

IV. Judging More Queerly

IV.1. Zooming in On Different Sources of Legal Orders and Attempts of Maintaining Them

The previous chapters have paid particular attention to the Supreme Court and the Constitution, thereby putting an emphasis on judicial approaches to law and the narratives and imaginaries associated with the legal system. While cultural narratives and imaginaries also do legal work in the form of challenging or legitimizing legal norms as argued in Chapter II.4, other legal and extra-legal dynamics of meaning-making are equally important for tactical queer rights activism and for establishing a queer hermeneutics of law. These dynamics this chapter sets out to examine, however, are not only important for developing actionable strategies. They are also foundational for understanding anti-discrimination projects as neither solely situated within sociocultural nor legal frameworks but entangled within diverse settings and thus need to be approached from an intersectional and interdisciplinary perspective.

The point that law is embedded in other sociocultural processes has been made, among others, by important scholars in queer studies,¹ sociology,² cultural studies,³ law,⁴ and psychology.⁵ While the latter discipline has con-

1 For instance, see Valdes; Kepros; Katz *Invention*.

2 For instance, see Cotterrell; Schaefer.

3 For instance, see Coombe "Contingent;" Olson and Schillings.

4 For instance, see Hart; Rosen; Häberle *Verfassungslehre*.

5 See Kite and Whitley 35 for an overview of the sociocultural theory of stereotyping and prejudice. They argue that "most individuals internalize their culture's stereotypes along with other cultural norms and attitudes" (35), and link changing research findings in psychology and medicine to changing attitudes towards gay rights (8). See also Allport 461–78 for an overview on the entanglements of legal norms and group relations.

tributed meaningful insights into the sociocultural and neuronal origins of discrimination, challenging these mechanisms is still considered to be a legal issue with legal manifestation of stereotypes and prejudice often being conceived of and depicted as in need of a court room. Relegating queer rights to this battlefield, however, invisibilizes and silences the multidimensional entanglements of law and culture, i.e., how law codifies sociocultural norms and stereotypes, and how sociocultural norms and stereotypes reenter the legal realm when not challenged. Zooming in on different origins of legal meaning-making thus needs to take into account processes of normativization as well as codification, it needs to examine the interplay between legal and sociocultural change, and it needs to thoroughly question and deconstruct the very foundations on which legal reasoning takes place.

To do so, Queer Theory provides the necessary analytical perspectives to question seemingly 'natural' distinctions and binaries, deconstruct terminologies and concepts, and look at sexualities as fluid and dynamic. Additionally, Critical Legal Studies approaches law with an interest in its social implications and consequences. Both subdisciplines are critical towards traditional hegemonies and examine how processes of normativization are (mis-)used to maintain existing hierarchies. This chapter uses Queer Theory and Critical Legal Studies as lenses through which to analyze cultural knowledge about law, and to queer the social constructions of legal categorizations.

'Different sources of law' are understood as various ordering principles that are directly or indirectly connected to the legal system. While some are quite obvious, for instance legislation, others are not as readily associated with law, for instance, one own's biographical background. However, all of these examples, although varying in their form and closeness to the legal system, contribute to our understanding of law. They all share their function as establishing, maintaining, or challenging existing orders of power. Legal scholar Lawrence Rosen describes this perspective on entangled cultural-legal processes succinctly:

Features that may not seem to be linked are, therefore, crucially related to one another: Our ideas of time inform our understanding of kinship and contract, our concepts of causation are entwined with the categories of persons we encounter, the ways we image our bodies and our interior states affect the powers we ascribe to the state and to our gods. In short, we create our experience, knit together disparate ideas and actions, and in the process fabricate a world of meaning that appears to us as real. (Rosen 4)

Regarding legal and sociocultural processes as intertwined blurs the allegedly static lines between these realms and illustrates how seemingly unrelated societal, cultural, and individual aspects feed back on each other. Growing out of and giving back to sociocultural conditions, laws are thus never neutral rules for ordering everyday life. They are equally indicative of and entangled in inequalities as the conditions they want to overcome or maintain.

Discriminatory laws may be changed by choosing one of various routes, i.e., the legislation, the judiciary, protesting. Yet changing discriminatory realities necessarily has to acknowledge all of these entanglements, examine all of the strategies available, and chose the one(s) that work best to prevent a legal domino effect in which bills and court decisions pop up and challenge laws, thus creating a federal legal patchwork. Patchwork systems bear the risk of tipping from mirroring democratic polyphony to undermining democracy's legitimacy when not able to communicate the reasonableness of their decisions to those being affected by them. Recent examples of this mechanism involve struggles between the state and federal level for or against minority rights in the U.S., most prominently the re-established power of states to decide whether to criminalize or allow abortions following the overturn of *Roe* in the Supreme Court's 2022 *Dobbs* decision.

But how could an approach that takes into account different sources of law be part of an activist practice? Is the best way to achieve lasting sociocultural change the legal route? And if so, what would be the best way to go about it? There is disagreement on whether the legal system is really able to become an ally in queer rights activism, whether it would be best to abolish it entirely (see also Chapter V.3), whether it needs to be reformed before being of use for sexual minorities (see Chapter V.2), or whether it is crucial to challenge other oppressing mechanisms simultaneously, for instance neoliberal capitalist, patriarchal, colonial structures, as claimed by material feminism. I argue that laws take on various shapes and that what is referred to as the legal system expands way beyond codified or common law to include sociocultural norms. Law-like norms also have an inherently legal character and need to be considered for tactical activism. The imaginaries surrounding the sociocultural construct of marriage work to illustrate this point. If, for instance, one continues to support and (re-)produce notions of the family as only proper when involving two married people, yet denies the legal possibility to get married to certain groups (non-heterosexual, non-cis individuals), the legal system operates unequally. Even if these excluded groups now gain the right to get married through legislation or the judiciary, such as in *Obergefell*, the norm of being married has not

been challenged, only its legal implementation for a specific group. The consequences of such an unchallenged cultural norm can then be seen by looking at *Masterpiece*. Exclusions for other groups to this normatized status are not addressed and continue to pose barriers for marginalized and invisibilized groups.

For establishing a more just and equal system of justice it is not sufficient to challenge the existing legal system; actively enabling conditions that allow for imagining and working towards alternatives to this system is equally important and goes beyond a mere abolishment of what is (the legal system as a whole) or a relocation of where to establish alternatives. This latter argument falsely considers economic, capitalist, political, neoliberal, colonial, or gender/sex political, patriarchal conditions as more important battlefields for activism while they need to be simultaneously tackled. Zooming in on other oppressive systems, away from the legal sphere, ignores the entanglements of these areas and their inherently legal character. Focusing on achieving more rights and establishing anti-discrimination laws for minorities is not about merely getting more say in an unequal system, it is about transforming said unequal system from within.

Certain conditions have explicitly or implicitly been inscribed into Western legal and moral cultures and continue their influence on legal communities even after they have been legally or socioculturally challenged. For instance, the existence of anti-abortion laws after *Roe* now enables states to re-establish pre-1973 conditions in their territory. States such as Oklahoma, Arkansas, Mississippi, and Alabama banned abortions before the Supreme Court decriminalized it federally in 1973, and these states are very likely to re-install this legal stance now that the Court decided in *Dobbs* that it is up to the states whether to allow or prohibit abortions if they have not done so already (Messerly; Sneed). The continuing existence of anti-abortion laws even during the time of *Roe* has established an anti-abortion stance as moral, cultural, and legal standard in these states. The continuing existence in law enabled imagining anti-abortion as culturally and morally codified in these states, necessitating legal measures to prohibit it.

Schulzke and Carroll argue that those aiming to change existing policies need to take into account that “governmental support is often necessary for reform, ... even when they are successful in acting outside of government” (2), for example, when using extra-institutional ways of putting legal norms under pressure. These extra-institutional means may range from organizing and taking part in protests and signing petitions to publicly criticizing the norms

in question and imagining, discussing, and sharing alternative, utopian forms of living and being.⁶ When confronted with choosing between governmental forms of challenging policies, the most crucial question is whether to aim for legislative measures or to turn to the judiciary as these two strategies

represent two fundamentally different ways of thinking about basic rights. Common law, which is the law created through judicial decisions, can have similar practical effects as new legislation, but the symbolism is much different. Courts cannot establish a new right, but they can interpret existing laws as affirming a right that has not been widely recognized. Judicial decisions may also explicitly reject previous legislation. When laws affecting culture are passed through legislative mechanisms, they create new rights and responsibilities. Unlike judicial decisions, legislative actions imply that the rights and responsibilities did not exist previously. This difference can have long-term consequences. (Schulzke and Caroll 2–3)

While legally, both legislative and judicial means promise similar results, culturally, these approaches have distinct effects. Although some scholars remark on the undemocratic process of judicially established legal norms,⁷ the symbolic power of judicial decisions, especially when handed down by the Supreme Court, demands closer attention as the general political climate in the U.S. continues to become more polarized.

The previous chapters have commented on the affective relation between feelings of Americanness, of belonging to the U.S., and the Constitution and its narratives of equality, liberty, and autonomy. In its function as the custodian of this founding document, the Supreme Court is readily imagined as a higher authority in interpreting those ideals that are at the core of Americanness. These American ideals need to be defended in the cultural-legal imagination, yet have never been successfully implemented into the socio-legal reality. SCOTUS therefore enjoys an imaginatively increased moral power while it is *de jure* not more powerfully situated within the *trias politica* model than the legislature.

Further, looking back on past legislative decisions, one wonders whether these attempts are in fact more democratic than judicial interventions in the

6 However, in its most successful and arguably most consequent form, imagining alternative legal and sociocultural orders may ultimately abolish the need for governmental support, as discussed in Chapter V.4.

7 See Schulzke and Caroll 2; Bickel.

law. As seen with Obamacare, the COVID-19 relief fund, and the *Equality Act*, the political maneuvering around and filibustering of these bills puts pressure on the idea that public opinion and the electorate's votes evidently influence processes of lawmaking – even though the election of lawmakers is a more democratic process than the appointment of judges and justices. As for the U.S., this imaginary of public participation in lawmaking is even more challenged by systematic voter suppression in forms of gerrymandering, inhibited access to polling stations, and identification laws (Newkirk).

The instances discussed in this chapter, from Supreme Court decisions and categorizations to models of equality and essentialism, constitute different sources of law-like norms because they share regulatory and ordering functions for the social groups they are employed in. These legal and quasi-legal norms feed back into Western moral and legal cultures, i.e., they shape one's understanding of what is right and wrong, legal and illegal, and allowed and to be sanctioned.

In establishing the need to link activist efforts to legal reform, Chapter IV stresses the importance of thinking strategically about the relationship(s) between law and culture, and to work in dialogue with activists on various levels to achieve lasting anti-discriminatory realities for marginalized and oppressed social groups. The following parts illustrate how this utopian idea needs to expand from legal endeavors to active collaboration and dialogue between social groups, a questioning of allegedly fixed cultural frameworks and concepts, and the acknowledgement and challenging of one's own biased situatedness, privileges, and position.

IV.2. Cultural Transformations through Supreme Court Decisions

While the 2016 U.S. election marks a turning point in the public's affective reaction towards political decisions and an intensified notion of the so-called 'culture wars,' Supreme Court decisions have caused political and sociocultural responses throughout history. In 1896, *Plessy v. Ferguson* decided that racial segregation is constitutional, laying the foundation for decades of various forms of discrimination, including unequal access to resources, and invisibilization of BIPOC voices in sociocultural discourses. In 1973, *Roe v. Wade* decriminalized abortion on a federal level, thus supporting female emancipation and fostering the notion of having agency over one's body. In 2003's *Lawrence v. Texas*, the Court struck down sodomy laws on a federal level and laid the foundation

for extending the fundamental right to marry to same-sex couples in *Obergefell v. Hodges* (2015). These examples illustrate how powerful Supreme Court decisions can be and the major sociocultural, economic, and political consequences they can have.

This chapter sets out to analyze how legal orders are influenced by cultural concepts, how legal and cultural categorizations of sexual orientation feed on and influence each other, and how sexual hierarchies are maintained in twenty-first century U.S. America. Taking legal norms and those who interpret them as its case studies, the chapter looks at the relation between legal and cultural-legal norms and power, and thereby establishes a queer hermeneutics within law.

The sociocultural transformations enabled by Supreme Court decisions can be observed by looking at *Plessy*, *Roe*, and *Lawrence*.⁸ However, the more interesting question is whether such transformations are caused or merely intensified by these decisions. In other words, do Supreme Court decisions inhabit a jurisgenerative⁹ nature, meaning that they have the power to establish a new “nomos”, that is a new “normative universe” (Cover “Nomos” 4)? And if so, would this new normative universe hold the power to initiate cultural transformations within mainstream society and culture simply by the act of deciding a legal case? Does a Supreme Court’s issued opinion serve as a performative utterance of cultural change? Or, does a decision merely reflect on the social movements’ claims that preceded the decision?

Critical Legal Studies often approach legal processes in terms of power formations and social hierarchies following a Marxist understanding of law (West 147–50), rendering the cultural arch which frames legal systems invisible. When law and power are analyzed from a sociological or political perspective, power hierarchies within cultural notions of what is ‘normal’ are often left underdiscussed. The cultural frames which inform legal conditions function as a given, and more than often remain invisible in legal analysis. For instance, the discourse about adoption regulations for non-heterosexual and trans individuals is often approached from the call for equal treatment, while the broader issues of the cultural constructs of family, kinship, and gender are left underdiscussed. This way, law works to regulate around unquestioned,

8 See Chapter IV.1.

9 Robert Cover uses the term “jurisgenesis” to refer to “the creation of legal meaning” (“Nomos” 11).

naturalized and already flawed cultural notions of what is ‘normal’ and what should be policed.

Legal Norms and Cultural Frames in *Pavan v. Smith*

The 2017 Supreme Court decision *Pavan v. Smith* works well to illustrate this point. In *Pavan v. Smith*, two lesbian couples sued the director of the Arkansas Department of Health, Dr. Nate Smith, because the Department issued a birth certificate for their children which only had the name of the biological mother on it. From a legal perspective, the case seemed rather clear as Arkansas state law violated the ruling in *Obergefell* that same-sex couples have the constitutional right to marry, which is the “basis for an expanding list of governmental rights, benefits, and responsibilities” (17), including “birth and death certificates” (17). Consequently, the Supreme Court decided in favor of the plaintiff, and the Department of Health had to issue a birth certificate with both mothers on it.

From a cultural perspective, however, both the Arkansas supreme court and the U.S. Supreme Court in the form of Justice Gorsuch’s dissent, joined by Justices Thomas and Alito, took issue with the addition of a same-sex, non-biological partner to the child’s birth certificate. For them, a birth registration system based on biology is legitimate because only then are states able to collect “reliable and comprehensive statistics of all vital events for purposes of public health research and identification of public health trends” (2016 Arkansas 437 S.Ct. at 14).¹⁰ This argumentation seems spurious, yet appealing because it speaks to our cultural desire of feeling protected and evading considerations of mortality through medical and biological certainty.

Interestingly, this medico-biologicistic perspective on bodies is also reflected in an overemphasis on biological sex in legal discourse. When looking at the increasingly fierce way of regulating trans and non-binary bodies in states such as Mississippi with its 2021 “Mississippi Fairness Act,”¹¹ a pattern

10 This line of argumentation which focusses on vital records and public health concerns can also be observed in multiple state bills aiming to prohibit changing trans individuals’ gender markers on their birth certificates. See South Dakota’s HB 1076 from 2021; see also *Ray v. McCloud* (2020) in which a federal court struck down an Ohio state policy.

11 Mississippi Senate Bill 2536, also known as the “Mississippi Fairness Act” prevents trans and non-binary youth to compete or even join athletic teams according to their gender identity. The Act mandates youth to join teams according to their biological sex.

of using biological sex as “supposed shelter of reliability even when existing understandings of gender, identity, and social equality are being actively challenged elsewhere” (Olson and Borchert 391) emerges. Operating similar to the tracking of genetic information for the purpose of ‘public health,’ biological sex is then naturalized as essential and scientifically relevant category of ordering social life – from issuing birth certificates to regulating youth’s sports activities to collecting information about potentially terminal illnesses.

It is doubtful whether a culture that has a different view on death and sickness, one that does not displace mourning and loss to its margins, would lay an equal emphasis on tracking health records to genetic lineage. It is equally questionable whether a cultural understanding of non-binary sexualities would continue to use a heteronormative lens for these considerations. However, this and similar arguments against equal treatment of minorities function as moral credentials which allow people to consciously and unconsciously mask their discriminatory stance towards LGBTQ+ people under the disguise of other cultural anxieties.

Additionally, the issues surrounding birth certification mirror other cultural anxieties about the loss of family cohesion and the endangerment of the heteronormative core family. One could also argue that a fear of non-heteronormative family models and an increasing fluidity in sex and gender relations is the original cultural anxiety which only stains the others. However, from a psychoanalytical perspective, fearing a dissolution of one’s presumably clear-cut identity and the omnipresent fear of dying may be equally threatening. As analyzed by queer theorist Gayle Rubin in her seminal 1984 essay “Thinking Sex,” Western conceptualizations of sexuality follow a certain hierarchy which values “heterosexual, marital, monogamous, reproductive, and noncommercial” (151) sexuality while condemning sexualities that are “homosexual, unmarried, promiscuous, nonprocreative, or commercial” (151). The cultural prioritization of these forms of sexuality mirror what Butler referred to as the “heterosexual matrix” (*Gender* 208). The binary understanding of stable biological sexes translates into a cultural expectation to behave a certain way (gender) and to feel attracted to the opposite sex (compulsory heterosexuality) (Butler *Gender* 101; 208).

Cultural and Legal Notions of Kinship and Family

Transgressing any of these borders, crossing any of those lines or violating any of the socioculturally mandated expectations Rubin and Butler mention, sets into motion “a domino theory of sexual peril” (Rubin 151) in which, if not act-

ing according to these heavily policed sexual norms, “something unspeakable will skitter across” (151). Here, the quasi-legal character of non-legal, sociocultural norms and the dawning punishment when neglecting them proves to be equally threatening and coercive as codified or common law. This cultural understanding of family as consisting of a cis man, functioning as husband, patriarch, breadwinner, and a cis woman, functioning as wife, mother, and care worker, has historically been enforced through legal and social norms, making it a dominant narrative of what is normatively perceived as ‘normal.’ These notions are also influenced and reinforced by legal-economic regulations which tied marriage, — until the Court’s 2015 *Obergefell* decision in many states only applying to heterosexual couples, — to certain financial benefits such as tax deductions (such as inheritance taxes, as seen in *Windsor*) or insurance rates.

Interestingly, while we are socialized to accept and, in some cases, unquestioningly follow this notion of what ‘family’ consists of, the religious, economic and cultural inkings of this concept go unnoticed. Becoming a husband or a wife respectively is inherent to what a ‘real,’ i.e. (morally) good and happy, family looks like. The historic development of this institution is not part of the sociocultural imaginaries about it. Marriage’s patriarchal-capitalist logic of a husband’s ownership of his wife are today at best incidentally remembered when choosing wedding rings or taking off one’s maiden name.¹² While wedding rings originate in the tradition of marking one’s property (Case “Feminists” 1210), taking on the husband’s name as legal name was not merely a tradition but state-level patriarchal force. The decision which name to use was not up to the wife but mandated and expected by society and law; if a woman would not comply with this expectation, she risked not being granted citizenship, getting a mortgage on property, or having troubles in voter registration (Case “Marriage” 1768; Kohout 105). Further, bourgeois promises of happiness, which include classed notions of property and privateness in one’s own four walls, evolve around the marriage contract as rite of passage into familyness. In this sense, the religious symbolism of marriage as a threshold to valid and meaningful relationships, and bureaucratic state procedures of becoming married qualify gender relations and knight them culturally.

The entanglements between cultural, religions, and legal conceptualizations of the family reinforce the impression of this heteronormative family structure as universally valid because they all support and build on each other.

12 For more on marriage as a patriarchal institution see Boucai 4; Case “Feminists” 1213–5; *Frontiero* at 685.

Consequently, religious understandings of normativity have become part of ordering human relations and continue to exercise this privileged status onto others by establishing quasi-legal norms and forms of sociocultural control – be it through adhering to religious ceremonial procedures, introducing moral orders, or enforcing traditional belief systems.

As a consequence of this normalization of heteronormative family structures, conceptualizations of models that deviate from this norm are more difficult and possibly taboo for us to imagine. Following a determinist understanding culture, these cultural frames and the organization of cultural realms, e.g., how do we perceive of gender relations, limit and determine our abilities to produce knowledge about our world.

Non-heteronormative family models, especially queer understandings of family cause cultural anxieties of blurring those structures a majority of people were socialized to believe are natural. While the sources of these anxieties remain unclear, – may they stem from discriminatory beliefs, the inability to understand these conceptualizations which are so ‘foreign,’ or discriminatory beliefs which result from the inability to understand these conceptualizations which are so ‘foreign,’ – they focus on adjusting the legal norms instead of the cultural understandings pertaining to the concept of family. ‘Family’ today more than often includes non-biological family members instead of biological ones, and trans or non-binary parents who gave birth to children qua their biological set-up while or before their decision to let others in on their identity, i.e., before their ‘coming-out.’

While *Pavan v. Smith* was straight forward with regard to the legal questions about whether to add the biological mother’s female spouse to the birth certificate, it may need more cultural inquiries into legal norms before these official documents are framed along the lines of parentage, regardless of biological kinship and gender. For instance, in Canada, the Ontario “All Families Are Equal Act” from 2016 recognizes more than two parents of a child.¹³ This

13 Another more recent example is the German government’s *Koalitionsvertrag* (coalition contract) from 2021. In this document, the parties *SPD*, *Bündnis 90/Die Grünen*, and *FDP* announce that they want to establish a new legal institution next to adoption called “small custody” (*SPD 101*; “kleines Sorgerecht”). This form of custody is directed at social parents and may include up to two adults next to the legal parents. This is all the more progressive as they claim that they want to introduce an “institution of collective responsibility” (*101*; “Institut der Verantwortungsgemeinschaft”) to provide security beyond and next to marriage or romantic relationships.

model still includes medico-biological considerations about lineage, – possibly even more so as those who contribute sperm and ovum are listed as parents plus their respective partners, – yet it is a progressive step towards a queering of cultural kinship concepts and the legal recognition thereof. Such progressive regulations not only queer the cultural concept of the family but they also circumvent legal discrimination of queer family models.

In order to initiate cultural transformations, it seems necessary to understand law not as a corrective of culture but as an ally in de-masking cultural conditions which enable social inequalities. This view presupposes that cultural control works unconsciously to maintain social stratification and acts as a legal order in itself this way. In this understanding, law may be utilized to understand cultural values and ways of upholding hierarchies implicitly instead of seeing legal norms or lawmakers as explicit, unique, and most important enforcers of legal orders.

What *Pavan v. Smith* also teaches is that discriminatory legal norms, or the failure or unwillingness to apply norms correctly in this case, make queer lives harder. Coming back to the introductory questions, namely whether sociocultural transformations are caused by Supreme Court decisions, one can safely say: Yes, they do. Following social psychologist Gordon Allport, if “we can be entirely sure that discriminative laws *increase* prejudice – why, then, should not legislation of the reverse order *diminish* prejudice?” (467; emphasis in original). Even if social movements have paved the way for legislative or judicial measures to strengthen minority rights, the implementation of those demands through institutional powers brings queer right claims into the public consciousness and opens up debates about their sociocultural implications. This heightened awareness fosters an active engagement with minority groups and naturalized cultural concepts, and makes intergroup contact more likely. Thus, learning about other people’s realities reflects on how one perceives their claims and helps contextualizing, or even empathizing with those claims through taking the other’s perspective.

The role of the Supreme Court in this endeavor is powerful. The strong authoritative force of the Constitution and the Court’s role as its interpreter or even guardian make constitutional decisions arguably more affectively binding than legislative ones. It is again Allport who succinctly lays down this connection:

While it is true that unless a fairly large percentage of the people are in favor of a law it will not work, yet it is false to say that folkways must al-

ways take precedence over stateways. ... It is often said that the way must be paved for remedial legislation through education. ... But when the initial work has been done, then the legislation in turn becomes educative. The masses of people do not become converts in advance; rather they are converted by the *fait accompli*. ... Actually, in the United States, stateways – at least as expressed in the Constitution – are in advance of folkways. The Constitution is clear in its intentions that total democracy shall prevail. Thus the “official” morality of this country is high (470–1)

I quote Allport here at length because of his argument’s importance for queer rights discourse. Although Allport refers to legislative means, judicial decisions by the highest court are arguably even more educative. They continue to exert affective force because of their reference and closeness to the Constitution, even in times of an increasing politization and polarization of the Court. Similar to the Constitution’s ideals of equality and liberty, which have arguably not been implemented into U.S. American legal or cultural praxis, emancipatory Supreme Court decisions may equally exert affective and imaginary power. Such decisions then become true landmarks in that they guide the way for fostering equity throughout legal and cultural realms. Following this understanding, stateways or rather federal legal land gains for minority groups may not necessarily be in advance of folkways, for instance, in the form of social movements that advocate for queer rights. Rather, they advance folkways, meaning stateways influence the majority’s prejudices and stereotypes about LGBTQ+ people. This view supports the claim that queer rights activists should aim for constitutional protections.

As in the example of *Pavan v. Smith*, one needs to zoom in on the respective parties’ lines of legal argumentation, and then zoom out to analyze which cultural purposes the arguments made seem to fulfill. Utilized this way, law may work to uncover inequalizing conditions. The following part expands on the method of queering law in the sense of troubling, questioning, and deconstructing it. Strengthening sensibilities for queer realities and cultural-legal education again serves as an essential tool for improving legal conditions and aiming for overcoming discriminatory conditions. The subsequent parts establish legal norms’ and judges’ inadequacy in ruling on queer realities without challenging cultural-legal orders, and examine the possibility of responding to identity political demands and calls for legal protections via a rejection of generalizations and a favoring of specific classifications.

IV.3. Processes of Categorization

Categorization is defined by social psychologists as “the process of simplifying the environment by creating categories on the basis of characteristics (such as hair color or athletic ability) that a particular set of people appear to have in common” (Kite and Whitley 87). While simplification may prove useful in situations that may seem overwhelming, such as when being overexposed to information or forced to make a decision quickly, it reduces complexity in favor of a (over-)generalization, which social scientists have identified as one of the bases for developing stereotypes and prejudice.¹⁴ Cultural approaches to law have similarly recognized that the “limited ability of legal categories to acknowledge multiple forms of social subordination was one of the early insights from identity-based scholarship” (Coombe “Cultural Studies” 40); with scholars noting that “[t]he normative distinctions that are reproduced by law systematize our experience of the world” (Olson and Schillings 3), and that “the particular value of studying the law from the perspectives of literary and cultural studies lies in explicating these legal categories’ specific cultural valences” (Olson and Schillings 3). In other words, critical cultural approaches towards law aim to deconstruct and de-naturalize the authority of legal categories and assumptions by questioning the process(es) of categorization.

The critique inherent in these approaches does not seem surprising, and similar critiques of categorical thinking can be found in other disciplines as well. Queer theorist Eve Kosofsky Sedgwick’s famous axioms start with claiming that “people are different from each other” (22), which “prove[s] that even people who share all or most of our own positionings along these crude axes [i.e., gender, race, class, nationality, sexual orientation; lb] may still be different enough from us, from each other, to seem like all but different species” (22). While these perspectives signal the need for more conceptual tools for dealing with pluralisms in general, they also emphasize concerns about the usefulness/harmfulness of legal and sexual classifications in particular.

Feminist legal scholar Kimberlé Crenshaw’s intersectionality theory, as well as activists’ educational work and fights against multi-layered forms of oppression, has contributed to an advanced understanding of intertwined axes of multiple discrimination. As Coombe puts it, “[t]he concept of intersectionality developed from the understanding that persons rarely occupy just one legal category of identity and that the law fails to recognize the complexity

14 See Tajfel 84–6; Tajfel et. al. 154–7; Kite and Whitley 331.

of their situations as a consequence" ("Cultural Studies" 40).¹⁵ One, if not the, most important analytical tool for examining oppression based on multiple identities, intersectionality exceeds law as a discipline by acknowledging the uniqueness of one's being and thus providing a site for negotiating and experiencing pluralistic identities.

In legal practice, however, this theory is not only difficult to apply given that "[l]egislating rigid distinctions between categories of human populations is a necessary condition of contemporary Western law and statehood" (Olson and Schillings 3). But it also clashes with a lack of consciousness about what these identities entail. In these instances, stereotypical perceptions and judgments based on ignorance are prone to fill in. Prominent examples of this can be found in Richard Posner's controversial *Sex and Reason* which he introduces with the

belated discovery that judges know next to nothing about the subject [sex] beyond their own personal experience, which is limited, perhaps more so than average, because people with irregular sex lives are pretty much (not entirely, of course) screened out of the judiciary—especially the federal judiciary, with its elaborate preappointment investigations by the FBI and other bodies. (1)

Posner, an important figure for the Law and Literature project,¹⁶ has been heavily criticized by other scholars¹⁷ for adopting an essentialist and reductionist perspective on sexual orientation,¹⁸ contributing to an ongoing invisibilization of lesbian experience,¹⁹ and reproducing heterosexist assumptions about gays, lesbians, and bisexuals as Other²⁰ in his book. While *Sex and Reason* draws attention to the project of queer rights by benefitting from Posner's status as

15 While Coombe rightly attributes Crenshaw with the advent of intersectionality, the underlying logics of multiple oppression can be traced back to the Combahee River Collective Statement in 1977.

16 See his seminal 1988 book *Law and Literature: A Misunderstood Relation*.

17 Posner responded to some of this criticism by Gillian K. Hadfield, Martha Fineman, Katharine T. Bartlett, and Ruthann Robson in "The Radical Feminist Critique of *Sex and Reason*." His response summarizes *Sex and Reason's* main arguments and sheds light on how Posner tries to legitimize his heteronormative position by discrediting feminist views as radical and continuing to ignore the need to engage with his own biases that a male-centered socialization inevitably creates.

18 Kepros 293; Eskridge "Critique" 365–8.

19 Robson 201; Eskridge "Critique" 334.

20 Eskridge "Critique" 359–60.

“a celebrated mainstream legal academic and judge” (Eskridge “Critique” 335), it also illustrates how judges and legal academics are affected by stereotypical thinking and continue to reproduce these simplifications in their works. Images of gay men as “effeminate” (Posner *Sex* 304) and “somewhat more neurotic” (*Sex* 304) than straight people feed back into modern Western moral and ultimately legal cultures.

Another instance is former SCOTUS Justice Lewis F. Powell Jr.’s statement “I don’t believe I’ve ever met a homosexual” (Greenhouse). By now, this statement has a tragicomical ring to it because the law clerk he talked to was gay, and Powell’s vote was the decisive one for the continuing criminalization of (particularly gay) oral and anal sex in *Bowers v. Hardwick* (1986) (Lazarus). In both of these instances, judicial power over queer lives was in the hands of people who admittedly had no concept of how queer lives (could) look like. Lack of knowledge paired with the inability, or sometimes unwillingness, to imagine the forms of exclusion and discrimination that deviating from heterosexual norms brings with results in a judicial representation without cultural legitimation. Judges like Posner and Powell may enjoy the legal authority to decide on queer lives, yet their heteronormative situatedness and unfamiliarity with queer culture(s) deprives them from the competence to shape queer realities.

In this book’s understanding, queer culture consists of a shared set of values and discriminatory experiences, however heterogeneous within the non-homogeneous group one often refers to as ‘the’ queer community. While acknowledging the individual, intersectional, lived experience and processes of knowledge production, facing discrimination on basis of one’s non-normative ways of identifying oneself in terms of gender, sexuality or performance, still constitutes a shared set of experience. Non-normativity thus functions as a complex to which experiences of discrimination, non-acceptance, violence, and economic struggles are attached to for queers. The various ways of attachments to this complex then constitute a common denominator.

Even in settings which see assimilation by queer people and also possibly queers who identify with conservative values, it is queers who assimilate to a heterosexual, cis norm and not the other way around. The power of these norms is mirrored in considerations of law’s authority and legitimacy. Following Habermas that law “can preserve its socially integrating force only insofar as the addressees of legal norms can understand themselves, taken as a whole, as the rational *authors* of those norms” (33; emphasis in original), the question arises of how legal norms can remain accepted in a diversified, pluralistic sociocultural setting which still inhabits rather homogeneous power rela-

tions that benefit mostly White, male, cis, heterosexual, able-bodied, proper-tied persons with citizenship rights. This perspective is also reflected in Hart's view on the relationship between law and those it governs: "[I]f a system of rules is to be imposed by force on any, there must be a sufficient number of who accept it voluntarily" (201). Agreeing with Hart's assertion that "the coercive power of law presupposes its accepted authority" (203), which, again mirrors the sociocultural constructed nature of law since it is only as powerful as it is constructed to be, one wonders if legal authority necessarily corresponds to a moral one. Hart contests this view and argues that following legal rules may have various reasons, only a few of which require conceiving of law as morally binding or universally 'right' (201–3). In this sense, legal authority does not equal moral validity, and it also does not translate into cultural competence or legitimacy.

In the U.S., this relationship is more tense than in other legal cultures. Tracing back the development of the U.S.'s legal system and specifically the U.S. Constitution's perception as the 'law of the land,' considerations of moral validity, legal authority, and cultural legitimacy were always closely entangled. Without perceiving of British rule as unjust and cruel, and without perceiving of the American colonies as distinct communities culturally different from those who governed them, the legal system of the U.S. as laid down in the Constitution would not have been thinkable. Federalism, checks-and-balances, and the separation of powers doctrine speak to this moral, political, cultural, and legal understanding of a legal system's validity, which "incorporate[s] principles of justice or substantive moral values" (Hart 204).

Connected to the questions of legal authorship or law's authorship is the issue of interpretative authority. The increasing reliance on the judiciary's intervention in legal questions, an instance of and catalyst for the growing politization of this governmental branch, necessitates, following Habermas, inquiring into the interpreters of those norms. By extension, of course, this also means examining the structures which still benefit those already in power and those likely to fill in positions which come with the power to shape sociocultural conditions by interpreting laws.

This view may appear controversial because it risks being misunderstood as reproducing contested identity political demands that only those are granted permission to speak who are directly affected and part of a community. This is not what the critique of heteronormative and privileged positions entails, here exemplified by looking at Posner and Powell. Their competence to rule is not lacking because they are not queer but because they have failed to

look through the heterosexist matrix they are part of, and because they have failed to take the perspectives of those being ruled on, thus strengthening exactly those structures anti-discrimination laws aim to overcome. Moreover, given Posner's and Powell's status as important and powerful figures in their respective fields, their statements indicate at least a touch of saturated ignorance; they might not have met a queer person or are knowledgeable on the subject of sex, yet they neither need to be nor do they have to show a particular interest in these matters to remain in their powerful positions. This close reading of these instances is, of course, symptomatic of a wider logic of heteronormative, cis entitlement.

Denying Posner's and Powell's competence to rule does not equal denying their right, or their (legal) authority, to do so. Picking up the argument made by Habermas, Roger Cotterrell is however right to point out that in terms of law's legitimacy "questions about its *moral authority* remain" (28; emphasis in original) even when its prescriptive force is made clear. In the context of the Posner/Powell discussion above, questions about law's moral authority are inevitably linked to questions about judges' and justices' cultural competence. In Cotterrell's words, this is because "as the nature of the social changes, sociolegal [and cultural-legal; lb] research is challenged to consider these questions [of authority and competence; lb] anew, perhaps long before they become dilemmas disrupting law's everyday practice of the method of detail" (28).

It is true that today's cultural landscape is quite different from 1992 when Posner published his book and from 1986 when Powell decided in *Bowers*. Complex medial representations²¹ of, among others, homo-, a-, bisexual, queer, and trans characters onscreen, for instance in seminal shows such as *Pose* (2018–2021), *Sense8* (2015–2018), or *Orange Is the New Black* (2013–2019) as well as activist work done by those being part of the #MeToo movements, Women's March, #BlackLivesMatter and less medially present movements have strengthened public sensibilities for identities and experiences beyond the normative mainstream. These growing visibilities, both in terms of creators of and characters in media products, advance and multiply possibilities

21 These representations have not increased quantitatively but most of all qualitatively, reducing tokenism in favor of more nuanced representations of queer characters. This way, the pressures put on one character to represent a whole community have been reduced and the notion of queers as homogenous group has been challenged. I thank Rahel Sixta Schmitz for this insight and the vivid discussion about representational politics.

of perspective-taking and contribute to the development of pluralistic gazes on others' lives. While one can only guess whether today's judges and justices watch *Netflix* or to what extent they are familiar with activists' demands, it remains true "that on a court composed of human beings, biography matters" (Greenhouse).

One's biography, however, does not exist in a vacuum untouched by socio-cultural conditions. Even queer judges may be impeded to rule in favor of queer demands based on their fear of being publicly condemned – , especially if not being 'out,' – , anxiety to become accused of uncritically pursuing identity political activism, or internalized self-hatred due to the still valid fact that "modern American culture is unusually antihomosexual" (Eskridge "Critique" 340).²² One may therefore argue that not only in courts but in a legal system dependent on human actors in general, sociocultural conditions matter as legal and cultural realms affect each other and the people within them constantly.

These consideration about the interplay of individuals within the legal system and those realities which are affected by this system tie into what is perceived to be one of the key issues within jurisprudence, the relationship between legal norms and facts. Similar to the dogmatic differences in textual and organic modes of constitutional interpretation, one's understanding of how norms shape realities or vice versa influences one's openness to inter- and transdisciplinary perspectives.²³ Pointing to the indeterminate character of legal norms, i.e., those parts within the law which lack precision and leave room for interpretation,²⁴ legal scholar Hermann Kantorowicz emphasizes the importance of judges who are familiar with the social realities they decide on:

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- 22 A claim which may easily be expanded by including unusually anti-transgender or unusually hostile towards other identity categories defying medical-biologist notions or binary concepts of sexuality.
- 23 For a succinct introduction to different directions in the sociology of law, see Baer *Rechtssoziologie* 25–27: While Puchta's *conceptual jurisprudence* considers legal norms to be self-sufficient for resolving conflicts, Ehrlich's *living law* stresses the simultaneous existence of pluralistic legal cultures within society, and the *free law school*, advocated by Kantorowicz, Fuchs, and Sinzheimer, calls for filling in the gaps in legal norms by looking at social realities.
- 24 For Kantorowicz, these imprecise parts make up much of what we consider law: "It is not the case that there are some gaps here and there within the law, no, one may confidently say that there are as many gaps as there are words" (15), (dt.: "Denn nicht so liegt der Sachverhalt, daß Lücken im Gesetz sich hier und da wohl vorfinden, nein, getrost darf man behaupten, daß nicht weniger Lücken als Worte da sind."). My translation.

We want judges who, drawing from them [living conditions; lb] and their own experience, know how to rule with full awareness of the social functions of every legal norm and the social consequences of their decisions. To comprehend everything means ruling on everything justly. ... For partiality which – it must not be denied – is found in so many decisions, especially those in criminal law, is not rooted in ill will, but in naked unawareness of social facts and views, and in those biases in naive class prejudices which find their root and excuse precisely in this unawareness.²⁵ (Kantorowicz 46)

Certainly, when Kantorowicz wrote these words in 1906, ignorance to other people's realities was circumstantial and not intentional – at least more so than today. However, this in *dubio pro reo* view on an unawareness of lives peripheral to privileged sociocultural sites can today, at best, be considered as a form of reverse victimization: *Barbarus hic ergo sum, quia non intellegor ulli*;²⁶ judges claiming to be unaware of queer living conditions and thus impaired in their rulings reject their position's responsibility to educate themselves and take other perspectives in order to represent not only their respective peer groups. Resorting to lack of knowledge means putting oneself in a victim position and redirecting the responsibility for changing sociocultural conditions back to those who suffer from them, in this case LGBTQ+ individuals without judicial representation.²⁷ Given these indeterminate legal categorizations and the difficulties in relying on judges to fill them out adequately, approaching legal norms with more specificity and perspective-taking may be useful.

25 The German original reads: "Und Richter wollen wir, die, auf sie und die eigne Erfahrung gestützt, in voller Kenntnis der sozialen Funktionen jedes Rechtssatzes und der sozialen Wirkung ihrer Entscheidung, zu urteilen wissen. Alles verstehen, heißt alles gerecht bewerten. ... Denn die Parteilichkeit, welche – es darf nicht geleugnet werden – aus so vielen besonders strafrechtlichen Urteilen spricht, stammt nicht aus bösem Willen, sondern aus nackter Unkenntnis der sozialen Tatsachen und Anschauungen und aus jener Befangenheit in naiven Klassenurteilen, welche eben in jener Unkenntnis ihre Wurzel und Entschuldigung finden." My translation.

26 The English translation is: I am a barbarian here (only) because nobody here understands me. This Latin aphorism is attributed to Ovid.

27 While one may argue that this judicial representation is growingly diverse, this cannot, at least until 2024, be said for the set-up of the Supreme Court.

IV.4. Legal Generalizations vs. Legal Specificness

The positive correlation between complex queer representations on and off screen, public discourses about LGBTQ+ rights, and the growing visibilities of queers increase public and individual awareness of sexual minorities. Being and constantly becoming aware of others' realities is crucial for assessing socio-legal conditions, and it is certainly an idealtypical democratic necessity to allow for pluralism within a society. Yet these developments suggest that most LGBTQ+ struggles have been won, and that sexual orientation is not a political, least legal, issue anymore. From this perspective, strengthening universal rights seems more important than establishing particular rights for queers or other minorities. Even for those arguing in favor of greater protections for queers, the idea of post-class-based legal protection seems the ultimate remedy for discriminatory legal classifications. Claiming that "there is no such thing as 'gay rights'; there is only the question of which rights, such as sexual privacy, qualification to volunteer for military service, marriage, and so forth, must be equally enforced," (Gerstmann *Underclass* viii), scholars imagine a legal system which is rather dedicated to protecting substantive rights of all instead of expanding the rights of some to more groups.

This impression has also found its way into legal scholarship and into the cultural imaginary that minority rights are discriminatory because they favor one group over others. Thinking back of Kenji Yoshino's generalizing approach to civil rights (792), one may feel inclined to follow his argumentation that gaining and maintaining equality works best when "newly visible kinds people" (747), in this case queers, are at least reminded of "the ideals of assimilation and integration" (751) into U.S. American legal culture rather than annexed via 'special' protections:

The liberty claim is more persuasive because it performs the empathy it seeks. It frames the right at a high enough level of generality that opposite-sex couples are urged to imagine a world in which they were denied the right. In contrast, *equal protection claims tend to stress distinctions among us*, even as they ask us to overcome those distinctions. That exhortation is a performative contradiction. It asks us to transcend a distinction that the entity urging transcendence is unable itself to achieve. (Yoshino 794; emphasis added)

According to this view, “[l]iberty-based dignity claims” (Yoshino 792) seek to be more effective in uniting U.S. Americans than equality-based ones because the former takes being human as criterion which warrants protection while the latter draws attention to distinction and thus stresses difference. Yoshino is right to question the potentially divisive character equal protection brings with it, – and has historically been criticized for,²⁸ – but neglects the equally divisive notion of legal understandings of liberty. In Western legal cultures, this fundamental right is culturally framed and constructed around an imagined White, cisgendered, heterosexual, able-bodied, propertied man as the prototypical, and idealtypical receiver, and rightfully bearer, of such liberty.

Yoshino fittingly criticizes the divisive power of categorizations in general, yet fails to acknowledge their cultural embeddedness. While scientists²⁹ are still out on the question about whether sexual orientation is socially constructed or an essential part of one’s being (caused either through biology or socialization), the importance Western cultures attach to this category most certainly is constructed. When ordering categories of sexuality shifted from focusing on certain behaviors to certain identities during the early twentieth century,³⁰ new forms of group memberships became available. Following the queer theoretical observation that from all possible combinations of sexuality it is interesting that we place so much emphasis on object-choice, categories which subsume people into homo-, hetero-, bi-, a-sexual or other appear both arbitrary and inevitable. It is difficult to imagine that the decision to view sexuality through the lens of object-choice will change anytime soon because these categories have become and continue to be meaningful in Western moral and legal cultures. Identity political discourses add to this development and cement these socially constructed categories into cultural-legal norms. Whether someone identifies as gay or straight then may have legal consequences such as being denied certain rights or being persecuted. It may also result in being treated differently by one’s neighbors or family members. Within this cultural frame, however, sexual preference in terms of coital positions, forms of intimacy, what one enjoys listening to while having sex, or other individual likes are not nearly

28 The Court’s 1898 decision *Plessy v. Ferguson* speaks to this perverted understanding of equality in equal protection jurisprudence and how equal protection claims have been politicized in the past.

29 ‘Scientists’ refers to both scholars in the natural and social sciences, incorporating Wilton’s critique of the academic hegemony of natural science, see Wilton 18.

30 See Foucault *History* 192; Jagose 11; Katz “Questioning” 45.

as relevant for discrimination. These preferences are also less likely to wield such identity-forming power over individuals compared to questions of object-choice.

Coming from a queer theoretical perspective, overcoming categories of sexual orientation seems promising for smashing sexual moral hierarchies and finally arriving at what Yoshino imagines as a “Supreme Court jurisprudence that focuses on universal liberties guaranteed to all persons or citizens under the Constitution” (Yoshino 796). It is the same queer theoretical perspective, however, which maintains that this road to more liberty, or equity as I would argue, needs to take a detour via heightened, group-specific equal protections. Without critically analyzing and deconstructing the sociocultural mechanisms which enable discriminatory realities, legal protections cannot offer sufficient authority for shielding minorities off biases and violence; without drawing attention to and visibilizing group-specific realities and discrimination, universal legal regulations remain void of understanding for and acknowledgement of LGBTQ+-specific experiences and thus empty of promises for queers.

The current legal-political tendency to subsume discrimination based on sex, gender, sexual orientation or gender identity under one generalized umbrella speaks to this misinformed understanding of the relationship between legal and cultural mechanisms. What we can learn from the 2020 Supreme Court landmark decision *Bostock v. Clayton County*, and its implementation in the Biden administration’s Executive Order 13988 on “Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation” is that sexual minorities are certainly better protected legally but their discrimination’s cultural foundations are not being challenged. Distinctions between concepts relating to sexuality are already blurred and growing sensibilities for identities make it even more difficult for people within and outside of the LGBTQ+ community to keep track of the various ways in which people make sense of their being. Throwing the big blanket of one general protection for gender identity and sexual orientation makes the legal situation of sexual minorities more predictable and their lives safer. Yet it also inhibits a distinct engagement with gay, lesbian, trans, bisexual and other demands. To protect everyone then means not having to distinctively engage with the particular claims of anyone. Plus, it prevents a thorough analysis of why these categories have become added with meaning rather than meaningful categories of group membership in the first place.

Some queer people may criticize that their respective and specific demands are not heard. As a consequence, they might reject legal reforms because they do not feel represented by them. This is particularly true for controversial legal land gains such as same-sex marriage, which is by some considered as an inherently heteronormative, patriarchal-capitalist and oppressive institution. Further, demands for an intersectional and individual approach to considering people's realities by scholars such as Sedgwick and Crenshaw are ignored. Considering sexual minorities' rights from a universal rights standpoint impedes the analysis of the biases and discriminatory foundational beliefs about queers that contribute to their sociocultural marginalization. Without this tracking of sociocultural foundations of discrimination, this marginalization will continue to find its way into legal norms and judicial reasoning via biased or ignorant law-makers, politicians, and judges. This marginalization will continue to be displayed in cultural-legal orders which may not be as formal as statutes but maybe even more effective in excluding and violating queer bodies.

The results of this approach can already be witnessed. In 2021, the number of state-level anti-LBTQ+ bills which have been proposed and introduced has increased drastically,³¹ marking 2021 as "record-breaking year" (Krishnakumar) of anti-trans legislation – a trend that goes on ever since (ACLU "Mapping"). Admittedly, the state-level backlash to progressive minority emancipation is not a unique consequence of *Bostock* or Biden's presidency. However, the increasing fierceness to implement such anti-minority laws, as evidenced by their growing numbers, speaks to the claim that legal developments need to be accompanied by cultural re-negotiations.

Another explanation for the increase in these legal responses may be the growing inability to culturally regulate queerness; with heightened on and off-screen visibilities of LGBTQ+ people and only a few, yet medially bloated federal law victories, resorting to state law promises a closer-to-home tool for countering queer emancipation. Imagining states as resources for support of one's political beliefs, introducing bills which defy federal regulations becomes

31 Wyatt Ronan states that "(m)ore than 250 anti-LGBTQ bills have been introduced in state legislatures in 2021," while Krishnakumar lists "more than 100 bills that aim to curb the rights of transgender people across the country" as of April 2021. For instance, May 2021's Texan "Heartbeat Bill" (SB 8) serves as a significant land gain for those aiming to curl back the right to determine one's bodily autonomy.

more and more important in times of declining trust in institutions such as the Supreme Court.³²

Sociocultural Constructions of Sexual Orientation

The staticness of perceptions of queerness is already inscribed in today's legal understandings, which is by no means different for other legal categories. When scholar John Boswell asks, "do categories exist because humans recognize real distinctions in the world around them, or are categories arbitrary conventions, simply names for things that have categorical force because humans agree to use them in certain ways?" (36) he succinctly frames the issue at hand: the epistemological question about whether categories relating to identity, for instance sexual orientation, are 'real' or 'constructed' concepts.

What Boswell labels as a controversy between "realists" and "nominalists" (37) is more aptly known as the essentialism vs. social constructionism debate in queer theory (among others, see Stein 325–27). In both instances, the discourse evolves around the issue whether sexual orientation is a universal category, reflecting a 'real' biological and natural order that is temporally and spatially the same, or whether sexual orientation is established by the society it emerges in with culture-specific implications that vary historically. Those who understand sexual orientation in the latter sense

aver that categories of sexual preference and behavior are created by humans and human societies. Whatever reality they have is the consequence of the power they exert in those societies and the socialization processes that make them seem real to persons influenced by them. ... The category "heterosexuality," in other words, does not so much describe a pattern of behavior inherent in human beings as it creates and establishes it. (Boswell 37)

Important queer scholars and activists have analyzed and de-constructed the connection between categorizing sexual orientations according to object-choice and attributing meaning to these categories, taking a rather social constructionist perspective on sexuality, gender, gender identity and sexual orientation. Most famously, Henry Havelock Ellis and later Jonathan Ned

32 This is all the more relevant at a time when only 40% of the U.S. American public approves of the Supreme Court, marking a historical low in the twenty-first century (Jones). These numbers affirm the Court's pressure to legitimate its actions.

Katz claimed that hetero- and homosexuality are not essential categories of human sexuality but that they have merely been ‘invented’ during the course of the nineteenth century (Havelock Ellis 19; Katz *Invention* 10).³³ Once these categories have been established, it was possible to police, regulate, and add meaning to them. For instance, while the concept of a homosexual would not have been something people were able to relate to before 1868, in 1948, gay men were already imagined, portrayed, and persecuted as “sexual psychopaths” (sec. 201, *Miller Act*) and “degenerate sex offenders” (FBI Director Hoover qtd. in Eskridge *Gaylaw* 60).³⁴ Given this rather swift progression in meaning, one questions the functions of this development of sexual orientation’s cultural and legal perception. Moreover, one wonders whether this concept carries inherent meaning or might simply have been added with such; in other words, one is interested in whether sexual orientation is a meaningful distinction between living beings or whether it is merely a product of our societal and culture-specific perspective on sexuality.

This “social constructionist controversy” (Stein 325) is at the core of political, medical, social, and legal forms of control and sociocultural processes of normatization. As essentialism assumes an inherent nature of, for instance, one’s gender, it works to parcel different issues into controllable units. Framing a woman’s love for her newborn child as her inherent, natural capability of experiencing empathy and providing care for another being is essentializing her and simultaneously assuming and expecting that these characteristics are shared by all women.³⁵ These essentialisms provide the basis for (lack of) legal regulations and cultural expectations of work. As child-rearing and care

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- 33 As they have noted, the term ‘homosexual’ was firstly used in 1868 (Havelock Ellis 19; Katz *Invention* 10), and picked up alongside the term ‘heterosexual’ for the U.S. American context firstly in 1892 in Dr. James D. Kiernan’s article “Responsibility in Sexual Perversion” (Katz *Invention* 10; 19). Back then, both concepts had an entirely different meaning than they do today, with heterosexuality signifying a sexual perversion, namely unproductive sex (Katz “Questioning” 44).
- 34 The years indicated in this example have been chosen because Katz and Havelock Ellis refer to 1868 as the first instance when the term ‘homosexual’ has been used in a publication (Katz *Invention* 10; Havelock Ellis 19); 1948 refers to the year in which the District of Columbia introduced the *Miller Act*, which punished sodomy particularly harshly when conducted between two gay men and laid the legal foundation for conversion ‘therapies’ (Francis and Felts 2–5; Eskridge *Gaylaw* 61–5).
- 35 Since these essentialisms usually work with a normative understanding of gender roles in mind, and those establishing these power relations are predominantly hetero and cis, this example would typically only work for biological cis mothers.

are traditionally associated with female responsibilities in Western cultures, parental leave most of the time aims to support mothers who stay at home and is at least partially included in economic logics of paying men more. In return, this serves as further legitimization of having mothers stay at home – economically, it would simply make more sense for men to continue work. In turn, the hypervisibility of women doing unpaid care work and their underrepresentation in jobs where empathy and qualities associated with traditional care work are not valued, for instance leading management positions,³⁶ blurs the lines of how these mechanisms are intertwined and perpetuates the belief that essentialisms are objectively true. As Grosz succinctly put it, “[e]ssentialism thus refers to the existence of fixed characteristics, given attributes, and ahistorical functions which limit the possibilities of change and thus of social reorganization” (334).³⁷

As for the medical and political forms of control, conversion ‘therapies’ operate from the premise that sexual orientation is changeable and thus take on a rather social constructionalist perspective. Conservative politicians, on the other hand, are more likely to reject progressive attempts at challenging sexual hierarchies. A reason for this is that they stress the naturalness and importance of heterosexuality, following an essentialist notion of sexual orientation (see also Boswell 38). Both examples, although juxtaposed, show how the discourse about sexual orientation’s core is instrumentalized for one’s own agenda. In this sense, sexual orientation is always socially constructed and culturally added with meaning in political discourses, regardless of whether it is indeed a universal or a relative category of human relations.

The power of categories is also mirrored when looking at strategies to circumvent, tackle or adjust to them. In this context, assimilation may serve as another way of upholding hierarchies and defying social change. By “becoming a part, or making someone become a part” (“Assimilation”) of societal or cultural norms and standards, differences may be smoothed and demands silenced. This mechanism usually affects those who need to assimilate, i.e., those in the minority, and it works two-fold. On the one hand, assimilating comes

36 Arguably, since so-called ‘soft skills’ continue to become economicalized, empathy and emotional intelligence have already been appropriated by neoliberal capitalist logics and thus are higher valued in such positions of power.

37 For an overview about the relationship between essentialism, biologism, naturalism, and universalism, see Grosz 333–6.

with more privileges – a minority adjusts to the mainstream and thereby inhabits a more powerful position. On the other hand, assimilationist strategies risk depoliticizing a group's demands. The example of same-sex marriage illustrates this point well. *Obergefell* can be read as an assimilation of gay couples to the heteronormative understanding of family relations, and as a concession to privatized notions of liberty inherent in granting same-sex couples equal rights within the private sphere, yet leaving them vulnerable in public domains such as employment, housing, credit regulations.³⁸ As a consequence of *Obergefell*, demands for further rights of queers have been silenced as this seemingly victory of being included in the fundamental right to marry is now being utilized as proof of a post-homophobic society. Feeding on this narrative of being beyond 'homophobia',³⁹ queer rights' demands risk being framed as insatiable. Even more, wanting too much also stands to lose those privileges that have already been won. Assimilation is therefore to be treated with caution. While some regard it as step-by-step way of gaining more thorough rights, it most prominently serves to promote the illusion that there is neither further need nor the wish for more rights. After all, being granted access to the mainstream is perceived as good enough by the mainstream.

These considerations show how sexual orientation is constructed, also in legal discourse. There is no unambiguous or neutral definition of this category, which makes it more difficult to apply judicial reasoning without taking into account sexual orientation's epistemology.

IV.5. Legal Sexual Orientationism

Given the inflexibility of categorizations, the questionable sociocultural mandate of those making and interpreting laws, and the uncertainties surrounding the concept of sexual orientation itself, the question remains whether a specified legal understanding of sexual orientation is able to perform anti-discrimi-

38 On the homonormativity inherent in Supreme Court decisions, see Huffer 101–5 and Franke.

39 The term 'homophobia' is put in quotation marks as it is my understanding that referring to hostility towards queers as a phobia invisibilizes actively adverse behavior towards LGBTQ+ by implying that anxiety is a reason for anti-queer animus. Such implications negate both individual responsibilities and harmful sociocultural discourses about queer persons by perpetuating insecurities and ambiguities about sexual Otherized groups.

nation work. As this section argues, not only is the current legal understanding of sexual orientation as an inflexible as other categories, but it also reinforces and reproduces existing biases outside of the law. Thus, an updated definition of sexual orientation in law is necessary to reflect pluralistic and intersectional conceptions of sexuality, to strengthen the possibility of perspective-taking, and to do legal-cultural educational work.

The monolithic perception of LGBTQ+ people in law is here being referred to as 'legal sexual orientationism.' This chapter uses legal sexual orientationism as an analytical lens to illustrate how heteronormative cultural orders and heterosexist bias permeate legal norms. My claim is that sexual orientation, as it is currently constructed in U.S. American law, is indeed not a neutral ordering category but already marred by sociocultural implications of 'proper' sexuality, and a subsequent victimization, pathologization, and criminalization of those being constructed as deviant from the norm.

Legal sexual orientationism refers to the generalizing treatment of sexual orientation as an umbrella term for a variety of diverse sexual identities including, but not limited to homo-, bi-, and a-sexuality. It typically does not include heterosexuality for several reasons, which all illustrate the essentializing power of legal sexual orientationism: Heterosexuality functions as the meta-norm of Western sexual cultures. Heterosexuality is in no need of legal protections because laws are already tailored to fit the needs of those who adhere to this sociocultural standard of sexual orientation. This mechanism will be explained in more detail below and constitutes what I call the heteronormative gaze of the law.

Accepting heterosexuality as the default mode, this dominant form of sexual orientation becomes invisible in discourses about legal protections. Legal scholar Laura Adamietz explains this succinctly with regard to the legal category of *Geschlecht*, here referring to biological sex, in the German legal context:

Historically and currently relevant as societal ordering category, "sex" has, comparable to skin color, the quality of being invisible especially when being unproblematic, meaning adhering to the ideas about what is considered the "normal subject" in societal and legal terms. (15)⁴⁰

40 The German original reads: "Die historisch wie aktuell relevante gesellschaftliche Ordnungskategorie 'Geschlecht' hat – vergleichbar mit der Hautfarbe – die Eigenschaft, insbesondere dann unsichtbar zu sein, wenn sie unproblematisch ist, das heißt der Vorstellung des gesellschaftlich (und rechtlich) gesetzten 'Normal-Subjekts' entspricht." My translation.

Adamietz' observation is particularly important for legal sexual orientationism as it refers to how societal expectations and legal orders reinforce each other. The "normal subject," the one who adheres to the sociocultural norm of being heterosexual, White, middle-class, educated, able-bodied, is imagined to be the idealtypical rights-bearer and default addressee of legal norms. From a legal perspective, this idealtypical subject is conceived of as worthy of protection since it is imagined to cover the majority of people in a society. However, law's operating with defaults, in this context heterosexuality, forces the non-heterosexual subject to become (hyper)visible when claiming rights, and thereby instantly posing a threat to existing, queer-non-inclusive legal orders. The violence of having to 'come out' to the law is therefore experienced by both parties: by the one claiming their rights and by the legal system and its different branches which have to respond to this claim.

Further, demands for (extra) protections of sexual orientation as a legal category only cover all non-heterosexual identities, risking a victimization and Othering of those outside the sociocultural and legal norm while perpetuating the normalization and normativization of heterosexuality. Heterosexuality then appears as unproblematic and adaptable norm while orientations apart from it continue to cause trouble by disrupting law's workings.

Legal sexual orientationism claims that an exoticization and Othering of non-heterosexual orientations is established by and through law. Closely resembling Edward Said's concept of Orientalism orthographically, legal sexual orientationism shares its logic of Othering with Said's concept,⁴¹ yet lacks a distinct intersectional focus with regard to the entanglement of race, ethnicity, and sexual orientation, which is found in research on homonationalism (Puar), and discourses about (sexual) citizenship (see for instance Altman; Sabsay; Richardson). Legal sexual orientationism approaches legal norms and discourses about queer rights with an interest in disentangling the notion of sexual orientation as a merely descriptive, neutral category. It constitutes a specific way of thinking which separates the concept of sexual orientation, meaning non-heterosexual orientations, from heterosexuality, implicitly presuming that these concepts are inherently different. Taking legal sexual orientationism as a lens, legal norms and legal systems are analyzed to uncover their underlying cis, heterosexist and -normative logic.

41 However, these findings primarily cover the Western legal hemisphere; any analyses for non-Western legal cultures would have to be conducted by scholars and activists whose knowledge and experience is not limited to U.S. and German contexts.

Discourses about the legal protection of sexual orientation inevitably illustrate heteronormativity's hegemony. Conceiving of non-heterosexual orientations as in need of (more) protection, not only are these orientations victimized but they are also depicted as inferior and unable to protect themselves. While this paradox between wanting to protect, and stressing and thus reinforcing existing vulnerabilities has been elaborated on in feminist discourses as detailed below, legal sexual orientationism explicitly criticizes the heteronormative and -sexist gaze of the law. Whether one examines taxes, reproductive rights, inheritance or adoption laws, heterosexual, oftentimes married couples are advantaged and taken as default for considerations of legal regulations. *De facto*, these couples are even more privileged when being (read as) cis, White, and monied. Queer people are then included or annexed to an existing legal system evolving around heterosexual subjects. For instance, being able to inherit from your same-sex partner has only been decided by the Supreme Court in *U.S. v. Windsor* in 2013.⁴² This rather late decision underlines how a heteronormative legal logic refuses to acknowledge and include, and thereby continues to disadvantage, people who live outside the preferred sexual norm on various levels. Before 2013, same-sex partners were not able to make use of the same legal provisions as heterosexual partners, showing how law was designed to assume heterosexual individuals as its primary, and oftentimes only, right-bearing and legally agentic subjects.

Beyond the psychological and mental distress these conditions pose for the individual, i.e., knowing one is never the default but always has to fight to become included, the material disadvantages reinforce the impression that legal norms want to punish queers economically. In these instances, legal sexual orientationism functions as a gate-keeping mechanism for maintaining sociocultural orders and neoliberal capitalist power structures; property and opportunities to accumulate wealth are then sites where deprivation is felt more affectively than elsewhere.⁴³

42 Examples of these heteronormative regulations can be found throughout U.S. and German legal contexts. In Germany, many insurance companies or banks only offer packages and shared accounts to married couples, which again emphasizes the cultural importance of marriage and oftentimes excludes queer couples, who consciously refuse to support this historically patriarchal and oppressive social institution and are thus economically disadvantaged.

43 Admittedly, neoliberal capitalist power structures are already part of the sociocultural orders analyzed here. Yet, to stress this particular aspect of legal sexual orientationism, both are mentioned next to each other.

The interplay between maintaining sociocultural and legal norms has been analyzed throughout this chapter. However, legal sexual orientationism goes further than that. The concept conceives of legal norms as working *a priori* with a biased understanding of sexual orientation which, even when trying to increase protection for sexual minorities, always does so from a heteronormative and -sexist outlook. This way, law is understood to be heterosexualized, a claim which resembles claims that law is cultured (Rosen 4), gendered (Olson “Turgid” 65), or cised (Olson and Borchert 2022).

Subsuming these diverse concepts of sexuality, and those identifying with them, under the term sexual orientation is believed to be necessary and useful for establishing a working definition for legal considerations. As stated above, law needs categorizations in order to be effective.⁴⁴ Legal sexual orientationism, however, includes more than the mere legal treatment of sexual orientation. The legal praxis of subsuming so much under one term, yet excluding heterosexuality, mirrors the most problematic tendencies in anti-discrimination law. Working with sexual orientation as a legal category, legal norms perpetuate the importance of this socioculturally constructed phenomenon and thus stress its vulnerability and visibility while originally aiming to increase the level of protection. Further, the act of categorizing blurs the lines between distinct parts within the category and contributes to an essentialization of sexual orientation as deviant, possibly harmful, and in need of containment and policing.

The inability to move beyond the classifications given within a legal system illuminates the subaltern position of the legal subject and raises questions about the degree of agency one’s legal citizenship entails. This issue is what (legal) feminist theory calls “dilemma of difference,”⁴⁵ as introduced by feminist legal scholar Martha Minow:

[W]hen does treating people differently emphasize their differences and stigmatize or hinder them on that basis? ... I call this question “the dilemma of difference.” The stigma of difference may be recreated both by ignoring

44 This claim holds for now, yet will be critically questioned in Chapter V’s section on post-categorical anti-discrimination law. Current legal discourses in anti-discrimination law and asylum laws discuss the possibility to establish ‘post-categorical’ approaches to law. See Liebscher et al.; Foljanty 89–91.

45 As stated by Berger and Purth, the dilemma of difference, also being referred to as feminist dilemma, has been picked up by many feminist scholars, see, for instance, Baer “Dilemmata” 242; Cornell 1–20.

and by focusing on it. Decisions about education, employment, benefits, and other opportunities in society should not turn on an individual's ethnicity, disability, race, gender, religion, or membership in any other group about which some have deprecating or hostile attitudes. Yet refusing to acknowledge these differences may make them continue to matter in a world constructed with some groups, but not others, in mind. The problems of inequality can be exacerbated both by treating members of minority groups the same as members of the majority and by treating the two groups differently. (20)

Minow points out the dual character of difference succinctly. While people with different abilities or different experiences have distinct needs and may need special treatment, treating people differently because of their abilities or experiences may (further) contribute to their stigmatization and discrimination. The dilemma of difference, however, exceeds the legal realm, and its entanglements can be found in a variety of sociocultural conditions, which are all variations of legal orders. These legal orders, and cultural hierarchies, are constructed around a certain (legal) subject which stands in as default, unquestioned norm, and preferred standard for cultural and legal considerations. In the context of sexual orientation, this legal subject is imagined to be heterosexual; in the context of gender identity, it would be cisgendered. For instance, critiques of family laws which discriminate against same-sex couples when it comes to adoption regulations, marriage, inheritance, or birth certificates – as analyzed in *Pavan v. Smith* in Chapter IV.1, – illustrate how these legal norms have been “constructed with some groups, but not others, in mind,” in this case heterosexual, oftentimes married, probably White, propertied, educated, able-bodied couples. In an extended argument for this consideration, one may also look at why romantically partnered couples who involve two persons remain the unquestioned cultural and legal norm of familiness while single people, friend groups or chosen families continue to be marginalized, not legally recognized, and possibly stigmatized in a multitude of social, cultural and legal contexts.⁴⁶

Minow's findings are as vital for queer rights discourses as they are for a critique of legal categories. Suggesting that it “grows from the ways in which this society assigns individuals to categories and, on that basis, determines

46 See the German *Koalitionsvertrag* as instance of a countermodel to this norm in socio-cultural and legal discourse (SPD) as discussed in IV.2. See also Ontario's “All Families Are Equal Act.”

whom to include in and whom to exclude from political, social, and economic activities” (21), Minow frames the dilemma of difference as resulting of and contributing to processes of essentialization and exclusion within society:

Because the activities are designed, in turn, with only the included participants in mind, the excluded seem not to fit because of something in their own nature. Thus, people have used categories based on age, race, gender, ethnicity, religion, and disability to decide formally and informally who is eligible to enroll in a given school, who is excluded from a particular sports activity, who may join a particular club, who may adopt a given child, and a variety of other questions. (21–22)

In this understanding, categories employ similar functions to legal norms, even without being read and applied in the context of law. For instance, taking Minow’s considerations as starting point, the gendered division of sports teams has taken on such a strong quasi-legal force that legal endeavors to de-binarize and de-cisgender the system and include trans and non-binary athletes are met with heavy political backlash. This backlash includes attempts to proactively protect and police the gendered participation in sports teams.⁴⁷ (Cis) Female and male are thus classifications which bear orders out of themselves and warrant normative perpetuation of stereotypes and hierarchies. Lauren Sudeall Lucas is similarly critical of classifications in U.S. law in an assessment of equal protection claims as “identity-based jurisprudence:”

[E]qual protection relies on identity as a proxy, standing in to signify the types of discrimination we find most troubling. Equal protection’s current use of identity as proxy leads to a number of problems, including difficulties in defining identity categories; the tendency to privilege a dominant-identity narrative; failure to distinguish among the experiences of subgroups within larger identity categories; and psychological and emotional harm that can result from being forced to identify in a particular way to lay claim to legal protection. Moreover, because the Court’s identity-as-proxy jurisprudence relies on superficial notions of identity to fulfill

47 As discussed earlier, starting in 2021, an increasing number of states have passed legislation targeting trans and non-binary children and youth, mostly in the realm of sports. For instance, Mississippi’s governor Tate Reeves has signed SB 2536, known as the “Mississippi Fairness Act” in March 2021. The bill assigns sport teams according to athletes’ biological sex.

a substantive commitment to equality, it is susceptible to co-option by majority groups. (1605)

Sexual orientation's deviance is indicated by its use in distinction to the norm of heterosexuality. Legal cases and publications which analyze sexual orientation primarily deal with homosexuality, bisexuality or other forms of sexual identity which are not heterosexuality. The use of the term 'sexual orientation' in legal texts is mostly used as heterosexuality's Other, reinforcing notions of heterosexuality as 'natural' default while sexual orientations, meaning non-heterosexual identities, are the exception.

Legal sexual orientationism thus disparately impacts non-heterosexual orientations, while the heterosexual norm remains the golden standard against which other orientations have to legitimate themselves. This sociocultural bias directly affects legal decision-making. If sexual orientation would be understood as including heterosexuality, it most probably would have already been regarded as a suspect classification. This argument finds proof in the way *Charles E. Moritz v. Commissioner of Internal Revenue* (1972) was decided. Arguing that excluding an unmarried man from the same tax deduction benefits as a woman is in violation of the Equal Protection Clause, Ruth Bader Ginsburg successfully represented the plaintiff and helped establish that discrimination on the basis of sex is unconstitutional. In this case, fostering equal rights for women by making sex a protected legal category was only successful through arguing how a (cis) man was discriminated against because of his sex. Similarly, the Supreme Court's 2020 landmark employment law decision *Bostock* was based on the "because-of-sex"-argument by the Court's majority (see Chapter III.3). This argument made clear that none of the queer and trans plaintiffs would have been fired if they had been of a different sex assigned at birth. While *Bostock* decidedly draws on biological sex as a legal category, it implicitly heteronormative (and cised) gaze becomes obvious. *Bostock's* queer and trans plaintiffs have been granted rights only because the Court used the default scenario of a heterosexual (and cis, respectively) person as the foundation for its reasoning. Applying this test by imagining how a heterosexual person would be treated (and feel) in the same situation, the Court's justices perpetuate the heteronormative gaze of the law in their majority opinion. Their reasoning underlines how legal norms are constructed with an idealtypically heterosexual (and cis) legal subject as rights-receiver in mind and how sexual orientation is defined in negative distinction to what is perceived to be the invisibilized norm.

Legal sexual orientationism thus invisibilizes heterosexuality's belonging to the category of sexual orientation(s) because sociocultural notions of its 'naturalness' and desirability place heterosexuality not only high in the sexual orientation hierarchy but outside of it; heterosexuality is not a sexual orientation, it is an essential part of being human. This claim is emphasized by Evan Gerstmann's analysis of the suspect classification/class 'switch':

When gays seek to move up in the equal protection hierarchy, the courts tell them they are not a *suspect class* because they are not politically powerless. But when whites seek protection against affirmative action programs, courts do not ask them to prove that they are politically powerless (obviously they are not). Instead, courts subtly switch terminology; they hold that race is a *suspect classification* and thereby protect whites from racial preferences. Similarly, the courts protect men from discrimination by holding that gender is a quasi-suspect classification. By switching between the terms *suspect class* and *suspect classification*, the Supreme Court can require some groups to show they are politically powerless but allow other, far more politically powerful groups to benefit from strong constitutional protection. The Court has never explicitly recognized that it does this, and it has never attempted to justify it. (*Underclass 9*; emphasis in original)

Gerstman illustrates how judicial decision-making picks up upon biased perceptions of sexual orientations. Supreme Court justices have added to the "protection" of the dominant norm of heterosexuality even in cases primarily concerned with minorities. Both the direct and the disparate impact of judicial decision-making are therefore often positive for the heterosexual norm and those seeking to guard it.

Legal sexual orientationism supports the essentialist assumption that sexual orientations are fixed and static by taking heterosexuality out of the sphere of protection. Implying that those who *are* heterosexual are safe, the possibility, and appeal, of questioning what one *identifies* with over the course of one's life becomes limited. (Note that heterosexuality is seldomly referred to as identity category but as a given.) In this context, it is important to acknowledge what needs no protection legally because it already is untouchable socioculturally. Here, sociocultural orders and legal orders intertwine. The emphasis on and biologization of heterosexuality as dominant sociocultural norm establishes a sexual hierarchy which inferiorizes and Others those orientations that differ from this norm. Only this social-culturally constructed hierarchy translates into the need to protect sexual minorities legally.

Perceptions of sexual orientation's deviance and cultural anxieties about its possible harmfulness culminate in cases that deal with non-procreational sex. As *Bowers* and *Lawrence* show, negotiating legal norms that regulate sexual practices also put in relation cultural fears about vulnerabilities of the corporeal and political body. Linking non-procreational sex to immorality and disease, queer sex is both dangerous for those partaking in it and society as a whole. Assuming that "good citizenship relies on appropriate sexual behavior and proper gender performance" (Nagel 30), and that "[s]exuality and gender, thus, are important building blocks of the nation" (30),⁴⁸ violating these conditions of sexual citizenship threatens the collective's cohesion. Even more so, queering the cultural assumptions about proper object-choice, sexual moderation, and socioculturally shared knowledge about 'natural' forms of desire incites existential cultural fears about the dissolution of fixed and reliable categories of knowledge. This anxiety of having to constantly negotiate and question processes of knowledge production, exposed vulnerabilities of the nation-state and mortal corporality, and possibly shifting sexual and gender hierarchies results in a politics of containment and policing of sexual orientation. While these figurations of sexual orientation's essence take place through and in legal praxis, they are influenced by socially transmitted stereotypes and feed back into social processes of knowledge production.

To effectively challenge stereotypical thinking, resulting biases, and discrimination, anti-discrimination laws need to better depict pluralism within legal classifications. This demand is bold, given the constructiveness of Western legal and cultural systems as based on categories. However, as judicial decisions concerning sexual orientation rely on judges' and justices' ability to disentangle their own sexual orientationized knowledge, specifying living conditions of queers in legal norms may challenge the judicial praxis of making recourse to simplified notions of LGBTQ+ lives. Especially those judges and justices whose knowledge is situated in hetero-patriarchal, White, middle to upper class, cis, able-bodied, and otherwise privileged settings⁴⁹ are prone to

48 Turner goes even further by suggesting a "reproductive citizenship" (qtd. in Richardson 212) instead of one based on sexuality. In this view, "the reason for the historical exclusion of lesbians and gay men from full citizenship" (Richardson 212) is "the non-reproductivity of same sex unions and, therefore, their failure to contribute fully to society" (212).

49 See also Mazukatow and Binder 460–61; Haraway 592: "Situated knowledges require that the object of knowledge be pictured as an actor and agent, not as a screen or a

introduce these stereotypical templates and thereby continue to inscribe sexual orientationized knowledge into legal norms.

The explicit inclusion and repeated naming of heterosexuality as part of sexual orientation is necessary for crashing the underlying heterosexist matrix. It is this matrix which denaturalizes non-normative orientations while simultaneously negating the need to address its own hegemonic position. Being aware of these reasons for including heterosexuality, Wintemute uses the term “sexual orientation discrimination” (12) rather than “gay, lesbian, and bisexual rights’ ... to suggest that prohibitions of such discrimination should be symmetrical, protecting not only gay, lesbian and bisexual persons, but also heterosexual persons” (12). While one may be skeptical about why heterosexual persons may need such a protection, Wintemute’s further points are important:

It is also intended to emphasize the importance of thinking of sexual orientation as neutral, universal characteristic, with several different manifestations, rather than a phenomenon unique to gay, lesbian, and bisexual persons. Heterosexual persons need to be reminded that they too have a sexual orientation, and that theirs is not the only possibility. (13)

Stressing that sexual orientations exist on a spectrum and in flux, a legal-cultural education that takes into account the importance compulsory heterosexuality plays for legal-cultural orders needs to replace legal sexual orientationism. Where legal sexual orientationism tends to argue from a subaltern perspective of non-normativity, a possibly more effective legal-cultural education equips its audience with an understanding of how processes of sociocultural knowledge production work. This includes becoming or making more aware of what compulsory heterosexuality entails and how it feeds back into perceptions of what/who is in need and worthy of protection. Approaching legal protections for sexual minorities in this way is thus decidedly aiming for anti-discrimination laws instead of merely establishing non-discriminatory ones. In an ideal world, anti-discrimination laws may work to *prevent* discrimination not merely police it. It is again Wintemute who calls for a more holistic perspective on anti-discrimination laws by advocating for what I repeatedly refer to as legal-cultural education, i.e., the need to consider discrimination not as

ground or a resource, never finally as slave to the master that closes off the dialectic in his unique agency and his authorship of ‘objective’ knowledge.”

a self-contained concept occurring in the vacuum of legal regulations but as connected to other sociocultural realities:

Such protections [which cover both private and public spheres; lb] could perhaps help break the vicious circle whereby fear of discrimination on the part of gay, lesbian, and bisexual persons prevents their being open with heterosexual persons, and thereby precludes the educative process that would increase understanding and reduce prejudice and discrimination. (Wintemute 15)

This approach, although dependent on the sociocultural climate and legal conditions, would allow for more dialogue between social groups. Maybe it would have even enabled Justice Powell to learn about his law clerk's reality. Advocating intergroup contact, perspective-taking, and empathy, Wintemute's take on legal protections is decidedly humanistic and democratic. Plus, it is taking into account sociocultural orders that inhibit legal regulations from being useful. Without keeping in mind extra-legal sources of discrimination, intra-legal solutions are ultimately ineffective. Additionally, by reinforcing neoliberal notions of individual responsibility, collective endeavors are limited to social group membership. Thus, promoting discussions that extend one's carefully parceled units of interests invites pluralisms, strengthens democratic structures, and hopefully underlines the necessity for collective activism.

