

Gender and Criminal Justice: the German Case.

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I have two reasons for talking about the relationship between gender and criminal justice. The first one is related to the peculiarities of criminal justice in German historiography. Apart from the traditional legal history, which exclusively focused on the processual features of lawsuits and on legal norms, there was no such thing as a criminal history in its own right in Germany for quite a long time. Hesitatingly, the first studies which dealt with delinquency and delinquents were published during the 1980s, and during the 1990s the development assumed the shape of a veritable boom. However, this „new German criminal history“ emerged in a set of circumstances completely different from those in which its models in France, Britain, Scandinavia, the Netherlands or the United States came into being. Under the influence of the current debates on historical anthropology, micro history or the new cultural history, German criminal history soon assumed a distinctly cultural historical profile.¹ Sceptical with regard to quantifying approaches and quick macro-historical explanations, this kind of research produced a large number of case studies, which emphasized the links between the application of justice, the societal mechanisms of conflict solution and the complex options of action among which the involved persons could take their choice. It was in this point that the interests of criminal history met with those of gender history, under whose sharp scrutiny many „unequivocal truths“ had already been called into question. Besides, many female representatives of gender history discovered court files as valuable and essential source material for dealing with topics, whose range could reach far beyond the narrow field of justice. As a consequence, Otto Ulbricht has recently remarked (and quite correctly so), that „two dynamic movements of historiography“ are about to converge at this point.² However, the cooperation between gender and criminal history has often been a critical one. Gender historians have quite frequently criticised the investigative interests, methods and assessments of criminal history.

¹ Cf. Gerd SCHWERHOFF, *La storia della criminalità nel tardo medioevo e nella prima età moderna. Il ‘ritardo’ di un settore della ricerca tedesca*, in: *Annali dell’ Istituto storico italo-germanico in Trento* 24 (1998) [erschienen 1999], pp. 573-630; idem, *Aktenkundig und gerichtsnotorisch. Einführung in die historische Kriminalitätsforschung*, Tübingen 1999; idem, *Historische Kriminalitätsforschung für das Alte Reich. Zum Profil eines „verspäteten“ Forschungszweiges*, in: Andreas BLAUERT/ Gerd SCHWERHOFF (eds.): *Kriminalitätsgeschichte. Studien zur Sozial- und Kulturgeschichte der Vormoderne*, Konstanz 2000.

² Otto ULBRICHT, *Einleitung*, in: idem (ed.), *Von Huren und Rabenmüttern. Weibliche Kriminalität in der Frühen Neuzeit*, Köln 1995, p. 4; also Ute GERHARD (ed.): *Frauen in der Geschichte des Rechts. Von der Frühen Neuzeit bis zur Gegenwart*, München 1997, and the most recent, important study by Ulinka RUBLACK, *The Crimes of Women in Early Modern Germany*, Oxford 1999 (published in German 1998).

This fact prepares the ground for the second reason of my choice of topic. Even although it does no longer appear somewhat exotic to deal with gender and crime, I have the impression that the critical potential of gender history has not been exhausted with regard to many questions. After all, the general success of the history of crime, delinquency, and criminal justice is based on its compatibility with numerous of the „big questions“ of historiography: as the discussion paper of the organizers of our section has already pointed out, it is, for instance, compatible with questions in regard to the modernisation and pacification of society, or to the emergence of the modern state. In contrast to that, the research with regard to the gender problem seems to take place on an „island“ of its own or, if you like, on a particular part of the world. The expeditions, which start their quest for the phenomena of pacification or the emergence of the state in different realms of research, often appear to remain untouched by its findings. At best, a micro-perspective, a perspective „from below“, which examines historical subjects and the strategies of historical agents – an area where gender history is usually positioned – is added to the macro-perspective of modernisation, centralisation etc. In this paper, however, I want to ask to which extent this micro-perspective may have both productive and critical repercussions on the macro-perspective. At the same time, this paper also represents a criticism of the self-sufficient variant of micro history, which confines itself to the production of meticulously researched case studies and postpones the answering of more general questions to the future until a sufficient density of analyses on a small-scale level is accomplished. The problem is, that in fact and as a rule, this point is never reached. Personally speaking, I am firmly convinced that a fruitful union of gender and criminal history, too, cannot do without formulating hypotheses and the inspiration by theories.

Subsequently, the paper is divided in three parts. Firstly, the gender historical criticism of traditional criminal history is represented by particularly dealing with the share of women in the rate of delinquency. In contrast, the two other parts explore innovating perspectives. The second part will deal with the meaning and change of violent delinquency in the *ancien régime*, and the third part with the repercussions the moral politics enforced by the authorities had on the female scope of action.

I. Female Criminality – No Historical Constant

The connection between gender and criminality is often reduced to the question of the quantitative share of men and women in the overall criminality. The basic thesis is that, strikingly constantly, women with a share of 10 or, at most, 20 per cent were dramatically underrepresented in criminal statistics and still are to the present day. As late as in 1990, two renowned American criminologists could remark in an apodictical manner: „Gender differences appear to be invariant over time and space.“³ In Germany, one year later, Robert Jütte published his substantial survey on gender-specific criminality in the late Middle Ages and the early modern period, which verified a continuous underrepresentation of women in the criminal statistics.⁴ The numbers in regard to the presence of women in the Lippe district court during the 18th century, for instance, represent the average picture: Of a sample of approximately 3,000 defendants 352 persons were female (10.5 per cent); in regard to the plaintiffs, the picture was very similar indeed (11.5 per cent were women) and among the 604 witnesses women represented but 15.4 per cent.⁵

There are a whole host of attempts to explain this underrepresentation of women. A common feature of most of these divergent explanations is that it is exclusively female „weaknesses“ which are held responsible for this statistical finding.⁶ Older studies explained this discovery by reference to biologist or anthropological gender differences: „Searching for the born criminal, Lombroso found out at the end of the 19th century that, as a rule, women do not belong into this category. He ascribed a lower mental and emotional developmental state to women, which according to his opinion corresponded to that of a child. Therefore, women could not effect anything outstanding in the field of criminality, they were occasional culprits at best.“⁷ Due to this low developmental stage, he considered „bodily“ offences like

³ Michael R. GOTTFREDSON/ Travis HIRSCHI: *A General Theory of Crime*, Stanford 1990, p. 45

⁴ Robert JÜTTE, *Geschlechtsspezifische Kriminalität im Späten Mittelalter und in der Frühen Neuzeit*, in: *Zeitschrift für Rechtsgeschichte, Germanistische Abtl.* 108 (1991), pp. 86-116

⁵ Michael FRANK, *Dörfliche Gesellschaft und Kriminalität. Das Fallbeispiel Lippe 1650-1800*, Paderborn 1995, p. 232.

⁶ Cf. JÜTTE 1991, 98ff.; Heide WUNDER, "Weibliche Kriminalität" in der Frühen Neuzeit. Überlegungen aus der Sicht der Geschlechtergeschichte, in: ULBRICHT 1995, pp. 39-61; Claudia ULBRICH, *Weibliche Delinquenz im 18. Jahrhundert. Eine dörfliche Fallstudie*, in: ULBRICHT 1995, pp. 281-311; Susanna BURGHARTZ, "Geschlecht" und "Kriminalität" - ein fruchtbares Verhältnis? in: Rudolf JAUN/ Brigitte STUDER (eds.): *weiblich - männlich. Geschlechterverhältnisse in der Schweiz: Rechtsprechung, Diskurs, Praktiken*, Zürich 1995, pp. 23-31.

⁷ ULBRICHT 1995, p. 21f.

prostitution to be typically female crimes.⁸ This stereotype of women as „sexual offenders“ had a strong power of persistence and, if strongly modified, became part and parcel of the thesis of the „hidden character“ of female criminality (Otto Pollak 1950).

Even if the criminal-sociological turn in the academic field has deservedly banished such ‘explanations’, socio-cultural analyses are still often linked to the ‘deficit approach’. For instance, many scientists perceive „the limited socio-economic role attributed to women in most societies or the extensive dissociation of family and employment life which is linked to this role as an explanation for women being less endangered by delinquency. Especially the lower economic power and the allegedly more protected position of the married, non-employed housewife are held responsible for the lower rate of female criminality.“⁹ Additional factors, which are referred to in this context, are the women’s orientation by a female role pattern concurring with social norms and their lack of opportunity to gain experience in alternative, deviant environments. This little part of a whole range of explanatory suggestions is already sufficient to reveal a problem with which quantifying research has to struggle quite often: Very general explanations are given for very general statistical trends and even though they have a certain plausibility, the validity of these explanations is hard to be checked in a precise and reliable manner.

However, the problems do not really start with the coarseness of possible explanations, but already with the *explanandum*, the statistical finding. As a matter of fact, a closer glance at the statistics on female delinquency reveals great differences over time and sphere. In Jütte’s tables for the 18th century, for instance, the variation of the female share in the total of delinquents ranges from 10 to 35 and even 40 per cent.¹⁰ In the face of such facts, the thesis of female „underrepresentation“ seems to represent a very rough common denominator indeed. Besides, a careful interpretation of criminal statistics quickly cuts the ground from under the foot of large-scale hypotheses about the developmental tendencies of female criminality. Having the differences between industrial and third world countries in mind, Freda Adler, for instance, has argued in favour of an emancipation theory according to which „the female rate of criminality assimilates to its male counterpart by a stronger participation of women in the

⁸ Peter BECKER, ‘Gefallene Engel’ und ‘verhinderte Menschen’: Über ‘Erzählmuster’, Prostituierte und die Kriminalistik des vorigen Jahrhunderts, in: Detlev FREHSEE et al. (eds.): Konstruktion der Wirklichkeit durch Kriminalität und Strafe, Baden-Baden 1997, pp. 329-349

⁹ JÜTTE 1991, p. 100.

¹⁰ Ibidem p. 93.

economy and the employment life.“¹¹ From a historical point of view, the difference often observed between urban and rural areas could serve as a case in point, but the general trend is anything but clear. Malcolm Feeley, for instance, has examined felonies which were dealt with in Old Bailey, in London, between 1687 and 1912 and he comes to a diametrically opposed conclusion. While female criminality had an average share of more than 30 per cent during the 18th century which, in fact, increased somewhat towards the end of the century, a considerable and continuous decrease to approximately 10 per cent can be observed afterwards. If somewhat toned down, this trend even continued well into the 20th century.¹² Consulting comparative material (mainly from Britain and the Netherlands), Feeley noticed a clear overall trend: „the Vanishing Female“. He regarded an increasing patriarchal control exerted on women by the emerging bourgeois society as the possible reason for this development. The peak of female criminality in the 18th century is explained by the transformation of agrarian societies into industrial ones – a process which according to Feeley temporarily increased female chances of social and economic participation. Both the emancipation and the patriarchy thesis, which are mutually exclusive, are hardly elaborated as concepts and empirically they stand on dodgy ground. German criminal statistics, for instance, paint a divergent picture in regard to the 19th century. Both among the Prussian culprits around the middle of the 19th century and in the criminal statistics of the German Reich towards the end of the century, women have a share of about 20 per cent, even though their employment rate distinctly increased during this period of time, both in absolute terms and in proportion to male employment numbers.¹³

Under the impression of these completely disparate findings, female representatives of gender-history have warned of an uncritical use of summary criminal statistics. Instead, they demanded a „micro-historical perspective“ on the delinquency of women by examining small entities (such as regions), which can be more helpful in extracting the conditions of the constitution and construction of female criminality more precisely.¹⁴ According to gender historians, female chances and restrictions of access to specific courts have to be dealt with as well as institutional mechanism of selection and the numerous filters, which either highlighted

¹¹ Ibidem p. 101.

¹² Malcolm FEELEY, The Decline of Women in the Criminal Process: A Comparative History, in: Criminal Justice History 15 (1994), pp. 235-274, p. 239]

¹³ Dirk BLASIUS, Kriminalität und Alltag. Zur Konfliktgeschichte des Alltagslebens im 19. Jahrhundert, Göttingen 1978, p. 80; Eric A. JOHNSON, Urbanisation and crime: Germany 1871-1914, New York/Melbourne 1995, p. 189f.

¹⁴ ULBRICH 1995, p. 301.

female behaviour as a relevant transgression of legal norms or, on the contrary, rendered it invisible. They put forward the proposition, that common gender stereotypes shaped the production of norms to the same extent as the selection of criminal behaviour between the act and the legal proceedings.¹⁵ With regard to both historical and modern female criminality, this view has, for example, led to the thesis that female rather than male criminality was sanctioned outside the court-room.

In this perspective, criminal statistics do not provide mere facts, but are themselves the result of historical processes of perception and selection – a fact which is not only true in regard to female criminality, but which is especially felt in this area. Realizing this fact, the utility of statistics is not generally denied, but strongly qualified. Whether they were produced by contemporaries (in regard to the modern period) or whether they were *ex post* reconstructed on the basis of contemporary records (in regard to the premodern period), these statistics can only serve as the starting point for further interpretations. At this point, gender history bears methodical implications, which can be of crucial importance for criminal history and the history of justice in general.

This is not to say, that the detection of „long term trends“ is impossible, but that the identification of these trends requires a more critical and more comprehensive interpretation. Apart from statistical material, the discursive level, for instance, should always be included into the analysis. An impressive example for a quantitative analysis actually becoming a starting point for the illumination of gender stereotypes and female scopes of action is provided by Wolfgang Behringer's examination of electoral Bavaria. With regard to the 17th century, he identified a strikingly large share of women among the delinquents (approximately 30 per cent), who were predominantly involved in religious and sexual offences (fornication, concubinage, witchcraft etc.). According to Behringer, the decrease in the share of women, which can be observed in the subsequent period of time, is due to the fact that sexual offences (especially cases of fornication) were no longer dealt with by the overburdened Privy Counsellor, but by the district courts instead. Consequently, these cases did no longer turn up in the criminal statistics. Due to intensive debates in the course of the 18th century, a tendency of decriminalisation with regard to offences such as witchcraft, infanticide, and „licentious behaviour“ can be observed, which could indicate a fundamental change in the stereotypical

¹⁵ WUNDER 1995, p. 44.

conceptualization of women: "From the female culprits who were predestined for committing crimes by the Fall from Grace to the 'blameless' victims of societal circumstances, who were to be particularly protected by the administration of justice."¹⁶

However, the gender historical critique of criminal history is not confined to castigating the uncritical utilisation of criminal statistics. Those reductions which result from the ultimate commitment to a "perspective of deviation" have only recently been brought up. The basic reproach is that this perspective results in an, as it were, analytical re-doubling of the label 'deviant behaviour', which was already used by the contemporary courts in order to characterise the behaviour of defendants (and as which it is hence already represented in the sources). In turn, this redoubling leads to neglecting the fact, that this kind of deviant behaviour could assume a different, and indeed, completely normal social meaning in the context of other social institutions. In regard to the historiographical perception of women in the course of history, this fact has especially grave repercussions: "Taking into account the general low visibility of women in the premodern tradition, those actions, which have been labelled as 'deviant', suddenly turn into the only possible actions - or, indeed, into a pattern of "female" behaviour as such."¹⁷

II. Violence as a Male Code of Behaviour

Physical violence is one of the central topics of the research on justice and criminality. "The pacification of human societies by the national state" has been named as an important focus of this section by the discussion paper of the organisers. According to a widely accepted theory, the administration of justice has played an important part in reducing the application of violence. From an idealtypical point of view, two stages can be distinguished: On the one hand, an process of subordinating social conflicts to legal procedures, which successively gained in momentum and which aimed at turning such conflicts, which were formerly solved by violent means and outside the courts, into matters which were exclusively dealt with by the courts. On the other hand, a trend towards an increasing criminalisation of violence is discernible, as Xavier Rousseaux, for example, has recently discovered and conceptualized in the phrase "from case to crime". On the basis of the long term reconstruction criminality rates in general and homicide

¹⁶ Wolfgang BEHRINGER, Weibliche Kriminalität in Kurbayern in der Frühen Neuzeit, in: ULBRICHT 1995, pp. 63-82, p. 79.

¹⁷ Andrea GRIESEBNER/ Monika MOMMERTZ, Vorgetäuschte Liebschaften? Methodische Anmerkungen zum Verhältnis zwischen historischer Kriminalitätsforschung und Geschlechtergeschichte, in: BLAUERT/SCHWERHOFF 2000.

rates in particular, a long term decrease in the use of physical violence has been detected - an observation which has been interpreted in the terms of Norbert Elias as a check against affects triggered off by the monopolisation of physical violence.¹⁸

To what extent can a criminal history informed by the categories of gender provide new insights in this context? Many German (and European) studies¹⁹ agree that physical violence - at least with regard to the public sphere - is a typical male domain; women do rather seldom become visible as either perpetrators or victims. Yet as Jan Peters concludes on the basis of his micro analysis about delinquency on a 17th century estate in the Mark Brandenburg: "Physical violence by women existed on any level imaginable: Between women of different and equal social status, between men and women in general, within and without their own families..." On the other hand, many studies attribute the sphere of verbal violence, invectives and insults to the female domain. To quote from Peters, once again: "Women appeared more versed as against men in regard to oral violence – expressions as an instrument of deciding conflicts in their favour was rather a female peculiarity."²⁰ Yet, this claim cannot be substantiated statistically. Although it is true that women stood more often accused because of invectives and insults than because of any other misdeeds, men still dominated the picture from a quantitative point of view.²¹ As a

¹⁸ Xavier ROUSSEAU: From Case to Crime: Homicide Regulation in Medieval and Modern Europe, in: Dietmar WILLOWEIT (ed.), *Die Entstehung des öffentlichen Strafrechts*, Köln 1999, pp. 143-175; Eric A. JOHNSON./ Eric H. MONKKONEN (eds.): *The Civilization of Crime. Violence in Town and Country Since the Middle Ages*, Urbana and Chicago 1996.

¹⁹ Among the most important case studies are Peter SCHUSTER, *Eine Stadt vor Gericht. Recht und Alltag im mittelalterlichen Konstanz*, Paderborn 2000; Susanne POHL, „Ehrlicher Totschlag“ - „Rache“ - „Notwehr“. Zwischen männlichem Ehrcode und dem Primat des Stadtfriedens (Zürich 1376-1600), in: Bernhard JUSSEN/ Craig KOSLOFSKY (eds.): *Kulturelle Reformation. Semantische Umordnung und soziale Transformation 1400-1600*, Göttingen 1999, pp. 239-283; Mark HÄBERLEIN, *Tod auf der Herrentrinkstube. Ehre und Gewalt in der Augsburger Führungsschicht (1500-1620)*, in: Sybille BACKMANN et al. (eds.) *Ehrkonzepte in der Frühen Neuzeit. Identitäten und Abgrenzungen*, Berlin 1998, pp. 148-169; Joachim EIBACH, *Städtische Gewaltkriminalität im Ancien Régime. Frankfurt am Main im europäischen Kontext*, in: *Zeitschrift für Historische Forschung* 25 (1998), pp. 359-382; Brigitte RATH, „...und wolt das Schwert durch in stossen.“ Zur physischen Gewalt in Südtirol um 1500, in: *L'Homme. Zeitschrift für Feministische Geschichtswissenschaft* 7 (1996), pp. 56-69; Michael FRANK, : *Ehre und Gewalt im Dorf der Frühen Neuzeit. Das Beispiel Heiden (Grafschaft Lippe) im 17. u. 18. Jahrhundert*, in: Klaus SCHREINER/ Gerd SCHWERHOFF (eds.): *Verletzte Ehre. Ehrkonflikte in Gesellschaften des Mittelalters und der Frühen Neuzeit*, Köln 1995, pp. 320-338; Valentin GROEBNER, *Der verletzte Körper und die Stadt. Gewalttätigkeit und Gewalt in Nürnberg am Ende des 15. Jahrhunderts*, in: Thomas LINDENBERGER/ Alf LÜDTKE (eds.): *Physische Gewalt. Studien zur Geschichte der Neuzeit*, Frankfurt 1995, pp. 162-189; Walter RUMMEL, *Verletzung von Körper, Ehre und Eigentum. Varianten im Umgang mit Gewalt in Dörfern des 17. Jahrhunderts*, in: Andreas BLAUERT/ Gerd SCHWERHOFF (eds.), *Mit den Waffen der Justiz*, Frankfurt/M. 1993, pp. 86-114; Katharina SIMON-MUSCHEID, *Gewalt und Ehre im spätmittelalterlichen Handwerk am Beispiel Basels*, in: *Zeitschrift für Historische Forschung* 18 (1991), pp. 1-31.

²⁰ Jan PETERS, *Frauen vor Gericht in einer märkischen Gutsherrschaft (2. Hälfte des 17. Jahrhunderts)*, in: ULBRICHT 1995, pp. 231-258, p. 251 bzw. p. 247.

²¹ For a sceptical assessment cf. Rainer WALZ, *Schimpfende Weiber*, in: Heide WUNDER/ Christina VANJA (Hg.): *Weiber, Menscher, Frauenzimmer. Frauen in der ländlichen Gesellschaft 1500 - 1800*, Göttingen 1996, pp. 175-198.

tendency, the statistical evidence stands in contradiction to the qualitative assessment. Yet, it need not necessarily be the allegedly 'hard' statistical facts which represent reality more appropriately. Instead, a gender-specific selection by the involved courts is more probable. When women resorted to insulting words, for instance, they often used them against other women - a fact which may have made their action less relevant from a legal point of view. Moreover, in conflicts which were fought out publicly and verbally, women often acted in cooperation with their husbands. Action in solidarity with one's marital partner cannot only be observed with regard to "marital communities of defense" against the representatives of the authorities (for instance, on the occasion of distraints), but also with regard to other such couples in the streets.²² When it comes to fighting out matters of honour and insult, couples acted like a team which proceeds on the principle of the division of labour: Women acting on behalf of their husbands could both start the conflict or introduce a new stage of conflict, they could even become particularly aggressive, since they did not have to expect as heavy legal sanctions as men. The dominance of men as plaintiffs in court also often resulted from such a team strategy and does not necessarily mean that men dominated this kind of conflicts.²³

However, if we accept the claim that physical violence first and foremost was a male offence, then this offence can be analysed as a typically male code of behaviour with the analytical instruments of gender and micro history. For this purpose, however, it is necessary to leave the perspective of deviation for a moment and to describe violence as an integral part of a more general conflict behaviour, in whose framework women were not capable of giving satisfaction. During the last years, numerous studies have painted a picture of the phenomenology of everyday violent behaviour in the early modern period by offering a whole range of variants, while at the same time agreeing on most basic features. I only want to remind you of the well-known scenario with a couple of remarks. Often the participants of a quarrel knew each other; conflicts between neighbours or colleagues can be regarded as the two most common constellations under which such conflicts emerged. Yet, especially in bigger cities, there is a certain chance of complete strangers becoming involved in a row, who as a rule, however, belonged to similar societal groups - a typical example for this kind of conflicts are violent encounters between artisans. As a consequence, the causes and the occasions of such quarrels may be very different indeed: long-term conflicts between acquaintances about matters of property, conflicts of status,

²² PETERS 1995, p. 238f.; ULBRICH 1995, p. 296f.

²³ Martin DINGES, "Weiblichkeit" in "Männlichkeitsritualen"? Zu weiblichen Taktiken im Ehrhandel in Paris im 18. Jahrhundert, in: *Francia* 18/2 (1991), pp. 71-98, p. 90ff.

or conflicts due to unfriendly behaviour can be found as well as quarrels between strangers, which were born out of a coincidental situation. The sources only partly reveal anything about the past history of the case. Yet, regardless of the actual cause of any of these violent rows: In any of these cases, the common denominator was a rigid codex of honour, which homogenized heterogeneous motives, by translating them, as it were, into a language of honour. To put it somewhat brusquely: No matter, what was 'actually' at the heart of these violent conflicts from our modern point of view, according to the social logic of the participants, the violent fights in premodern streets were always – in one way or another – connected to an argument about honour. Thus the impending loss or the defense of honour were the engine for the use of violence, which always has to be analysed in terms of a process. Usually, these quarrels started with verbal arguments and terminated with the death of one opponent. Yet, at least from an *ex post* perspective some stages of escalation can be distinguished. Only as a remark in passing: This pattern also implies that it was only possible to differentiate between culprit and victim *ex post*, namely by the rather coincidental result of who was injured or even slain. The escalation of violence took place according to certain social rules. That is the reason why - in this context - historians prefer to talk of "ritualized violence", the "liturgy of violence" or the like. The script of violent conflicts followed a dramaturgy, whose elements - in correspondence to ethnological research - have best been described in German historiography by Rainer Walz. One of these elements is for instance the *retorsion*, that is, as it were, the attempt to pay back an insult in the same manner in which it was uttered, or an action of outdoing the opponent as an attempt to decide the conflict in one's favour. Certain general instruments and aims were integral parts of this elaborated social script of "agonal communication". Here, I only want to remind you of the canonical repertoire of insults such as "knave", "thief" or "whore", which can be found all over Northern Europe with striking regularity. In the context of this repertoire, the accusation of having had incestuous intercourse belongs to the heavier weapons. Insults could fluidly turn into threats of applying violence – typically in the form of challenging somebody to come out of his house. When sharp tongues denied their service, daggers were drawn – most of the time, however, these weapons were simple bread knives, which were not included in the prohibition of weapons issued by the authorities. In the dramaturgy of these conflicts, the drawing of knives represented a crucial gesture of threat in the immediate run-up to physical violence, which was separately dealt with by proclamations of the authorities. A second level of escalation before actually attacking the body of the opponent was the violation of his "second skin", that is his fence or the wall of his house. If one did not have any weapon at hand, then the knocking off of

the opponent's hat often was the initial act which led to the use of fists – a gesture which symbolised both contempt for and disgrace of the opponent.

Why did I sketch out this micro scenario and in how far does it bear consequences on our conceptualisation of long-term processes of historical change? Usually – and to some extent by all means correctly – historical studies comprehend physical violence as objects of social control: According to the common point of view, violence was slowly checked by laws, offers for a legal solution of conflicts and sharper sanctions against homicidal and violent offenders. The micro perspective, however, reveals that - at the same time - violence represented a medium of social control in early modern Europe, a means of conflict regulation (if from our point of view not always a rational and legitimate one), which was closely related to the self-representation of virility. Up to well into the 18th century, this culture of violence remained largely unimpaired - despite all legal and repressive counter-measures.

Therefore, the pacification of society can hardly be understood by solely referring to the suppression of violence by the state and the juridical administration. He or she who really wants to comprehend this phenomenon has to examine how this societal process of delegitimising the culture of violence took place. Case studies on this topic, however, do not exist as yet, neither on the macro nor on the micro level. Only some hypotheses are available. On a trial basis, Joachim Eibach, for example, has introduced the term "*Verbürgerlichung*" into the debate.²⁴ Though from another angle, one of Elias' thoughts is picked up again, namely that the conduct of the upper social strata had the character and influence of a model for the rest of society. That the bourgeois merchants and intellectual elites distanced themselves from the violent culture of both artisans and the nobility appears to be plausible with regard to the entire early modern period. However, it would be necessary to establish if the bourgeois role model had actual effects. If, on the other hand, one examines the carrier strata of this violence - especially the urban artisans and the peasants in the rural areas - one could ask which factors were responsible for drying up the "agonal culture of contention" and where the decisive points of change were situated. Are there any indicators for norms which were mediated by the guilds and which successively lost their power of integration? It is evident that more research on this aspect is required. Yet, it is also clear that the hypothesis of an ever increasing repression of violence is no longer sufficient to explain the change that can be observed.

III. Moral Politics of the Early Modern State and Female Scopes of Action

While the long-term trend towards a repression of publicly used physical violence mainly refers to the male culture of honour, both sexes were equally concerned by the moral politics of the authorities (the term "moral politics" denotes the attempt to discipline both the sexual and moral behaviour), although the consequences in turn were different for men and women. This thesis is fairly easy to substantiate if one takes a closer look at some sexual offences.

In a historical perspective, prostitution – the female offence *par excellence* in the criminological discourse of the 19th century – can by no means generally be regarded as illegal behaviour.²⁵ Although there are distinct indicators for discrimination against and the marginalisation of prostitutes in the medieval society, their activities were nonetheless tolerated for quite some time. Especially in Southern Germany, numerous, as it were, official brothels were indeed established by city councils in the 14th and 15th centuries. Following the Augustinian dictum of tolerating lesser evil in order to avoid greater damage, prostitutes could pursue their business under the auspices of an official innkeeper who was bound to the council by oath. In the course of the 15th century, the moral politics of the authorities gained in momentum; numerous tendencies of marginalisation and stigmatisation represented the initial stages of a consequent criminalisation of prostitution: stricter dress regulations, a more rigid seclusion of prostitutes in ghettos, a more severe persecution of „free-lance“ prostitution outside the official brothel, which increasingly assumed the character of a medium of social control. Finally, the shutting down of these „women’s houses“ since the beginning of the 16th century, which was motivated by the moral rigourism of the reformation, represented a radicalisation of this trend; prostitution was now made a punishable offence everywhere – of course, without being able to actually suppress it.²⁶ However, this process was more than a mere criminalisation of a specific professional occupation. The decisive point is that a whole form of living was exposed to general suspicion. Since the 15th century, all women who did

²⁴ Joachim EIBACH, *Städtische Gewaltkriminalität im Ancien Régime*. Frankfurt am Main im europäischen Kontext, in: *Zeitschrift für Historische Forschung* 25 (1998), pp. 359-382.

²⁵ Peter SCHUSTER, *Das Frauenhaus. Städtische Bordelle in Deutschland 1350 bis 1600*, Paderborn 1992; idem, *Hinaus oder ins Frauenhaus. Weibliche Sexualität und gesellschaftliche Kontrolle an der Wende vom Mittelalter zur Neuzeit*, in: BLAUERT/SCHWERHOFF 1993, pp. 17-31; Beate SCHUSTER, *Die freien Frauen. Dirnen und Frauenhäuser im 15. und 16. Jahrhundert*, Frankfurt 1995; eadem, *Wer gehört ins Frauenhaus? Rügebräuche und städtische Sittlichkeitspolitik im 15. und 16. Jahrhundert*, in: Reinhard BLÄNKNER und Bernhard JUSSEN (eds.): *Institution und Ereignis. Über historische Praktiken und Vorstellungen gesellschaftlichen Ordens*, Göttingen 1998, pp. 185-252

not fit into the male clichés of „virgins“ or „(house)wives“ increasingly had to reckon with being classified as „whores“; women who lived with a man without being married to him were also threatened with compulsory hospitalisation in those official „women’s houses“. In the process, the customs of reprimand, which the official whores applied to those women, whom they conceived to be competitors as they pursued the same line of business in secret, at times became a supplement to the measures of the authorities in their quest for social control.

More recent studies emphasize the rather surprising long-term uniformity of prostitution. The scandalous process about blackmailing and prostitution, which shook the Wurtemberg town of Hall to its foundation in 1824-26 and in which approximately 150 persons of all social strata were involved, was extraordinarily situated on the border line between the *ancien régime* and modernity.²⁷ Behind the scenes of bourgeois respectability, a network of organized brothel and street prostitution became visible by which women from the poorer strata of the town had improved their financial means for years; besides, they tried to blackmail the wealthier among their customers by means of faked or actual pregnancy. The perception of the sexual transgressions of fornication and prostitution as displayed by the early 19th century authorities hardly differed from that of the preceding centuries; some of the relevant legislation even stemmed from the age of Reformation. The specific profile of the case of Hall, however, can only be comprehended against the background of the town’s character as a former free city, which still guarded its internal affairs against the state of Wurtemberg and its representatives. For quite some time, the dignitaries of the city, who were well informed about the proceedings, and who were at least partly directly involved as either customers or profiteers, ignored the hustle and bustle within their city walls. The comprehensive source material documents the rules of prostitution (the use of public spheres, the role of procurers and procuresses etc.), but it does not show any substantial changes in regard to the information we have about similar incidents from earlier times and the strategies of self-legitimation, which were used in court. In spite of a language, which clearly expresses the asymmetry and the decline in power between the two sexes (Men „used“ the body of women), the men of Hall did not refer to female „powers of seduction“ or the „general lack of female honour“ in order to excuse their own transgressions. The experience of sexual violence is often (and as if self-explanatory) at the centre of female statements – an experience which – from their point of

²⁶ Cf. Lyndal ROPER, *The Holy Household. Women and Morals in Reformation Augsburg*, Oxford 1989, p. 89ff.]

²⁷ Sabine KIENITZ, *Sexualität, Macht und Moral. Prostitution und Geschlechterbeziehungen Anfang des 19. Jahrhunderts in Württemberg*, Berlin 1995.

view – justified their claim to financial compensation. Yet, it is not only this form of active resistance which contradicts an interpretation of the proceedings in Hall along the lines of a simple ‘patriarchy equation’, according to which women are always the victims, while men are always the offenders. These women themselves perceived their body as an economic asset, „which could be converted into financial capital both spontaneously and deliberately in times of need without them feeling obliged to justify their behaviour to the authorities, or – if they were married – to their own husband.“ It was not bourgeois sexual ethics, but a „professional“ logic of exchanging their body for money, which formed the framework in which these women categorized and assessed their conduct: „Thus (occasional) prostitution was not „deviant“ behaviour for women from a low social background, but – in the face of a lack of alternatives – a legitimate way to secure a sufficient income.“ There is a connection between the case study of Sabine Kienitz and the observations of Richard Evans with regard to the environment of prostitution (and the struggle against it) in the late 19th century German Empire.²⁸ Despite all material deprivation of the persons affected and all gender-specific asymmetry of power, Evans also emphasizes the prostitutes’ scope of action, since the prostitutes were almost always successful in evading the regimentation and registration by the authorities, and the variety inherent to the game of sexual demand and offer, which hardly can be reduced to the common denominator of bourgeois bigotry and female victims. The finding of a partial decriminalisation of this offence in the police practice of the German Empire, which only preceded the actual decriminalisation via the criminal law in the Weimar republic handsomely fits into this general picture.²⁹

This extension of the concept of prostitution – a process which started after the Reformation – reaches out far beyond the history of prostitution itself. The same phenomenon of which was increasingly stigmatised and legally persecuted as „fornication“ and „licentiousness“ by the authorities in the early modern period had its roots in the informal marriage-broking customs of popular culture: According to these customs, sexual intercourse before wedlock was legitimate if a firm „engagement“, a promise of marriage with the exchange of pawns, had preceded it. As a consequence, courts were often confronted with female suits against men who had broken their engagement when a pre-marital pregnancy had occurred. As Susanna Burghartz’ research on the marital courts of Basle has demonstrated, pre-marital sexual

²⁸ Richard EVANS, *Szenen aus der deutschen Unterwelt. Verbrechen und Strafe 1800-1914*, Reinbeck 1997, p. 240ff.

contacts were rather criminalised and „female honour“ and sexual purity were closer related to each other in the re-definition of the concept of matrimony which took place since the Reformation.³⁰ By unilaterally holding women responsible for abiding by the limits of legitimate sexuality, asymmetric scopes of action emerged for both sexes. At the latest after the Reformation regulation of 1637, which created the offence of „early“ (that is: pre-marital) sexual intercourse, women who lost their honour as virgins were harshly branded as licentious and socially singled out – for instance, by losing their virgin wreaths or by their separation in the church room. In the practice of the marital courts, however, the old traditions kept their old weight for a longer period of time. In spite of contrary norms, the Basle marital courts agreed with the claims of women who insisted on a broken informal engagement and sentenced the men to pay for the maintenance of the child. Hence, women still had a chance to preserve their status as „pious daughter“ and thus their female honour. A lot depended on the social context being immaculate and on the testimony of informal monitoring bodies (the family, peers, neighbours) painting a favourable picture of the respective woman’s life. It was only later – in the 18th century – that the practice of the courts assimilated to the legal norms and it was only at this stage that the marital courts assumed the character of an instrument of social discipline „by which – via gender – male rule over women was expanded and guaranteed in every day life.“

Especially in regard to court cases about fornication, a steady gulf between the „deviation perspective“ of the authorities and a societal regulative system becomes visible, which demonstrates that pre- and extra-marital sexuality had a multi-dimensional meaning and cannot be reduced to a deviant behaviour *per se*. In catholic Bavaria, for instance, the evaluation of offences of „licentiousness“ („Leichtfertigkeit“) seems to have diverged between the authorities on the one hand and the rural society on the other during the whole early modern period.³¹ The public opinion of the villagers did by no means share the radical stigmatisation of the traditional component of marriage-broking if the choice of the sexual partner was not coincidental, but followed the mostly economically determined rules of the rural system of heritage and matrimony. In the *Altmark*, too, the unmarried state of later-born

²⁹ Andreas ROTH, *Kriminalitätsbekämpfung in deutschen Großstädten 1850-1914. Ein Beitrag zur Geschichte des strafrechtlichen Ermittlungsverfahrens*, Berlin 1997, p. 385.

³⁰ Susanna BURGHARTZ, *Geschlecht - Körper - Ehre. Überlegungen zur weiblichen Ehre in der frühen Neuzeit am Beispiel der Basler Ehegerichtsprotokolle*, in: SCHREINER/SCHWERHOFF 1995, pp. 214-234; cf. Now eadem, *Zeiten der Reinheit - Orte der Unzucht. Ehe und Sexualität in Basel während der Frühen Neuzeit*, Paderborn 1999.

³¹ Stefan BREIT, *"Leichtfertigkeit" und ländliche Gesellschaft: voreheliche Sexualität in der frühen Neuzeit*, München 1991.

children or poor villagers stood in the service of the social order and property order of the village; single adults and illegitimate children were nonetheless welcome as members of the work force. Only due to „the inquiry process of the authorities, norms of male and, first and foremost, female sexual behaviour were constructed along the lines of the social status of the respective persons and the conflict which existed between them.“³² In other words: the court covered the complex social reality with a net of standardized, gender-specific norms of behaviour – according to the thesis of Gleixner, it also participated in the elaboration of modern gender characters by this step.

So far, the examples have revealed an increasing disciplining of women and the reduction of their scope of action by legal means – even if a strong residue of resistance and defiance, a non-assimilation to these legal norms can be observed until well into the 19th century. A similar thesis could be drawn up with regard to the field of inner-marital quarrels and domestic violence. It is doubtlessly true, that the court records only allow a piecemeal glance on the use of (the often brutal) violence of husbands against their wives. Yet, on the other hand, it is also undebatably true that housefathers had a legitimate right to use corporal punishment and that the norms of the authorities rather aimed at the reduction of the female scope of action. Consequently, some female historians – with reference to the court records – comprehend the matrimony as an indissoluble, coercive relationship, which the involved women could only put up resistance to via the courts in exceptional cases.³³ However, there are also more optimistic interpretations. According to Rebecca Habermas' results, 18th century female Frankfurters – indeed, as „objectively inferior party in the struggle of the sexes“ – could use the courts, „in order to offer resistance to just this gender-specific inferiority.“³⁴ Heinrich Richard Schmidt has examined all research on the early modern marital courts of all denominations, which is available so far, and his conclusion is that there was an alliance between wives and judges in order to domesticate the husbands of the former. According to his opinion, the housefather ideology and patriarchalism turned out to be double-edged swords: On the one hand, they guaranteed the male claim to rule supreme in his house and family, on the other hand they required him to display due obedience to 'male' virtues and

³² Ulrike GLEIXNER, "Das Mensch" und "der Kerl". Die Konstruktion von Geschlecht in Unzuchtsverfahren der Frühen Neuzeit (1700-1760), Frankfurt 1994, p. 216.

³³ Michaela HOHKAMP, Häusliche Gewalt. Beispiele aus einer ländlichen Region des mittleren Schwarzwaldes im 18. Jahrhundert, in: LINDENBERGER/LÜDTKE 1995, pp. 276-302.

³⁴ Rebekka HABERMAS, Frauen und Männer im Kampf um Leib, Ökonomie und Recht, in: Richard van DÜLMEN (ed.), Dynamik der Tradition, Frankfurt/M. 1992, pp. 109-136, p. 135.

duties such as modesty, economical behaviour and the acceptance of female companionship. In the case that any of these aspects were violated, the courts were offered a chance to interfere in the otherwise immune area of domestic affairs. Drunkenness and wastefulness were negotiated in court as well as the „excessive“ use of violence – and these suits were initiated by the complaints of women. Women resisted their violent husbands „by putting the canonical courts onto their heels, which in the name of the patriarchalism demanded self-control, justice, and modesty. Since these ideals were hardly observed in quarrels, the male use of violence could not be classified as ‘housefatherly correction’ in these cases. Hence, the male privilege of the legitimate use of violence was undermined, men were exposed to a disciplining pressure.“³⁵ In the long run, Schmidt concludes, this alliance of women and the courts provided dynamite for the patriarchal system in general.

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³⁵ Heinrich R. SCHMIDT, Hausväter vor Gericht. Der Patriarchalismus als zweischneidiges Schwert, in: Martin DINGES, (ed.): Hausväter, Priester, Kastraten. Zur Konstruktion von Männlichkeit in Spätmittelalter und Früher Neuzeit, Göttingen 1998, pp. 213-236, p. 222.