V. Approaches Towards a Queer Legal Future

V.1. Queering Constitutional Cultures

Speaking of a 'queer legal future' is already a bold statement in itself. It supposes that there will be a futurity in and for queerness and that it is also reflected in law. Thinking back a few decades and even in many states and countries today, being or being read as queer, especially when intersecting with other categories of difference such as being Black, brown, trans, non-binary, dis/abled, poor, and/or having no access to education, meant and still means fearing for one's life. For people facing such situations, making and having made these experiences, the promise of a queer legal future may sound shallow and deceiving – how can law, as a state-centered mechanism, achieve justice for those the state has oppressed, violated, murdered, and persecuted for years? This skepticism about what law is, whom it benefits, and which subjects it constitutes is mirrored in the various responses throughout academic disciplines and activist practices. Two of the most recent strands in thinking about law are found in feminist jurisprudence's approaches towards a post-categorical law (see Liebscher et al.) and activist endeavors to fundamentally transform law by eventually abolishing the current legal system (see Abolition Collective). These two perspectives will be examined in this chapter, and add to establishing a queer hermeneutics of law, between those making law and those being affected by law, beyond what is and towards what could be. In addition to this analysis of recent discourses about law's future(s), this chapter proposes its own practical perspectives on anti-discrimination protections. By applying a queer legal theoretical lens, the Supreme Court's way of deciding on suspect classifications is troubled and queer(ed) alternatives to existing constitutional practice are proposed. Queer and queering in this context not only refer to the importance of establishing a queer legal hermeneutics of constitutional law and equal protection but they also serve to reclaim cis-ed, heteronormativized

legal territory. Suspect classifications, as this chapter argues, need to include sexual orientation for both legal-protective purposes and sociocultural space holding.

So far, this book has analyzed how law holds the possibility to be utilized as an emancipatory instrument, yet has historically rather been (ab)used as a tool for maintaining and legitimizing power hierarchies. Aiming to strengthen the queer legal hermeneutics this book constructs, this chapter examines different approaches towards a reformation of the entanglements of queer lives and law. As argued throughout, law is not to be approached as a secluded domain within a system of meaning-making; law is rather a vital part of culture's set-up and something we need to (learn to) navigate. Thus, even if our understandings of what a 'legal order' constitutes differ, – codified legal norms, judicial interpretation, sociocultural norms that order and regulate behavior just as well as legal ones, a state-made instrument of oppression, – our conceptualizations of legality and justice are in parts shaped by the legal and moral cultures surrounding us (Ewick and Shelby; Legrand "Comparative;" Olson *Legality*). Even in discourses about abolishing the legal system in its current form (see Chapter V.3), Western understandings of the concept of 'law' lead to finding other, community-based approaches that one may nevertheless regard as law because they fulfill an ordering and regulatory function.[1] An important distinction is that such alternatives promise less discrimination and more intersectionality.

My analyses of constitutional law and sexual orientation's suspect classification are situated within the belief that changing legal and sociocultural norms need to go together to proactively challenge backlash. While this is but one approach to thinking about queer rights, this chapter also takes into account the affective power of feelings of justice in its discussion of abolitionist ideas and utopian configurations in order to (re-)imagine what law means and whether it is necessarily an instrument of power or of those in power. While these approaches reject a state-based solution to justice, these movements do foundational work for changing sociocultural norms and learning from them

1 This understanding of law and hierarchies is also mirrored in Danielle Allen's assessment that "[b]ut not least, the world without rule is not a world without hierarchy, nor a world without constraints, it is rather that hierarchy and constraints, such as laws, must be legitimate" ("Nicht zuletzt ist die Welt ohne Herrschaft keine Welt ohne Hierarchie und auch keine Welt ohne Zwänge, vielmehr müssen Hierarchie und Zwänge, wie zum Beispiel Gesetze, legititm sein") (71 qtd. in Thiele 398).

is necessary for building a queer legal future which acknowledges its own communities' heterogeneity and endures differences within.

The approaches introduced here start from different political-activist assumptions, propose more or less radical transformations, and offer views of sociocultural processes from functional, conflicting and/or feminist angles. What they all share, however, is their understanding that norms challenging discrimination need to be reformed – because, and in order to guarantee that, there is a (legal) futurity in and for queerness.

V.2. The Cultural and Legal Significance of Sexual Orientation's Constitutional Protection

This book has commented on the history of equal protection, the politicization and polarization of the Supreme Court, and cultural imaginaries surrounding constitutional processes. While the previous chapters have established *how* sexual orientation is treated legally, it remains yet to uncover *why* this treatment should be reformed via considering it a suspect classification. After all, anti-discrimination laws could simply be introduced by the legislative. Starting from the premise that anti-discrimination is more affectively, symbolically, and legally powerful when emerging out of a constitutional reading, this subchapter analyzes why a class-based protection for sexual orientation is relevant from both a cultural and legal standpoint.

From a legal perspective, this question has already been approached through close readings of cases which had discrimination based on sexual orientation as their foundation (see Chapter III). It is important to stress again that any project aiming at legal protection of sexual minorities needs to carefully consider which tools are the most efficient in establishing long-lasting change. As we have seen by looking at statues, bills, but also landmark cases such as *Bowers* and *Roe*, legal conditions bear the risk, and possibility respectively, of being overturned in the future with some being more resistant to change than others. The analyses of important landmark decisions such as *Lawrence* or *Windsor* showed the fragility of Acts and stressed the need to find reliable legal protections for sexual minorities.

Foreshadowing the Trump administration's attacks on queer rights, Evan Gerstmann already anticipated in 2003 the vulnerability of merely reforming government policies and federal laws without challenging "the position of gays and lesbians at the bottom of the equal protection hierarchy [which] denies

them constitutional protection against the reinstatement of any of these policies should the political climate change" (*Underclass* 7). To Gerstmann, this position at the 'bottom of the equal protection hierarchy' has been established by the number of equal protection cases gays, lesbians and bisexuals have lost (*Underclass* 5–6) as well as by the lack of "any *legal* standard to protect them from discrimination" (*Underclass* 8; emphasis in original), leaving them at the hands of "judicial sympathy and intuitions about fairness" (8).[2] As the concept of legal sexual orientationism makes explicit (Chapter IV.4), Gerstmann's assessment is not surprising given that law assumes its default subjects to be heterosexual and cisgendered, and thereby continues to constitute this legally idealtypical, rights-holding individual. Rather than standing at the bottom of the equal protection hierarchy, these subjects seem to be annexed in hindsight because those dominating the U.S. constitutional interpretive community simply did not consider sexual minorities a part of equal protection's promise.

Current demands to review progressive Supreme Court landmark decisions illustrate this point, with justices seeking to reopen the debate about the validity of *Obergefell*'s constitutional reading[3] and land gains for opponents of abortion rights. From January 2021's finding that restrictions of access to abortion medication are constitutional in FDA v. American College of Obstetricians and Gynecologists to September 2021's "Texas Heartbeat Act" (HB 1515 / SB8), in which Texas banned abortions after six weeks of pregnancy except in cases of medical emergency (see TX SB 8 Sec. 171.205 a), the Supreme Court has granted anti-abortion actors more space and authority. In May 2022, a leaked Supreme Court draft majority opinion written by conservative Justice Samuel Alito confirmed these anxieties of an overturning of Roe v. Wade. In Alito's draft, which is the opinion for *Dobbs v. Jackson Women's Health Organization*, the Court is set

2 This view on sexual minorities is also found in William Eskridge Jr.'s work, see *Gaylaw* 2: "Although it is not illegal to be gay in the United States, the law continues to treat gay people as second-class citizens." While Eskridge and Gerstmann have conducted their analyses before landmark decisions such as *Obergefell* and *Bostock*, it remains true that queers have to legitimate themselves and their desires before being granted equal rights compared to cis-heterosexuals. As (cis-)heterosexuality continues to be the sociocultural norm in U.S. America, queers are subjected to a comparison to this norm and an implicit, and sometimes even explicit, social, political and legal expectation to assimilate to this norm, see also Chapter IV.6 on legal sexual orientationism.

3 See the statement by Justices Thomas and Alito in *Kim Davis v. David Ermold* (2020), as well as Thomas' opinion in *Dobbs* (2022).

to find that since "[t]he Constitution makes no reference to abortion" (5, draft majority opinion by Alito) and "Roe was egregiously wrong from the start" (6, draft majority opinion by Alito), "Roe and Casey must be overruled" (6). With June 2022's Dobbs decision, the Supreme Court finalized its gradual work towards gutting abortions rights and strengthening both state authority and religious conservatives. These increasingly successful attempts of changing existing progressive legal conditions are direct and coordinated attacks on minority rights and overregulate sexuality through means of law.

In order to counteract such developments, legal projects need to ask themselves which route is most promising for achieving their aims without being curled back anytime soon. Admittedly, activists and legal scholars are no clairvoyants and as the previous chapters have made clear, legal norms are as fluid as sociocultural ones. However, aiming to accommodate groups' needs and working towards a pluralistic future need to evolve around changing people's perceptions in addition to tackling legal regulations.

One preferred route is change via legal acts. Proposals such as the *Equality Act* are important for drawing attention to LGBTQ+ realities and they foster public discourse about legal protections of minorities. The *Equality Act*, which has been introduced several times in Congress by Democrats but always failed to gain a majority vote, aims to tackle "the patchwork nature of state non-discrimination laws and the lack of permanent, comprehensive federal non-discrimination laws leaves millions of people subject to uncertainty and potential discrimination that impacts their safety, their families, and their day-to-day lives" (*Equality Act*).

The enactment of the *Equality Act* would legally achieve the same protections as sexual orientation's suspect classification: prohibiting discrimination on the basis of sexual orientation in the areas of public accommodation (sec. 3), public facilities (sec. 4), public education (sec. 5), employment (sec. 7), housing (sec. 10), credit (sec. 11), and juries (sec. 12) on a federal level. Even more, this Act would apply to discrimination based on sexual orientation *and* sex *and* gender identity, making it even more sweeping than a mere protection of one of those categories.

Yet, acts are introduced by politicians and have to go through both chambers in Congress to become law. This means that acts in general and the *Equality Act* in particular depend on the ruling government's political stance towards queers. In addition, as analyzed in the context of the *Defense of Marriage Act* (DOMA) in Chapter III.3, acts may be superseded by the Supreme Court or, as with the *Equality Act* itself, are stalled by the respective political majority op-

posing it.[4] As both of these instances illustrate, acts prove to be rather vulnerable to political volatilities, making them wobbly foundations for minority protections. This is even more concerning at a time of (il)legal moves of self-empowerment by extremist political groups and politicians. The rise of far-right politicians and those who sympathize with organizations supporting conspiracy myths such as QAnon[5] have made it more difficult to reach compromises in Congress. The power play between the U.S.'s two major political parties has become more polarized and violent over the last years as seen in the capitol attack by a mob of Trump supporters in January 2021, the peak of an ongoing struggle for political hegemony. Moreover, attempts to legally investigate and culturally process the violence against democratically elected officials have been filibustered and stalled by Republicans.[6] As these instances show, legal-political compromises continue to become more contested, making the option of achieving long-lasting change for queer demands via legal acts less likely.

Of course, constitutional protections of sexual minorities are no less dependent on democratic structures which preserve their validity and frame the social order than acts are dependent on politicians. Thus, one may argue that law, regardless of whether it is established through state made bills, constitutional amendments or executive orders, is only as authoritative as the institutions that issue it. But while trust in politicians and lawmakers seems to plummet since the 2010s, (re)turning to supposedly eternal ingredients of Americanness seems to increase. The Constitution, as important pillar of U.S. American identity, still evokes more positive feelings and adherence than legislatively enacted acts. This affective relation to the Constitution is (closely) connected to the narratives and imaginaries described in Chapter II.4, and the understanding of one's fundamental rights as inalienable, natural and potentially universal. For instance, one is more familiar with hearing someone else invoke their

4 Democratic Congressman David Cicilline (RI) introduced the *Equality Act* in 2019 in the House of Representatives but, after passing, it remains for consideration at the Republican-controlled senate as of January 2021.

5 Among them are Representatives Marjorie Taylor Greene from Georgia and Colorado's Lauren Boebert (Kirkpatrick). QAnon followers believe in the existence of a 'deep state' in the U.S. which is controlled by Democratic satanists. The network of QAnon supporters is believed to be involved in a number of coordinated attacks, most prominently the attack on the U.S. Capitol on 6 January 2021(Kirkpatrick).

6 In May 2021, Senate Republicans under minority leader Mitch McConnell tried to prevent the creation of a bipartisan commission to investigate the events of January 6, see Smith.

freedom of speech than claiming their rights laid down by a state bill with equal fierce and determination. Constitutionally protected rights are not only more readily available in one's legal imagination but also more affectively charged than are state ordinances, local regulations, or city statutes.

The differences in affective and symbolic weight of legal texts are not only dependent on the governmental branch that decides on them but also on their socioculturally created meaning. Although a state bill and a fundamental right both allow or prohibit certain conducts, the former has certainly a less prominent place in how people imagine their legal systems, i.e., how they perceive of what is legal or illegal in their respective state. This fuzziness of compartmentalized legal norms, the 'big' ones stated in the Bill of Rights and found under Due Process and the 'small' ones consisting of state bills, local regulations, city policies, influences U.S. moral cultures as well. While fundamental rights are ingrained into one's understanding of what is allowed, or even prescribed, and (a) right from birth onwards due to popular cultural invocations in television series, films, and novels, state and local laws play a significantly less important role in one's legal knowledge and moral understandings. This claim requires more elaboration. By stating that constitutional rights are imagined as more fundamental or more readily available as such, I am not referring to the general relationship between federal and state law. States have historically tried to enact laws which reflect the sentiment of their citizens, and federal regulations have had the tendency to divide the federal and states' governments along ideological lines. A prominent example can be found in different states' different legal regulations about religious liberty or toleration in the seventeenth and eighteenth century.

Today, these ideological divides ultimately refer back to how one interprets the words and ideals laid out in the Constitution and how much autonomy it grants to the states. Yet, it is still conspicuous that constitutionally protected rights such as the right to bear arms are more readily invoked than are specific state regulations. One's affective relationship and feelings of belonging to one's state may thus influence one's *Rechtsgefühle* without having knowledge about state-specific legal norms. In these instances, one can again observe how legal-cultural education, or lack thereof, bears legal-cultural imaginaries: Imagining Texas, for example, as more liberal than California may hold affective truth for those conceiving of "woke" laws such as the right to bodily autonomy as paternalistic and constraining. It does however not indicate which of these states indeed has more liberal laws than the other.

This cultural argument for a constitutional instead of a legislative solution for queer legal vulnerabilities is packed by the Supreme Court's ability to shape cultural sentiments and thus works to de-escalate legal stalemates between fundamental rights, in particular when it comes to religion and freedom of speech. As the 2018 landmark decision *Masterpiece Cakeshop v. Colorado Civil Rights Commission* shows, the threat of striking down LGBTQ+ and women's protections is particularly imminent in questions of religious belief and moral convictions and continues to raise questions about the relationship between liberty and equality (see Chapter III.3).

Another option to induce legal change is via Executive Orders such as President Biden's Executive Order 13988 on "Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation." This order has been celebrated by mainstream media as a progressive pro-LGBTQ+ measure that forcefully heralded the start of a post-Trumpist political era. In fact, from a sociocultural perspective, this order was successful in conveying the impression that better times are coming and it therefore did affective legal work. The Biden administration managed to evoke the impression of being decidedly in favor of queer and trans issues and ready to fight for them, too. The emotional first section of the order speaks to this:

> Every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love. Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports. Adults should be able to earn a living and pursue a vocation knowing that they will not be fired, demoted, or mistreated because of whom they go home to or because how they dress does not conform to sex-based stereotypes. People should be able to access healthcare and secure a roof over their heads without being subjected to sex discrimination. All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation. ("Preventing" sec. 1)

This romanticized description of what an America under Biden/Harris should look like with regard to LGBTQ+ protections resembles the narrativization of public personae found in presidential candidates' biographies. In both instances, a person-centered version of events is insinuated to obtain a political benefit. Issuing the order was certainly important for the public acknowledgement and the continuation of discourses on queer rights, and it sent

the message to the queer community that the Biden/Harris administration aims at making LGBTQ+ individuals feel safer. Moreover, the Order serves as powerful demarcation to what the new government refers to as "four years of relentless attacks on LGBTIQ* rights" under the Trump administration (White House "Fact Sheet"), using a narrative of progress and condemning the past as uncivilized, thereby establishing a founding myth of queer protection.

Aiming to protect anyone, regardless of 'who they are or whom they love' frames the political and legal question of equal protections for sexual minorities in an easily digestible manner: Using the cultural ideal of romantic love as means to assimilate LGBTQ+ to cis hetero norms, queer rights more made more appealing – after all, they are people like you and me, just wanting to love someone. Next to using the almost fundamental cultural right of romantic love as social glue, the Executive Order makes recourse to the trope of the imperiled child for affective back-up. Not denying the importance of the protections laid out in the Biden/Harris Order, this reading illustrates how legal demands by sexual minorities need to go through a process of sociocultural legitimation before appearing valid in the eyes of the cis hetero majority.

However, the political advantage of this Order outweighs its legal importance as it did not do any factual, progressive legal work. The Supreme Court's *Bostock* decision laid the foundation for the Order, and the new Biden/Harris government merely implemented what the Court said is constitutional. As ACLU's Deputy Director for Transgender Justice Chase Strangio stated, "[b]y stating the administration's intention to follow Supreme Court precedent and federal law, at core all the newly-elected president did was lay out what the law is and agree, unlike his predecessor, to follow it" ("President Biden's"). It is thus true that "[t]hose who claim to be victims of Biden's affirmation of these legal protections are really angry about legal rules that were drafted by Congress decades ago and affirmed by the Supreme Court in June" (Strangio "President Biden's"), but the same goes for those celebrating this Order as a legal victory, though a sociocultural land gain it may be.

Culturally, it is important to stress the entanglements of law and culture, examine whether a constitutional protection is able to change cultural perceptions of sexual orientation or vice versa or not at all, and recognize the transformative power of the Supreme Court's decisions. By passing on the opportunity to declare sexual orientation a suspect classification, the *Windsor* and *Obergefell* Courts have judicially failed to establish this status and politically circumvented debates about expanding the classifications which warrant heightened or strict scrutiny. More importantly, however, SCOTUS's decisions com-

municated that the explicit and heightened protection of sexual orientation is neither culturally nor legally relevant. By deciding cases about sexual orientation, the Court establishes legal precedents future decisions have to consider, and how these precedents influence the prevalence, and possibly preference, of certain modes of interpretation as seen in the case studies of Chapter III. By not deciding on the vulnerabilities and questions of equality of sexual orientation, for instance by opting for an 'all marriages equality' instead of same-sex marriage equality, the Court is prioritizing fundamental rights over minority rights. By doing so, the Court forms frames of legal reference, in the form of precedents and (dis-)continued lines of modes of interpretations, and cultural reference, in the form of evaluating what and who needs protection.

A constitutionally anchored anti-discrimination protection for sexual minorities is all the more relevant in twenty-first century U.S. America. While acts and legislative decisions may aim for the same outcome, and are possibly equally able to achieve it, a reading of the Constitution which sees sexual orientation as in need of strict scrutiny reverberates culturally.

Feeding on U.S. American civil religion and its quasi-sainting of the Constitution as well as the imagined identicalness of the Supreme Court and the Constitution, a group-based equal protection would position sexual orientation in the Court's aegis and into the Constitution's canon of categories that make up U.S. American cultural identity.[7] This way, a constitutional protection of sexual orientation may have the same or similar legal implications as one based on legislature, for example the *Equality Act*, but a different and arguably stronger cultural backing. In this instance, cultural implications add legitimacy to the current legal order, and thus may work to establish similar or even more meaningful orders, and maintain or construct cultural norms which again feed into processes of legal knowledge production and development of legal norms. Another advantage of the push for suspect classification is its sweeping impact:

> Unlike the seemingly limited protection offered by the right of privacy or the First Amendment, the suspect classification argument is seen as capable of protecting both public and private same-sex emotional-sexual con-

7 This view sees the already protected categories race, religion, national origin, and alienage as indicative of what the Court found to be parts of the U.S.'s cultural identity, namely U.S. America as immigrant culture, culturally diversity, place of equal opportunity, moral role model, and rooted in Judeo-Christian traditions.

> duct, and potentially encompassing all aspects of public sector discrimination against gay, lesbian, and bisexual persons, especially in employment, housing, and services, and with respect to the right of couples and parents. (Wintemute 61)

Wintemute compares what he labels 'fundamental choice argument,' discussed in more detail in Chapter III, to the 'immutable status argument.' In comparison, the latter seems more promising for enabling thorough legal protection and sociocultural change: "A Supreme Court decision that sexual orientation constitutes a suspect classification might thus serve as the *Brown v. Board of Education* that gay, lesbian, and bisexual persons in the U.S. have been seeking" (Wintemute 61). Referencing *Brown*, Wintemute invokes the powerful cultural memory of a Supreme Court decision that substantially changed U.S. America. By doing so, he draws attention to law's transformative power and alluding to a supposedly post-queerphobic society – a utopian idea because post-racist sociocultural conditions have also been merely imaginary after *Brown*.

Further, Wintemute calls upon the common analogy between race and sexual orientation in terms of their discriminatory potential and legal treatment. Legal discourses about sexual orientation's suspect classification have in the past picked up the argument that "gay is the new black" (Gross) as both race and sexual orientation are approached similarly in law. Although their histories of discrimination are not comparable, both categories are important sites of civil rights movements, both are socioculturally constructed phenomena, and both are subject to discrimination based on stereotypes. The next chapter examines how sexual orientation fulfills or does not fulfill the four major criteria required by suspect classification, and focusses in particular on the question of immutability as constitutional criterion and sociocultural (moral) construct. This way, suspect classification's four criteria are being questioned, deconstructed, and, as is the constant goal of this book's approach to law, queered.

V.3. Queering Suspect Classification's Four Criteria

An important instance of the interplay between cultural and legal norms is the legal reasoning behind suspect classification. As laid out in more detail in Chapter II.3, in order for a characteristic to be considered a suspect basis

for classification in U.S. American Constitutional Law, the Supreme Court has come to identify four main requirements over time: immutability, a history of incorrect stereotypes, political powerlessness, and a history of discrimination.[8] However, this list is neither an official nor exhaustive one. As Wintemute states, "the Supreme Court has referred to different combinations of these requirements, but has never provided a coherent theory explaining their purpose and relative importance" (63).[9] Even more, as laid out by Gerstmann, "all the criteria the courts use to decide where different groups belong in the equal protection hierarchy are so loaded with contradictions, double standards, and unresolvable ambiguities that principled decision making in this area is virtually impossible" (*Underclass* 9–10).

Acknowledging the difficulties a system which is not consistent in its reasoning poses, this chapter aims to propose changes to the most important hurdles to sexual orientation's suspect classification. Despite the inconsistencies in finding a classification suspect, there is an underlying structure of the dominant factors which are most picked up upon. Suspect classification evolves around the central questions of whether the respective group has been treated unequally over a long period of time (historical dimension), whether the group has to suffer from particular types of stereotypes (moral dimension), whether the group is considered a minority and not able to represent its interests (political dimension), and whether the classification is unchangeable and constituted by birth (essentialist dimension).

Qualifying these criteria as historical, moral, political, and essentialist poses an arbitrary attempt at classifying them according to their respective

8 See, e.g., Wintemute 61–4 for dissenting views on the number of criteria. While Wintemute identifies seven criteria, he asserts that "[s]ome of the criteria, such as history of unequal treatment and prejudice or stigma, prejudice and stereotypes, or immutability and irrelevance, are frequently lumped together" (63, footnote 24).

9 This observation has also been made by other scholars; see for instance Simon 141: "The various cases in which the Court has considered whether or not a class qualifies as suspect leave the Court's analysis in disarray. The Court uses a mixture of criteria to determine suspectness, creating an analytical muddle, and the boundary line between suspect classes and non-suspect classes is drawn in a haphazard way. Thus, the process model fails to provide a coherent and viable framework for the Court's suspect class analysis;" see Strauss 138: "The Supreme Court has not provided a coherent explanation for precisely what factors trigger heightened scrutiny;" see Wilkinson 983: "The criteria of suspectness have not been thoughtfully defined or consistently applied."

foci; while the essentialist dimension might as well be labeled 'natural,' the political dimension 'historical,' and all of them have a 'discriminatory' quality, basically all dimensions are inherently politically instrumentalized, if not weaponized, and socioculturally constructed as I argue. This means that each of these factors functions as a gatekeeping device for furthering legal protections of minorities. Employing a queer theoretical perspective, these factors' heteronormative logic is visibilized and subverted. In a first step, I lay down the covert political functions and sociocultural origins of these four criteria before proposing alternatives to traditional approaches to suspect classification's requirements, thereby offering an updated, queered understanding of the politics of constitutional protection.

The cultural relevance of these legal terms emerges when questioning their meaning. As mentioned in Chapter IV.1, legal norms are characterized by their indeterminate, even gappy character, which legal scholars, judges and justices are filling with interpretations. However, when trying to interpret legal terms, it becomes obvious that their meaning is connected to other cultural realms. Therefore, legal interpretation feeds on culturally relevant programming, i.e., on those processes of meaning-making relied upon for navigating one's social and cultural world. Assessing the legal meaning of suspect classification's criteria therefore necessarily involves looking at those criteria's sociocultural constructed meaning: What does immutability mean? When are stereotypes incorrect and who decides on that? Does increasing visibility equal increasing political power? Who writes the history the judiciary looks at? Which version of it will matter at which occasion? While these questions are by no means new inquiries into this particular part of constitutional law,[10] they illustrate that legal terms do neither evolve out of thin air nor out of themselves but always use existing cultural notions and understandings as their points of reference.

By now, several lower court judges and state supreme court justices have found that sexual orientation qualifies for a group-based equal protection because it fulfills these four dimensions. Among them is the Supreme Court of California, which held that sexual orientation is a suspect classification in 2008.[11] In this instance, the court compared sexual orientation to other already

10 See Strauss 139 about other questions concerning the "significant uncertainty about the precise definition and measure of each factor."

11 See also the following cases holding that sexual orientation is a quasi-suspect classification: Iowa's *Varnum v. Brien* (2009); Connecticut's *Kerrigan v. Commissioner of Public Health* (2008). See also Eskridge "Political" 9.

recognized suspect classifications such as religion and alienage. Arguing that "one's religion, of course, is not immutable but is a matter over which an individual has control" (*In Re Marriage Cases* 842) and quoting the 1972 decision *Raffaelli v. Committee of Bar Examiners* in which "alienage [was] treated as a suspect classification notwithstanding circumstance that [an] alien can become a citizen" (842), the Californian Supreme Court based their decision which level of review to use not on solving the issues surrounding sexual orientation's immutability. Instead, the court questioned the implications of these requirements with regard to other classifications which are considered suspect. This understanding of a less formalist application of the four criteria may also be influenced by a changing relation to the concepts of religion and alienage as both have become highly politicized during the twenty-first century.

What can be gained from the Californian Supreme Court's approach to suspect classification is that there is both a willingness and a possibility to re-think these seemingly static requirements and thus challenge traditional notions of class-based jurisprudence. The following investigations, de- and re-constructions of legal classifications are thus in good judicial company.

'Political Powerlessness'

Measuring the need for a group's constitutional protection has its origins in the question of political representation. In 1938, Justice Harlan Fiske Stone laid the foundation for SCOTUS's different levels of review by directly addressing "prejudice against discrete and insular minorities …, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[12] While Stone's footnote remains highly abstract with regard to what constitutes "those political processes ordinarily to be relied upon" or how prejudice effectively translates into serious curtailments, today's understanding of his words is that the judiciary, mostly in the form of the Supreme Court, "must protect groups that are vulnerable to legislative bias" (Strauss 153). This vulnerability is predominantly measured quantitively by looking at voting rights or the lack thereof, the size of a group (sheer number of members), laws that benefit the group, and political representation (number of held political offices).[13]

12 Footnote four, *U.S. v. Carolene Products Co.* (1938); see also Chapter II.3.

13 See also Strauss 154: "Judges and scholars have suggested four possible approaches, used either separately or in combination, to assess power. These approaches consider (1) the group's ability to vote; (2) the pure numbers of the group; (3) the existence

The reasoning behind this approach is that minorities are perceived to be unable to represent their interests or propose statues when they are left out of majoritarian political processes. This view is interesting for several reasons. First, it suggests that political powerlessness is necessarily connected to political participation. In the case of sexual orientation, it seems to suggest that those who are not openly queer, whether they are closeted or not identifying as queer, cannot represent queer demands. The power to shape legal norms from within the legislative branch is here understood to be decisive; influencing legal norms from an external position, for example by imagining alternatives to existing legal realities and putting pressure on the legal status quo,[14] is not considered. Neither is approaching elected officials and proposing bills to them. Additionally, it leaves out the political power of social movements which work towards legal recognition without being (yet) able to participate politically. However, allyship plays an important role in gaining rights and strengthening public sensibilities for the need of those rights. Labeling these influences unpolitical would betray their power to shape law, politics, and sociocultural understandings for minority concerns.

Admittedly, the view on political power(lessness) as best measured by political representation corresponds to an identity political understanding of who is qualified to speak for whose interests. This objection to consider sexual minorities powerful in the understanding of suspect classifications' logic is vital for tackling existing sociocultural hierarchies. Questioning the legitimacy of advocating for queer rights as a cis-hetero person in power is thus not meant to denounce efforts at allyship but to stress the need to acknowledge one's own privileges and to work towards dismantling inequalities beside the legal ones at hand. This way, unequal legal and sociocultural orders are simultaneously addressed and visibilized. However, arguing that sexual minorities are politically powerless because they are still underrepresented in political offices also shifts responsibility away from those in power while simultaneously putting extra pressure on queer politicians. While cis-hetero politicians are perceived as only able to represent their respective interests, thereby negating the possibility of common ones, queer politicians have to represent an entirely het-

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of favorable legislative enactments that might demonstrate political power; and (4) whether members of the group have achieved positions of power and authority."

14 See also Mazukatow and Binder who state that "the process of imagining does not only contribute to the stabilization of knowledge about society but it also belongs to the repertoire of critical practices aiming for change" (460).

erogenous community accurately or else they risk losing support and credibility.

Second, linking political powerlessness to a lack of political representation establishes illusory scientific evidence for political power and naturalizes a political system that works hierarchically. The logic that representation, mostly in the form of who is part of Congress and state legislatures, equals power denies any engagement with the reasons for exclusion and their extended influence on the Supreme Court. The Court as well as state supreme courts, which are responsible for deciding on whether the criterion of political powerlessness is met, have to interpret what constitutes powerlessness. Is one in a hundred a minority and thus powerless? Probably. But what about forty in a hundred? The scale is completely arbitrary and up for debate. As the power to decide on such questions is in the hand of a few, unelected justices, who are already highly biased as I argue in Chapter III, the interpretation of what constitutes power remains with those who already got it. In addition to the issue of interpreting statistics and adding them with meaning, setting up statistics is already entangled in biased economies of knowledge production. In the U.S., polls and surveys play an important role in elections, yet the money politicians spent on campaigns, including paying companies to conduct surveys, make statistics never an *a priori* innocent instrument but one that is already situated within power relations and likely to reproduce them (Kennedy "Key Things").

Understanding political powerlessness as connected to "a group's inability to rely on the legislative process to protect its interests" (Strauss 153) inevitably raises the question how a supposedly democratic system is able to create such a group. The paradox of using this criterion for considering how thoroughly a court reviews cases in which a group is discriminated without addressing the urgent question how this political exclusion came into being in the first place and thus tackling one's own (and one's group's) responsibility in supporting this system seem to stem from a dissociative national identity disorder. Undoubtably, equal protection acknowledges the need to protect vulnerable minorities, yet it does not address the inherent discrepancy between democratic equalitarian ideals and the definition of political powerlessness. This criterion is based on the very assumption that the U.S. American legal system is based on inequal options of representation which can only be balanced out when in office. Thus, the reasoning behind political powerlessness works with two juxtaposed, yet simultaneously maintained understandings of suspect classification and the role of the U.S. American legal system in general.

The access to political participation is important and there certainly are less visible and less politically powerful groups than the LGBTQ+ community, and also less visible and less politically powerful groups than the White, able-bodied, cis, propertied, gay members within the LGBTQ+ community. Yet, approaching the issue of political power from the question of congressional or state legislature's representation assumes that laws are merely made within these parameters, betraying any analysis of the multiple entanglements of law(makers), culture, and society. As the number of openly gay, lesbian, bisexual, asexual, and other non-heterosexual politicians increases,[15] considerations of political powerlessness may become obsolete despite heavy legal backlash against queers. Lack of political powerlessness, i.e., political power in the form of political representation and participation, may thus work as a disadvantage of being granted a higher form of constitutional protection. Gerstmann commented on this scenario as early as 2003 when he claimed that

> Gays and lesbians are told that they must remain at the bottom of the constitutional hierarchy because they are too politically powerful to require heightened scrutiny. In order for this assertion to make sense, we would have to believe that gays and lesbians are more powerful than are women, or, even more implausibly, than are the white students who were recently given the protection of heightened scrutiny in their challenges to the University of Michigan's affirmative action policies. (*Underclass* viii-ix)

In 1996's *Romer v. Evans*, Justice Scalia's dissenting opinion followed this argumentation by stating that "[i]t is also nothing short of preposterous to call 'politically unpopular' a group which enjoys enormous influence in American media and politics, and which, as the trial court here noted, though composing no more than 4% of the population had the support of 46% of the voters on Amendment 2" (652). Interestingly, understanding politically unpopular as synonymous with politically powerless smoothens the negation of this criterion; while popularity may indicate a sociocultural climate which is not entirely hostile to queers, – a claim which would also be challenged by many within

15 See Goldmacher: "The number of gay, lesbian, bisexual and transgender elected officials has continued to surge, growing by about 17 percent in the last year to nearly 1,000 nationwide — more than double the number just four years ago, according to a new annual report." According to the "Out for America 2021" census, 0.19% of elected officials in the U.S. are queer, necessitating that "28,116 more LGBTQ people must be elected to achieve equitable representation" ("Out").

the LGBTQ+ community today –, winning votes, being elected to positions of power, and ultimately passing laws is not a causality or logical consequence of being popular.

The criterion of political powerlessness is connected to what I label 'legal sexual orientationism' (see Chapter IV.2) and to what Gerstmann considers the "class/classification switch" (*Underclass* 9). Approaching questions of political power with the aim to protect gays, lesbians, asexuals, bisexuals and other non-heterosexual individuals, i.e., thinking about these persons as potential *suspect classes*, the Court would most probably negate the lack of political power. However, considering sexual orientation as *suspect classification* would involve potential protections also for those who identify as heterosexual, making the call to protect the category instead of specific groups a strategic one. Yet, given the logic inconsistencies and political uneasiness about only being able to fulfill this criterion when appropriating heterosexist reasoning, a thorough reform of this criterion may be the cleaner option – and one which may prove more promising for future struggles for a group's rights.

Abolishing questions of political power(lessness) entirely in the context of suspect classification would pose the threat of ultimately benefitting those already in power – which the current legal situation more than often does. Working with power structures is thus necessary to capture existing socio-cultural inequalities and to compensate for them legally. Instead of taking political powerlessness or lack of political representation as criterion, a reversal of the burden of proof may work better to suit the demands of queer right projects. Comparing the number of discriminatory bills that are issued, the number of anti-discrimination bills and laws that have successfully been implemented in contrast with those which are being stalled, and the court cases which deal with LGBTQ+ discrimination and have been decided in favor of queers may work better to represent actual legal realities instead of the potential political opportunity to influence them. This approach would also satisfy this criterion's affinity for quantitative measurements.

'History of Discrimination'

The history of a group's discrimination examines whether a group has been treated unequally and been denied the same treatment as other groups over a long period of time. This criterion is connected to political powerlessness as legal scholar Bruce Ackerman explains:

> [A]lthough each of us cannot always expect to convince our legislators, we can at least insist that they treat our claims with respect. At the very least, they should thoughtfully consider our moral and empirical arguments, rejecting them only after conscientiously deciding that they are inconsistent with the public interest. If a group fails to receive this treatment, it suffers a special wrong, one quite distinct from its substantive treatment on the merits. (738)

This closeness to the question of political powerlessness and lack of legislative protection has led commentators to consider a group's history of discrimination "to be a subset of the political powerlessness criteria rather than its own separate and distinct criterion" (Strauss 150). Both criteria start from the premise that there is a historical and/or structural inequality which warrants legislative interference.

Similar to the aspect of political powerlessness, a group's history of discrimination lacks a coherent definition,[16] making considerations about whether a group meets this criterion or not again highly subjective to a court's interpretation. The respective political set-up of the Court and its justices' biographies and philosophies therefore play an important part in deciding upon the way of interpreting this criterion – this finding of course also applies to the other criteria.

Despite these differences in modes of interpretation, the legal legacy of *Brown*, "the Court's most famous equal protection decision" (Eskridge "Powerlessness" 5) as well as the origin of the Equal Protection Clause, namely serving to protect the formerly enslaved after the Civil War, still influences the discourse on suspect classification. After the Court decided in 1954 that racial segregation in public schools is unconstitutional, the 1967 landmark decision *Loving v. Virginia* picked up on the Court's reasoning and established race as a suspect classification (see also Eskridge "Powerlessness" 5). Taking *Loving* as a blueprint, different minorities tried to demand strict(er) scrutiny by comparing their situation to racial minorities.[17] Race then again appears as

16 See Strauss 151; Wilkinson 981.

17 See Eskridge "Powerlessness" 5: "The form of the argument was usually this: like people of color, our group has suffered from pervasive state discrimination founded on prejudice and unfair stereotypes; like race, our stigmatizing trait is not one whose deployment usually contributes to the public good; and like racial minorities, our group is not politically powerful enough to resist or repeal these unjust discriminatory laws. This represented a concept that focused on harm, irrationality, and lack of

continuing reference point for considerations about suspect classification and its criteria.

The first pertinent issue when it comes to a group's history of discrimination is the period of time one choses to look at. Legal scholars have commented on this aspect multiple times and even courts have exhibited a surprisingly high degree of self-reflective sociocultural analysis as in respect to the history of discrimination of women in U.S. American society:

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. … Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women not on a pedestal, but in a cage. … As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes, and, indeed, throughout much of the 19th century, the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. (*Frontiero* 684–85; majority opinion by Justice Brennan)

If the Court is able to acknowledge and historically trace back such inequalities to systematic pattern of sexism, one wonders why dismantling these structures has not been a consistent red thread in SCOTUS' decisions ever since. Equally important, the question arises why the comparison to formerly enslaved persons and Blacks is necessary to perceive of sex discrimination's unconstitutionality as legitimate. In fact, the reasoning in *Frontiero* mirrors a general practice when trying to determine a group's history of discrimination:

> Because of the lack of precise guidance in determining whether a group has the requisite history of discrimination, courts often decide discriminatory history by comparing the experience of the group to that of African-Americans or women. Presumably, if a history is not analogous to that of either African-Americans or women—the former a suspect class and the latter a quasi-suspect class—the group is probably nonsuspect. (Strauss 151–2)

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a political remedy as the classic instance when equal protection analysis by judges ought to be particularly scrutinizing."

Although there are common interests and comparable parameters of women, people of color/Blacks, and the LGBTQ+ community, – most importantly experiences of discrimination in an oppressive, structurally and institutionally discriminatory system, – the distinct history of each group makes a comparison impossible. When non-heterosexual orientations, and arguably also heterosexuality itself, became increasingly important and added with cultural meaning during the nineteenth century, colonialism, slavery and racism have had already violated and killed Blacks and people of color for centuries, while women had to navigate patriarchal structures of sexism, economic exploitation, and legal subordination. As Eskridge states, "[t]he sexual orientation concept barely existed at the turn of the century but is charged with normative meaning at the turn of the millennium" (*Gaylaw* 9). Moreover, sexism and racism and the conditions they enable have not disappeared after declaring sex a quasi-suspect classification and race a suspect classification. In addition, this focus on racial and sex inequalities ignores any intersectional experiences and thus invisibilizes the experience of those who have to face multiple oppression such as queer Black women. For them, their 'history of discrimination' entails a plurality of experiences and is more adequately captured as *histories* of discrimination.

So, why would the Supreme Court work with such a flawed analogy that is neither able to adequately reflect differences between groups nor mirror the still prevalent forms of discrimination Blacks, people of color, and women face? In his brilliant article "The Id, the Ego, and Equal Protection. Reckoning with Unconscious Racism,"[18] law professor Charles R. Lawrence III analyzes the unconscious racial bias permeating U.S. American culture. Perceiving racially discriminatory laws as not always intentional but as a result of "a common historical and cultural heritage in which racism has played and still plays a dominant role" (322), Lawrence proposes to include a more thorough cultural analysis in legal doctrine; the "'cultural' meaning test" (328), which

18 Lawrence's article deals with the disparate impact test the Supreme Court has established in its 1976 *Washington v. Davis* decision, yet offers important findings applicable for considerations about suspect classification. In *Davis*, the Court decided that laws which have a discriminatory effect on racial minorities are only unconstitutional when there is a provable discriminatory intention, meaning that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose" (*Davis* at 240).

"posits a connection between unconscious racism and the existence of cultural symbols that have racial meaning" (324).[19] Aiming at detecting racialist motivated governmental action, a court would then

> analyze governmental behavior much like a cultural anthropologist might: by considering evidence regarding the historical and social context in which the decision was made and effectuated. If the court determined by a preponderance of the evidence that a significant portion of the population thinks of the governmental action in racial terms, then it would presume that socially shared, unconscious racial attitudes made evident by the action's meaning had influenced the decisionmakers. As a result, it would apply heightened scrutiny. (356)

While it remains unclear how a court should determine the objectivity and neutrality of evidence, historical or social context, and which part of the population is being asked in the first place, Lawrence offers important suggestions for re-thinking suspect classification. Examining the cultural meaning of a legal norm de-emphasizes historical context by trying to visibilize covert discriminatory attitudes which have not yet entered into public, meaning majoritarian, consciousness but already showed their cultural significance and presence in public discourse. For instance, at the time of *Bowers v. Hardwick*, the 1986 U.S. Supreme Court decision which criminalized consensual homosexual activity, public opinion about sex between consenting adults of the same-sex may not have been as progressive as it is nowadays,[20] yet the perception of sex was heavily loaded with cultural meaning. As indicated by the opinion of Chief Justice Warren E. Burger, who joined the majority's opinion in *Bowers*,

> the proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been subject to state inter-

19 Lawrence defines his test further: "It suggests that the 'cultural meaning' of an allegedly racially discriminatory act is the best available analogue for, and evidence of, a collective unconscious that we cannot observe directly. This test would thus evaluate governmental conduct to determine whether it conveys a symbolic message to which the culture attaches racial significance" (324).

20 This view takes into account the medial and cultural visibility of homosexual, bisexual, pansexual and other persons, and pro-LGBTQ+ landmark decisions such as *Obergefell* and *Bostock*. The argument considers these examples as evidence for a majoritarian public opinion which, if not welcomes, at least condones homosexual persons as part of society.

> vention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. (196, footnote 8)

Making an undoubtably culturalistic and religious argument for criminalizing homosexual sex, – and its moral and legal rightfulness, – Burger unwillingly argues for an acknowledgement of homosexuals' history of discrimination. However, while his perspective on history is subjective and influenced by a Western, heteronormative gaze which fails to acknowledge the development of cultural perceptions of sexuality and sexual orientation, the strong emphasis and recourse to moral cultures and power hierarchies reveals the degree of cultural and affective loadedness of the topic.

Thus, a useful cultural meaning test would not take into account how society thought about a particular topic at a certain time, it would refer to the degree of tabooization and affective responses to a topic. Analyzing these aspects then takes into account how much a topic is loaded with cultural meaning, including anxieties, moral panics, and/or scapegoating. Utilizing Lawrence' proposed test for sexual minorities, one would have to examine the cultural meaning of legal decisions discriminating against queers.

Similar to questions about political powerlessness, the importance placed on a group's history of discrimination should suffice as evidence for affirming that this criterion is fulfilled. As seen by looking at *Bowers*, there is a cultural, legal, and moral distinction between homosexual and heterosexual sex, making sexual orientation an important marker of social stratification in the U.S. By distinguishing between different sexual orientations when criminalizing consensual behavior between adults, not only can we observe a hierarchization of homo- and heterosexuality, but we can also extract the cultural meaning of this ordering category. Following Lawrence's idea of a cultural meaning test, in U.S. American culture, sexual orientation matters as a legal category warranting heightened or strict scrutiny because law and culture treat people differently based on their respective sexual orientation. Thus, this category is loaded with cultural meaning.

'Immutability'

The criterion of immutability is possibly one of the most difficult ones to prove, and the most controversial to interpret. In suspect classification cases, immutability evolves around the question whether a trait is integral to one's iden-

tity or, in other words, whether it is "determined solely by the accident of birth" (*Frontiero* 686). With regard to sex, ethnicity and race, the Court has already established these characteristics' immutability by affirming their innateness and connecting the protection of these characteristics to "the basic concept of our system that legal burdens should bear some relationship to individual responsibility" (Weber v. Aetna Casualty & Surety Co. 175). This means that if someone is not responsible because they did not choose to be, look, or feel a certain way, they are excused by the legal system. According to this logic, if laws would discriminate against any trait over which the individual has no control and is not responsible for, they would be inherently unfair. As for race, it is argued that one's racial or ethnical lineage are beyond one's control, therefore the individual holds no responsibility for the respective trait. This approach is problematic for several reasons.

First, stressing individual responsibility as an important factor, suspect classification's immutability criterion affirms that the classification, be it race, ethnicity, or sex, does matter and is a meaningful category for law. By doing so, judges and justices risk perpetuating existing stigmata and contribute to further loading these categories with sociocultural meaning and stressing the need for legal interference. This emphasis on individualism ties into U.S. American cultural narratives that the individual is solely responsible for their material, bodily, and sociocultural standing. Second, this approach negates and blends out the sociocultural constructedness of such identity categories, thereby shying away from a thorough analysis of power structures and existing legal-cultural orders. This contributes to a further essentialization of race, ethnicity, sex, and other categories as it conceives their degree of staticness to be decisive for legal protections. If they are found to be changeable or reversable, they would not be considered immutable. Arguing that a trait is not immutable, meaning not integral to one's identity or changeable respectively, works to control its place in the cultural imaginary as inferior, negligible, or potentially unimportant.

This approach poses similar pitfalls and problematic consequences for queers as found in essentialist and constructionist controversies about sexuality (see Chapter III). As elaborated on by Elizabeth Grosz and John Boswell, essentialist and constructionist perspectives on sexuality are switched for political purposes as needed; in order to legitimate the ongoing pathologization of sexual orientation, medical professionals have taken on constructionist views and advocated for conversion 'therapies' based on the notion that sexual orientation is not immutable and thus possible to change. Simultaneously, the

naturalness of heterosexuality is emphasized as an essentialist norm to which those with other sexual orientations need to return to.

Scholars, judges, and justices have rightfully deconstructed the paradox of considering religion an immutable characteristic, such as the Californian Supreme Court in its 2008's *In Re Marriage Cases*: "one's religion, of course, is not immutable but is a matter over which an individual has control" (842). As Eskridge states, "it is not clear that sexual orientation is a matter of choice-and in any event, sexual orientation is less mutable than religion and alienage, both of which are suspect classifications" (*Gaylaw* 9). Given the still not extinct discourse around this criterion reveals its appeal as a power tool. Arguing for a trait's immutability approaches legal uncertainties through lending legitimacy from supposedly more objective sciences, most importantly biology. The notion that there is a clear-cut answer to what is 'natural,' meaning biologically given, and what is added later on by society and culture speaks for a longing for what I have elsewhere called a "supposed shelter of reliability" (Olson and Borchert 391). Immutability is perceived as a criterion which offers guidance in increasingly complex questions of identity and legal personhood while simultaneously being an instrument for gatekeeping more thorough legal protections and rights.

Considering immutability a decisive criterion perverts and weaponizes scientific evidence about the sociocultural constructedness of sexual orientation. Acknowledging the fluidity of sexual orientation equals denying this legal category the status of immutability and thus negating the worthiness of its stricter legal protection. Sexual orientation remains associated with non-heterosexual orientation, stressing legal sexual orientationist perspectives, and non-normative, deviant even, by choice. Those not willing to change their (non-hetero-) sexual orientation are considered rule-breakers and trouble-makers when this trait is considered changeable. In this sense, immutability serves to maintain a cisnormative, heterosexist, patriarchal power structure whether it is considered as applying to sexual orientation or not.

From a legal perspective, immutability establishes a dichotomy of 'good' and 'bad' traits, reminiscent of Gayle Rubin's findings about sociocultural perspectives on and hierarchization of sexuality. Innateness functions as a moral carte blanche, making its holder free from judgement because of a characteristic they cannot control. Culturally, innateness makes recourse to genetic and biologistic notions of one's 'true' or core identity, neglecting any argument for fluidity. This understanding is reinforced by immutability's second aspect, a trait's irreversibility. As immutability is understood to combine that a trait is

both unable to change by the individual and part of them from birth onwards, the question arises which trait would be able to fulfill this definition.

Focusing on a trait's immutability reproduces existing sociocultural hierarchies and biases. Considering race an immutable criterion naturalizes race as ordering category by presuming it is not a socially constructed phenomenon but a genetic or biological given. The same logic applies to considerations for sexual orientation and gender identity. For instance, if the Court finds that gender is not immutable because it acknowledges the right of determining one own's gender identity and neglects medical-biologistic notions of gender, it ultimately reinforces medical-biologistic notions of having to refer to 'natural,' meaning biological circumstances to evaluate a legal situation. Then, gender would not qualify as suspect classification. However, if the Court finds that gender is immutable, it ignores sociocultural realities of those who consider their trans, non-binary, or gender queer identity as fluid – but gender would qualify for suspect classification. In both cases, immutability as a legal criterion fails because it operates with sociocultural paradoxes. Or, as Martha Nussbaum states, "the legal notion of immutability is confused" (122).

Further, having to prove that a trait is immutable stigmatizes the group asking for suspect class status or their trait's suspect classification when the law already privileges their majoritarian Other. When queers demand suspect classification for sexual orientation, having to prove immutability again illustrates legal sexual orientationism. Law, in its normative power, operates with heteronormative categories and privileges those who adhere to this norm. As these categories and their protections are considered natural, other, non-heteronormative orientations have to legitimate themselves and prove their worthiness of protection. While the immutability of heterosexuality is not questioned when establishing legal norms that prioritize and thus protect it 'naturally' more, non-heterosexual orientations have to bring on the impossible task for proving themselves to those unable or unwilling to grasp their realities.

In addition to being 'confused,' the need for closure immutability demands also yields violence over queer bodies beyond the legal realm. Over the last decades, researchers have tried to determine the source of homosexual orientation by, inter alia, conducting twin studies, analyzing possible genetic predispositions within one's family, examining the mixture of certain hormones within one's body post- and prenatally and by observing one's brain morphology (Green 539–54). Additionally, therapies such as psychoanalysis, religious faith healing and chemical and electrical aversion treatment have been tried to eradicate (non-hetero-) sexual preference. Most of these treatments were

not successful, "psychologically wrenching" and "sometimes physically painful" (Green 569). Attempts at finding the cause of sexual orientation and trying to reverse it proved to be ultimately inconclusive or short-lived.[21] The persistent search for more (natural-) scientific evidence about sexual orientation not only serves legal endeavors to regulate sexuality, it also feeds into nationalist imaginaries:

> Homosexuality does not fit easily into ideologies stressing traditional family life as the cornerstone of ethnic community. Thus, homophobia is a common feature of racial, ethnic, and nationalist ideologies and programs of social control. Unlike racism and prejudice that "seek targets *outside* ethnic boundaries, homophobia can be directed *inside* ethnic communities as well, and used to create an internal sexual boundary that excludes or 'disqualifies' a group's own members (Nagel 26; emphasis in original).

Homosexual orientation violates the implicit societal assumption of having to procreate to guarantee national survival (see Nagel 30). In this context, scientific evidence about the causalities and implications of sexual orientation risks being misused for attempts at 'curing' such a genetic predisposition by prenatal genetic testing, medication, or, as predicted by Katrin C. Rose, even by societal planning in the form of eugenics.[22] This notion is also what Waites refers to when stating that

> research has shown how medical and psychological perspectives on sexuality inform and structure political debates … together with work demonstrating the international power of health and medicine discourses … suggests the value of examining the extent to which biomedical and psychological expertise concerning 'sexual orientation' is implicated in global configurations of power" (145).

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21 See Green 539: "However, the hope of finding a single gene or set of genes to explain fully the development of any syndrome has met with failure except in the case of some chromosomal disorders (such as Down's syndrome). With other behaviors … , research has found that while there may be some contribution from genetics, this is far from being the entire story. Much of the contribution appears to be either environmental or some complex interaction between nurture and nature."

22 See Rose 57–8: "History has provided too many examples of questionable governmental practices based on notions of better living through 'genetic cleansing.' … Would a gay gene be something that society accepts and protects? Or would society mark this gene as an item to be cured or eradicated?"

Approaching anti-discrimination laws from this stance of ruling on a trait's immutability makes it easier to put traits into binary pairs of what is worthy of special protection and what is not by using a biologistic, or respectively essentialist, understanding of identity. Immutability, in this context, illuminates thus how different areas of knowledge/research function as legal gate-keepers and thus become part of legal orders themselves, and how these different legal orders intertwine to uphold cultural narratives of equality. Biologistic-essentialist findings are being utilized to prove what law failed to do, namely that a trait should not receive heightened protection. Debating the immutability of a trait thus may suggest analyzing its significance for an individual's identity, yet it ultimately proves this trait's impact in sociocultural value systems and negotiations of power and identity. This logic, however, only holds true in cultures which put emphasis on biologistic, medical evidence which still qualifies over sociocultural self-analysis.

To avoid these unsolvable nature-nurture-controversies, suspect classification's argumentation needs to be based not on how a characteristic is constituted, i.e., its immutability, history, neutrality, but what it constitutes, i.e., a discriminatory legal pluralism in which some holders of the characteristic are treated differently than others. Historic instances of these discriminatory legal pluralisms are most prominently found in separate-but-equal logics of the Jim Crow era, which saw race as a criterion that demanded special treatment. Interestingly, all of these biases only work in comparison to a norm, which is imagined as, among others, White, cis, heteronormative, able-bodied, non-immigrant.

Immutability proves a dangerous criterion for queer bodies because of its problematic implications. If sexual orientation is considered immutable, it essentializes the individual and pathologizes them; if sexual orientation is considered not immutable, it allows for measures to change the respective orientation to adjust to the heteronorm. The continuing emphasis on this criterion, however, offers an opportunity to de-essentialize it. As Nussbaum states,

> the case for heightened scrutiny for sexual orientation is very strong. Sexual orientation, like being female, is irrelevant to many things for which society confusedly holds it to be relevant. It is also deep and central in people's lives, like religion, in a way that makes us think asking people to give up acting on their orientation is a kind of cruelty. (122)

This "idea of relevance and the idea of depth or centrality" (122) might then replace the biologistic emphasis on innateness. Moving towards an understanding of core importance also smoothens the logical inconstancies regarding other classifications such as alienage, religion or illegitimacy of birth. Although determined by one's birth, the status of each of these classes can be changed, i.e., by naturalizing citizens, legitimizing illegitimates and by converting to another religion, which makes them something over which the individual has control, can be held responsible for, and that is no longer immutable. In this sense, the Supreme Court's definition of the criterion of immutability should be adjusted accordingly, if not abolished altogether. This way, sexual orientation's status as immutable part of one's identity would satisfy suspect classification's criterion of immutability, leaving the proof of moral neutrality as only remaining factor to be satisfied.

'Moral Neutrality'

Established together with immutability in the Court's 1973 *Frontiero* decision, this criterion deals with historically evolved stereotypes, which are considered incorrect. Such stereotypes can be used to justify statutes and institutional discrimination and thus contribute to the political and social powerlessness and disadvantages of certain social groups. For instance, the hostile stereotype of perceiving of gay men as pedophiles and as potentially molesting children has "been used to justify sodomy statutes, employment discrimination and housing discrimination" according to Culverhouse and Lewis (243).

The concept of historic and incorrect stereotypes has also been used to prove whether a characteristic is 'morally neutral,' meaning in line with religious and sociocultural values of a majoritarian legal collective. Linking minority protection to questions of morality already anticipates the highly problematic application of this criterion. In a diversifying pluralistic society, referring to (Christian) religious values, linking them to inherently cultural ones and applying them to legal issues naturalizes cultural and legal orders. Conceiving of Christianity as default authority for moral questions, the Court establishes a hierarchy of state-sanctioned religions and inevitably inferiorizes others. Additionally, working with the concept of morality in legal discourse makes recourse to an essentialist understanding of justice in which there is indeed an unbiased, objectively 'right' and just *teleos*.

The criterion of moral neutrality thus means that the trait in question has to be in accordance with religious and sociocultural principles which constitute a legal collective's cultural and legal value system. Proving that a characteristic

is not immoral and thus makes up one criterion which warrants extraordinary legal protection to the highest court of the society that discriminates exactly against this trait is one of the main issues in the context of suspect classification since existing biases have to be reversed. The difficulty of this task is reinforced by the political powerlessness of the minorities involved.

The criterion of moral neutrality can be seen as the reversed definition of a classification which reflects historic and incorrect stereotypes with no basis in fact. In this context, the aspect of incorrectness refers to traits which are wrongfully perceived as being harmful, morally bad or which are wrongfully said to influence a person's ability to perform in or contribute to society negatively. Thus, moral neutrality has alternatively been described as a characteristic which is "relevant to [a group's; lb] ability to perform or contribute to society" (Strauss 145).

Finding a coherent definition for moral neutrality to make this criterion legally applicable without reference to Christian religion seems at best highly difficult given the Supreme Court's shift to the religious right in its recent decisions (*Dobbs*; *Kennedy*). Having to legitimize heightened scrutiny for sexual orientation through religious understandings of morality undermines the separation of church and state and thereby perverts the claim that SCOTUS is apolitical, and by extension secular, even further. In addition, determining what is morally neutral can change over time with formerly immoral conducts becoming morally neutral and vice versa. An example for such a reversal is the Supreme Court's 1967 decision in *Loving v. Virginia* which ruled that a Virginia statute banning interracial marriages was unconstitutional. Here, the State of Virginia argued that its objectives for prohibiting interracial marriages were "'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride'" (7), which were reversed by the Supreme Court's ruling that there is "no legitimate overriding purpose independent of invidious racial discrimination" (11).

This constellation illustrates that even in a society which shares the same legal and sociocultural heritage, the definition of moral and immoral conduct seems to differ, with the recognition of race as morally neutral trait as prime example in U.S. American cultural-legal history. Stating that the Supreme Court has broadened the reach of equal protection by "distilling from the principle of the moral irrelevance of race the more general principle of the moral irrelevance of any trait that reveals nothing about the moral worth or desert of a person" (Perry 1065), Perry proposes how one can identify such a morally neutral criterion. Each characteristic which "indicates nothing about the person's

physical or mental capacity – in the form of native talent, acquired skills, temperament, or the like – to make particular choices or engage in particular activities" (1066) should be regarded as morally neutral since it is neither relevant to one's ability to perform in society nor does it influence the morality of one's character.

This definition, however, again presupposes an element of neutrality towards a trait, which is not always given. Whether one takes the incorrect stereotype of race as an indicator of low intelligence,[23] or the bias that gay men are always effeminate,[24] the establishment and persistence of incorrect stereotypes attributed to a classification influence how members of these social groups are perceived. Consequently, legal recognition of a characteristic's moral neutrality proves difficult for a class facing such prejudices.

For sexual orientation, this is especially true when considering the bias that anything besides or beyond the heteronorm is "antisocial behavior" (Altman qtd. in Duncan 398). Using a reference to Martin Luther King to add authority to his claims, outspoken Christian and law professor Richard F. Duncan states that "people should be judged by the content of their character, not by the color of their skin" (402) but that (non-hetero-) sexual orientation is an indicator of one's character:

> Race tells us nothing about a person's character. Sexual behavior and orientation, however, tell us much about a person's character because they tell us what a person does (or what he is inclined to do). Sexual conduct and preferences are fraught with moral and religious significance. To be sure, not everyone agrees that homosexual behaviors and inclinations are immoral. But the point is that, unlike race, sexuality is morally controversial. (403–5)

Duncan seems to believe that race is not an immoral trait because the individual cannot in some way behave racially but that sexual orientation always goes together with at least questionable sexual behaviors. According to his essentialist perspective, same-sex sexual practices are deemed immoral by "our society's three major religions" (404) and triggers infections and diseases such

23 During World War I, the U.S. army conducted demeaning IQ tests which aimed at showing an alleged "[B]lack inferiority" (Schuman et al. 11).

24 See Chauncey 13: "The abnormality (or 'queerness') of the 'fairy,' that is, was defined as much by his 'woman-like' character or 'effeminacy' as his solicitation of male sexual partners."

as AIDS (404). This view presupposes that any non-heterosexual orientation, in particular homosexuality, is a sin which also endangers others and that this sexual behavior reflects on a person's identity and thus gives insight into their somewhat 'flawed' character. This essentialization of sexual orientation only applies to deviant ones whereas heterosexuality is regarded by Duncan as the normative, morally pure sexual status quo. The logic of legal sexual orientationism takes on Christian religious claims to moral superiority and nationalistic notions of protecting the people from diseased sexual Others.

Duncan's argument, which is based on the implicit assumption that homosexual conduct should be criminalized, disregards its own historicity. Non-heterosexual orientations may only be deemed morally controversial because of their histories of discrimination and the persistence of incorrect stereotypes through time. Consequently, arguing that some characteristic is immoral because it has been historically regarded as such seems to recycle established stereotyped notions without examining their plausibility.

Unfortunately, Duncan is right when he claims that "sexuality is morally controversial" (405). Today still, the lines between gender, sexuality, sexual orientation, and sexual conduct are blurred and one would have to spread awareness about each terms' implications before promoting equal protection. However, it is especially the invisibilization of heterosexuality as one of many sexual orientations which others sexuality, and feeds the belief that discourse about sexuality is always stickily perverse and abnormal.

Granting sexual orientation heightened scrutiny would elevate this category to the same level as race and religious affiliation. As indicated by Duncan's views, stereotyped preconceptions and flawed prior knowledge about queer realities indicate that the criterion of moral neutrality is the most difficult to satisfy since it evolves around biased perceptions of sexual orientation in general and non-heterosexual ones in particular. These stereotypes and the subsequent unequal social treatment, the very reason for demanding extraordinary legal protection, prove to be difficult to reverse because they intertwine with other fundamental rights such as religion and have been established over a long period of time. Consequently, overcoming the bias that sexual orientation is not morally neutral is the most problematic task for the proponents for sexual orientation's suspect classification, and increasingly so in times of the Supreme Court's positive stance towards religious conservatism. To re-establish the separation of church and state, and to de-hierarchize the cultural order of acceptable and privileged religions, the criterion of moral neutrality needs to be abolished.

V.4. Queer Legal Imaginaries

Landmark Supreme Court decisions such as *Bostock* or *Lawrence* have sustainably influenced both the U.S. American constitutional landscape and queer lives. However, as the chapters in this book make clear, legal changes may take time and are subject to ongoing negotiations, (re-)transformations, and outright attacks. Most recently, infamously coined 'Don't Say Gay' bills show how contested queer rights still are today and that states increasingly target LGBTQ+ youth. Individual or group relations to one's surrounding legal environment are not only impacted by actual legal developments but also, and arguably even more so, by cultural narratives and cultural-constitutional imaginaries. Chapter II.4 already introduced the notion of cultural-constitutional imaginaries as a certain form of legal affects which are cognitively and affectively appealing. This subchapter supplements the concept of cultural-constitutional imaginaries by commenting on the affective power of configuring alternatives to the legal status quo, and their relevance for queer activism.

The understanding of imaginaries as "encounters with alternative imagined configurations which can be recognized as making both cognitive *and* affective sense" (Lennon 107; emphasis in original) is central here. Law and rights discourses are not conducted from objectively true and neutral positions but always subjectively and affectively experienced. Configurations of power and affect are therefore entwined in how legal cultures imagine themselves and their subjects. Following Mazukatow's and Binder's understanding of imaginaries, I claim that the social praxis of imagining alternatives to the established legal system and existing legal norms reconfigures, subverts, and ultimately queers cultural-legal orders. This subchapter uses the term 'configurations' because these constructs differ from the imaginaries introduced in Chapter II.4 as they have been narrativized, shared, and altered within a legal collective. Drawing on Wolfgang Iser's theory of the real, the fictive, and the imaginary as triad (1), configurations as introduced here are closest to his category of "fictionalizing acts," which he understands as "a crossing of boundaries" (3):

> This transgression function of the fictionalizing act links it to the imaginary. … The act of fictionalizing is therefore not identical to the imaginary with its protean potential. *For the fictionalizing act is a guided act*. It aims at something that in *turn endows the imaginary with an articulate gestalt* – a gestalt that differs from the fantasies, projections, daydreams, and other

> reveries that ordinarily give the imaginary expression in our day-to-day-experience. Here, too, we have an overstepping of limits, as we pass from the diffuse to the precise. Just as the fictionalizing act outstrips the determinacy of the real, so it provides the imaginary with the determinacy that it would not otherwise possess. (3; emphases added)

The act of becoming articulated and guided is what I refer to as higher degree of narrativization of configurations compared to imaginaries as introduced earlier. This transgression from affectively and cognitively experienced imaginaries to affectively shared, altered, and narrativized configurations is what Iser coins as endowing the "imaginary with an articulate gestalt" (3). Thus, the act of imagining reoccurs in the configurations presented and stands out as giving rise to their establishment. Referring to configurations instead of fictionalizing acts as suggested by Iser is due to the formers' cultural-political relevance. While Iser's theory may also be read as having a political impact on how one approaches literary texts, the cultural-legal texts analyzed here have an immediate impact on queer lives. Configurations are thus highly charged with affective and political meaning. They are not only observations of ongoing negotiations with the legal-cultural status quo, they are also queer utopian horizons towards which to work. In this sense, they all work with an envisioned reality after what is now, something that is post the current situation. At their core, these configurations imagine cultural-legal realities which underlie their logic.

A system of law that is in a temporal sense *post* its current form, either post-discriminatory, post-categorical, or post the current status quo implies that law is able to overcome its current form and to evolve into something new, something post current experience. This necessarily involves an abolitionist element of deconstructing, or queering, the status quo to make room for something else. This assumption operates from the premise that a) there is something a legal collective agrees on that *needs* changing, and b) that this status *is able* to be reformed. While this book has elaborated on the aspects that indeed need a reconceptualization and the suspectness of discrimination against sexual minorities, it has yet to comment on the larger question of whether there is something inherently suspect about the legal system as such.

So far, the argument has been made that suspect classification, an already existing tool in constitutional law's box, should and could be adjusted to serve queers' legal protection. While this may be regarded as an important step towards approaching what is oftentimes socioculturally imagined as 'equality' but would rather be labeled equity for queer purposes, the analyses and in-

sights into legal and sociocultural processes prompt the question: If law and culture are so closely connected, would it not make more sense to re-conceptualize existing notions of law as a whole instead of fixing only certain parts of it? Attempts at answering this question have been made by a number of jurists, scholars, and activists, whose voices this subchapter amplifies. Further, these views' compatibility to what this book has established in terms of sexual orientation's relation to law, sociocultural notions of equality, and political power relations will be elaborated on.

All of these perspectives share their innovative, queered, sometimes even rebellious outlook towards the law. They all envision a law which is contrary to, questioning, or deconstructing what we understand to be part of a 'proper' legal system.[25] In this sense, these alternatives to the status quo imagine a queered version of the law, one that challenges established notions and works against inflexible categorizations and attributions. Simultaneously, the perspectives examined here often share their background in Critical Theory, Queer Theory, and Postcolonial Studies, and/or have in common that their activism is rooted in, has been influenced by, or has helped to establish these academic concepts. In this sense, this subchapter introduces configurations about what constitutes a possible legal future (co-)created by and welcoming for queers.

The argument for strengthening legal protections by using already existing concepts of law may be rejected by those who feel and think law in its current form cannot provide the necessary tools for queer emancipation given its discriminatory and oppressive effects on queer realities. Acknowledging these voices, this subchapter sets out to outline some of the most vocal calls for such a law-exherent, or extralegal, solution. Indeed, this outlook is meant to provide space for possible further research on queer rights and it acknowledges the importance of these claims while continuing to argue that law-inherent, and even more importantly sociocultural solutions, must step in first – because without challenging cultural knowledge about queer lives, both law-inherent and law-exherent solutions will ultimately fail.

25 Of course, this overgeneralization mostly refers to those familiar with what constitutes a (Western) legal system. Those with no experience with (state-centered) legal orders may not perceive of these alternatives to the existing system as innovative or even particularly rebellious.

Disentangling Cultural Knowledge about Rights

Similar to what has been claimed in the presiding chapters, queering takes place on the premise of questioning, de-constructing and re-constructing. As illustrated by the analysis of law's and culture's entanglements (see Chapter IV), one needs to break through established pattern of thinking and to question socioculturally and legally naturalized concepts in order to succeed at a holistic analysis.

One of the most naturalized assumptions in this context is that 'rights' hold an emancipatory and transformative power, and are thus important tools for establishing and maintaining formal, if not substantive, equality. The sociocultural understanding of rights found in the U.S. American legal context is therefore a positively connotated one based on an implicit cultural knowledge about rights as enabling tools. 'Rights' are one vital concept this book has been dealing with and that a large part of the queer community are demanding. Comparable to sociocultural imaginaries about law, namely that is it an unemotional, scientific and allegedly neutral sphere,[26] rights are readily associated with ability, agency, and power. In this sense, rights are connotated as something generally positive and to long for, although the living conditions for those who do not currently have them may be more than often at least precarious. Additionally, this culturally embedded notion of rights mirrors a tendency to conceive of this legal construct as gendered mirror of masculinistic expectations about hegemonies (Olson "Turgid;" Olson and Borchert).

These imbalances caused by rights may already be indicative of their bias towards power, yet one has to define what exactly rights are before analyzing their sociocultural meaning. While it is necessary to work with legal concepts that are universally graspable, i.e., they need to share a (culture-)specific meaning to become addressable and nameable in legal discourses, the implication of these concepts may not be entirely obvious and thus contributing to a marred understanding of fundamental cultural values such as equality, liberty, and privacy.

In Western legal cultures, rights are commonly understood as indicative of a privileged status. Either one needs to fight to gain this status or one is, for instance qua birth, holder of this status, indicating belonging to a certain entitled group. In both cases, rights are fundamentally important because they demarcate the borders of one's radius of movement – figuratively, yet often also literally. Whether they lay out which countries one is allowed to travel, which places

26 For an analysis of this claim, see Siegrist and Sugarman 15.

one is allowed to occupy, which person one is allowed to marry, or which bathroom one is allowed to use, rights dictate the boundaries of one's being. Since rights come with this implicit notion of demarcation, it does not surprise that scholars increasingly focus on what is being referred to as a "propertization" of rights. While property rights are a part of the law, the propertization of rights refers to what historian Hannes Siegrist calls the "expansion, distension, and dissolution of property" ("Propertisierung" 14):

> "Public goods" such as information, knowledge, symbols, and forms of expression are protected under property law with the help of patent law, copyright, and trademark law in order to make them marketable in the interests of private providers. Critics warn against the "proliferation" of intellectual property protection for technical production processes, computer programs, texts, images, forms and artistic products because this would restrict cultural access and slow down cultural creativity and economic dynamics. ("Propertisierung"13)[27]

The concept of property includes more than merely one's house, car, or clothes. It transgresses traditional notions of which objects belong to a person to more immeasurable things such as ideas, art, or services. This tendency to consider more and more aspects through a lens of private property, and to appeal to legal means to gain ownership over these goods is connected to the changing sociocultural role of property, which is, similar to other cultural realms such as law and culture, subject to temporal and spatial developments (see also Siegrist and Sugarman 12). This tendency towards a propertization of rights thereby reproduces the logic behind private property regulations into rights of all sorts:

> If we consider that property represents and regulates the handling of social relations in relation to material as well as immaterial objects, and bundles of rights, propertization means that the guiding idea of private property

27 The German original reads: "'Öffentliche Güter' wie Information, Wissen, Symbole und Ausdrucksformen werden mit Hilfe des Patentrechts, Urheberrechts und Markenrechts eigentumsrechtlich geschützt, um sie im Interesse privater Anbieter marktfähig zu machen. Kritiker warnen vor dem 'Ausufern' des geistigen Eigentumsschutzes für technische Herstellungsverfahren, Computerprogramme, Texte, Bildzeichen, Formen und künstlerische Leistungen, weil dadurch kulturelle Zugangsrechte eingeschränkt und die kulturelle Kreativität und wirtschaftliche Dynamik gebremst werden." My translation.

> prevails and becomes the central institution for governing and regulating action. (Löhr)[28]

The concept of property reveals itself to be a vital guiding principle and force behind considerations about rights and those who hold them, and one of the "key themes of modern social and cultural history" (Siegrist and Sugarman 9). Understanding rights not only as an indicator of what one is allowed (or denied) to do but also as a reflection of how Western cultures value the concepts of property (what or who can be owned) and ownership (who can own), one comes to question whether current U.S. American cultural understandings of legal rights contribute to the maintaining of unequal sociocultural orders.

As rights continue to demarcate cultural space and serve as important allies in what is discursively being referred to as 'cultural wars,' holding rights has been supplemented with an element of legitimacy. As legal scholar Duncan Kennedy states, "rights are mediators between the domain of pure value judgments and the domain of factual judgments" ("Critique" 184), thus stressing the authority rights grant to its recipients' position in sociocultural hierarchies. Within this logic, the absence of rights for queers in areas such as housing, credit services, or public accommodation may erroneously be taken as evidence for queers' punishable, socioculturally contestable, or pathological sexual orientation. This mechanism not only emphasizes legal sexual orientationism by othering non-heterosexual orientations, but it also legitimizes the overruling or curtailment of existing queer rights. Notions of property which feed into legal discourse are thus directly connected to establishing, maintaining, or subverting legal and cultural orders.

Beyond Law's Discriminatory Potential

I argue that law is not *a priori* proprietarian in essence but rather that these implications are socioculturally constructed and based on the cultural knowledge of what law is and what rights are supposed to do. Since there is no intrinsic character of what law is, much as there is no intrinsic character of what culture is, understandings of these categories of meaning-making may differ

28 The German original reads: "Geht man davon aus, dass Eigentum den Umgang mit sozialen Beziehungen in Bezug auf materielle wie immaterielle Gegenstände und Bündel von Rechten repräsentiert und regelt, meint Propertization, dass die Leitidee des privaten Eigentums vorherrschend und zur zentralen, handlungsleitenden und –regelnden Institution wird." My translation.

across time, locations, and groups. Trying to adjust laws with a gold standard in mind, e.g., proprietarian or consumptive conceptualizations of rights, degrades law to a static and inflexible tool which re-produces power hierarchies but fails to respond to changing notions of emergency. Even if, for instance, LGBTQ+ persons reject turning to the courts to get their relationships formally recognized, – which was a controversy within different strands of the LGBTQ+ community during the time of arguing for same-sex marriage with some demanding the right to get married and others refusing to be included in this heteronormative, patriarchal institution, – *Obergefell* has resulted in positive changes for the material equality of queers. While the concept of rights, in this example the highly controversial fundamental right to get married, needs to be put under strict scrutiny from a sociocultural perspective, including examining its oppressive, binary, heteronormative history and efficacy, the material and cultural situation of queer couples who are discriminated by, e.g., their insurance companies, adoption agencies, or bank for not being in a married relationship (may) necessitate the claim for such a right while being critical of the concept of such.

Responding to these crises is ultimately prevented not by existing legal norms but by cultural anxieties of deprival. According to social psychology's relative deprivation theory,[29] when people feel deprived of what they had in the past or what others have, they are more likely to turn to scapegoating people with a high visibility but low social status. Following this logic, the pressing fear of losing one's ability to own or consume results in a seemingly inextricable conflict. While the idea of resolving these emergencies leads to angst about losing resources, this angst bears more blaming, possible exclusion, and discrimination of minority groups.

Gunnar Myrdal's seminal study on race relations in the U.S., *An American Dilemma*,[30] examines the cultural foundations of this "ever-raging conflict" (xlvii) between "moral valuations on various levels of consciousness and

29 See Whitley and Kite 312–15 on William Sumner's 1906 theory which was in 1966 picked up and expanded on by Muzafer Sherif in his Robbers Cave Study, and in 1994 analyzed with regard to groups with different social status by John Duckitt.

30 This analysis of Myrdal explicitly ignores his warning that using his findings "for wider conclusions concerning the United States and its civilization than are warranted by is direction of interest is misusing them" (lix) as the issues of racism, social inequality, and discrimination still dominate twenty-first century U.S. American society and culture and have come to be regarded not only as "a corner – although a fairly big one-of American civilization" (lviii) but at least a whole floor.

generality" (xlvii): To Myrdal, the "American Dilemma" exists between two fundamentally opposing value systems, the

> American Creed, where the American thinks, talks, and acts under the influence of high national and Christian precepts, and, on the other hand, the valuations on specific planes of individual and group living, where personal and local interests; economic, social, and sexual jealousies; considerations of community prestige and conformity; group prejudice against particular persons or types of people; and all sorts of miscellaneous wants, impulses, and habits dominate his outlook. (xlvii)

Arguably, Christianity has been replaced in its impact on U.S. American cultural identity by quasi-sacred civil religious symbols and texts, and, for instance, *Identitätsangebote* by online communities, political groups, and grassroots activists. Today, these "high national precepts" would still include the ideal of equality among all U.S. Americans, both conceptually and socio-economically, and personal liberty but also expand to mean ecological sustainability and awareness of the climate crises, and political struggles against inequalities such as #BlackLivesMatters, Women's March, and #MeToo. Stressing that especially these 'newer' values which include ecological and minoritarian considerations clash not only with regard to the American Creed but also with other "valuations on specific planes of individual and group living," namely socio-economic protectionism, sexual hegemonies, and political scapegoating, the American Dilemma becomes a trilemma for those involved but ultimately able to be resolved collectively. By adjusting the values inscribed in the American Creed to include the fundamental right to live for all species while acknowledging individual jealousies not as obstacles but as sites which warrant more sensitive ways of negotiating, the American Dilemma may become the new version of American Exceptionalism.

However, up to today, this ideal remains unattainable. While the concepts that influence the individual may have changed over time, Myrdal's analysis remains highly accurate in its assessment that

> Trying to defend their behavior to others, and primarily to themselves, people will attempt to conceal the conflict between their different valuations of what is desirable and undesirable, right or wrong, by keeping away some valuations from awareness and by focussing attention to others. For the same opportune purposes, *people will twist and mutilate their beliefs of how social reality actually is*. (xlix; emphasis in original)

This reminder of people's intrinsic tendency to shape their social realities may also be read in a positive light. It is this ability to shape, imagine, and create which makes up an individual's and group's power to establish new realities and give meaning to them. This view also opposes culturalisms and legalisms which conceive of realities as indicative of 'natural' orders or merely mirrors of God-given, biological or 'normal' circumstances that warrant no questioning as they are given and unchangeable.

Aiming to change law has to evolve challenging other power regimes, too. This includes neoliberal capitalism and its (sociocultural) interpretations of individualism, liberty, property, and consumerism, gender belief systems, cultural-legal constructions and emphases on sexuality and sexual orientation, processes of knowledge production, transfer, and validation.

Not law or the law is discriminatory, but specific legal norms, decisions, and regulations may be if they are utilized for upholding inequalizing hierarchies. Although this distinction may seem peripheral at first sight, its implications are vital. As voiced by various German legal scholars, most prominently Rudolf von Jhering in his seminal *Der Kampf ums Recht* (*The Struggle for Law*), law is an arena which constantly invites and requires fights, affective, methodological, and even violent social ones in order to be able to adequately respond to and mirror sociocultural transformations. Considering law as *a priori* repressive and/or discriminatory is deciding to see law's transformative and corrective potential only in its abusive/negative implementation, and as a domain which needs revision. This view ignores that law, as culture, is in constant revision and malleable to changing circumstances. Put differently, law's "pluralistic character" (Olson "Mapping" 234) is often perceived of in terms of its function as instrument of power with an emphasis on its oppressive forces, thereby underrating its usefulness for queer activism, and reifying its binary, masculinistic gendering.

Seeing law in terms of power seems increasingly problematic. The ongoing politization and polarization of U.S. American society does not only respond to (ab)uses of power, but it also reproduces demands for more. This *perpetuum mobile* of power drags law into its dynamics by utilizing it to produce outcomes which in themselves again bear the very forces that divide people along the lines of identity, social group memberships, and ideologies. Whenever groups of people within society decide on legal norms for the collective, there will be groups who benefit and groups who are harmed.

However, law exceeds these realms of conflicts of power. Beyond these emancipatory or oppressive properties, law may also serve as an agent of un-

covering inequalizing conditions. In this function, law works as a magnifier of those areas in which lived equality is unachievable due to pre-existing conditions. By shedding light on these preconditions, law is able to guide discourses to the origins of inequalities, which are mostly so engrained in cultural and social imaginaries and sustained through narratives that discovering them proves highly difficult. In this idealistic understanding, law manages to stay agentic and able to bring about change without being harmful.

Configuration 1: Towards a Post-Categorical and Anti-Identitarian Law

The first queer configuration is picking up on proposals to replace existing legal categories and de-emphasizing identity-based classifications in law. It is thus closest to leaving the current U.S. legal system as it is. While this book has argued for considering sexual orientation a suspect classification throughout, this configuration rejects the very idea of protecting singular categories such as sexual orientation but instead argues for the need to include the multitude of complex identity sections which produce distinct discrimination experiences (Foljanty 91). Calling for an intersectional approach to discriminatory legal norms and realities, a post-categorical law envisions a legal system which is not beyond categories but beyond essentializing ones. Liebscher et al. describe this mechanism as follows:

> In academia and everyday life, widespread notions of "the (two) sexes," "the lesbians," "the foreigners" or "the disabled" shape the practice of legal argumentation. Similar stereotypes also reside in the minds of those who establish and apply anti-discrimination laws. Conversely, law shapes and legitimizes social ideas about the comprehensiveness of discrimination categories *qua* its normative authority and narrative power. Beyond its legitimatory function, law also has a productive effect in the field of categorial classifications and perpetuates them. (206)[31]

31 The German original reads: "In Wissenschaft und Alltag verbreitete Vorstellungen von 'den (zwei) Geschlechtern', 'den Lesben', den 'Fremden' oder 'den Behinderten' prägen die juristische Argumentationspraxis. Derartige Stereotype sitzen auch in den Köpfen der Personen, die Antidiskriminierungsrecht setzen und anwenden. Umgekehrt prägt und legitimiert das Recht qua normativer Autorität und narrativer Kraft gesellschaftliche Vorstellungen über die Verfasstheit von Diskriminierungskategorien. Über die Legitimation hinaus wirkt Recht zudem produktiv im Feld kategorialer Zuordnungen und verstetigt diese." My translation.

Similar to my argument in Chapter IV about the situatedness of cis, heterosexual judges and justices, Liebscher et al. draw attention to the persistence of stereotypes which enter the legal system through sociocultural discourses and persist through repetition in and invocation by law. This entanglement then results in the legal-cultural imaginary that the person being at the center of a case, for instance a widowed lesbian cis woman as in *Windsor*, becomes endowed with all the essentializing notions of what a lesbian constitutes according to the justices' precedential, discursively established knowledge, made up, among others, of sociocultural representations and medially established templates. The lesbian is imagined by the Court as a certain type of person and accordingly judged; a distinct and intersectional analysis is, while not necessarily prevented at all times, at least complicated by the force of established categories law offers. An increasingly persistent *stare decisis* then applies to both the justices' mode of interpretation and their essentializing knowledge about queer lives.

Legal categories are thus not objective and innocent but already charged with meaning. Quoting Susanne Baer, Liebscher et al. contest that "because group rights are essentializing difference and inequality, and solidify collective identity concepts, they are – according to Susanne Baer – 'no solutions but a central problem of anti-discrimination rights'" (204).[32] Baer therefore advocates for a post-categorical anti-discrimination law (*postkategoriales Antidiskriminierungsrecht*). But how could such a law look like in practice?

One proposed solution to undermine categories would be to establish broader universal rights for everyone in society (Liebscher et al. 212). Agreeing with taking such a human rights stance, legal scholar Kenji Yoshino claims that a group-based civil rights approach to protecting fundamental rights of all humans will be easier to achieve politically than protecting individual group's rights more thoroughly (792–95). To Yoshino, such a universal approach would also help reducing distinctions between social groups as neither would feel left out, disadvantaged, or deprived of their rights (792–95).[33] This view can also be

32 The German original reads: "Da Gruppenrechte Differenz und Ungleichheiten essentialisieren und kol- lektive Identitätskonzepte verfestigen, sind sie – so Susanne Baer – 'keine Lösung, sondern ein zentrales Problem von Recht gegen Diskriminierung.'" My translation.

33 See also Chapter III.3 on the *Bostock* case, which features the appealing, yet dangerous argument that discrimination based on sexual orientation should be treated akin to discrimination based on sex.

found in lesbian demands of the 1970s in which the collective Radicallesbians state that "[i]n a society in which men do not oppress women, and sexual expression is allowed to follow feelings, the categories of homosexuality and heterosexuality would disappear" (17–18, qtd. in Wilton 14). While it is true that "lesbianism, like male homosexuality, is a category of behaviour possible only in a sexist society characterised by rigid sex roles and dominated by male supremacy [and that] [h]omosexuality is a by-product of a particular way of setting up roles (or approved patterns of behaviour) on the basis of sex" (17–18, qtd. in Wilton 14), the current situation demands working with the already heterosexist conditions the legal system provides.

The underlying premise to these approaches, namely that social tensions would be reduced if everyone got the same rights, neglects already existing inequalities, which necessitate positive discriminatory measures to arrive on a level playing field. Further, intersectional forms of discrimination are ignored because distinct approaches to tackle interlocking forms of oppression are replaced by inflexible one-fits-all legal templates.

Legal scholars have come to consider anti-discrimination laws in general, and the equal protection doctrine in particular, as problematic contributors to essentializing and victimizing perceptions of certain social groups. Liebscher et al. describe how "discrimination features" (*Diskriminierungsmerkmale*; 204) such as ethnicity, race, able-bodiedness or gender force those who are being discriminated against to classify themselves according to these features in order to be granted legal protections. This argumentation illustrates both the inherent violence in categorizations and processes of categorizing (see Chapter IV.1), and the legal necessity of relying on already established and shared understandings of group membership.

Approaching minority rights form such a universal rights perspective thus invisibilizes and also inferioritizes minority concerns. Thinking about specific, intersectional anti-discrimination measures, however, takes the distinct experiences of groups and individuals seriously and legally negotiates what being, for instance, a Black, lesbian, disabled, cis woman socioculturally means and how existing inequalities attached to this identity may be balanced out by the legal system.

While a focus on identity in law is needed given these sociocultural entanglements of discrimination, identity-based laws and policies are also contested from a postmodern, anti-foundational queer theoretical standpoint (Fineman 6). As queer scholar Janet Halley attests, "queer work will be more interested, descriptively and normatively, in practices than identities, in performativity

than essences, and in mobility than stabilities" (28). Moving away from affirmations of identity and towards a focus on the dynamics of challenging, adhering to, trying to fixate or responding to identity, recent proposals to adjust anti-discriminatory legal norms include protecting individuals not because of their respective identity but because of the discriminatory experiences based on their identity. For sexual orientation, this would for instance mean protecting individuals against heterosexism instead of protecting their gay, lesbian, or other identity. This approach prevents perpetuating stigmatized identity categories and making recourse to essentialized, biologistic, or culturalistic notions of personhood, while drawing attention to the practices involved in setting up sociocultural hierarchies and inequalities (Liebscher et al. 217). Post-identitarian, post-categorical law is thus a law that does not protect groups or classifications, i.e., traits that are socioculturally constructed to group people, but one that focuses on and thereby magnifies areas of unequal treatment. This way, disparate impact, that is indirect forms of discrimination, may be easier to spot and challenge. Plus, it challenges legal categories and thus contributes to a legal and cultural deconstruction of stereotypes, allowing for considering intersectional perspectives. Identity political demands are therefore important for refiguring law's normative force. Yet in order to allow for the legal development of more pluralistic structures, identity needs to be used as an analytical tool for identifying and deconstructing oppressive norms, and not as an inflexible category of protection.

Configuration 2: Towards an Anti-Proprietary and Anti-Consumptive Understanding of Law and Fundamental Rights

By upholding the high status of property in legal areas of life, transplanting the underlying logic of property into sociocultural realms, and conceiving of rights as something one owns, sociocultural validations, the economic order of private property, and legal norms reinforce each other. Rights reflect on those (not) having them and vice versa. Even more, laws that reproduce this proprietarian logic beget a sociocultural imagination which is fueled by the desire to become or remain owners; (im)material objects as well as ideas and rights then necessarily belong to someone who is legally able to be granted ownership based on – depending on time and context – citizenship status, gender, age, race/ethnicity, sexual orientation, gender identity, or dis/ability. These decisions over the agency and legal maturity of potential rights-owners make recourse to existing sociocultural hierarchies and established means of catego-

rization. In these cases, law assumes agency over questions of reliability and degrees of own-ability.[34]

Stressing the central place proprietary structures takes on in cultural-legal orders by preferring certain values and rights, Siegrist and Sugarman claim that those structures directly affect the individual:

> those who own property, or those who are at least not principally excluded from accessing it, are ascribed specific qualities, such as diligence, eagerness to work, and the agency over their own life. Throughout history, certain groups have been excluded from property, personal, and civil rights: slaves, natives in the colonies, servants, and laborers, members of religious minorities, and women (especially when married) were considered incapable of owning property because they did not determine their own work and manage their own affairs. The poor were denied the right to own property because this would only tempt them to become idle. The assumption that married women were incapable of managing property independently, responsibly, and efficiently justified a paternalistic society, while the wealthy simultaneously and repeatedly circumvented and increasingly disputed this assumption. (Siegrist and Sugarman 17).[35]

Linking Siegrist's and Sugarman's observations to queer rights discourses, current state attempts to paternalistically 'protect,' 'safe' or 'enable' youth

34 This claim is similar to the legal treatment and non-consentability of trans and non-binary persons, see Olson and Borchert. On the relation between social groups and their historically changing perception as not "eigentumsfähig" see Siegrist and Sugarman 17.

35 The German original reads: "Denjenigen, die Eigentum haben, oder wenigstens prinzipiell vom Zugang dazu nicht ausgeschlossen sind, werden spezifische Eigenschaften zugeschrieben, wie Fleiß, Arbeitseifer und die Fähigkeit, das eigene Leben zu meistern. Im Laufe der Geschichte wurden immer wieder bestimmte Gruppen von den Eigentums-, Persönlichkeits- und Bürgerrechten ausgeschlossen: Sklaven, Eingeborene in den Kolonien, Knechte, Dienstboten und Arbeiter, Angehörige religiöser Minderheiten sowie Frauen (insbesondere verheiratete) galten aufgrund der Behauptung, daß sie ihre Arbeit nicht selber bestimmten und ihre Angelegenheiten nicht selbst verwalten könnten, als eigentumsunfähig. Den Armen sprach man das Recht auf Eigentum ab, da sie dadurch nur zu verschwenderischem Nichtstun verführt würden. Die Annahme, daß die verheiratete Frau unfähig sei, Eigentum selbstständig, verantwortlich und effizient zu verwalten, rechtfertigte die paternalistische Gesellschaft, wurde allerdings von den Vermögenden immer wieder umgangen und zunehmend bestritten" (Siegrist and Sugarman 17). My translation.

and (cis) women mirror the same logic of codifying legal-cultural orders by stigmatizing those who already lack rights. Trans, non-binary, and gender-nonconforming individuals are legally Othered and labeled as non-rights-hold-able by, for instance, framing them as potentially dangerous or unreliable (Olson and Borchert), while using the inherent cis-heteronormativity of the law as precedent for their continued exclusion from rights. Understanding the need to protect the supposedly innocent and defenseless as democratic and civilized value means culturalizing sexist notions of who is in need of (paternal) protections. While minority protections are important, the explicit exclusion of certain groups, for instance trans women or immigrant children, speaks for the hypocrisy and bias of calls for protecting those who are cis and hold citizenship rights. Additionally, such demands legitimize legal endeavors to codify or judicially establish these culturalist misconceptions, thereby perpetuating the imaginary that cis women and young children are indeed 'weaker' or less able to stand in for themselves. This, in turn, necessitates more paternalistic laws and law's duty to become the guardian of those perceived to be unagentic and possibly unreliable (see also Olson and Borchert).

If one recognizes that property and ownership are culturally cherished values which are not established by legal norms but more fundamentally have found their way into our culture and thus are enacted through law and are merely reflected in norms, one has to question how law's proprietarian character influences how we imagine legal realities and forms of justice in times which see violent contestations of minority rights. This observation departs from the understanding that "[a] 'right' does not directly nourish us without the systems in place to ensure that people can demand, enforce and realize the fruits of that right," as ACLU's Deputy Director for Transgender Justice Chase Strangio states ("The Court"). The upcoming configurations shed light on some queer strategies, which move away from a focus of rights as ultimate goal of emancipation and towards law-exherent, or extralegal, possibilities.

Configuration 3: Towards an Extralegal Network of Care

The unrelenting attacks on LGBTQ+ rights, queer-hostile statements by politicians such as Abbott or DeSantis, and the Supreme Court's dooming overruling of *Roe v. Wade* in its *Dobbs v. Jackson Women's Health* decision shackle queer trust in governmental actors and courts. Strangio succinctly describes the current moment of queer legal issues as follows:

> Dobbs [sic] is not a turning point. Rather, it's a reflection of where we currently are … The current precarity of queer and trans life might be best understood as an over-reliance on legal system wins and an under investment in material redistribution. … Narrowly focusing our attention on a hypothetical future problem while so many people are under constant, immediate attack betrays the current problem: Our movement is too focused on formal legal equality and blockbuster Supreme Court victories. ("The Court")

Strangio, one of the most active and outspoken litigators for LGBTQ+ rights in the U.S., advocates for a queer legal future which is not dependent on the legal system. This apparent paradox, a successful lawyer arguing for extralegal ways to organize as a community, mirrors how the ongoing politization of the U.S. judiciary makes configurations for a more thorough queer protection by the judiciary rather hopeless. As Strangio states,

> [u]ltimately, we cannot trust the Supreme Court, or any court, to honor the capaciousness and complexity of our bodies and lives. If we are to ensure that transgender youth are not criminalized, that our community members are not over-policed and incarcerated, that our lives are not reduced to reductive and sensationalized headlines about "What Makes a Woman?", then we need to do more than just ask the state for our rights ("The Court").

Strangio critiques the lacking queer hermeneutics within the current U.S. American legal system. His perspective mirrors the distrust in the Supreme Court's justices which have demonstrated their inability to make sense of queer realities in past decisions and are unwilling to tackle the heterosexist matrix underlying their reasoning (see Chapter III). However, there are already configurations how a queer (extra)legal form of organization could look like. These 'alternative configurations,' in Kathleen Lennon's sense, try to appropriate and regain power from governmental institutions, which have failed to offer sustainable protection to queer, trans, non-binary, gender-nonconforming and other(ed) bodies. Speaking of an extralegal network of care, the act of caring is understood as a social practice situated between queer legal, social, financial, medical, and affective needs, all of which are understood to be interconnected. For instance, as current state bills restrict trans youth access to health care (AR HB 1570, which was blocked from enforcement but also OH HB 4, SC S1259, and AL SB 184), and states increasingly move from youth to targeting adults (Abbott "February"), trans people will

face forced de-transition if not getting access to puberty blockers or hormones (Walker). These challenges to circumvent discriminatory bills result in higher emotional, financial, and organizational efforts for trans people to have their needs met.

One proposed concept for such an extralegal network of care would be the expansion of material aid projects to a larger number of queer people. Taking the Covid-19 pandemic as starting point, legal scholar and activist Dean Spade explains the concept of mutual aid as a "collective coordination to meet each other's needs, usually from an awareness that the systems we have in place are not going to meet them" (*Mutual Aid* 7). Giving concrete examples of how such an organized, collective care works in practice, Spade refers to "every single social movement" (*Mutual Aid* 7) of the past decades,

> whether it's people raising money for workers on strike, setting up a ride-sharing system during the Montgomery Bus Boycott, putting drinking water in the desert for migrants crossing the border, training each other in emergency medicine because ambulance response time in poor neighborhoods is too slow, raising money to pay abortions for those who can't afford them, or coordinating letter-writing to prisoners. (*Mutual Aid* 7)

At the time of this writing, with *Roe*'s demise and the attacks on trans people on multiple levels, the need to organize is particularly visible for those lacking the material resources to access life-saving procedures and supplies such as abortions or hormones.[36] According to Spade, such envisioned alternatives to the current system acknowledge the interdependence of legal and sociocultural realms by identifying "the systems, not the people suffering in them, as the problem [, which] can help people move from shame to anger and defiance" (*Mutual Aid* 13). The configuration of establishing an extralegal network of care is this closely connected to legal realities, yet conceives of lived equality as in need of extralegal, material solutions and less reliance on courts and the legislature.

36 Being aware of the apparent paradox of this statement for those unfamiliar with LGBTQ+ issues, I argue that it is vital to address these consequences as life-threatening. For those unable to get abortions or hormones, these decisions directly impact one's options for education, economic status, social and geographic mobility, and they increase visibility which may lead to more violence for trans people.

Configuration 4: Abolitionism

While jurists approach anti-discrimination laws with an interest in improving legal norms' ability to protect an increasingly differentiated set of people,[37] Black, PoC (people of color), queer, and trans activists call for more radical transformations. For instance, a central claim of #BlackLivesMatter activists has been to defund the police[38] as a consequence of the murder of George Floyd, the abuse of power by police officers. While this demand already seems radical for many, the police abolition movement calls not only for a defunding but also for an abolishment of the police because it is perceived to be an inherently discriminatory institution.[39]

Abolitionism, originally referring to the movements calling for the abolition of slavery before the U.S. Civil War, finds a revitalization in contemporary activist movements. Today's movements understand abolitionism in W.E.B. Du Bois' and Angela Davis' sense, namely that the abolition of slavery has not ended Black Americans' oppression but only relocated it to other state-made institutions such as the police, the industrial prison complex, and capitalism:

> We can trace a direct lineage from those penal practices to today's policing and punishing. In fact, sometimes, we can even trace the legal precedent directly back to the law of slavery. … Our abolitionist efforts today—whether they target the police, prisons, capital punishment, or more broadly our punitive society—have to be understood through this perspective: the dark legacy and long history of the still uncompleted abolition of slavery. (Harcourt)

The entanglement of oppressive systems and the diverse forms of discrimination inherent to them has been one of the major points of intersectionality the-

37 See also Cotterrell 100: "Law's interpretive communities now reflect the patterned differentiation of the social."

38 See for instance the #BlackLivesMatter petition following George Floyd's death (BlackLivesMatter).

39 In fact, the movement(s) differ in their understanding of what abolishing and defunding police means, yet they all agree that the current police system needs to be challenged. See Illing, quoting Christy Lopez: "'Police abolition' and 'defund the police' are not terms I came up with, and different people mean different things when they use those terms. But a shared objective among most defund proponents, which I also share, is that we need to reset public safety in order to eliminate our overreliance on law enforcement, discrimination, and avoidable harm in public safety, including unnecessary police killings."

ory and can be found throughout other disciplines as well. It is especially a class perspective which finds way into discourses about power relations, mirroring configuration 1's anti- proprietary and anti-consumptive stance. According to Du Bois, slavery was abolished at the expense of those who lacked education, property, and money to actively make use of their new freedom. Without these requirements to make it in a capitalist society, newly freed people were forced to become dependent on Whites again:

> DuBois argued that the abolition of slavery was accomplished only in the negative sense. In order to achieve the comprehensive abolition of slavery—after the institution was rendered illegal and black people were released from their chains—new institutions should have been created to incorporate black people into the social order. … Slavery could not be truly abolished until people were provided with the economic means for their subsistence. They also needed access to educational institutions and needed to claim voting and other political rights, a process that had begun, but remained incomplete during the short period of radical reconstruction that ended in 1877. DuBois thus argued that a host of democratic institutions are needed to dully achieve abolition—thus abolition democracy. (Davis *Abolition* 8; emphasis in original)

This understanding of abolition as a project of the elites that benefitted more from the new conditions than those who were *de jure* freed, thus an uncompleted endeavor, too often accompanied by the establishment of oppressive and discriminatory proxies is mirrored in current discourses about queer rights. As discussed in Chapter IV, top-down legislation and decisions concerning queer lives are similarly problematic as forms of queer activism which only focus on White, propertied, educated, able-bodied gay men or the demands of the gay (monied) mainstream. In these cases, already privileged and over-represented individuals are imagined to stand in for a diverse group of people, falsely essentializing both the demands, needs, and experiences of the queer community and reproducing unequal power hierarchies in which rights are "granted" from above.

Further, the fight for queer rights seems to have lost impetus after *Obergefell* and risks becoming perceived to be obsolete after *Bostock*. While these decisions have had enormous consequences for the lives of many queers, a society and culture which still operates under the assumption of a heteronormative standard, moral values derived from an arguably anti-queer quasi-state

religion, and a neoliberal capitalist logic of exploitation and utilization will inevitably reproduce anti-queer orders. This observation is supplemented by the narcotizing function of pro-queer landmark decisions which mobilize and bind resources of the LGBTQ+ community only to find them lacking in other areas. As Chase Strangio points out, this was already the case when in 2013 the *Defense of Marriage Act* (DOMA) was struck down and continues until today:

> While the mainstream LGBTQ movement celebrated the end of DOMA, there was a lack of movement focus on the breathtaking implications of the *Shelby County v. Holder* decision [Voting Rights Act; lb], which led to immediate voter suppression measures being implemented across the country. Our reductive celebration ultimately diverted focus away from the post-Shelby County world in which state legislatures shifted further and further to the political right and legal protections for everyone became increasingly precarious. Landmark wins at the Supreme Court almost always come with significant cost. In order to reform our legal system, we must examine the consequences and limitations of both our victories and defeats. ("The Court")

Strangio, who was part of the litigation team for *Obergefell* and worked on one of the cases which were combined in *Bostock*, claims that Supreme Court decisions, even pro-queer ones, are only able to cover the demands of some while leaving others (more) vulnerable, visible, and prone to backlash from conservative, right-wing actors. Interestingly, these observations mirror Angela Davis' finding that after the abolition of slavery, other discriminatory institutions and practices were in place which contributed to an ongoing subordination of the newly freed while *de jure* slavery was abolished. Similarly, the continuing hyper visible Supreme Court gains by queers are accompanied by the gutting of rights in other areas and in seemingly unrelated ones such as deciding on states' rights to determine their rules for elections. Decisions such as in *Shelby* prey on the general public's inability to grasp the enormous consequences for even those legal questions which are not directly connected to queer demands, making a strong case for a more thorough legal-cultural education. In the case of *Shelby*, the now legalized practice of altering election rules enables states and local governments to gerrymander, i.e., establish burdens which are particularly hard or impossible to overcome for some social groups which are more

likely to vote for the undesired party.[40] Thus, a queer rights project cannot be but uncompleted and in constant progress.

However, what is new in recent discourses about abolitionism is their focus on actively working towards alternatives to what activist Mariame Kaba refers to as "death-making institutions, which are policing, imprisonment, sentencing, and surveillance" (qtd. in Taylor). This claim, which may sound extreme and also threatening to those fearing a disruption of established social orders and a rise in crimes, finds its equivalent in queer activism. Referring back to the historical roots of queer resistance in the Stonewall riots, queer activists have connected the call to abolish the police to their own emancipatory endeavors and the police's and government's roles in oppressing these.[41] As trans rights activist and scholar Dean Spade explains:

> Queer and trans liberation is inextricable from other leftist liberation movements — feminism, migrant justice, Black liberation, disability justice, and more. All marginalized and targeted groups face not only poverty and housing insecurity, but also police violence and targeted criminalization and deportation. All these movements imagine another world where all people have what they need, no one is exploited to enrich others, and we don't live with a violent standing army of police endangering our lives and using resources that could be better put toward housing, health care, and childcare. … We are abolitionists because we know it is not a broken system that needs to be fixed — it is a system operating exactly as it was designed to operate and hurting the people it has always hurt, and it needs to be dismantled. ("The Queer and Trans Fight")

Spade's argumentation is important on several grounds. First, he conceives of queer activism as embedded in a collective approach to justice. This form of allyship is decisive for advocating for a pluralistic, intersectional, diverse, and culture-sensible cultural-legal education which challenges discriminatory

40 Following *Shelby*, states such as Georgia and North Dakota have introduced new voting bills. In Georgia, the "exact match" bill requires voters to present a form of identification which is issued by the government and matches their voter registration exactly, without "a missing hyphen, an extra space, or a typo" (Nilsen). In North Dakota, a new law requires voters to show an identification with a residential address on it, making "this … the most controversial because much of the state's Native American population and other rural voters don't have fixed street addresses; they use PO boxes instead" (Nilsen).

41 See Bassichis, Lee, Spade; Spade "The Queer and Trans Fight."

thinking at its roots before these stereotypes and prejudices are full-grown and might find their ways into legal, social, cultural, physical, mental, or economic violence. This is especially important when looking back at abolitionism's history and how discriminatory and oppressive systems such as Black codes filled in where the abolishment of slavery left off. Today, one can also observe how state-made bills find ways to discriminate against queer and trans youth in areas which are not yet covered by federal protections. These instances show how forms of violence and oppression are relocated and constantly adapted because the abolishment of one discriminatory system or practice has not been able to supply alternatives to people's behavior and thinking.

Second, Spade refers to the power of envisioning alternatives to the status quo. Imagining an ideal world, a utopia serves both as fuel for activism and as a force that puts existing discriminatory realities under legitimatory pressure. Third, he proposes concrete alternatives to existing inequalities and offers practical solutions to current issues, thus suggesting an activism that is realistic and non-threatening to those fearing a disruption of social life as we know it. Fourth, Spade extracts the very idea of abolitionist movements: A system that was meant to trigger discriminatory outcomes cannot be trans- or reformed but only abolished and replaced.

Spade voices the need to treat the U.S. American legal system similar to the police, thus challenging a system that was designed to discriminate. But is abolishing the legal system as it is currently constructed really the *ultima ratio* for queer rights projects? Indeed, queer abolitionists are right to criticize the smarmy approaches by homonormative queers whose demands become depolitized when having been legally included into neoliberal, class-based agendas, including the right to form a core family, consume, and serve in the military. As history shows, however, these gains are by no means socioculturally irrelevant, although their value for the individual may be disputed.

Looking back to the development of the Fourteenth Amendment and the Civil War, i.e., the beginnings of the original abolitionist movement, the decision to allow African-Americans to serve in the military (see also the Militia Act of 1862) had not only strategic consequences for outmanning the South but also enabled African-Americans to imagine themselves, and let others imagine them, as citizens of the U.S. While we today know that emancipation and equality have to be perceived as two distinct goals of any oppressed group, the possibility to imagine alternative realities is vital for gaining both. Within an oppressed community, imagining emancipation sometimes bears out of the need to endure inequalities and one's will to survive, thus making the act of

imagining both a political and existential issue. In order to enable those outside of the community to imagine equality, however, they must be confronted with the possibility to imagine those realities, and in the context of sexual orientations, challenge and question the heterosexist matrix they are socialized in. While it is too much to ask of those fighting for those rights to educate those against them on the way, both tasks need to be accomplished in order to initiate change.

Without this legal-cultural education, the faulty legal system may be abolished, yet only to allow equally discriminatory and hierarchizing cultural orders to step in the newly created gap and (re-)establish the abolished legal orders in a different form. As abolitionism calls for an abolishment of inherently discriminatory institutions such as the legal system, it fails to consider what happens to those who believe in, sustain, and profit from them. My claim is that abolishing these systems without educating about their inequal implications on the way, without engaging in dialogues about future alternatives inevitably represses negative affects, which then find their expression elsewhere. As Ferguson states with regard to trauma in law:

> [A] story wrongly refused by the law will return in the republic of laws as cultural narrative and, often enough, as renewed legal event. The law does not get beyond what it has not worked through. The pendulum swings back because the culture has made an ideological commitment to social justice and because the expectation of justice causes injustice to loom large. (Ferguson 97)

Ferguson makes clear that reforming legal norms needs to include sociocultural reconsiderations, too. This is also supported by historical developments in the U.S. In a historically comparative perspective, Black codes are examples of how the abolishment of one violently unjust system, slavery, translates into the establishment of further inequalities and injustices when not targeted in a holistic manner, taking into account all implicit and explicit legal and quasi-legal, i.e., legal-cultural, norms connected to the system, and the underlying prejudice and stereotypes which give birth to these norms.

Of course, queer abolitionists do not claim that abolishing is enough; any restructuring needs to be accompanied by a re-thinking, re-conceptualizing, and re-creating. But one wonders why this latter part, the re-imagining of alternative realities cannot be the starting point. Imagining queer(er) laws, queering laws, constituting queer realities and queering constitutional cul-

tures may then become the activistic and academic tools for engaging in re-shaping the legal system. Ultimately, this conversation inevitably translates into a new system by renovating its foundation instead of demolishing it. So, while it may be true that the master's tool will never dismantle the master's house following Audre Lorde's understanding, disowning the masters, who lack the cultural mandate to rule over queer lives, knowledge about queer realities, and empathy for queer concerns, will make these tools useable again. And ready to dismantle.