

**DECREEING WOMEN'S EQUALITY: USING WOMEN'S
HISTORY TO CREATE LEGAL PARITY**

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Debating Women's Equality: Toward a Feminist Theory of Law from a European Perspective. By Ute Gerhard. Rutgers University Press, 2001. 264 pages. \$45.00.

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Equality under law is an ideal that has inspired women's legal reform efforts since at least the French Revolution.¹ Today, legal efforts on behalf of women in the United States are often framed in terms of equal rights.² Most recently, international human rights campaigns have reinvigorated worldwide efforts for "equal rights" for women.³ Yet,

feminists . . . are skeptical of the principle of equality because—apart from the obvious gap that exists between the ideal of equality and the tenacious reality of inequality—that principle appears to establish sameness as the condition for women's legal recognition and social justice and, consequently, to erase multiple articulations of social and sexual difference.⁴

Moreover, in Germany, rights skepticism joins equality skepticism in undermining hope that "equal rights" will turn out to be a successful political strategy for women. Many German "feminists have tended to view a rights-based strategy of social change as extremely limited and dangerously state centered."⁵

With these concerns in mind, and interested in vindicating an equal rights strategy, Ute Gerhard offers *Debating Women's Equality: Toward a Feminist Theory of Law from a European Perspective*.⁶ By arguing against a simplistic, acontextual conception of equality, she hopes to convince rights and equality skeptics, in particular, that an equal rights strategy still holds great promise in the struggle for women's self-determination.⁷ In turn, she posits (but is unable to conclude), "feminist criticism of the androcentrism of

1. UTE GERHARD, *DEBATING WOMEN'S EQUALITY: TOWARD A FEMINIST THEORY OF LAW FROM A EUROPEAN PERSPECTIVE* 159 (2001) (hereinafter "GERHARD").

2. For instance, a recent Brennan Center Jorde Symposium focused on the possibility of constitutionalizing equal rights for women in the United States. See, e.g., Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CAL. L. REV. 735 (2002).

3. See, e.g., GERHARD, *supra* note 1, at 149-50, 158, 178. For an example of the debate Gerhard identifies, see Berta Esperanza Hernandez-Truyol, *Out Of The Shadows: Traversing The Imaginary Of Sameness, Difference, And Relationalism - A Human Rights Proposal*, 17 WIS. WOMEN'S L.J. 111 (2002).

4. Linda M. G. Zerilli, *Foreword* to GERHARD, *supra* note 1, at ix.

5. *Id.*

6. Gerhard, *supra* note 1. Ute Gerhard holds the honor of being the first university professor of gender studies (a subdepartment in sociology at the Universität) that an entirely state-funded higher educational system in Germany has produced. *DEBATING WOMEN'S EQUALITY* is her first full-length work, published in Germany a full decade ago and translated into English for Rutgers University Press' *Women and Politics Series* in 2001.

7. *Id.* at 4, 162-66.

[international] human rights will have an impact on the discussion of their universality, encouraging a reinterpretation and/or redefinition of human rights.”⁸

Throughout *Debating Women's Equality*, Gerhard appears to have three ambitious objectives in mind: (1) to decry the paucity of research into women's legal history while beginning to do the needed work, focusing primarily on Germany but also broadly exploring European trends, (2) to demonstrate that German/European women's legal history ultimately vindicates reliance on “equal rights” as a political strategy for women, and (3) to develop an understanding of legal equality that can serve as a meaningful tool in the struggle for women's self-determination.⁹

Gerhard succeeds admirably at the first objective. Indeed, the vast majority of the book's pages are devoted to a detailed exploration of German (and because for a period they were intertwined, to a lesser extent, continental European) women's history of creating and resisting law.¹⁰ In our view, she falls short on the second objective: we found ourselves depressed rather than encouraged by her recitation of German women's struggle for civil rights. This may be due to the fact that while the legal standing of German/European women has improved, such improvement is not the main focus of Gerhard's mainly eighteenth and nineteenth century analysis; rather, she focuses on struggles and oppression. Most significantly, she not only fails to accomplish her third objective, she devotes precious little space in the book to either

8. *Id.* at 150. While synergy between women's rights efforts and international human rights efforts is a topic that Gerhard touches upon, particularly in her last chapter, the book is not primarily about international human rights, narrowly conceived, and could stand on its own without any of the human rights discussion.

9. We say “appears to have” because a significant frustration reading Gerhard's book is her failure to say clearly what she is doing or how the various parts of the book are connected. For instance, we would have to quote most of her introduction and the final chapter to support our above summary of her objectives. For this reason, we highly recommend reading the introduction and last chapter before tackling the detailed intermediate chapters. Doing so will clarify the importance of those chapters to her ultimate philosophical, legal and political analysis. Moreover, Gerhard heavily favors a passive-voiced, abstracted writing style which considerably lessens the liveliness of her prose; how much of this problem might be due to awkward translation is somewhat difficult to ascertain. These weaknesses do not rob the book of value but do make for challenging reading.

10. Six of the book's eight chapters (Chapters 2-7) are explicitly devoted to providing historical detail.

explaining her vision of meaningful legal equality or providing concrete guidelines as to how equality may be used to help, rather than harm, women's future progress.

As a work of history, however, her book will be valuable both to those in the know about women's legal history in the United States and are interested in comparing the German/European experience, and to those who have not yet studied any kind of women's legal history. But as a philosophical treatise or a blueprint for pragmatic action in the struggle for women's self-determination, the book can be overlooked in favor of other more extensive, future-looking and specific treatments.

I. OBJECTIVE 1: REVEALING WOMEN'S HISTORY

"The best prophet of the future is the past."¹¹

Gerhard's is an ambitious work, spanning several centuries and containing significant chunks of assiduous scholarship. She uncovers notable feminist writers and activists who have been largely omitted from mainstream legal history texts and excavates obscure German provincial edicts that severely proscribed women's freedoms.¹² For modern-day Germany, where as recently as 1996 women comprised fewer than 3% of all law professors—17 out of 771 nationwide—this volume is also surely a seminal addition to the small but burgeoning scholarship exploring the intersection of history, women's studies, and law.¹³

Gerhard's compass in this work is a conviction that current gender injustices cannot be properly understood without reference to their historical predecessors, *i.e.*, placed in context. More specifically, her compelling thesis is that mainstream legal historians and feminist strategists alike have failed to conduct a detailed review of either women's systemic legislated exclusion from the 'public' sphere of activity (commerce, association, choice of profession) or their individual and collective efforts to overturn such exclusion.¹⁴ For Gerhard, the inattention to women's legal

11. Memorandum from Lord Byron (Jan. 28, 1821) *available at* <http://engphil.astate.edu/gallery/byron9.html>.

12. *E.g.*, GERHARD, *supra* note 1, at 130-45.

13. Susanne Baer, *A Different Approach to Jurisprudence? Feminisms in German Legal Science, Legal Cultures and the Ambivalence of Law*, 3 *CARDOZO WOMEN'S L.J.* 251, 255 (1996).

14. GERHARD, *supra* note 1, at 12, 59-60. Though Gerhard bills her book as a

history is a crucial elision; she wants to convince the reader that it is primarily by and through law that women have been silenced. Moreover, she is convinced that an equal rights strategy will work for women *if* developed with sensitivity to context.

Gerhard's method of supplying that crucial context in this work is simultaneously narrow and broad. Narrowly, she devotes an entire passionate chapter¹⁵ to one activist from eighteenth century revolutionary France, Olympe de Gouges. De Gouges' 1791 political tract calling for extension of the political ideal of equality to women, *Declaration of the Rights of Woman and the Female Citizen*,¹⁶ "is missing from most collections and bibliographic sources" and was not fully translated into German until 1977 or English until 1979.¹⁷ "The way in which it has been withheld, or only preserved in fragments [,] . . . suffices in itself to illustrate the depth and diversity of resistance to equal rights for women."¹⁸ Gerhard also

"legal history" and as such it ought to be of global interest to those in legal academia, DEBATING WOMEN'S EQUALITY has received relatively little notice from law reviews here; only one American critique has appeared since its publication. Erin Han, *Legal and Non-Legal Responses to Concerns for Women's Rights in Countries Practicing Female Circumcision*, 22 B.C. THIRD WORLD L.J. 201, 201 (2002). This lack of American reaction might well be due to Gerhard's primary historical focus on the last few centuries of Germany's struggle to attain rights for all of its nation's adults. In any case, "legal history" is something of a misnomer to characterize the work. DEBATING WOMEN'S EQUALITY is rather a history of German women's individual and collective struggles to even *have* a legal history. As such it should be more accurately considered a *pre*legal history. Intriguingly, for Gerhard, feminists are partly to blame for inattention to women's history.

[I]nternational and interdisciplinary feminist criticism of the androcentrism of law has all too often neglected different historical and legal contexts. As a result, this criticism has made generalizing statements, despite all the talk of differences, and failed to take adequately into account the role of social movements, especially of feminist movements and their struggle for rights, as a driving force in the history of law.

GERHARD, *supra* note 1, at 2.

15. *Id.* at 38-58 (Chapter 3).

16. Olympe de Gouges, *Declaration of the Rights of Woman and the Female Citizen*, in 1 WOMEN, THE FAMILY AND FREEDOM: THE DEBATE IN DOCUMENTS 104-06 (Susan Groag Bell & Karen M. Offen eds., 1983).

17. GERHARD, *supra* note 1, at 41.

18. *Id.* The work of Olympe de Gouges is not completely unknown to U.S. scholars. For instance, see Joan Wallach Scott, *A Woman Who Has Only Paradoxes to Offer: Olympe de Gouges Claims Rights for Women*, in REBEL DAUGHTERS: WOMEN AND THE FRENCH REVOLUTION 102 (Sara E. Melzer & Leslie W. Rabine eds., 1992). An online search of law review articles located seven references to De Gouges in articles written in the English language but no in-depth treatment of her work or its meaning. For instance, see Mary Anne Case, *Reflections on Constitutionalizing Women's Equality*, 90 CAL. L. REV. 765, 775, n. 65 (2002); J.A. Lindgren Alves, *The*

dedicates significant sections in several chapters to the pivotal nineteenth century suffrage efforts in reaction to ‘married women’s’ laws from various German provincial territories.¹⁹

More broadly, Gerhard provides the reader with a sweeping historical overview of “worthy and emotional precursors to the idea of human equality that are significant for the cultural heritage of women.”²⁰ Sampling prominent views from ancient Greece to the particularly oppressive Enlightenment, Gerhard alerts readers to how deeply sexist, yet largely unchallenged, normative opinions generated by philosophers, clergymen, and “men of science” surprisingly continue to underwrite our current liberal political associations. Specifically, she traces the simultaneous development of equality as a political ideal and the belief that women are fundamentally different from men. This belief in “gender” being necessary to justify continued exclusion of women from a public sphere in which equality of the individual is purported to be a value. “Reference to women’s ‘nature’ has not served to justify their autonomy and liberty. . . . [I]t has led to their explicit exclusion and subordination.”²¹ Yet, she also sets out to “find systematic reference points for a theory of law that could also apply to women” and to determine whether “the traditional concept of equality can . . . be employed to communicate the demands on present-day society expressed by women.”²²

Reviewing centuries of women’s subordinate legal status, Gerhard recognizes that, beyond suffragists’ efforts to attain the right to vote and to legally possess title to property, there remains arguably but one critical “women’s legal issue”—equality within the family. For instance, Gerhard observes, referring to natural law proponents, “[b]ecause the ‘natural’ liberty and equality of women was presupposed in principle, . . . their unequal treatment and subordination under civil conditions demanded at least a legal explanation. This justification was supplied not by the social contract but by the institution of marriage.”²³ Grotius, Locke, Pudendorf, Wolff and other prominent early Enlightenment thinkers struggled to justify women’s subordinate position within

United Nations, Postmodernity, and Human Rights, 32 U.S.F.L. REV. 479, 523 (1998).

19. GERHARD, *supra* note 1 at 69-74, 105-09, 112-14, 122-48.

20. *Id.* at 12-37 (Chapter 2).

21. *Id.* at 22.

22. *Id.* at 13.

23. *Id.* at 22.

marriage viewed as a contract between equals.

The obligations of spouses . . . were thus conceived of as reciprocal and mutual, since marriage was fundamentally a 'community of equals.' The supremacy of the husband that was justified in the same breath . . . arose because the wife voluntarily subordinated herself, through the marriage contract, to the authority of the husband. . . . In following the various authors over time, not even a gradual development toward greater freedom can be discerned.²⁴

The justification of women's political exclusion by their special role within marriage survived the transition from natural law to positive law. German philosopher J.G. Fichte "justified the 'subjec[tion]' of the woman and the husband's 'right of compulsion over her' on the basis of reason."²⁵ According to Fichte, "the woman 'stands one step lower' than the man in the 'natural institution' of marriage. . . . '[Woman's] continuing necessary wish . . . to be so subjected' excludes her from all individual rights."²⁶ Gerhard goes on to examine the subordinate status accorded women by Rousseau and Kant, who shared with Fichte the view that woman's nature, as evidenced by her role—whether economic or sexual—within marriage justified her legal and political inequality. "The decisive shift to functional gender difference was completed . . . with Jean-Jacques Rousseau's concept of femininity and sexual difference."²⁷

Against this backdrop, in one of her liveliest chapters, Gerhard introduces the life and work of Olympe de Gouges. De Gouges wrote poetically and passionately on behalf of women and children's legal rights during the period immediately preceding the French revolution. Telling her story allows Gerhard both to provide a counterpoint to male equality theory and to zero in on a key means by which women's difference and subordination was constructed.

24. *Id.* at 22-23.

25. *Id.* at 30-31.

26. *Id.*

27. *Id.* at 25. Although Gerhard's main focus is on androcentric visions of equality, she does call attention to thinkers who advocated inclusion of women in the developing value of legal equality, including Thomasius and certain Romantic philosophers. *Id.* at 24, 35-37. Thomasius (1655-1728) "rejected the husband's absolute authority, since the purpose of marriage could only be achieved through friendship or 'rational love.' . . . Where there is coercion there is no love." *Id.* at 24, 186 (quoting THOMASIIUS, INSTITUTIONEN JURISPRUDENTIAE DIVINAE (1688)).

De Gouges wrote *Declaration of the Rights of Woman and the Female Citizen*²⁸ in response to the exclusion of women from *Declaration of the Rights of Man and of the Citizen* approved in 1789 by the “representatives of the French people” organized as the National Assembly of France.²⁹ “The Constitution is invalid,” de Gouges wrote, “if the majority of individuals who compose the Nation have not cooperated in writing it.”³⁰ For de Gouges, the foundation of sovereignty was not “the people,” for half the people were excluded from representation by the National Assembly; instead it was the “nation,” conceived as a “union of Woman and Man.”³¹ Throughout the articles of de Gouges’ *Declaration of the Rights of Woman and the Female Citizen*, she insists on the legal and political equality of women, in dramatic contrast to the prominent male thinkers who came before her.³²

De Gouges’ conception of equality forces her to contend with the fear that equality and liberty may be mutually exclusive values. Capturing the essence of what may well be liberalism’s deepest conceptual shortcoming, grounded as it is in the conflation of liberty with property, Gerhard writes,

[d]e Gouges makes us ask why, in all legal theory, ‘liberty’ is conceivable only as a right or a space that becomes smaller when shared with others, especially when everyone else is also free and equal. Why are others perceived only as limitations – not even as opposites but as

28. De Gouges, *supra* note 16.

29. *Declaration of the Rights of Man and of the Citizen*, at <http://www.hrcr.org/docs/frenchdec.html> (last visited Jan. 7, 2003).

30. GERHARD, *supra* note 1, at 44.

31. *Id.*

32. *Id.* at 223-26 (setting forth a full translation of De Gouges’ *Declaration*).
For instance:

Article 1. Woman is born free and remains equal in rights to man. . . .

Article 6. The law *should be* the expression of the general will; all *female* and *male* citizens must participate in its elaboration personally or through their representatives. It should be the same for all; all *female* and *male* citizens, being equal in the eyes of the law, *should be* equally admitted to all honors, positions and public employments

Article 7. *No woman is immune*; she can be accused, arrested, and detained in cases as determined by law. *Women, like men*, must obey these rigorous laws. . . .

Article 13. For the maintenance of public forces and administrative expenses, the contributions of *women and men shall be equal*; *the woman shares in all forced labor and all painful tasks, therefore she must have the same share in the distribution of positions, tasks, assignments, honors, and industry.*

Id. at 224-25.

adversaries – instead of their freedom being seen as expanded agency or potential enrichment?³³

Before being beheaded for her political activities,³⁴ de Gouges also grappled with the parallel and deeply entwined dichotomies that had been created, largely courtesy of the popular German philosophers Kant and Fichte, between *women and men* and *morality and law*. To wit: “Women are the representatives of love, just as men are the representatives of law. . . .”³⁵ The deeply embedded conceptual framework that subliminally pits love and morality against law is precisely what continues to hobble a just legal system, according to Gerhard.

This was the form and justification by which society in Olympe de Gouges' time broke off all communication about different interpretations of law and justice. By differentiating between morality and law, and abandoning natural law in favor of a law of reason or positive law, legal scholarship – and on this point legal theories are surprisingly agreed – failed entirely to resolve its problem of ‘material justice.’³⁶

Radical thinkers like de Gouges notwithstanding, the mainstream continued on its way, providing Gerhard with plenty of material to continue her exploration of women's exclusion from legal equality into the nineteenth and twentieth centuries. The nineteenth century novelist Honore de Balzac wrote, “[m]aternal love makes of every woman a slave.” *Debating Women's Equality* makes the case that it is by and through marriage and the laws supporting it that women were legislated into a status akin to legalized slavery. “The man owes his wife protection, the wife owes her husband obedience” was codified in federal German civil law until 1938.³⁷ Earlier edicts specified the appalling composition of such obedience. Married women could not own, transfer or in any way hold property or earnings; they could not work outside of the house; they had no legal authority over their own children; they could not appear in court.³⁸

Furthermore, until the turn of the twentieth century, Germany

33. *Id.* at 48.

34. See Joan Wallach Scott, *supra* note 18, at 106-16.

35. GERHARD, *supra* note 1, at 48 (quoting from entry under “Frauen” in the *Encyclopedia for the Educated Classes*, ca. 1820).

36. GERHARD, *supra* note 1, at 48.

37. GERHARD, *supra* note 1, at 129.

38. See GERHARD, *supra* note 1, Chapters 4, 6, and 7.

had “laws of association,” draconian decrees to prevent such virtual slaves from reaching their most promising exit, that of collective organized action. Women could not meet with or unite with other women for any political purpose, or risk prosecution.³⁹ In conclusion, Gerhard recalls the strong words of Anita Augspurg, who in 1905 called for a marriage boycott via an article published in the weekly magazine *Europa*: [f]or a woman with self-respect who knows the legal effects of civil marriage, it is impossible, I am convinced, to enter a legitimate marriage; her drive for self-preservation, her self-respect, and her claim to respect from her husband leaves only the option of [extramarital cohabitation].⁴⁰

Though Germany’s first laws appear unrelated to current reality, the attitudes underlying them are in fact far from dead. Recent American case law provides continuing evidence of the so-called *doctrine of marital service*. For instance, in 1993 a California appeals court held that a wife could not enforce an oral agreement by which her husband, who was recovering from a stroke, promised to bequeath certain property to her if she agreed to care for the him at home for the duration of his illness so that he would not have to move to a nursing home.⁴¹

We therefore adhere to the long-standing rule that a spouse is not entitled to compensation for support, apart from rights to community property and the like that arise from the marital relation itself. Personal performance of a personal duty created by the contract of marriage does not constitute a new consideration supporting the indebtedness, alleged in this case. . . . The dissent maintains that mores have changed to the point that spouses can be treated just like any other parties haggling at arm’s length. Whether or not the modern marriage has become like a business, and regardless of whatever else it may have become, it continues to be defined by statute as a personal relationship of mutual support. Thus, even if few things are left that cannot command a price, marital support remains one of them.⁴²

Needless to say, freedom to contract is one of the most basic legal freedoms available in an open society, but one that continues to be functionally unavailable to most women within the institution of marriage.

39. GERHARD, *supra* note 1, at 67.

40. *Id.* at 105-06.

41. *Borelli v. Brousseau*, 16 Cal. Rptr. 2d 16, 20 (Cal. Ct. App. 1993).

42. *Id.*

Gerhard's historical treatment has some flaws. At times, when Gerhard has an opportunity to valuably augment the subject matter she has chosen, she curiously declines. For example, in discussing the French *Code Civil*'s irrational mandates incorporated into German law regulating marital issues and children born out of wedlock, Gerhard writes, "[d]ivorce law, the flip side of bourgeois morality, will not be pursued further in this context, even though it often played a prominent role in the legal debates of the transitional periods."⁴³ This is a strange and somewhat glaring omission in an otherwise detail-oriented history. If bourgeois morality was so stifling to women, then what *was* happening on the oppositional legal frontlines at that time, especially if it was considered, in Gerhard's own characterization, "prominent?"

Gerhard also at times relaxes into the superficial rhetoric of current politically correct truisms without pushing her analysis far enough. For example, we are told that "[w]omen's sense of justice, which often deviates from men's, would lead to a different concept of law."⁴⁴ Many feminists hold critically hopeful stock in the value of this potentially powerful assertion, yet precisely just what does this mean, and is it really so? For instance, there are scads of women judges who share conservative positions with men on everything from reproductive freedom to the death penalty. If women are more protective of life, one might not expect this to be so. Furthermore, does Gerhard mean to implicate in her generalization women lawyers, women in general, mothers and/or others? The reader is given several, mostly untranslated German titles in an accompanying footnote to this assertion, but an explanation as to what Gerhard's own interpretation of this important proposition may mean would be helpful.

II. OBJECTIVE 2: UNDERSTANDING THE SIGNIFICANCE OF WOMEN'S HISTORY

"Anything but history, for history must be false."⁴⁵

Discovering historically notable events is one activity; determining their meaning is sometimes quite another. Gerhard introduces her work by asserting that "if equality is to be more than

43. GERHARD, *supra* note 1, at 140.

44. *Id.* at 60.

45. Sir Robert Walpole, *Walpoliana*, No. 141.

an empty word or a political slogan, logical deductions will get us no further, instead we must consider its historically determined message. . . .”⁴⁶ No doubt it is most prudent to comprehend, as Gerhard opens Chapter 1 by asserting, “the conditions under which the question [of equal rights] is posed . . . [by] taking their history into account.”⁴⁷

Unfortunately, Gerhard devotes little effort to analyzing her data, and leaves the reader to reach her own conclusions about the message to be taken from the considerable historical material set forth in chapters 2-7. Where she does supply some thought about the significance of German women’s legal history, her conclusions are surprising in light of the dark impression created by reading the history. Gerhard unearths voices in this volume emerging from centuries past so freshly contemporaneous in their demands, complaints, and epiphanies, that perusing *Debating Women’s Equality* actually becomes somewhat alarming. Yet, Gerhard concludes that German/European women have made perceptible and important progress in the struggle for legal equality and should continue to wield equality as a tool in the struggle for self-determination.

Gerhard’s leap from dark history to happy ending can be sampled in a relatively brief, but telling, discussion of Germany’s version of America’s doomed Equal Rights Amendment. After spending six chapters detailing centuries of German law’s failure to provide equality for women, Gerhard spends a scant three pages on Article 3, Section 2 of the German Basic Law.⁴⁸ Article 3, Section 2 was enacted in 1949 and amended in 1993 to specify equality between men and women, which she describes as an “equal rights clause” requiring enactment of “equal rights laws” by specified dates.⁴⁹

Leading up to the 1993 adoption specifying sex equality, Gerhard first describes years of legislative inaction on the general promise of equality—“[e]qual rights were not laid down in the private law until the 1976 reform of matrimonial and family law. . . .”⁵⁰ She then describes years of judicial misinterpretation—

46. GERHARD, *supra* note 1, at 11.

47. *Id.* at 7.

48. *Id.* at 162-63.

49. *Id.* at 162-63. The Basic Law is the Constitution of the German Democratic Republic. Article 3 provides for “equality before the law,” and Section 2 provides, “[m]en and women have equal rights.” Basic Law for the F.R.G., at <http://www.jura.uni-sb.de/law/GG/gg1.htm> (last visited Jan. 8, 2003).

50. GERHARD, *supra* note 1, at 163.

“[t]he negative impact was sustained by a landmark 1953 decision in which a legal loophole allowed the Aristotelian legal interpretation to be applied in court rulings.”⁵¹ In the end, however, Gerhard arrives suddenly and inexplicably at the happy ending that forms the basis for her fundamental conclusions about the prospects of equal rights strategy for women:

All in all, after many detours and much resistance regarding the interpretation of the equal rights article, a “prevailing opinion” has developed, with the help of important advocates, briefs, and court rulings. According to the compromise formulated by a joint constitutional commission, Art. 3, Sec. 2 refers to “the actual implementation of equal rights of women and men,” and the state has been assigned the task of working towards the “elimination of existing disadvantages” and *creating* equality. The legislature has obligated itself not only to combat discrimination based on certain characteristics, including gender, but also expressly to support women as a group, even if occasional instances of discrimination against the dominant group (men) could arise.⁵²

Gerhard supplies not a single word of explanation about how years of foot-dragging culminated in a sweeping acknowledgement of the equality of women. Nor does historical evidence of man's propensity to proclaim equality that permits women's subordination seem to teach her a lesson about the value of promises to “eliminat[e] . . . existing disadvantages” and “expressly support women as a group.”

A newly published British anthology provides a stark contrast to Gerhard's summary conclusions about the impact of Germany's equal rights clause. Kirsten Scheiwe's essay, *The Management of Care in Germany*, presents and deconstructs Germany's constitutional amendment to eliminate gender discrimination.⁵³ For example, while Germany, in strongly progressive contrast to America, offers a stay-at-home parent a federally funded two-year allowance following the birth of a child.⁵⁴ Scheiwe observes that critical tax law

51. The Aristotelian legal interpretation provides that equal rights apply only to people who are the same. *Id.*

52. *Id.* at 164 (footnotes omitted).

53. Kirsten Scheiwe, *The Management of Care in Germany*, in *GENDERED POLICIES IN EUROPE: RECONCILING EMPLOYMENT AND FAMILY LIFE*, (Linda Hantrai ed., 2000). Linda Hantrai is director of Loughborough University's European Research Centre.

54. Scheiwe, *supra* note 53, at 98.

provisions uniformly heavily favor the single-earner marriage.⁵⁵ Significant difficulty in obtaining a place in a preschool as well as other mundane yet essential social protections lead Scheiwe to conclude that while the language of equality might be in place, its enforcement is not. Scheiwe's detailed examination of lawmakers' actions stands a better chance of persuading the reader of the chance for equality under law than Gerhard's naïve trust in their words.

As in a homeopathic remedy where the poison is rendered as the cure, Gerhard believes that it is precisely legal activism—the lobbying for and creation of new law, the power of litigation—which has and will offer women in cultures conducted under the rule of law the strongest opportunities to obtain parity with men.⁵⁶ Yet she does so without acknowledging something that her historical treatment seems to reveal—the difficulty of evaluating the meaning of apparent legal progress (or lack thereof) for the lives of women.

A clue to Gerhard's optimism may be found in her hopeful survey of late twentieth century western feminist writing that appears in her final chapter.⁵⁷ Culled from the fields of jurisprudence, philosophy, psychology, sociology and political science, these rational thought-provoking theories are correctives to a millennium of patriarchal philosophy, custom and law. Although it is not at all clear how this part of the book relates to Gerhard's exploration of eighteenth and nineteenth century legal history, it does seem to explain Gerhard's optimistic faith in "equal rights" as a tonic for women's oppression:

Thus my empirical and theoretical point of reference for participation in the equality discourse . . . is the women's movements and the experiences of injustice expressed within these movements. They have stood for a sense of justice, legal subjectivity, and the political agency of the participants. . . . This form of autonomous politics—that is, insisting on self-determination, including political self-determination—and involvement in current policymaking on legal and equality issues are therefore not contradictory; they belong together.⁵⁸

55. *Id.*

56. GERHARD, *supra* note 1, at 4.

57. *Id.* at 150-66.

58. *Id.* at 165.

III. OBJECTIVE 3: USING WOMEN'S HISTORY TO BUILD A BETTER FUTURE

"You can never plan the future by the past."⁵⁹

A difficulty with this book announces itself early on, in its title—*Debating Women's Equality: Toward a Feminist Theory of Law*. Gerhard's subtitle, in particular, turns out to make a promise that goes largely unfulfilled.⁶⁰ The work is actually a precursor to the creation of a cohesive theory, therefore something other than what many feminist legal activists might crave: a paradigm of a gender-just legal system. In effect, Gerhard never fleshes out precisely what a feminist equality theory may be in a positive autonomous sense, but concentrates on what it is not—a mechanistic, formalistic principle requiring that likes be treated alike.⁶¹ More importantly, she fails to provide any concrete recommendation for action, let alone a conception of equality that a lawyer could take to court.

The "paradox [of] demand[ing] the right to equality while at the same time insisting that differences be taken into consideration" is one of Gerhard's central philosophic concerns in *Debating Women's Equality*.⁶² Formulating either the answer to, or question of, how to achieve equality in abstract moral terms, as in, *everybody ought to be equal*, then worrying a definition of that Grand Principle Equality, is *not* a useful vantage point, theoretically or practically. This is because *equal*, at least with respect to complex carbon-based life forms, turns out to grammatically (conceptually) behave like *freedom*: it cannot stand on its own. As *freedom* demands a preposition following it for it to essentially mean anything at all (*i.e.* freedom *from*, freedom *to*), so *equal* only works for humans as a

59. Edmund Burke, *Letter to a Member of the National Assembly*, Vol. IV, p. 55.

60. The main title—DEBATING WOMEN'S EQUALITY—is also a problem, but of a subtler nature. Seeing such, any twenty-first century humanist is likely to ask themselves a question to the effect of: *What's to debate? Haven't we already figured out that the earth is round?*; as this title suggests a present-tense reality. While focusing on present-day injustices is obviously not the principal aim in this work, Gerhard does remind us that, on evidence of our extant institutions, mores, and quotidian practices, all of which are so splendidly reflected in generated from our laws, apparently many of us have *not* in fact figured this out. However, most readers of this work will be interested in this book precisely because they know there is no valid debate still to be had on this topic. They may therefore find themselves under challenged by the bulk of almost exclusively historical themes posed herein. Indeed, DECREASING WOMEN'S INEQUALITY would have been a far more apt title.

61. GERHARD, *supra* note 1, at 9.

62. *Id.* at 159.

modifier: equal bedtimes . . . equal wages . . . equal *rights*. Of course, *rights* threatens to fly off into the troposphere of abstraction almost as quickly as it, too, is put on the page, so it too must be modified by aspect.

Gerhard's own text reveals that she does know better. "Equality [can only be sought] in specific respects."⁶³ In addition, she is clear that the "specific respect" cannot be men (or women for that matter, but that does not seem to be a present danger). "[E]njoying equal rights does not presuppose assimilation into men's status and lifestyle. Instead, it must be based on a superordinate standard, a degree of freedom possible for all people. . . ."⁶⁴ She does not get much further than that, however. She only circles around a beginning of an alternative conception of equality when she provides her most detailed elaboration of her views:

[i]t should be emphasized . . . that equality . . . is neither an absolute principle nor a firm standard; it is a dynamic, discursive concept. It must first be determined in what respect two persons or things are viewed as equal, with reference to a third party This third party can never simply be 'man' or the status of men; it must be a standard that is fair to both genders. The meaning of equality in past and present legal practice thus cannot be determined at the level of doctrinal formulas or 'argumentative logic'; it can only be determined by taking into account the conditions under which the question of equality is posed. . . . Thus modified, the two sides of feminist discourse on equality and difference unite to create a dynamic understanding of 'equality in difference' that varies depending on time and place.⁶⁵

Against Gerhard's vague and puzzling discussion of equality theory, spades of statistical evidence prove to demonstrate that the overwhelming majority of women are still earning the proverbial seventy cents to a man's dollar (actually significantly less, when their "second shift" of homemaking and childrearing is factored in).⁶⁶ Only if women forgo mothering are they able in statistically

63. *Id.* at 7.

64. *Id.* at 9-10.

65. *Id.* at 164-66.

66. See ANN CRITTENDEN, THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED 8 (2001).

significant numbers to break through this earnings ceiling.⁶⁷ Gerhard recognizes the problem. She writes,

[s]ince in a liberal market economy the only things that count are those that bring in money, law registers people only from the point of view of their labor – that is, labor that carries a price. Indispensable tasks such as housework, child rearing, and caring for others [currently] have no calculable value and lead to actual legal inequality, since the substance of the laws does not correspond to female production modes.⁶⁸

However, beyond identifying the most intractable problems facing women in a battle to share in the wealth of opportunities available to men, Gerhard does not spell out specific legislative reforms or present a platform of how to achieve political goals. For instance, Gerhard follows up the above statement by declaring, “[t]his social ill can only be eliminated by abolishing the gender-specific division of labor.”⁶⁹ *But just how do we do that? Ask men to help with the dishes and watch the kids?*

Is Gerhard wary of the factionalizing potential underwriting specific, pragmatic, and political prescriptions? Is there no unified theory to be had? Perhaps she remains, as are many other eminent feminists, unsure of which prescriptions will carry the day.⁷⁰ Failure to develop a coherent alternate vision of legal equality no doubt partly explains why Gerhard fails completely to offer any future-looking, specific proposals for legal reform. Thankfully however, *Debating Women's Equality*, written in 1990, has since been followed by a spate of books depicting practical as well as more radical solutions for the problems Gerhard describes, supplementing her theoretical analysis with concrete prescriptions. Three works are excitingly specific as to what would constitute corrective legislation and litigation in this country. They are all first steps in the direction Gerhard obviously wants to go but fails to articulate in

67. *Id.* at Chapter 5.

68. GERHARD, *supra* note 1, at 91-92.

69. *Id.* at 92.

70. Call it the *what-to-do-about-it* factor. As a reviewer wrote in summary when assessing philosopher and law professor Martha Nussbaum's recent work *WOMEN AND HUMAN DEVELOPMENT*, “[a]s a brief for the legitimacy and necessity of global feminism, *WAHD* is eloquent. The undertow of resistance to such briefs – and the question of what to do about it – remains between the lines.” Ellen Willis, *Parity Begins at Home*, N.Y. TIMES BOOK REV., Oct. 15, 2000, § 7 at 32 (reviewing MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2001)).

detail.

The first of these is Ann Crittenden's brilliant book, *The Price of Motherhood*.⁷¹ Crittenden, a Pulitzer Prize nominee with a background in economics, offers correctives not only to our currencies but to also to our concepts. For instance, anticipating the classic objection to wages for motherhood, Crittenden writes,

[i]t is true, of course, that caring for one's child is not a job that anyone does for the sake of remuneration . . . raising a child is much more like a gift, a gift motivated by maternal love, the most unselfish emotion in the human repertoire. How can one be paid for a labor of love? The very idea seems emotionally askew, foreign to the essence of care. But just because caring work is not self-seeking doesn't mean that it isn't also a difficult, time-consuming⁷² obligation that is expected of one sex and not the other.

Crittenden delineates specific legislative revisions that would reform marriage law, most notably separating marriages out into two distinct categories: those with children and those without. She proposes practical tax-based incentives and funding for community, employer and federal programs for childcare to deal with the onus that childrearing imposes so heavily upon women. Universal preschools for three-and-four year olds, federal child allowances for caregivers, federal caregivers' health care coverage, factoring in unpaid household labor into the nation's GNP, and setting up a single federal agency for post-divorce payments are but a few of Crittenden's eminently implementable, concrete proposals. In sum, *The Price of Motherhood* is quite likely the most accessible, logically argued, and legally significant book about "how to bring children up without putting women down" that has been written to date by any American writer. It is particularly powerful when read in tandem with the following volume.

Joan Williams, professor-of-law at American University Law School, co-director of that school's Gender, Work and Family Project and author of the recent *Unbending Gender: Why Family and Work Conflict and What to Do About It*, subscribes to litigating over legislating.⁷³ As Williams writes,

[s]uing your employer is not the ideal mechanism of

71. CRITTENDEN, *supra* note 66.

72. CRITTENDEN, *supra* note 66, at 7-8.

73. JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000).

social change. . . . Nevertheless, legal liability has a remarkable ability to focus the mind. Sexual harassment has been around a long time; employers got serious about it only once they faced legal liability. The threat of legal liability, rather than the damages awarded in individual lawsuits, is what leads to social change.⁷⁴

Williams builds her practical prescriptions upon important theoretical work about how discrimination can be conceived to exist despite women's apparent exercise of choice in curtailing market work in favor of family work. Her words are worth reproducing at length here:

[i]f every single [woman]. . . protested each and every constraint handed down to us, our society would be rapidly immobilized. Hence it is not surprising that women facing the constraints handed down by domesticity speak of having made a "choice." But the fact that women have internalized these constraints does not mean they are consistent with our commitment to gender equality. A central message of this book is that mothers' marginalization reflects not mere choice, it also reflects discrimination. Note that choice and discrimination are not mutually exclusive. Choice concerns the everyday process of making decisions within constraints. Discrimination involves a value judgment that the constraints society imposes are inconsistent with its commitment to equality. Current discussions often confuse the relationship between choice and discrimination by setting up a dichotomy between agency and constraint. . . . Clearing up this confusion requires a language that captures both the social constraints within which people operate and the scope of agency they exercise within those constraints.⁷⁵

By carefully developing a fresh understanding of sex discrimination, Williams, unlike Gerhard, is able to offer specific proposals aimed at eliminating what Williams labels "the masculine norm of work."⁷⁶ She enumerates the sorts of suits women might bring—disparate treatment suits, equal pay actions, disparate-impact suits, and the like—to force the market to provide quality childcare, flex-time schedules, family and medical leave.⁷⁷

74. *Id.* at 101.

75. *Id.* at 37-38.

76. *Id.* at Chapter 3.

77. *Id.* at 101-05.

Martha Fineman, professor-of-law at Cornell and author of *The Neutered Mother, the Sexual Family, and other Twentieth Century Tragedies*, envisions perhaps the most radical of solutions: abolish marriage as a legal category.⁷⁸ In its stead, promulgate new social policy by creating tax-funded programs designed to legally support a parent-child dyad rather than the traditional husband-wife marriage dyad, suggests Fineman. Dependence of parents on the state would replace today's paradigm of unpaid female dependence on paid male partners in the early years of raising children. This paradigm shift would also protect caregivers from dangerously overstretched resources they now face when engaged in the occupation of motherhood while working full-time.

Fineman would supplement support for parenting with a total freedom to contract for any additional marriage-type sexual or partnership arrangement, decided independently among consenting adults. In her words:

I argue for the abolition of marriage with its special family law rules. I urge leaving adults who are sexually affiliated free to use traditional means, such as contract or property, to forge desired legal relationships. They would be given the option of resorting to tort or criminal law if they were harmed or abused by each other. Children and other "dependents" need special protection however, and are not so easily set free of the "protective" confines of the family and the constrictions of family law. . . . It is this unit [the parent-child dyad] that I urge be considered our "core" family unit – the entity that defines "natural" and is protected as "private";⁷⁹ the unit around which policy should be structured.

If looking backwards at historical constraints is critical to arriving at a feminist or humanist jurisprudence, is it not equally or even more critical for such purposes to envision future enfranchisement? Ultimately, Gerhard's book is less than satisfying because she does not animate tomorrow's solutions with the specificity she devotes to yesterday's problems. Though that is a demanding request of any one architect, mechanic or visionary to perform, Gerhard attempts to take it on and therefore can be held accountable for failing to follow through. Gerhard's formidable

78. MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

79. *Id.* at 199-200.

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achievement in *Debating Women's Equality* is that she clearly knows what fundamentally hangs in the balance in any consideration of optimal justice for all, and she provides ample historical evidence to be convincing about one of the key obstacles to legal equality for women—their specialized and subordinate roles within the family. Justice in a society's smallest political unit of governance holds the key to justice in its largest (and *vice versa*). As Gerhard states, “[m]aking freedom and equality possible in the family remains the promise of a truly civil society.”⁸⁰ What she fails to provide is a vision of legal equality that can usefully be employed to fulfill that promise.

80. GERHARD, *supra* note 1, at 148.