

Legality and Affect Left and Right – Queering Legal Orders’ Normative Force with Feeling

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Abstract

In her book *From Law and Literature to Legality and Affect*, Greta Olson argues for an expansive view of the legal, which encompasses both one’s *Rechtsgefühl* and the sociocultural normative settings one is surrounded by. Acknowledging the existence of “a variety of competing *nomoi*” (Olson, *From Law and Literature*, p.7), i.e., diverse normative environments within a given legal order, notions of law as legality, and affect as law’s new Other are conceptualized as projects fostering legal pluralism.

Yet, is such a pluralistic, diversified notion of legality able to challenge those normative legal-cultural conditions which still privilege cis, male, heterosexual, White, able-bodied, propertied non-immigrants? Agreeing with Roger Cotterrell that “[l]aw’s interpretive communities now reflect the patterned differentiation of the social” (*Law*, p.100), and Olson’s claim that “ideas about law are negotiated outside of the courtroom, the parliament, or even the governmental office where law and legal ordinances are directly translated into everyday life experience” (*From Law and Literature*, p. 20), this article examines how legality may speak back to law, in its professionalized, dogmatic sense, and to legal orders, and analyzes in which ways an understanding of law as legality may affect LGBTQIAP* rights activism. This critical queer theoretical perspective thus challenges Olson’s *nomoi* by approaching the limitations of legal affects for trans and queer legal subjects. By analyzing the design and logic behind two recent cases of anti-trans bills in the U.S., Arkansas’ HB 1570 (‘Save Adolescents from Experimentation Act’) and Idaho’s HB 500 (‘Fairness in Women’s Sports Act’) from a cultural studies perspective, this article examines how an expanded understanding of law as legality may affect the gendered, cis-ed, and heteronormative nature of the U.S.’s dominant legal order(s).

Keywords

Law and Affect, trans rights, LGBTQ, Law and Literature, queer theory, legal affects

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Affect has emerged as law's new Other. This observation is at the core of Greta Olson's *From Law and Literature to Legality and Affect* (2022) and already part of everyday (popular) legal discourse. Legality, that is "the reality of radically opposed legal identities [i.e., differing relationships to legal norms; lb] within a given legal environment,"¹ develops and forms within a cultural frame which may or may not be influenced by dogmatic, 'actual' evidence and knowledge about legal systems. Arguing for an expansive view of the legal, which encompasses both one's *Rechtsgefühl* and the sociocultural normative settings one is surrounded by, Olson acknowledges the existence of "a variety of competing *nomoi*,"² i.e., diverse normative environments within a given legal order. But how are affective responses to legal norms experienced by those within the majority legal community and those outside of it, at the right and left margins?

This article sets out to probe Olson's claim of legality and affect having a constituting effect on legal pluralism and, most importantly, analyzes what such a legal pluralism means in practice for queer and trans bodies. These groups, which are considered as standing outside of the dominant legal community, namely at the fringes of who or what is worthy of protection, are increasingly facing backlash and outright hostility from U.S. state legislators, right-wing and conservative politicians, and religious organizations. Like Olson's two-hearted *From Law and Literature to Legality and Affect*, this article speaks from an U.S. American studies perspective written by a German author. With Olson, I believe in the comparability of these two geographical and political areas in terms of their Westernness, democratic ideals, and civic backlash in times of the Covid-19 pandemic.

Through a wide reading of Arkansas' HB 1570 ('Save Adolescents from Experimentation Act') and Idaho's HB 500 ('Fairness in Women's Sports Act') from a cultural and queer studies perspective, this article examines how an expanded understanding of law as legality may affect the gendered, cis (gender)-ed, and heteronormative nature of the U.S.'s dominant legal order(s). Agreeing with Roger Cotterrell that "[l]aw's interpretive communities now reflect the patterned differentiation of the social,"³ and Olson's claim that "ideas about law are negotiated outside of the courtroom, the parliament, or even the governmental office where law and legal ordinances are directly translated into everyday life experience,"⁴ this article analyzes how legality may speak back to law, in its professionalized, dogmatic sense. Further, it illustrates how legality challenges legal orders and analyzes in which ways an understanding of law as legality may be made fruitful for LGBTQIAP* rights activism. But before tackling these entanglements between the legal and the sociocultural from a queer legal perspective, I begin by looking at everyday affective encounters with law.

While legal and Cultural Studies scholars have long identified the entanglements between law and culture⁵ and commented on the sociocultural constructedness of the

1. G. Olson, *From Law and Literature to Legality and Affect* (Oxford: Oxford University Press, 2022), p.7.
2. *Ibid.*, p.7.
3. R. Cotterrell, *Law, Culture and Society. Legal Ideas in the Mirror of Social Theory* (Farnham: Ashgate, 2008), p.100.
4. Olson, *From Law and Literature*, p.20.
5. See, among others, S.L. Knox, Sara L. & C. Davies, 'The Force of Meaning,' *Cultural Studies* XXVII 1 (2013), pp.1–10, doi: 10.1080/09502386.2012.722288; L. Rosen, *Law as*

law,⁶ affect and imaginaries play an increasingly important role in investigations of the legal sphere. In Germany, but arguably also in other Western societies such as the U.S., one already witnesses this interplay of legality and affect happening on a daily basis in (popular) discourses about law—whether we watch *Netflix* documentaries about serial killers, listen to true crime podcasts, or indulge in fictional court hearings on reality TV in which Judge Judy finds us guiltily pleased, as Olson confesses.⁷ Taking part in these medial negotiations of the law, we as viewers become familiar with a fictionalized and simplified version of legal processes, which one might feel inclined to take as lawyers’ and judges’ reality. This cultivation of “misinformed conceptions of law – reduced to only criminal law – . . . via popular cultural media and in particular through fictional television series”⁸ is also referred to as the “CSI-effect.” This term, named after the popular forensic crime TV series franchise of the early 2000s, thus stands in for taking what we see on television or in other popular cultural texts for sociocultural realities – and expecting legal actors to behave following the rules we observe on screen.⁹ However, the notion that what we consume online or on screen constitutes our common ideas about law extends criminal law as it growingly affects our conceptions about constitutional law as well.

Constitutional Imaginaries and Felt Justice

As feminist legal scholar Anna Katharina Mangold recently tweeted, there seem to be “80 million constitutional lawyers”¹⁰ in Germany today, ironically referring to social media users’ ever more self-confident display of assumed legal authority and knowledge. In this particular instance, one user had responded to a news tweet about new Covid-19 related regulations for the members of the *Bundestag*, the German federal parliament, who were now required to wear FFP2 masks and provide proof that they are vaccinated or recovered plus tested to get access to the parliament floor.¹¹ The user Mangold

Culture. An Invitation (Princeton: Princeton University Press, 2006); P.W. Kahn, ‘Freedom, Autonomy, and the Cultural Study of Law,’ *Yale J.L. & Human.* XIII 1 (2001), available at: <https://digitalcommons.law.yale.edu/yjlh/vol13/iss1/5>; see R. J. Coombe, “Is there a Cultural Studies of Law,” in *A Companion to Cultural Studies*, ed. T. Miller (London 2005), pp. 36–62.

6. See C. Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973); H.L.A. Hart, *The Concept of Law* (3rd ed., Oxford: Clarendon Press / Oxford University Press, 2012 [1961]).
7. Olson, *From Law and Literature*, Ch. 2, p.21.
8. Olson, *From Law and Literature*, Ch. 2, p.5.
9. See, among others, S. A. Cole and R. Dioso-Villa, ‘Investigating the “CSI Effect” Effect: Media and Litigation Crisis in Criminal Law,’ *Stanford Law Review* LXI 6 (2009), pp. 1335–373; K. Podlas, “The CSI Effect: Exposing the Media Myth,” *Media and Entertainment Law Journal* XVI 2 (2006), pp. 429–86; S. Lee, “Law and Tel; M. Byers and V. M. Johnson, *The CSI Effect* (Lanham: Lexington Books, 2009).
10. A.K. Mangold (@feministconlaw), ‘80 Mio. Verfassungsrechtler*innen. Fast (!) fühle ich mit Bundestrainerin. . .,’ *Twitter*, 12 Jan. 2022, 10:47 a.m., <https://twitter.com/feministconlaw/status/1481201108299223040> (accessed 13 January 2022). Translations of German tweets by the author if not indicated otherwise.
11. Heute im Bundestag (@hib_Nachrichten), ‘Ab heute erhalten nur geimpfte [. . .] #2GPlus,’ *Twitter*, 12 Jan. 2022, 9:57 a.m., https://twitter.com/hib_Nachrichten/status/1481188651702923264. (accessed 17 January 2022).

commented on in her tweet condemned these measures as “simply unconstitutional,”¹² claiming they would violate “at least Art. 1, Art. 2 sec. 2 s. 2 GG [*Grundgesetz*, the German constitution], Art. 3”¹³ next to being “of course also morally reprehensible” (Joeli 2022). Mangold, professor for international and EU law, jokingly continues in her response by saying, “Oh, das gefühlte Recht – wie ich es liebe!” (“Oh, felt law – how I love it!”).¹⁴

For this user, as well as for one personally, laws may feel right or wrong, just or unjust without one actually being aware of their jurisprudential implications. Joeli thus may feel the new regulations for members of the *Bundestag* are unconstitutional because this person perceives them to be unjust, exaggerated or simply wrong. This affective response, however, neither requires nor demonstrates substantiated knowledge on how law works. It simply speaks to this person’s perception of a gap between what is and what ought to be legally regulated. Legal affects thus extend political affects in that they increasingly focus on legal norms and pick up on questions of constitutionality, be they merely felt or actually jurisprudential ones. Law then becomes the public site of (re-)negotiating (felt) injustices and inequalities.

Olson, following German legal philosopher Rudolf von Jhering’s ideas as laid out in his 1872 *Der Kampf ums Recht*,¹⁵ frames these divides between spoken, codified or in general established legal norms and (lay) people’s reaction to them as *Rechtsgeföhle*.¹⁶ While the former, jurisprudentially established law, requires a degree of actual knowledge about law’s processes and its scientific embeddedness, emotional responses to law do not. Affects, such as *Rechtsgeföhle*, operate within a realm of personal convictions, beliefs, and secluded spaces – bodily feelings do not necessitate legitimacy from outer authorities because they seem to inhabit an authoritative force of their own. Whenever a person then becomes dissatisfied with their legal culture, affective responses find their way into public discourse through, as shown by Olson, rap songs, graffiti, or plots and characters in television series, among others.

Conceiving of law in that sense, are not all of us simultaneously affected, or at least affectable, by law? For the person Mangold responded to with her tweet, user @Joeli60589127, the case seems rather clear. The *Bundestag*’s pandemic measures do not only appear unconstitutional to them, they are also considered to be morally wrong. This triple pack of legitimacy, law, and morality reoccurs in different legal settings and continues to serve as a knockout argument for those channeling their *Rechtsgeföhle*: Even if something *is* not legally permissible (or not prohibited), it *ought* to be, and thus, it is only right and just to protest against or simply not enforce it. In these instances, in which *Rechtsgeföhle* take on a marred Radbruch-formula understanding of morality,

12. Joeli (@Joeli60589127), ‘Das man gesunde Ungeimpfte [. . .] Test, Hygiene,’ *Twitter*, 12 Jan. 2022, 10:15 a.m., <https://twitter.com/Joeli60589127/status/1481192983546454016> (accessed 17 January 2022).

13. *Ibid.*

14. A.K. Mangold (@feministconlaw), ‘Oh, das gefühlte Recht – wie ich es liebe!’, *Twitter*, 12 Jan. 2022, 11:58 a.m., <https://twitter.com/feministconlaw/status/1481219139398258691> (accessed 13 January 2022).

15. R. von Jhering, *Der Kampf ums Recht* (Freiburg: Haufe, 1992 [1872]).

16. Olson, *From Law and Literature*, p.22.

laws – and, in extension, those making them – are depicted and perceived as faulty, fallible institutions which fail to include those voices they should represent. Doubting these instances' reliability and justness, our *Rechtsgeföhle* then go on to legitimate resistance against legal norms.

While minority groups, especially queer and trans folx, are used to law assigning them a back seat, the increasing vocalization of other societal groups' felt violation of their rights is a relatively new phenomenon, at least in its vehemence. The 2016 U.S. presidential election certainly enabled right-wing and extremist opinions to enter mainstream popular discourse through their governmental normalization by the Trump administration,¹⁷ which the Covid-19 pandemic further fueled. The attack on the U.S. Capitol in January 2021 and the August 2020 (almost) entering of the German governmental building, the *Reichstag*, by those denying the existence of the coronavirus and those against the government's measures against the spread of the virus, are only two examples of people's affective responses to law in the author's areas of research.¹⁸ These instances illustrate how people's imagined sense of their constitutional rights, their constitutional imaginaries, feed on what they believe to be true about their legal environments. Popular legality, as Olson succinctly analyzes, medially constitutes these imaginaries about legal processes, thereby establishing a false legal consciousness – the conviction that certain legal norms are right or wrong based only on one's affective knowledge. What feels wrong is thus taken as face value for actual legal mishandlings.

The shift from popular legal opinions about criminal law, such as indicated by the CSI-effect, to constitutional imaginaries is a remarkable and potentially dangerous one. Picking up legal scholar Robert Cover's concept of *nomos*, i.e., a "normative universe,"¹⁹ Olson refers to "a variety of competing *nomoi* . . . within a given legal system,"²⁰ which "are in a constant state of evolution, collapse, and contestation, since members of a given legal order have radically different experiences of that order, depending on how legitimately or illegitimately it responds to or ignores their concerns."²¹ Olson's concept of *nomoi* offers an argument for legal pluralism and a strengthening of democratic structures by inviting challenges to dominant legal norms by those in the minority. To Olson, legality develops out of *nomos*, but these terms are not synonymous: As the affective

17. See C. Pérez-Curiel, R. Rivas-de-Roca, and M. García-Gordillo, 'Impact of Trump's Digital Rhetoric on the US Elections: A View from Worldwide Far-Right Populism,' *Social Sciences X* 5 152 (2021), pp. 1–17. <https://doi.org/10.3390/socsci10050152>; R.C. Rowland, *The Rhetoric of Donald Trump: Nationalist Populism and American Democracy* (Lawrence: University Press of Kansas, 2021).

18. For more on this, see also G. Olson, 'Why *Rechtsgeföhle*? Why Do People Have Impassioned Feelings about Justice and the Law? The Turn to Affect in Legal Studies,' in *Rechtsgeföhle. Die Relevanz des Affektiven für die Rechtsentwicklung in pluralen Rechtskulturen*, eds. Thorsten Keiser, Greta Olson, Franz Reimer, (Giessen: forthcoming).

19. R. M. Cover, 'The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative,' *Harvard Law Review* XCVII 1 (1983), pp. 4–68, p.4.

20. Olson, *From Law and Literature*, p.8.

21. *Ibid.*

response to the normative universe one inhabits (*nomos*), legality may be articulated through artistic, medial, visual or other means. Legality may work to critique or agree with aspects of *nomos* depending on one's (or one's group's) respective *Rechtsgefühl(e)*. Legality, which may be expressed through media, arts, etc. may then again elicit one's *Rechtsgeföhle*. For instance, one feels angry when seeing the "Rapefugees Welcome" logo because it is unjust towards those having to flee their home countries; or, one feels left out or behind by mainstream politicians' decisions, and thus feels sympathetic towards those who created the "Rapefugee Welcome" logo. Legality shapes the *nomos* one inhabits by altering or re-arranging the norms, narratives, and cultural imaginaries one is surrounded by.

However, it is questionable whether those attacking governmental buildings, those protesting measures against the spread of a lethal virus, and those proposing bills to restrict the bodily autonomy of trans individuals as analyzed below indeed have "radically different experiences of that order" or whether they rather deny the legitimacy of the dominant narratives on which a shared, generally agreed upon *nomos* is built. As Cover understands it,

legal tradition is hence part and parcel of a complex normative world. The tradition includes not only a corpus juris, but also a language and a mythos – narratives in which the corpus juris is located by those whose wills act upon it. These myths establish the paradigms for behavior. They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic.²²

What Cover and Olson seem to take as a given, an implicit agreement on the constraints of the dominant normative universe – whether one takes this as starting point to challenge it or to agree with it – continues to be more contested. Legal tradition, once considered a foundation for our legal *nomos*, seems to be supplemented by affective legitimacy and constitutional imaginaries, i.e., the authority which is ascribed to individual feelings of justice, *Rechtsgeföhle*, and an imagined sense of the Constitution (or the *Grundgesetz*, that is). Competing *nomoi* then become excluding *nomoi*, depriving others' normative and material universes of their legitimacy and force because they fail to adhere to a certain culturally essentialist self-understanding of one's legal system and of those to whom it applies or should apply. This element of unambiguity is even more prevalent in queer and trans rights discourses, particularly with regard to doubting LGBTQIAP* materialities and legal subjectivities, and state-centered attempts of silencing them. The following section's wide reading of recent anti- LGBTQIAP* bills illustrates how queer- and trans-hostile affects enter legal discourse and ultimately become law.

The Violence of Cis-ing Legal Subjects

Law hits queer and trans people differently than cis, heterosexual folk. This is especially true for those living in more conservative states. In the U.S., despite important federal legal land gains, LGBTQIAP* communities suffer from ever fiercer and coordinated

22. Cover, 'Nomos,' p.9.

state level forms of discrimination. While the highest court in the U.S., the Supreme Court, has declared same-sex marriage a fundamental right in 2015 (*Obergefell v. Hodges*), and in 2020, the Court's *Bostock v. Clayton County* made gender identity and sexual orientation protected categories in employment, states have found ways to challenge the pro-trans and pro-queer direction of these decisions. 2021 even became a "record-breaking year" of anti-trans legislation,²³ in which "thirty-three states have introduced more than 100 bills that aim to curb the rights of transgender people across the country."²⁴ Amongst others, these anti-trans state bills aim at preventing "transgender youth from being able to access best-practice, age-appropriate, gender-affirming medical care" (at least 35 bills),²⁵ "[a]t least 69 bills . . . would prohibit transgender youth (and in some cases college students) from participating in sports consistent with their gender identity,"²⁶ and "[a]t least 43 bills . . . would allow people to assert a religious belief as justification for failing to abide by the law or provide services to people whom they disapprove."²⁷ These examples show how trans people, particularly youth, are being targeted in various areas of everyday life and that these attacks happen throughout the U.S. at the same time.

These developments are already indicative of a larger shift towards affective justice and constitutional imaginaries. Following the 2020 U.S. presidential elections, conservative and right-wing politicians, amplified by former president Donald Trump, narrativized the electoral defeat using the myth of 'the stolen election.'²⁸ In their understanding,

23. P. Krishnakumar, "This Record-breaking Year for Anti-Transgender Legislation Would Affect Minors the Most," *CNN*, 15 April. 2021, <https://edition.cnn.com/2021/04/15/politics/anti-transgender-legislation-2021/index.html> (accessed 13 January 2022).

24. *Ibid.* These numbers only refer to bills introduced up until April 2021, making the actual numbers significantly higher, see ACLU (American Civil Liberties Union), 'Legislation Affecting LGBT Rights Across the Country,' ACLU, <https://www.aclu.org/legislation-affecting-lgbt-rights-across-country>, 2021 (accessed 7 November 2021). According to the Human Rights Campaign's Wyatt Ronan, numbers are also higher for LGBTQIAP* bills with "(m)ore than 250 anti-LGBTQ bills hav[ing] been introduced in state legislatures in 2021" (Ronan, 'Officially,' n. pag.).

25. W. Ronan, '2021 Officially Becomes Worst Year in Recent History for LGBTQ State Legislative Attacks as Unprecedented Number of States Enact Record-Shattering Number of Anti-LGBTQ Measures Into Law,' *Hrc.org*, Human Rights Campaign, 7 May 2021, <https://www.hrc.org/press-releases/2021-officially-becomes-worst-year-in-recent-history-for-lgbtq-state-legislative-attacks-as-unprecedented-number-of-states-enact-record-shattering-number-of-anti-lgbtq-measures-into-law> (accessed 24 January 2022).

26. *Ibid.*

27. *Ibid.*

28. The political instrumentalization of alleged voter fraud in its current form only emerged in the 2010s. Yet, the 2000 presidential election "gave rise to a whole new generation of voting rights activists who did not trust the authorities in many states to implement reform free of partisan taint, did not trust the competence or the motives of private voting machine companies vying to replace the old punch-card and lever machines with updated computer technology, and did not trust what little oversight the federal and state governments exercised over the introduction of new machinery" (A. Gumbel, 'Election Fraud and the Myths of American Democracy,' *Social Research* LXXV 4 (2008), pp.1109-134, p.1112).

the Republican Party had not lost the election to Democratic runners Joe Biden and Kamala Harris but had been tricked out of the necessary votes through, for instance, rigged voting machines. These events further ignited an already highly emotionalized debate about political, legal, societal and cultural hegemonies.

Pushing back on progressive federal developments, in 2020 and 2021, Idaho and Arkansas were among the states that successfully introduced such anti-trans bills, which by now have become state law. In March 2020, Idaho signed into law HB 500, the ‘Fairness in Women’s Sports Act.’ HB 500 requires students may only join athletic teams that correspond to the biological sex on their birth certificate at the time of birth. This bill was the first one of a series of anti-trans bills that got signed into law and serves as a blueprint for other states: Comparing HB 500 with Mississippi’s SB 2536, Arkansas’ SB 354, West Virginia’s HB 2917, and Florida’s SB 1028, all of these bills quote the exact sources Idaho does for legitimating sport bans for trans, gender non-conforming, and non-binary youth. Their reasoning rests on research which identifies, among others, “inherent differences between men and women,”²⁹ “categorically different strength, speed, and endurance”³⁰ between men and women, and a necessity for biological sex-based classifications “to promote sex equality,”³¹ which offers cis girls and young cis women “opportunities to obtain recognition and accolades, college scholarships, and the numerous other long-term benefits that flow from success in athletic endeavors.”^{32,33}

The similarity or, rather, identicalness of these bills shows, in addition to a lack of originality among those drafting them, how coordinated these anti-trans efforts are and

29. House Bill 500, ‘Fairness in Women’s Sports Act,’ Legislature of the State of Idaho, 65th Legislature, 2nd Regular Session 2020, <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/H0500.pdf>, n.d. (accessed 31 January 2022), 33-6202.

30. *Ibid.*, 33-6202, 5.

31. *Ibid.*, 33-6202, 12.

32. *Ibid.*, 33-6202, 12.

33. For Mississippi’s SB 2536, the respective passages can be found here: Sec. 2 (b); sec. 2 (e); sec. 2 (l); *ibid.*, see Senate Bill 2536, ‘Mississippi Fairness Act,’ Mississippi Legislature, 2021 Regular Session, <http://billstatus.ls.state.ms.us/documents/2021/html/SB/2500-2599/SB2536IN.htm>, 11 March 2021 (accessed 21 February 2022). For Arkansas’ SB 354, the respective passages can be found here: Sec. 1 (a) (1); sec. 1 (a) (5); sec. 1 (a) (12); sec. 1 (a) (12), see Senate Bill 354, ‘To Create the Fairness in Women’s Sports Act,’ State of Arkansas, 93rd General Assembly, Regular Session 2021, <https://www.arkleg.state.ar.us/Bills/FTPDocument?path=%2FBills%2F2021R%2FPublic%2FSB354.pdf>, 9 March 2021 (accessed 10 January 2022). For West Virginia’s HB 2917, the respective passages can be found here: §18-9A-27 sec. a no. 2; §18-9A-27 sec. a no. 6; §18-9A-27 sec. a no. 13; §18-9A-27 sec. a no. 13, see House Bill 2917, ‘Save Women’s Sports Act,’ West Virginia Legislature, 2021 Regular Session, http://www.wvlegislature.gov/Bill_Status/bills_text.cfm?billdoc=HB2917%20INTR.htm&yr=2021&sesstype=RS&i=2917, 4 March 2021 (accessed 21 February 2022). For Florida’s SB 1028, only the passage about cis girls’ and women’s “opportunities to obtain recognition and accolades, college scholarships, and the numerous other long-term benefits that flow from success in athletic endeavors” (1006.205(2) (a)) has been kept, see Senate Bill 1028 [House Bill 1475], ‘Fairness in Women’s Sports Act,’ The Florida Senate, 2021 Legislature, <https://www.flsenate.gov/Session/Bill/2021/1028/BillText/er/PDF>, n.d. (accessed 31 January 2022).

that depending on the political climate in the respective state, what works in one state is very likely to work in another, too. These ‘Fairness’ acts are framed as reforms to the education system, which makes them even more insidious, because they are presented as necessary and helpful improvements for youth. For instance, Florida’s ‘Fairness’ bill has been incorporated into an education act³⁴ which, among others, regulates online teaching, education plans, and scholarships.

As another example, in March 2021, Arkansas enacted House bill 1570, which implemented the ‘Save Adolescents from Experimentation (SAFE) Act.’³⁵ The ‘SAFE’ Act assumes that the state’s task of “protecting the health and safety of its citizens, especially vulnerable children”³⁶ needs to involve prohibiting gender-affirming procedures for youth under the age of 18.³⁷ This act considers the majority of children as in need of legal protections against “hormonal or surgical invention”³⁸ while framing those who are “struggling with distress at identifying with their biological sex [as] often hav[ing] already experienced psychopathology, which indicates these individuals should be encouraged to seek mental health services to address comorbidities and underlying causes of their distress.”³⁹ This ableist, binary understanding frames children as either ‘healthy’, ‘functional’ and ‘normal’ and thus worthy of protection, or considers those non-conforming with biologicistic and gender regimes as in need of psychological treatment and possibly physically sick. Those deviating from the norm, considered ‘innocent’ due to their age, are framed as in need of containment from their gender non-conforming desires and potentially also from ‘woke’ ideologies through the medical-industrial complex. While Idaho’s ‘Fairness in Women’s Sports Act’ negotiates cultural anxieties about transness under the guise of voicing concerns for the equal opportunities of (cis) women in sports, Arkansas’ ‘SAFE’ establishes a dangerous precedent in targeting trans people via concerns for ‘innocent’ children. In these instances, law substantially affects trans bodies and voices who have historically been accustomed to being violated and muted. The way of framing these acts as beneficial to youth, under the cloak of enabling possibilities for young people, is strategic.

Arkansas’ ‘SAFE’ is particularly relevant for understanding legislative anti-LGBT-QIAP* endeavors because it is the first act which criminalizes doctors’ and health care providers’ support of trans children, prohibiting the prescription of hormones and puberty-blockers. Being the first one of its kind in the U.S., Arkansas’ act foreshadowed how the legal treatment of trans people continues to evolve around targeting allies, too. In a similar vein, current anti-trans bills under discussion include a bill in Texas (SB 1646) which labels gender-affirming treatment as child abuse.⁴⁰ This is a not too

34. Senate Bill 1028 [House Bill 1475].

35. House Bill 1570 [Act 626], ‘To Create the Arkansas Save Adolescents from Experimentation (SAFE) Act,’ State of Arkansas, 93rd General Assembly, Regular Session 2021, <https://www.arkleg.state.ar.us/Bills/FTPDocument?path=%2FBills%2F2021R%2FPublic%2FHB1570.pdf>, 8 March 2021 (accessed 13 May 2022).

36. *Ibid.*, sec. 2 (1).

37. *Ibid.*, 20-9-1502.

38. *Ibid.*, sec. 2 (4).

39. *Ibid.*, sec. 2 (4).

40. According to Texas SB 1646, sec. 1, “‘Abuse’: (A) includes the following acts or omissions by a person: . . . (xiv) administering or supplying, or consenting to or assisting in the

surprising development given that Texas is at the forefront of states targeting queer and trans individuals zealously. Texas Governor Greg Abbott, one of the most outspoken anti- LGBTQIAP* politicians, has issued an order in February 2022 which “imposes a duty on DFPS [Department of Family and Protective Services] to investigate the parents of a child who is subjected to (. . .) abusive gender-transitioning procedures, and other state agencies to investigate licensed facilities where such procedures may occur.”⁴¹ Quoting Texas Commissioner Jaime Masters, Abbott also compared gender reassignment surgeries to genital mutilation on his *Twitter* account.⁴² Abbott’s interventions illustrate how anti- LGBTQIAP* bills evolve around highly affective tropes of the imperiled child, which are supplemented by quoting concerns for (cis) women’s and young girls’ equal opportunities. Florida Governor Ron DeSantis, an equally fierce LGBTQIAP* rights opponent, continuously emphasizes that ‘Fairness’ sports bills are important to stop “robbing women and girls of achievements, awards, and scholarships.”⁴³ To DeSantis, bills which allow trans athletes to compete in the teams consistent with their gender identity are “destroying opportunities for women, . . . perpetuating a fraud,” “elevating ideology over biology” and “trying to make others complicit in a lie.”⁴⁴ Therefore, ‘Fairness’ bills are most of all needed to protect (cis) women’s rights and opportunities.⁴⁵

administration or supply of, a puberty suppression prescription drug or cross-sex hormone to a child, other than an intersex child, for the purpose of gender transitioning or gender reassignment; or (xv) performing or consenting to the performance of surgery or another medical procedure on a child, other than an intersex child, for the purpose of gender transitioning or gender reassignment” (Perry, Bettencourt, Birdwell, Buckingham, Campbell, Creighton, Hall, Hancock, Hughes, Paxton, Schwertner, Springer, Taylor, and Kolkhorst, Senate Bill 1646, ‘Relating to the Definition of Abuse of a Child,’ Texas Legislature Session 87 (R), <https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB01646E.pdf#navpanes=0>, 3 May 2021 [accessed 24 February 2022]).

41. G. Abbott, ‘The Honorable Jaime Masters,’ 22 February 2022, State of Texas, <https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf> (accessed 15 May 2022).
42. G. Abbott (@GregAbbott_TX), “Genital mutilation of a child through reassignment surgery is child abuse. . .” – Commissioner Jaime Masters, @TexasDFPS The determination and subsequent enforcement of Commissioner Masters’ conclusions are effective immediately. *bit.ly/DFPSLetter*, *Twitter*, 11 Aug. 2022, 10:28 p.m., https://twitter.com/gregabbott_tx/status/1425554618482892807 (accessed 13 May 2022).
43. R. DeSantis (@GovRonDeSantis), ‘By allowing men to compete in women’s sports, the NCAA is destroying opportunities for women, making a mockery of its championships, and perpetuating a fraud. In Florida, we reject these lies and recognize Sarasota’s Emma Weyant as the best women’s swimmer in the 500y freestyle,’ *Twitter*, 22 March 2022, 06:03 p.m., <https://twitter.com/GovRonDeSantis/status/1506315576674865153> (accessed 15 May 2022).
44. *Ibid.*
45. This logic finds proof in enacted ‘Fairness’ bills such as Idaho’s HB500, which states that “having sex-specific teams furthers efforts to promote sex equality . . . [and] provid[es] opportunities for female athletes to demonstrate their skill, strength, and athletic abilities while also providing them with opportunities to obtain recognition and accolades, college scholarships, and the numerous other long-term benefits that flow from success in athletic endeavors” (33-6202, 12).

Such bills demonstrate how law-makers not only change existing protections for trans and non-binary people, but how they also target the way one speaks about trans, non-binary, and queer issues and how the public conceives of them. Labeling these bills as ‘saving’ and establishing ‘fairness’ while simultaneously targeting gender-affirming procedures and even framing them as child abuse shifts both legal, cultural and social discourses about gender identity and sexual orientation.

These anti-LGBTQIAP* acts are both framed as necessary legal adjustment that ultimately protect those most vulnerable in society – cis children and cis women. Labeling these acts as ‘saving’ and establishing ‘fairness,’ the states’ choice of words already reveals the assumed helplessness of those whom these measures should benefit. On the other hand, trans children and trans women are inevitably framed as the ‘innocents’ and ‘vulnerables’ Other, those aiming to invade the carefully parceled space of protect-worthy groups. Trans bodies are thus depicted as gender-bending, non-conforming deviants who need to be policed, because they are prone to harm those who are too young or too defenseless to stand up for themselves.

Creating such a binarized logic of those too weak to protect themselves – cis youth and cis women – and those too threatening to be left unregulated – trans youth and trans women – law poses as a masculinistic, cised, and binarized instrument of power. Law, in its function as a (re-)distributor of power and establishing force of social order, yields a degree of violence often associated with and compared to forms of patriarchal control and male dominance over female bodies.⁴⁶ Law’s masculinization, however, does not only rest on gendered stereotypes of it being a rational and forceful discipline, but it also results from the increasing legal protective paternalism to which youth, women, trans and gender-nonconforming people are subjected. Framing legal attempts to regulate these groups’ bodily autonomy as protecting children from harm as in Arkansas’ ‘SAFE’ Act, as preserving the interests of the unborn as in recent endeavors to pushback on abortion rights,⁴⁷ or as standing in for cis women’s equal opportunities in prohibiting trans

46. See also G. Olson, ‘Law Is Not Turgid and Literature Not Fleishy: Gendering and Heteronormativity in Law and Literature Scholarship,’ Special Issue on “Law and Humanities Futures,” ed. Marett Leiboff, *Australian Feminist Law Journal* XXXVI (2012), pp.65-86.

47. In 2021, the Supreme Court case *FDA v. American College of Obstetricians and Gynecologists* helped paving the way for a growing attack on women rights, which the ‘Texas Heartbeat Act’ (HB1515/SB8) followed up upon, see Slawson, House Bill 1515, Senate Bill 8, ‘Texas Heartbeat Act,’ Texas State Legislature, 87th Legislature, <https://capitol.texas.gov/tlodocs/87R/billtext/html/HB01515I.htm>, 19 May 2021 (accessed 8 March 2022); see *FDA v. American College of Obstetricians and Gynecologists*, 592 U.S. ____ (2021), Supreme Court of the United States, https://www.supremecourt.gov/opinions/20pdf/20a34_3f14.pdf, 12 January 2021 (accessed 8 March 2022). In this case, the Court decided that the access to abortion medication may be restricted; Texas’ ‘Heartbeat Act’ criminalized abortions after six weeks of pregnancy. Further, during the time of writing this article, the Supreme Court has overturned *Roe v. Wade* in its *Dobbs v. Jackson Women’s Health Organization* opinion, see *Dobbs v. Jackson Women’s Health Organization*, docket no. 19-1392, Supreme Court of the United States, <https://www.supremecourt.gov/docket/docketfiles/html/public/19-1392.html>, n.d. (accessed 10 May 2022); *Roe v. Wade*, 410 U.S. 113 (1973), *Legal Information Institute*, Cornell University Law School, supreme.justia.com/cases/federal/us/410/113/#tab-opinion-1950136.

folx to compete in athletic teams, law dictates and demarcates the requirements of its subjects.⁴⁸ That is, law constitutes its subjects by erasing those outside, beyond, or in opposition to the cis gendered, heterosexual, binary norm. State bills speak to this organized mobilization of cementing cis and binary gender categories into law, and erasing non-binary, trans, and non-conforming gender identities from it.

The violence of cis-ing legal subjects, that is forcefully requiring trans and non-binary subjects to cohere around the static cis, binary categories of gender which law offers, can be read as analogous to hate crimes committed against trans and non-binary bodies. The murdering of people because of their gender identities and performances which do not conform to binary, normative expectations, oftentimes not prominently medially covered, then symbolizes “how these acts are not simply about killing the individual but about ending trans/queer possibility.”⁴⁹ Likewise, legal death attempts to erase trans and non-binary legal subjectivity by taking away these individual’s sexual-legal personhood.

In extension, law continues to take on, cement and reproduce cis logics by fostering the cultural narrative of cis women and cis children as in need of being helped and unable to do so themselves. We again encounter how dominant sociocultural tropes, the imperiled child and the woman in distress, find their reproduction and perpetuation in law.⁵⁰ At the same time, trans children and trans women are inevitably framed as the Other of ‘helpless’ cis girls and women, who are imagined as in need of being rescued from trans and gender-non-conforming golf or tennis players, swimmers or runners. Trans and non-binary bodies are depicted as unreliable and not legally agentic. They are not to be trusted and potentially dangerous – both in terms of sexually assaulting cis women in the locker room and of robbing them of their future careers.

Similar to the observation that popular cultural representations of law may incline us to think about onscreen depictions as reality, we see comparable dynamics in terms of how gender categories are portrayed in law. In current discourses about law and gender identity, we witness how naturalistic and biologicistic assumptions find their way into legal protections or lack thereof.

In the context of these sports bills, that means that cis men are assumed to be essentially stronger than cis women and that there are inherent differences between the two complementary biological sexes, thus building on supposedly unquestioned biologicistic assumptions. Everything beyond or in opposition to that binary gets erased by the ‘Fairness’ bills. The violence of these laws is particularly salient in Idaho’s HB500 because it mandates proof in case the child’s sex is ‘disputed.’ In such a case, a physician

48. See also Gaakeer, “‘Sua Cuique Persona,’” p.295: “The crucial point with respect to assigning legal personhood is that the human being is not a person before the law because he is a human being, but because the law calls him or her ‘person’” (J. Gaakeer, “‘Sua Cuique Persona’ A Note on the Fiction of Legal Personhood and a Reflection on Interdisciplinary Consequences,” *Law and Literature* XXVIII 3 (2016), pp.287-317); see also Dewey, p.655: “for the purposes of law the conception of ‘person’ is a legal conception; put roughly, ‘person’ signifies what law makes it signify” (J. Dewey, ‘The Historic Background of Corporate Legal Personality,’ *The Yale Law Journal*, XXXV 6 (April 1926), pp.655-73).

49. E. Stanley, *Atmospheres of Violence. Structuring Antagonism and the Trans/Queer Ungovernable* (Durham/London: Duke University Press, 2021), p.17.

50. For a thorough analysis of the trope of the ‘imperiled child’ in anti-trans and anti-non-binary legislation, see also Olson and Borchert, ‘Narrative Authority.’

may examine the child and provide proof of their biological sex by looking at reproductive anatomy, genetic set-up or levels of testosterone.

These legal negotiations of gender may then be taken as universal truth of how gender identities and law work: The ongoing pairing of nature, biology, law and gender/sexuality works to validate claims to exclude certain social groups such as trans and non-binary people. While nature and biology lend legitimacy to those exclusionary arguments, the cultural implications of those fields remain invisible. This gender legality then assumes that biologicistic arguments represent an unquestionable reality to which law needs to adjust. It does not take into account how biological categories themselves have been subject to cultural processes and are shaped by historically and geographically contingent practices of meaning-making.⁵¹ This lack of a legal-cultural education, of equating law with biology and biology with truth and reliability, results in cementing essentialist assumptions about a binary gender identity in law. Criminal law's CSI-effect, misguided notions of legal processes based on consuming simplified depictions of law onscreen, re-emerges as law's implicit cis normativity: Misinformed conceptions of gender identities, i.e., the legal praxis of assuming binary gender constructions, via legal texts and meaning-making appears to us as indicative of gender realities and contributes to the re-affirmation of cis gender as natural norm – both biologically and legally. What we see here is how law-makers strategically and violently attempt to purge trans and non-binary possibility from the law by making recourse to an assumed and affectively felt universal, in this context biological, truth.

Transing Law, Once More with Affect

The violence of anti-queer and anti-trans legal hermeneutics, found in the ways and arguments with which states introduce and propose anti-LGBTQIAP* laws, resembles what we witness with regard to protests against Covid-19 protections. In both discourses, the affectively felt injustice of having something imposed upon one, be it protective measures against contracting a possibly deadly virus or humanitarian values such as acceptance of non-cis gender identities, feeds on a marred relationship to the law – and on a marred understanding of its processes and logic. In these instances, law, morality, and justice are equated with essentialist claims to truth and universality. In case of those protesting against what they perceive as unjust restrictions with regard to Covid-19, these claims come in the shape of a cultural essentialism which understands law, especially constitutional law, as reflective of fundamental, static values of a group of people which, if running the risk of being challenged, necessitate violent defending.

The increasingly fierce invocation of the US American Constitution and the German *Grundgesetz* as well as of one's rights in general in cultural, social and political

51. For an assessment of how biological sex, similarly to gender, is a sociocultural construct, see T. Laqueur, *Making Sex: Body and Gender from the Greeks to Freud* (Cambridge, MA, 1990), and A. Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (New York: Basic Books, 2000).

discourses suggest that drawing on such ontological allies serves to lend *über*-temporal and universal legitimacy to one's claims. This tendency to appeal to a seemingly universal source of legitimacy and authority is also observable in current anti-trans and anti-LGBTQIAP* rights discourses. Referring to biology in the context of the legal treatment of trans, non-binary and gender non-conforming people attempts to make bodies and identities violently and unambiguously readable and, by extension, controllable. Requiring the law to use levels of hormones, genetic make-up and genital set-up as ultimate and necessary proof of one's identity tries to naturalize law's and biology's not so natural relationship while ignoring the sociocultural embeddedness of each of these realms. Further, it strengthens affective reactions to law. Legality then means taking one's affective relationship to law as identical to universal justice and thus imagining constitutional law and individual rights need to adjust to one's legality, one's own *nomos*.

Additionally, the debates about legal protections for trans persons and against the coronavirus both illustrate how legal discourses increasingly materialize in questions about one's body. While feminist scholarship and activism have a long history of fighting for bodily autonomy and material justice, it appears that there is a new quality to legal-cultural discourses about the body. This pluralization of sites in which the body becomes contested and the center of attention manifests particularly in queer rights discourses and contributes to a pluralization of *Rechtsgefühle* and conceptualizations of legality.

The body appears in these contexts as locus of rights and site of politicization: While those against state-mandated coronavirus protections call upon one's right of self-determination, those in favor of restrictions of trans possibility in law deem trans bodies as (too) unreliable and potentially (too) threatening to even become applicable to hold such rights. Law, in these instances, is understood as cis-ed, heteronormative, and masculinistic in that it resists paternalism but simultaneously patronizes those not conforming to its normative orders. In this understanding of law, a body needs to be 'able' (in the sense of being able-bodied), consistently readable with regard to gender norms, unambiguous, and adult. How one inhabits one's body then determines how one (is able to) navigate one's legal system.

Coming back to Cover's concept of *nomos* and Olson's *nomoi*, it is questionable whether a legal pluralism in Olson's sense is desirable in times when the underlying narratives of the legal system pluralize and give voice to what Olson calls legality, i.e., invocations of "the totality of what people perceive to be binding norms."⁵² It is true that at this tipping point, to pluralize legal norms holds the opportunity for a simultaneous transing, de-binarizing, and genderqueering of the law. Such an approach would challenge legal norms which specifically target or invisibilize trans, non-binary, and queer legal subjects and their experiences. This vision would finally acknowledge and include non-cis individuals by de-naturalizing those gender categories in law which uphold cis-heterosexual hegemonies. However, allowing for legality and affect to become meaningful fields of inquiry in academic discourse would also mean to strengthen their position with regard to law. This development would potentially hit those hardest who are already prone to be victims of affective reactions towards trespassing gender norms.

52. Olson, *From Law and Literature*, p.6.

Continuing to acknowledge others' legalities thus needs to evolve around established and agreed upon underlying narratives of the legal. These underlying narratives, which historically exclude trans, queer, and sexual/gender Other(ed) bodies, yet need to be re-negotiated first. This process of figuring out a new *nomos* seems inevitable before inviting diverse *nomoi* to float freely. To close with Rudolf von Jhering, negotiating such a new *nomos* will certainly be a struggle for those voices that are still being muted by law. However, "[i]t is the energy of our moral nature protesting against the violation of the law; it is the most beautiful and the highest testimony which the feeling of legal right can bear to itself."⁵³ In this sense, the affective power of suffering injustice, even if not inflicted but only condoned by the law may ultimately be the same force which initiates and fosters its transformation and evolution.

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53. R. von Jhering, *Der Kampf ums Recht. Druckfassung des Vortrags* (Wien 1872), lecture from 11 March 1872, available at https://www.hs-augsburg.de/~harsch/germanica/Chronologie/19Jh/Jhering/jhe_kamd.html (accessed 21 February 2022), pp.79 ff.

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