I. A Few Notes on Concepts
A Note on Definitions

In addition to the most prominent terms presented in this chapter, further terms are being clarified with the use of footnotes, following the legal tradition of referencing. I try to avoid attributing terminology at any cost because they often imply and generate derogatory associations. These terms are often catalysts for stereotypical thinking; they foster the impression that a certain characteristic of a person, sexual orientation or gender identity in this case, is an indicator of other aspects of an individual such as their intelligence, character, or morality. However, what one may perceive as rather neutral (if there is such a thing), another may find harmful. Identifying these terms is particularly difficult in the context of sexual orientation and gender identity as many attributing terms such as *gay*, *queer*, and *faggot* have already been reclaimed and appropriated by the LGBTQ+ community. Any exclusionary and discriminatory terms and concepts are not willingly used, and those who feel misrepresented by them are invited to approach me for finding a more fitting term, concept, or way of framing.

I.1. Mapping Our Language

Sexuality is messy. Talking about it makes matters worse in some cases. This may even be more prevalent in the twenty-first century. The contemporary focus on the policing of language is undoubtedly connected to the sensibility of an audience's ears in terms of identity politics. One's pervasive medial training in paying attention to words, phrases, and symbols has not only heightened one's awareness of what is being communicated by whom, but it has also strengthened one's mistrust in who is communicating what or to which ends. As this kind of systemic questioning targets any speaker, it

seems all the more important to develop a precise terminology for academic and public discourse(s) about non-normative sexual orientations, gender (identity), sexual practices, and their legal recognition in order to prevent any misunderstandings on the level of rhetoric whenever a mutual teleological perspective is given.

Trying to avoid exclusion by using an exclusively academic code, I wish to circumvent the discourse about queer rights' inaccessibility for those outside the respective discipline so, to use Michael Warner's words, not to "allow people to speak in code and forget questions that might be posed from the outside" (116). This chapter clarifies my understanding and usage of the most important terms and concepts connected to sexuality and law, and explains why certain terms and concepts are chosen in favor of others. Drawing on Donna Haraway's concept of "situated knowledge," (581) such an endeavor can only be conducted from a subjective, necessarily limited perspective. Only by acknowledging this limitation and by locating this book within the feminist strand of deconstructing the notion of the default masculinist, cis, heterosexual, White, able-bodied academic and knowledgeable subject, *Suspect Subjects* takes on a feminist objectivity and refuses to make itself "[i]rresponsible [which] means unable to be called into account" (583).

Drawing attention to the power and relevance of specific wordings and ways of framing is all the more important for those interested in legal thought. As emphasized by justices' modes of constitutional interpretation (Chapter III), and as held by legal scholars (Hart vi; Baer *Rechtssoziologie* 18), language matters when navigating law's realm because words carry meaning, associations, and also ideological freight. Words are even more important in law because, to use Robert Cover's much quoted insight, "[l]egal interpretation takes place in a field of pain and death" ("Violence" 1601), making judicial approaches to words essential to questions of labor regulations, housing, civil rights, citizenship, and also survival.[1]

1 One may think of the Supreme Court's interpretation of the Constitution's Eighth Amendment, which prohibits "cruel or unusual punishments," as not applying to capital punishment. See for instance *Bucklew v. Precythe*, majority opinion by Justice Gorsuch: "The Constitution allows capital punishment. … In fact, death was 'the standard penalty for all serious crimes' at the time of the founding. … Nor did the later addition of the Eighth Amendment outlaw the practice. On the contrary—the Fifth Amendment, added to the Constitution at the same time as the Eighth, expressly contemplates that a defendant may be tried for a 'capital' crime and 'deprived of life' as a penalty, so long as proper procedures are followed."

Sex, Gender, Identity

Throughout this book, I use 'sex' as referring to one's genital anatomy or chromosomal set-up as indicative of biological group membership constructed along the binary categories of female and male (one's sex assigned at birth), or the act(s) considered as sexual activity. Although 'biological' is closely connected to sex in this context, it is acknowledged that even this seemingly clear-cut category has undergone a process of sociocultural construction (Laqueur 8; Fausto-Sterling 5–7).

'Gender' refers to the socially, and culturally, constructed notions of being and doing, in the sense of performing, a certain sex, generally also conceived of in binary terms of male and female. The pre-fixes 'cis' and 'trans' refer to whether one identifies with the gender, i.e., their socioculturally constructed sex, assigned at birth (cis), or whether one does not identify with the gender assigned at birth but a different one (trans). While these two 'gender identities' are currently the most prominent ones and often depicted as antagonist and binary, this book acknowledges the existence of multiple forms of gender identity subsumed or beyond those cis and trans. 'Sexual orientation,' as explained in more detail below, refers to the sexual and/or romantic preference(s) one has. In this context, 'queer' is used as an umbrella term for non-heterosexual, non-cis identities and practices which "mean different things to different people, at different moments, in different contexts" (Stychin 140). The fluidity and un-grasp-ability of queerness is elaborated on later in this chapter as will the subversive force of queering as both identity term and way of thinking. Although it is often used in legal and sociocultural contexts as an identity category, this meaning is considered but also questioned here.

Approaching sexuality may best start with posing some questions: Is a cis gendered woman who is in a sexual relationship with a cis man but falls in love with another cis or trans woman a lesbian or heterosexual? Are trans men who have sexual intercourse with women 'allowed' to call themselves lesbians? Is a gender-queer person, whose birth certificate considers them male and who engages in sexual activity with men, gay, bisexual, or something else entirely?[2] As these examples show, language influences and determines the way one is thinking about and perceiving of sexuality, and linguistic precision enables one to reflect upon one's own inclusionary or exclusionary cognitive patterns. However, the current, unreliable, yet dominant nomenclature with regard to sexual

2 See also Jagose 8 on similar questions which trouble static conceptualizations of sexuality and gender.

orientation and gender creates tensions both outside of and within the community of members and allies of non-normative sexual orientations.[3] Further, these (in-)abilities to speak of and thus gasp sexuality in all its messiness result in issues for those making, interpreting, and aiming to abide by laws. As put by legal scholar Peter Nicolas,

> when a law says that a "homosexual" cannot adopt children or serve in a particular kind of job, or that marriages between persons of the same "sex" are prohibited, what do those terms mean? Stated somewhat differently, what does it mean for someone to be a "homosexual," or a "man," or a "woman"? In almost all cases, laws of the sort described above do not define such terms, leaving it to those applying the laws (and, to the extent that litigation ensues, the courts) to determine their meaning. Thus, a necessary prelude to addressing the constitutionality of such laws is statutory interpretation. (Sexual Orientation 3–4, emphasis in original)

Working with a clear and transparent vocabulary when it comes to concepts of sexuality thus makes discourses accessible, and may contribute to educating others who (have to) work with them. Similarly, spelling out laws' understanding of sexuality and gender may contribute to a deeper insight on the (mis)use of legal norms in policing these spheres. A recent example is Florida's HB 1557, which was introduced in January 2022 to target LGBTQ+ youth. By stating that the bill "prohibit[s] classroom discussion about sexual orientation or gender identity in certain grade levels or in a specified manner" (1) without explicitly mentioning queer, lesbian, gay, or trans issues, Florida's law could be interpreted to effectively ban any kind of discussion about gender and sexuality. This view was sported in a letter gone viral a Florida teacher wrote:

> Dear Florida parent/caretaker: … To be in accordance with this policy, I will no longer be referring to your student with gendered pronouns. All students will be referred to as "they" or "them." … Furthermore, I will be removing all books or instruction which refer to a person being a "mother," "father," "husband" or "wife" as these are gender identities that also may allude to sexual orientation. (Bernstein)

3 Probably the most prominent example is the discourse about who to include in the abbreviation for the queer community. For instance, while some argue for the use of LGBT+, others do not feel represented being merely a '+'. The same applies to other forms of writing such as LGBTQ*, LGBT, LGBTQIAP*, and others.

While this letter has merely been a satirical attempt at criticizing the law and showing its hypocrisy (Isger), this example illustrates how contested the field of legal interpretation is and how much the cis gendered, heterosexual norm becomes invisibilized by and in legal and cultural discourse. In legal discourses, it is also pivotal to stress that constitutionality of laws may be directly linked to the sociocultural meaning of concepts and terms (Nicolas *Sexual Orientation* 4). A recent instance would be the legal understanding of 'sex' as encompassing biological sex, sexual orientation, and gender identity as decided in *Bostock v. Clayton County* (2020).[4] Before 2020, the meaning of 'sex' has not included these aspects of identity and thus, Title VII of the Civil Rights Act of 1964 did not cover LGBTQ+, making firing them because of their sexual orientation or gender identity constitutional. While the use of sex in this case was decided in a legal context, the decision to expand sex to refer to more than biological make-up has arguably been influenced by sociocultural developments, and an updated understanding of how sexual orientation, gender, and sex are entangled and (co-)constructed.

Sociocultural Constructions

The need to dissect the constructedness of concepts and terms is important for (re-)negotiations of their power as especially sexual terminology always comes with ideological freight. For instance, today's Western understanding of homosexuality, which was only 'invented' in the nineteenth century, comes with the historical baggage of pathologizing and criminalizing same-sex desires.[5] As queer theorists have noted, the term 'homosexual' was firstly used in 1868 (Havelock Ellis 19; Katz *Invention* 10), and picked up alongside the term 'heterosexual' in the U.S. American context firstly in 1892 in Dr. James D. Kiernan's article "Responsibility in Sexual Perversion" (Katz *Invention* 10, 19).

4 The Supreme Court decided in *Bostock* that Title VII of the Civil Rights Act of 1964 extends to sexual orientation and gender identity, making discrimination against gays, lesbians, bisexuals, trans persons, or anyone else because of their sexual orientation and/or gender identity in employment unconstitutional.

5 See McIntosh 183–4: "The creation of a specialized, despised, and punished role of homosexual keeps the bulk of society pure in rather the same way that the similar treatment of some kinds of criminals helps keep the rest of society law-abiding. … The way in which people become labeled as homosexual can now be seen as an important social process connected with mechanisms of social control. … [A]s we have seen, psychologists and psychiatrists on the whole have not retained their objectivity but become involved as diagnostic agents in the process of social labeling."

Back then, both concepts had an entirely different meaning than they do today, with heterosexuality signifying a sexual perversion, namely unreproductive sex (Katz "Questioning" 44). Understanding the history of concepts of sexuality helps contextualizing and deconstructing their implications. As Jacques Derrida points out, deconstruction "means not 'destroying' but 'undoing', while analysing the different layers of a structure to know how it has been built" (2). Deconstruction, in this sense, is a tool which needs to "emphasiz[e] the history of the construction" (2) to understand each role's part.

While one perceives them as 'natural' in the twenty-first century, these categories of human differentiation are in fact historically changing in their meaning. In the context of sexual orientation, the current perception is only a rather new interpretation. There simply were no 'homosexuals' or 'heterosexuals' in today's understanding in other historic periods such as Ancient Greece (Foucault *History* 42–44, 188, 192) although, from today's standpoint, we might label them as such. The most important distinction between concepts of sexual orientation back then and today is their essenzializing notion. Back then, sexual orientation was something defined with regard to what somebody *did*, comparable to today's meaning of sexual practices or sexual behavior, while today, this notion rather evolves around the question of what somebody *is*, allowing for an essentialization, pathologization, and criminalization (Foucault *History* 192; Jagose 11; Katz "Questioning" 45). As Michel Foucault states, starting in the nineteenth-century, "the homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology" (*History* 43). These historical developments show that today's terminology of sexuality is influenced by the specific time, culture, and geographic position one lives in and is not a static, universal, objective ordering category.

Such concepts are thus not 'naturally' given but socially and culturally constructed, necessitating that the sociocultural conditions in which these concepts emerge are being questioned and deconstructed. This understanding supposes that cultures are different from each other and that what may be of importance for one culture may be irrelevant to another. This view rejects cultural universalism and calls for a culture-specific investigation of legal and sexual norms while evading cultural essentialisms. Questioning cultural frameworks means also questioning the concept of sexuality as such because of culture's and sexuality's interconnectedness. This anti-foundational perspective ('questioning everything') follows queer theorists who deconstruct

seemingly 'natural' basic assumptions such as the relevance of sexual object-choice for categorizing people.

Following this approach, I view social group membership on basis of one's sexual orientation as becoming only meaningful in terms of its discursively established meaning. The gender and sex of the person(s) one loves, is in relationships with, and/or has sex with only becomes meaningful for analysis when met by cultural or legal norms. This information then gives much insight into legal cultures and what they perceive as important to police.

Sexual Orientation(s)

The decision to use the term 'sexual orientation' is a conscious one and meant to signal the political project of this book. Sexual orientation follows the legal nomenclature, which uses this clinical term to indicate any (legal) form of sexual preference. But, more importantly, using the term sexual orientation means reclaiming and politicizing it. Following lesbian activist and human sexuality scholar Tamsin Wilton's approach of "dis/orientating," I take Wilton's work as role model for queering theories about legal-cultural conceptions of sexual orientations (11). Dis/orientating then refers to questioning, deconstructing and transforming seemingly naturalized notions of sexual orientation in the sense of disturbing the fixedness of this concept. This approach situates the discourse on sexual orientation and the law not within one's individual (private) sexual desire(s) but in a public sphere, making sexuality (again) political.

Speaking of 'orientation' instead of sexual 'identity' also mirrors recent human rights scholarship's favoring of the former term to signal the contextuality of its importance. While for some, their sexual orientation may be an important part of their identity, others might prefer to see it as less integral to their being (Waites 144).

The term 'sexual minorities' is used to refer to the sociocultural perception of LGBTQ+ groups as deviant[6] from the norm. While some may not feel represented under the umbrella of being 'queer,' and one can also consider

6 In this book, the term deviant is defined as describing any kind of behavior "that violates the standards of conduct or expectations of a group or society" (Schaefer 159) unless indicated otherwise. It is used to indicate behaviors, appearances, or orientations which differ from the social norm, i.e., the predominant status quo in a society. The situational description of these hegemonic conditions does not imply approval or disproval as such. The term non-normative is preferred here.

themselves as queer in relation to the LGBTQ+ community,[7] I perceive the term queerness as the state of being regarded, regarding oneself, and acting in opposition to the heterosexual, cis gendered sociocultural norm. In this sense, non- or anti-normative behavior within the realm of sexuality is regarded as queer. 'Queer' is thus understood as more than a form of sexual or gender identity, it is perceived as a political stance which seeks to trouble those normative settings one is surrounded by. Although this term may be rather specific to the Anglo-American and European context,[8] the implications of queer as an identity term, meaning non-normative, troubling, defying and refusing attempts of categorization, is also mirrored in using it as a verb. To queer then means to question, to disrupt and to dismantle something in order to look at all its parts before re-assembling it again in a different manner.

Admittingly, this approach is already flawed. In current discourses about 'gay rights' or 'queer rights,' claiming one's gay, lesbian, queer or other identity is vital for the emancipatory project of gaining more visibility, legal protection(s), and recognition. Depending on one's socioeconomic situation, national origin, ethnicity, dis/ability, sociocultural norms, or religion, it may not be possible for people to proudly claim their sexual orientation without risking stigmatization, criminalization, and/or punishment and exclusion. For those people, 'queer rights' are not only emancipatory, they are the foundation for economic, social, or physical survival. However, others may feel that these rights and connected fights are not theirs. For instance, same-sex marriage has not been a demand of a unified LGBTQ+ community but rather something only parts of the community argued for while others opposed it as a continuation of the patriarchal instrument of oppression and means of swarming over to heteronormatively controlled forms of living, often referred to as homonormativity.

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7 As LGBTQ+ and queer are not fixed identity categories but discursively constructed terms, feelings of not belonging to or being underrepresented in discourses about these social groups applies especially to those genders, sexual orientations, and intersections which are marginalized and invisibilized. Examples include asexuality, bisexuality, trans, queer people of color, and queer people with disabilities. However, feeling queer within the queer community may differ individually based on location, personal sentiment, and time.

8 I thank Edith Frankzelia Otero Quezada for alerting me to the different ways people of the queer/LGBTQ+ community refer to their identities, and the Western-centric assumption of using 'queer' as a more general term.

The most prominent concepts of gender identity used in this book are cis and trans as explained above. One's gender identity is based on whether their biological sex fits their socioculturally constructed sex (gender). The plus (+) used in the abbreviation LGBTQ+ indicates that there is more to the concept than explained here. It functions as a *Leerstelle* ('placeholder') which can be filled with meaning and which offers people an opportunity to connect. It also underlines that categories of sexual orientation and gender identity refuse to give into a binary and exclusionary logic, i.e., trans does not equal transgender or transsexual but "it can be understood as the most inclusive umbrella term to describe various communities and individuals with nonconforming gender identities and/or expressions en masse" (Jones qtd. in Garvin). Originally, my preferred way of writing trans would also include an asterisk (trans*). However, over the course of writing, transness has taken on more political meaning. So, in order to distinguish itself from other struggles such as those of non-binary or intersex folk, it is necessary to address trans singularly and without an inclusionary asterisk.

During the writing of this book, I have received numerous questions on why I include trans (or non-binary or agender or else) folx in a book about sexual orientation. While I acknowledge that issues of gender identity are distinct from issues of sexual orientation, I do not understand them as separate, at least not in the legal sphere. The decision to include them is thus not only a linguistic one but also, again, political. This kind of allyship is vital for the queer community and for discourses about queer rights and sexual politics, and I wish to avoid reproducing trans-exclusive feminist perspectives. However, equating transness with non-normative sexual orientations would strengthen the illusory correlation that trans individuals are necessarily non-heterosexual, and that transness is not only an expression of gender identity but also of sexual orientation.

Legality, Illegality, Discrimination

A reoccurring reaction to this book has been, "but don't we already have (enough) legal protections for everyone?," which has alternatively been put as "who still cares about this? Everyone should love who they want!" As academics and activists know, engaging with these questions, and those posing them, is equally important as it is exhausting. Anyone who has experienced instances of discrimination because of their actual or perceived sexual orientation can attest to the fact that being treated differently, and, even more, oftentimes hostilely, is at any time worth talking about. Discourses and questions as

stated above seem to equal legality or illegality of certain conducts as indicative of their existence in everyday life – what cannot be there legally, is not there socially. This perception is both over-emphasizing law's power and denying one's own's responsibilities. It is also conspicuous that such affective responses to minority rights are often voiced by people who are not identifying as non-normative in terms of their gender identity and/or sexual orientation. To those, these issues seem non-existent because they perceive these issues to be too troubling, and too disturbing. Or, in a more benevolent reading, people asking such questions follow a humanitarian understanding of equality and feel everyone should be treated the same.

Discrimination, as understood here, is any instance of unequal treatment someone suffers due to their actual or perceived sexual orientation. This discrimination is always a form of violence, – either physically, mentally, economically, legally, socially, culturally, or sexually, – because it restricts and polices behaviors and thus has an impact on how one allows oneself or is allowed to live. According to social psychologist Gordon W. Allport, discrimination takes place whenever a "prejudiced person makes detrimental distinctions of an active sort" (15), with segregation being "an institutionalized form of discrimination, enforced legally or by common custom" (15). While Allport explicitly mentions only those acts actively conducted to distinguish between groups or individuals, he considers hostile ways of speaking about groups or individuals one dislikes (antilocution), avoiding them, physically attacking them, and exterminating them as different stages of a "fateful progression" (15) of acting out prejudice, with discrimination being in the middle of this spectrum. To Allport, "activity in one level makes transition to a more intense level easier" (15), which is why for the purpose of this book, discrimination is understood to cover even those less active contributions to discriminating groups such as antilocution and hate speech as well as avoidance.

As legal scholar Robert Wintemute[9] argued in 1995, scholars have focused more on instances of direct discrimination in the U.S. legal context as "the gay, lesbian, and bisexual minority still faces a tremendous amount of legislation that discriminates directly on the basis of sexual orientation …, and many litigated cases of sexual orientation discrimination involve direct discrimination" (10–11). Direct discrimination refers to laws that explicitly target, or fail to protect people of a particular sexual orientation. By 2024, this situation has

9 I quote Wintemute as expert on the rights same-sex couples, also in human rights discourse, yet strongly disagree with his stances on gender identity.

changed. Today, direct discrimination is still relevant as many areas of social life are not covered by existing anti-discrimination laws, and many states are constantly pushing against pro-queer legislation by issuing discriminatory bills, but the U.S. is arguably in an intermediate situation in which instances of direct and indirect discrimination intersect (see Chapter IV).

It is especially these indirect instances of discrimination that illustrate how concepts of legality or illegality may clash with realities. Indirect discrimination occurs when there is "a neutral requirement (other than being of a particular sexual orientation) with which a disproportionate number of persons of the other person's sexual orientation are unable to comply, and which cannot be justified" (Wintemute 10). This difference and disparity between *de jure* and *de facto* conditions, not only in connection to discrimination, has a strong affective component. While one may know about the legality of a certain conduct, for example that same-sex marriage is constitutional (*de jure* condition), they may still exercise their power to not issue marriage licenses to same-sex couples (*de facto* condition). Likewise, one may know that a certain conduct is illegal, such as having oral and anal sex before its de-criminalization in *Lawrence v. Texas* in 2003 (*de jure*), yet they decide to ignore the legal conditions to do what they *feel* is right (*de facto*). As Carpenter states by offering anecdotal evidence to post-*Obergefell* realities for same-sex couples wanting to get married,

> nonjudicial staff often perform critical gatekeeping functions that are virtually unregulated, and that take place outside of the courtroom and off the record. Where court administrators and other bureaucrats are hostile to LGBT people, or do not comprehend their legal position, that gatekeeping function can actually act as a practically impermeable barrier to access to the announced right. (273)

These instances of *de facto* discrimination where *de jure* rights are given illustrate that "rights do not self-enforce" (271), strengthening the argument for a thorough legal-cultural education and a simultaneous tackling of discriminatory legal and cultural notions.

Affective Orders: Rechtsgefühl, Legal Consciousness, Legal Subjectivities, Legal Mentalité

As both instances show, one's affective relation to legal norms, i.e., how one feels about their rightness or wrongness, influences whether one challenges, questions, ignores, or acts in accordance to them. This affective dimension of

law is being referred to by some scholars working on the frictions between law and culture as one's *Rechtsgefühl* ('legal affect'),[10] borrowing from German legal scholar Rudolf von Jhering, or legal consciousness (Merry; Ewick and Silbey; Silbey "Studying"), legal subjectivities (Olson *Legality*), or legal mentalité (Legrand "Comparative," "Converging").[11]

The notion of *Rechtsgefühl* has another equally important aspect to it. While one may know about the legality of a certain conduct, they may still *feel* like they are doing something illegal and vice versa, depending on the environment the conduct is happening in. This feeling, whose causes at times remain unconscious to its feeler, is connected to extra-legal norms that are equally and sometimes even more powerful than legal ones. Imagine an apartment building with alternating schedules for cleaning the stairway – a rather typical scenario in German cities. Forgetting that you are due for cleaning the stairs may not be sufficient reason to terminate your tenancy but it certainly makes you feel uneasy when meeting your neighbors. Social and cultural norms, social pressure and social control all feed into the establishment and maintenance of legal orders or those acting analogous to them.

In this sense, legal-cultural orders are understood as orders that do legal work, i.e., police and maintain conducts – be it social norms that police behaviors, cultural norms that hierarchically value some conducts over others, or intra-community norms which obligate one to act in accordance with them and threaten those with exclusion who do not.

Narratives, Imaginaries, Constitutional Processes

Instances of felt, imagined, and narrated legal realities play a prominent role in this book. In the fields of law and culture, the former is often associated with rational, fact-based, and ordered inquiries whereas the latter represents

10 The specifics of the German language allow for a hybrid concept that is difficult to grasp in English: *Rechtsgefühl* does not only imply the affective relation to law but also the affective relation to justice.

11 See Legrand "Comparative" 265–6: "The law, in its many manifestations, is an incorporative cultural form. Just as culture is a source of identity, legal practices are a source of identity. They encode experiences. To my mind, legal practices are very much a reflection of a given culture and of a given legal mentalité (in the sense of the interiorised culture). They reveal an implicit structure of attitude and reference, or a way of experiencing legal order."

a more irrational, associative, and muddy area.[12] For instance, many people seem to have a clearer understanding about the tasks of a lawyer than they do about a scholar in cultural studies. This dualism is approached here via narratives and imaginaries in order to uncover and analyze the affectively experienced truths which bind together both realms. Cultural narratives, in my understanding, are stories which add and carry meaning to sociocultural processes, and "by and through which a group of people legitimizes their claims to a given national identity" (Olson "Futures" 56). In this sense, they can serve as explanatory models, which help people make sense of their world, they can be politically instrumentalized for establishing or maintaining sociocultural hierarchies, they can offer spaces of identification, or they can add legitimacy to a group's actions. An example would be the U.S. (grand) cultural narrative of one's ability to overcome class lines and socioeconomic hierarchies simply by hard work and dedication, stressing that the U.S. is built on the promise of equal opportunity.

What such narratives have in common is their focus on affect. Cultural narratives not only carry meaning but they also appeal to people's emotional reaction to a certain event. Thus, they do not necessarily rest on historical or scientific facts to become true; they find their way into a collective truth by being subjectively *felt* as true. Expanding on the forms and functions of cultural narratives, Chapter II gives examples of this process with regard to the Constitution and the ideals inscribed in it.

Legal-cultural imaginaries are introduced in this book as supplements to cultural narratives, which share characteristics of the latter, yet differ from cultural narratives in that they are less established, i.e., they are not as prominently anchored in people's minds, less identifiable, and they are less static. However, imaginaries are considerably more fueled by affect than cultural narratives. Imaginaries strongly focus on phantasmatic configurations of realities while narratives' already claim a quasi-factual, narrativized truth to them. Imaginaries thus work towards changing existing sociocultural conditions while narratives rather legitimize and add meaning to them. The concept of cultural-legal imaginaries picks up on the notion that Cultural Studies, Critical Legal Studies and other disciplines notice a "turn to affect" (Fischer-Lascano; Krasmann; Shaw).

12 For a detailed analysis of the gendered relationship between law and the humanities, see Olson *Legality* 26–30.

Cultural narratives and imaginaries could also be distinguished along their spatial capacity of questioning or maintaining existing power structures. Narratives serve as rather conservative tools, aiming to maintain existing structures and legitimizing past events in a people's history, while imaginaries serve as progressive catalysts, aiming for change. However, this distinction seems to become blurrier when analyzing current constitutional processes. Current perceptions of how the Constitution works and how laws in general (ought to) operate have significantly been transformed during the twenty-first century due to the ongoing politization and polarization of the U.S. legal system. Among others, I claim that a general trust in the legal system, i.e., the narrative that the system is able to fix itself without interference, has been supplemented by a strong belief in one's entitlement to absolution, i.e., the imaginary that one has the right to have their particular *Rechtsgefühl* represented and accounted for in legal norms and the subsequent right to enforce this *Rechtsgefühl* via violence if legal norms fail to acknowledge that right.

Analyses of legal and cultural orders thus have to involve a multitude of constitutional processes, which refer to any operation (or imagined operation) of actors and actresses as well as to any ideals that are linked to or are invoking the Constitution, including but not limited to Supreme Court justices, those claiming their fundamental rights, and the rights themselves. Just as one might perceive of 'constitutional processes' as a muddy term, the affective relation to it is equally blurry because of imagined realities, narratives of individual and institutional legitimization, and felt 'truths.'

Normativity

Suspect Subjects emphasizes non-normativity and deviance over normativity and conformity. From a legal perspective, this focus becomes clear when revisiting the Equal Protection Clause's historical and thus original meaning. Although the first section of the Fourteenth Amendment refers to "any person under the law," the phrase was originally directed at any discriminatory behavior towards formerly enslaved people, of whom most were forcefully migrated from Africa. The Equal Protection Clause's claim to protect anybody was then primarily directed at people of a certain race, i.e., Africans and African-Americans who have been serving as slaves. Consequently, the Equal Protection Clause's legal recognition and protection aims at what is differing from the norm, i.e., what – in the sense of characteristics –, and who – in the sense of members of social groups – is likely to be discriminated against.

It is important to note that the discourses about LGBTQ+ rights evolve around the notion that those outside the normative heterosexual, cisgendered matrix face distinct forms of discrimination and challenges based on their respective identity. This is why they need special forms of protection. However, this view neglects the diversity, multiplicity, and fluidity of personal identities and experiences of discrimination. Even special forms of protection cannot account to this highly individual need, at least not thoroughly. Legal protection for LGBTQ+ individuals may thus need to take a detour through assimilationist perspectives on and legal categorizations of sexual orientations. Yet, for gaining social equity, it is important to bear in mind that rigid identity categories are merely legal fictions which serve the interests of justice and do not represent an objective, historical truth or reality.

I.2. State of Research: Mapping the Field

Culturalist approaches to legal studies have arguably only recently found their way into the study of law. While feminist studies, anthropology, history and critical legal studies have already been analyzing law's mechanisms and implications for decades (Branco and Izzo 48; Olson "Mapping" 245), the so-called 'cultural turn' of critical legal studies only started in the 1980s (Knox and Davies 3–6; Silbey "Legal Culture" 470). Since then, Law and Culture scholarship has come to be known as one of many Law and X projects[13] that continue to shape humanistic interrogations of legal studies.

Approaching law from a cultural studies perspective means acknowledging law's function as upholding and establishing forms of social control and normative orders (Silbey "Legal Culture" 473; Olson and Schillings 2), yet simultaneously de-constructing the underlying cultural assumptions of what and who needs being socially controlled and normatively ordered (Olson and Schillings 2). Researchers in the field have embraced cultural legal studies as an interdisciplinary and transdisciplinary endeavor[14] which goes beyond the strict dis-

13 These projects include, but are not limited to, Law and Literature, Law and Narrative, Law and Economics, Law and Visual Culture, Law and Media Studies.

14 See also Kahn "Freedom" 145–46: "The claims of the doctrinal science of law, however, were thoroughly discredited by the legal realists, who left the law professor looking like a snake oil salesman who had illegitimately worked his way into the university. Legal decisions and legal rules, the legal realists taught us, have to be understood in a social/political context that is not captured by the categories and descriptions of law.

ciplinary confinement of legal studies.[15] Analyzing law as "pluralistic" (Olson "Mapping" 234), i.e., diverse in its forms and functions, means understanding legal processes "to be cultural-political phenomena that need to be comprehended with methods extending beyond those developed in more traditional forms of legal scholarship" (Olson "Mapping" 235).

Scholars such as Rosemary Coombe and Lawrence Rosen call for de-juxtaposing legal studies with cultural studies by questioning the dualistic perception of law and culture and thereby advocating for an understanding of law *as* culture as well as a distinct academic home for the discipline. Claiming that "a cultural studies of law will only emerge as a distinctive field of academic inquiry when scholars stop reifying law and start analyzing it as culture" ("Cultural Studies" 36), Coombe promotes an interdisciplinary endeavor that expands textualist approaches to include analyses of "the social power of forms of legality or their meaning in forms of life that exist anywhere outside of the legal trial or the reported case" ("Cultural Studies" 55). Rosen also stresses these entanglements of law and culture and calls for an understanding of both realms' impact on each other:

> [L]aw is so inextricably entwined in culture that, for all its specialized capabilities, it may, indeed, best be seen not simply as a mechanism for attending to disputes or enforcing decisions, not solely as articulated rules or as evidence of differential power, and not even as the reification of personal values or superordinate beliefs, but as a framework for ordered relationships, and orderliness that is itself dependent on its attachment to all the other realms of its adherents' lives. … nowhere is law (in this sense of ordered relationships) without its place within a system that gives meaning to its people's lives. (Rosen 6–7)

Law satisfies none of the normative criteria of autonomy: it is not objective, neutral or coherent."

15 See also Kahn "Freedom" 142–43: "Traditionally, the autonomy of the discipline of legal study was located within the doctrinal rules, which were thought to be capable of generating solutions to every actual controversy. The expert – a position claimed by both the judge and the law professor – could remain wholly within the domain of law in order to resolve social conflicts. To reach outside was to commit either the sin of 'result-oriented' jurisprudence or that of 'usurping the legislative role.' Legal practice and legal study formed a seamless whole."

Rosen approaches law as a vital part of culture and influenced by culture's overarching function as meaning-making faculty of ordering human relationships. The concept of culture Rosen follows is reminiscent of the one by Clifford Geertz, who understands culture as "webs of significance he [man; lb] himself has spun" (*Interpretation* 5). Analyzing culture is thus to Geertz "not an experimental science in search of law but an interpretive one in search of meaning" (*Interpretation* 5). By treating the meaning of cultural texts as dependent on the culture they are settled in, Geertz claims that

> the cultural patterns involved are not general but specific-not just "marriage" but a particular set of notions about what men and women are like, how spouses should treat one another, or who should properly marry whom; not just "religion" but belief in the wheel of karma, the observance of a month of fasting, or the practice of cattle sacrifice. (*Interpretation* 52)

The Geertzian cultural relativism is at the heart of Law and Culture scholarship. "[T]his field [cultural legal studies; lb] embraces a social-constructionist framework where the law is seen not simply as applying to a preexisting social world but as actively creating the social world as we experience it" (Coombe "Cultural Studies" 36). The postmodern skepticism towards universal beliefs and the de-construction of essentialism links cultural approaches towards legal studies to other critical inquiries which equally perceive of law as contextual and geographically and temporally specific (Olson and Schillings 4; Kahn "Freedom" 150).

In this sense, law is not merely understood as a constitutive force which shapes culture but as equally constitutive of culture as culture is for law. The most important perspective of Law and Culture scholarship is to perceive of law and culture as entangled, interrelated fields which feed on and influence each other; academic analyses within each field need to look beyond disciplinary boundaries in order to arrive at holistic insights, as many cultural-legal scholars assert to (Legrand "Converging;" Eskridge *Gaylaw*; Rosen; Stone *Constitution*). Indeed, law is not only part of a cultural frame but also simultaneously constituting it. Law itself may be considered "a system of meaning rather than an imposition of force" (Cover "Nomos" 12).

Gender, Identity, and Sexual Orientation in Legal Scholarship

In U.S. American society, the sociocultural sensibilization for conceptualizations of normativity and non-normativity in terms of gender, gender identity,

and sexual orientation seems to develop more rapidly than the legal assessment of these categories despite the overregulation of sexuality in U.S. American law.[16] A prominent instance of this claim can be found in the struggle for woman suffrage. While organized forms of women rights struggles can be traced back to as early as 1848's Seneca Falls Convention, it was not until the 18th August 1920 that the Constitution was amended to include "the right of citizens of the United States to vote" (amend. XVIIII, sec. 1) regardless of one's sex.

Similarly, differentiations between sexual orientations have only been introduced as socioculturally meaningful concepts in the late nineteenth century (Katz *Invention* 10; 13) and then emerged into "new regulatory categories [which] affected the evolution of law between 1880 and 1946" (Eskridge *Gaylaw* 18). Another watershed moment is the only recently gained visibility and public awareness during the 1960s and 1970s when the AIDS epidemic forcefully pulled gay men out of the closet (Stone *Constitution* 448). Social movements have thus increased cultural sensibilities before legal recognition (in the form of control or protections) was established.[17]

Given these concepts' respective histories, it is not surprising that the Supreme Court of the United States (SCOTUS) has already classified gender as a quasi-suspect classification,[18] while sexual orientation has largely and, as I argue, strategically been ignored by the Court. Although there have been rulings on discrimination based on sexual orientation,[19] it was not until the beginning of the twenty-first century that the Court adopted a decidedly pro-LGBTQ+ stance; its decisions in *Lawrence v. Texas* (2003) and *United States v. Windsor* (2013) are regarded as leading the way for recognizing same-sex marriages in *Obergefell v. Hodges* (2015), which then facilitated *Bostock v. Clayton County* (2020).

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16 See Olson "Futures" 52–53 for an analysis of the influence of popular cultural outlets on socio-legal processes and these fictional platforms' ability to convey and negotiate issues in an accessible way.

17 It is equally correct that legal recognition of certain issues has influenced social and cultural developments. This claim is important for understanding why today's progressive legal developments are met with increasing anti-queer backlash, see also Chapter V. For more on this claim in a historical perspective, see Eskridge *Gaylaw* 18.

18 See *Mississippi Univ. v. Hogan* 724–26 (1982); *Craig v. Boren* 197–200 (1976).

19 On the constitutionality of sexual acts between consensual adults of the same sex see *Bowers v. Hardwick*; on the question if a state's constitutional amendment may explicitly bar sexual orientation from legal protection see *Romer v. Evans*.

The academic discourse about sexual orientation's equal protection has mostly been focusing on the case of homosexuality as potential suspect classification (Green; "Constitutional Status"), on intradisciplinary elaborations on the Supreme Court's opinions and the Constitution as such (Yoshino), and on the structural relationship between the Due Process Clause and the Equal Protection Clause (Miller; Sunstein; Rush). These analyses have provided insights into the character of the Equal Protection Clause and the argumentative trends of the Supreme Court justices, yet they have largely ignored sexual orientation's potential suspect classification. Another weakness of this approach is the laser-focus on homosexuality. Only analyzing homosexuality's potential suspect class status (over-)stresses notions of fragility and Otherness of this particular sexual orientation and thereby fixates stereotypes and categorizations (Baer "Chancen und Risiken" 13–15).

Further, these elaborations have not established analytical connections between legal and cultural processes. James Boyd White's seminal work on the discipline of Law and Literature, as well as Peter Häberle's work on constitutions and culture, have shaped and re-vitalized the discourse about the entanglements of jurisprudence and the humanities. Their interdisciplinary approaches were considered rather progressive, even though such considerations have a long academic tradition of thinking about law from a humanities perspective.[20] While jurists have historically proven to be more open to interdisciplinary endeavors (Gephart *Recht* 9; Gephart "Erforschung" 20–22),[21] legal scholarship on suspect classification and equal protection has not yet examined this discourse's cultural and social scope.

Evan Gerstmann's third edition of *Same-Sex Marriage and the Constitution* (2017) opens up the discourse about marriage equality by including social psychological, political, and cultural considerations. However, when touching on sexual orientation's suspect classification, Gerstmann's analysis shies aways

20 See, for instance, Jacob Grimm's essays on poetry and law, *Von der Poesie im Recht* (1957 [1816]).

21 Acknowledging that this statement is controversial, I draw from my own experience in the areas of American Studies, Cultural Studies, and Law. Further, legal scholars are more dependent on investigating those realms law touches upon while cultural studies scholars tend to refer to laws less often. Also, Supreme Court opinions and dissents usually pick up on historical, cultural, and social developments and sentiments while Cultural Studies scholars tend to treat law as distinct from other scientific disciplines, particularly their own, see also Steel 88.

from assigning responsibility to the Court and defending its lack of intersectional analysis as simply too complex (65–69).[22] By referring to his prior work in *The Constitutional Underclass* (1999), Gerstmann reiterates his point that suspect classification is "a dead letter" (*Same-Sex* 75) because of the Court's incoherent application of its criteria and the reluctance to include more suspect classifications since the 1970s. Gerstmann advocates for a different approach, one that does not "exacerbate[] the public perception that they are seeking *special* rights rather than equal rights" (*Same-Sex* 75; emphasis in original) and which "show[s] that they were just seeking the same rights that heterosexual couples already had and that they were not seeking any sort of privileged status" (*Same-Sex* 75). This way, he uncritically reiterates his lacking queer theoretical perspective and fails to engage with the heteronormative implications of this suggestions and its consequences for the cultural narratives and imaginaries surrounding LGBTQ+ people. While Gerstmann's analyses can also be read as simply laying out the most successful route to more protections for queers, his views do not seem to question the very legal-cultural foundation on which these analyses stand.

Peter Nicolas' research is arguably the most seminal work currently being done on sexual orientation's suspect classification. Nicolas argues that "a clear, class-based equal protection decision declaring sexual orientation a suspect or quasi-suspect classification" ("Squandered" 138) would circumvent future voting stalemates at the Supreme Court when it comes to cases involving sexual minorities. His analyses provide a historical and procedural overview of the challenges sexual orientation's suspect classification has to face, and clearly outline the judicial consequences its non-recognition has for the LGBTQ+ community. Although Nicolas does not comment on the sociocultural entanglements of sexual minorities' constitutional protection, his work succeeds in framing the issue as not primarily a legal one but most of all an epistemological and conceptual one, which combines questions of social constructionism versus essentialism, and pits biologistic arguments against sociocultural ones (Nicolas *Sexual Orientation*).

22 See also, for instance, Gerstmann *Underclass* 66: "So the difficulty with linking homophobia to sexism is not that the link is false. The problem is that so many other such links exist. … Is it really stronger than, for example, the link between racism and sexism? Are the courts in any position to make such a judgment? … Such an approach would turn the Supreme Court into our sociologist-in-chief."

One of the main obstacles of the discourse about sexual orientation's potential suspect classification is not the application of the criteria for suspect classification nor is it the Supreme Court's reluctance to argue the matter, which, again is informed by the illusory claim sexual orientation would not fulfill the criteria. Sexual orientation's suspect classification's biggest issue is that "even the most liberalizing legislation will – inevitably – continue to replicate the orientationist discourses of sexuality which attempt to contain desire within restrictive parameters in the interests of reproducing heteronormativity," as Tamsin Wilton lays out (178).

Wilson's work ties into current research on Queer Legal Theory (QLT). Building on important queer theorists such as Eve Kosofsky Sedgwick's and Michel Foucault's understanding of sex, gender, and sexual orientation, QLT applies these de-constructionist perspectives to the legal realm. Legal Gender Studies, as a teaching and research field which has gained more attention in the German-speaking contexts with the help of scholars like Elisabeth Holzleithner and Susanne Baer, is interested in how gender relations are manifested in and perpetuated by legal systems. Feminist Jurisprudence, which is often used synonymously for Legal Gender Studies, is associated with Legal Gender Studies as both fields aim at reforming legal norms to reach a more equal treatment of all genders, and to draw attention to specific struggles of individuals based on their respective gender, gender or sexual identities, or sex.

While all three disciplines share this goal, QLT differs from its related disciplines in its basic premises and arguably also radicalness. Queer Legal Theory not only examines how existing gender and legal systems legitimate themselves, it also radically questions the foundations upon which our concepts of sexuality and law are built. Queering legal, cultural, and sexual concepts thus means conceiving of them as unstable, fluid, discursively established, and human-made. Disrupting the assumption that these concepts are ahistorical, natural and universal is part of QLT's aim. Just as Queer Theory problematizes heterosexuality as much as it does homosexuality (Wilton 12; Jagose 16), Queer Legal Theory includes questioning both non-normative and normative categories of sexuality, and examining approaches towards the legal system. This emphasis on questioning assumptions, critically deconstructing conditions, and asking about motivations of those who established a certain status quo makes QLT, together with Critical Race Theory or Critical Legal Theory, a significant tool for navigating jurisprudence and for questioning legal norms and those establishing them (Baer *Rechtssoziologie* 12).

Following a postmodern, anti-essentialist approach, QLT uses Queer Theory's key aspects, i.e., "its skepticism toward universalist theory, foundationalism, and stability; its emphasis on embedded cultural ideas and local narratives; and its recognition of the legitimacy of multiple identities" (Kepros 282), to analyze the connections between social, legal, and cultural biases which are reflected in and reproduced by legal norms.

Law professor Francisco Valdes problematizes the muddied application of distinct concepts relating to sexuality. This imprecise understanding feeds into processes of knowledge production and socio-legal treatment, and vice versa. Conflation, "the historic and contemporary confusion and distortion of sex, gender, and sexual orientation as social and legal constructs" (qtd. in Kepros 3) is for Valdes the key issue in societal treatment of sexuality, which typically manifests in three "legs:"

> The first leg conflates sex and gender such that every person's sex is also his or her gender. The second leg conflates gender and sexual orientation so notions of masculinity and femininity become coalesced into models of sexual orientation (e.g., society recognizes "sissies" and "tomboys" as evolving into "fags" and "dykes"). The third leg conflates sex and sexual orientation such that society concludes an individual's participation in a same-sex couple means he or she has a "homosexual" orientation. (qtd. in Kepros 294)

To Valdes, QLT can and should be used as a tool to acknowledge and address these conflations because it is able to "introduce[] Queer cultural consciousness into jurisprudence—which has not yet recognized meaningful legal identities for sexual minorities" (294). Stressing the contextuality and doubting the universality of cultural notions of sexuality and legal norms relating to it, queer legal theorists problematize the processes of legal categorization and how meaning is already inscribed in or prior to this process.

In addition to Valdes, social psychologist Gregory M. Herek's research emphasizes that sexual orientation is perceived differently than gender, race, or sex. To Herek, bias against non-heterosexual persons should be referred to as "sexual prejudice," reminding of the importance of linguistic precision for conceptual differentiation:

> The term homophobia has gained widespread usage since 1972, even as its limitations have become increasingly apparent. Chief among these is its construction of prejudice as an individual pathology. … [T]his clinically de-

> rived perspective limits our ability to understand hostility toward sexual minorities, both among individuals and in society at large. I have argued instead for the value of framing heterosexuals' negative responses to sexual minorities in terms of *sexual prejudice* and of conceptualizing sexual prejudice as the internalization of societal stigma … . (65; emphasis in original)

Herek claims that structural inequalities bear societal stigma which then affects the individual and their prejudice. The pervasive visibility and normativization of heterosexuality in cultural realms such as law and medicine "embedd[s] sexual stigma in society's institutions … [to] ensure that sexual minority individuals have less power than heterosexuals" (67). This is why reducing sexual prejudice also needs to involve cultural transformations and changes in structural stigma (88), emphasizing the need to include cultural considerations in the study and analysis of law.

Herek's work provides a social psychological foundation for arguing that sexual orientation discrimination differs from sex discrimination because of the particular ways cultural and societal stigma intersect with individual prejudices. Sexual minority individuals face specific forms of discrimination, which are influenced by gender norms (Herek and McLemore 321), which are not identical to gender prejudice. This view is important for deconstructing legal arguments which conflate sex and sexual orientation. As seen in the decision *Bostock v. Clayton County* (2020), arguments that sex discrimination is sexual orientation discrimination-on-route have gained momentum in recent legal scholarship and judicial decision-making.

Acting as custodian of the Constitution and thus as one pillar of U.S. American moral authority, the Supreme Court interprets and translates the intention(s) of its framers for twenty-first century U.S. American society.[23] This adaptation to contemporary conditions enables the Court's justices to use their own understanding of the Constitution's words, public opinion, and morality to shape the legal and sociocultural landscape. This power is also mirrored in the increasing politicization of the Court's personnel decisions. By blocking or enabling nominations of justices, both the Republican Party and the Democratic Party aim to affect legislation and politics for decades, thereby (trans-)forming the United States' national self-image and social hierarchies according to their ideological principles.

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23 For the distinction between textualism, intentionalism, and the degree of interpretation of the Constitution by textualists, see Hiebaum 156–59 and Chapter III.

The relationship between law's authority and cultural identity, especially with regard to a national self-understanding, stresses the importance of an inter- and transdisciplinary analysis of law's pluralistic character.[24] Examining law's role as enforcer of social norms, its ability to (de-)establish forms of social inclusion and cultural acceptance is not only linked to rational considerations but also to feelings of justice (or lack thereof). Thus, an interdisciplinary and intersectional analysis of sexual orientation as one marker of social group membership needs to evolve around questions of political, moral, cultural, and societal hegemonies which serve as gatekeepers for this group's suspect classification and sociocultural acceptance.

The Equal Protection Clause's practice of considering individuals only in terms of their social group membership approaches identity as a unidimensional construct and complicates the case for sexual orientation. The conceptual and terminological closeness of gender, gender identity, sex, sexual conduct, sexual preference, and sexual identity complicates sexual orientation's legal situation, and may be cited as one of the reasons why the Court is reluctant to regard it as a suspect classification.[25] However, as the very idea behind suspect classification involves the application of strict scrutiny in cases where discrimination against a suspect class is given, laws which serve a compelling governmental interest can still be enacted. Consequently, claims that sexual orientation's suspect class status might serve as gateway for preferences including non-consent or otherwise legally questionable behaviors, or as the beginning of softening the Equal Protection Clause's impact by including too many groups, appear to be merely politically motivated instead of legally valid.

Simultaneously, suspect classification functions as site where ideologies of (in)equalities are being negotiated and cultural identities are being constituted or maintained. This connection between the Constitution and culture stresses the notion of the Constitution as culture. By analyzing how and why the Equal

24 See Olson's definition of the term: "The term pluralities keys into the call for a transdisciplinary approach to law, legal processes, and legality that understands them to be cultural-political phenomena that need to be comprehended with methods extending beyond those developed in more traditional forms of legal scholarship" ("Mapping" 235–7).

25 There are political reasons for not including all of these categories: Fearing a disruption of the Constitution's impact and reputation, the Court's reluctance to include more suspect classes corresponds to a "pluralism anxiety" (Yoshino 747), reflecting U.S. America's struggle to maintain a coherent national identity while remaining socially and ethnically diverse.

Protection Clause protects minorities, and how and why the four criteria of suspect classification have been established by the Court, one is able to draw conclusions about the cultural self-understanding of the U.S. and how this self-understanding has been manifested in the Clause and is constantly being adjusted in the judiciary's decisions. Moreover, these analytical connections are modes of critique of the way the Supreme Court has approached the possible bond between suspect classification and sexual orientation so far, and the way the Court upholds sociocultural hierarchies by continuing to do so.

I.3. From Cultural Studies of Law to a Queer Legal Hermeneutics

As a conceptual frame, I work with an interpretive concept of culture as developed by Clifford Geertz, yet acknowledge the Eurocentric and colonial legacy of modern conceptualizations of 'culture.'[26] This concept of culture self-identifies as sociological in that it follows Schaefer's understanding that the term 'culture' "does not refer solely to the fine arts and refined intellectual taste" (53) but involves "the totality of learned, socially transmitted customs, knowledge, material objects, and behavior," including "the ideas, values, and artifacts … of groups of people" (53).

However, the underlying implications of what a 'culture' constitutes, already visible in Schaefer's distinction towards 'fine arts' and 'intellectual,' still permeate Western colonial and racist understandings of what is "cultured" or "primitive." Thus, acknowledging and actively writing against notions of culture that devalue and silence non-Western, non-normative, and non-White people, customs, ideas, and values is important for critical inquiries into law. This is even more true when considering that even allegedly scientifically neutral conceptualizations of terms such as culture may lead to hierarchizing distinctions based on class, race, gender, sexuality, or other.

My concept of culture, based on and expressed through signs, is not meant to be a normative one but rather self-referential, taking into account those cultural imaginaries and narratives found in official cultural-legal documents

26 Rosemary J. Coombe succinctly traces the genealogies of Western understandings and constructions of law and culture: "Culture derives its modern meaning in processes of colonization, even in its meaning as the tilling of soil, which emphasizes the physicality of territory to be occupied, cultivated, and possessed to the exclusion of tribal others" ("Cultural Studies" 23).

such as the Constitution, the Declaration of Independence, and court opinions. The primary sources used here are the U.S. Constitution, especially the Fourteenth Amendment, and, since the American legal system is based on case law, Supreme Court decisions which have interpreted and thus shaped the Equal Protection Clause of the Fourteenth Amendment. These decisions are being understood as legal documents and cultural texts in the Geertzian tradition.

Additionally, other cultural texts such as popular cultural depictions of the workings of law, and culture as a text in itself, reinforce, challenge and (trans)form these imaginaries and narratives. These imaginaries and narratives continue to be used as umbrellas for affectively experienced forms of belonging to the U.S. This approach to culture, being "in search of meaning" (Geertz *Interpretation* 5), does thus not aim at excluding pluralist considerations nor negate the existence of various cultures of legality within a society (Olson "Mapping" 247–8); it rather claims that there is an overarching, discursively dominant culture within the U.S. based on historically valid cultural narratives. On a codified, formal level, this constant negotiation of cultural values and legal regulations manifests itself in judicial opinions, state law, and constitutional amendments, which shape the cultural narratives and imaginaries they are situated in. One has to understand these legal-cultural frameworks in order to bring about social, cultural, and legal change.

This book employs queering, wide reading, and critical legal reading as its poststructuralist, qualitative-analytical methodology. Following Wolfgang Hallet's understanding of wide reading (294), I take the legal texts this book engages with as only analyz-able in connection with cultural discourses about equality and LGBTQ+ issues as well as political developments concerning U.S. party politics and the Supreme Court.

By conducting a qualitative analysis of the most relevant Supreme Court cases dealing with sexual orientation in the twenty-first century, I examine how sexual minorities are constituted by the Court. This method of analyzing cultural texts which deal with the legal protection of queers serves to uncover, question, and deconstruct cultural conceptualizations of sexuality and its legal treatment, and aims to establish a queer hermeneutics of the law.

A discipline-specific form of close reading, critical legal reading constitutes in "itself a form of legal reasoning," which "is a constituent and fundamental aspect of critical legal thinking" (Steel et al. 190). To understand the reading of law as closely connected to its interpretation mirrors the hermeneutic similarities between this discipline and literary studies. Close reading and critical legal reading therefore both evolve out of

different strands of critical theory, New Criticism and New Legal Criticism (West 144). While close reading is perceived rather as a tool, critical legal reading also encompasses specific understandings of law and its critique, making it more of an approach. Fajans and Falk add to this interpretation by stating that "to read judicial opinions closely and critically is to talk back to power" (165), reinforcing Robert Cover's notion that "[l]egal interpretation takes place in a field of pain and death" ("Violence" 1601).

Critical legal reading and reasoning, in the tradition of the Critical Legal Studies movement, is fueled by critiques of power rather than morality (West 148),[27] whereas New Legal Criticism considers moral principles drawn from law itself (West 147). I wish to pick up on these notions from the Critical Legal Studies movement and New Legal Criticism and add a queer theoretical perspective. Considering that "law could and should be unmasked, deconstructed, and criticized, not because it falls short of a moral ideal, but rather because it embodies, legitimates, renders invisible, or promotes various forms of social, economic, or legal power" (West 148), Queer Theory provides the necessary tools for this endeavor.

Drawing on José Esteban Muñoz' concept of disidentification, queer theoretical analyses of law are "meant to be descriptive of the survival strategies the minority subject practices in order to negotiate a phobic majoritarian public sphere that continuously elides or punishes the existence of subjects who do not conform to the phantasm of normative citizenship" (4). While Muñoz is explicitly interested in forms of belonging, the analyses here emphasize queer survivalist notions of legal personhood. Following Fatima El-Tayeb's work on queering ethnicity in her seminal book *European Others*,[28] I consider queer-

27 This perspective excludes of course considerations of morality as a tool for maintaining or establishing power relations such as in the form of Christian or generally religious forms of exercising force via moral or religious norms (see Foucault "Subject" 782).

28 See El-Tayeb on the survival strategies of European minority communities: "Circumventing the structures that exclude them, these preliminary collectives use new media and popular culture in order to radically rewrite European history through a queer practice, a revised definition of political agency as well as national identification, and a reassessment of the relationship between community, space, and identity in a post-ethnic and translocal context. This process of alternative community building might best be defined as the queering of ethnicity, that is, as a movement in which '[i]dentity, too, becomes a noun of process' (Gilroy 2000, 252)" (xxx).

ing as a positioning beyond, apart, contrary to, or in opposition of the dominant norm, both with regard to identity categories of sexuality and sociocultural, legal, and political practices. Queering then indicates a dynamic process of resisting one's unchallenged normative surroundings and a reassessment of law's structurally heterosexist configurations of the queer subject. Carl F. Stychin also acknowledges the entanglements of Queer Theory and legal analyses when he states that "[i]n providing a critique of categorical thinking in general, and by denaturalizing the meaning which has been discursively invested in categories, queer theory has obvious applications to law" (148). It is especially Chapter IV which will pick up on Stychin's claim and offer a queer perspective to contemporary legal categories and meaning-making.

The methodological access to critically reflecting on the concepts of both sexual orientation and suspect classification is transdisciplinary, interdisciplinary, intersectional, and, in the legal realm of constitutional interpretation, intradisciplinary. By adding an inter- and transdisciplinary perspective to the issue of sexual orientation's constitutional protection, it becomes possible to link the logic of constitutional anti-discrimination laws to the shifting sociocultural imaginaries and those who are constructing them.

Against a Disciplinary Confinement

The connection between Queer Theory and cultural studies of law shows how the discourse about equal protection of sexual minorities needs to be situated at the intersection of Cultural Studies, American Studies, abolitionist studies and Queer Theory and (Critical) Legal Studies in the form of Queer Legal Theory. The interdisciplinary bond of American Studies' methodological unorthodoxy, Queer Legal Theory's disrupting qualities, and Legal Studies' rather dogmatic theoretical frame may be off-setting to the purely culturalist, queer theoretical or jurist reader. Yet, these disciplines enrich each other by providing analytical sharpness with sociocultural contextualization and denaturalizing, critical inquiries.

The focus on Queer Studies and Theory instead of Gender Studies is linked to the need of constantly questioning the normative and thus aiming to circumvent categorizations both on a legal level and in terms of sexuality. As employed here, Queer Theory is committed to resisting categorizing, and especially binarizing, people according to their sexual and/or gender identity, sexual preferences, or gender performance. This approach wants to address the realities of lesbian, gay, trans, inter, women, men, agender people but also speak to those in-between, everyone queer, everyone*. In this sense, binary concep-

tualizations are rejected in favor of a pluralized and fluid understanding of sexuality following queer critics such as Eve Kosofsky Sedgwick, Annamaria Jagose, or Tamsin Wilton.

Further, this inquiry into sexual orientation from a cultural-legal perspective examines normative sexual orientations and gender identities by arguing for a protection of non-normative ones. Queer Theory is about queering processes of knowledge production, categories, and ways of thinking, making it highly relevant for legal analysis. It is a way of engaging with the material rather than a disciplinary container or place of discourse. Eluding a definite description in this context corresponds to Kepros's assessment: "'Queer' escapes definition because its meaning expands with every individual assertion of Queerness" (282). Even more, "[t]o attempt an overview of queer theory and to identify it as a significant school of thought, which those in pursuit of general knowledge should be familiar with, is to risk domesticating it, and fixing it in ways that queer theory resists fixing itself" (Jagose 2). This post-structural, deconstructionist approach corresponds to Coombe' understanding that "[d]econstruction is a means of making visible those others who are invisible in legal discourse and the dominant narratives it reproduces" ("Cultural Studies" 52).

Cultural Studies of Law

Research on the frictions of law and culture has various names and even more varieties of methodological access. While some refer to the 'Cultural Studies of Law'/'Cultural Study of Law' (Coombe; Knox and Davies), 'Law as Culture' (Rosen) or 'Cultural Legal Studies' (Sharp and Leiboff), others prefer to speak of 'Law and Culture,' mirroring this scholarship's embeddedness in a web of manifold 'Law and Xs.'[29] The methodological access to each of these fields is connected to its main analytical concerns. Popular cultural approaches to law are more likely to use Media Studies' tools and methods and to analyze television shows or films (Olson *Legality*), while anthropologists would rather use methods such as ethnographies (Sharp and Leiboff), or employ comparative methods to analyze different 'legal cultures' (Häberle *Verfassungsstaat*; Häberle *Feiertagsgarantien*; Häberle *Verfassungslehre*; Blankenburg).

The understanding of law and culture here follows a Geertzian, Hartian approach which considers law to be a social construction (Hart xvii) and a cultural

29 Other dominant fields of research in this area are, among others, Law and Literature, Law and the Humanities, Law and Visual Culture, and Law and Society.

sign (Geertz *Interpretation* 21; 118). Law in this understanding may constitute a distinct system with specific dogmatic rules, symbols, and methods, yet it is a cultural product which can be read, interpreted, analyzed, deconstructed and possibly abolished just as literary texts, historic monuments, musical compositions, or religious rituals. Law then constitutes a certain perspective on society and culture while also influencing the society and culture it is embedded in. This ambiguity of cultural-legal entanglements makes the connection(s) between law and culture arguably harder to grasp, but it also illustrates how both realms lend authority and thus validity to each other.

Following Hermann Kantorowicz that the personality of judges matters when interpreting legal norms (Chapter III), the analytical approach here positions itself among the theories of the German Free Law School and Critical Legal Studies which consider law's indeterminacy connected to social, political, and, as I argue, cultural conditions. This is in line with a legal positivism of Eugen Ehrlich and H.L.A. Hart in that law is considered to be everything that is posited by people (Hart xix) and influenced as well as influencing sociocultural realities.[30]

Toward a Queer Legal Hermeneutics

As the concept of suspect classification is highly complex, accessing its implications, and understanding them may at times challenge the general reader, who is not familiar with legal language and thinking. The same is true for sexual orientation, whose conceptualization may differ depending on the discipline it is employed in. These heightened difficulties in engaging in the discourse about sexual orientation's potential suspect classification, however, are not considered liabilities but assets. They enable the reader to connect law, here mostly in the form of the judiciary and the Constitution, to their respective areas of expertise, however unrelated to jurisprudence they may seem. This invitation to a transdisciplinary engagement in the material may at times be difficult due to discipline-specific terms, ways of thinking, or knowledge. I try to consider and work with these obstacles.

This approach is in line with James Boyd White's way of accessing the legal landscape by "establish[ing] a way of looking at the law from the outside, a way of comparing it with other forms of literary and intellectual activity, a way of

30 Note, however, that this legal positivism is not corresponding to Hans Kelsen's Pure Theory of Law, which is considered normative legal positivism, see also on this Baer *Rechtssoziologie* 29–31.

defining the legal imagination by comparing it with others" (*Imagination* xx). The Whitean approach of opening up the discourse's access to a legal and non-legal audience also holds true for the non-culturalist readership as it attempts to translate cultural concepts for the non-culturalist reader. The reader's background may therefore influence their access to the legal and sociocultural issues described here, yet it is not meant to exclude them from, but rather to enable an enrichment of, the discourse. White, referring to the generic masculine readership of his own law students, voiced this idea by stating that the reader shall "[feel] free to bring into play anything that he knows or is" (*Imagination* xxi). Opening up the discourse about sexual orientation's constitutional protection not only transdisciplinarily to a wider audience, including legal and non-legal readers, but also to a more liberal, interdisciplinary approach, which is not restricting readers to their knowledge within a discipline, circumvents traditional knowledge hierarchies which value professional training more utilitarian than personal experience.

This hybrid of contributing what one 'knows and is' to a book is also mirrored in the author's access. My way of writing and thinking is decisively academic, and some argue it may even be too law-y at times, yet this book's aim and my personal beliefs are also activistic. Thus, *Suspect Subjects*, which is written in an activist academic tradition, hopes to resonate in those who perceive themselves as academic activists and who are willing and able to use my work for their own academic and/or activist purposes to get in conversation with other queer legal theorists, and to approach me to discuss what I omitted. Growing up and being educated in a German-European environment, I acknowledge and actively attempt to counteract racist, sexist, and otherwise discriminatory ways of thinking this privileged perspective brings with it. As identifying one's own sexism, culturalism, and racism is not always successful, feedback on these parts is highly welcome.

However, as this disclaimer only touches upon a small fraction of where I am coming from as a person, it is not indicative to what I, as the author, am or know. Acknowledging my own socialization in predominantly cis, heterosexual, White, propertied, non-migrant, able-bodied, rather religious contexts, this information is necessarily incomplete without my situatedness in these contexts as a queer person who cannot but refuse a clear-cut cis identity. This attempt at a disclaimer already foreshadows some of the inherent tensions in situating oneself, and the necessarily gap-y and incomplete approaches towards identity discourses while trying to evade inflexible categorizations. Queer theoretical academic activism, in my understanding, may make use of

disclaimers like these to enable being held accountable and position oneself, yet it ultimately has to question, refuse, deconstruct or challenge processes of categorization. Since categorizations are key factors for approaching sexual orientation and its eligibility as suspect classification, yet their processes of formation and their meanings are contextual, disciplinary, and not historical, their usefulness and applicability are critically questioned in the upcoming chapters – and for now impossible to engage with without generating stereotypical associations with categories which have not been defined yet.

These social-psychological mechanisms of categorization have been taken up by Feminist Legal Theory and constitute one important issue of anti-discrimination laws. Using a feminist anti-essentialist, intersectional approach, one analytical focus is the interplay between legal protection against discrimination and what Susanne Baer and Ute Sacksofsky call "perpetuated stigmatization"[31] (*Autonomie* 15). According to Baer and Sacksofsky, this aspect of the "ambivalence of legal regulation"[32] (15) examines law's dualistic balancing of protecting minorities while not contributing to the sociocultural transfer of knowledge about their inferiority. In other words, whenever a legal regulation aims to protect someone, it runs the risk of weakening this person by stressing, and drawing attention to, their historically, economically, and/or politically inferior status in a society's hierarchy.

To Baer, Sacksofsky and to other scholars of Legal Gender Studies, Queer Studies, and Gender Studies, the route to legal and sociocultural equality needs to cross the intersections of different people's living conditions and experiences without using the White, able-bodied, heterosexual, cis gendered dominant group's perspective as its basis. Thus, arguing for anti-discrimination protections needs to take into account that the umbrella of non-normative sexual orientations does not cover a homogenous group of people. However, one can observe how a particular queer subject is constituted through law, and how sexual orientation continues to be meaningful as identity, legal, and sociocultural category. As Chapter IV analyzes in more depth, non-normative sexual orientations are constantly constructed against and in opposition to the dominant heterosexual norm.

The categories of race, gender, and class serve as equally important axes of social stratification following Kimberlée Crenshaw's originally legal understanding of intersectionality. To Crenshaw, intersectional analysis is

31 The German original reads: "perpetuierte Stigmatisierung." My translation.

32 The German original reads: "Ambivalenz rechtlicher Regulierung." My translation.

understood as a concept that opposes "a way of thinking about discrimination which structures politics so that struggles are categorized as singular issues" (167). While the origin of intersectionality has been attributed to Crenshaw, who made this theory applicable for academia, the idea of multi-dimensional oppression can already be found in the Combahee River Collective's manifesto from 1977. The radical Black feminist group declared that:

> We believe that sexual politics under patriarchy is as pervasive in Black women's lives as are the politics of class and race. We also often find it difficult to separate race from class from sex oppression because in our lives they are most often experienced simultaneously. We know that there is such a thing as racial-sexual oppression which is neither solely racial nor solely sexual, e.g., the history of rape of Black women by white men as a weapon of political repression. (19)

It is central to acknowledge this development of intersectionality to de-academize the concept and stress its origins in activists' work. Intersectionality is a concept critical of categories that enable and maintain patriarchal, capitalist, male, cis, White, able-bodied, monied, heterosexual hegemonies, pivotal for legal thinking, and evolving out of both activist and academic discourses. Consequently, using an intersectional queer feminist approach towards analyzing sexual orientation means being aware of how activist and academic work is connected and fuels each other.

Sexual orientation is understood as one factor of social stratification, resulting from and reflecting on different axes of inequalities. For instance, a Black, lesbian woman may experience forms of exclusion and discrimination different from those of a White, gay men although they share a non-normative sexual orientation. Perceiving of inequalities as multifactorial corresponds to the Equal Protection Clause's maxim of treating those individuals similarly who share the same characteristics, i.e., those in similar conditions and circumstances (Tussmann and tenBroek 345). In order to establish these similarities, the multi-level entanglements of social group membership(s), e.g., sexual orientation, class, race, gender, dis/ability, and education, have to be examined interdisciplinary.

Theories and concepts in terms of sexual orientation from sociology, Critical Legal Studies, social psychology, Literary Studies, Cultural Studies, Gender Studies, and American Studies are not merely overlapping; they complement each other. This interdisciplinary and intersectional queer feminist approach

to sexual orientation's relation to legal recognition aims at making visible and understanding underlying sociocultural hierarchies and the simultaneities of power relations on different levels in twenty-first century U.S. American society by taking sexual orientation's legal situation as a starting point for re-negotiating its potential for sociocultural change.

Since intersectionality aims at making visible and understanding underlying social hierarchies, the simultaneities of power relations on a social, political, and legal level in the context of sexual orientation require the examination of the following questions: In what instances does U.S. American society need to police sexuality, and what are the benefits and respective limitations for this intervention in the citizen's private sphere? How does legally regulating sexual behaviors socially influence the individual and their preferences? What are the objectives and political motives of denying or respectively granting sexual orientation suspect class status? The following chapters approach these questions and move from a cultural studies of law towards establishing a queer hermeneutics of law, a distinct way of looking at law using a queer, cultural-legal perspective.