

# Germany

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## A. Background

### I. General attitude in society toward sexual relations

German society is fairly open-minded regarding sexual relations. Heterosexual as well as homosexual sex among consenting persons older than 14 years is almost generally accepted; only some religious groups (including the Catholic church) object to extra-marital sex.

Most criminal laws regarding sexual acts are gender neutral. The only exception is exhibitionism, which is criminal only if committed by a man (§ 183 German Penal Code [PC]).

### II. Background of criminal laws on sexual conduct

The role of criminal law in regulating sexual conduct has long been subject to debate. When in the past the protection of public morals was regarded as the main purpose of criminal prohibitions, liberal reformers argued that criminal law should not be utilized for regulating private consensual behavior and that criminal prohibitions based on the alleged immorality of sexual relations (such as male homosexuality and adultery) should be abolished.<sup>1</sup> This movement of the 1960s led to a decrease of criminal prohibitions in this area and to a re-definition of the general rationale of criminal prohibitions concerning sexual relations. Since 1973, this rationale is the protection of the sexual autonomy of the persons involved.<sup>2</sup>

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1 *Friedrich-Christian Schroeder*, *Neue Juristische Wochenschrift* (NJW) 1994, 1501; *Joachim Renzikowski*, in: *Münchener Kommentar Strafgesetzbuch*, 4<sup>th</sup> ed. 2021, Vor § 174 marginal notes 2–3.

2 *Thomas Fischer*, *Strafgesetzbuch, Kommentar*, 68<sup>th</sup> ed. 2021, Vor § 174 marginal note 1; *Renzikowski* (note 1), Vor § 174 marginal note 6; *Theo Ziegler*, in: *Bernd von Heintschel-Heinegg* (ed), *Beck'scher Online-Kommentar Strafgesetzbuch* (BeckOK StGB), 53<sup>rd</sup> ed. 2022, § 174 marginal note 2.

The key role of autonomy in regulating sexual conduct can be seen, *inter alia*, in the laws regarding prostitution. In 2001, prostitution of adults was legalized mostly to protect prostitutes' economic interests against fraud and coercion.<sup>3</sup> More recent legislation sought to give better protection to sex workers against coercion and exploitation. Having sexual relations with prostitutes younger than 18 years or with persons who have been coerced into prostitution now are criminal offenses (§§ 180 sec. 2, 232a sec. 6 PC). In the current political debate, several groups demand a reversal of the general legalization of buying sexual services, arguing that very few women sell such services based on a truly autonomous decision.<sup>4</sup> Some authors also advocate the Scandinavian model of making punishable the purchase but not the sale of sexual services.<sup>5</sup>

After the reform of the early 1970s, only conduct that manifestly violated a person's sexual autonomy continued to be prohibited by the criminal law. But since the beginning of the 21<sup>st</sup> century, a greater sensitivity developed in German society for structural and implied pressures on women to tolerate sexual conduct even though it was not welcome. Consequently, the reach of the criminal law was extended to prohibit more subtle violations of sexual autonomy beyond using or threatening physical force. Typical results of this development toward a broader understanding of autonomy and its protection are the prohibitions of

- sexual acts “against the recognizable will” of another person (§ 177 sec. 1 PC);
- sexual harassment of another person by touching him or her in a sexually connoted way (§ 184i PC);
- participating in a group of persons who harass another person in order to commit an offense against him or her, if a sexual offense is committed by any group member (§ 184j PC); and
- unlawfully taking a photograph of the genitals, buttocks, or the female breast of another person if these parts of the body are covered by clothing (§ 184k sec. 1 no. 1 PC).

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3 The present legislation is *Gesetz zum Schutz von in der Prostitution tätigen Personen (Prostituiertenschutzgesetz)* (Bundesgesetzblatt 2016 I, p. 2372), in force since 2017.

4 Wolfgang Weiß and Stefanie Höfer, *Neue Juristische Online-Zeitschrift (NJOZ)* 2021, 1473; Wolfgang Weiß and Stefanie Höfer, *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* 2022, 31.

5 Beate Merk, *Zeitschrift für Rechtspolitik (ZRP)* 2006, 252.

The protection of children against sexual predation has also been extended, for example, by creating the crime of “cyber grooming” (§ 176 sec. 4 no. 3 PC).

### III. Definition of sexual coercion offenses

Until 2016, the crime of sexual coercion<sup>6</sup> required that the perpetrator used force or threats of force, or took advantage of a situation in which the victim was without protection against his acts. Since force or threat of force were means to subordinate the victim’s will according to the perpetrator’s wishes, the victim’s consent in the performance of sexual acts negated the element of coercion and thus the completion of the offense. Critics pointed out that the legal definition of sexual coercion did not cover situations in which the victim’s autonomous will is overborne by other means, such as taking advantage of his or her surprise or psychological inability to resist (“freezing”).<sup>7</sup>

A reform law passed in 2016 fundamentally changed the legal situation.<sup>8</sup> The traditional crime of sexual coercion became an aggravated case of the new basic offense called sexual abuse (*sexueller Übergriff*). Sexual abuse is defined as the performance of a sexual act (by the perpetrator or the victim) against the victim’s “recognizable will” (§ 177 sec. 1 PC). His or her valid consent in the sexual act therefore negates the objective element of this offense. However, the following subsection (§ 177 sec. 2 PC) provides for the punishability of sexual acts in certain situations in which the victim is prevented from expressing his or her will or is inhibited in forming the will autonomously. In addition to the obvious cases of sexually abusing a person who is unconscious, asleep, or drunk<sup>9</sup> (§ 177 sec. 2 nos. 1 and 2 PC), the law also prohibits performing sexual acts if the victim is tak-

6 “Rape” (*Vergewaltigung*) was and still is defined as an aggravated case of sexual coercion involving sexual penetration or similar acts that have a particularly humiliating effect on the victim.

7 Tatjana Hörnle, *Neue Zeitschrift für Strafrecht* (NStZ) 2017, 13, 17; Ralf Eschelbach, in: Holger Matt and Joachim Renzikowski (eds), *Strafgesetzbuch* (StGB), 2<sup>nd</sup> ed. 2020, § 177 marginal notes 36–37.

8 For assessments of this law, see Elisa Hoven and Thomas Weigend, *JuristenZeitung* (JZ) 2017, 182; Hörnle (note 7); Elisa Hoven, *Neue Zeitschrift für Strafrecht* (NStZ) 2020, 578.

9 If the other person’s ability to form or express his or her will is “significantly diminished” due to his or her bodily or mental state, the actor is permitted to perform sexual acts only if he or she has obtained the partner’s specific consent (§ 177

en by surprise (§ 177 sec. 2 no. 3 PC), if the actor coerces him or her by threatening them with a significant harm (§ 177 sec. 2 no. 5 PC), or if the perpetrator intentionally takes advantage of the fact that someone else may do harm to the victim if he or she resists (§ 177 sec. 2 nos. 4 PC). In the latter two situations, the victim may appear to express consent to the sexual act, but that consent is vitiated by the pressure exerted on the victim, and the perpetrator is aware of this.

#### IV. General role of consent in criminal law

Under German law, the victim's valid consent can have the effect of negating the *actus reus* of the offense. For example, the offense of criminal trespass (§ 123 PC) cannot be committed if the owner of the building in question has agreed to a visit by the actor. Sexual coercion is another case in point, as has been mentioned above: one cannot be coerced to do an act that one wishes to do.

There are other offenses, however, whose *actus reus* can be committed regardless of whether the affected person consents. Examples are inflicting bodily injury (§ 223 PC) and destruction of property (§ 303 PC). Regarding these offenses, the victim's consent leaves the *actus reus* intact but can have the effect of *justifying* the actor. If, for example, D asks owner V if it is alright if D destroys V's old bicycle, and V gives his consent, the destruction of the bicycle meets the definition of § 303 PC,<sup>10</sup> but D's act is justified by V's consent. The reason for giving legal effect to consent is respect for the affected person's autonomy.<sup>11</sup> If, in our example, V wishes to get rid of the bicycle and thanks D for taking care of its destruction – why should the

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sec. 2 no. 2 PC). The legislature thus wished to impose the “only yes means yes” rule for this situation, especially if the victim is drunk.

10 § 303 PC: “Whoever unlawfully damages or destroys an object that belongs to someone else is punishable by imprisonment up to 2 years or a fine.” The word “unlawfully” here is regarded not as a specific element of the *actus reus* but only refers to the general rule that there is no punishability of lawful conduct. See *Brunbild Wieck-Noodt*, in: *Volker Erb and Jürgen Schäfer* (eds), *Münchener Kommentar Strafgesetzbuch*, 3<sup>rd</sup> ed. 2019, vol. 5, § 303 marginal note 64. For a differing interpretation of the above hypothetical (V changes the function of the bicycle to an object to be destroyed, hence D does not complete the *actus reus* of § 303 PC) see *Hans-Heinrich Jescheck and Thomas Weigend*, *Lehrbuch des Strafrechts, Allgemeiner Teil*, 5<sup>th</sup> ed. 1996, 376.

11 *Thomas Weigend*, *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* 98 (1986), 41; *Thomas Rönnau*, in: *Gabriele Cirener et al.* (eds), *Leipziger Kommentar*

state interfere by holding D criminally responsible? This rationale of justification holds true even if an objective observer would disapprove of V's decision, for example, because the bicycle is valuable and still in good shape.

Consent does not, however, justify an otherwise criminal act under all circumstances. First, justification presupposes that the person giving consent has a right to dispose of the legal interest in question. In the above hypothetical, consent given by V's spiteful neighbor N, who encourages D to destroy V's bicycle, is not relevant for D's punishability (unless D thinks that the bicycle belongs to N). The same is true if the legal interest in question is a communal interest, such as the preservation of the environment. In that case, no private individual can dispose of the interest and give valid consent, e.g., to the pollution of a lake.

Homicide and bodily injury are special cases. Actor D who kills V because V had earnestly and expressly requested D to kill him will be punished. Yet, his conviction will not be of murder but of the special offense of "killing on request" (§ 216 PC), which carries a much lesser sentence than murder or manslaughter.<sup>12</sup> The reason for punishing even well-intentioned "mercy killings" has been subject to debate.<sup>13</sup> One explanation refers to the state's interest in preserving human life; but that interest should not trump the earnest wish of the "victim" to have his or her life terminated. The most plausible explanation lies in the difficulty of disproving a homicide defendant's claim that he acted upon the deceased person's request when there are no witnesses to the transaction.<sup>14</sup>

With regard to causing bodily injury, § 228 PC provides that a person who injures another person with his or her consent acts unlawfully only if the act violates "good moral standards (*gute Sitten*)" despite the consent. After some back and forth on the question of what "good moral standards" mean here, the Federal Court of Justice has come to the conclusion that "good moral standards" do not refer to the morality of the conduct in question but are violated only if the act of causing injury implies a serious

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Strafgesetzbuch, 13th ed. 2019, vol. 3, Vor § 32 marginal notes 146–146a; *Claus Roxin and Luis Greco*, *Strafrecht Allgemeiner Teil I*, vol. I, 5<sup>th</sup> ed. 2020, 655–657.

12 The penalty for murder is life imprisonment, whereas killing on request is punishable by imprisonment between 6 months and 5 years.

13 See *Andreas Jurgelcit*, *Neue Juristische Wochenschrift (NJW)* 2015, 2708; *Josef Franz Lindner*, *ZRP* 2020, 66.

14 *Hartmut Schneider*, in: *Münchener Kommentar StGB*, 4<sup>th</sup> ed. 2021, § 216 marginal notes 5 et seq.

risk to the victim's life.<sup>15</sup> In relation to sexual conduct, this means that even acts of sado-masochistic sex causing injury are justified by the victim's consent unless the act is life-endangering (as in choking the sexual partner with an iron bar<sup>16</sup>).

## B. Requirements for valid consent

In the following paragraphs, I explain the general rules on the preconditions of a valid consent and its scope in German criminal law. It should be borne in mind, however, that the offense of sexual abuse (§ 177 sec. 1 PC) requires more than the absence of the victim's consent; the actor is punishable only if the victim has "recognizably" (*erkennbar*) expressed his or her opposition to sexual acts.

### I. General capacity to give consent

Generally, a person's capacity to give consent to conduct that would otherwise be criminal does not depend on that person's age but on his or her ability to understand the nature of the act in question and its possible consequences.<sup>17</sup> However, the law has established special rules for sexual acts. Children younger than 14 years are conclusively assumed to be incapable of giving voluntary consent; hence any sexual act involving children (even as mere spectators) is prohibited and punishable by imprisonment of up to 15 years (§§ 176, 176a PC). Young persons of 14 and 15 years are generally regarded as capable of making autonomous decisions; however, a person older than 21 years who performs a sexual act with a juvenile under 16 years and thereby intentionally abuses the individual inability of that person to make autonomous decisions in sexual matters is punishable by imprisonment of up to three years (§ 182 sec. 3 PC). It follows from these

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15 Federal Court of Justice (*Bundesgerichtshof* – BGH), Judgment of 11 Dec. 2003, 3 StR 120/03, 49 Entscheidungen des Bundesgerichtshofes 34; Judgment of 26 May 2004, 2 StR 505/03, 49 Entscheidungen des Bundesgerichtshofes in Strafsachen 166.

16 That was the situation in the leading Judgment of 26 May 2004, 2 StR 505/03 (note 15).

17 *Rönnau* (note 11), Vor § 32 marginal notes 192–195; *Detlev Sternberg-Lieben*, in: *Albin Eser et al., Schönke/Schröder, Strafgesetzbuch Kommentar*, 30<sup>th</sup> ed. 2019, Vor § 32 marginal note 39 with further references.

rules that persons of 16 years and older are presumed to be able to give valid consent in sexual matters unless they suffer from an individual defect.

Persons of any age can be unable to give valid consent as a result of a mental disease or a severe impairment of intelligence (cf. § 177 Sec. 2 nos. 1 and 2 PC). A temporary inability can be the consequence of consuming alcohol or drugs that impair the person's ability to think clearly or to control his or her impulses. Some writers draw a parallel between the ability to give valid consent and the criminal responsibility for offenses; they think that a person cannot give consent if he or she would not be held responsible, due to a chronic or temporary mental impairment, for an offense he or she commits.<sup>18</sup> But according to the majority view, these two issues should be treated separately and be decided according to different criteria.<sup>19</sup> Hence the capacity to consent depends, among other factors, on the specific conduct that the actor is to perform<sup>20</sup> – even a young teenager can give informed consent to the extraction of a tooth but not to the investment of her inherited funds in a dubious business enterprise.

## II. Ways of giving valid consent

In sexual relations, a person's consent can be relied upon if he or she expressed it verbally or in non-verbal forms, such as nodding one's head when asked whether one wishes to have sex. Problems with regard to sexual conduct can occur if one partner to a sexual act expresses neither consent nor dissent but just remains passive while the other person touches him or her sexually. The definition of sexual abuse in § 177 sec. 1 PC describes the *actus reus* as performing a sexual act "against the recognizable will" of the other person. This implies that the victim must have made up his or her mind against accepting the sexual act that the perpetrator is about to perform. But an internal opposition is not sufficient. The victim must also have expressed – verbally or non-verbally – his or her rejection of the proposed sexual act. Only if the victim uses words or gestures indicating his or her disagreement with the perpetrator's intended act can the victim's opposition be deemed "recognizable". If the victim remains passive while the other person performs a sexual act, the victim's opposing will is

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18 *Eschelbach* (note 7), § 177 marginal note 49.

19 *Eschelbach* (note 7), § 177 marginal notes 49, 53.

20 *Renzikowski* (note 1), § 177 marginal note 50.

not “recognizable”, even if the actor knows from prior encounters that the other person is unlikely to consent to his sexual acts.<sup>21</sup>

“Recognizability” is determined from the viewpoint of an objective observer who is familiar with the relevant facts. German law thus accepts the rule “No means No” but shifts to the affected person the burden of taking some action to express his or her opposition. A lack of protest thus equals consent.<sup>22</sup> This is true even if the victim is generally afraid of the perpetrator and therefore refrains from expressing his or her opposing will. Without a recognizable expression of rejection, sexual abuse exists only if the victim is unable to form or freely express his or her will for a specific reason listed in the Code, for example, because the perpetrator takes advantage of the victim’s surprise or makes threats to prevent any opposition (see § 177 sec. 2 nos. 3, 5 PC).

If the victim protests and the actor nevertheless performs a sexual act because he thinks that the protest is not meant seriously but is part of a role play, the perpetrator acts at his own risk. If it turns out that the other person indeed objected to the perpetrator’s plan, there was a “recognizable expression” of his or her opposition, and it is doubtful whether the court will later accept the defendant’s claim of a *bona fide* mistake of fact on his part.

### III. Grounds for negating validity of consent

The use of force or threats of force to make the victim submit to the perpetrator’s will clearly negates the effect of any ostensible expression of consent by the victim. German law goes even further: a person is guilty of sexual abuse if he or she threatens the victim with inflicting any serious harm and thereby makes the victim submit to a sexual act (§ 177 sec. 2 no. 5 PC). Even taking advantage of someone else’s threats against the victim is regarded as a form of sexual abuse: If D knows that X will beat V if V refuses to have sex with D and takes advantage of V’s vulnerable position for having sex with V, D is guilty of sexual abuse (§ 177 sec. 2 no. 4 PC). This leaves open the question of whether an express or implied “threat” of a negative turn in professional relations between A and B in case B refuses to comply with A’s sexual wishes is sufficient to negate any effect of B’s de-

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21 See *Eisele*, in: Schönke/Schröder (note 17), § 177 marginal note 19.

22 BGH, Judgment of 30 March 2022 – 2 StR 292/21, in: *Neue Zeitschrift für Strafrecht, Rechtsprechungsreport* (NStZ-RR) 2022, 211; *Hoven* (note 8), 579.

clared consent or B's active participation in mutual sexual acts.<sup>23</sup> Similar questions arise if A tells B that he intends to terminate their relationship unless B agrees to have sex with him. In deciding on the coercive character of such threats, courts need to balance B's sexual autonomy against A's freedom to continue a relationship with B, which should normally prevail.<sup>24</sup>

While German law rules out valid consent if the victim's autonomy has been affected by threats, *deceptive behavior* for the purpose of obtaining consent in sexual acts is not expressly mentioned in the Penal Code. With regard to instances where consent is a ground of justification, there is general agreement that consent is invalid if the person giving consent has been tricked into doing so by a misrepresentation of relevant facts.<sup>25</sup> But some authors view the matter differently if lack of consent is an element of the *actus reus* of an offense, as, e.g., in criminal trespass or larceny: In that instance, they claim that it does not matter how the person has been motivated to declare consent – its mere verbal or factual declaration is said to be sufficient to negate the *actus reus*.<sup>26</sup> It must be doubted that this view holds true as a general principle, because the impact of fraud and deceit on a person's free will can hardly depend on whether consent is regarded as negating the *actus reus* or the unlawfulness of the actor's conduct.<sup>27</sup>

But it may make sense, as a matter of criminal policy, to distinguish among different instances of deceit with regard to consent in sexual matters.<sup>28</sup> Consent should not be valid if the actor made the victim believe

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- 23 For a controversial decision on this question, see Federal Court of Justice (Bundesgerichtshof) of Nov. 21, 2018, 1 StR 290/18, in 2019 *Neue Zeitschrift für Strafrecht* (NSTZ) 717, and the comments by *Tatjana Hörnle*, 'Sexueller Übergriff (§ 177 Abs. 1 StGB) bei aktivem Handeln von Geschädigten', 2019 NSTZ 439, 440, and *Elisa Hoven*, 'Das neue Sexualstrafrecht. Ein erster Überblick', 2020 NSTZ 578, 579–580.
- 24 But see the decision of the Karlsruhe Appellate Court of Jan. 17, 2019, 2 Ws 341/18, in 2019 NSTZ 350 (emphasizing the need to take B's subjective situation into account when deciding on the coercive character of A's threat to leave B).
- 25 *Rönnau* (note 11), Vor § 32 marginal notes 203 et seq.
- 26 *Johannes Wessels*, *Werner Beulke* and *Helmuth Satzger*, *Strafrecht Allgemeiner Teil*, 50<sup>th</sup> ed. 2020, marginal notes 554, 560; *Fischer* (note 2), Vor § 32 marginal note 3b.
- 27 See *Rönnau* (note 11), Vor § 32 marginal notes 157–160 (arguing in favor of making the effect of fraud depend on the offense type); *Horst Schlehofer*, *Einwilligung*, in: *Eric Hilgendorf*, *Hans Kudlich* and *Brian Valerius* (eds), *Handbuch des Strafrechts*, vol. 2, 2020, marginal notes 117–121.
- 28 For extensive argument, see *Elisa Hoven* and *Thomas Weigend*, *Kriminalpolitische Zeitschrift* (KriPoZ) 2018, 156; *Rita Vavra*, *Zeitschrift für internationale Strafrechtsdogmatik* (ZIS) 2018, 611; see also *Roxin* and *Greco* (note 11), 700.

that his or her act is not sexual at all but, e.g., a necessary medical examination. Deceit about one's identity also vitiates the victim's consent because a person's willingness to permit sexual intimacy normally depends on the identity of the partner. It should thus be regarded as sexual abuse if the actor makes the victim believe that he or she is another person with whom the victim is familiar.<sup>29</sup> On the other hand, consent in sexual acts is still valid if the actor made false promises (e.g., to pay the other person some money or to marry him or her) or misled the other person about his or her personal qualities (e.g., pretending to be rich or to be a gentle person). Forming a wrong impression about another person is a general risk of social life, and making the decision to enter into sexual relations on the basis of such a false impression is a risk that should be borne by the victim even if the actor is responsible for creating the impression. It should be mentioned, however, that these issues have not yet been discussed much in German case law and legal literature.<sup>30</sup>

### C. Reach of consent

#### I. Timing of consent

As a general rule, consent is relevant in criminal law only if it was expressed before the relevant act took place.<sup>31</sup> Hence, if the actor performs a sexual act although the other person "recognizably" expressed his or her opposition, the actor commits the offense of sexual abuse even if the victim later declares that he or she forgives the perpetrator or that he or she enjoyed the sexual act. In the latter instance, however, the victim is unlikely to report the matter to the police.

Consent expresses the will of a person at the time when it is given. This implies that consent may be withdrawn at any time, even while sexual intercourse or similar acts are being carried out. If one person lets the other person know, verbally or by gestures, that he or she no longer consents to the sexual act in question, the other partner must immediately

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29 This would not cover the case that a person who meets the victim for the first time introduces himself or herself using a false name.

30 But see *Hoven* (note 8), 581; *Renzikowski* (note 1), § 177 marginal note 52; *Ziegler* (note 2), § 177 marginal note 10; *Beatriz Correa Camargo*, *Zeitschrift für die gesamte Strafrechtswissenschaft* (ZStW) 134 (2022), 355.

31 *Sternberg-Lieben*, in: Schönke/Schröder (note 17), Vor § 32 marginal note 44; *Engländer*, in: Matt/Renzikowski (note 7), Vor § 32 marginal note 20.

terminate the act. If the actor continues after consent has been withdrawn, he or she commits the *actus reus* of sexual abuse.<sup>32</sup> However, withdrawal of consent does not work retroactively; hence anything that happened before the person said “stop!” remains a consensual sexual act.

## II. Scope of consent

Consent to sexual acts can be general or specific. If one of the partners limits his or her consent to certain acts and/or specifically excludes some acts, that specification is binding on the other partner. If “general” consent is given, that normally extends to sexual acts that can be expected under the circumstances, including sexual intercourse. To what extent “unusual” sexual acts are included depends on the relationship between the persons involved. The other person may, however, express his or her opposition to specific acts even if he or she had agreed to them at prior occasions, and that opposition is binding on the actor.

A case decided by the Federal Court of Justice in 2018<sup>33</sup> has led to a spirited debate about the possible scope of non-consent.<sup>34</sup> In that case, a hospital nurse had had an affair with a doctor, her boss. After she ended the affair, he asked her to give him oral sex one more time. She said that she didn’t want to do that, but when he presented his penis, she took it between her lips for a few moments in order to avoid possible negative consequences for her employment. This case raised the question of whether a person can claim to withhold consent when he or she actively performs a sexual act, such as giving oral sex. Unless that person’s will had been subdued by force or threats, actively performing a sexual act normally implies a conscious decision to do so, even if the person does not “like” to do this act or performs it only for ulterior purposes (e.g., to stay in friendly relations with the other person). Barring exceptional circumstances, an unforced sexual activity therefore should not be regarded as being involuntary.<sup>35</sup>

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32 *Renzikowski* (note 1), § 177 marginal note 49.

33 BGH, Decision of 21 November 2018 – 1 StR 290/18, NStZ 2019, 717.

34 For discussions, see *Thomas Fischer*, NStZ 2019, 580; *Tatjana Hörnle*, NStZ 2019, 439; *Hoven* (note 8), 579.

35 The District Court convicted the defendant of sexual abuse, arguing that he knew that the nurse did not wish to have oral sex with him. The Federal Court of Justice reversed, criticizing the District Court for not sufficiently explaining in the written judgment how the nurse’s ambivalent behavior (verbal protest but

In recent years, courts increasingly had to deal with a phenomenon called “stealththing”, i.e., the secret removal of a condom by the male partner before or during intercourse.<sup>36</sup> A clear majority regard this conduct as a form of sexual abuse, arguing that the woman’s consent is normally limited to protected intercourse, given the risks of pregnancy and transmission of diseases if no condom is used.<sup>37</sup> Hence if the male partner secretly removes the condom before or during intercourse, the ensuing penetration is not covered by her consent unless she had explicitly agreed to unprotected sex.

### III. Finality of non-consent

If a person declares that he or she does not consent to (certain) sexual acts, that declaration does not exclude a later change of mind. The other person therefore should be free to try to persuade the partner to re-think his or her opposition to sexual acts. Whereas verbal persuasion is not covered by the criminal law, performing sexual acts in the hope that the unwilling partner may change his or her mind clearly falls under the heading of sexual abuse in the sense of § 177 sec. 1 PC (“against the recognizable will of the other person”).

#### D. Intent as to lack of consent

All offenses of sexual abuse and coercion in the German Penal Code require intent. The scope of the intent is not altogether clear in the basic offense of sexual abuse (§ 177 sec. 1 PC), because the offense is defined as acting against the “recognizable” will of the other person. Since the victim’s will must be “recognizable” for an objective observer, the offense definition does not refer to the perpetrator’s negligence about ascertaining the victim’s consent but to his intent as to the perception of an objective ob-

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active sexual conduct) could be understood by the defendant. The case against the defendant was eventually dismissed in exchange for a payment of 9,000 Euro.

36 See, e.g., Kammergericht, Decision of 27 July 2020 – 4 Ss 58/20, in: BeckRS 2020, 18243; Oberlandesgericht Schleswig, Judgment of 19 March 2021 – 2 OLG 4 Ss 13/21, NStZ 2021, 619; Bayerisches Oberstes Landesgericht, Decision of 20 August 2021 – 206 StRR 87/21, in: BeckRS 2021, 31633.

37 See Felix Herzog, in: Stephan Barton et al., Festschrift für Thomas Fischer, 2018, 351; Thomas Michael Hoffmann, NStZ 2019, 16; Hoven (note 8), 580–581.

server: the perpetrator must be aware that a well-informed objective observer would interpret the victim's behavior as indicating opposition to the sexual act proposed by the perpetrator.<sup>38</sup> "Intent" in German law includes so-called conditional intent (*dolus eventualis*), that is, consciously taking the risk that the perpetrator's conduct meets the offense definition. Regarding the lack of consent, it is thus sufficient that the perpetrator thinks that it is possible that the victim's conduct expresses his or her lack of consent, and still decides to perform the sexual act.<sup>39</sup> The German solution thus approaches the recognition of "reckless" sexual coercion.

On the other hand, any mistake of fact on the part of the defendant negates intent. It is thus not sufficient for conviction that other reasonable persons would have interpreted the victim's conduct as clearly expressing opposition to the defendant's plans. The defendant can be convicted of intentional sexual abuse only if he or she knew or at least accepted the possibility that an observer would interpret the victim's conduct as expressing lack of consent.<sup>40</sup> Although there is no formal burden of proof on the prosecution, the court may convict only if the judges, after evaluating all the evidence, are convinced of the defendant's guilt beyond a reasonable doubt.<sup>41</sup> Conversely, if the conflicting testimony of the participants of a sexual encounter does not present a clear picture as to the "recognizable" lack of one partner's consent, the court must acquit the defendant. There is in any event no burden on the defendant of proving consent, nor are there evidentiary presumptions that non-consent is deemed to exist in certain situations (but see E. below).

### *E. Are there sexual offenses that do not require lack of consent?*

As mentioned above, children younger than 14 years are deemed incapable of giving valid consent to sexual acts (§ 176 PC). A similar irrefutable assumption of non-consent applies to persons who are in a defined situation of dependence on the perpetrator. Examples are

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38 *Eisele* (note 17), § 177 marginal notes 19–21; *Renzikowski* (note 1), § 177 marginal note 47.

39 *Monika Frommel*, in: *Urs Kindhäuser, Ulfrid Neumann and Hans-Ulrich Paeffgen* (eds), *Strafgesetzbuch, Kommentar*, 5<sup>th</sup> ed. 2017, § 177 marginal note 58; *Renzikowski* (note 1), § 177 marginal note 62.

40 *Ziegler* (note 2), § 177 marginal note 9.

41 § 261 Code of Criminal Procedure; see *Klaus Miebach*, *NSzZ* 2020, 72.

- minors younger than 16 years who have been placed under the perpetrator's care for their education or training (§ 174 sec. 1 no. 1 PC);
- prisoners, other persons in detention, and patients in a hospital in relation to persons employed by the institution if the perpetrator abuses his or her position of authority (§ 174a PC);
- patients in relation to physicians or psychotherapists who have accepted them for treatment, if the perpetrator abuses his or her position (§ 174c PC).

In these and similar cases, the person in authority is punishable for perpetrating sexual acts even if the other person agreed to them.