

## VI. Conclusion

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The starting point of this book was an interest in the mismatch of hypervisible pro-LGBTQ+ Supreme Court victories such as *Obergefell v. Hodges* (2015) and *Bostock v. Clayton County* (2020), and the increasing targeting of queers on a state level and areas unrelated to marriage and employment. Analyzing the compartmentalized U.S. American legal system and influential actors in it, I have laid out how legal considerations are always connected to political processes, which leaves laws ultimately in the hands of those in positions of power. The aim of this book was to draw attention to law's potential not only as an instrument of power but also as an agent of change, to deconstruct processes of establishing legal norms and the cultural conditions connected to them, and to establish Law and Culture's relevance for queer rights projects. To do so, I set out to argue for a heightened constitutional protection of sexual orientation in the form of a class-based equal protection, to stress the importance of Law and Culture approaches to analyzing legal-cultural entanglements, and to examine legal categorizations from a Cultural and Queer Studies perspective.

To engage with these research questions, Chapter I introduced the most important theories, concepts, and perspectives this book works with. Going beyond a mere theoretical and methodological introduction, this chapter is also a positioning among various former and current queer scholars whose voices I aim to amplify in my research. Further, it is meant as an invitation and call to action for other queer cultural-legal interlocutors who wish to engage in the shift from a cultural studies of law to a queer legal hermeneutics.

Chapter II introduced the fundamentals of the U.S. Constitution's Equal Protection Clause and commented on its cultural and legal histories, those culturally emphasized with equality as cherished U.S. American value, and those invisibilized with the Supreme Court's continuous attempts at circumventing equality for all. Revisiting the history of suspect classification served to understand the logic of using categories for equal protection and as illustration

how the cultural narrative of equality does not fit cultural-legal realities of minority groups from the 1860s to now. The last part turned to current cultural-legal developments by focusing on constitutional imaginaries and how they feed into sociocultural discourse and thus affect queer realities. This last subchapter demonstrated how cultural imaginaries and cultural narratives surrounding the Constitution, the Supreme Court, and the U.S. American (cultural-)legal system are picked up by political actors and are thus constantly being (re-)shaped and (mis-)used. The efficacy of American Constitutionalism affects people on a both legal and cultural level, arguing for a heightened constitutional protection of sexual orientation therefore ties into this logic and draws on the entanglements of quasi-sacred cultural notions of constitutional law to gain legitimacy.

Chapter III conducted a heightened review of the Supreme Court as an institution and of its justices. By looking at historic developments of the Court and dissecting contemporary dynamics of its polarization and politization, the claim that SCOTUS is an apolitical institution has been exposed as flawed and political in itself. Conducting a wide, critical legal reading of the most influential Supreme Court cases involving sexual orientation in the twenty-first century, this chapter established the biases in justices' modes of interpretation and their personae as such, making a strong argument for a form of anti-discrimination law that is not dependent on a fifth vote and trust in the egalitarian socialization of those on the bench. This chapter also illustrates how closely tied cultural and legal norms are and that deconstructing them may involve trying to rearrange systems which resist reorganization. The frustration and limited capacity to change legal and cultural norms while being still informed and ordered by them leaves this book's second aim in a state that is never accomplished but always in the process of becoming. Evading the finalization of deconstruction by reconstructing themselves constantly, legal and cultural norms continue to evolve, however (un)desired this development may seem. Thus, it requires endless efforts, patience, and discipline from everyone involved, academics and activists, to tackle these issues on a regular basis without losing faith in one day seeing the change one fights for.

Chapter IV set out to examine the various entanglements of law and culture within the realm of sexuality, particularly sexual orientation, and the connections between cultural and legal orders. Having shown in its first part that legally progressive decisions may not (always) contribute to cultural change or even encourage a distinct analysis of cultural, often naturalized concepts, part two established how processes of (legal) categorization make law an inflexible

tool for responding to queer demands and for reflecting queer realities adequately. Picking up on this notion of representing queer lives, part three analyzed why class-based protections are necessary as a first step towards an equitable queer legal future. This form of protection ties into identity political demands which see struggles as specific to certain groups, yet supplements this view with the claim that distinct legal analysis and treatment of minority demands strengthens cultural-legal sensibilities and may thus be able to foster cultural transformations through law. Parts four and five completed this analysis by offering a more general critique of law's essentialist and essentializing qualities. Introducing the concept of legal sexual orientationism, this chapter supplied a tool for tackling cis, heterosexist and -normative regimes which are already inscribed in and often invisibilized by law.

Chapter V shed light on some queer configurations of the U.S. legal system and introduced proposals for how to achieve them. Calling for a queering of constitutional cultures, the need to protect sexual orientation more thoroughly has been illustrated from both a cultural and legal perspective. I claim that revising legal and sociocultural norms needs to be conducted simultaneously to prevent repressing legal affects, which may (re-)enter legal and cultural spheres when not challenged. To support his claim, this part contextualized the call for sexual orientation's suspect classification by commenting on contemporary attacks on LGBTQ+ and women's rights. Having conducted a queer cultural-legal analysis of suspect classification's four criteria, I queered the notion that there needs to be solid proof for non-heterosexual orientation's imagined essentialisms of immutability or moral neutrality. Plus, I established that the Court's reluctance to review cases involving sexual minorities with strict scrutiny crystallizes as politically motivated instead of legally valid. The last part introduced configurations to the current legal system as voiced by queer scholars and activists. To do so, the interconnectedness between cultural and legal understandings of rights has been analyzed and deconstructed.

## Findings

This book has illustrated the suspectness of categories and processes of categorization, and the sociocultural and legal imaginaries which continue to marginalize LGBTQ+ people. By uncovering inequalizing conditions, law is able to initiate discourses about these conditions, which means relegating discriminatory issues back to the cultural realms that give birth to them. In this function, Law and Culture invites questioning the cultural conditions which seem 'natural' or 'given.' This fragility and volatility of law may tem-

porally be overcome by aiming for constitutional protections and solutions connected to polarizing contemporary legal issues. This logic feeds on the quasi-sacred place the Constitution inhabits in U.S. American culture and the Supreme Court's legitimacy in the U.S. American imagination. The authority the Constitution and other civil religious texts and symbols still hold speaks for the power and appeal of cultural texts that aim to build and maintain collective belonging and cohesion.

All of these findings support a human rights approach which stresses equality, a problematic concept in itself as this book laid out, on the expense of class-based protections. While sexuality and gender are legally overregulated in U.S. and one should consider erasing sex, possibly even identity-based categories, from legal considerations all together, this route is currently not the one queers should be arguing for, let alone possible to cement socioculturally. As William Eskridge claims, one "cannot go that far, for the feminist reason that sex remains a potent weapon of patriarchy, a way in which women are subordinated in relationships, the workplace, and society" (*Gaylaw* 11). Likewise, when it comes to queer rights and the question whether it would not make more sense to remove class-based protections altogether, an argument made by, for instance, legal scholar Kenji Yoshino, one has to acknowledge that such a transformative change ultimately has to fail in the current sociocultural climate. If one approaches anti-discrimination projects from this perspective, framing group-based protections as minoritarian endeavors and cultural considerations as identity politics merely serves to keep demands in check. The sexualized, racialized, gendered, ethnicized, and culturalized Other remains othered by stressing individualism, arguments about privacy, and thinking about rights in terms of social group membership. This claim is highly controversial as universal rights are in fact not universal but specific. As I have shown, law's universality is illusionary as long as *de jure* law continues to produce *de facto* discriminatory realities.

Thinking about the queer rights project in terms of universal rights, independent of social group membership and identity politics, may thus not be instrumental in creating equal social realities. But what else is there? Intersectional perspectives, universal right claims, and identity politics are vital for sensibilizing others for a group's or individual's concerns, needs, and realities. Yet, basing rights' claims on universal rights grounds will fail as long as rights have to be granted in order to become valid in our Western cultural understanding, and as long as having rights requires someone to give them to us. This call for rethinking rights, not with regard to specific ones but with re-

gard to the concept of rights as such, needs to evolve around cultural notions of law and more explicitly around our understanding of what rights do and how they are conceived of. These findings emphasize the need for “new texts” of minority protections in Robert Cover’s sense. Such texts are equally important in the form of new constitutional protections and cultural configurations of how queer subjects in and outside the law are imagined and constructed. These new texts are all the more important at a time in which the affective force of constitutional-cultural imaginaries adds to processes of judicial politization and political polarization.

In her presentation at the November 2021 workshop for the research group *Global Contestations of Women’s and Gender Rights* at the *Zentrum für interdisziplinäre Forschung* at Bielefeld University (Germany), Mishuana Goeman quite impressively linked considerations about rights to ecological and political issues by claiming that “if we all got the equal right to destroy the environment, it doesn’t matter.” A cultural revision of what law and rights entail, particularly in regard to notions of liberty, privacy, and equality, would need a frame to think about these issues and one which allows deconstructionist endeavors to be planted on democratic and pluralist soil. Law and Culture may provide such a locus when it is rediscovered as a hub of practical and theoretical approaches to how communal life should be organized. However, this discipline needs to be bold enough to alienate its academic co-disciplines by opening up and inviting non-academic voices, bodies, and experiences. This way, Law and Culture can enable anti-discriminatory projects to make use of its resources and emerge as the locus of mediating between legal pluralist understandings.

## What Is Next

The most recent developments with regard to the Court, namely the overturn of *Roe* in *Dobbs* and increasingly Christian conservative decisions such as *Kennedy v. Bremerton School District*<sup>1</sup> make an acknowledgement of sexual minorities’ unequal position in constitutional protection highly unlikely. They also show that queer rights efforts are always in progress and that even finally accomplished rights are not secure forever. Even more, referring to *Lawrence v. Texas* and *Obergefell v. Hodges* in *Dobbs v. Jackson Women’s Health Organization* as “errors” the Court has “a duty to ‘correct,’” Justice Clarence Thomas’ opinion

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1 In *Kennedy*, the Supreme Court held 6–3 that a (public) high school football coach’s engagement in Christian prayers during and after games is protected by the Free Exercise and Free Speech Clause of the First Amendment.

foreshadows that queer and trans bodies are expected to be even more policed, pathologized, and violated in the near future. The force of the *Dobbs* decision and the public backlash against it also bear questions about the harmfulness of strong judicial review and the power it grants to the Supreme Court justices.

Further, *Dobbs* and state-level anti-queer laws stress the need to engage in cultural-legal analyses of conservative actors' narrative strategies. This will prove increasingly important to understand how LGBTQ+ bodies are constructed as not only non-normative but also harmful, contagious, and unnatural. Such attempts at de-humanizing sexual minorities growingly take on human rights semantics to add more authority to them.

While these developments oppose this book's aim, i.e., to argue for sexual orientation's suspect classification, they add emphasis to the claim that queer, cultural analyses of law deserve a more prominent place in academic and activist discourses. *Dobbs* as well as state-level anti-LGBTQ+ bills and laws crystalize conservative anger and backlash against queer and trans possibilities and thereby directly comment on sociocultural transformations. Having to turn to law as the source of authority in times of diversifying sociocultural pluralism stresses the need for LGBTQ+ scholars to engage with this field, too, and to work towards queering and transing the legal system.

Remembering Francisco Valdes' call to "introduce[] Queer cultural consciousness into jurisprudence—which has not yet recognized meaningful legal identities for sexual minorities" (Kepros 294), my analyses reiterated and strengthened some of Valdes' points from 1995:

[W]e have gone from being "queers" and "homosexuals" to being "gay" and "lesbian" and "bisexual" and, most recently, to being 'Queer' ... This progression also has included the construction of a culture, the cultivation of a history, the organization of communities, and the study of the tribe. ... This progression, in turn, now can provide a point of transition from Queer cultural politics and studies to Queer legal theory and, ultimately, to Queering legal culture and doctrine. (350–1)

Law and Culture needs to queer cultural and legal consciousness(es) which are yet too concerned with recognizing only heteronormative identities, whether in cultural or legal terms. Strengthening sensibilities and understanding for sexual hierarchies and implicit and explicit legal orders cannot only be accomplished by establishing *de jure* equality. As my findings show, *de facto* equality

needs to evolve out of legal regulations and cultural conditions which secure and back legal orders.

Just as legal and cultural realms are entangled, queering cultural and legal consciousness(es) cannot take place within one discipline or on one platform alone. Legal and cultural literacy can only be gained through various media and research fields with different forms of visibilities of identities, diverse forms of narrativization of events, different forms of discourses, and different forms of imagined and experienced, collective and individual realities. Fostering a legal-cultural, bias-sensitive education has to acknowledge and keep in mind pluralistic positions in order to evade illiberal and undemocratic instrumentalization.

Defining political work then exceeds party politics and expands to include forms of fostering pluralism and strengthening democratic processes in our respective realms. This way, reading, talking, writing, thinking, and loving become the most important tools in fights against oppression. Changing existing laws thus may be possible via proposing bills as a politician, interpreting existing legal norms as a judge or justice, protesting against inequalities as an activist, educating students about legal systems and cultural processes as an academic, questioning one own's role in maintaining oppressive structures as a member of society, or doing a mixture of all of the above during the course of one's intersectional life time. In my understanding, not only are all of these measures beneficial for strengthening an equitable sociocultural reality but they are also mutually supporting each other.

This book has illustrated the strict scrutiny sexual orientation minorities have to face everyday while simultaneously being denied more thorough legal protections. The ongoing politization and polarization of democratic institutions, most prominently the Supreme Court, reinforce the volatility of legal norms and constitutional land gains for minorities. Whether it is female bodily autonomy as seen in the 2022 Supreme Court *Dobbs* decision which re-delegated abortion rights to the states, or same-sex marriage as seen in Justice Alito's and Thomas' 2020 statement about the faultiness of *Obergefell* – formerly gained fundamental rights are not secure. The currency of having to fear for the loss of one's rights is arguably connected to the thinning out of political moderatism and the growth of religious conservatism in the U.S. Thus, fearing for a complete paradigm shift in terms of rights is an affective part of each election.

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I wished to draw attention to the entanglements of law and culture, and the need for incorporating analyses of these connections into academic and activist practice. The intersections of law and culture are today arguably still underresearched, and in terms of academic disciplines oftentimes perceived of in binary pairs; law is then the rather rational, clear, instrumental part, and cultural studies stands in for the more emotional, fluid, almost erratic field. Here, gendered stereotypes of academic disciplines apply and again mirror how much sexual hierarchies are culturally embedded. However, to both law and culture these qualities are not essential but rather have been essentialized. In this sense, law is not *a priori* discriminatory and cultural concepts not *per se* natural. It is up to us as academics, and activists, to deconstruct these false assumptions and thus to contribute to encouraging queers to make use of the legal resources available to us while also working to expose cultural imaginaries and narratives which wield essentializing power. Only this way will queers be able to tackle discriminatory cultural and legal orders simultaneously.