

NOTE

Call Me By [My] Name: Gender-Fair Language Under German Civil and Constitutional Law

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Introduction

“If everyone knows that the male includes the female, what’s the harm?”¹

There have been many advances in gender equality over the last century;² however, women and non-binary individuals still face one key disadvantage: language. Most adults and children use some form of language every day, and language plays a key role in shaping our identities and perceptions of the world.³ But there is a problem: most languages are not neutral with respect to gender,⁴ and this non-neutrality affects individuals of different genders

1. Robyn Martin, *A Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Physical Injury*, 23 *ANGLO-AM. L. REV.* 334, 341 (1994). The harm, according to Martin, “is the universalization of particular features of masculinity, as if they were genuinely representative of both sexes.” *Id.* (citing Elizabeth Grosz, *Philosophy, FEMINIST KNOWLEDGE: CRITIQUE AND CONSTRUCT* 147, 150 (Sneja Gunew ed., 2013)).

2. See, e.g., A.W. Geiger & Kim Parker, *For Women’s History Month, a Look and Gender Gains – and Gaps – in the U.S.*, PEW RSCH. CTR. (Mar. 15, 2018), <https://www.pewresearch.org/fact-tank/2018/03/15/for-womens-history-month-a-look-at-gender-gains-and-gaps-in-the-u-s/> [perma.cc/K6X9-UFDP] (noting that “[o]ver the past half-century, women have strengthened their position in the labor force and boosted their economic standing by making gains in labor force participation, wages and access to more lucrative occupations.”).

3. See Alex Shashkevich, *The Power of Language: How Words Shape People, Culture*, STANFORD NEWS (Aug. 22, 2019), <https://news.stanford.edu/2019/08/22/the-power-of-language-how-words-shape-people-culture/> [perma.cc/3CGD-895G] (explaining that “[e]ven the slightest differences in language use can correspond with biased beliefs of the speakers” and that “[l]anguage can play a big role in how we and others perceive the world”); see also Pascal Mark Gyax et al., *A Language Index of Grammatical Gender Dimensions to Study the Impact of Grammatical Gender on the Way We Perceive Women and Men*, 10 *FRONT. PSYCH.* 1, 1 (2019) (“The way we perceive women and men in society is partly grounded in the way we speak or write about these two groups.”).

4. See Gyax et al., *supra* note 3.

differently.⁵ More specifically, languages that use the generic masculine, especially in the context of historically male-dominated professions, can perpetuate gender stereotypes and gender inequality.

This Note outlines the various harms that can be perpetuated by using the generic masculine and the current legal status of its counterpart—gender-fair language (“GFL”)—under German civil and constitutional law. Part I identifies the linguistic underpinnings of the generic masculine and outlines how grammatical gender operates under different language structures. Part II offers an overview of the psychological research showing that the generic masculine has a negative impact on women and non-binary individuals.⁶ Part III outlines the current legal doctrine addressing the status of GFL under German civil and constitutional law. Part IV then argues that the use of GFL should be legally required in certain contexts under German civil and constitutional law. Part V finally addresses counterarguments to this approach and argues that the only counterargument worth taking seriously is the concern that some forms of GFL perpetuate the gender binary.

I. Background: Gendered Languages and the Evolution of Gender-Fair Language

A. Language Categories and the Historical Need for the Generic Masculine

Languages fall into three broad categories with respect to gender:⁷ grammatical gender languages, natural gender languages, and genderless languages.⁸ Grammatical gender languages, including French, Spanish, and German, are languages where both personal nouns as well as inanimate nouns are classified by grammatical gender.⁹ For example, in German “the moon”

5. When referring to individuals (rather than grammatical objects such as words) I will use “gender” and “sex” interchangeably throughout this paper; however, I recognize that there are very important distinctions between gender and (biological) sex. See Britta N. Torgrimson & Christopher T. Minson, *Sex and Gender: What is the Difference?*, 99 J. APPLIED PHYSIOLOGY 785, 785–86 (2005) (noting that “[g]ender can be thought of as the behavioral, cultural, or psychological traits typically associated with one sex” and is “culturally determined,” whereas “sex includes the structural, functional, and behavioral characteristics of living things determined by sex chromosomes” and is “biologically determined”). These distinctions are not central to the arguments made in this paper; however, they will be explored tangentially in subpart V.C when I discuss the drawbacks of GFL and how it tends to perpetuate the gender binary.

6. In this paper I use the term “woman” to refer to anyone who identifies as a woman, and “non-binary individuals” to refer to anyone who does not identify as either masculine or feminine.

7. According to some sources there are five categories. See, e.g., Gygax et al., *supra* note 3, at 1. However, for the purposes of this paper it is sufficient to focus on the three broader categories that have been identified. See Sabine Sczesny, Magda Formanowicz & Franziska Moser, *Can Gender-Fair Language Reduce Gender Stereotyping and Discrimination?*, 7 FRONT. PSYCH. 1, 1 (2016).

8. See Sczesny, Formanowicz & Moser, *supra* note 7, at 2 (citing Dagmar Stahlberg, Friederike Braun, Lisa Irmen & Sabine Sczesny, *Representation of the Sexes in Language*, in SOCIAL COMMUNICATION 163, at 163–87 (Klaus Fiedler ed., 2007)).

9. See Gygax et al., *supra* note 3, at 3.

(*der Mond*) is masculine, whereas “the sun” (*die Sonne*) is feminine. Natural gender languages, meanwhile, do not classify inanimate nouns according to gender. English is an example of a natural gender language, where “table” is simply “table,” and all inanimate objects use the same form of definite (“the”) and indefinite (“a”) articles.¹⁰ Finally, genderless languages, such as Turkish and Finnish, “are languages where most human nouns as well as pronouns are generally unspecified for gender.”¹¹

German is a grammatical gender language, meaning that “every noun has a grammatical gender and the gender of personal nouns tends to express the gender of the referent.”¹² Research has shown that “gender and linguistic gender asymmetries are much more visible in grammatical gender languages than in natural gender languages or genderless languages.”¹³ Essentially, when describing a generic subject (i.e., a doctor or a professor, the gender of whom is either unknown or irrelevant), grammatical gender languages require the writer or speaker to describe the subject in gendered terms. For example, in German there is no option to say “doctor” in a linguistically gender-neutral way.¹⁴ You are either going to “*der Arzt*” (masculine) or “*die Ärztin*” (feminine).¹⁵ Generic subjects are therefore almost always described using the masculine noun form. This results in what is referred to as the “generic masculine.”¹⁶ Supposedly, the generic masculine is “commonly understood” to include both female and male referents.¹⁷ However, studies have consistently shown that this not how our brains process and interpret the generic masculine.¹⁸ In genderless languages,

10. In English “an” is also used as an indirect article in some cases; however, this is based on the first letter of the noun (specifically, whether it begins with a vowel sound), and not on the grammatical gender of the noun.

11. *Id.* at 4.

12. *Id.*

13. *Id.* (citing MARLIS HELLINGER & HADUMOD BUSSMANN, GENDER ACROSS LANGUAGES: THE LINGUISTIC REPRESENTATION OF WOMEN AND MEN 2 (2001)).

14. Absent using certain GFL strategies that will be discussed later on in this paper.

15. See Nette Nöstlinger, *Debate Over Gender-Neutral Language Divides Germany*, POLITICO (Mar. 8, 2021), <https://www.politico.eu/article/debate-over-gender-inclusive-neutral-language-divides-germany/> [perma.cc/4UD8-R86S] (“[A]t a hospital, you might be treated by a male *Arzt* or a female *Ärztin*.”).

16. See generally Lisa Irmen & Vera Steiger, *Zur Geschichte des Generischen Maskulinums: Sprachwissenschaftliche, sprachphilosophische und psychologische Aspekte im historischen Diskurs* [On the History of the Generic Use of the Masculine Gender: Linguistic, Philosophical, and Psychological Aspects in Historical Discourse], 33 ZEITSCHRIFT FÜR GERMANISTISCHE LINGUISTIK [JOURNAL FOR GERMAN LINGUISTICS] 212, 212–35 (2007) (tracing “the development of the generic masculine as a linguistic convention focusing on its origin and use in German” and noting that “the convention of the masculine as a generic gender goes along with . . . the notion of the masculine gender being more worthy than the feminine”).

17. See, e.g., BGH Mar. 13, 3018, VI ZR 143/17 (Ger.), <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=82652&xpos=0&anz=1> [perma.cc/9YM2-YMEJ] [hereinafter BGH Sparkasse Decision] (arguing that the generic masculine can include every gender and that its gender-inclusive meaning is commonly understood).

18. See, e.g., Megan M. Miller & Lori E. James, *Is the Generic Pronoun He Still Comprehended as Excluding Women?*, 122 AM. J. PSYCH. 483, 483 (2009) (finding that the use of generic masculine pronouns “reduce the likelihood of thoughts of females in what are intended to be non-sex-specific instances”).

there is no need for the generic masculine because nouns are not gendered.¹⁹ Likewise, in natural gender languages, only personal pronouns are gendered, and therefore it is easy to avoid the generic masculine by using “he or she” (rather than simply “he”) or the singular “they.”

Although many languages have moved away from the use of the generic masculine,²⁰ other languages, and in particular grammatical gender languages, still retain its use. For example, the European Parliament has acknowledged that in grammatical languages “it is almost impossible, from a lexical point of view, to create widely accepted gender-neutral forms from existing words.”²¹

B. The Emergence of GFL

Despite the linguistic challenges of doing so, many languages have started to recognize the importance of eliminating the male bias in language. In order to mitigate the discriminatory effects associated with male-biased language and the use of the generic masculine,²² several strategies have emerged to make languages more “fair.”²³ The two principal strategies used are neutralization and feminization.²⁴

Neutralization occurs when masculine noun forms (e.g., *policeman*) are replaced with gender-neutral noun forms (e.g., *police officer*).²⁵ Neutralization also occurs when a linguistic community actively creates a new pronoun to challenge the gender binary, such as the singular “they” in English or the Swedish pronoun “hen.”²⁶ In German, neutralization can be achieved in some instances by replacing gender-marked forms with gender-unmarked forms such as *Staatsoberhaupt* (a neutral noun meaning ‘head of state’).²⁷ Neutralization is harder to achieve in grammatical gender languages such as German, however, because most nouns do not have a gender-unmarked form.

Feminization, meanwhile, involves “the use of feminine forms to make female referents visible (i.e., *the applicant . . . he or she* instead of *the applicant . . . he*).”²⁸ Feminization can also involve the use of “paired forms,” e.g., using both

19. *But see* Gygax et al., *supra* note 3, at 4 (noting that in genderless languages gender can still “be conveyed by lexical means,” such as through the use of gender suffixes).

20. For instance, English writers are encouraged to find ways of achieving gender neutrality in their writing. *See, e.g.,* THE CHICAGO MANUAL OF STYLE ¶ 5.255 (17th ed. 2017) (listing techniques for achieving gender neutrality). *But see id.* at ¶ 5.256 (noting that the use of the singular *they* is still not “considered fully acceptable in formal writing” but is “steadily gaining ground”).

21. EUROPEAN PARLIAMENT, GENDER-NEUTRAL LANGUAGE IN THE EUROPEAN PARLIAMENT 5 (2018), https://www.europarl.europa.eu/cmsdata/151780/GNL_Guidelines_EN.pdf [perma.cc/FM3G-BZR3].

22. *See infra* Part II (describing these discriminatory effects).

23. *See* Sczesny, Formanowicz & Moser, *supra* note 7, at 2 (noting that GFL “was introduced as . . . part of a broader attempt to reduce stereotyping and discrimination in language”).

24. *See id.* at 1.

25. *See id.*

26. *See* Anna Lindqvist, Emma Aurora Renström & Marie Gustafsson Sendén, *Reducing a Male Bias in Language? Establishing the Efficacy of Three Different Sex Gender-Fair Language Strategies*, 81 SEX ROLES 109, 109 (2019).

27. *See* Sczesny, Formanowicz & Moser, *supra* note 7, at 3.

28. *Id.*

the masculine and feminine versions of a noun instead of simply using the masculine version (*Arzt/Ärztin* rather than just *Arzt*).²⁹

The German language primarily achieves Feminization by using paired forms (e.g., “Elektrikerinnen oder Elektriker”). It also achieves it using abbreviated forms with slashes (e.g., *der/die Journalist/-in*)³⁰ or asterisks (e.g., *die Journalist*innen*).³¹ The problem with using paired or abbreviated forms in grammatical gender languages, however, is that both strategies still require the use of a gendered indefinite article. This can result in clunky sentence structures³² and is why many writers and speakers may prefer to use the generic masculine when communicating in grammatical gender languages.³³

C. Resistance to GFL

Despite the role that GFL can play in improving gender equality and eliminating male biases,³⁴ many linguistic communities are still resistant and even vehemently opposed to its implementation. For example, GFLs status in Germany might be considered akin to that of critical race theory (“CRT”) in the United States.³⁵ Indeed, half of Germans surveyed oppose GFL so vehemently that they think it should be banned in official communications and in state-sponsored institutions.³⁶

29. *Id.*

30. *See id.*

31. For a comprehensive discussion of how GFL can be achieved in German, see *Geschlechtergerechter Sprachgebrauch* [Gender-Neutral Language Use], DUDEN, <https://www.duden.de/sprachwissen/sprachratgeber/Geschlechtergerechter-Sprachgebrauch> [perma.cc/URK9-6K6D] (last visited Apr. 13, 2022) [hereinafter *GFL in German*].

32. Claudius Petzold & Man-lun Chen, *Gendergerechte Sprache: Konflikt zwischen Gerechtigkeit und Verständlichkeit* [Gender-Neutral Language: The Conflict Between Equality and Comprehensibility], NJOZ 2022, 225, available at BECK-ONLINE by subscription (giving examples of GFL in German and noting that the readability of such texts suffers greatly).

33. In a survey conducted last year, sixty-five percent of the German population surveyed said that they did not support the adoption of GFL. *See Mehrheit der Deutschen lehnt gendergerechte Sprache ab* [The Majority of Germans Reject Gender-Fair Language], ZEIT ONLINE (May 23, 2021), https://www.zeit.de/news/2021-05/23/mehrheit-der-deutschen-lehnt-gendergerechte-sprache-ab?utm_referrer=https%3A%2F%2Fwww.google.com%2Fperma.cc/R3RL-JHY4.

34. *See generally* Sczesny, Formanowicz & Moser, *supra* note 7, at 8 (noting that “past research has revealed that GFL has the potential to make significant contributions to the reduction of gender stereotyping and discrimination”).

35. Compare Anthony Zurcher, *Critical Race Theory: The Concept Dividing the US*, BBC NEWS (July 22, 2021), <https://www.bbc.com/news/world-us-canada-57908808> [perma.cc/DM9E-Y42C] (discussing how critical race theory, a teaching philosophy aimed at uprooting racial biases, “has become a topic of fierce political debate” dividing the U.S. along mostly political lines), with Nöstlinger, *supra* note 15 (describing how the introduction of gender-neutral language in Germany has divided the country, also along mainly political lines, with the chairman of The German Language Society calling it “‘a modern Hitler salute,’ used by ‘left-wing ideologues’ to signal that they belong to a certain group.”).

36. *See Hälfte der Deutschen befürwortet Gendervot für staatliche Stellen* [Half of Germans Support a Gender Ban for Government Agencies], SPIEGEL (May 26, 2021), <https://www.spiegel.de/politik/deutschland/spiegel-umfrage-haelfte-der-deutschen-befuerwortet-gender-verbot-fuer-staatliche-stellen-a-f611d490-cf36-4358-9054-f08392af9fdf> [perma.cc/HSE8-CTRJ] [hereinafter *GFL Should Be Banned*].

On the one hand, conservatives argue that GFL is unnecessary,³⁷ and that grammatical gender should not be equated with biological sex.³⁸ On the other hand, liberals argue that grammatical gender—in particular the use of the generic masculine—cannot be disentangled from the power structures that it represents.³⁹

In 2020, Germany's influential Duden Dictionary began adding the feminine noun forms to its online dictionary.⁴⁰ In response, The German Language Society [*Verein Deutsche Sprache*] began collecting signatures for its petition to “save the German language from Duden [*Rettet die deutsche Sprache vor dem Duden*].”⁴¹ The petition warns that, by adding the feminine forms to more than 12,000 personal and occupational terms in its online dictionary, the Duden is engaging in a problematic “forced sexualization” of the German language.⁴² So far the petition has collected over forty-thousand signatures.⁴³ Alexander Krauß, one of the signatories and a member of the conservative CDU party, said that he is afraid that GFL “will deteriorate [the German] language” and “that it will no longer be fun to read a novel.”⁴⁴ Others argue that GFL is unnecessary because the generic masculine already includes women as referents.⁴⁵ However, contrary to the argument that the generic masculine encompasses female and male referents equally, “[p]sycholinguistic research has shown quite consistently that generic masculine trigger male-only associations and inferences, rather than gender balanced associations in recipients’

37. According to this argument, GFL is unnecessary because the generic masculine already includes female referents (“Frauen sind mitgemeint”). See Paula Leocadia Pleiss, *Warum es nicht ausreicht, Frauen “mitzumeinen”* [Why it is Not Enough to “Intend to Include” Women], WELT (June 3, 2019), <https://www.welt.de/kmpkt/article194491179/Generisches-Maskulinum-Warum-es-nicht-ausreicht-Frauen-mitzumeinen.html> [perma.cc/H39X-P9LQ] (describing one side of the argument as those who believe that the generic masculine sufficiently includes women and “everything should stay as it is” [*es sollte alles bleiben, wie es ist*]).

38. *Rettet die deutsche Sprache vor dem Duden*, VEREIN DEUTSCHE SPRACHE, <https://vds-ev.de/aktionen/aufrufe/rettet-die-deutsche-sprache-vor-dem-duden/> [perma.cc/C4UN-S3CF] (last visited Apr. 13, 2022) [hereinafter *Petition*] (“Das biologische Geschlecht (Sexus) ist nicht mit dem grammatikalischen Geschlecht (Genus) gleichzusetzen.” [“Biological sex should not be conflated with grammatical gender.”]).

39. See Irmen & Steiger, *supra* note 16 (“Historically, the convention of the masculine as a generic gender goes along with the idea of semantic relation between gender and sex as well as the notion of the masculine gender being more worthy than the feminine.”).

40. See Nöstlinger, *supra* note 15.

41. *Petition*, *supra* note 38.

42. *Id.* (“Mit seiner Ankündigung, mehr als 12.000 Personen- und Berufsbezeichnungen mit weiblicher und männlicher Form in die Netz-Version des Werkes aufzunehmen, betreibt der Duden eine problematische Zwangs-Sexualisierung, die in der deutschen Sprache so nicht vorgesehen ist.”)

43. See *id.* A professor from Humboldt University’s distinguished legal faculty was one of the first 100 signatories. *Id.* (listing Prof. Dr. Luis Greco, professor of criminal law at Humboldt University, as one of the first 100 signatories).

44. Nöstlinger, *supra* note 15, at 2.

45. See Nöstlinger, *supra* note 15, at 3 (“Many traditionalists . . . question the need for gender-neutral language . . .”). See also Peter Allgayer, *Der rechtliche Rahmen des Genderns* [The Legal Framework of Gender-Fair Language], NJW 2022, 452, available at BECK-ONLINE by subscription (arguing that introducing gender-inclusive pronouns is unnecessary because the generic masculine is already inclusive of all genders).

mental representations.”⁴⁶ This finding—discussed further in subsection II.A—strongly cuts against the argument that the generic masculine is truly inclusive.

Even in English speaking communities, where using gender-fair language is grammatically easier, many dictionaries and style guides have still not accepted the use of the singular “they.”⁴⁷ For example, the Chicago Manual of Style (CMS)—one of the leading grammar and style guides—warns that using GFL may diminish an author’s credibility among some readers.⁴⁸ On the other hand, the APA style and grammar guidelines encourage the use of the singular “they” over other GFL forms because it does not perpetuate the gender binary.⁴⁹

II. Systematic Harms Created by the Use of the Generic Masculine

As noted above, even after the emergence of GFL, many languages—primarily grammatical gender languages—still use the generic masculine.⁵⁰ This section explores the costs associated with the continued use of the generic masculine (subpart II.A) and why these costs should be weighed from the perspective of those who bear them (subpart II.B). This section lays the empirical basis for the legal claims that follow in Part IV.

A. Psychological Effects of Male-Biased Language

Numerous studies have documented the negative effects of male-biased language.⁵¹ Put broadly, male-biased language perpetuates gender stereotypes,

46. Dries Vervecken & Bettina Hannover, *Yes I Can! Effects of Gender Fair Job Descriptions on Children’s Perceptions of Job Status, Job Difficulty, and Vocational Self-Efficacy*, 46 *SOCIAL PSYCH.* 76, 78 (2015) (discussing psycholinguistic research on the effects of the generic masculine).

47. See *THE CHICAGO MANUAL OF STYLE* ¶ 5.256 (17th ed. 2017) (noting that the use of the singular *they* is still not “considered fully acceptable in formal writing” but is “steadily gaining ground”).

48. See *id.* ¶ 5.252. At the same time, however, CMS also notes that using the generic masculine also sacrifices credibility with some readers. *Id.* (“On the one hand, many reasonable readers find it unacceptable to use the generic masculine pronoun (*he* in reference to no one in particular). On the other hand, it is unacceptable to many readers (often different readers) either to resort to nontraditional gimmicks to avoid the generic masculine (by using *he/she* or *s/he*, for example) or to use *they* as a kind of singular pronoun . . . Either approach sacrifices credibility with some readers.”).

49. AMERICAN PSYCHOLOGICAL ASSOCIATION: APA STYLE AND GRAMMAR GUIDELINES, *Gender*, <https://apastyle.apa.org/style-grammar-guidelines/bias-free-language/gender> [perma.cc/2VNG-DXXJ] (last visited June 2, 2022) [hereinafter APA STYLE AND GRAMMAR GUIDELINES].

50. In German, for instance, the use of GFL is generally limited to academic or governmental settings. Cf. Ulrich Greiner, *Droht uns die Sprachenzensur? Ja!* [*Are We Threatened by Language Censorship? Yes!*], *ZEIT ONLINE* (May 31, 2018), https://www.zeit.de/2018/23/gendern-schrift-deutsche-sprache-zensur-ja?utm_referrer=https%3A%2F%2Fwww.google.com%2F [perma.cc/78AA-XKAH] (“Wie erfolgreich ist dieser Kampf? An den Universitäten hat er beeindruckende Erfolge erzielt. Es gibt Professoren, die ihren Studenten (korrekt: Studierenden) die Hausarbeit zurückgeben oder Punkte abziehen, wenn sie in der bislang gebräuchlichen Sprache abgefasst wurde. Staatliche Institutionen gehen immer häufiger dazu über, geschlechtsneutrale Partizipien (Auszubildende, Lehrende) oder Doppelnennungen (Schülerinnen und Schüler) vorzuschreiben. Das alltägliche Reden und Schreiben jedoch ist davon noch weitgehend unberührt. Die Muttersprache ist ein zähes Gebilde. Sie gleicht einem vegetativen Nervensystem, das sich gegen externe Anweisungen sträubt.”).

51. See, e.g., Vervecken & Hannover, *supra* note 46, at 77 (finding that “gender fair language . . . promote[s] female] children’s self-efficacy toward traditionally male occupations”);

particularly gendered occupational stereotypes,⁵² and inequalities by continuing to represent men as the dominant gender.⁵³ For instance, researchers in Germany found that the likelihood that someone would name a woman as a possible candidate for chancellor was dependent on the gender of the word “chancellor” in the question.⁵⁴ When only the masculine term was used (*Kanzler*), fewer respondents suggested a female politician as a candidate as compared to when both the masculine and feminine noun forms (*Kanzler/Kanzlerin*) were presented.⁵⁵ Although many argue that the generic masculine includes women as referents,⁵⁶ this argument does not line up with the research.⁵⁷

Studies have found that using masculine pronouns (“he” or “him”) generically—that is, in a manner that is intended to include female as well as male referents—rather than gender-specific pronouns (such as “he” or “she”) produces a male bias whereby listeners and readers are more likely to produce mental depictions of male-only referents.⁵⁸

Simply put, there is ample psycholinguistic evidence that people encountering he/man generics are more likely to think of *male* human beings as the referents of those terms. Thus, when a person reads or hears the word “mankind,” for example, [they are] likely to reflexively conjure up mental images of *men* (doing such-and-so) as opposed to either women or abstract visions [of] “the human race.” This has the effect of minimizing women’s importance and diverting attention away from their very existence. The result is a sort of invisibility—in the language itself, in the individual’s mind’s eye, and in the broader social consciousness.⁵⁹

This can be especially problematic when generic masculine pronouns are used to refer to people in particular professions, as it reinforces the idea that

Sandra L. Bem & Daryl J. Bem, *Does Sex-biased Job Advertising “Aid and Abet” Sex Discrimination*, 3 J. Applied Social Psych. 6, 6 (1973) (finding that women were more reluctant to apply for jobs when the job advertisements were written in gender-biased language); Jane G. Stout & Nilanjana Dasgupta, *When He Doesn’t Mean You: Gender-Exclusive Language and Ostracism*, 37 PERSONALITY & SOCIAL PSYCH. BULLETIN 757, 757 (2009) (finding that women experienced the use of gender-biased language during a mock job interview as ostracism).

52. See Vervecken & Hannover, *supra* note 46, at 77 (*passim*).

53. See Brian D. Earp, *The Extinction of Masculine Generics*, 2 J. COMM’N & CULTURE 4, 6 (2012) (noting that “masculine generics, such as mankind, seem to count being a man as the default or prototypical human status, creating . . . an ‘implicit equation of maleness with humanness’” and explaining how “[t]his equation has the effect of devaluing, excluding, or making invisible female human beings”).

54. See Dagmar Stahlberg & Sabine Sczesny, *Effekte des generischen Maskulinums und alternativer Sprachformen auf den gedanklichen Einbezug von Frauen [Effect of the Generic Masculine and Alternative Language Constructs on the Mental Depiction of Women]*, 52 PSYCH. RUNDSCHAU 131, 135 (2005).

55. *Id.*

56. See, e.g., Allgayer, *supra* note 45, at 457 (arguing that introducing gender-inclusive pronouns is unnecessary because the generic masculine is already inclusive of all genders).

57. See Earp, *supra* note 53, at 6.

58. See Miller & James, *supra* note 18, at 492 (finding that the use of generic masculine pronouns “reduce[s] the likelihood of thoughts of females in what are intended to be non-sex-specific instances”). But see Theresa Redl et al., *The Male Bias of a Generically-Intended Masculine Pronoun: Evidence from Eye-Tracking and Sentence Evaluation*, PLOS ONE 1, 14 (2021) (observing the male bias with generic pronoun use for men but not for women).

59. Earp, *supra* note 53, at 6 (internal citation omitted).

such professions are less accessible to women. Consider the following seemingly innocuous sentence: “A doctor learns that *he* should do no harm.”⁶⁰ Because the masculine pronoun *he*—despite being used in a way that is *intended* to include female referents—“more readily produces thoughts of males, the recipient of the message may assume that doctors are always or most often males or that only males can be doctors.”⁶¹

Indeed, studies conducted with children have found that this is exactly what happens. When children are asked to assess self-efficacy beliefs toward stereotypically male occupations—where self-efficacy is defined as the belief “in one’s capabilities to organize and execute the courses of action required to manage perspective situations”⁶²—they perceive stereotypically male jobs as more accessible (i.e., less difficult) when the job descriptions are presented in paired forms as opposed to the generic masculine.⁶³ This perceived accessibility mediates children’s self-efficacy beliefs about the professions.⁶⁴ More specifically, the researchers asked children: “Imagine you wanted to become . . . , how confident are you that you would pass the qualification test required to do this job when you are grown up?”⁶⁵ The study found that “[w]hen job titles had been presented in pair[ed] forms, children—regardless of their gender, first language, or age—felt more confident that they could pass a qualification test required to do this job than when the professions had been presented as generic masculine.”⁶⁶ The study also found that gender affects children’s self-efficacy beliefs, and that “[b]oys generally felt more confident that they could succeed in stereotypically male occupations than girls.”⁶⁷

If we consider gender pay equity to be a significant aspect of gender equality—a legally protected right—then it becomes clear how these study results could affect the legal landscape. Most high-paying occupations are also historically male-dominated occupations. Describing these occupations using the generic masculine, rather than paired forms, likely reduces the number of women who pursue careers in these fields due to a perceived lack of vocational self-efficacy. In other words: children are unlikely to pursue careers that they do not believe they can be successful at, and women are less likely to believe that they can be successful at stereotypically male professions, which pay higher,⁶⁸ when these professions are described using the generic masculine.

60. This example is borrowed from Miller & James, *supra* note 18, at 483.

61. *Id.* at 483–84.

62. Albert Bandura, *Exercise of personal and collective efficacy in changing societies*, in SELF-EFFICACY IN CHANGING SOCIETIES 1, 2 (Albert Bandura ed., 1995).

63. Verweken & Hannover, *supra* note 46, at 84–85.

64. *Id.* at 85.

65. *Id.* at 83 (describing an operational measure for vocational self-efficacy adapted from Armand Chatard et al., *Impact de la féminisation lexicale des professions sur l’auto-efficacité des élèves: une remise en cause de l’universalisme masculine?* [Occupational Self-Efficacy as a Function of Grammatical Gender in French], 105 L’ANNÉE PSYCHOLOGIQUE 249 (2005)).

66. Verweken & Hannover, *supra* note 46, at 85.

67. *Id.*

68. Indirect evidence can be seen by the fact that when women enter a historically male-dominated field, the salaries drop. See Claire Cain Miller, *As Women Take Over a Male-Dominated Field, the Pay Drops*, N.Y. TIMES (Mar. 18, 2016), <https://www.nytimes.com/2016/03/20/upshot/as-women-take-over-a-male-dominated-field-the-pay-drops.html> [perma.cc/J3TJ-8BZN].

This, thereby, reduces the chances of ever eliminating the gender pay gap.⁶⁹ Indeed, studies have shown that “the gender wage gap . . . can be predicted by the representation of gender in language: [c]ountries with a grammatical gender language show more gender inequality in payment than countries with a natural gender or genderless language.”⁷⁰

B. Whose Perception Matters? Problems with Using the Objective Reasonable Person Standard for Measuring Discrimination

In its discussion of the legal status of Gender-Fair Language,⁷¹ the *Bundesgerichtshof* (“BGH”)—the highest civil law court in Germany—focused on the fact that the generic masculine is, according to the BGH, generally interpreted as encompassing female referents.⁷² According to the BGH, this fact alone means that the use of the generic masculine is not discriminatory.⁷³ One of the lower courts also made the argument that because using the generic masculine corresponds to overall language uses, this does not result in women being treated less favorably than men.⁷⁴ In deciding whether pre-formulated contracts that use the generic masculine result in the discriminatory treatment of women, the BGH interpreted the contracts in light of the “objective perspective of a reasonable third party.”⁷⁵ The problem with this approach is that it assumes that the “objective perspective of a reasonable third party” is itself not discriminatory.⁷⁶ For purposes of this discussion, I will use the term “objective reasonable person” or “ORP”—the English equivalent of what the BGH referred to as the “objective perspective of a reasonable third party.”⁷⁷ Despite appearing on its face to be a gender-neutral construct, the ORP standard⁷⁸

69. Unless, of course, we were to raise the salaries for traditionally female-dominated professions such as nurses and teachers. See *id.*

70. Marcus C. G. Friedrich & Elke Heise, *Does the Use of Gender-Fair Language Influence the Comprehensibility of Texts?*, 78 SWISS J. PSYCH. 51, 52 (2019) (discussing Jennifer L. Prewitt-Freilino et al., *The Gendering of Language: A Comparison of Gender Equality in Countries with Gendered, Natural Gender, and Genderless Languages*, 66 SEX ROLES 268 (2012)).

71. See *infra*, subpart III.A.

72. See Ulrike Spangenberg, *Alltag oder Diskriminierung? [Normal or Discriminatory?]*, 51 KRITISCHE JUSTIZ [CRITICAL JUSTICE] 345, 345 (2018) (“Nach dem allgemein üblichen Sprachgebrauch und Sprachverständnis—so der BGH im Leitsatz der Entscheidung—könne der Bedeutungsgehalt einer grammatisch männlichen Personenbezeichnung jedes natürliche Geschlecht umfassen.” (citing the introduction (*Leitsatz*) to the BGH Sparkasse Decision)).

73. *Id.* (“Die Verwendung des sog. ‘generischen Maskulinums’ sei daher keine Diskrimination.”).

74. See Amtsgericht [AG] [Local Court] Saarbrücken Feb. 12, 2016, Az. 36 C 300/15 (Ger.), <https://openjur.de/u/2324315.html> [perma.cc/838M-LASN].

75. See Spangenberg, *supra* note 72, at 350 (“Für diese Beurteilung stützt sich der BGH unter Bezug auf die Auslegung von Allgemeinen Geschäftsbedingungen auf die objektive Sichte eines verständigen Dritten.”).

76. See *id.* at 350–51.

77. See BGH Sparkasse Decision, *supra* note 17, at 12 (“Maßgeblich für die Beurteilung, ob die betroffene Person eine weniger günstige Behandlung erfährt als die Vergleichsperson, ist die objektive Sicht eines verständigen Dritten, nicht die subjektive Sicht der betroffenen Person.”).

78. The ORP standard is the objective standard used to measure common-law negligence (*Fahrlässigkeit*) in tort law, and its emergence is generally traced to the 1837 case of

is arguably still the “reasonable man” standard in practice.⁷⁹ For example, William Hawkins’s treatise on criminal law referred to “a man of common prudence and caution.”⁸⁰ Likewise, in German law, the construct of the objective third party (*der verständige Dritte*) follows the legal tradition, according to which initially only men could be legal subjects.⁸¹ The same holds true for the Swiss equivalent.⁸² Despite the reformulation of the “reasonable man” to the “reasonable person,” (in German, from the “*vernünftigen Mann*” to the “*vernünftigen Person*”),⁸³ the standard remains, in all aspects apart from its linguistic formulation, an essentially masculine benchmark.⁸⁴

So why does it really matter if conduct is measured based on a “reasonable person” or a “reasonable man” standard? According to the BGH, whether or not a person has been treated less favorably than someone in a comparable position (i.e., whether someone has suffered discrimination based on a protected characteristic) is to be determined from the perspective of an objective third party, *not* from the perspective of the person who allegedly suffered discrimination.⁸⁵ But if the perspective we assess discrimination from is actually a male perspective, then the standard by which we assess discrimination is itself biased and will never lead to truly objective results.⁸⁶ In order to bypass this feature of the ORP standard, courts—including the BGH—must actively confront the discriminatory history of the standard and not apply it in a way that perpetuates historical inequalities.

Vaughan v. Menlove. See Simon Stern, R. v. Jones (1703): *The Origins of the “Reasonable Person”* (Sept. 7, 2015) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657309 [perma.cc/2P8D-VH2Q].

79. See *id.* at 1 (noting that “the reasonable person has, for most of its history, been cast as the reasonable man”); Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1431 (1992) (arguing that “reasonable person” is “simply a linguistic substitute for the reasonable man”); Martin, *supra* note 1, at 340 (“Where the acts of a professional person are being assessed, the standard becomes not that of the reasonable professional of that training, but the standard of the reasonable professional *man*.” (emphasis added)); Alena M. Allen, *The Emotional Woman*, 99 N.C. L. REV. 1027, 1032 (2021) (arguing that “[re]asonableness is not benign” and that “[l]urking in the DNA of the reasonable man is a penchant for dominance and subjugation”).

80. See Stern, *supra* note 78, at 1 (citing 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN (1716)).

81. See Spangenberg, *supra* note 72, at 351–52.

82. *Id.* (“Susan Emmenegger hat 1999 in ihrer Untersuchung zum schweizerischen Schuldvertrags- und Ehe recht gezeigt, dass das ‚konsultative Konstrukt‘ des Dritten—im schweizerischen Recht das Leitbild der ‚vernünftigen Person‘—keineswegs unvoreingenommen ist.”).

83. *Id.* (“Die Entwicklung der ‚vernünftigen Person‘ beginnt beim Leitbild des ‚vernünftigen Mannes‘ und wurde erst später rechtsterminologisch korrigiert und geschlechtsneutral formuliert.”).

84. *Id.* (“Vielmehr sei die vernünftige Person nach wie vor eine vorwiegend männliche Person, deren Verhalten am vermeintlich objektiven Maßstab des vornehmlich männlichen Richterstandes gemessen werde.”).

85. See BGH Sparkasse Decision, *supra* note 17, at 12 (“Maßgeblich für die Beurteilung, ob die betroffene Person eine weniger günstige Behandlung erfährt als die Vergleichsperson, ist die objektive Sicht eines verständigen Dritten, nicht die subjektive Sicht der betroffenen Person.”).

86. *Cf.* Spangenberg, *supra* note 72, at 351–52 (arguing that the objective third-party standard results in a form of structural discrimination, and that this form of discrimination—coupled with the use of the generic masculine—results in “mutually supportive practices that can paradoxically be simultaneously contested and persistent”).

III. The Current Legal Status of GFL Under German Law

A. The *Bundesgerichtshofs* (“BGH’s”) Assessment of GFL Under German Civil Law

In 2018, the BGH considered to what extent GFL might be required under German civil law.⁸⁷ The plaintiff, a female client of the German bank “Sparkasse,” challenged the bank’s use of masculine generics (in particular, the bank’s practice of using only the masculine version of “client”) in its pre-formulated contract documents.⁸⁸ At the time of the lawsuit, a local law (§ 28 *Saarländisches Gleichstellungsgesetz*) required certain public institutions (*Dienststellen*), including the Sparkasse, to use GFL.⁸⁹ This law, however, did not create a subjective right for individual citizens,⁹⁰ and the BGH held that the plaintiff did not have standing to sue Sparkasse for its failure to use GFL, even though this failure was a violation of a public law norm.⁹¹ In addition, the BGH held that the plaintiff had no claim under the German Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz* or “AGG”), because she had not adequately shown that, or in which ways, she had been treated less favorably than a male bank customer.⁹² The BGH also briefly discussed the status of GFL under German constitutional law; however, this portion of the decision will be discussed separately.⁹³

Although the BGH did not ultimately find a subjective legal right to GFL under German civil law, a few aspects of the BGH’s decision are nevertheless notable. First, the BGH held that when addressed using the generic masculine, a person of non-masculine gender experiences no less favorable treatment than a person of masculine gender would experience.⁹⁴ This is debatable, however, given that the psychological data (discussed above) show that women and non-binary individuals are not—psychologically speaking—included as referents when the generic masculine is used.⁹⁵

Second, as discussed above, the BGH held that the relevant standard when measuring discrimination is not how conduct is meant or how it is interpreted by the person who allegedly suffered discrimination, but rather how

87. See BGH Sparkasse Decision, *supra* note 17.

88. See *id.* at 2–3.

89. See Landesgleichstellungsgesetz [LGG] Saarland [State Equal Treatment Law of Saarland], available at https://www.saarland.de/masfg/DE/service/publikationen/publikationen_msgff_einzeln/lgg_praxishandbuch.pdf?__blob=publicationFile&v=3 [perma.cc/4CHX-9T9S].

90. BGH Sparkasse Decision, *supra* note 17, at 3 (“Bei § 28 Saarländisches Gleichstellungsgesetz (LGG Saarland) handle es sich nicht um eine drittschützende Norm, die einen Individualanspruch begründe.”).

91. See § 28 Saarländisches Gleichstellungsgesetz (LGG Saarland) (“Die Dienststellen haben beim Erlass von Rechtsvorschriften, bei der Gestaltung von Vordrucken, in amtlichen Schreiben, in der Öffentlichkeitsarbeit, im Marketing und bei der Stellenausschreibung dem Grundsatz der Gleichberechtigung von Frauen und Männern dadurch Rechnung zu tragen, dass geschlechtsneutrale Bezeichnungen gewählt werden, hilfsweise die weibliche und die männliche Form verwendet wird. . . .”).

92. See *id.* at 3, ¶ 4 (also noting that the AGG does not contain a general requirement that gender-neutral formulations be used in economic or legal communications).

93. See *infra*, subpart III.C.

94. BGH Sparkasse Decision, *supra* note 17, at 12, ¶ 30.

95. See *supra*, subpart II.A.

an “objective third party” would experience it.⁹⁶ Problematically, the BGH used the term “average recipients” (*Durchschnittsrezipienten*) when describing the relevant objective perspective.⁹⁷ If something is discriminatory only against a small percentage of the population, who are thereby not “average”, then it is hard to see how that group will ever be protected under the BGH’s framework. Additionally, as discussed above, the “objective third party” standard has historically been a male perspective,⁹⁸ and therefore the very standard that is being used to assess gender discrimination has male biases baked into it.

Finally, the court focused extensively on what constitutes typical German language usage (*üblicher deutscher Sprachgebrauch*).⁹⁹ According to the court, this is the relevant benchmark for determining whether a particular language construction—in this case the use of the generic masculine—is discriminatory.¹⁰⁰ But there is a problem with this: what if the typical German language usage is itself discriminatory? Measuring discrimination against the status quo will often lead to discriminatory results, since in many cases social change follows legal change. Take, for example, segregation in American schools in the South prior to *Brown v. Board of Education*.¹⁰¹ Prior to *Brown*, segregation was the norm, and many argued that segregation was not discriminatory because White and Black Americans were treated “equally.”¹⁰² It took a tremendous amount of paradigm-shifting legal work—done predominantly by the NAACP—to get to a point where the Court was ready to recognize that “separate” was not “equal,”¹⁰³ and that segregation had a discriminatory impact on African American children.¹⁰⁴ To be clear, this example is not trying to draw a

96. See BGH Sparkasse Decision, *supra* note 17, at 15, ¶ 39 (“Maßgeblich für die Deutung einer Äußerung ist weder die subjektive Absicht des sich Äußernden noch das subjektive Verständnis der von der Äußerung Betroffenen, sondern der Sinn, den sie nach dem Verständnis eines unvoreingenommenen und verständigen Durchschnittsrezipienten hat.”).

97. *Id.*

98. See *supra*, subpart II.B.

99. See, e.g., *id.* ¶ 4 (“Es sei für den Verwender von Formularvordrucken nach dem allgemeinen Sprachgebrauch ohne weiteres ersichtlich . . .”), ¶ 34 (“Dabei ist allgemeinkundig, ob eine Formulierung dem üblichen deutschen Sprachgebrauch entspricht.” (citations omitted)), ¶ 35 (“Grammatisch männliche Personenbezeichnungen können *nach dem allgemeinen Sprachgebrauch* und Sprachverständnis auch Personen umfassen, deren natürliches Geschlecht nicht männlich ist.”).

100. *Id.* at 18, ¶ 45 (“Maßgeblich ist insoweit der allgemeine deutsche Sprachgebrauch.” (citations omitted)).

101. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954), *supplemented sub nom. Brown v. Board of Educ.*, 349 U.S. 294 (1955).

102. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 545 (1896), *overruled by Brown*, 347 U.S. (holding that laws “interfering with the political equality of the negro,” which were unconstitutional under the Fourteenth Amendment, were not the same as “those [laws] requiring the separation of the two races in schools,” which—according to the Court—were constitutional).

103. Compare *Brown*, 347 U.S. at 495 (concluding that “in the field of public education the doctrine of ‘separate but equal’ has no place” because “[s]eparate educational facilities are inherently unequal”), with *Plessy*, 163 U.S. at 548 (arguing that “the enforced separation of the races . . . nether abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the law within the meaning of the fourteenth amendment”).

104. See *Brown*, 347 U.S. at 494–95.

comparison between GFL and desegregation. It is merely intended to highlight the problems of assessing discrimination based on current customary practices.

In summary, the BGH found that there was no subjective right to be addressed in GFL, and that the Sparkasse's failure to use GFL did not constitute gender discrimination because it aligned with common language practices.

B. Literary Critiques of the BGH's Judgment

Several scholars have criticized the BGH's decision. These critiques call into question 1) the BGH's assumption that the generic masculine does not systematically disadvantage women, and 2) the BGH's adoption of a majority-based standard for measuring discrimination.

Regarding the first critique, Professor Gregor Bachmann notes that the BGH interpreted the German AGG narrowly, finding that discrimination is defined based on individual disadvantages and that—in terms of the AGG—structural disadvantages are not covered.¹⁰⁵ The BGH blurred its discussion of legally relevant disadvantage (*Benachteiligung*) with its assertion that using the generic masculine is common practice and that an objective third party understands that the generic masculine includes women.¹⁰⁶ As Professor Bachmann notes, the fact that something is common practice does not preclude it from being a legally relevant disadvantage.¹⁰⁷ Rather, based on the legal definition of disadvantage (*Benachteiligung*), the issue turns on whether a woman experienced less favorable treatment on account of her gender.¹⁰⁸

Professor Bachmann also uses the example of segregation to highlight the loopholes in the BGH's argument. Professor Bachmann compares being “meant as well” (*mitgemeint*) in the context of the generic masculine to having to sit at the back of the bus but still being taken along for the ride. As we all know, this is now considered to be discriminatory,¹⁰⁹ despite it once being common practice.¹¹⁰

With regards to the second critique, touched on above,¹¹¹ Dr. Ulrike Spangenberg points out that there are serious problems with the BGH's reliance on an “objective,” majority-defined standard for measuring discrimination.

105. See Gregor Bachmann, *Kein Anspruch auf geschlechtergerechte Sprache in AGB und Formularen* [No Right to Gender-Fair Language in Terms of Services Agreements and Pre-formulated Contracts], 23 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1648, 1649 (2018) (“Eine strukturelle Benachteiligung ist per definitionem nicht minimal, doch hat das AGG mit seinen Anspruchsgrundlagen nicht die strukturelle Benachteiligung im Blick.”).

106. *Id.* at 1648 (noting that the BGH held that using the generic masculine does not constitute a legally relevant disadvantage because the use of the generic masculine is common in the German language, and it is generally understood that the generic masculine includes women as referents).

107. *Id.* at 1648–49.

108. *Id.* at 1649 (“Nach der Legaldefinition kommt es darauf an, ob eine Frau aufgrund ihres Geschlechts eine ‚weniger günstige Behandlung‘ erfährt.”).

109. See *Browder v. Gayle*, 352 U.S. 903 (1956) (holding that state statutes and city ordinances requiring segregation on buses were unconstitutional).

110. As Dr. Ulrike Spangenberg notes, discrimination does not require discriminatory intent under German law, and instead it is the actual consequences of a rule that matter. Spangenberg, *supra* note 72, at 352.

111. See *supra*, subparts II.B, III.A.

Dr. Spangenberg argues that reference to common language usage (*üblicher Sprachgebrauch*) is the wrong benchmark in anti-discrimination law because anti-discrimination law aims to protect the minority rather than to entrench dominant practices.¹¹²

Dr. Spangenberg also describes the inherent gender biases in the objective reasonable person standard, described above,¹¹³ and explains how the use of this standard fails to capture the discriminatory impact of the generic masculine.¹¹⁴ Dr. Spangenberg argues that it does not matter if the generic masculine is intended to be grammatically neutral; what matters instead is the effect that the generic masculine has in practice and the fact that its disadvantages—in terms of indirect discrimination—overwhelmingly affect women.¹¹⁵

Both critiques highlight that although still good law, the BGH's decision is open to attack on several grounds.

C. The Legal Relevance of GFL Under German Constitutional Law

In addition to the legal status of GFL under German civil law (specifically the AGG), the BGH also discussed the legal status of GFL under German constitutional law.¹¹⁶ The BGH held that there is no right to GFL under either general personality rights (Art. 2 I 1 GG in combination with Art. 1 I 1 GG) or under Article 3, in particular, Art. 3 I, II, III 1 GG).¹¹⁷

The BGH acknowledged that general personality rights (Art. 2 I 1 GG in combination with Art. 1 I 1 GG) protect gender identity, and that gender identity determines how people are addressed.¹¹⁸ Therefore, institutions and businesses may not address individuals contrary to how those individuals perceive their gender identities.¹¹⁹ With regards to the use of the generic masculine, however, the BGH held that general personality rights are not endangered if the gender affiliation is not indicated or designated and the concrete gender affiliation of a person is not reflected.¹²⁰ Essentially, when the masculine is used “generically”—that is, to refer to a category of people (such as a profession) or

112. See Spangenberg, *supra* note 72, at 352.

113. See *supra*, subpart II.B.

114. See Spangenberg, *supra* note 72, at 351–52.

115. *Id.* at 352.

116. See BGH Sparkasse Decision, *supra* note 17, at 17–19.

117. *Id.* at 17.

118. *Id.*

119. *Id.* at 18 (citing Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 15, 1996, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1997, 1632 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 27, 2011, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2012, 600 (Ger.)). See also Nur “Herr” und “Frau” als Anrede ist diskriminierend [Only “Mr.” and “Ms.” as a Salutation is Discriminatory], LEGAL TRIBUNE ONLINE (Jan. 26, 2022), [https://www.lto.de/recht/nachrichten/n/olg-karlsruhe-24u1921-herr-frau-anrede-diskriminierung-aber-keine-entschaedigung/?utm_source=Eloqua&utm_content=WKDE_LEG_NSL_LTO_Daily_EM&utm_campaign=wkde_leg_mp_lto_daily_ab13.05.2019&utm_econtactid=CWOLT000017859750&utm_medium=&utm_crmid=\[perma.cc/N9DR-RVE6\]](https://www.lto.de/recht/nachrichten/n/olg-karlsruhe-24u1921-herr-frau-anrede-diskriminierung-aber-keine-entschaedigung/?utm_source=Eloqua&utm_content=WKDE_LEG_NSL_LTO_Daily_EM&utm_campaign=wkde_leg_mp_lto_daily_ab13.05.2019&utm_econtactid=CWOLT000017859750&utm_medium=&utm_crmid=[perma.cc/N9DR-RVE6]) (describing a more recent case where the Oberlandesgericht (OLG) Karlsruhe held that an online shopping platform that required users to choose between “Mr.” and “Ms.” as a salutation violated equal treatment law and infringing the general personality rights of non-binary individuals).

120. BGH Sparkasse Decision, *supra* note 17, at 18. The original text does not lend itself well to translation and can be found in paragraph 45 of the decision.

to an unknown recipient (as is the case with pre-formulated forms)—it does not harm the personality rights of an individual by referring to them in a way that is not sensitive to their gender identity.

The BGH also found that there was no legal right to GFL under Art. 3 I, II, III 1 GG.¹²¹ The court held that because the generic masculine accords with general German language usage and is (according to the BGH) commonly understood to include women, the Sparkasse had not treated the plaintiff differently than it treated its male customers and had not disadvantaged the plaintiff on account of her gender.¹²² While it may be true that the Sparkasse's use of the generic masculine did not materially disadvantage the plaintiff,¹²³ it seems like a leap to equate accord with common practices with treating two groups of individuals equally (recall Professor Bachmann's bus segregation example described above).¹²⁴

The *Bundesverfassungsgericht* ("BVG"), the highest constitutional court in Germany, has not yet considered the question of the legal status of GFL in detail. In 2020, the Sparkasse customer's complaint reached the BVG; however, the Court dismissed the complaint on the grounds that the complainant had failed to adequately state her claim.¹²⁵ The BVG found that the complainant had not adequately addressed whether § 28 of the *Saarländisches Gleichstellungsgesetz* creates a subjective right of action, and had also not engaged with the argument—put forward by the BGH—that the German constitution (*Grundgesetz*) is itself not written in gender-neutral language.¹²⁶ The Court held that in order for a complainant to overcome a decision issued by a lower court—in this case the BGH—that is supported on multiple grounds, the complainant's constitutional complaint must engage sufficiently with each of these grounds.¹²⁷

IV. An Argument for GFL Under German Civil and Constitutional Law

This section makes the point that despite the decisions of the BGH and the BVG, there are strong legal arguments to be made for gender-fair language under German civil and constitutional law. Although an affected plaintiff might not be able to bring a claim on her own behalf due to standing issues,¹²⁸ the legislator and the courts should recognize that GFL is a legal imperative under German law.

121. *Id.* at 18–19.

122. *Id.* at 18, ¶ 48 ("Angesichts des üblichen Sprachgebrauchs und Sprachverständnisses . . . behandelt die Beklagte Personen männlichen Geschlechts sowie die Klägerin nicht ungleich . . . und benachteiligt die Klägerin nicht wegen ihres Geschlechts.")

123. See Bachmann, *supra* note 105, at 1649 (arguing that while the use of the generic masculine does not directly disadvantage individuals, it nevertheless creates structural disadvantages that indirectly disadvantage individuals).

124. See *supra* subpart III.B; Bachmann, *supra* note 105, at 1649.

125. Bundesverfassungsgericht [BVG] [Federal Constitutional Court] May 26, 2020, 1 BvR 1074/18, ¶ 4 (Ger.), http://www.bverfg.de/e/1k20200526_1bvr107418.html [<https://perma.cc/ZH9U-5ENT>] ("Die Verfassungsbeschwerde ist nicht zur Entscheidung anzunehmen, da sie den Begründungsanforderungen nicht genügt.")

126. *Id.* ¶ 3.

127. *Id.* ¶ 5.

128. See BGH Sparkasse Decision, *supra* note 17, at 3.

A. The Right to GFL Under German Civil Law

1. *The Generic Masculine Creates an Indirect Disadvantage (Mittelbare Benachteiligung) for Women, That is Not Immaterial*

As discussed in subpart II.A, the use of the generic masculine is not truly “benign” as the BHG and the *Landesgericht Saarbrücken* maintained.¹²⁹ Even if the generic masculine is *intended* to include women, intent is not necessary for something to be discriminatory in a legally relevant way.¹³⁰

Particularly when it comes to children, who are specially protected under international law,¹³¹ the generic masculine can have significant negative effects on the professional prospects of young girls. For example, Article 29 of the UN Convention on the Rights of the Child requires that state’s educate children in a way that allows them to develop their “personality, talents and mental and physical abilities to their fullest potential.”¹³² However, as psycholinguistic studies show, girls are less likely to pursue careers in historically male-dominated professions when those professions are described using generic-masculine terms.¹³³ When studying the linguistic intervention of describing traditionally male professions in paired forms (providing both the masculine and feminine versions), Vervecken and Hannover found that children between the ages of six and twelve, particularly girls, were more likely to view a profession as within their reach when presented with the feminine noun form alongside the masculine noun form.¹³⁴ Given that “[g]irls also tend to feel more restricted than boys in the number of occupations which they perceive to be ‘within reach’ and ‘appropriate’ for them,”¹³⁵ the negative impact of using the generic masculine, particularly when describing professions, can be significant for young girls.

On a broader level, language can also influence gender stereotypes and sexist attitudes within a culture, and studies have shown “that the stronger a language’s grammatical gender, the more its speakers rely on grammatical gender cues for making social inferences . . . and the more likely they are to express sexist attitudes.”¹³⁶ For example, Wasserman and Weseley conducted

129. See *supra*, subpart II.A.

130. See Spangenberg, *supra* note 72, at 352 (“Diskriminierung [setzt] weder Vorsatz noch Intention voraus, sondern stellt auf die tatsächlichen Folgen einer Regelung ab.”).

131. See *Protecting Children’s Rights*, FED. FOREIGN OFF. (Mar. 4, 2020), [https://www.auswaertiges-amt.de/en/aussepolitik/themen/menschenrechte/06-kinder/-/227618#:~:text=The%20four%20fundamental%20rights%20of,all%20decisions%20affecting%20their%20lives.\[perma.cc/XB8Z-PCS7\]](https://www.auswaertiges-amt.de/en/aussepolitik/themen/menschenrechte/06-kinder/-/227618#:~:text=The%20four%20fundamental%20rights%20of,all%20decisions%20affecting%20their%20lives.[perma.cc/XB8Z-PCS7]).

132. UN Convention on the Rights of the Child art. 29, Sept. 2, 1990, 1577 U.N.T.S. 13.

133. See Vervecken & Hannover, *supra* note 46, at 86 (explaining that “[g]eneric masculine forms versus pair forms do have a differential effect on children’s perceptions of the accessibility of stereotypically male occupations”).

134. *Id.* at 86–87.

135. *Id.* at 87 (citing Aimee Dorr & Gerald S. Lesser, *Career Awareness in Young Children*, 3 COMM. RES. & BROADCASTING 36, 36–75 (1980); William R. Looft, *Sex Differences in the Expression of Vocational Aspirations by Elementary School Children*, 5 DEV. PSYCH., 366 (1971); Mary McMahon & Wendy Patton, *Gender Differences in Children and Adolescents’ Perceptions of Influences on Their Career Development*, 44 THE SCHOOL COUNSELOR 368, 368–76 (1997)).

136. *Id.* (internal citations omitted).

a study to see if reading in a grammatically-gendered language would increase sexist attitudes in high school students.¹³⁷ The researchers found that when they asked the high school students to complete a survey of sexist attitudes in either English (a natural gender language) or a language with grammatical gender (French or Spanish), the students who completed the survey in French or Spanish showed more sexist attitudes in their responses.¹³⁸ Based on these results, the researchers concluded “that languages with grammatical gender promote sexist attitudes and have particular impact on females.”¹³⁹

As Professor Bachmann notes, the discriminatory harm caused by the generic masculine is hard to see at the individual level.¹⁴⁰ It exists rather at a larger structural level and is therefore by definition not *de minimis*.¹⁴¹ Although the AGG does not—as of yet—capture this type of discrimination, an evaluation of the AGG commissioned by the federal anti-discrimination office (*Antidiskriminierungsstelle des Bundes*) recommended that the AGG create a more binding framework with regards to positive measures—that is, measures designed to compensate for existing disadvantages—in order to overcome existing structural discrimination.¹⁴²

Another option would be to see structural discrimination—as it relates to an individual of the class effected by that discrimination—as an indirect form of discrimination against that individual. In its opinion the BGH rejected this approach.¹⁴³ However, it is still worth examining closer. As Professor Bachmann describes, indirect disadvantage occurs when a measure appears to be neutral on its face—for example, school district zoning based on zip codes that happen to correspond to segregated neighborhoods—but in practice disadvantages a protected group (i.e., the minority students who all end up at lower-funded public schools).¹⁴⁴ According to Professor Bachmann, however, a finding of indirect disadvantage also requires that the measure disadvantages the plaintiff “in a particular way.”¹⁴⁵ He argues that this is not the case for the female Sparkasse customer because the use of a pre-formulated document written in the generic masculine does not seriously disadvantage her.¹⁴⁶

One could argue, however, that “in a particular way” means a way that is particular to the plaintiff. Interpreted broadly, this could then be seen to mean that a plaintiff is disadvantaged in a particular way if the plaintiff belongs to the class of individuals who are disadvantaged by the measure, and if the class is protected under the AGG. Under this interpretation, the plaintiff in the Sparkasse case *would* be indirectly disadvantaged by the Sparkasse’s

137. See Benjamin D. Wasserman & Allyson J. Weseley, *¿Qué? Quoi? Do Languages with Grammatical Gender Promote Sexist Attitudes?*, 61 *SEX ROLES* 634, 634 (2009).

138. *Id.* at 634.

139. *Id.*

140. See Bachmann, *supra* note 105, at 1649.

141. *Id.*

142. ANTIDISKRIMINIERUNGSSTELLE DES BUNDES [FEDERAL ANTI-DISCRIMINATION OFFICE], EVALUATION DES ALLGEMEINEN GLEICHBEHANDLUNGSGESETZES [EVALUATION OF THE EQUAL TREATMENT ACT] 6 (2016).

143. See Bachmann, *supra* note 105, at 1649.

144. See *id.* (citing *Allgemeines Gleichbehandlungsgesetz* § 3, para. 2).

145. *Id.*

146. *Id.*

use of the generic masculine because she belongs to the protected class of individuals—women and non-binary folks—who are disadvantaged by the use of the generic masculine.

2. *The German General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz or “AGG”) is Intended to Overcome Structural Disadvantages Based on Protected Traits*

The purpose of Germany’s General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz* or “AGG”) is to prevent or eliminate discrimination on the basis of race, ethnic origin, sex, religion or beliefs, disability, age, or sexual identity.¹⁴⁷ Section 5 of the AGG also allows for positive measures designed to reduce existing structural disadvantages.¹⁴⁸ For example, unequal treatment, even on the basis of a protected class, is allowed if it is for the purpose of overcoming an existing structural disadvantage.¹⁴⁹ The classic example of this in Germany is the *Frauenquote* (“women’s quota”), which is aimed at increasing the number of women in certain professions and particularly in management positions.¹⁵⁰

3. *Based on a Teleological Interpretation of the AGG, Masculine Generics Should be Considered to Constitute a Legally Relevant Disadvantage Under the AGG*

Looking at § 1 and § 5 in tandem, it is hard to see how the legislature could have intended the scope of the AGG to be as narrow as the BGH interpreted it.¹⁵¹ According to the BGH, the generic masculine does not constitute a legally relevant disadvantage because it conforms to typical German language usage.¹⁵² As discussed above, however, the fact that something conforms to general practices does not make it *per se* non-discriminatory.¹⁵³ Although at an individual level it may be hard to see the true impact of the generic masculine,¹⁵⁴ psycholinguistic studies show that the use of the generic can have real

147. ALLGEMEINES GLEICHBEHANDLUNGSGESETZ (AGG) [EQUAL TREATMENT ACT], § 1, https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/AGG/agg_gleichbehandlungsgesetz.pdf?__blob=publicationFile#:~:text=August%202006%20in%20Kraft%20getreten.&text=Ziel%20des%20Gesetzes%20ist%2C%20Benachteiligungen,zu%20verhindern%20oder%20zu%20beseitigen [perma.cc/2372-KBKZ].

148. See *Allgemeines Gleichbehandlungsgesetz* § 5.

149. See *Diskriminierung aus Gründen des Geschlechts [Discrimination on the Basis of Sex]*, SENATSWERWALTUNG FÜR WISSENSCHAFT, GESUNDHEIT, PFLEGE UND GLEICHSTELLUNG [SENATE DEPARTMENT FOR SCIENCE, HEALTH, CARE AND EQUITY], <https://www.berlin.de/sen/frauen/recht/agg/geschlechts-diskriminierung/#:~:text=Das%20Geschlecht%20als%20Diskriminierungsmerkmal&text=Explizit%20erw%C3%A4hnt%20das%20AGG%2C%20dass,daher%20das%20biologische%20Geschlecht%20erfasst.> [perma.cc/VEE7-35XR] (last visited May 15, 2022).

150. See *id.*

151. See BGH Sparkasse Decision, *supra* note 17, at 12–14.

152. But see *id.* at 1648 (“Allein schließt das eine ‚Benachteiligung‘ iSv § 3 I AGG nicht aus.”).

153. See subpart III.B.

154. See Bachmann, *supra* note 105, at 1649.

and lasting impacts, specifically on young girls,¹⁵⁵ and can further increase sexist attitudes in society.¹⁵⁶

4. *Whether or Not the Use of the Generic Masculine is Legally Justifiable is an Open Question*

Even if, as argued above, the use of the generic masculine by public institutions such as the Sparkasse constitutes a legally relevant disadvantage, this still leaves open the possibility that such a disadvantage is legally justified.¹⁵⁷ Under the AGG, unless there is an “objective reason” for the unequal treatment, a disadvantage is justified (and therefore does not violate equal treatment law).¹⁵⁸ In the case of the generic masculine, potential justifications for its use include the cost of implementing GFL, liability concerns (specifically in the case of contracts and other legal documents), and the comprehensibility of text written in GFL. The lower courts in the Sparkasse case raised the first two potential justifications when discussing a potential constitutional violation.¹⁵⁹ The third potential justification has been widely circulated by GFL critics.¹⁶⁰ A discussion of each potential justification will follow.

a. The Costs of Implementing GFL are Too High

In weighing the interests of Sparkasse customers with the interests of the Sparkasse, the lower courts argued that implementing GFL would bear significant costs for the Sparkasse.¹⁶¹ The BGH agreed with the lower courts that implementing GFL would require considerable economic expenditures on the part of the Sparkasse.¹⁶² Although changing all current boilerplate templates to GFL would certainly bear some cost,¹⁶³ it is hard to imagine that the costs of updating these templates would be prohibitively high. As Professor Bachmann notes, the elimination of an established yet discriminatory system is always

155. See Vervecken & Hannover, *supra* note 46.

156. See Wasserman & Weseley, *supra* note 137.

157. See *Allgemeines Gleichbehandlungsgesetz* § 8 § 20.

158. *Id.* § 20, para. 1; see Bachmann, *supra* note 105, at 1649 (“[N]ach [§ 20 I AGG] ist eine Verletzung des Benachteiligungsverbots nicht gegeben, wenn für die unterschiedliche Behandlung ein sachlicher Grund vorliegt.”).

159. See Amtsgericht [AG] [Local Court] Saarbrücken Feb. 12, 2016, Az. 36 C 300/15 (Ger.), <https://openjur.de/u/2324315.html> [perma.cc/838M-LASN]; Landgericht [District Court] Saarbrücken, Mar. 10, 2017, Az. 1 S 4/16, <https://openjur.de/u/972021.html> [perma.cc/CVB3-VRY5].

160. See, e.g., Nöstlinger, *supra* note 15 (quoting a CDU politician who claimed that GFL would make it “no longer . . . fun to read a novel”); Greiner, *supra* note 50 (arguing that texts written in GFL are incomprehensible).

161. See Amtsgericht [AG] [Local Court] Saarbrücken Feb. 12, 2016, Az. 36 C 300/15 (Ger.), <https://openjur.de/u/2324315.html> [perma.cc/838M-LASN]; Landgericht [District Court] Saarbrücken, Mar. 10, 2017, Az. 1 S 4/16, <https://openjur.de/u/972021.html> [perma.cc/CVB3-VRY5].

162. See Spangenberg, *supra* note 72, at 345 (citing the introduction to the BGH Sparkasse decision).

163. Cf. Michael Kluth, *Gender-Sprache in Kiel kostet 50000 Euro [GFL in Kiel Costs 50,000 Euro]*, KIELER NACHRICHTEN (May 22, 2019), <https://www.kn-online.de/Kiel/Geschlechtergerechtigkeit-Gender-Sprache-in-Kiel-kostet-50000-Euro> [perma.cc/3LQ7-E69U] (reporting that the introduction of GFL in Kiel’s city administration will cost the city at least 50,000 euro).

tied to expenditure.¹⁶⁴ In addition, electronic word processing programs and industry-wide templates should make the implementation of GFL reasonably feasible and cost-effective.¹⁶⁵

b. Institutions like Sparkasse Might be Exposed to Legal Risks if They Implement GFL

Lower courts raised the additional concern that institutions like the Sparkasse might face increased legal risks if they to use GFL and thereby deviate from the standardized forms issued by the *Deutschen Sparkassenverlag* (the publishing house for German savings banks).¹⁶⁶ The Landgericht Saarbrücken noted that because the Sparkasse currently uses standardized forms that are kept up to date by the *Deutschen Sparkassenverlag*, the *Sparkassenverlag* bears the responsibility of making sure that the forms are aligned with the most recent German case law.¹⁶⁷ If the Sparkasse were to use its own forms, then it could potentially face legal liability if the forms did not conform to federal law.¹⁶⁸

Although it is true that the Sparkasse can avoid some liability by using standardized forms rather than composing its own, it is also true that the Sparkasse is legally required under the LGG to use GFL in its pre-formulated forms and contract documents.¹⁶⁹ It is therefore not viable to argue that the Sparkasse should avoid liability for *potentially* violating the law by doing something that *definitely* violates the law.

c. Text Written in GFL is “Ugly” and Hard to Understand

Many critics of GFL argue that it is simply too hard to understand and that it makes text “ugly.”¹⁷⁰ Recall, for example, the CDU politician who claimed that GFL will make it “no longer . . . fun to read a novel.”¹⁷¹ Some critics go even further and argue that text written in GFL is “unreadable” and “unspeakable.”¹⁷² But is that really true? Beauty is a subjective standard, so it is certainly possible to argue that text written in GFL is less attractive for many readers.¹⁷³ Comprehension, meanwhile, is something that is easier to measure

164. Bachmann, *supra* note 105, at 1650.

165. *See id.*

166. *See* Amtsgericht [AG] [Local Court] Saarbrücken, Feb. 12, 2016, Az. 36 C 300/15 (Ger.), <https://openjur.de/u/2324315.html> [perma.cc/838M-LASN]; Landgericht [District Court] Saarbrücken, Mar. 10, 2017, Az. 1 S 4/16 (Ger.), <https://openjur.de/u/972021.html> [perma.cc/CVB3-VRY5].

167. Landgericht [District Court] Saarbrücken, Mar. 10, 2017, Az. 1 S 4/16 (Ger.), <https://openjur.de/u/972021.html> [perma.cc/CVB3-VRY5].

168. *Id.*

169. *See* § 28 Saarländisches Gleichstellungsgesetz (LGG Saarland).

170. *See, e.g.,* Greiner, *supra* note 50 (arguing that texts written in GFL are “ugly and full of contortions” and that “only the previous German is understandable for everyone”).

171. Nöstlinger, *supra* note 15.

172. Greiner, *supra* note 50 (“Gendergerechte Texte sind nicht lesbar und nicht sprechbar.”).

173. *See, e.g., id.* (comparing an English translation of a poem to the original and arguing that much of the poetic beauty of the text is lost without the gendered nouns). *See also* Bachmann, *supra* note 105, at 1651 (questioning whether the beauty of a text is sufficient justification for unequal treatment based on gender).

empirically. Indeed, psychologists have measured the effects of GFL on text comprehension.

Markus Friedrich and Elke Heise conducted an experiment where they compared the comprehensibility of a text written in GFL to the comprehensibility of the same text written using the generic masculine.¹⁷⁴ In addition, the participants were shown a simplified version of the text.¹⁷⁵ All versions of the text were written in German, and Friedrich and Heise found that the students who read the version of the text written in GFL did not rate it significantly harder to understand ($p > .05$) than the students who had read the version of the text written using the generic masculine.¹⁷⁶ Students who received a simplified version of the text, meanwhile, did rate it significantly easier to understand.¹⁷⁷ These results suggest that if readability is the goal, then attacking GFL is not the answer, and institutions like the Sparkasse would have a better chance at increasing the comprehensibility of their contracts if they used more common words and avoided complex sentence structures.¹⁷⁸

When it comes to aesthetics, participants rated the text written in GFL as slightly less aesthetically pleasing.¹⁷⁹ But is this enough to justify a language form that structurally disadvantages women? According to Professor Bachmann, whether or not concern for lexical beauty is enough to justify unequal treatment is an open question.¹⁸⁰ If one follows the current guidelines for reform of the AGG—which call for tightening the scope of possible justifications for unequal treatment¹⁸¹—then it seems unlikely that the aesthetics of a text would be enough to justify the discriminatory disadvantages that accompany the use of the generic masculine.

5. Conclusion

In conclusion, the AGG should be interpreted broadly and in a way that encompasses structural discrimination. In addition, none of the concerns raised by the courts in the Sparkasse case are sufficient to justify a structural linguistic disadvantage based on gender.

B. GFL as a Legal Imperative (*Staatsziel*) Under German Constitutional Law

Under Article 3 of the German Basic Law (*Grundgesetz*), men and women shall receive equal treatment under the law (Art. 3 II 1 GG). Furthermore, the

174. See Friedrich & Heise, *supra* note 70.

175. *Id.* at 55–56.

176. *Id.* at 56.

177. See *id.*

178. See *id.* at 55 (describing the steps taken to reduce the complexity of the sample text).

179. See Paula Leocadia Pleiss, *Warum es nicht ausreicht, Frauen "mitzumeinen"* [Why It's Not Enough to "Intend to Include Women"], WELT (June 3, 2019), <https://www.welt.de/kmpkt/article194491179/Generisches-Maskulinum-Warum-es-nicht-ausreicht-Frauen-mitzumeinen.html> [<https://perma.cc/4M6U-9FKL>]. But see Sczesny, Formanowicz & Moser, *supra* note 7, at 7 ("When GFL texts were compared to (generic) masculine texts, there were no differences in readability and esthetic appeal." (emphasis added) (citation omitted)).

180. See Bachmann, *supra* note 105, at 1651.

181. See EVALUATION OF THE EQUAL TREATMENT ACT, *supra* note 142, at 6.

State has a responsibility to promote the actual implementation of equal rights for men and women and to work towards eliminating existing disadvantages based on sex or gender (Art. 3 II 2 GG). The second sentence of paragraph 2 in Article 3 does not create a subjective right. However, it is a so-called “national goal” (*Staatsziel*) or legal imperative.¹⁸² The state constitution of Sachsen contains a legal definition of the term *Staatsziel*, according to which the State has a duty to strive to achieve constitutionally-established goals to the best of its ability and to align its actions accordingly.¹⁸³

Although the construct of state goals is weaker than that of the state structure principles (*Staatsstrukturprinzipien*), state goals nevertheless constitute binding directives for all exercises of state power¹⁸⁴, and stipulate that the state is constitutionally bound to pursue certain objectives.¹⁸⁵ According to one commentary, state goals “are not mere constitutional prose, rather they constitute applicable law that binds the state.”¹⁸⁶

Given the negative impact that the generic masculine has on individuals who do not identify as masculine,¹⁸⁷ it should be the duty of the state to implement GFL as part of its attempt to achieve true gender equality. The state of Saarland was arguably attempting to do just that by requiring public institutions—such as the Spaarkasse—to use GFL in their official communications.¹⁸⁸ To what extent the State is required to promote the use of GFL outside of its own communications is debatable. However, any attempt to hinder the use of GFL—such as by banning its use in official communications¹⁸⁹—should be seen as a blatant violation of the *Staatsziel* contained in Article 3 of the *Grundgesetz*.¹⁹⁰

V. Counterarguments

This section addresses the most serious counterarguments against GFL. It does not discuss counterarguments which, although prevalent, are mainly political.¹⁹¹

182. See CHRISTOPH GRÖPL, KAY WINDTHORST & CHRISTIAN VON COELLN, STUDIENKOMMENTAR GG [COMMENTARY TO THE GERMAN BASIC LAW] 114 (C.H Beck ed., 4th ed. 2020).

183. See VERFASSUNG DES FREISTAATES SACHSEN [CONSTITUTION OF THE FREE STATE OF SACHSEN], May 27, 1992, art. 13 (Ger.), available at https://www.slpb.de/fileadmin/media/Publikationen/Ebooks/verfassung_freistaat_sachsen.pdf [<https://perma.cc/PJ8V-DUHB>].

184. See GRÖPL, WINDTHORST & VON COELLN, *supra* note 182, at 390.

185. *Id.* (Staatszielbestimmungen legen den Staat verfassungskräftig auf die Verfolgung bestimmter Ziele fest.”).

186. *Id.* ([Staatsziele sind keine unverbindliche Verfassungsprosa, sondern geltendes recht, das den Staat bindet.”).

187. See *supra*, subpart II.A.

188. See § 28 Saarländisches Gleichstellungsgesetz (LGG Saarland) (“Die Dienststellen haben beim Erlass von Rechtsvorschriften, bei der Gestaltung von Vordrucken, in amtlichen Schreiben, in der Öffentlichkeitsarbeit, im Marketing und bei der Stellenausschreibung dem Grundsatz der Gleichberechtigung von Frauen und Männern dadurch Rechnung zu tragen, dass geschlechtsneutrale Bezeichnungen gewählt werden, hilfsweise die weibliche und die männliche Form verwendet wird. . .”).

189. See, e.g., *GFL Should Be Banned*, *supra* note 36 (describing the CDU politician Christoph Ploß’s attempt to ban GFL in official communications).

190. See Grundgesetz, art. 3, II 2.

191. For instance, the “language is a trivial concern” and the “that’s the way we’ve always done things” arguments are not explored in this section. See Anna Katharina Mangold,

A. GFL is Incomprehensible

As noted above, many critics of GFL argue that it makes text, particularly in German, too hard to understand.¹⁹² Although it is more difficult for an author or speaker to apply GFL, the empirical data does not show that GFL makes text harder to understand—even in German.¹⁹³ Specifically, as discussed above, researchers have found that readers do not find it significantly harder to understand GFL text than text written using masculine generics.¹⁹⁴ In other words, empirical data do not support the argument that GFL is incomprehensible.¹⁹⁵

Those who oppose GFL also argue that GFL may have the effect of discriminating against certain groups of people, such as non-native speakers and those with a harder time understanding language, because it makes text harder to understand.¹⁹⁶ However, this argument rests on the assumption that GFL does indeed make text harder to understand. As this assumption is not supported by empirical research, this argument also has no teeth.

B. GFL Perpetuates the Gender Binary

This is the most serious argument against GFL, and it deserves considerable attention. As noted above, there are several ways in which authors may implement GFL. Authors, first, may feminize their writing by using both men and women as referents in a sentence. For example, rather than simply using a masculine pronoun to refer to an unmarked noun (i.e., *the judge . . . he*), an author may use paired forms (i.e., *the judge . . . he or she*).¹⁹⁷ In German, feminization involves using both the masculine and feminine versions of a noun when referring to a referent of an unknown gender (i.e., *Kolleginnen und Kollegen*).¹⁹⁸

The problem with feminization is that it implicitly excludes non-binary folks.¹⁹⁹ As a result, some GFL guidelines encourage avoiding feminization when possible and instead using other GFL strategies. For example, the APA style and grammar guidelines encourage using the singular “they” rather than feminine-masculine word pairs (e.g., “he or she”) because “such constructions imply an exclusively binary nature of gender and exclude individuals who do not use these pronouns.”²⁰⁰ Along similar lines, Peter Allgayer notes that fem-

Frauen sind mitgemeint. . . ? [Women are Included. . . ?], VERFASSUNGSBLOG [CONSTITUTIONAL BLOG] (Mar. 13, 2018), <https://verfassungsblog.de/frauen-sind-mitgemeint/> [perma.cc/9D-K5-WC3W]; Maija S. Blaubergs, *An Analysis of Classic Arguments Against Changing Sexist Language*, 3 WOMEN'S STUD. INT'L Q. 135 *passim* (1980).

192. See subsection IV.A.4(c).

193. See Friedrich & Heise, *supra* note 70, at 56.

194. See *id.*

195. See, e.g., Greiner, *supra* note 50 (arguing that “only the previous German is understandable for everyone”).

196. See Bachmann, *supra* note 105, at 1651.

197. See Lindqvist, Renström & Sendén, *supra* note 26, at 109.

198. See *GFL in German*, *supra* note 31.

199. “Non-binary” refers to individuals who “feel their gender cannot be defined within the margins of the gender binary” and who “understand their gender in a way that goes beyond simply identifying as either a man or woman.” *Non-Binary Inclusion*, LGBT FOUND., <https://lgbt.foundation/who-we-help/trans-people/non-binary> [perma.cc/4Z99-9KN4] (last visited May 30, 2022).

200. APA STYLE AND GRAMMAR GUIDELINES, *supra* note 49.

inization only (explicitly) includes men and women as referents, and thereby leaves out individuals who do not identify as either gender.²⁰¹ According to Allgayer, the generic masculine does a better job of including non-binary individuals than feminization does.²⁰² The question then becomes whether masculine generics, as Allgayer argues, are truly more inclusive than feminization.

Although feminization does perpetuate the gender binary by implying that there are only two genders, this does not necessarily mean that it is less inclusive than the generic masculine. As noted above, the generic masculine tends to produce mental depictions of male-only referents.²⁰³ Feminization, therefore, does a better job of including *more* individuals as referents, even if it does not perfectly capture all potential referents. Although it is by no means a perfect solution, it is still a step in the right direction in terms of inclusivity.

The second strategy for achieving GFL is through neutralization. Neutralization can involve using gender-neutral noun forms (e.g., *police officer* instead of *policeman*)²⁰⁴ or creating gender-neutral pronouns (such as the singular “they” in English or the Swedish pronoun “hen”).²⁰⁵ In German, neutralization can also be achieved through substantiation (e.g., *die Studierende*) or through using unmarked noun forms (e.g., *Staatsoberhaupt*). The problem with singular unmarked nouns in German is that they must be written with a gendered direct or indirect article. For example, “a student” must either be written as *ein Studierende* (masc.) or *eine Studierende* (fem.).²⁰⁶ There is no commonly accepted singular gender-neutral pronoun in German,²⁰⁷ and given the current resistance to GFL in Germany²⁰⁸ it seems unlikely that one will emerge in the near future.

Unlike feminization, neutralization does not imply that there are only two genders. However, some studies suggest that neutralization may face some of the same problems as the generic masculine. Namely, gender-neutral noun forms likely produce mental depictions of male referents,²⁰⁹ specifically in contexts

201. See Allgayer, *supra* note 45, at 457.

202. *Id.*

203. See generally Sczesny, Formanowicz & Moser, *supra* note 7, at 6 (“Regardless of language structure and the ease of implementing GFL . . . a consistent finding is that speakers do not understand masculine forms as referring to both genders equally but that they interpret them in a male-biased way.” (internal citation omitted)).

204. See *id.* at 1.

205. See Lindqvist, Aurora Renström & Gustafsson Sendén, *supra* note 26, at 109.

206. See *GFL in German*, *supra* note 31 (“Im Singular zeigt der Artikel bei den Substantivierungen das Geschlecht an. Geschlechterneutral ist hier nur die Pluralverwendung.”).

207. Although the German language technically has three genders, including a “neutral gender” (*neuter*), the neutral pronoun “es” is equivalent to “it” in English and is generally only used to refer to inanimate objects. Some non-binary folks prefer to use either no pronouns or the gender-neutral pronoun “em;” however, the use of singular gender-neutral pronouns in German is still on the outskirts and is not nearly as common as the use of the singular “they” in English. See Lena Mändlen, *Welches Pronomen benutzt man bei Menschen, die sich weder als Mann noch als Frau definieren?* [Which Pronouns Does One Use for People Who Identify as Neither Masculine nor Feminine?], JETZT (Jan. 2, 2020) (describing a non-binary individual who prefers to use either no pronouns or the gender-neutral pronoun “em”).

208. See *supra*, subpart I.C.

209. See Sczesny, Formanowicz & Moser, *supra* note 7, at 6.

where male stereotypes are prevalent.²¹⁰ Nonetheless, gender-neutral forms still display less of a male bias than generic-masculine forms.²¹¹

Other German-specific GFL strategies, although often criticized, do a better job of including non-binary individuals. For example, the “gender gap” (e.g., *Professor_innen*) and the “gender star” (e.g., *Professor*innen*) are both examples of GFL devices where the extra character is intended to represent non-binary individuals.²¹²

A final strategy that has been implemented in some countries and by some institutions in an attempt to overcome the male bias in language is the use of the generic feminine rather than the generic masculine (e.g., *the plaintiff . . . she*). In English language academic writing this standard has become much more common over the last half century.²¹³ In addition, some studies also show that the use of the generic feminine has increased in non-academic writing as well. For example, Brian D. Eerp examined the evolution of sexist language (e.g., *mankind* vs. *humankind*) and generic pronoun use, and found that between 1990 and 2012 the spontaneous use of the generic feminine in an experimentally conducted personal writing task increased from 4% percent in 1990 to 13.5% in 2012.²¹⁴

In Germany, some institutions and groups—such as the University of Leipzig²¹⁵ and the student representatives for the University of Erlangen-Nürnberg²¹⁶—have chosen to adopt the generic feminine. Although the generic feminine has become quite common in English language academic writing, it has been met with considerable resistance in Germany.²¹⁷ For instance, in response to the University of Leipzig’s adoption of the generic feminine in its university constitution, many older male professors were concerned that they might one day be referred to by feminine job titles (e.g., *Doktorin* or *Professorin*).²¹⁸

210. See Stahlberg & Sczesny, *supra* note 54, at 135 (“Diese Ergebnisse geben erste Hinweise darauf, daß eine häufigere Nennung von Frauen bei geschlechtergerechter Sprache nur dann erfolgt, wenn in der abgefragten Kategorie Frauen plausiblerweise vertreten sind . . . nicht jedoch wenn Frauen deutlich weniger repräsentative Vertreterinnen der genannten Kategorie als die männlichen Exemplare.”).

211. Lisa Irmen & Nadja Roßberg, *Gender Markedness of Language: The Impact of Grammatical and Nonlinguistic Information on the Mental Representation of Person Information*, 23 J. LANGUAGE & SOCIAL PSYCH. 272, 299 (2004).

212. See Anja Kühne, “Frauen sind keine Sonderfälle” [“Women are not a Special Case”], DER TAGESSPIEGEL (June 6, 2013), <https://www.tagesspiegel.de/wissen/generisches-femininum-an-der-uni-leipzig-frauen-sind-keine-sonderfaelle/8310626.html> [perma.cc/N4AS-KH5G] (arguing that the gender gap and gender start do not refer only to men and women, but also to other genders such as transgender and intersex people).

213. Cf. *id.* (“In der amerikanischen Wissenschaft sagen die Autoren oft am Anfang ihrer Texte in einer Fußnote, dass sie im folgenden nur ‚she‘ sagen oder zwischen ‚she‘ und ‚he‘ wechseln, aber immer alle Geschlechter gemeint sind.”).

214. Eerp, *supra* note 53, at 14.

215. See *id.*

216. Louweyers, *Generic Feminine*, STUDIERENDENVERTRETUNG DER UNIVERSITÄT ERLANGEN-NÜRNBERG (May 17, 2021), <https://stuve.fau.de/en/2021/05/17/generisches-femininum/> [perma.cc/47MV-Z4S7].

217. Franziska Hentsch, *Universität Leipzig: Heftige Reaktionen auf die weibliche Form [University of Leipzig: Strong Reactions to the Female Form]*, DEUTSCHLANDFUNK (Aug. 8, 2014), <https://www.deutschlandfunk.de/universitaet-leipzig-heftige-reaktionen-auf-die-weibliche-100.html> [perma.cc/T6QZ-W7C9].

218. See *id.*

However, as the University of Erlangen-Nürnberg's student representative group points out, this is exactly the same gender bias that already exists with the generic masculine—it is just being reversed in an attempt to overcome existing structural disadvantages.²¹⁹

Although it is still controversial in Germany, the generic feminine has several advantages over other GFL strategies. Specifically, it avoids many of the critiques against GFL—e.g., that it is syntactically complicated and, in some instances, grammatically incorrect—while at the same time making women more visible in language. However, it is still less inclusive of the non-binary population than neutralization.

In general, neutralization is the preferable GFL strategy when it comes to true gender inclusivity. However, as noted above, neutralization faces some of the same problems as the generic masculine—namely, gender-neutral terms also tend to produce mental depictions of male-only referents.²²⁰ This may be especially the case in contexts where male referents are more cognitively accessible due to the prevalence of males in that position or industry. To overcome this cognitive bias, it may be necessary to use feminization as a mechanism for improving diversity and thereby improving cognitive accessibility of non-male referents. Once the gender landscape changes, it is possible that gender-neutral terms will produce a more balanced result in terms of cognitive referents.

Conclusion

Research demonstrates that the generic masculine is not—psychologically speaking—inclusive and that its use perpetuates structural gender inequalities. From a German legal standpoint, these findings should be taken seriously and the BGH should not have been so quick to conclude that the generic masculine does not constitute a legally relevant disadvantage for women and non-binary individuals.

Many of the arguments against GFL—such as that it makes text harder to understand—are not supported by the empirical data.²²¹ As some have pointed out, the criticisms against GFL are mainly political.²²² Indeed, overcoming structural discrimination and implicit sexism is hard. However, this is not a justification for not doing it. Given the legal imperative (*Staatsziel*) contained in Article 3 of the German Basic Law to strive for true gender equality, putting GFL into practice—at the very least in government and state-sponsored communications—should be the clear choice. This may mean that it is time

219. Louweyrs, *supra* note 216.

220. Szesny, Formanowicz & Moser, *supra* note 7, at 6.

221. On an anecdotal level, I was recently tasked with reviewing a German prospectus exemption document (*Prospektbefreiendes Dokument*) that happened to be written in GFL. As a non-native speaker the fact that the document was written in GFL did not make it harder to understand than it otherwise would have been.

222. See, e.g., Blaubergs, *supra* note 191, at 136 (“The arguments that favor *man* and *mankind* as generics are not substantive, but political.” (quoting Julia P. Stanley, *Prescribed Passivity: The Language of Sexism*, in *VIEWS ON LANGUAGE* (Reza Ordoubadian & Walburga von Raffler Engel eds., 1975))).

to rewrite the German Basic Law to explicitly include women and non-binary individuals.

Although Article 3 paragraph 2, sentence 2 of the German Basic Law and the German AGG do not convey a subjective right to be addressed in gender-fair language,²²³ there is nevertheless a responsibility on the State to implement language policies that promote gender equality and do not promote or perpetuate sexism and inequality.

223. GRÖPL, WINDTHORTS & VON COELLN, *supra* note 182, at 114 (“Art. 3 II 2 begründet im Gegensatz zu Art. 3 II 1 kein Grundrecht, also kein subjective-öffentliches Recht, sondern einen Förderauftrag an den Staat, in erster Linie an den Gesetzgeber (Staatsziel).” [Article 3, paragraph 2, sentence 2 does not establish a basic right, i.e., a subjective right. This is in contrast to Article 3, paragraph 2, sentence 1. Instead, Article 3, paragraph 2, sentence 2 establishes a mandate on the State—in the first place on the lawmaker (i.e., a legal imperative).].) See also Art. 3 II 2 GG (“Der Staat fördert die tatsächliche Durchsetzung der Gleichberechtigung von Frauen und Männern und wirkt auf die Beseitigung bestehender Nachteile hin.”).