A DIFFERENT APPROACH TO JURISPRUDENCE? FEMINISMS IN GERMAN LEGAL SCIENCE, LEGAL CULTURES, AND THE AMBIVALENCE OF LAW

SUSANNE BAER*

Throughout the world, institutions of professional thinking face with increasing frequency the question whether, and how, feminist theories—I will discuss what thesis label may mean—can and should be integrated into legal science and law schools.[1] "Legal science" (*Rechtswissenschaft*), in this case, identifies law as taught and researched in German, Austrian, and Swiss universities. In this context, it is a broader term than "legal theory" or "jurisprudence"; yet it also contains the traditional continental, rather anachronistic academic model of law. The more recent influence of socio-legal perspectives, legal anthropology, critical schools, and last but not least, feminism, have shattered the causal model of norm and sanction, opening up perspectives that include other norms and a variety of ways of sanctioning. In this text, however, I will use "legal science" as a broad and inclusive concept; Anglo-American readers will be asked, in passing, to reconsider what it is lawyers do in the academy.

The basic question whether feminism should be part of legal education at all has already been answered affirmatively in countries such as Norway, Denmark, the Netherlands, Canada, Australia, Great Britain and, last but not least, the United States.[2] In Germany, we are still waiting for a response. Integration does not

* Free University of Berlin, first state exam 1988, second state exam 1991; University of Michigan Law School 1993 (LL.M.); currently teaches at Humboldt University in Berlin and works on legal theory, constitutional and administrative law. She coauthored a civil anti-pornography bill in 1988 that gained a hearing in the German parliament, and has translated several of Catharine MacKinnon's works into German. She also worked in the legal office of the Berlin department of urban planning and environmental protection, 1991-92. A significantly different version of this paper has been published in German. The author would like to thank Belinda Cooper, as well as Nicola Lacey, Jackie Stevens, and Catharine MacKinnon.

[1] Early works can be found in the only German feminist law journal, *Streit*. For compilations, *see* Ute Gerhard & Jutta Limbach *in* WIE MÄNNLICH IST DIE WISSENSCHAFT? (Karin Hausen & Helga Nowotny eds., 1986) and the essays *in* RECHTSALLTAG VON FRAUEN (Ute Gerhard & Jutta Limbach eds., 1988); FRAUEN IM RECHT (Ulrich Battis & Ulrike Schultz eds., 1990).

[2] In South and Central America, Asia and Africa, initiatives exist for "women's legal academies" (i.e., Pakistan) and extensive research on women and law (i.e., Women and Law in Southern Africa-WLSA).

necessarily imply acceptance, as U.S. scholars are well aware, but the German experience also indicates that making inroads into institutions is a significant step in moving a legal system in the direction of equality. The answer to the question of how such "feminization" should proceed—add women and stir? separatism? gendering the curriculum? mainstreaming?—varies and changes depending on cultural particularities. In many cases, it is not clear at all—or has lately become unclear through the influence of postmodernism—what feminism is. Approaching such issues in an attempt at cross cultural exchange reveals that there is neither one jurisprudence nor one feminism independent of cultural context—but there are things we can learn from one another.

This article attempts to paint a picture of feminist approaches to German jurisprudence. To do this, it is crucial to take the institutional circumstances encountered by women and feminisms at law schools and in Germany's legal culture into historically informed consideration, particularly now that two legal cultures (West and East German) have merged. Therefore, I will first craft the frame and design the gallery for this painting. This will include a discussion of the delay in the development of German feminist jurisprudence at universities, in comparison with both Anglo-American and Scandinavian countries and with other academic disciplines.

It is commonly believed that developments in German jurisprudence lag up to five years behind their American counterparts. However, a second glance reveals the delay to be more than a time-lag in institutionalization: it may be a different approach to jurisprudence as such.[3] This has much to do with the specific characteristics of the field. Jurisprudence is everywhere bound to law, and thus affirmatively bound to the power structures of society. In Germany, legal science also has such specific bondage, both affirmative and forced, which is historically quite strong and has proven throughout history to be problematic. Yet at the same time, power structures are the central and focal point of feminist critique. This creates a tension between power and marginalization within which the discipline of feminist jurisprudence tends to endanger itself. There is also a more general tension between the feminist critique

[3] For an excellent discussion of a similar observation on Critical Legal Studies in Europe and the U.S., *see* PETER GOODRICH, LAW IN THE COURTS OF LOVE. LITERATURE AND OTHER MINOR JURISPRUDENCES (1996). For similarities and differences, *see* Susanne Baer & Sabine Berghahn, *Auf dem Weg zu einer feministischen Rechtskultur? Deutsche and US-amerikanische Ansätze, in* TERESA KULAWIK & BIRGIT SAUER, DER HALBIERTE STAAT. GRUNDLAGEN FEMINISTISCHER POLITIKWISSENSCHAFT 223 (1996).

of scholarship and theory and the search for a newly conceptualized scientific, though contextual, rationality; because of it, feminist theorizing generally tends to transcend the framework of universities and their understanding of what they do.[4] Thus the frame of the picture of feminist jurisprudence in Germany is crafted within the overall structure of German academic culture. This points to complex contextual issues that any reading of one another's texts should acknowledge.

The second and central part of this article paints the canvas; the colors used vary in shade, intensity and structure. By way of describing the historical development of issues in feminist jurisprudence and situating them in more generally defined theoretical contexts, this part will discuss a little more broadly what defines or may define something as "feminist" in jurisprudence, specifically in its German variant. So many labels now exist that it is worth asking what they signify. Is "feminist" defined by a subject matter, and is that subject matter "women," or "female law," or "women's law" (conceptualized as "feminist law") as in Norway;[5] or, as in Bremen, the first German university to establish a chair dedicated to these issues, is it a "law of gender relations" that we are dealing with? Do feminists—in Germany, they are almost exclusively female, marking another difference from the U.S.—work with a specific method? Do we engage in "feminist legal theory?" Do we, again, add women and stir in every other field, or do we create something genuine, a jurisprudence of our own? Is feminism therefore a part of legal science? Is there another jurisprudence, or even part of another field formerly known as women's studies, which focusses these days on gender? Anyone hoping to answer these questions finds herself oscillating between equality and difference, universalism and particularity, integration and autonomy. Again, labels are significant in this arena, and one may uncover what lies behind them.

By the final part of this paper, an image will hopefully have emerged, but not (and never) the whole picture. It should be obvious by then that, in this academic context, all feminisms move between the seductive force of the mainstream, which may include iconization of the exotic, and marginalization of the disruptive, dangerous, or critical in the best sense of the word. In the legal context, and particularly in the German academic setting, it should

---

[4] EVELYN FOX KELLER, *Feminismus and Wissenschaft, in* Denkverhältnisse - Feminismus und Kritik 281 (Elisabeth List & Herlinde Studer eds., 1989).

[5] *See* Tove Stang Dahl, Women's Law: An Introduction to Feminist Jurisprudence (Ronald L. Craig trans., 1987).

be noted that feminisms in law tend to impose a shape on reality. Therefore, the tensions between equality and difference, between universalism and particularity, between integration and autonomy are less theoretical here than elsewhere; they work with the force of law, and are part of a discourse of power.

I. THE FRAME: BETWEEN MARGINALIZATION AND POWER

Efforts to integrate feminist approaches into German legal education are not new. Students have been asking for a long time that the lives of women be taken into account in research and teaching, and quite a few analyses have been done of law school discrimination. As early as 1977, then-students Franziska Pabst and Vera Slupik presented an analysis of the image of women in cases used to teach civil law. They showed that women were underrepresented in educational hypotheses, acted primarily in the private sphere or in "typically female" professions, were defined by their relationships to men or as the objects or motives of men's behavior, and were thus portrayed as nonexistent in and of themselves.[6] Through such imagery, legal education dogmatized discrimination. At least in Austria, similar analyses and critiques led to change. Kienapfel, a law professor from Linz, rewrote his well-known textbook on criminal law to correct gender-specific stereotyping.[7]

For German developments, however, 1977 is not that long ago. In 1995, many more feminist works can be found in print, but not much more feminism in law schools. It must be asked—and this question is often asked by North Americans—why, in Germany, feminism took so long to enter law school. Although there are many reasons for this delay, and although some feminisms may be overlooked if one's image of what they should look like is homegrown, there are still two factors of major importance: the specific nature of the German feminist approach to law when related to German institutional culture, and the universal tension between power and marginalization feminist lawyers face, in a specifically German form that also arises from the legal and academic culture. First, I will sketch the starting points and focuses of German feminist jurisprudence; then, I will present the institutional conditions of such interventions; third, I will briefly discuss the crisis of femi-

---

6 Franziska Pabst & Vera Slupik, *Das Frauenbild im zivilrechtlichen Schulfall. Eine empirische Untersuchung, zugleich ein Beitrag zur Kritik gegenwärtiger Rechtsdidaktik*, KRITISCHE JUSTIZ 242, 255 (1977); also published *in* RECHTSALLTAG VON FRAUEN, *supra* note 1, at 199.

7 PETRA KODRÉ, DER FORSCHE HANSI UND DIE ENTZÜCKENDE RESI. EINE ANALYSE VON ALLTAGSSEXISMEN AM BEISPIEL EINES LEHRBUCHES (1991).

nist (as well as other) scholarship; and finally, I will consider the specificities of dealing with the subject of law in the German legal culture.

1. Starting Points: German Feminists Approach Law

In 1986, Jutta Limbach, then a law professor and now president of the German Constitutional Court, asked "how male" German legal science really was.[8] She concluded that "at the level of postulates . . . legal scholars and jurists think in extremely egalitarian fashion," but "the acrobatic thinking" that veils the hierarchical character of gender relations contributed to the fact "that sex equality becomes mired at the level of formal guarantees."[9] In 1988, she and Ute Gerhard, the first women's studies professor in Germany, based in Frankfurt, added that "legal education socializes into adaptation" and that "for too long, jurisprudence proved its ability to abstract from the concrete lives of women and revealed its one-sided interests through the exclusion of women from the development of a 'universal law.'"[10] Exclusion of experience goes hand in hand with exclusion of presence. Women today are still significantly underrepresented in legal academia; in West Germany, 771 male law professors have accepted seventeen women onto legal faculties. Feminist approaches, if found at all, are the exception in German law schools.[11]

Before targeting exclusion from education and educational institutions, German feminist work in law targeted discrimination in and by law in practice. This starting point indicates that the central "*Erkenntnisinteresse*" (epistemological interests)[12] of feminist work in law was a genuinely practical impulse. It was an impulse for change, for something to happen in the world, based on the knowledge of law's potential. Early studies dealt with one-sided perception patterns and unreflected preconceptions to be found in what were, at the time, court rulings and legislative law-making that not only stereotyped, but discriminated.[13] For example, feminists could prove that court rulings, particularly in the area of sexual

---

8 *See* Limbach *in* WIE MÄNNLICH IST DIE WISSENSCHAFT?, *supra* note 1, at 87.

9 *Id.* at 104.

10 *See* RECHTSALLTAG VON FRAUEN, *supra* note 1, at 9 (Gerhard & Limbach's introduction).

11 *See* Mareike Coppi et al., *Betwen Legal Studies and Feminism*, 3 CARDOZO WOMEN'S L.J. 451 (1996).

12 *See* JÜRGEN HABERMAS, ERKENNTNIS UND INTERESSE (2d ed. 1973).

13 MARIA HENRIETTE ABEL, VERGEWALTIGUNG - STEREOTYPEN IN DER RECHTSPRECHUNG UND EMPIRISCHE BEFUNDE (1986); MONIKA RAAB, MÄNNLICHE RICHTER - WEIBLICHE ANGEKLAGTE (1993).

violence, were still dominated by myths that established the perpetrator's view as the reigning perspective.[14] As another example, studies showed that German family law, which reluctantly adopted standards of formal equality in 1976, worked with gendered role ascriptions detrimental to women.[15] Since 1983, the feminist law journal *Streit* has published a diverse range of analyses in almost all areas of law; founded by lawyers, it remains to this day the only German-language periodical focusing on feminist jurisprudence.[16] Due to the practical provenance and focus of such writings, *Streit* also publishes many court decisions. The editors' policy is to devote their limited space to "positive" court rulings and critical analyses, rather than "purely academic" theorizing, that point to ways out of inequality; this corresponds to a strong current in feminist debate in Germany that rejects a "victimization discourse."[17] The work by feminist lawyers published in this way is read primarily by other practitioners, particularly by commissioners for equality and/or women's affairs.

Only recently have a small number of questions involving feminist jurisprudence made their way into a few law schools. A chair for the "law of gender relations" was established in Bremen in 1992, and a "feminist jurisprudence project" has existed in Berlin since the 1993-94 semester, hosting guest professors Frances Olsen of UCLA in 1995 and Nicola Lacey of Oxford, then Birkbeck in London, in 1996. Other law faculties offer an occasional seminar.

Some argue that this lack of recognition of feminist jurisprudence is due to the practical focus of German feminist work in law and its lack of high-quality theoretical analysis. Aside from the anti-feminist sentiments it may conceal, this argument ignores the fact

---

[14] For example, the myth, now becoming more rare, that women do not know the men who rape them, or that having a beer with the man who rapes one constitutes consent. For extensive analysis *see* Susanne Baer, Würde oder Gleichheit? Zur angemessenen grundrechtlichen Konzeption von Recht gegen Diskriminierung am Beispiel sexueller Belästigung am Arbeitsplatz in der Bundesrepublik Deutschland und den USA 123 (1995).

[15] MARLIESE DOBBERTHIEN, INHALTSANALYTISCHE UNTERSUCHUNG WEIBLICHER ROLLENASKRIPTIONEN IM EHE - UND FAMILIENRECHT (1978); SABINE BERGHAHN, NEUE CHANCEN FÜR GESCHIEDENE FRAUEN? EINE UNTERSUCHUNG ÜBER DIE RECHTSPRAXIS VON EHEGATTENUNTERHALT ZUR QUALIFIZIERUNG (1992); Jutta Bahr-Jendges, *Gleichberechtigung und Kindeswohl - ein Widerspruch? Die rechtliche Gestaltung von Geschlechter- und Elternbeziehungen bei der Regelung des Sorgerechts*, STREIT 27 (1993).

[16] On the history of STREIT, *see* issue 1/2 of 1993; *see also* Jutta Limbach, *Engagement und Distanz als Probleme einer feministischen Rechtswissenschaft*, *in* RECHTSALLTAG VON FRAUEN, *supra* note 1, at 169. Other journals that publish feminist work are ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE, KRITISCHE JUSTIZ, KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT, and KRIMINOLOGISCHES JOURNAL. In Germany, law journals are run not by students, but by publishers with professorial editorial boards. This is another reason for the current lack of recognition of feminist jurisprudence.

[17] *See* Christina Thürmer-Rohr, *Frauen in Gewaltverhältnissen: Opfer und Mittäterinnen*, ZEITSCHRIFT FÜR SEXUALFORSCHUNG 1 (1989).

that it accepts the dominant standards of the meaning of "practice" and "theory," as well as "good" or "bad" quality. As will be seen from the picture of feminisms in legal science drawn below, feminist jurisprudence has set out to challenge these dominant standards as well.

2. *Institutional Conditions: Law Schools and Women*

If we are to examine the development of German feminisms in law, we must consider the conditions under which they came into existence. Conditions to establish feminist jurisprudence at German law schools have never been encouraging. Females, in particular feminist females, are not a normal sight in legal academia; and marginalization, ignorance of the category of gender, and discrimination in academia have consequences.[18] In addition, compared to the United States, the structure of the German academy as such and of law schools in particular proves detrimental to the presence of minorities. Central to the university is the *Lehrstuhl*, or "chair," the highest-ranking professorship, with its attendant assistants, secretary, budget and reputation, based on the concept of a lone thinker and his "helpful spirits," as it were, bringing information straight to his desk. Nepotism is an almost natural consequence.

On the positive side, schools are public, open to all, and still basically free of charge;[19] the negative backdrop is that graduate qualifications, particularly the doctorate and the so-called *habilitation*, or professorial qualification, must be supervised; they are thus dependent on an individual, and in all but seventeen out of 771 cases a male, professor and holder of a *Lehrstuhl*.[20] Here discrimination may take effect; in general, "outsiders" (including women who are primary caretakers in a culture that emphasizes child care by the mother) have very little chance to gain access—or, perhaps more to the point, are very likely to be excluded. The employment rate of women in the German labor force is also generally lower

---

[18] *See* INNENANSICHTEN. STUDENTINNEN UND WISSENSCHAFTLERINNEN AN DER UNIVERSITÄT (Christine Färber ed., 1994); SILVIA LANGE, DISKRIMINIERUNG VON FRAUEN IN PRÜFUNGSSITUATIONEN (1994); BETTINA SCHOLZ & ANJA SCHITTENHELM, EXMATRIKULATION. STUDIENABBRUCHVERHALTEN VON FRAUEN UND MÄNNERN (1994); LYDIA DREWS, ALLES UNTER EINEN HUT KRIEGEN. DIE SITUATION VON STUDIERENDEN UND WISSENSCHAFTLERINNEN MIT KINDERN (1994); and KRISTINE DREYER & CLAUDIA TROLLE, SEXUELL BELÄSTIGT. STUDENTINNEN BERICHTEN ÜBER IHRE ERFAHRUNGEN MIT DOZENTEN (1994).

[19] At present, due to the poor state of the economy, tuition, or at least student loans, are being discussed to replace the state scholarship system based on need.

[20] About 20-30% of all doctorates are earned by women, under conditions that prove to be less favorable than those of men; *see supra* note 18.

than in the U.S.[21] In law schools, education in a variety of disciplines, which feminist work often requires due to its interdisciplinary character, or which at least improves such work, is not generally appreciated; nor are excursions into legal practice beyond the two years of internships that are part of German legal education and form a basis for a thorough understanding of such practice.

Historically, the exclusion of women from higher education has also been particularly thorough in law; therefore, women have only a short professional history to look back on.[22] Women in law were the victims of massive discrimination that peaked, though it neither began nor ended, under German fascism.[23] The first doctorate in law was earned in Switzerland by radical feminist Anita Augspurg.[24] Also, in the 1920s, which for many were not so roaring, gender was a more significant issue for professional development than religion;[25] the latter became more central under the Nazi ideology and reign of terror. The misogyny of the Nazi regime resulted in the exclusion of women from most academic

---

21 Of all German university professors, 5.5 % are women, with natural sciences and engineering ranking lower than law. For data that also compare the GDR and the FRG, *see* STUDIERENDE UND STUDIERTE FRAUEN. EIN OST- WEST-DEUTSCHER VERGLEICH (Ruth-Heidi Stein & Angelika Wetterer eds., 1994), in particular Sibylle Bōge, *Ungleiche Chancen, gleiches Recht zu vertreten*; Ulrike Schultz, *Wie männlich ist die Juristenschaft? Begleittext der FernUniversität Gesamthochschule Hagen* (1994). *See also* the data from HASSELS & HOMMERICH, FRAUEN IN DER JUSTIZ (Bundesministerium für Justiz, 1993). Conversely, there are increasing numbers of women judges—up from 3 % in 1960 to 23 % in 1993.

22 *See* Coppi et al., *supra* note 11; for further accounts, *see* JURISTINNEN IN DEUTSCHLAND. EINE DOKUMENTATION 1900-84 (Deutscher Juristinnenbund ed., 1984) [hereinafter DJB]; Limbach *in* WIE MÄNNLICH IST DIE WISSENSCHAFT?, *supra* note 1, at 89. In 1920, the important German legal philosopher Gustav Radbruch argued for equal norms in the practice of law, REICHSTAGS DRUCKSACHE (Reichstag publication) 363, Anfrage 139 of 28 July 1920.

23 DJB, *supra* note 22, at 11.

24 At the time, women were not admitted to the second state exam, required to practice law. In Germany, women could not take the first state exam until 1912 in Bavaria and 1919 in Prussia. The first woman lawyer in Germany was Clāre Meyer, in Hamburg, 1930. The right to a *habilitation*—the prerequisite for full professorship—was earned by philosopher Edith Stein in 1920. She herself was too old to make use of it by that time. On histories of the professions, *see* Theresa Wobbe, *Von Marianne Weber zu Edith Stein: Historische Koordinaten des Zugangs zur Wissenschaft, in* THERESA WOBBE & GESA LINDEMANN, DENKSACHEN. ZUR THEORETISCHEN UND INSTITUTIONELLEN REDE VOM GESCHLECHT 28 (1994); further details *in* DJB, *supra* note 22, at 2 and in a personal account *in* JURISTINNEN (Margarethe Fabricius-Brand et al. eds., 1982).

25 Claudia Huerkamp, *Jüdische Akademikerinnen in Germany 1900-1938, in* WOBBE & LINDEMANN, *supra* note 24, at 100. Eleven out of 19 practicing female lawyers in Berlin were Jewish.

fields.[26] In legal practice, the presence of women was defined as "a great injustice to the man, as well as to the woman herself."[27]

After 1945, women could study and practice law, but gender discrimination did not end. Legal exclusion—comparable to the *Bradwell* situation in the U.S.—is now a thing of the past, but its legacy lives on.[28] East Germany provided greater formal equality in the professions, but it was bought at the price of a general lack of intellectual freedom and critical thought; it remains to be seen what imprint this left on women and the law. Important details in the history of women in law—a history of women acting with, suffering through, and thinking about law—have been provided by feminist sociologist Ute Gerhard.[29] However, much remains to be studied; for example, the history of legal doctrines and the law of divided Germany. Also, the history of the work of female jurists, similar to one recently written for the field of sociology,[30] has so far been only partly recreated. For example, the works of sociologist Mathilde Vaerting, who in 1928 analyzed gender as a hierarchical structure and ascription,[31] and many others await rediscovery.

Institutionally, such depressing history and numbers call for affirmative action. Most of Germany's states have now amended their university laws to include affirmative action clauses, and many have specific plans to promote the presence of women. Yet many law departments tend to ignore their new legal duty not only to institute a women's affairs commissioner, but also to improve the situation of women within their own ranks. The norms that have been institutionalized have generally been less effective than hoped. Also, simply counting biological presence has not been,

---

26 This was made explicit in the primarily anti-Semitic *Gesetz gegen die berfüllung der deutschen Schulen und Hochschulen* (Law Against the Overcrowding of German Schools and Colleges) of 1933. It permitted no more than 10% women students. In practice, things worked a little differently, at least in medicine; *see* Huerkamp, *supra* note 25, at 103, 107.

27 Dietrich, *Der Beruf der Frau zur Rechtsprechung*, DEUTSCHE JURISTEN ZEITUNG 1255 (1923). *See* the compilation of measures *in* Anne-Gudrun Meier-Scherling, *Die Benachteiligung der Juristin zwischen 1933 und 1945*, DEUTSCHE RICHTER ZEITUNG 10 (1975); *see also* Stefan Bajohr & Kathrin Rüdiger-Bajohr, *Die Diskriminierung der Juristin in Germany bis 1945*, KRITISCHE JUSTIZ 39 (1980). Women were not to appear as legal actors at all. A personal account is given by ERNA PROSKAUER, WEGE UND UMWEGE. ERINNERUNGEN EINER RECHTSANWÄLTIN (1989).

28 Bradwell v. State, 83 U.S. 130 (1872); a historical account is given by Nikolaus Benke, *Women in the Courts: An Old Thorn in Men's Sides*, 3 MICH. J. OF GENDER & L. 195 (1995).

29 *See, e.g.*, UTE GERHARD, VERHÄLTNISSE UND VERHINDERUNGEN (1978) and her GLEICHHEIT OHNE ANGLEICHUNG. FRAUEN IM RECHT (1990). *See also* HANNELORE SCHRÖDER, DIE RECHTLOSIGKEIT DER FRAU IM RECHTSSTAAT (1979).

30 Wobbe, *supra* note 24, at 15. *Generally* RECHTSWISSENSCHAFT IN DER BONNER REPUBLIK. STUDIEN ZUR WISSENSCHAFTSGESCHICHTE DER JURISPRUDENZ (Dieter Simon ed., 1994).

31 NEUBEGRÜNDUNG DER PSYCHOLOGIE VON MANN UND WEIB, BD. I: DIE WEIBLICHE EIGENART IM MÄNNERSTAAT UND DIE MÄNNLICHE EIGENART IM FRAUENSTAAT (1921) (*reprinted in* 1975 in Berlin). *See also* Wobbe, *supra* note 24, at 38.

and will not necessarily be, successful or sufficient; biological females do not in themselves represent feminist thinking. Certainly, this is an insight not reserved for Germans; if we do not target a qualification structure with all its discriminatory factors, affirmative action at the end of the line, conditioned on equal qualifications, will be of little use. In German law schools these days, it is not easy—though also not impossible—to find women equally qualified for professorships. As pointed out in equality theory, symmetrical equality produces subordination when applied to unequally situated human beings.[32] A qualitative change in the content of jurisprudence that would signify equality—involving, for example, an adequate understanding of the meaning of "women" and "men" in law and elsewhere—cannot be achieved simply through biology-based affirmative action.

At the institutional level, too, the structure of such institutions of legal discourse in Germany and the organizational character of universities are not at all favorable to feminists. In the Anglo-American systems, with decentralized, often private schools eager for profile and reputation, controlled by demand and oriented towards success, niches in the academy are created that do not exist in the German system.[33] Even in other European countries, legal scholarship has been more curious and open; in Scandinavian countries such as Norway and Denmark, a field called "women's law" was established as early as the 1970s.[34] In Germany, schools are state-controlled,[35] and the personalized hierarchy of the "*Lehrstuhl*" system ensures that they do not offer "places for qualification and professionalization" for people who have suffered discrimination.[36] In the normatively homogenous German culture, efforts to create such spaces are thought of as separatist, not as a means towards equality. Also, output-orientation and the rather "sales"-like character of teaching at Anglo-American schools create greater receptivity towards social demands springing from social change, of which the change in gender relations is a part.

---

32 Most thoroughly analyzed by CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); *see also* Catherine MacKinnon, *Reflections on Sex Equality under Law*, 100 YALE L.J. 1281 (1991).

33 One exception might be the new Viadrina University at Frankfurt-Oder, on the Polish-German border, with its interdisciplinary approach.

34 *See* DAHL *supra* note 5; for U.S. developments until 1980, *see* Cynthia Fuchs Epstein, Women in Law 219 (1983).

35 In the case of law schools, final exams are administered by the state; therefore, curriculums are primarily—and quite rigidly—established by law.

36 *See* Wobbe, *supra* note 24, at 46 (discussing the anti-egalitarian mentality at German universities and the resulting extreme resistance to change).

In considering women and German law schools, it should also be noted that some characteristics must be understood in light of the immense freedom enjoyed by professors at German universities. A job that connects tremendous power with status tends to keep critics out; a legal system in which law professors play important roles—for example, by writing highly influential legal commentaries, representing cases before the Constitutional Court, and submitting expert opinions in legal decision-making on everything from legislation to contracts—will not allow just anyone to join the club. The comparatively lesser power of status of U.S. law professors thus produces a comparatively greater openness towards minorities.

However, the situation in Germany is changing, though change is ambivalent. Cultural theorist and filmmaker Christina von Braun, now a professor at Humboldt University in Berlin, argues that women are being allowed in at a moment when universities in continental Europe are losing their status.[37] From another angle, Angelika Wetterer, a prominent sociologist working on the professional dynamics of exclusion, argues that opposition to women in the academy is based in part on the fact that their presence indicates a loss of reputation.[38]

3. Crisis of the Social and Cultural Sciences

More generally, feminists making inroads into legal science are finding it, and academic institutions, in a state of crisis.[39] Resources are disappearing, and there is little money from third parties for research without the promise of immediate usefulness. Theorists muse about the "crisis of the humanities"[40] that may turn them into the first victims of austerity policies. The crisis is related to a linguistic turn that also poses a problem for feminist theory. "Women's studies" started out with the goal of constantly and critically questioning its own and others' methodology, formation of categories and choice of subject matter, as well as its relationship

---

37 CHRISTINA VON BRAUN, *Der Mythos der "Unversehrtheit" in der Moderne: Zur Geschichte des Begriffs "Die Intellektuellen,"* *in* THEORIE - GESCHLECHT - FIKTION 25 (Nathalie Amstutz & Martina Kuoni eds., 1994).

38 *See* ANGELIKA WETTERER, PROFESSION UND GESCHLECHT. BER DIE MARGINALITÄT VON FRAUEN IN HOCHQUALIFIZIERTEN BERUFEN (1992).

39 *See* Hans-Uwe Erichsen & Arno Scherzberg, *Verfassungsrechtliche Determinanten staatlicher Hochschulpolitik*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 8 (1990).

40 Though it reaches problematic conclusions, *see* JUERGEN B. DOUGES ET AL. (KRONBERGER KREIS), ZUR REFORM DER HOCHSCHULEN (1993), which begins with the statement, "The German University once had top status—in the last century."

to other approaches and to scholarship as such.[41] A consequence of this is, for example, the evolution from "women's studies" to "gender studies"; another example is the ongoing debate on the political responsibilities and relevance of feminist studies to the politics of the women's movement, challenging science's foundational practice-theory dichotomy.[42]

Feminist approaches in all disciplines thus face a dilemma, as some theorists call for an end to the central categories of these approaches: women and men. The nature and relevance of gender has become the hottest topic in German feminist theory. Its implications can be seen in the German discussion of Judith Butler's work. Some German criticism leveled against her "Gender Trouble"[43] claimed Butler had lost sight of the classically critical set of feminist questions that target power-laden contexts of discrimination. Butler focused solely on the depoliticized question of changing representations of gender, said these critics, and fell into old traps by ignoring the body as a physical-material being and experience. She thus rendered a political subject called "the women's movement" impossible, discouraged political activity and downplayed hierarchical conditions.[44]

This critique pitted a starting point of feminist scholarship—the focus on experience, power, and politics—against a trend in theory to render inequality an aesthetic question. One calls for a close connection between theory and practice; the other is at least skeptical of, if not opposed to, any recourse to empirical facts. The critique at times ignored the critical stance in Butler's work directed at the heterosexual matrix as an order of coercion, which Adrienne Rich had targeted in the 1980s and which Butler more explicitly depicts as a political issue in "Bodies That Matter: On the Discursive Limits of Sex."[45] However, this critique also highlighted a German tendency not only to politicize theory, but to specifically challenge the academic ivory tower even in its feminist form.

---

41 *See* the 1984 special issue on women's studies versus feminist studies, *Frauenforschung oder feministische Forschung?* 7 BEITRÄGE ZUR FEMINISTISCHEN THEORIE UND PRAXIS No. 11 and the 1986 special issue of SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY *reprinted in* FEMINIST THEORY IN PRACTICE AND PROCESS (Micheline R. Malson et al. eds., 1989).

42 *See*, as long ago as 1841, Lorenz Stein, *Zur Charakteristik der heutigen Rechtswissenschaft (In Fortsetzungen zu Savigny's System des heutigen römischen Rechts)*, 92-100 DEUTSCHE JAHRBÜCHER FÜR WISSENSCHAFT UND KUNST, drawn to my attention by Christian Bumke.

43 1990, published in German as DAS UNBEHAGEN DES GESCHLECHTS (1991).

44 *See* the essays *in* 4 NEUE RUNDSCHAU (1991).

45 In German, KÖRPER VON GEWICHT. BER DIE DISKURSIVEN GRENZEN DES KÖRPERGESCHLECHTS. *See* Adrienne Rich, *Compulsory Hetrosexuality and Lesbian Existence, in* BLOOD, BREAD, AND POETRY: SELECTED PROSE 23 (1986).

Politicization of theory is not understood by feminists as the end of rationality and scholarship as such. It is a dismissal of false claims to neutrality and objectivity. To borrow the words of Georg Christoph Lichtenberg, a 17th-century German physicist and man of letters who wrote against religious dogmas and is known for his aphorisms, "All impartiality is artificial. Humankind is always partial, and rightly so. Even impartiality is partial."[46] Theory, then, must not lose itself in subjective and interest-driven relativistic stances, but search for a newly defined neutrality.[47] One approach already taken towards this goal in epistemology is known as consciousness-raising;[48] in German feminist theory, a similar mixture of materialist basis and subjective, experience-based hermeneutics is favored.[49] This mix of subjectivity and empirical fact, bound by a normative evaluation of a critical kind, proves to be particularly interesting in law.

4. The Specificity of the Subject

The lack of receptivity to feminism in German legal science or—in the 1986 words of Ute Gerhard—the *Voreingenommenheit der Jurisprudenz als dogmatische Wissenschaft*, or "bias of the doctrinal science of jurisprudence,"[50] is inextricably linked to the subject and methods of legal science. The dominant understanding of law—more precisely, the understanding of the relationship between law and life[51]—is incompatible with a feminist perspective; and German legal science, to a much greater degree than its U.S. counterpart, lives from a proximity to law that takes it so close to power that a feminist approach risks losing sight of the object of its challenge.

The understanding of law that forms the basis for legal science separates both law and politics and law and morality. It works with the self-proclaimed expectation that it will function and act neutrally, which is seen as the consequence of a specific objectivity

---

46 GEORG CHRISTOPH LICHTENBERG, SUDELBÜCHER F 578 (1968).

47 On the concomitant dangers, *see* Keller, *supra* note 4, at 286; Susanne Baer, *Objektiv - neutral - gerecht? Feministische Rechtswissenschaft am Beispiel sexueller Diskriminierung im Erwerbsleben*, 77 KRITISCHE VIERTELJAHRESSCHRIFT FÜR RECHTSWISSENSCHAFT UND GESETZGEBUNG 154 (1994) and in 1995, *supra* note 14, at 159.

48 *See* MACKINNON, *supra* note 32, at ch. 1.

49 For approaches in German social sciences, *see* DAS GECHLECHTERVERHÄLTNIS ALS GEGENSTAND DER SOZIALWISSENSCHAFTEN (Regina Becker-Schmidt & Gudrun-Axeli Knapp eds., 1995).

50 *See* WIE MÄNNLICH IST DIE WISSENSCHAFT?, *supra* note 1, at 108.

51 *Compare* the title of CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987).

gained from a specific legal rationality.[52] After a brief period of reference to natural law following World War II,[53] German law returned to a less positivistic stance than Austrian law,[54] yet German law still favors a clear separation of law and politics.[55] In legal culture, this positivism arises in part from a focus on legislative rather than judicial law-making; culturally, it is also exemplified daily in a lack of political pragmatism that, to a degree, characterizes the German attitude toward law. There is, compared to the U.S., a greater—or different—acceptance of rules and principles, and of legal authority, in Germany. Courts are much more closely associated with the executive aspect of the state than in the U.S. It is, however, interesting to note that recent decisions by the Constitutional Court, such as those prohibiting states from hanging crucifixes in public school classrooms, or dealing with political practices in the former East Germany, or allowing people to quote the poet Kurt Tucholsky's statement that "soldiers are murderers," have fueled controversial, politicizing debates throughout the country.

Certain additional factors make feminist inroads into German law and law schools quite difficult. Law is generally taught from a judicial perspective. Teaching tends to present law as offering one "right" solution to a case, one legitimate interpretation, one point of view. This tendency has become particularly noteworthy at a time when almost half the country is emerging from decades of experience of life under an authoritarian regime. Further, German law schools do not aim at the education of lawyers, but of "uniform jurists" modeled after the judge—and a judge implements rather than questioning norms. In a system, like that of the U.S., that educates primarily lawyers—that is, people who will use law in the service of certain interests—pluralistic perspectives are necessarily involved to a greater degree.

From feminist and other critical perspectives, legal science is neither neutral nor objective, but part of a legal system, making law. Science—and in Germany, a science of law with much power can be understood as a practice behind the actual practice of law-making—is interest driven, perspective bound, and enforces realities. Feminist legal theorists go even further than other critical approaches, since they stress not only the inextricable relationship

---

52 ROBERT ALEXY, THEORIE DER JURISTISCHEN ARGUMENTATION (2d ed. 1991).

53 *See* LINSMAYER, DAS NATURRECHT IN DER DEUTSCHEN RECHTSPRECHUNG DER NACHKRIEGSZEIT (1963).

54 *Compare* for the Vienna school the work of Hans Kelsen, who based his theories on law as a coercive order; also Austin Hobbes (orders), nowadays Hart (acceptance).

55 *See also* Jürgen Habermas, The Tanner Lectures on Human Values, Vol. VIII, 217-80 (1988).

between law, social realities, and politics, but also their one-sidedness, shaped by a male point of view.[56] Therefore, feminist jurisprudence moves within a particular discourse, a discourse of institutionalized power that aspires through specific means, such as procedure, to a specific rationality.[57] In their movement into and out of this discourse, feminists deal with the dialectics of law as a means of power on the one hand, and of law as a means towards emancipation on the other.[58]

German feminist discourse, particularly when compared to its counterpart in the U.S., tends to emphasize structures of law rather than cases, institutions rather than actors; thus it politicizes law in a different manner. For example, a more positivistic and less pragmatic background, and the continental emphasis on legislative lawmaking, may be reasons for some general German skepticism towards law as such—the worse the problem, the more you must destroy all its parts—and lesser hope that law can serve the interests of women who have never been legally present as subjects. According to theoretical interventions from linguistics and psychoanalysis, the dialectics of law are duplicated when the ambivalent potential of law—oppression as well as liberation—is combined with an ambivalence in the use of words that describe oppressive realities in order to combat them. Some say that such a description of oppression in law establishes that situation as a victim reality and status; the claim, however, tends to ignore that without such descriptions as the basis of rights, silence remains the status quo.

German feminist critique challenges not only the self-image of legal science, but also the hegemonic claims of its effects, which are, again, bound to a self-legitimating, male-dominated perspective.[59] Feminist legal theory views law with sensitivity to its consequences for society, as part of social reality, as a social practice, and as a self-legitimating discourse of dominance.[60] From this perspective, law looks like a cultural code of and by institutionalized authority; the practical impulse of German feminist jurisprudence, however, challenges that.

---

56 *See* BAER, *supra* note 14 (for perspectives in law); more recently, Nicola Lacey, *Feminist Legal Theory Beyond Neutrality*, *in* M.D.A. Freeman & R. Halson, CURRENT LEGAL PROBLEMS: COLLECTED PAPERS 48 (Part 2 1995); and generally on maleness in law, MacKinnon, *supra* note 32.

57 *See* ALEXY, *supra* note 52, for the argument that legal discourse is a special practical discourse, in particular *Nachwort: Antwort auf einige Kritiker*, and at 261.

58 Andrea Maihofer, *Zum Dilemma Grüner Rechtspolitik*, KRITISCHE JUSTIZ 432 (1988).

59 Catharine A. MacKinnon, *Feminism in Legal Education*, 1 LEGAL EDUC. REV. 85 (1989).

60 *See generally*, MacKinnon, *supra* note 32.

This code, then, either is untrue to its own rules—to be objective, neutral, and thus just—or has yet, in gender structured societies, to learn to base its legitimacy on a new form of universalism and objectivity.

Yet the critical distance that shapes a feminist approach to law should not be confused with abstinence; German feminists in law are quite conscious of their inescapable participation in a discourse of power. This is experienced particularly by practicing feminist lawyers, who also write in the journal *Streit*, as the dilemma of belonging to a theoretical and practical movement that questions power, thereby undermining its own field.

As part of a specific institutionalized discourse of power, legal science thus differs from other academic fields working with historically-based social realities. The participation in power that goes along with a position in the world of "scholarship"[61] can make a feminist approach to legal science look like a contradiction in terms.[62] Those not present in law remain unseen, and thus suffer structural discrimination; those not protected by law, but harmed by it, would have no place. Women are among them. Feminist approaches to law must attempt to escape this dilemma productively. The frame of our picture of German feminist jurisprudence is, therefore, constantly in flux.

II. THE LABELS: "WOMEN'S LAW," "LAW OF GENDER RELATIONS," "FEMINIST LEGAL THEORY," OR "FEMINIST LEGAL SCIENCE"?

"In the discourse of women's studies, it is not easy to find out what should be seen as a feminist approach."[63]

The relationship between the presence—or absence—of female jurists at universities and feminist approaches to jurisprudence is quite complex. In systems in which feminist approaches are part of the canon, women are part of law faculties. From a German perspective, this is particularly obvious in the United States where—without ignoring the lasting effects and ongoing practices of exclusion and marginalization—feminist work seems to be relatively integrated into mainstream legal science. German

---

61 For reflections on this, *see* MARILYN FRYE, WILLFUL VIRGIN, ESSAYS IN FEMINISM 1976-92 (1992), Part 1, and more generally PIERRE BOURDIEU, HOMO ACADEMICUS (1984).

62 *See* the essay by Nikolaus Benke, *Juristinnenausbildung - ein Mißverständnis? in* FRAUEN UND RECHT. EINE DOKUMENTATION DER ENQUETE DER BUNDESMINISTERIN FÜR FRAUENANGELEGENHEITEN UND DES BUNDESMINISTERS FÜR JUSTIZ VOM 18. UND 19. Oct. 1993 published by Chancellor's Office (Bundeskanzleramt), *Grundsatzabteilung für Frauenangelegenheiten* (Department for principles of women's issues) 267 (1994).

63 Carol Hagemann-White and Reiner Schröder on a decade of women's studies in Germany in editorial to IFG 1-2, at 5 (1993).

feminists wonder, however, whether mainstreaming means less radical analysis, and, in the academic context, less impact.

However, a certain level of institutionalization is necessary anywhere in order to systematically approach questions of gender and law. At least in the U.S. and Canada, affirmative action plans based on race and gender have led to the quantitative and qualitative presence of critical approaches to law in research and teaching. This, incidentally, also indicates that equality policies using legal means, though they necessarily refer to women and men as biological beings, target gender in a social and political construct tied to biology. A comparative review of academic developments in both countries can thus serve as a basis for discussion of some postmodern critique in and of feminist jurisprudence. If we are not—in the extreme version—supposed to refer to "women" or "men," whom are we empowering in law?

In the German feminist discussion, newer conceptions of gender focus on the intersection of body and representation, or to put it another way, of sign and signification. Gender thus becomes a dynamic, ever changing mix of biology and shared experience (as in MacKinnon's work) and living conditions.[64] German feminist philosopher Andrea Maihofer calls this an *Existenzweise*, a "way of existence," thus moving beyond an early Butlerian concept of almost pure representation[65] by bringing the body back into the equation.[66] Equality is thus unthinkable without a reference to physical existence, but is also not limited to it. In the academy, equality means a change in personnel, but this is always also a change in content.

Although such changes are only starting to take place, there is already an abundance of German feminist work in, about and with law. The picture whose frame we have already met is multicolored, and its canvas contains some broad and some fine brush strokes. Its most striking feature is its incompleteness. In Germany, all the painters are biologically women, and at first they were all practicing lawyers; now they are more and more frequently students and women at the university.

---

64 With emphasis, Gesa Lindemann, *Die Konstruktion der Wirklichkeit und die Wirklichkeit der Konstruktion, in* WOBBE & LINDEMANN, *supra* note 24, at 115; Catharine A. MacKinnon, *Gleichheit der Geschlechter: ber Differenz und Dominanz, in* Erna Appelt & Gerda Neyer, FEMINISTISCHE POLITIKWISSENSCHAFT 37 (1994); and *Women as Women in Law, in* CATHARINE MACKINNON, FEMINISM UNMODIFIED (1987).

65 Butler, *supra* note 43.

66 Andrea Maihofer, *Geschlecht als Existenzweise. Einige kritische Anmerkungen zu aktuellen Versuchen zu einem neuen Verständnis von "Geschlecht," in* GESCHLECHTERVERHÄLTNISSE UND POLITIK 168 (Institut für Sozialforschung ed., 1994). Butler's move is comparable, *see supra* note 45.

All feminists in law broaden the scope of their subject, moving from legal science to the power-focused analysis of legal discourse. They share some starting points, some methodology, and some goals, yet there are many differences. The following is a necessarily subjective attempt to sketch the political positions, reach and implications of the major current German approaches.

In the United States, feminist and feminist legal theories tend to be labeled liberal, radical, postmodern and cultural. Frances Olsen has grouped feminist work into those emphasizing difference, those emphasizing the equal worth of difference, and those that fight any difference as hierarchy;[67] at times one author may fit into more than one category.[68] The German debate cannot be simply categorized in this way. It emphasizes topics and legal aspects different from those of the North American discussion; the "state" has a different meaning, "law" plays a different role in society, "difference" has a specific history, and "equality" raises different doubts.

1. "Women and Law"

Attempts to realize equality in legal perspectives and contents have been undertaken for a long time and in many versions. In the German context, the term often used is found in Art. 3 of the Basic Law, the German constitution, requiring *Gleichberechtigung* of women and men—equal rights to something. The beginning of serious efforts towards equality involved a search for the presence, or mostly absence, of women as a group discriminated against in law. In Europe as in the U.S., work on "Women and Law" marks the starting point of a movement seeking to reveal gender-blindness in legal discourse. As one sociologist put it, "[r]ules that constitute a gender-based relationship and divide persons into men and women for the rest of their lives" are shown by feminists to be contingent, and described as "fairly consistent power balances in themselves."[69] The aim of feminist unbalancing is to end the silence about women's daily lives.

In Germany, the silence about women's lives ended with analyses that focused on *weibliche Lebenszusammenhänge*, the contexts of female lives,[70] the empirical and normative aspects of a typical wo-

---

67 Frances E. Olsen, *Das Geschlecht des Rechts*, KRITISCHE JUSTIZ 303, at 305, 310 (1990).

68 The difficulty of categorization is exemplified by MacKinnon, who figures in various categories but is not distinguished on the basis of her dominance-focused approach. *See id.*

69 Ursula Pasero, *Geschlechterforschung revisited: konstruktivistische und systemtheoretische Perspektiven*, *in* WOBBE & LINDEMANN, *supra* note 24, at 266.

70 In the words of Ulrike Prokop, author of the first study on the "contexts of female lives."

man's biography. This work was based not so much on the critique of the public-private dichotomy found in the Anglo-American context,[71] but on sociological analyses of women's realities. One of those analyzed the gender differences in the uses of formal law. Researching institutional attitudes towards women, adding the feminist critique of the law's male point of view, and employing a socio-cultural perspective on legal matters, it became clear that the dominant assumption of "women's inferior legal conscience" was discriminatory and wrong, and should be replaced by an analysis of women's and men's chances and rational expectations of gains or justice from law, which might lead to improved and equal access to the legal system.[72]

However, the problem of the public-private dichotomy that this implies is somewhat different from the U.S. constellation. For example, in Germany the right to privacy in constitutional law is not related to the home, but to a qualitatively defined aspect of self-determination best described as inner feelings or, more philosophically, as one's own determination of a good life. Therefore, legally, Germany does not provide a right of privacy as strong as in the U.S. The similarities reappear when we listen to the political rather than legal debates about, for example, explicitly penalizing a man for raping his wife. Facing attempts to reformulate criminal law to include such acts of violence, politicians—now more so than twenty years ago—conclude that the state cannot destroy a marriage even if violence occurs.[73] Thus the concept of a private sphere is invoked, even though its norms would not be applicable in this case. At present, reform efforts are limited to penalizing marital rape, while allowing for special decriminalizing measures if they are in the interest of the marriage.[74] Though the theoretical critique of the private-public split is known and discussed in Germany, inspired by the frequent presence of Frances Olsen on the continent, it is less prevalent in the legal sphere and less effective as a critique in urging reform.

Other examples of early analyses of women and law can be found in criminal law and criminology, a result of the women's

---

71 For the U.S., *see* Frances Olsen, *The Family and The Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); *see also* Jean L. Cohen, *Das Öffentliche, das Private und die Repräsentation von Differenz*, 104 NEUE RUNDSCHAU 92 (1993).

72 On this, among others, *see* Vera Slupik, *Weibliche Moral versus männliche Gerechtigkeitsmathematik? Zum geschlechtsspezifischen Rechtsbewußtsein, in* RECHTSPRODUKTION UND RECHTSBEWUßTSEIN 221 (Brun-Otto Bryde & Wolfgang Hoffmann-Riem eds., 1988); GERHARD, *supra* note 29.

73 *See* 2 TERRE DES FEMMES RUNDBRIEF 1995, documenting a TV discussion in 1995 with Wolfgang von Stetten and Norbert Geis, both conservative politicians in the Bundestag.

74 BT-DRUCKS 13/199, 12 Jan. 1995, § 177 (4).

movement's focus on sexual violence.[75] Some later analyses dealt with family law,[76] a consequence of women's marginalization into and in the domestic sphere. Then, feminist lawyers began to litigate and theorize about labor law,[77] a result of the growing presence of women in the work force and an increasing awareness of their insecure position, low status and pay, and the glass ceiling.

In general, then, the movement targeting such questions is closely bound to the practical orientation of feminist work in law; this is partly a legacy of the initial and early work done by practicing lawyers, which continues to leave its imprint on publications and debates, and partly the effect of German legal science's proximity to applied law. As mentioned previously, there is something of a practice-theory tension in the feminist legal community. However, the priority ascribed to practical results, in the sense of immediate usefulness for litigation or legislative politics, seems to be fading with the change of generations. In the U.S., this change seems to have brought about a theoretical bent in feminist jurisprudence which, from a German perspective, often seems to have moved quite far from its critical, even radical origins, both methodologically and content-wise.[78] In Germany, at least, it remains to be seen whether a more theoretical focus must inevitably lose sight of the realities of sexual discrimination.

---

75 *See* Alisa Schapira, *Die Rechtsprechung zur Vergewaltigung. ber die weit gezogenen Grenzen der unerlaubten Gewalt gegen Frauen*, 10 KRITISCHE JUSTIZ 221 (1977); Ingrid Becker et al., *Vergewaltigung als soziales Problem*, POLIZEI HEUTE, 7 (1982); Alexandra Goy & Ingrid Lohstöter, *Anmerkung zum Urteil des BGH v.* 1.7.1981, Strafverteidiger 20 (1982); Angelika Burghardt, *Glaubwürdigkeitsbegutachtung als Frauendiskriminierung*, STREIT 3 (1985); Sexuelle Gewalt. Erfahrungen. Analysen. Forderungen (Kommitee für Grundrechte und Demokratie, AK Sexuelle Gewalt ed., 1985); ABEL, *supra* note 13.

76 DOBBERTHIEN, *supra* note 15; Sibylla Flügge, *Kein gemeinsames Sorgerecht ohne Ehe, Anmerkungen zur Entscheidung des BVerfG vom 24.3.1981*, STREIT 24 (1983); DORIS LUCKE & SABINE BERGHAHN, "ANGEMESSENHEIT" IM SCHEIDUNGSRECHT. FRAUEN ZWISCHEN BERUFSCHANCE, ERWERBSPFLICHT UND UNTERHALTSPRIVILEG (1983); Beatrice Caesar-Wolf & Dorothee Eidmann, *Gleichberechtigungsmodelle im neuen Scheidungsfolgenrecht und ihre Umsetzung in die familiengerichtliche Praxis*, ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 163 (1985); Bahr-Jendges, *supra* note 15; Barbelies Wiegmann, *Die Wertschätzung weiblicher Arbeit, wenn die Liebe vergeht, in* FRAUEN IM RECHT, *supra* note 1, at 43; Sabine Heinke, *Erben und Vererben, in* DORIS LUCKE & SABINE BERGHAHN, RECHTSRATGEBER FÜR FRAUEN 568 (1991).

77 Marliese Dobberthien, *Kritik des Frauenarbeitsschutzes*, ZEITSCHRIFT FÜR RECHTSPOLITIK 105 (1976); Sibylle Raasch, *Chancengleichheit für Frauen auf dem Arbeitsmarkt*, Demokratie und Recht 319 (1985); ERNST BENDA, NOTWENDIGKEIT UND MÖGLICHKEITEN POSITIVER AKTIONEN ZUGUNSTEN VON FRAUEN IM ÖFFENTLICHEN DIENST (1986); Anna Lenze, *Die Bewertung des Unverwertbaren. Die Honorierung weiblicher Hausarbeit durch die Rechtsprechung*, STREIT 86 (1986); Barbara Degen, *Sind Frauen auch Arbeitnehmer - oder: Wie geschlechtsneutral ist das Arbeitsrecht?*, STREIT 51 (1988); HEIDE PFARR & KLAUS BERTELSMANN, DISKRIMINIERUNG IM ERWERBSLEBEN (1989).

78 This was a major aspect of the reaction to Judith Butler's work, *see* 4 NEUE RUNDSCHAU (1991).

2. *"Women in Law"*[79]

In the second phase of feminist inroads into legal discourse, the question of the position of women in law became predominant. The shift from "and law" to "in law" may seem minor, but it meant a sharpening of focus and methodology. Looking for "women and law" and the effects of law on women leaves the basic concepts of law untouched. Looking for "women in law"—an approach later described as a search for the construction and constitution of gender[80]—opens the field for a fundamental critique of legal categories, concepts, and consequences. The fragmentation of human beings accomplished by law that neatly separates paid work, family, leisure, financial transactions, and the like could thus be analyzed as a perfect way to obscure the cumulative and discriminatory effects of law.[81]

On a conceptual level, such work includes the search for the systematic or structural exclusion of women's lives from law. For example, if family law privileges traditional marriages in which women are economically dependent and at home, labor law can be tremendously equal, and yet equality will not be achieved. Conceptual exclusion simply reappears in the form of enforceable attribution of gender-structured spheres of action, to the advantage of men. To give another example, building on the analysis that labor law does not treat female employees according to their abilities, this analysis reveals the concept of "the employee" as such—a full time worker, combined with "work" as a non-domestic activity—to be discriminatory on the basis of sex.[82] In civil law, the concept of the "reasonable man," in German the *billig und gerecht denkende Rechtsgenosse,* is male;[83] in constitutional law, the free individual with a capacity for choice is also a man.[84] On the level of imple-

---

79 Ute Gerhard, *Anderes Recht für Frauen? Feminismus als Gegenkultur,* in RECHTSPRODUKTION UND RECHTSBEWUßTSEIN 209-26 (Volkmar Gessner & Winfried Hassemer eds., 1988).

80 *See* the essays in the special issue of *Geschlechterverhältnisse und Kriminologie,* KRIMINOLOGISCHE J. (Martina Althoff & Sibylle Kappelt eds. fifth supplementary issue, 1995).

81 For example, gender-neutral labor and family law only result in women's relegation to the "private sphere." On gender-specific distribution of time by law, *see* KIRSTEN SCHEIWE, FRAUENZEITEN - MÄNNERZEITEN (1993).

82 *Compare, e.g.,* Degen, *supra* note 77.

83 For the discussion of the "reasonable woman" and the "reasonable victim" in U.S. law from a German perspective, *see* BAER, *supra* note 14, at 159.

84 Olsen, *supra* note 71; Cohen, *supra* note 71. Recent decisions by the German Federal Constitutional Court indicate growing sensitivity towards "private" hierarchies that may impede a weaker party's freedom to contract. *See* 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, AMTLICHE SAMMLUNG (official compilation of Constitutional Court decisions) [hereinafter BVERFGE] 214, 231 (on private bonds); 81 BVERFGE 242, 253 (on commercial representatives); for a view radically opposed to such trends *see* constitutional scholar Josef Isensee, V HANDBUCH DES STAATSRECHTS § 111 marginal no. 135 (1992).

mentation, feminist lawyers discovered, as the current president of the Constitutional Court once put it, "sexist patterns of thought,"[85] a concept also used to analyze judgments in rape trials to criticize prejudice in the judiciary.[86]

3. "Female Law" or "Women's Law"

"Under the found weight of devaluing attributions" existing in law, "it may, at first glance, seem evident that things must be turned upside down."[87] In feminist jurisprudence, this reversal is called "women's law" and a "sex-differentiated legal order," in the form of "female" or "feminine" law, a "feminization of law" or a "female way of making law." Facing the weight of the negative, the vehemence of discrimination, the universalized male (including the universalized absence or worthlessness of the female), such approaches encounter significant positive response. Aside from differences in detail, all base their approach on an affirmative acknowledgment of a gender difference, claiming our problems would be solved if we valued each side equally but left it intact. Phrased more simply, women and men are different, but neither is better or worse.

On the theoretical level, the search for femininity in law used Carol Gilligan's work in developmental psychology as a starting point.[88] It is one of the best examples of how unreflected transfer of theories from one field to another can harm both sides. Not only are the later modifications undertaken by Gilligan herself[89] much less known in Germany than the empirical critique by German scholars;[90] Gilligan's conclusions, drawn for and in a specific context, have been transferred into a discourse that works on a completely different level. Gilligan's emphasis on an "ethics of care" overlooked by science for centuries does not imply that, for example, mediation is the answer in (violent) family conflicts, or that women do not use law because they prefer a life without

---

85 WIE MÄNNLICH IST DIE WISSENSCHAFT?, *supra* note 1, at 94 (referring to Alisa Schapira, *Die Rechtsprechung zur Vergewaltigung. ber die weit gezogenen Grenzen der unerlaubten Gewalt gegen Frauen*, KRITISCHE JUSTIZ 221 (1977)).

86 ABEL & RAAB, *supra* note 13.

87 Pasero, *supra* note 69, at 271.

88 Starting point was her study in developmental psychology, *In a Different Voice* (1982), which had an impressive seductive impact not only on feminist legal theorists. *See e.g.*, the debate with Gilligan in Ellen C. Dubois et al., *Feminist Discourse, Moral Values, and the Law - A Conversation*, 43 BUFF. L. REV. 11 (1985).

89 *E.g.*, Carol Gilligan, *Joining the Resistance: Psychology, Politics, Girls and Women*, 29 MICH. Q. REV.; THE FEMALE BODY I 501 (Laurence Goldstein ed., 1990).

90 *See* essays *in* WEIBLICHE MORAL. DIE KONTROVERSE UM EINE GESCHLECHTSSPEZIFISCHE ETHIK (Gertrud Nunner-Winkler ed., 1991).

rules,[91] or that women need special rights, even though we know the history of oppression based on such well-meaning measures.[92]

However, the term "difference" dominated the German discussion for some time. Feminists may even have foreseen the later mainstream debate, having mused from the beginning on a topic that became popular in the 1980s and 90s, though it was called something different at the time. In law, this debate became particularly important because of its direct relevance to the interpretation of the central right for women: equality. After centuries of promises and little reality, the alternative call upon difference brought hope even to legal circles. Also, an emphasis on difference implied the affirmation of a feminine element that had up to then been described as discriminated against, oppressed, and victimized. The appeal to difference satisfied a need to abandon the victim discourse that forced women to deal with a lack of quality in their own lives. It is not easy to accept oneself as a defined unequal; it is also part of the women's movement experience to value women in ways they have not been valued before.

Doctrinally, the difference-based approach interprets the equality guarantee in law as a right to be different;[93] a minor difference with no major consequences, as it were.[94] In 1949, Elisabeth Selbert argued for this in her successful fight for inclusion of an equal rights guarantee for women in the German Basic Law.[95] Equality in law is not understood as a strict prohibition on differentiation in the sense of a prohibition on basing any legal measures on sex. Instead, it allows for some distinctions that are said not to lead to hierarchies. With regard to German constitutional law, however, this might be a step backward. In 1992, the Federal Constitutional Court reinterpreted the sex equality guarantee of Art. 3 (2) of the Basic Law as requiring the achievement of equality in

---

91 Malin Bode, *Auf der Suche nach dem weiblichen Naturrecht, in* FEMINISTISCHE JURISPRUDENZ 47 (Ursula Floßmann ed., 1995).

92 *Compare* LUCE IRIGARAY, DIE ZEIT DER DIFFERENZ. FÜR EINE FRIEDLICHE REVOLUTION (1991); LIBRERIA DELLE DONNE DIE MILANO, WIE WEIBLICHE FREIHEIT ENTSTEHT (1988). For a critical view *see* BAER, *supra* note 14, at 205.

93 ANDREA MAIHOFER, *Gleichheit nur für Gleiche? in* DIFFERENZ UND GLEICHHEIT. MENSCHENRECHTE HABEN (K)EIN GESCHLECHT 351 (Ute Gerhard et al. eds., 1990).

94 A German feminist classic was entitled *The Minor Difference with Major Consequences.* ALICE SCHWARZER, DER KLEINE UNTERSCHIED MIT DEN GROßEN FOLGEN (1971).

95 *See* the political biography by BARBARA BÖTTGER, DAS RECHT AUF GLEICHHEIT UND DIFFERENZ. ELISABETH SELBERT UND DER KAMPF DER FRAUEN UM ART. 3.2 GRUNDGESETZ (1990).

society,[96] thus taking a step that avoided turning difference into disadvantage.[97]

In the equality concept of difference, gender is thought to be a relevant and valuable fact in society. This implies that differences in gender as such, or men and women, are retained, but also that the hierarchical dimension of gender is not inextricably linked to this difference. We can only ask for a right to be different with regard to gender if we retain genders as categories or sets of attributes that remain definable, and thus fixed.

One approach which resonated in German feminist jurisprudence was offered by a Norwegian feminist, Tove Stang Dahl.[98] She attempted to create law from a "systematic women's perspective," to build "women's law."[99] "Women's law" deals with typical conflicts women face und constructs a new field of study; it also confronts "already established legal disciplines with the women's perspective."[100] This calls for an end to the usual categorizations in the legal system, for a "reorganization of the legal canon."[101] We should think not in terms of criminal, civil and family law, but about the law of money (Dahl discusses women's right to it), the law of the domestic sphere, and the law of birth.[102] These would be dominated by a "female norm"—an ambivalent demand if we consider the German history of special and protective legislation that functioned as paternalist discrimination, such as prohibitions on night work for women.[103] The ambivalence rests in the women's law focus on difference: it leaves the right to equality as a right to equal treatment untouched,[104] and runs into the problems which have been identified elsewhere with such Aristotelian logic.[105]

The problems with the difference-based approach become apparent when we look at legal practice. In Germany, a group of fem-

---

96 85 BVERFGE 191, 207 (nightwork); BVERFG in STREIT 125 (1994), annotated by Heike Dieball (discrimination in hiring). The Federal Constitutional Court has left open the possibility of considering biological differences, 85 BVERFGE 191, 207.

97 For excellent and extensive doctrinal analysis, *see* Ute Sacksofsky, Das Grundrecht auf Gleichberechtigung (1990).

98 DAHL, *supra* note 5.

99 *Id.* at 15.

100 *Id.* at 11.

101 *Id.* at 23.

102 *Id.* at chs. 6, 7, 8.

103 With a different emphasis, *see* Ute Gerhard's review *in* STREIT 123, 124 (1993). On the night work prohibition, *see* Dagmar Schiek, *Lifting the Ban on Women's Night Work in Europe—A Straight Road to Equality in Employment?*, 3 Cardozo Women's L.J. 309 (1996).

104 DAHL *supra* note 5, at 35.

105 BAER, *supra* note 15; MACKINNON, *supra* note 32; and MACKINNON, *supra* note 51 (some of MacKinnon's work has been published in Germany, for example, *in* KRITISCHE VIERTELJAHRESSCHRIFT and STREIT).

inists associated with the "Feminist Legal Institute" in Bonn seek alternative "female" or "feminine" forms of law. These include, for example, mediation and negotiation models in place of conflict-resolution decision models. Contrasting with such attempts, more recent sociological data on legal practice makes it impossible to relate positive developments in the law to the gender of those acting in the legal system. There is no "female" practice of law that is better than its male counterpart, at least not within the existing German legal system. Women do not, apparently, judge in a more friendly, understanding or "humane" way, nor do female defendants profit from a "women's bonus."[106] Nevertheless, it is still worth examining the informal procedures women use to solve conflicts, which might suggest alternatives to existing procedures that could be more hospitable to the realities of women's lives.[107]

On all levels, the problems of difference have become the central focus of feminist theory in Germany. This has not yet led to a great deal of theoretical reflection in jurisprudence, but has already shaped some newer legislative concepts. In the past, feminists, like other lawmakers, thought it necessary to rely on reference to biological sex to improve women's situation under law. The best example is affirmative action. Early legislation in Germany created norms that forced public employers to hire women instead of men, where both were equally qualified, until equality was reached. Not only has this kind of quota been stricken down repeatedly by German courts, as well as by the European Court in the recent *Kalanke* decision;[108] it has also subjected women to the stigma of the so called "quota woman." In the political sphere, the victim was seen to be not so much the poor male harmed by affirmative action, but the unfortunate female who got her job "only" because she was a woman. In court, men won their cases; in public, however, women as a group were portrayed as the ones unjustifiably gaining from quotas.

The heart of the problem was not so much the shaping of a public image of gender, but the reliance on biological sex in law. To avoid the pitfall of duplicating women's subordinate status in laws meant to improve that status, German feminists rethought their legal concepts and began relying on gender neutral descrip-

106 REGINE DREWNIAK, STRAFRICHTERINNEN ALS HOFFNUNGSTRÄGERINNEN? (1993); Dagmar Oberlies, *Der Versuch, das Ungleiche zu vergleichen. Tötungsdelikte zwischen Männern und Frauen und die rechtliche Reaktion,* KRITISCHE JUSTIZ 318 (1990).

107 *See* FEMINISTISCHE JURISPRUDENZ, *supra* note 91 (for essays by Degen and Bode *in* Floßmann).

108 ECJ Judgment of 17 Oct. 1995, Case C-450/93, Kalanke. The case, annotated by Ninon Colneric, can be found *in* STREIT 159 (1995).

tions of typical women's experiences. More recent affirmative action legislation contains not the "hire women if" rule, but more complex norms that demand recognition of child-raising experience, care of families and elder persons, and unpaid social work as qualifications for most jobs, or as factors upon which a decision not to hire may not be based.[109] This forces employers to compare male and female applicants seriously and fairly; this will, at least in many cases, lead them to hire women. Thus the dilemma of difference can be circumvented if hierarchies are clearly identified.

As a whole, all difference-based models face the risk of an affirmative recourse to gender difference that might be gender dominance. Two ways out have been discussed: Law could be asked to recognize all differences as equal,[110] or it could be asked to raise "the feminine" to the level of "the masculine." The first leads to law's inability to eliminate difference, while the second works with a male standard.[111] More profoundly, the newer understandings of gender turn any attempt to affirmatively emphasize gender difference into a contradiction in terms: No gender difference can be preserved if all gender difference is gender hierarchy. This is, incidentally, a problem for feminism or any other political movement focussing on groups.[112] In a dominance or power-focused approach, an affirmative recourse to biological, psychological or any other socially labeled difference is impossible. Even postmodern and cultural theory currents in difference approaches run into problems if, like Luce Irigaray, they refer to a new and feminine symbolic order.[113] The problem is that we have no point of reference and no acquisition of meaning outside a reality that is still fundamentally gender hierarchical. All reliance on difference runs the unintended risk of "ontologizing content," which can "duplicate old patterns of ascription."[114] "Femininity" cannot be saved from its context, but its context can be changed.

---

109 *See* the annotated edition of German affirmative action laws by DAGMAR SCHIEK ET AL., GLEICHSTELLUNGSGESETZE (1996).

110 This path seems to be taken by MARTHA MINOW, MAKING ALL THE DIFFERENCE. INCLUSION, EXCLUSION AND AMERICAN LAW (1990) and some postmodern legal theorists.

111 German approaches in the tradition of Critical Theory include Gudrun-Axeli Knapp, *Macht und Geschlecht. Neuere Entwicklungen in der feministischen Macht- und Herrschaftsdiskussion, in* TRADITIONENBRÜCHE. ENTWICKLUNGEN FEMINISTISCHER THEORIE 287 (Gudrun-Axeli Knapp & Angelika Wetterer eds., 1992).

112 Difference as identity and thus as a factor in constitution and mobilization is crucial to sociopolitical movements, particularly in multicultural yet homogeneous societies like the U.S.

113 IRIGARAY 1991, *supra* note 92.

114 Pasero, *supra* note 69, at 271.

4. *"Law of Gender Relations"*

The first German university chair for feminist jurisprudence, noteworthy for its lower status than most chairs at German law schools, was a chair at the university of Bremen in "the law of gender relations." It need not teach women's law, nor is it necessarily feminist, although the students who fought for it wanted it to be so. What is it, then? The label takes up a current in feminist studies all over the world—away from women's studies and toward gender studies. The aim of such studies is to apply the category of gender to all kinds of discourses and (con)texts.[115] In law, this implicates all law that forms and deals with the relationship between genders, ranging from the intimate to the violent. It is to be hoped that the "law of gender relations" will be able to encompass those feminist approaches (such as "queer theory" from the U.S.) that target the discriminatory effects of the norm of heterosexuality. In German law, those effects can be located in the law of marriage, which prohibits civil marriage between men or between women and was upheld by a recent German Constitutional Court decision, although the Court suggested that the legislature might have to act in the area.[116]

In seeking the "law of gender relations," German feminists hope for a "holistic approach" that allows for "undogmatic legal solutions."[117] In this sense, the dominant approaches that currently see "women" and "men" as elements of a binary order[118] and locate discrimination as a part of that ordering could be integrated into legal thinking. Institutionally, however, "gender" is a neutral term. It remains to be seen how feminist gender studies will be in the future.

---

115 For approaches in German sociology, *see* DAS GECHLECHTERVERHÄLTNIS ALS GEGENSTAND DER SOZIALWISSENSCHAFTEN, *supra* note 49. For political science, *see* KULAWIK & SAUER, *supra* note 3.

116 *See* the Constitutional Court decision and European Parliament vote in favor of equality for gays, published in STREIT 176 (1995); *see also* Sabine Hark *in* 11 FEMINISTISCHE STUDIEN (1993).

117 Doris Lucke, *Vorüberlegungen für ein Recht der Geschlechterbeziehungen. Zur Begründung eines "anderen" Rechts*, STREIT 91, 94 (1991).

118 On binary gender constructions, *see* Carol Hagemann-White, *Thesen zur kulturellen Konstruktion von Zweigeschlechtlichkeit*, MYTHOS FRAU 137 (Schaeffer-Hegel & Wartmann eds., 1984); *see also* GESA LINDEMANN, DAS PARADOXE GESCHLECHT. TRANSSEXUALITÄT IM SPANNUNGSFELD VON KÖRPER, LEIB UND GEFÜHL (1994); and Andrea Rödig, *Geschlecht als Kategorie. berlegungen zum philosophisch-feministischen Diskurs*, FEMINISTISCHE STUDIEN 105 (1992).

5. "Feminist Legal Theory"

The more political and controversial label "feminist" has been picked up by younger women (once again). Much of it has been inspired by Anglo-American theory, sometimes without proper attention to the differences in legal, social, and political culture. Their use of the label "theory" also indicates a break with German academic tradition, since until very recently, while German law schools taught legal philosophy and theory, they reduced theory to the question of whether law was valid. Imitating the U.S. labeling, feminist legal theory can now include any thinking or writing about law; it is mostly interdisciplinary, often philosophical, and because of professional exclusion, very often written in other academic fields.

The label feminist legal theory, however, also implicates a meta level. It runs the risk of removing itself from politics, which would cut off its roots in feminist critiques of the modern understanding of scholarship. German feminist theory concentrates on the relationship between feminist theory and practice, a trend that might be explained by the student movement of the sixties that demanded such a combination and by Critical Theory. In feminist work, the choice between theory and practice was ended in order to be able to reflect both of them with and against each other.[119] Feminist legal theory would thus work with the inextricability of law and life, asking about the role of law in and for gender. This includes existing work in political theory,[120] or analyses of ideas and theories of justice,[121] that begin to recognize the significance of women's lives.

6. Feminist Legal Science

In the German chronology of feminist approaches in law, the latest attempt to institutionalize such thought at universities has been labeled "feminist legal science." It may sound a bit arrogant—who has a science of one's own?—but is meant to give a frame to all the pictures painted previously, and to developments to come. As a label, it also indicates that feminist jurisprudence

---

119 To some, theory was meant to serve a practical end.

120 *E.g.*, Nancy Fraser, Unruly Practice: Power, Discourse and Gender in Contemporary Social Theory (1989); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990).

121 *E.g.*, Susan Moller Okin, Justice, Gender and the Family (1989); Seyla Benhabib, *Der verallgemeinerte und der konkrete Andere. Ansätze zu einer feministischen Moraltheorie, in* DENKVERHÄLTNISSE - FEMINISMUS UND KRITIK 454 (Elisabeth List & Herline Studer eds., 1990).

seeks a different kind of legal science: involved, self-critical, sensitive to injustice, not *per se* legitimating law.[122] In a similar vein, a reader on feminist political science published in 1994 focused on the attempt to "reconceptualize" the field by asking feminist questions.[123]

There was also an unconscious wish to counter the popular prejudice against feminism as "non-scholarly" that feminists at universities encountered as assessments of their theses and dissertations when they took up their challenge. Ironically enough, such judgments can be countered with the words of the Federal Constitutional Court itself. In adjudicating access to universities for all (and in Germany, still free of charge), the Court has defined scholarship as anything that "appears in content and form to be a serious and systematic search for the truth."[124] Seriousness can easily be proven when we look at feminist researchers working in fields that still do not promise institutional recognition.

Feminist theorizing on method also gives evidence of systematic method. The "search for truth" is quite refined in current thinking; it is not a single painting of the world we seek, but a multidimensional picture. If we define truth properly, which in a way is no way, feminism is one of the many ways of searching for it. Even more specifically, feminist critique dismantles the one-sidedness of preexisting "truth" by analyzing its maleness and its exclusion or mythologization of women. The search for truth then becomes a search for a more adequate, in a way a more just, way of thinking. And in Germany, holding "debasing, defamatory or disrespectful opinions" even about the constitution itself is incidentally considered to fall under the heading of "academic freedom."[125] Feminism is generally much more polite than that.

"Feminist legal science" thus asks gender sensitive questions that target the male perspective in law and legal institutions. It can do so in the sense of an immanent critique, asking for more consistent arguments relating to law's reaction to women and sex discrimination.[126] In German criminal law, a reform of all norms

---

122 Baer, *supra* note 47, at 160.

123 Appelt & Neyer, *supra* note 64, at 7. For a similar critical analysis, *see* Marlis Krüger, *berlegungen und Thesen zu einer feministischen (Sozial-)Wissenschaft, in* KLASSE - GESCHLECHT 58 (Ursula Beer ed., 1987).

124 35 BVERFGE 79, 113; on the difference between cognitive and social definitions, *see* Alexander Blankenagel, *Wissenschaftsfreiheit aus der Sicht der Wissenschaftssoziologie,* 105 JÖR 35, 38, 48 (1980).

125 *Compare* Bernhard Schlink, *Zwischen Identifikation und Distanz,* DER STAAT 335, 353 (1976); *see also* § 3 (2) of the Federal Universities Law (*Hochschulrahmengesetz)* [hereinafter HRG], *see infra* note 137.

126 *See* Olsen 1990, *supra* note 67.

protecting "sexual self determination" would have to bring the definition of sexual violence into line with other definitions of coercive or harmful violence; unsystematic interpretations for the special case of women would have to be discarded,[127] and discriminatory preconceptions would not be permitted in legal interpretation.[128] In addition, gender sensitive questions could introduce more radical perspectives not only to cases, but more generally—and in a continental legalist culture, more probably—to concepts embodied in laws. For example, the criteria of relevance that turn social into legal facts should be reevaluated based on whether they reflect male views, and historical interpretation should be applied with care, given that women have been excluded from or continue to be underrepresented in law-making.

Feminist approaches to legal science thus broaden the subject of legal science in the direction of a more cultural view of law. Law is not an autonomous sphere, in the sense of radical systems theory, or a simple mirror of society, but a power-structured aspect of a "culture of dominance."[129] While this is occasionally a theme in U.S. publications, particularly of poststructuralist origin, it is hardly present in German legal circles. At the same time, feminist legal science is a label that stands for a methodological and epistemological starting point, and for a tradition. It is grounded in the theory and practice of emancipatory movements, and it may be interesting to note that feminist jurisprudence is the first jurisprudence of such a movement that has entered law.[130] Feminist legal science also works with what is for some a depressingly outdated goal: justice in equality, that is, the end of all personal and all content-shaping discrimination of perspectives. It is political scholarship, in a sense, but is not ideological; it asks questions rather than starting with answers; it looks at dominance but does not marginalize the different. Such open politicization makes things more difficult strategically and in institutions. It is part of an openness that feminists demand from everyone else as well.

In sum, all feminist approaches to law share three elements.[131] First, they analyze gender in law, the legal constitution of "women" and "men." Second, they fashion the lives of women according to a critical perception of the world, in opposition to dominant ascrip-

---

127 A similar critique can be found *in* Monika Frommel, *Rechtsprechung statt Rechtsverweigerung*, NEUE KRIMINALPOLITIK 22 (1993).

128 *See* ABEL, *supra* note 13; BAER, *supra* note 14, at 123.

129 Title of a 1995 book by Birgit Rommelspacher.

130 *Explicitly* GERHARD, *supra* note 29.

131 For a more extensive account, *see* FEMINISTISCHE JURISPRUDENZ, *supra* note 91.

tions. Third, epistemologically as well as methodologically, they call for a pluralism of perspectives rather than monolithic objectivity,[132] but would nonetheless delegitimize views of the world that harm others, particularly if based on sex. Feminist legal science labels a feminist challenge in and to law that will, at times, demand a reconceptualizing of basic concepts of jurisprudence. It deals not only with "women's law," nor merely gender relations, but primarily with gender hierarchy and the attempt to give space to individuals beyond gender; and it is much more than theory, as it deals with all doctrines until they prove to be truly gender-neutral, in law and life.

III. The Field: Remarks on the Relationship between Issue and Institution

Urging qualitative change in its own field and what it produces, shifting between power and marginalization, feminist legal science needs a place in law schools. There are political reasons for this, as well as an academic expectation of quality that would replace prejudiced one-sidedness with pluralism. There are also legal arguments drawn from the normative framework in which German universities operate. In Germany, practical experience has been gained in Bremen, with its professorship for law and gender questions, and in Berlin, with the "feminist jurisprudence project" and guest professorships. In Berlin, students' interest in and acceptance of the presence of the seminars and lectures is growing. But there are also difficulties. As in any other culture and as with other feminist efforts, the excitement and estrangement, strengths and difficulties of a feminist approach become apparent. They appear primarily in the proximity of issues to the every day lives of participants, the demand for inter- or multidisciplinarity in feminist scholarship, and the overarching character of feminist legal analysis.[133]

The issues covered in seminars on feminist legal science usually come close to the realities of the people present. Everyone is interested in intimate relationships, which are discussed not only realistically, but also critically. Many have experienced sexual violence, or at least the intricacies of figuring out where to draw the line, which is discussed in particular with regard to the effects such

---

132 On perspectives in law, *see* Baer, *supra* note 14, at 159.

133 Besides the closeness of subjects and interdisciplinarity, there are more practical problems that can be more easily solved; for example, didactically useful texts are not yet available in sufficient quantity.

experiences have on our lives. All are confronted with images of men and women and their roles, which are analyzed and critiqued and thus removed from the sphere of comfortable compliance. Whether it is desired or not, in feminist discussions, people's lives are quickly implicated; from a teacher's perspective, there is no way to take on all the personal reactions that emerge, but only the chance to offer ways out through critique. In particular, men react very personally indeed. In almost all cases, their interest is followed by a discussion of the negative images of feminism. This rhetorical strategy forces women to "trash" other women's work to save their own (it is good to have some radicals around if you want to be a respected academic), and it asks women to relieve men's fear of being collectively challenged—generally termed "man hating" or "rejection"—because of their gender privilege. Older men usually want to discuss their marriages and/or divorces and the injustice perpetrated by the courts. After a while— and after enough consolation—many men seek more or less abstract information on the legitimate boundaries of flirtatious behavior and the future of the heterosexual lifestyle. They seek this, again, from a feminist academic, not from a good friend. Information about feminist jurisprudence can hardly be conveyed in such conversations; yet feminists are not expected to take offense or draw judgmental conclusions from these defense mechanisms and lack of serious interest.

Feminist legal science is necessarily inter- and multidisciplinary scholarship. It must respond to life's realities, and thus to data gleaned from primarily qualitative, rarely quantitative empirical studies. To be able to demonstrate the discriminatory limits of a traditional legal perspective, it must offer other perspectives—philosophical, linguistic, psychological—on the same issues. This, again, moves away from the rest of the field; prominent German legal scholars consider legal science to be primarily "individual and disciplinary," practiced alone and never crossing the boundaries of disciplines.[134] If legal science becomes more than that, it also becomes a problem of teaching time; for example, in civil law, it is much easier to teach contracts in the traditional manner than to teach it from a feminist perspective, which requires discussion of the freedom of contract as based in a white male ideology of autonomous decision-making, discussion of the bias of the "reasonable

---

134 Eberhard Schmidt-Aßmann, *Zur Situation der rechtswissenschaftlichen Forschung*, JURISTENZEITUNG 2, at 5 (1995). For another view, *see DFG-Perspektivenbericht, id.* at 5, 7-8 (for his skepticism); *see generally* RECHTSWISSENSCHAFT UND NACHBARWISSENSCHAFTEN (Dieter Grimm ed. vols. 1 & 2, 1976).

man," and consideration of law as a protective shield against detrimental asymmetries.[135]

In teaching law from a feminist perspective in Germany, we also face the problem that most law students are neither accustomed nor trained to deal with elaborate sociological or theoretical texts. Also, students know little about the law they are learning to critique from a feminist point of view. For example, the legal response to violence against women can only be understood if one understands criminal law and criminal procedure, civil law, including contracts, torts and civil procedure, family and social security law, and police administration and social administration law. A thorough analysis thus asks a great deal of students and teachers alike.

In addition, law school does not tend to confront students with plural interests and different but equally legitimate perspectives. Also, in Germany feminist work in other fields is often experienced as diffuse, essayistic, and lacking in substance. This is also a common reaction to U.S. literature, since academic discourse on the two sides of the Atlantic differs so extremely, as indicated throughout this text. Finally, there is a question as to whether anyone is seriously qualified to integrate all that feminism seems to ask for.

Many problems confronted by feminist jurisprudence stem from the traditional structure of the field. In the long run, one should consider whether law schools would better serve the interests of society if they structured legal thinking around social conflict rather than doctrinal systems. This question is not a question for feminists alone. Comparative legal work and international, regional or global legal thinking, which is increasingly necessary in these times, also has to focus on social reality and different legal responses to it, rather than on legal constructs based on a culturally specific—and interested—presentation of life.

Until now, most German law schools have chosen to ignore or downplay the importance of such a rethinking of the field. Neither the existence of islands of feminism in Bremen and Berlin, nor the simple call to teach and research law with greater gender sensitivity, have been successful in this sense. Even in Bremen, where a new curriculum in 1987 obliged every professor to consider "women-specific issues" in his or her field, this failed to change most of

135 In U.S. literature, *see* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L. J. 997 (1985); on a macro level, *see* CAROLE PATEMAN, THE SEXUAL CONTRACT (1988).

them.[136] Again, many do not know what such issues might be. This institutional ignorance leads to closed institutions. Therefore, in the German situation, the independent establishment of feminist jurisprudence at law schools is as desperately necessary as its integration into all areas of law.

In times of recession and general cutbacks, law schools willing to integrate feminist jurisprudence into their offerings have fewer resources, but they have the law on their side. In Germany, universities must by law serve scholarship through research, teaching and studies; this is required under § 2 (1) sent. 1 of the federal universities law.[137] By law, universities must adapt to new and relevant developments in all fields, or at least continuously challenge their own positions. Feminist approaches help in this. Under § 2 (1) sent. 2 of the law, academic education is also supposed to prepare for professional life. This life, particularly for lawyers and judges, is structured according to gender. People who work in law must learn to deal with men and women alike; they must know each other's problems. Also, universities cannot continue to tolerate the lack of identification of, and discrimination against, female students who are originally highly motivated. A feminist approach to law serves these ends as well.

Finally, and a little more explicitly, § 2 (2) of the law obliges universities "to work to eliminate disadvantages for women in the academy."[138] As part of the German welfare state, the law still requires schools to take steps making it possible for everyone at universities to take advantage of academic freedom,[139] which may require "personnel, financial, and organizational resources."[140] When feminist work is ignored or discredited, this constitutes a disadvantage and lack of academic freedom; fortunately, some schools have stopped doing this. Under the law, they would all have to.

IV. THINKING IN AND OUT

Radical thought among women has always existed outside of law schools and universities. From one point of view, the lack of

---

136 ANTIDISKRIMINIERUNGSRICHTLINIE, at 4 (Beschluß des Fachbereichsrates vom 5.7. 1995).

137 *Hochschulrahmengesetz*—the binding federal law governing universities. In addition, every state has a "university law" for its schools that regulates issues within the limits of the federal law. On affirmative action in German university laws, *see* Bettina Graue, *Frauenförderung in den Gleichstellungs- und Hochschulgesetzen der BRD*, STREIT 23 (1996).

138 *See* annotation by ANDREAS REICH, HRG-KOMMENTAR § 2 marg. note 3 (4th ed. 1994).

139 35 BVERFGE 79, 116.

140 *Id.* at 114-15.

feminism in law schools in Germany can be seen as an advantage, since feminist jurisprudence has thus simultaneously retained both critical and close links to politics and power, while, for example, critical legal thought in the United States has in part followed the trends of the politics of translation and publishing, fashion, and the emphasis in theory on rhetoric, and in some cases grammar trouble.

Many other women have attempted to think radically from within, and many have failed,[141] but others have succeeded. Thinking is possible in and out of school. Doing something about law and using law to end discrimination is certainly easier if it is freed from institutional norms. However, the law cannot be a "tool to dismantle the master's house" if it cannot be taken away from him. If law is to be used for women and men alike and towards equality in the future, feminists must be present in German law schools in order to educate future lawyers, judges, and government officials.

In Berlin, the law faculty has decided to create a chair in feminist jurisprudence.[142] Something similar is desperately needed in many other places, because the pictures I attempted to draw are growing in number, size, and complexity. Debates around such issues will further our understanding of what we and others do. In a way, we need more paintings hung on many walls; all of them will profit from more comparative, and therefore careful, perspectives.

---

141 *See* Wobbe, *supra* note 24.

142 At German universities, professors generally must have a *venia legendi*—a certification—to work in a specific sub-field of law. This *venia* is granted at the end of the *habilitation* process, the process for becoming a professor. As of now, accepted subjects include criminal law, civil law, public (administrative and constitutional) law, European and international law, and the like. State examinations focus on these subjects. Feminist jurisprudence has not yet gained this status.