 (2), number 3 StGB—the offender exploits a moment of surprise—was introduced to cover one type of the impossibility cases, surprise attacks. The old version of Sect. 177 StGB captured only the modus operandi coercion, but not the modus operandi speed and catching victims off-guard. The need to criminalize surprise attacks was uncontroversial even among those who otherwise criticized the new law. It was hard to deny that the old law contained a loophole. The Ministry of Justice had proposed a similar offense description.[43] Surprise attacks typically involve sexual touching, but penetration is also possible.[44] They can happen between strangers and in public spaces, public transportation for example, but also in private settings and among persons acquainted with each other.[45]

Sect. 177 (2), number 1 StGB penalizes sexual assaults that would have been labeled sexual abuse under the old, now abolished version of Sect. 179 StGB. The wording of the former Sect. 179 StGB had been tailored to the old physical resistance rule. The goal was to cover circumstances that make physical resistance impossible. It applied to mentally competent, fully autonomous persons who were merely physically handicapped. Under the new paradigm, the law focuses on inability to form or express an adverse will. Examples are: loss of consciousness through anesthesia, sleep, coma, drugs, or alcohol; very severe mental handicaps; acute forms of psychosis; or acute or severe symptoms of withdrawal from drugs, or, in very rare cases, if communication is entirely impossible due to complete paralysis. If a chemical substance causes incapacity, the norm applies to offenders who administered this substance to the unknowing or unwilling victim. In this case, the aggravating circumstance of violence leads to higher punishment,[46] as well as to offenders who found the victim in this state by coincidence. The legislative materials emphasize that victims must be absolutely incapable of forming or expressing their will. [47] This is important regarding alcohol and drugs. Even if the victim is considerably intoxicated, most cases will not fall under Sect. 177 (2), number 1 StGB.[48]

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[43] *See* case cited *supra* note 23, at 5, 16.

[44] *Judgment of June 2, 1982* at 2264; *Judgment of Nov. 8, 2011* at 268.

[45] *See* case cited *supra* note 24, at 26.

[46] *See* STRAFGESETZBUCH [STGB] [PENAL CODE] § 177 (5), No. 1 (Austria).

[47] *See* case cited *supra* note 24, at 25.

[48] *But see also infra Section II* (discussing StGB, § 177 (2), No. 2).

With regard to sentencing, the law distinguishes between "merely" intoxicated, narcotized, or sleeping victims on the one hand and ill or handicapped victims on the other. If inability is caused by disease or disability, Sect. 177 (4) StGB prescribes an increase in punishment: one year imprisonment to fifteen years imprisonment.[49] With regard to sexual autonomy, this does not make sense. In all cases, the sexual acts violate sexual autonomy. At this point, moralistic thinking crept into the law. Exploiting the ill and handicapped is deemed especially unmoral,

III. Sect. 177 (2), Number 2 StGB (The Offender Exploits That the Person, Due to Her Physical or Mental State, Is Severely Restricted in Forming or Expressing Her Will, Unless He Has Assured Himself of Her Approval)

On first view, the element "due to her mental state" could be understood as covering a rather wide range of cases. In ordinary language and everyday psychology, mental state is used to describe phenomena such as anxiety, agitation, and despondence. But the legislative materials clearly state that psychological discords are not sufficient and that only pathological states identifiable in a clinical way are covered.[50] In practice, the most important applications for Sect. 177 (2), number 2 StGB will be intoxication, severe mental handicaps, and dementia.

The "unless"-clause is important. The new law aims to clarify the range for positive sexual freedom. The starting point is the distinction between autonomous decisions and mere factual wants. The former require a certain minimum of cognitive and mental competence. If consent must always be autonomous, as a consequence, severely mentally handicapped or demented persons could not have any sex life; their expressions of approval would always be evaluated as invalid. The new Sect. 177 (2), Number 2 StGB stipulates that factual approval can be sufficient without the risk of criminal punishment for the other person. Approval of others—relatives and guardians—is neither necessary nor can it be a substitute for the approval of the person involved in the sexual activity.[51]

Assuring means to take measures to ascertain approval, excluding all reasonable doubts.[52] The offender must clarify an ambiguous situation. The victims' obligation to communicate their will is, and must be, suspended if the victims are severely mentally handicapped or highly intoxicated. The legislative materials declare that Sect. 177 (2), number 2 StGB is

[49] For the upper limit, *see* STRAFGESETZBUCH [StGB] [PENAL CODE] § 38 (2) (Austria).

[50] *See* case cited *supra* note 23, at 15.

[51] *See* case cited *supra* note 24, at 25.

[52] *See id*.

based on an affirmative consent model.[53] This does not mean that defendants will always be punished if the situation remained ambiguous. The offense description also requires exploitation, and it is possible that this element is lacking if, for instance, both involved parties were intoxicated or mentally handicapped.

IV. Sect. 177 (2) Number 4 (The Offender Exploits a Situation in Which the Victim in the Case of Resistance Has to Expect a Serious Evil); Number 5 (The Offender has Coerced the Person to Perform or Suffer the Sexual Act by Threatening a Serious Evil)

Sect. 177 (2) Number 5 StGB describes the classical coercion-by-threat scenario, however, without restricting it to threats of imminent danger to life or limb as in Sect. 177 (1) old version. Victims are not obliged to express refusal. If the offender threatens or knows about the menace, this is not a case of ambiguity. In the German Criminal Code, a similar prohibition existed prior to the reform, but outside the chapter on sexual offenses.[54]

Sect. 177 (2), Number 4 StGB targets cases in which the victim was intimidated by a serious evil, without the offender uttering a threat. Note that the law requires an objective standard. The victim's subjective fear is not sufficient. It needs to be proven that the situation was objectively menacing. The legislative materials explicitly exclude the following scenario: The victim is worried about the possibility of lay-offs in her firm and decides to offer sexual favors to a decision-maker or accepts an indecent proposal to help. Both variations, even accepting the other's offer of sex in return for not being fired, do not fall under Sect. 177 (2), number 4 StGB.[55] This requires explanation. After all, serious social vulnerability might be seen as a factor that destroys autonomy. But the German law, for good reasons, takes a more nuanced view. It is a part of positive sexual freedom to use sexuality not only for pleasure or love, but also in an instrumental way as a means to avert an expected disadvantage. The situation is different if the evil is the offender's response to refusal of sexual contacts. The point of Sect. 177 (2), number 4 StGB is not social vulnerability per se, but the offender's responsibility for the menacing evil. The nexus between refusal and evil is made either by an explicit threat (Number 5) or by an implicit threat (Number 4).

How could one imagine constellations in which victim and offender know that a serious evil is going to happen in the case of refusal[56] without the offender uttering a threat? The legislative materials point to climate-of-violence cases:[57] victim and offender are or were

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[53] *See id.*

[54] § 240 (IV) old law.

[55] *See* case cited *supra* note 23, at 16-17.

[56] *See* STRAFGESETZBUCH [STGB] [PENAL CODE] § 177 (2), No. 4 (Austria).

[57] *See* case cited *supra* note 24, at 26; case cited *supra* note 23, at 17.

connected by an intimate relationship or family ties and the partner or family member has established a pattern of violence in the past that makes explicit threats superfluous. In practice, even in climate-of-violence constellations, it will be difficult to establish that the victim really had to expect a serious evil. Often, violence alternates with periods of regret and reform, and offenders will argue that this demand for sex fell into a good phase. In practice, one can expect that Sect. 177 (2), number 4 StGB will be only applied to extreme cases, that is, relationships with enduring practices of brutal subjugation. Besides the climate-of-violence cases, Sect. 177 (2), number 4 StGB becomes relevant if the victim has been coerced by threats, but not by the offender himself, for example, if a pimp has threatened a prostitute if she should refuse customers' demands and the customer is aware of this.[58]

V. Aggravating Circumstances (Sect. 177 (5)-(8))

Sexual assaults will be punished more seriously if aggravating circumstances turn them into sexual coercion or rape or another especially serious crime. Sect. 177 (5) StGB resembles the old Sect. 177 (1) StGB, though there are some important differences. The old law had required coercion by force. The Federal Court of Justice looked for chronological order—first violence, then sexual acts—and also sexual intentions at the time when the offender used force. Therefore, the Court did not convict a man of rape who, out of jealousy and hate, killed his ex-girlfriend's new partner with a shot in the head while she was sitting on the sofa next to the victim, and decided in the aftermath of the killing to have intercourse with the traumatized woman. The reason given was that it could not be proven that the offender had planned the sexual acts prior to the killing.[59] The insistence that sexual intentions must precede the application of violence was misconceived. It is not rare that violent persons act aggressively and impulsively, and decide to exploit a situation for sexual purposes after the victim has been intimidated for other reasons or no reasons at all. The new, simpler wording "applies force against the victim" was consciously chosen to break with this case law that required antecedent sexual intentions.[60] It is sufficient that the offender applies violence—or a threat of violence, Sect. 177 (5), number 2—during, after, or before the sexual act. Unfortunately, the new law contains a restriction that was not part of the old Sect. 177 (1) StGB: Force must be applied against the victim. In a case like the one just mentioned, the brutal force against the new boyfriend would not aggravate the sexual assault under the new law.[61]

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[58] *See* case cited *supra* note 23, at 17.

[59] Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 16, 2012, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 2013, 279 [hereinafter *Judgment of Oct. 16, 2012*].

[60] *See* case cited *supra* note 24, at 27.

[61] Under circumstances exactly like the *Judgment of June 2, 1982*, the use of the pistol would considerably raise the punishment for the sexual assault. *See* STRAFGESETZBUCH [STGB] [PENAL CODE] § 177 (8), No. 4 (Austria). In this provision, the law does not demand that the weapon is used against the victim. If, however, the offender beats a

With regard to Sect. 177 (5), number 3 StGB—"a situation in which the victim is unprotected and at the mercy of the offender"—the legislative materials also criticize prior case law by stating that victims do not need to meet unrealistic requirements such as taking hazards or revealing their vulnerable situation to third persons.[62]

The label rape is, like in the prior law, defined as "penetration of the body," and it is one example within the larger group of "especially serious cases" in Sect. 177 (6) StGB. The higher punishment is not mandatory. The law classifies rape only as a "typically" especially serious case, thus leaving courts the possibility to find a case to be, all things considered, exceptional and not especially serious. There is one small change in the definition of rape. While the old law required that the victim had physical contact with another human being, the new law also applies if the victim is forced to perform a penetrating sexual act with an object or animal.

Subsections 7 and 8 prescribe minimum sentences of three or five years—rather high penalties for German standards—if offenders endanger or injure victims' life and health. The aggravating circumstances had already been part of the old law with the same sentence range. One must keep in mind that retaining the same sentence range for these aggravations came with the introduction of a new basic offense—sexual assault instead of sexual coercion—with lower sentences. It would have been recommendable to adjust sanctions for aggravations, too—this did not happen, probably because the reform was hastily done. Some of the aggravating circumstances certainly justify the much higher sentence range even for sexual assault cases. [63] But for some offense descriptions, the risk of harm is remote, such as carrying a potentially dangerous instrument without intention to use it.[64] Nevertheless, the minimum sentence for a simple sexual touching jumps from six months to three years if the offender knew, for example, that he had a screwdriver or other tool in his pocket.

E. The new Sect. 184i StGB (Sexual Harassment)

Until 2016, the German Criminal Code lacked a prohibition addressing sexual harassment. Sexual touchings were not considered a criminal offense in most cases. The old version of

person close to the victim with his fists, such an outburst of violence could only be considered as an implicit threat to injure the victim. *See id.* at No. 2. But this will not always be the case; in *Judgment of June 2, 1982*, the offender began talking about his continuing love to the victim.

[62] *See* case cited *supra* note 24, at 28.

[63] *See* STRAFGESETZBUCH [STGB] [PENAL CODE] § 177 (8), No. 2 (Austria). (addressing infliction of severe pain and danger of death).

[64] *See* STRAFGESETZBUCH [STGB] [PENAL CODE] § 177 (7), No. 2 (Austria).

Sect. 177 StGB did not address the modus operandi of surprise. And even if the offender did not act in a fast and surprising way but intimidated its victim with violence or threats, a further requirement must be satisfied. German law has a high de minimis-threshold in the chapter on sexual offenses. Sexual offenses presuppose sexual acts "which are of some importance regarding the protected legal interest."[65] With reference to this restriction, German courts have refused to convict men who groped women's breasts or genitals if the victims were dressed,[66] unless they used brutal force.[67] This has met criticism[68]—sexual touching violates personal rights more intensely than offensive behavior such as exhibitionism or verbal insults—criminal offenses under German law.[69]

At the beginning of 2016, the topics of sexual assault by surprise and sexual harassment suddenly gained a lot of attention. In Cologne, Hamburg, and other cities, large numbers of male migrants—often from North African countries—had gathered in public spaces on New Year's Eve, and some men circled female passersby and attacked them sexually. Police and established media had first been reluctant to report, but finally, under the pressure of social media, the incidents made headlines. Of course, sexual harassment is not a new phenomenon. But these incidents added a new dimension regarding the number of assaults, the threat to public security and peace with large clusters of men openly hostile towards women in public space, and the specific modus operandi of encircling one victim with a multitude of attackers, often combining robberies with groping. These worrisome developments finally persuaded lawmakers that sexual harassment and sexual assaults should no longer be considered unworthy of criminal sanctions. The vote in Parliament was unanimous. Only one parliamentarian abstained from voting, while all others voted in favor of a new offense in German criminal law: Sect. 184i StGB.[70]

> **Sect. 184i StGB: Sexual harassment**
>
> (1) Who touches the body of another person in a sexually determined way and thus offends the other

[65] STRAFGESETZBUCH [StGB] [PENAL CODE] § 184h, No. 1 (Austria).

[66] Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 20, 2012, BeckRS 2012, 11487 para. 25 [hereinafter *Judgment of Mar. 20, 2012*]; Jan. 22, 2013 [hereinafter *Judgment of Jan. 22, 2013*]; BeckRS 2013, 02643.

[67] Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 1, 2011, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 2012, 269, 270 [hereinafter *Judgment of Dec. 1, 2011*].

[68] *See* Brigitte Sick, *Die Rechtsprechung zur Sexualbeleidigung*, 46 JURISTENZEITUNG [JZ] 330 (1991); Ulrike Lembke, *Sexuelle Übergriffe im öffentlichen Raum*, 49 KRITISCHE JUSTIZ [KJ] 3 (2016); Tatjana Hörnle, *Besserer Schutz vor sexuellen Übergriffen*, 32 STREIT 3 (2016).

[69] *See* STRAFGESETZBUCH [StGB] [PENAL CODE] §§ 183, 185 (Austria).

[70] Plenarprotokoll [Parliament, Protocols of Plenary Sessions], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT], 18/183, 18018 (Ger.).

> person, will be punished with imprisonment up to two years or a fine, if the offense is not punishable under another norm with higher punishment.
> (2) In especially serious cases the punishment will be imprisonment of not less than two years. An especially serious case typically occurs if several persons commit the offense jointly.
> (3) Prosecution requires a request by the victim unless the prosecuting authority considers that due to a special public interest prosecution *ex officio* is required.

The new offense of sexual harassment in Sect. 184i StGB requires that offenders touch another person's body in a sexually determined way and thus offend the other person. Verbal harassment is not a criminal offense. One of the open questions regarding the application of Sect. 184i StGB is how the courts will interpret "in a sexually determined way", see Sect. 184i (1) StGB. Should rather innocuous acts such as putting a hand on another person's arm or knee fall under Sect. 184i StGB if the actor intends this to be the first step towards sex and the other person is not interested and reacts angrily? The legislative materials are not very clear.[71] In my view, focusing solely on actors' subjective motives would extend the prohibition too far. The better alternative is to require that the touching as such cross the threshold towards being sexual. The test should be whether this specific kind of touching is only socially acceptable within an existing intimate relationship, for example the touching of breasts, genitals, or kisses on mouth and neck. If a bodily touching is common in non-sexual friendships and among relatives, such as kisses on the cheek, hugging, putting the arm around the other's shoulder, or holding hands, it should not be considered sexually determined, even if the actor intended this to be the prelude to a sexual interaction.

E. Sect. 184j (Offenses out of Groups)

The second new prohibition introduced in 2016 is:

> **Sect. 184j: Offenses out of Groups**
>
> Who facilitates a criminal offense by participating in a group of persons which corners another person in order to commit a criminal offense against her, will be punished with imprisonment up to two years or a fine, if one of the members of the group commits an offense according to §§ 177 or 184i and if the offense is not

[71] *See* case cited *supra* note 24, at 30.

> punishable under another norm with higher punishment.

This new prohibition is a response to the events in Cologne and other cities on New Year's Eve. Regarding sexual harassment, the lack of a criminal prohibition was criticized prior to these incidents,[72] but nobody had previously proposed to amend the Criminal Code with "offenses out of groups." The materials emphasize that group dynamics encourage offenders and weaken inhibitions.[73] This part of the reform was controversial and a significant minority in parliament voted against it.[74]

In substance, Sect. 184j StGB extends the scope of participatory offenses. The provision on aiding in the General Part Sect. 27 StGB has been interpreted by the courts to require specific intent. The aider must have a basic idea of the crime the main perpetrator is going to commit.[75] Sect. 184j StGB presupposes only a more general kind of intent. The aider must have seen and accepted the likelihood of *a* crime and any type of criminal offense will do. The fact that a sexual offense—either sexual assault or sexual harassment—was actually committed is only considered a so-called "objective element of the crime."[76] It is not necessary to prove an act or contribution other than the participation in a group that cornered the later victim, and it is not necessary to prove intent concerning the sexual nature of the ensuing crime.

Despite this lowered standard for a participatory offense, it is not likely that Sect. 184j StGB will be applied in practice often. The main problem, insoluble by substantive criminal law, is identification. Witnesses who were under a high degree of stress are hardly ever able to reliably identify the members of large groups of men. And even under Sect. 184j StGB, it is necessary to prove intent regarding a crime other than the cornering. If suspects argue that pestering a woman was an end in itself, this will not fall under the prohibition. Opponents of the new law argued that it introduced guilt by association and thus is incompatible with

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[72] *See* STRAFGESETZBUCH [StGB] [PENAL CODE] §§ 183, 185 (Austria).

[73] *See* case cited *supra* note 24, at 31.

[74] *See* Plenarprotokoll [Parliament, Protocols of Plenary Sessions], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT], 18/183, 18024. Another point of controversy were additions in the laws on asylum and residence which, following the extension of Sect. 177 StGB, make extradition possible if offenders have been convicted of sexual assault. This is mainly a symbolic change as the vast majority of extradition orders are not enforced in real life. But because symbolic gestures are becoming increasingly important in the contemporary German political climate, this point was strongly contested by the Opposition.

[75] *See* MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL LAW 173 (2009).

[76] *See* case cited *supra* note 24, at 31

the principle of guilt, which has constitutional status in German law.[77] This allegation is still not convincing. Sect. 184j StGB has been drafted after an existing norm in the chapter on bodily injuries in the StGB. "Taking part in a brawl", the title of Sect. 231 StGB, addresses a similar scenario: a group event leads to victimization—death or grievous bodily injury—and the crucial blow, stab, etc. cannot be attributed to an individual participant. The principle of guilt does not stand in the way of such offenses. Persons convicted on the basis of Sect. 231, 184j StGB are punished for their own acts—joining the group or the brawl—that constitute personal wrongdoing with rather mild sanctions.[78] It is wrong to intentionally join a group knowing that the group will corner another person for the purpose of an offense.

One can criticize Sect. 184j StGB for being placed wrongly. An offense called "Offenses out of Groups" does not really belong in the chapter on criminal offenses, but in the General Part as a new participatory offense. The perpetrator of this offense is not necessarily a sex offender because he must be aware of impending criminal activities but not necessarily aware of sexual acts. Again, it is unfortunate that the reform was completed in a hurry. It is not consistent to penalize participation in a group when a sexual assault occurred, but ignore participation in a group if the disinhibiting effects of a mob lead to other spontaneous crimes, such as, for instance, arson. If group dynamics are an issue, "Offenses out of Groups" should be punished beyond sexual assault and sexual harassment.

[77] *See generally* comments from the Opposition (Bündnis 90/Die Grünen; Die Linke), Plenarprotokoll [Parliament, Protocols of Plenary Sessions], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 18/183, 18003, 18005.

[78] The sentence range in Section 231 varies from a fine to imprisonment up to three years.