

Michigan Journal of Race and Law

Volume 6

2001

Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination

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Recommended Citation

Darren L. Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285 (2001).

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IDENTITY CRISIS: “INTERSECTIONALITY,” “MULTIDIMENSIONALITY,” AND THE DEVELOPMENT OF AN ADEQUATE THEORY OF SUBORDINATION

*Darren Lenard Hutchinson**

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INTRODUCTION

In 1998, the Human Rights Campaign (“HRC”), the nation’s largest gay and lesbian civil rights organization, caused a national controversy with its decision to endorse then-United States Senator Alfonse D’Amato, a Republican from New York state, in his re-election bid.¹ Many individuals voiced opposition to the endorsement, citing the generally more hostile attitudes toward gay, lesbian, bisexual, and transgender equality among Republicans and D’Amato’s own conservative politics, including his

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1. See Edward Walsh, *Gay Rights Group Stirs Flap With D’Amato Nod*, WASH. POST, Oct. 23, 1998, at A13.

opposition to abortion rights.² Responding to widespread criticism of its selection, HRC distributed an "Open Letter" to its "Members and Friends" that sought to explain and defend the organization's endorsement.³ The Open Letter states that HRC endorsed over two hundred candidates in 1998 congressional elections and that the majority of those endorsements supported Democratic candidates.⁴ The Open Letter, nevertheless, explains that "a growing number of Republicans are also represented among those we have named as preferred candidates."⁵ The Open Letter further states that HRC takes two primary factors into consideration in each endorsement decision: a preference for pro-gay and lesbian *incumbents* and a commitment to supporting only one candidate in each race, despite a rival's positive record on gay and lesbian equality.⁶

The Open Letter then describes HRC's perception of D'Amato's support for gay, lesbian, bisexual, and transgender people⁷ and argues that

2. See *id.*; see also James Dao, *Democrats Try to Talk Gay Group Out of Backing D'Amato*, N.Y. TIMES, Oct. 11, 1998, at 37.

3. See Open Letter "Regarding the New York Senate Race" from Elizabeth Birch, Executive Director, Human Rights Campaign, to Members and Friends of the Human Rights Campaign (Oct. 20, 1998) (on file with the Michigan Journal of Race & Law).

4. *Id.* at 1.

5. *Id.*

6. *Id.* The Open Letter states:

The process by which our endorsements are made is rigorous, but two aspects in particular, incumbent preference and single-candidate endorsements, are worth special note.

First, where an incumbent in office has worked consistently on behalf of gay and lesbian Americans, even if a rival's record is also excellent, we reward the incumbent for supporting the cause of gay and lesbian equality while in that office.

Second, because a dual endorsement does not direct voters toward a single candidate, we select one candidate in each race even when the record and official position of more than one candidate is exemplary.

Id.

7. According to the Open Letter,

[S]enator D'Amato has *improved* his record significantly. He has helped secure critical increases in HIV and AIDS funding, has cosponsored the Hate Crimes Prevention Act and has both cosponsored and worked on behalf of the Employment Non-Discrimination Act (ENDA). He has been with us on other critical votes as well. In short, his record is among one of the best in the United States Senate at this time.

Five years ago, while other Republicans (and Democrats) stood silent on the issue of gays and lesbians serving openly in the U.S. military, Senator D'Amato broke with his party's leadership to vigorously support such service. This year, as the nomination of Jim Hormel languished under

"fairness" compels the organization's support of D'Amato over his rival, and ultimate victor, Democratic candidate Charles Schumer.⁸ Specifically, the Open Letter states that while Schumer has an "excellent record" on gay and lesbian equality, the organization must consistently apply its endorsement principles that favor pro-gay incumbents and single-candidate endorsements.⁹ The Open Letter explains that

as an organization, HRC cannot seek fairness in civil society unless it is also willing to model fairness in its own behaviors. And this endorsement resulted from an application of the same rules that have been applied before, in less strident campaigns and less unsettled times, with an absolute devotion to fairness.¹⁰

HRC undoubtedly drafted the Open Letter as a public relations measure intended to quell the anger of progressive activists and of donors to and members of the organization who disagreed with its decision.¹¹ But the Open Letter represents much more than this, for it is also at the center of an ongoing conflict over the direction of identity politics: whether essentialist and single-issue commitments should continue to dominate social equality movements or whether these movements must begin to embrace a more multidimensional understanding of subordination and discrimination and engage in the difficult work needed to form political coalitions across social movements and across individual and group identities. HRC's Open Letter places the organization squarely within the essentialist status quo of gay, lesbian, bisexual, and transgender politics.

HRC's endorsement of D'Amato is essentialist (as well as racist, sexist, and classist) because it defines gay and lesbian politics in white, upper-class, and male terms. The organization endorsed D'Amato despite his utter lack of support among persons of color, feminists, and even the larger population of gays and lesbians (who are not, of course, completely separate communities).¹² These communities undoubtedly withheld their

Trent Lott's benign neglect, Senator D'Amato challenged his party's leadership by championing a fair hearing and approval process.

Id. at 2 (emphasis added).

8. *Id.* at 1-2.

9. *Id.* at 2.

10. *Id.* at 1-2.

11. At least one member of HRC's Board of Directors resigned in protest. See Walsh, *supra* note 1.

12. D'Amato's challenger, Charles Schumer received votes from 59% of female voters, 86% of black voters, and 82% of Latino voters. Kevin Flynn, *Schumer Showed Strength Across the State, Even in Some of D'Amato's Strongholds*, N.Y. TIMES, Nov. 5, 1998, at B15. A separate report indicates that 80% of gay and lesbian voters selected Schumer.

support from D'Amato due to his political positions disfavoring the poor, women, and persons of color; they also opposed the broader racism, sexism and homophobia within the Republican party. HRC, nevertheless, overlooked these critical issues and selected D'Amato over Schumer because D'Amato cast scattered votes for "gay" issues. Thus, HRC's position placed gay and lesbian equality in tension with racial, class, and gender justice. The organization concluded that D'Amato had a positive record on gay and lesbian equality, despite his negative attitudes on race, gender, and class equity and his unfavorable status among women, persons of color, and progressive gay, lesbian, bisexual, and transgender people. HRC's vision of gay and lesbian equality required gay men of color and lesbians of all races to silence central parts of their identities and political commitments in order to embrace a narrowly defined gay and lesbian "equality."¹³ White, upper-class male constituents of HRC did not have to make such complicated choices. Thus, while HRC attempted to defend its decision on "fairness" grounds, the organization's vision of fairness and equality stands upon racial, class, and gender privileges.¹⁴

The HRC endorsement controversy reflects broader, structural problems in antisubordination theory: the embrace of essentialist politics, the positioning of progressive movements as oppositional and conflicting forces, rather than as potential alliances and coalitions, and the failure to recognize the multidimensional and complex nature of subordination.¹⁵

Douglas Turner, *Schumer Puts Big Dent in State GOP Machine Built By D'Amato*, BUFFALO NEWS, Nov. 4, 1998, at 8A.

13. The late Audre Lorde observed, in an oft-quoted passage:

As a Black lesbian feminist comfortable with the many different ingredients of my identity, and a woman committed to racial and sexual freedom from oppression, I find I am constantly being encouraged to pluck out some one aspect of myself and present this as the meaningful whole, eclipsing or denying the other parts of self. But this is a destructive and fragmenting way to live.

AUDRE LORDE, *Age, Race, Class, and Sex: Women Redefining Difference*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 114, 120 (1984).

14. See Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 621-22 (1997) [hereinafter Hutchinson, *Out Yet Unseen*] ("Although [essentialist white gay male activists] contend that race, class, and gender detract—or are separate—from gay politics, the political vision they prescribe rests firmly upon racial, class, and gender privilege.").

15. For a survey of literature on the problem of essentialism in progressive theory, see BELL HOOKS, *AIN'T I A WOMAN? BLACK WOMEN AND FEMINISM* (1981); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory, and Anti-Racist Politics*, 47 BUFF. L. REV. 1 (1999) [hereinafter Hutchinson, *Ignoring the Sexualization of Race*];

While essentialism remains a prominent feature of progressive social movements, critical scholars have offered persuasive arguments against traditional, single-issue politics and have proposed reforms in a variety of doctrinal and policy contexts.¹⁶ The feminist of color critiques of feminism and antiracism provided the earliest framework for analyzing oppression in complex terms. Feminists of color and other critical scholars have examined racism and patriarchy as “intersecting” phenomena, rather than as separate and mutually exclusive systems of domination.¹⁷ Their work on the intersectionality of subordination has encouraged some judges and progressive scholars to discard the “separate spheres” analysis of race and gender.¹⁸ The powerful intersectionality model has also inspired many other avenues of critical engagement. Lesbian-feminist theorists, for example, have challenged the patriarchy and heterosexism of law and sexuality and feminist theorists, respectively,¹⁹ and, recently, a growing intellectual movement has emerged that responds to racism within gay and lesbian circles and heterosexism within antiracist activism.²⁰ These “post-intersectionality” scholars are collectively pushing

Hutchinson, *Out Yet Unseen*, *supra* note 14; Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183 (1991).

16. See sources cited *supra* note 15.

17. See, e.g., Crenshaw, *supra* note 15 (developing and employing “intersectionality” to analyze domestic violence policies); Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CAL. L. REV. 775 (1991) (discussing the intersection of race and gender in employment law).

18. See *Lam v. University of Hawai'i*, 40 F.3d 1551, 1562 (9th Cir. 1994) (“[W]here two bases for discrimination exist, they cannot be neatly reduced to distinct components. Rather than aiding the decisional process, the attempt to bisect a person’s identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences.”) (citations omitted).

19. For discussions on conflicts between lesbians and gay men within the context of “gay” politics see MARTIN DUBERMAN, *STONEWALL* 247–50 (1993); Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 VA. J. SOC. POL’Y & L. 43, 60 (1994) (citing Charlotte Bunch, *Not for Lesbians Only*, in BUILDING FEMINIST THEORY: ESSAYS FROM QUEST 67, 68 (1981)); Steven Seidman, *Identity and Politics in a “Postmodern” Gay Culture: Some Historical and Conceptual Notes*, in FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 105, 111–27 (Michael Warner ed., 1993). For discussions on the conflicts between lesbians and heterosexual women within the context of feminist theory see SHEILA JEFFREYS, *THE SPINSTER AND HER ENEMIES: FEMINISM AND SEXUALITY 1880–1930* (1985); *LESBIANISM AND THE WOMEN’S MOVEMENT* (Nancy Myron & Charlotte Bunch eds., 1975); DEL MARTIN & PHYLLIS LYON, *LESBIAN/WOMAN* 274–76 (1972); Mary Eaton, *At the Intersection of Gender and Sexual Orientation: Toward Lesbian Jurisprudence*, 3 S. CAL. REV. L. & WOMEN’S STUD. 183, 187–88 (1994).

20. See Hutchinson, *Out Yet Unseen*, *supra* note 14, at 563–64 n.12 (listing numerous works on race and sexual identity); see also Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 15, at 4 n.12 (same).

jurists and progressive theorists to examine forms of subordination as interrelated, rather than conflicting, phenomena.

This Article arises out of the intersectionality and post-intersectionality literature and makes a case against the essentialist considerations that informed HRC's endorsement of D'Amato. Part I discusses the pitfalls that occur when scholars and activists engage in essentialist politics and treat identities and forms of subordination as conflicting forces. Part II examines how essentialism negatively affects legal theory in the equality context. Part III considers the historical motivation for and the efficacy of the "intersectionality" response to the problem of essentialism. Part III also extensively analyzes the "multidimensional" critiques of essentialism offered by the most recent school of thought in this area—the race-sexuality critics of law and sexuality and critical race theory. Finally, Part III examines the conceptual and substantive distinctions between multidimensionality (and other post-intersectionality theories) and intersectionality and offers suggestions for future theorizing in anti-subordination jurisprudence.

I. CONFLICTING IDENTITIES AND MOVEMENTS

A. *The Politics of Essentialism*

Although activists and scholars have vigorously challenged the essentialist nature of contemporary identity politics and equality theory, progressive movements invariably remain singular in their focus. Internal critics within feminism, antiracism, gay and lesbian rights, and other progressive movements have endeavored to broaden the scope of these movements so that they can adequately address the complex sources of inequality that their constituent populations endure.²¹ The impact of the internal, anti-essentialist critiques has been limited, however, and these movements remain centered around the experiences of individuals with relative privilege.²² As the internal critiques reveal, essentialism in progressive movements does not result merely from a lack of "data" on the particularity of identity and the multiplicity of subordination, but from the embrace of racial, class, gender, and sexuality hierarchies by "dominant" classes within these movements.²³ For example, racial, class

21. See, e.g., Darren Lenard Hutchinson, *Beyond the Rhetoric of Dirty Laundry: Examining the Value of Internal Criticism within Progressive Social Movements and Oppressed Communities*, 5 MICH. J. RACE & L. 185 (1999) [hereinafter Hutchinson, *Beyond the Rhetoric*].

22. See *id.* at 188–91.

23. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 874 (1990) ("A theory that purports to isolate gender as a basis for oppression . . . reinforces other forms of oppression."); Trina Grillo & Stephanie Wildman, *Obscuring the Importance*

and gender privileges inform the absence of attention to "material" or "substantive" equality in most gay political agendas. These agendas demand, almost exclusively, formal equality.²⁴ While the achievement of formal equality will likely enhance the status of all gays and lesbians, persons who suffer from structural barriers to societal resources, such as poverty and institutionalized racism and sexism, will need deeper legal and policy reforms that address these conditions.²⁵ By ignoring the impact of racism, sexism, and poverty upon gay men and lesbians, gay and lesbian rights organizations reflect the racial, gender, and class privileges of the individuals who shape and direct their institutional endeavors.

When progressive theorists and activists resist implementing multi-dimensional agendas, they often create conflict among the various movements for social justice. As the controversy surrounding HRC's endorsement of Senator D'Amato illustrates, gay and lesbian essentialism leads to tension among anti-heterosexist, antiracist, and feminist scholars and activists. Acceptance of HRC's view of gay and lesbian equality, for example, required a silencing of progressive racial, gender and class politics.

The pursuit of same-sex marriage, a formal equality goal, has created similar conflicts within the gay rights community. As I have previously observed, lesbian-feminists have voiced their strong opposition to or skepticism of the pursuit of same-sex marriage because marriage has historically facilitated the domination of women by men.²⁶ Racial critics have also challenged the primacy given to marriage in gay and lesbian politics because the marriage movement lends credibility to a harmful discourse that stigmatizes the non-nuclear family arrangements in poor communities of color.²⁷ Furthermore, extensive sociological data have demonstrated that marriage supplies very little, if any, economic benefits

of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other -Isms), 1991 DUKE L.J. 397, 401 (arguing that feminist theory, when comparing racism to sexism, "perpetuates patterns of racial domination" by, among other things, centralizing "white issues" and "rendering women of color invisible"); Hutchinson, *Out Yet Unseen*, *supra* note 14, at 637 ("[B]y marginalizing issues of race and class, gay and lesbian essentialism replicates patterns of social exclusion—racism, sexism, economic oppression, people of color, women, and the poor remain irrelevant.").

24. Darren Lenard Hutchinson, "Gay Rights" for "Gay Whites"?: *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1369 (2000) [hereinafter, Hutchinson, *Gay Rights for Gay Whites*] (criticizing lack of material element in mainstream gay, lesbian, bisexual and transgender political and legal agendas).

25. *Id.* at 1370.

26. See, e.g., Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in LESBIANS, GAY MEN, AND THE LAW 401 (William B. Rubenstein ed., 1993); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV. 1535 (1993).

27. See Hutchinson, *Out Yet Unseen*, *supra* note 14, at 592–93; Hutchinson, *Gay Rights for Gay Whites*, *supra* note 24, at 1370–72.

to extremely poor individuals.²⁸ Due to these economic and cultural patterns, heterosexuals of color marry in lower rates than whites.²⁹ By decreeing legal marriage “the most important” goal for gay and lesbian politics,³⁰ scholars and activists obscure racial, class, and gender distinctions among gays, lesbians, bisexuals, and transgender people, construct gay and lesbian political agendas upon gender, class, and racial hierarchies, and create conflict among antiracist, feminist, anti-heterosexist, and antipoverty activists and scholars.³¹

Disputes between gay and lesbian activists and antiracists over the “relative” value of anti-heterosexism and antiracism provide some of the more contentious conflicts around race and sexuality. Advocates of sexual equality invite these disputes with their frequent analogies of race and racism to sexual identity and heterosexism. Proponents of the race-sexuality analogies hope to create empathy for gay and lesbian equality efforts and to place anti-heterosexism within the constitutional and statutory civil rights frameworks that evolve from a history of racial subordination.³² Because heterosexism is as socially harmful as racism, according to the analogies, civil rights law should strictly scrutinize private and governmental discrimination on the basis of sexual orientation.³³

The race-sexuality analogies are blatantly essentialist.³⁴ The analogies blur the differences within the population of gays, lesbians, bisexuals and transgender people by treating this population as separate from people of

28. See Lisa Catanzarite & Vilma Ortiz, *Family Matters, Work Matters?: Poverty Among Women of Color and White Women*, in RACE, CLASS, AND GENDER: AN ANTHOLOGY 149–60 (Margaret L. Andersen & Patricia Hill Collins eds., 1998) (arguing that poverty reduces the economic attractiveness of marriage); Hutchinson, *Gay Rights for Gay Whites*, *supra* note 24, at 1370–72 (discussing racial and class implications of marriage).

29. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 63–92 (1987); WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 101–04 (1996); Catanzarite & Ortiz, *supra* note 28, at 149–160.

30. WILLIAM N. ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 8 (1996) (“Marriage is the most important right the state has to offer . . .”).

31. See Hutchinson, *Out Yet Unseen*, *supra* note 14, at 585–602.

32. See, e.g., Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 115, 121 (David Kairys ed., 1988). Halley argues that “gay and lesbian advocates often find themselves saying that sexual orientation is like race, or that gay men and lesbians are like a racial group, or that anti-gay policies are like racist policies, or that homophobia is like racism.” *Id.* at 121; see also Sharon Elizabeth Rush, *Equal Protection Analogies—Identity and “Passing”: Race and Sexual Orientation*, 13 HARV. BLACK LETTER L.J. 65, 76 (1997) (“At present . . . advocates for gay men and lesbians who attempt to secure heightened scrutiny for sexual orientation discrimination cases are pursuing both possibilities of comparing sexual orientation to sex and race.”).

33. See Rush, *supra* note 32, at 76.

34. See Hutchinson, *Out Yet Unseen*, *supra* note 14, at 631–34.

color, and they ignore the differences across the population of marginalized groups by purporting to equate the experiences of the racially subordinate and victims of heterosexism.³⁵

Many antiracist scholars and persons of color have rejected the analogies; their responses arise out of both homophobia³⁶ and antiessentialism.³⁷ Some of the reactions to the race-sexuality analogies by persons of color are homophobic because they trivialize the harmful impact of heterosexist subordination and, after purporting to find no parallels between racism and heterosexism, completely discount the social value of a pro-gay civil rights structure. Colin Powell, for example, defends the military's anti-gay discrimination on the ground that race, unlike sexual identity, is a "benign" characteristic.³⁸ Even some critical race theorists have questioned the legitimacy of including sexual identity as a protected category in civil rights statutes and doctrine; their arguments often make light of or question the subordination that gays, lesbians, bisexuals, and transgender people endure.³⁹

While some of the person of color responses to the race-sexuality analogies evolve out of homophobia, many of the responses rightfully criticize gay and lesbian essentialism. The critics of the analogies have accurately revealed how the analogies hide the pervasiveness of racial and class oppression. When white gays and lesbians claim that they are similarly situated with persons of color, they mask the operation of white

35. See *id.*; see also Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 297 (1994) (arguing that race-sexuality analogies "erase[] 'vertical' differences within a group . . . [and] 'horizontal' differences across the spectrum of legally protected groups"). See also Grillo & Wildman, *supra* note 23, at 401 ("Comparing sexism to racism perpetuates patterns of racial domination by marginalizing and obscuring the different roles that race plays in the lives of people of color and of whites.").

36. See URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* 187 (1995) ("[S]ome of the [black community's] anger at the analogies stems from homophobia . . ."); Hutchinson, *Out Yet Unseen*, *supra* note 14, at 628 (arguing that black responses to the race-sexuality analogies may "flow from a disapprobation of homosexuality and an opposition to gay and lesbian rights").

37. See VAID, *supra* note 36, at 187 ("To a large extent, black resentment at our use of the racial analogy arises from the persistence of racism, despite the best efforts of a seasoned movement to eradicate it."); Hutchinson, *Out Yet Unseen*, *supra* note 14, at 627 ("A review of the black responses [to the race-sexuality analogies] reveals that blacks are troubled that white gays, by comparing their experiences with discrimination to those of blacks, trivialize the impact of racial subordination and privilege in the lives of blacks and white gays.") (emphasis in original).

38. Lynne Duke, *Drawing Parallels—Gays and Blacks: Linking Military Ban to Integration Fight Stirs Outrage, Sympathy*, WASH. POST, Feb. 13, 1993, at A1 ("Homosexuality is not a benign . . . characteristic such as skin color It goes to one of the most fundamental aspects of human behavior.") (quoting Colin Powell).

39. See generally Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 15 (discussing the marginalization of gays and lesbians within critical race theory).

and upper-class privilege in their lives. This essentialist distortion of race and class oppression has caused conflict among persons of color and pro-gay advocates.⁴⁰

While the racial critics of the race-sexuality analogies persuasively challenge gay and lesbian essentialism, their own narrow vision of equality also fosters conflict between progressive scholars and activists. The racial critics place race and sexual identity in completely separate spheres. In their rejection of the race-sexuality analogies, they dismiss any connection between the experiences of persons of color and gays and lesbians.⁴¹ This pattern reflects a broader marginalization of the importance of gay and lesbian equality in racial justice efforts; antiracist movements have commonly excluded progressive gay and lesbian politics from their agendas.⁴² The experiences of gay, lesbian, bisexual, and transgender persons of color, however, belie such a fragmented antisubordination analysis. Heterosexism and racism interact to shape their subordination in a variety of contexts, including oppressive violence, public health issues, and employment discrimination.⁴³ Advocates of gay and lesbian equality and antiracists, nevertheless, often fail to respond adequately to such incidents of "homophobic racism" due to their support of essentialism, racism, and heterosexism.⁴⁴ Because antiracist and pro-gay activists treat racism and heterosexism as wholly separate phenomena, they withhold their advocacy from incidents of discrimination and structures of subordination that involve these synergistic forms of exclusion.⁴⁵ When antiracist and pro-gay activists challenge incidents of homophobic racism, their responses are singular: they focus solely on the racial *or* homophobic dimensions of the acts of domination and fail to unveil the multidimensional nature of oppression.⁴⁶

40. See sources cited *supra* note 37.

41. See, e.g., John Sibley Butler, *Homosexuals and the Military Establishment*, 31 SOCIETY 13, 15 (1993) ("[T]he issue of social change relating to homosexuality must be divorced from issues relating to the history of blacks in America.").

42. See generally Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 15.

43. See Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 15, at 17-40, 56-57; Hutchinson, *Gay Rights for Gay Whites*, *supra* note 24, at 1375-78.

44. See Hutchinson, *Out Yet Unseen*, *supra* note 14, at 567-82 (discussing inadequate response to sexualized racism by gay and lesbian advocacy groups); Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 15, at 56-58 (discussing inadequate response to sexualized racism by antiracists).

45. See sources cited *supra* note 44.

46. See Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 15, at 21-33 (discussing pro-gay and antiracist responses to sexualized racist violence).

B. *The Contradictions of Essentialism*

Although progressive theorists often reject multiplicity theories, their disagreement with theories regarding the complexity of oppression is selective and contradictory, for the scholarship of essentialist theorists actually embraces the particularity of experience—but to a limited and subtle degree: these activists and theorists challenge only the multidimensional subordination experienced by more privileged members of oppressed communities.⁴⁷ The legacy of racial subordination, for example, is replete with examples of sexualized oppression. Lynching, the imposition of the death penalty in the context of interracial rape, sexual harassment, and the rape of women of color are all institutions that involve a potent intersection of racial, gender, and sexuality hierarchies—colored by white fears and marginalization of the heterosexual practices of persons of color.⁴⁸ Antiracist activists and theorists have thoroughly countered and examined this sexualized oppression, but have declined to engage in advocacy on behalf of gays and lesbians of color who also endure sexualized racist oppression.⁴⁹ Thus, antiracists have responded to racism in its “heterosexual” forms, but, driven by essentialism and heterosexism, they refuse to recognize and challenge homophobic racism. Essentialist antiracist theory is, therefore, internally inconsistent. Antiracists do not ignore all forms of complex subordination; instead, they

47. See Crenshaw, *supra* note 15, at 1252 (arguing that the “specific raced and gendered experiences [of men of color and white women], although intersectional, often define as well as confine the interests of the entire group”) (emphasis in original); Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 15, at 12–17, 79–96 (discussing the multilayered experiences of classes that dominate antisubordination theory).

48. See generally CHARLES HERBERT STEMER, *SEXUAL RACISM: THE EMOTIONAL BARRIER TO AN INTEGRATED SOCIETY* (1976) (discussing “sexualized racism”); Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177 (1997) (analyzing “sexualized racial stereotypes” and “racialized gender stereotypes”); Stacey Pastel Dougan, *With Justice for Whom? The Presumption of Moral Innocence in Rape Trials*, 71 IND. L.J. 419, 435–37 (1996) (discussing “racialized sexual stereotypes”); Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 15, at 79–96 (discussing the “sexualization of race”); see also NAOMI ZACK, *The American Sexualization of Race*, in RACE/SEX: THEIR SAMENESS, DIFFERENCE, AND INTERPLAY 145 (Naomi Zack ed., 1997) (discussing “sexualization of race”). Zack argues that

[t]he result of the historical intersection or connection between socially constructed sexuality and socially constructed race has been the sexualization of race in American lived experience The sexualization of race means that the fictitious ideological machinery which posits and reproduces the existence of races . . . as well as the crimes and slights that whites have committed, and still do commit, against blacks in American culture . . . are qualities and conditions of sexuality, for some individuals.

ZACK, *supra*, at 147.

49. See Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 15, at 96–97.

reserve their advocacy and theorizing for more “dominant” members of oppressed communities, such as heterosexual men of color. Because they rest their advocacy and theories on gender and sexuality hierarchies, essentialist antiracist theorists undermine the central goal of progressive legal advocacy—the eradication of social oppression.⁵⁰

Gay and lesbian essentialism is similarly contradictory. While gay and lesbian theorists have explicitly and implicitly embraced essentialist analyses, their theories are, nevertheless, informed by interwoven racial, class, and gender hierarchies.⁵¹ The gay rights’ dismissal of lesbian-feminist and racial critiques of same-sex marriage, for example, produces an analysis grounded upon the experiences of white and upper-class gays and lesbians.⁵² Several white, upper-class, male theorists, for example, contend that same-sex marriage is the “most important” right for gays and lesbians.⁵³ Seemingly unmoved⁵⁴ by the concerns of women and persons of color who challenge the racial, socio-economic, and sexual hegemony of marriage, these theorists place tremendous importance on an “equality” goal that will distribute its benefits along racial, class, and gender lines. Their advocacy responds to the positionality of white, upper-class, and male individuals. Thus, the “absence” of attention to race, class, and gender hierarchies within law and sexuality scholarship simply reinforces, as critical race and feminist theorists have observed, invisible social norms of whiteness, maleness, and class privilege.⁵⁵

50. See *id.* at 97 (“Heteronormativity in anti-racist discourse . . . compounds the marginalization of gay, lesbian, bisexual and transgendered people of color, who already face racial, class, gender and heterosexist oppression from the greater society.”).

51. See Hutchinson, *Out Yet Unseen*, *supra* note 14, at 621 (observing that gay and lesbian essentialism reinforces racial, class, and gender hierarchies).

52. See *id.* at 585–602 (unveiling racial, class, and gender assumptions of same-sex marriage proponents); Hutchinson, *Gay Rights for Gay Whites*, *supra* note 24, at 1370–72 (same); Ettelbrick, *supra* note 26, at 403–04 (same).

53. See ESKRIDGE, *supra* note 30, at 8.

54. See William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1493 (1993). Professor Eskridge acknowledges the lesbian feminist critiques of same-sex but concludes that

[t]he gay man is less likely to commit himself to gender and race discrimination issues than is the lesbian or the person of color, again whether or not he can get married. The gay man is already more likely to be an insider. Allowing him to marry another man will not change that.

Id. Eskridge does not consider whether same-sex marriage will reinforce the “gay man’s” insider status or whether this “gay man” is likely white. See Hutchinson, *Out Yet Unseen*, *supra* note 14, at 600 (criticizing Eskridge’s analysis).

55. Critical scholars have examined the “transparent” nature of whiteness and maleness. For a discussion of white transparency, see HARLON L. DALTON, *RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS AND WHITES* 109 (1995) (“For most Whites, race—or more precisely, their own race—is simply part of the unseen, unproblematic

The failure of gay and lesbian equality theorists to examine racial hierarchy is particularly disturbing in light of the ways in which opponents of gay rights exploit race to contest the legitimacy of progressive sexual politics. Anti-gay activists describe legal proscriptions of sexual orientation discrimination as "special rights."⁵⁶ These rights are purportedly "special" because gays and lesbians, according to the misleading rhetoric, possess disproportionate amounts of political power, wealth, and education (unlike persons of color), and their privileged status does not warrant the protection of civil rights structures.⁵⁷ As I have previously observed, the "special rights" rhetoric racializes gays and lesbians as a white and wealthy class, who are not harmed by any discrimination they face.⁵⁸ Although the racialized "special rights" rhetoric is a common and dangerous response to gay and lesbian rights efforts, the essentialist nature of gay and lesbian theory does not permit an adequate countering of this discourse. Because the poor, persons of color, and issues of racial subjugation and poverty are marginalized within gay and lesbian theory, political organizations, and communities, pro-gay advocacy may actually *affirm* the perception of gay privilege; the invisibility of these populations and issues simply reinforces and helps to construct the pervasive, yet incorrect, wealthy gay stereotype.⁵⁹

Progressive social movements suffer from their singular, essentialist focus. When progressive theorists do not acknowledge the relationships between various forms of subordination, they place progressive movements in tension with one another. Essentialism also forces individuals who suffer from multiple forms of subordination to silence portions of

background."); Barbara J. Flagg, *"Was Blind but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993) (examining the "transparency phenomenon[, i.e.] the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific"). For a discussion of maleness as a hidden norm, see Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 316-17 (1993) ("[T]he law's incorporation of a male normative standard may be invisible but it is not inconsequential.") (footnote omitted); Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 888 (1989) ("The body of law about gender discrimination is widely understood to involve 'women's issues'—thus reinforcing the understanding that 'man' is a genderless, standard creature who does not have to concern himself with gender issues.").

56. Schacter, *supra* note 35, at 293 ("'Special rights' has become the central slogan for the anti-gay movement, appearing regularly in the names of organizations opposing gay civil rights and in their media campaigns.").

57. *Id.* at 291-93.

58. See Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 15, at 70-74; Hutchinson, *Gay Rights for Gay Whites*, *supra* note 24, at 1372-75.

59. See Hutchinson, *Gay Rights for Gay Whites*, *supra* note 24, at 1368-72 (discussing role of gay and lesbian essentialism in perpetuating notion that gays and lesbians are wealthy, privileged, and white).

their identity in order to embrace a limited and narrow vision of equality. These pitfalls do not affect only theory and activism. Instead, legal analysis, as Part II discusses, employs a similarly fragmented and artificial approach to subordination, an approach that defeats efforts to expand social equality.

II. CRISIS IN LAW

A. *The Comparative Rhetoric of Equality*

Equality jurisprudence creates tension between and essentializes oppressed social groups. Equal protection analysis in federal courts, for example, deploys a "comparative" framework that requires groups seeking heightened judicial scrutiny of their claims of discrimination to demonstrate that they are like existing protected classes—namely persons of color and women—and that the system of subordination that affects them operates in the "same" manner as racism and sexism.⁶⁰ In the context of gay and lesbian civil rights, this comparative approach has resulted in a denial of heightened judicial solicitude to oppressed sexual minorities. Applying the suspect class doctrine implicated in footnote four of *Carolene Products*,⁶¹ courts have invariably concluded that gays and lesbians do not carry the indicia of suspicion that warrant application of heightened judicial scrutiny.⁶² The courts' analysis typically focuses on the "immutability" and "political power" components of the representation-reinforcement rationale.⁶³

In several opinions, for example, courts have denied heightened scrutiny in cases of discrimination brought by gays and lesbians based on the notion that sexual orientation, unlike race, is behavioral and chosen, rather than immutable. In *High Tech Gays v. Defense Industrial Security Clearing House*,⁶⁴ the Ninth Circuit justifies its refusal to treat gays and lesbians as a suspect class on the grounds that "[h]omosexuality is not an

60. See *Frontiero v. Richardson*, 411 U.S. 677, 685–86 (1973) (comparing the status of women to blacks and "aliens" and concluding that sex discrimination warrants heightened scrutiny) (plurality opinion); see also Hutchinson, *Gay Rights for Gay Whites*, *supra* note 24, at 1378–82 (discussing the comparative nature of equal protection analysis); Rush, *supra* note 32, at 73–77 (same).

61. *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938).

62. See EVAN GERSTMANN, *THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION* 60 (1999) ("The appellate courts have consistently rejected the argument that gays and lesbians are a suspect class Every court that has considered the issue has stated that gays and lesbians simply do not meet the criteria for a suspect class.").

63. See generally Hutchinson, *Gay Rights for Gay Whites*, *supra* note 24, at 1378–82.

64. 895 F.2d 563 (9th Cir. 1990) (holding that gays and lesbians do not constitute a suspect or quasi-suspect class).

immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes.”⁶⁵ The immutability framework seeks to compare gays and lesbians with persons of color and women. This comparative analysis is essentialist because it treats these populations as mutually exclusive.⁶⁶ Also, like the proponents of the “special rights” rhetoric, the immutability analysis purportedly searches for similarities between gays and lesbians and persons of color and because it can find none, denies heightened scrutiny to the former. A comparative equality jurisprudence, therefore, invokes racial subjugation

65. *Id.* at 573. The court’s logic suffers in many respects. First, it includes immutability in the suspect class doctrine when no Supreme Court opinion has stated that a finding of immutability is essential in this context. See *Watkins v. United States Army*, 847 F.2d 1329, 1347 (9th Cir. 1988), *withdrawn*, 875 F.2d 699 (9th Cir. 1989) (“The Supreme Court has never held that only classes with immutable traits can be deemed suspect.”) (citation omitted); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 507–10 (1994) (arguing that “immutability” is not a requirement for suspect class status). In fact, the Court applies heightened scrutiny to non-marital children and alienage discrimination claims, in which the traits are *mutable*. See *United States v. Clark*, 445 U.S. 23, 26–27 (1980) (applying heightened scrutiny to non-marital children discrimination claims); *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) (applying strict scrutiny in case of “alienage” discrimination). Furthermore, the Court reduces the “behavioral” dimensions of race and gender in its analysis. Critical race theory and contemporary feminists view race and gender as “social constructs,” rather than biological phenomena. See Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27–28 (1994) (discussing social fabrication of race). History, economic forces, and social relations fabricate the meaning of race and gender. See generally *id.* Race and gender are aspects of culture, tools of political analysis, and “performative” and “experiential.” See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 25 (1990) (“[G]ender is always a doing, though not a doing by a subject who might be said to preexist the deed There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very ‘expressions’ that are said to be its result.”); Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864, 1864–65 (1990) (“Critical Race Theorists are attempting to integrate their experiential knowledge, drawn from a shared history as ‘other,’ with their ongoing struggles to transform a world deteriorating under the albatross of racial hegemony.”). The immutability doctrine, however, treats race and gender strictly as biological entities. See Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1370 (1997) (“[T]he mutable-versus-immutable dichotomy ignores the persuasive argument . . . that even so-called ‘immutable’ characteristics such as race and sex are social constructs rather than anthropological or biological facts of life.”). The court’s analysis also implies a “slipperiness” and volatility to gay, lesbian, bisexual, and transgender status, when many individuals consider their sexual attraction fixed, even if shaped by social and political forces.

66. See Hutchinson, *Gay Rights for Gay Whites*, *supra* note 24, at 1382.

and persons of color to the detriment of gay and lesbian equality efforts; race and sexuality are placed in opposition in such an analysis.

Moreover, courts also reject the notion that gays and lesbians lack political power, a factor in the suspect class doctrine that goes somewhat to the heart of *Carolene Products* and process theory rationales for heightened scrutiny: it ensures that courts interfere with the legislative arena only to protect those groups that cannot defeat abusive legislation in the political process. Several courts have found that gays and lesbians fail this test.

In *High Tech Gays*, for example, the court held that

[l]egislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation. Thus, homosexuals are not without political power; they have the ability to and do 'attract the attention of the lawmakers' as evidenced by such legislation.⁶⁷

Furthermore, while the Supreme Court has not decided whether gays and lesbians are entitled to heightened scrutiny, at least three members of the Court—Chief Justice Rehnquist and Justices Scalia and Thomas—would clearly reject such a claim, and their arguments would likely rest, in part, on the theory that gays and lesbians are a “politically powerful” class. In *Romer v. Evans*,⁶⁸ Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented from the Court’s ruling that a Colorado constitutional amendment that banned the state from enacting laws that protected gays, lesbians, and bisexuals from discrimination failed a rational basis analysis because the amendment was based on “animus.”⁶⁹ Justice Scalia’s dissent offers a sociological portrait of gay and lesbian individuals that questions their need for judicial solicitude and that deploys the pernicious wealthy gay stereotype. Justice Scalia reasons that

because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving

67. *High Tech Gays*, 895 F.2d at 574 (citation omitted).

68. 517 U.S. 620 (1996).

69. *Id.* at 632.

not merely a grudging social toleration, but full social acceptance, of homosexuality.⁷⁰

Justice Scalia also criticizes the majority for “plac[ing] the prestige of [the Court] behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias.”⁷¹ Justice Scalia embraces, in every respect, the racializing special rights argument because he finds troubling distinctions between “those who engage in homosexual conduct” and persons of color, and he perceives legal protection of gays and lesbians as a benefit for a “politically powerful” and wealthy social class.⁷²

Equal protection jurisprudence thus engages in the same essentialism that plagues progressive theory and activism. Jurists require gays and lesbians to demonstrate that they are “like” persons of color and women in order to qualify for heightened judicial scrutiny. Equality doctrine, therefore, encourages pro-gay activists and legal theorists to utilize the divisive and essentialist race-sexuality analogies that spark conflict between persons of color and gay and lesbian communities. Thus, comparative equality jurisprudence contributes to the tension among progressive communities and oppressed social groups. Legal essentialism, as the next section discusses, also fragments the identities of persons who suffer from multiple forms of subordination. Because equality jurisprudence does not always accommodate claims of multidimensional or intersecting discrimination, courts often fail to provide relief for plaintiffs in cases involving multiplicitous discrimination.

B. “Either/Or” Antidiscrimination Analysis

Because equality theory does not acknowledge the complex nature of subordination, courts often require plaintiffs to formulate their claims of discrimination in an “either/or” fashion, alleging one form of discrimination or another.⁷³ Furthermore, courts have failed to recognize that the cumulative effect of multiple forms of discrimination may create

70. *Id.* at 645–46 (Scalia, J., dissenting) (citations omitted).

71. *Id.* at 636.

72. *Id.* at 644–51. For an extended discussion of the racial implications of equal protection jurisprudence in the gay and lesbian rights context, see Hutchinson, *Gay Rights for Gay Whites*, *supra* note 24, at 1378–82. The present discussion in this Article borrows heavily from my prior observations.

73. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 142–43 (discussing failure of courts to recognize the intersecting discrimination claims of black women).

a unique type of victimization that differs in kind from the sum of individual acts of discrimination.⁷⁴

Kimberlè Williams Crenshaw, in an influential work on the problem of essentialism in antidiscrimination doctrine,⁷⁵ analyzes the doctrinal treatment of women of color in antidiscrimination cases. Crenshaw finds that courts have denied relief to women of color because they narrowly construe civil rights statutes as not providing these plaintiffs with a remedy for any discrimination they endure *as women of color*—rather than as women alone or as persons of color alone.⁷⁶ Crenshaw's analysis demonstrates that antidiscrimination doctrine imagines the quintessential race plaintiffs as men of color and the model sex discrimination plaintiffs as white women.⁷⁷ The claims of women of color are viewed as presenting an unprotected "sub-category" or "special class" and as placing civil rights doctrine on a dangerous slippery slope.⁷⁸

While *some* improvement has occurred in the treatment of women of color in antidiscrimination cases⁷⁹ (a result of the intersectionality

74. See *id.* at 140 (arguing that "the intersectional experience is greater than the sum of racism and sexism").

75. See *id.*

76. *Id.* at 142. Crenshaw argues that the

refusal . . . to acknowledge that Black women encounter combined race and sex discrimination implies that the boundaries of sex and race discrimination doctrine are defined respectively by white women's and Black men's experiences. Under this view, Black women are protected only to the extent that their experiences coincide with those of either of the two groups.

Id. at 142–43.

77. See *id.* at 151 (arguing that the "paradigm of sex discrimination tends to be based on the experiences of white women [and that] the model of race discrimination tends to be based on the experiences of the most privileged Blacks").

78. See, e.g., *Degraffenreid v. General Motors Assembly Div.*, 413 F. Supp. 142, 145 (E.D. Mo. 1976). In *Degraffenreid*, the court held that

[t]he legislative history surrounding Title VII does not indicate that the goal of the statute was to create a new classification of 'black women' who would have greater standing than, for example, a black male. The prospect of the creation of new classes of protected minorities, governed only by the mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora's box.

Id.

79. See, e.g., *Lam v. University of Hawai'i*, 40 F.3d 1551, 1562 (9th Cir. 1994) ("[W]here two bases for discrimination exist, they cannot be neatly reduced to distinct components. Rather than aiding the decisional process, the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences.") (citing Crenshaw, *supra* note 73, at 139); Winston, *supra* note 17, at 775.

critique), courts have not even begun to address the problem of essentialism in the context of race/sexuality/gender cases. In these cases, courts do not recognize "intersecting" discrimination; they have found that evidence of sexual orientation discrimination negates any possibility that defendants also engage in racial discrimination; and they have refused to accept arguments that plaintiffs face unique discrimination as gays and lesbians of color.⁸⁰ Furthermore, because sexual orientation remains an unprotected category in federal statutory and constitutional civil rights law,⁸¹ discriminators may willingly concede sexual orientation discrimination when some evidence of discriminatory action exists, but deny racial or gender discrimination.⁸² The precarious status of sexual orientation in civil rights law, therefore, allows for the furtherance of racial subjugation and patriarchy, as defendants package their racism and sexism in homophobic terms in order to escape liability.⁸³

In *Peterson v. Bodlovich*,⁸⁴ for example, the plaintiff—Lawrence Peterson—a black gay male prison inmate, argued that prison officials violated the Eighth and Fourteenth Amendments when they failed to house him in an area of the prison that would not complicate his respiratory problems (including asthma and an allergy to cat dander).⁸⁵ Peterson claimed that the prison officials refused to house him in an "open" section of the prison (where he would have had access to fresh air) on account of his race and sexual orientation.⁸⁶ Peterson also alleged that white gays, by contrast, lived in the open dormitory⁸⁷ and that a prison official told him that "'black homosexuals don't adjust right' to dormitory living."⁸⁸ A doctor recommended that prison officials change Peterson's living conditions so that he would not come into contact with

80. See, e.g., *infra* text accompanying notes 84–101.

81. See Hutchinson, *Gay Rights for Gay Whites*, *supra* note 24, at 1358–59 (discussing statutory and constitutional vulnerability of gays, lesbians, bisexuals, and transgender people).

82. See, e.g., Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 15, at 110 ("[T]he failure of civil rights law to provide for sexual equality may actually provide an incentive for defendants in discrimination cases to concede 'heterosexist,' rather than 'racial,' bias when the surrounding circumstances of their cases strongly suggest the operation of 'some' discriminatory motivation."); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 147 (1995) (arguing that "because sexual orientation discrimination is generally permissible, an employer need only say that it based its sex/gender discrimination on a 'suspicion' about sexual orientation to elude legal repercussion").

83. See Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 15, at 110.

84. No. 99-3150, 2000 WL 702126 (7th Cir. May 24, 2000).

85. *Id.* at *1.

86. *Id.*

87. *Id.*

88. *Id.*

allergens.⁸⁹ Peterson contended that the defendant's refusal to transfer him constituted deliberate indifference to his medical needs, a violation of the Eighth Amendment, and also amounted to invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment.⁹⁰

The prison officials justified their refusal to move Peterson to the open dormitory in sexually-charged terms:

They insisted that the transfer was not appropriate because Peterson had previously lived in E-Dormitory [an open dormitory], but proved unsuitable for dormitory living because of his *open and aggressive homosexual behavior*. Prison officials noted that *women's clothes* were confiscated from Peterson when he was living in E-dormitory. During that time, confidential informants complained to prison staff about Peterson's late-night sexual activities and the fear of sexually transmitted diseases.⁹¹

The prison's argument clearly reaffirms heterosexist and patriarchal ideology. The prison officials viewed Peterson as a security risk because he is, in stereotypic rhetoric, an "open and aggressive homosexual"⁹² who once had "*women's clothes*" in his cell.⁹³ The officials removed Peterson from the open dormitory because he engaged in "late-night sexual activities"; thus, Peterson, *not* the heterosexual or closeted homosexual men with whom he had sexual relations, posed a threat of "sexually transmitted diseases"⁹⁴ and unrest.

In addition to challenging the defendant's blatant homophobia, Peterson also argued that he suffered from racial discrimination. Specifically, Peterson alleged that prison officials allowed white gays to live in the

89. *Id.*

90. *Id.*

91. *Id.* (emphasis added).

92. See, e.g., John Balzar, *Why Does America Fear Gays?*, L.A. TIMES, Feb. 4, 1993, at A1 (discussing the "gay as sexual predator" stereotype).

93. See also Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1, 58-69 (1995) (arguing that the legal suppression of "cross-dressing" and transgenderism reinscribes traditional gender norms).

94. The prison officials' belief that Peterson may spread a sexually transmitted disease is likely a product of "AIDS-phobia" and homophobia. See Laurence Zuckerman, *Open Season on Gays: AIDS Sparks An Epidemic of Violence Against Homosexuals*, TIME, Mar. 7, 1988, at 24 (discussing a rise in anti-gay hate crimes due to irrational fears concerning the AIDS epidemic). The court pointed to no evidence in the record concerning the spread of disease in the prison. *Peterson*, 2000 WL 702126. If the prison officials were concerned about disease, they could have considered providing inmates with condoms, rather than engaging in discrimination.

open dormitory and that these officials told him that black gays could not be assimilated into the open dormitory environment.⁹⁵

Despite the evidence of racial and sexual orientation discrimination in the record, the court of appeals upheld the district court's award of summary judgment to the defendant on both the Eighth and Fourteenth Amendment claims.⁹⁶ With respect to plaintiff's Equal Protection claim, the court held that there was no evidence of racial discrimination in the record.⁹⁷ The court acknowledged that the prison officials denied any racial animus but conceded discriminating on the basis of sexual orientation:

In the record before us, there is nothing to show that prison officials had a racially discriminatory intent when they refused to move Peterson to E-Dormitory. The defendants submitted affidavits denying that the decision not to transfer Peterson was racially motivated. The defendants explained that they tried not to place any admitted homosexuals in an open dormitory because it was disruptive to the other prisoners.⁹⁸

The court's analysis improperly resolves competing, material factual claims on a motion for summary judgment.⁹⁹ Because Peterson presented evidence that white gays, unlike black gays, were housed in the open dormitory, the record was in dispute over the existence of racial discrimination.¹⁰⁰ More significantly, however, the court's dismissal of Peterson's allegations of racial discrimination rests entirely on the defendant conceding its heterosexism. The defendant's admission to discriminating against gay inmates precluded the court from finding that the defendant also engaged in racial discrimination. In other words, the defendant's homophobia erected a barrier to a finding of racism; the

95. *Peterson*, 2000 WL 702126, at *1.

96. The court upheld summary judgment on the Eighth Amendment claim on the grounds that the plaintiff's respiratory problems were not severe enough to mandate extraordinary attention by the prison and that the prison had tried to accommodate the plaintiff's condition by moving him to a cell near an open door and providing him medical treatment. *Id.* at *2.

97. *Id.*

98. *Id.*

99. Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

100. Often, discrimination cases will present questions of fact regarding the defendant's intent or motive, thereby precluding summary judgment. See CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 2732.2, 349-50 (2d ed. 1983).

court treated racism and heterosexism as conflicting phenomena that exist in completely separate spheres. The court thus deploys the same essentialist equality framework that imagines the various identity categories and systems of subordination as unconnected and oppositional. This essentialist model denies civil rights protection to members of oppressed social groups who suffer from multiple forms of exclusion.¹⁰¹

In the context of race and sexuality discrimination claims, the unprotected status of sexual orientation in civil rights jurisprudence, along with judicial essentialism, actually provides an incentive for defendants to concede homophobic intent as a way of masking and obscuring racism.¹⁰² In *Peterson*, for example, the court held that the defendant's admission of heterosexist discrimination does not advance plaintiff's claim because sexual orientation discrimination receives a lower level of scrutiny than racial discrimination in equal protection cases:

The defendants did admit that their decision not to transfer Peterson to E-Dormitory was based on his sexual orientation, but this decision is subject only to rational basis review because homosexuals are neither a suspect nor quasi-suspect class. Under this standard, defendants need only show that their decision was rationally related to a legitimate government interest. We agree with the defendants that their decision not to transfer Peterson was rationally related to their legitimate interest in reducing openly sexual behavior in the prison. Peterson's previous open and aggressive sexual behavior demonstrated to defendants that he was not a suitable candidate for open dormitory living.¹⁰³

The court, therefore, legitimizes the defendant's sexual orientation discrimination and allows the defendant to disprove evidence of racial discrimination by openly embracing heterosexism. Thus, homophobia reinforces racial subjugation. The essentialist nature of equality jurisprudence and the unprotected status of sexual orientation in civil rights law permit such a harmful result. Because the court does not understand discrimination as a multidimensional entity, its decision can recognize only racial discrimination *or* sexual orientation discrimination, but not

101. See *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989) (awarding summary judgment to the defendant in an employment discrimination case brought by a black gay male on the grounds that the plaintiff's discharge centered more on his sexuality, not his race, and because federal civil rights statutes do not prohibit sexual orientation discrimination).

102. See sources cited *supra* note 82.

103. *Peterson*, 2000 WL 702126 at *2.

both.¹⁰⁴ Furthermore, the deferential judicial review of sexual orientation discrimination will likely encourage defendants in race-sexuality cases, where some evidence of discrimination exists, to admit their heterosexism and succeed under a rationality review, while racial hierarchy is masked, hidden, and deemed disproved.¹⁰⁵

Although equality theory and jurisprudence utilize a narrow and essentialist theory of equality and justice, several scholars have presented alternative models that do not fragment individual identity or place systems of subordination and progressive theorists in conflict. The next section of this Article discusses the historical evolution of this work and examines the conceptual and substantive differences among scholars in this area who, collectively, are attempting to construct an adequate theory of subordination.

III. "INTERSECTIONALITY," "MULTIDIMENSIONALITY" AND BEYOND

A. The Intersectionality Model

Feminist theorists have developed the most influential and extensive scholarly responses to the problems of essentialism in equality theory and jurisprudence. These scholars have criticized antiracist analysis, feminist theory, and equality jurisprudence for failing to recognize the "intersection" of race and sex discrimination and the impact of this intersectional discrimination upon women of color.¹⁰⁶ Kimberlè Williams Crenshaw, a leading intersectionality theorist, wishes to "disrupt the tendencies to see race and gender as exclusive or separable categories," but she views intersectionality as a "transitional concept" that "can be replaced as our understanding of each category becomes *more multidimensional*."¹⁰⁷

104. Cf. Crenshaw, *supra* note 73, at 142–43 (criticizing judicial failure to recognize the multidimensionality of black women's experiences).

105. See sources cited *supra* note 82.

106. For a list of relevant literature, see Hutchinson, *Out Yet Unseen*, *supra* note 14, at 562 n.9.

107. Kimberlè Williams Crenshaw, *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, in *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 111, 114 (Mari J. Matsuda et al. eds., 1993) (emphasis added). Several other scholars share Crenshaw's vision. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 615 (criticizing feminist essentialism and arguing that feminists must "root out and examine [their] differences"); Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991) (arguing that "[w]orking in coalition forces us to look for both the obvious and non-obvious relationships of domination, helping us to realize that no form of subordination ever stands alone").

The intersectionality critique has brought several compelling insights to bear upon legal theory. First, intersectionality scholarship has destabilized traditional attempts to treat oppressed classes as monolithic groups. By exploring the interactions between racial oppression and patriarchy, intersectionality theorists have persuasively demonstrated the diverging social statuses among and between “women” and “persons of color,” differences caused by racial, gender, and class positionality.¹⁰⁸

Second, intersectionality theory provides a formidable challenge to the notion that scholars can adequately examine or provide solutions to one form of subordination without analyzing how it is affected and shaped by other systems of domination.¹⁰⁹ Intersectionality theorists, for example, have provided compelling accounts of the role that patriarchy plays in the marginalization of persons of color; their work has demonstrated that intersecting gender and racial domination affect women of color in areas as diverse as domestic violence,¹¹⁰ sexual assault,¹¹¹ reproductive control,¹¹² and criminal law.¹¹³ Their analyses counsel against developing policies to combat gender and racial hierarchy without first examining how these forms of oppression interact.

Third, intersectionality theory has illustrated that the failure to examine the problem of intersecting subordination produces an equality theory that centers around the lives of relatively privileged individuals. The absence of an analysis of racial subjugation in feminist theory, for example, means that feminism will reflect the experiences and needs of white women—who do not suffer directly from racial oppression; likewise, when antiracists refuse to challenge gender hierarchy, they construct an equality theory that centers around men—who are not the immediate victims of sexism.¹¹⁴

Finally, intersectionality considers the intersection of forms of subordination—rather than intersecting privilege and subordination—as an extremely important site of analysis; accordingly, white women and men

108. See generally Harris, *supra* note 107.

109. See Matsuda, *supra* note 15, at 1189 (“As we look at these patterns of oppression, we may come to learn, finally and most importantly, that all forms of subordination are interlocking and mutually reinforcing.”).

110. See Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1017–30 (1995).

111. See, e.g., Jennifer Wriggins, Note, *Rape, Racism, and the Law*, 6 HARV. WOMEN’S L.J. 103 (1983).

112. See Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

113. See *id.*

114. See Crenshaw, *supra* note 73, at 151 (arguing that the “paradigm of sex discrimination tends to be based on the experiences of white women [and that] the model of race discrimination tends to be based on the experiences of the most privileged Blacks”).

of color are not frequent subjects in intersectionality scholarship. Instead, women of color (and others who suffer from “multiple” forms of domination) figure prominently in the intersectionality literature.¹¹⁵ This final aspect of intersectionality responded to the virtual absence of any juridical and theoretical recognition of the particular hardships that women of color endure as victims of subordination.¹¹⁶ Thus, intersectionality scholarship enriched legal theory by filling this glaring, jurisprudential vacuum.

B. “Multidimensionality” and Other Extensions of Intersectionality

The intersectionality scholarship has inspired helpful analyses in areas outside of the contexts of feminism and antiracism. Lesbian feminists, gays and lesbians of color, and other scholars have utilized the intersectional model in order to counter essentialism in feminism, law and sexuality, critical race theory, and poverty studies.¹¹⁷ These scholars, like the intersectionality theorists, have also examined the experiences of persons who suffer from intersecting forms of marginalization and have proposed policies to address the reality of complex subordination.¹¹⁸ Although heavily influenced by intersectional analysis, the “post-intersectionality” theorists have offered several improvements to the intersectionality model. In particular, race-sexuality critics, whose work examines the relationships among racism, patriarchy, class domination, and heterosexism, are currently developing a sizeable body of scholarship that extends intersectionality theory into new substantive and conceptual terrains.

In a series of articles, I have examined the relationships among racism, heterosexism, patriarchy, and class oppression utilizing a model I refer to as “multidimensionality.” Multidimensionality “recognize[s] the inherent complexity of systems of oppression . . . and the social identity categories around which social power and disempowerment are distributed.”¹¹⁹ Multidimensionality posits that the various forms of identity and oppression are “inextricably and forever intertwined”¹²⁰ and that essentialist equality theories “invariably reflect the experiences of class- and

115. See *id.* at 167 (urging legal theorists to place women of color at the center of their analyses).

116. See Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 15, at 14.

117. See Hutchinson, *Beyond the Rhetoric*, *supra* note 21, at 185–88.

118. Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 15, at 14.

119. *Id.* at 9.

120. Hutchinson, *Out Yet Unseen*, *supra* note 14, at 641.

race-privileged” individuals.¹²¹ Multidimensionality, therefore, arises out of and is informed by intersectionality theory.¹²²

The writings of other race-sexuality scholars make similar observations. Francisco Valdes, a leading race-sexuality theorist, has embraced explicitly a multidimensional antisubordination theory. Valdes envisions “multidimensionality” as a tool to:

remind[] all outgroups that all forms of identity hierarchy impinge on the social and legal interests of their members: biases based on race/ethnicity, sex/gender, sexual orientation and other identity features are directly relevant to each of those overlapping groups’ social and legal interests because all of those biases impact members of every such group. Multidimensionality tends to promote awareness of patterns as well as particularities in social relations by studying in an *interconnected* way the specifics of subordination.¹²³

Valdes’ nuanced analyses help illuminate the “interconnectivity”¹²⁴ of subordination and the need to develop more complex, rather than essentialist, responses to oppression.

Similarly, Elvia Arriola has examined the operation of gender, race, sexuality, and class hierarchies in the lives of lesbian, gay, bisexual, and transgender individuals.¹²⁵ Arriola’s scholarship “rejects the idea of arbitrarily separating out categories to address discrimination in our society. Instead, [Arriola] understands discrimination as a problem that arises when multiple traits and stereotypes constructed around them converge in a specific harmful act.”¹²⁶ Arriola urges legal scholars to engage in a “holistic” examination of the contours and effects of subordination.¹²⁷

Finally, Peter Kwan analyzes the synergistic relationship between identity categories using a framework he calls “co-synthesis.”¹²⁸ Kwan’s

121. Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 15, at 10.

122. *See id.*

123. Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409, 1415 (1998) (emphasis added).

124. Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN’S STUD. 25 (1995).

125. Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERKELEY WOMEN’S L.J. 103 (1994).

126. *Id.* at 141.

127. *Id.* at 139–41.

128. Peter Kwan, *Complicity and Complexity: Cosynthesis and Praxis*, 49 DEPAUL L. REV. 673. (2000).

theory of co-synthesis argues that social identity categories are mutually reinforcing and rely upon one another for meaning:

Cosynthesis insists that identity categories are sometimes themselves constructed or synthesized out of and relies [sic] upon other categorical notions. Therefore, this mutually defining, synergistic, and complicit relationship between identity categories is a dynamic model of multiple subordinating gestures. It denies the priority of the deconstructive concerns of class over race, of race over gender, or of gender over sexual orientation, of anything over anything else.¹²⁹

Kwan's analysis provides a complicated alternative to traditional essentialist models.

Although the race-sexuality scholars borrow heavily from the intersectionality literature, these theorists have offered compelling substantive and conceptual extensions of intersectional analysis.¹³⁰

1. Substantive Extension of Intersectionality

The most important substantive addition that multidimensionality and other race-sexuality models bring to intersectionality scholarship is the examination of heterosexist subordination (alongside race, gender, and class), a topic that is omitted from much of the intersectionality literature.¹³¹ The inclusion of sexual identity within multidimensional analysis permits scholars to examine the complexity of subordination in the gay and lesbian context and provides a richer, fuller portrait of the particularity of experience.

2. Conceptual Extensions of Intersectionality

The race-sexuality theorists have also offered several conceptual reformulations of intersectionality. These scholars, for example, have examined the "intersections" of privilege and subordination, while intersectionality usually focuses primarily upon the reality of intersecting

129. *Id.* at 688.

130. Much of the ensuing analysis reflects theories developed in my own scholarship. Nevertheless, as noted, other race-sexuality scholars have begun to move their work in similar directions.

131. See Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 15, at 11–12; Valdes, *supra* note 123, at 1421.

subordination.¹³² Accordingly, my scholarship treats complex subordination as a “universal phenomenon,” rather than a problem limited to classes of persons currently excluded from equality discourse.¹³³ As a result, multidimensionality offers a compelling response to essentialist scholars who reject intersectional analyses on the ground that such work is relevant only to those individuals who endure multiple forms of domination. By examining the intersecting privilege and subordination that serve as the foundation for essentialist analysis in critical race theory, feminism, and in law and sexuality scholarship, multidimensionality unveils the discrimination that results when proponents of essentialism continue to exclude current outsiders (e.g., gay, lesbian, bisexual, and transgender persons of color) from equality theory on the ground that these groups are burdened by tertiary concerns. The essentialist theories are firmly grounded upon complexity—the multidimensional experiences of individuals who, though subordinate, enjoy social privilege (e.g., heterosexual, upper-class, white women).¹³⁴

Multidimensionality also complicates the very notions of privilege and subordination. For instance, by focusing on intersecting “privileged” and “subordinate” categories, my scholarship has uncovered the heterosexual stereotypes that inform the “sexualized racism” endured by all people of color.¹³⁵ Lynching, for example, was frequently “justified” through a racist, sexualized rhetoric that constructed black males as heterosexual threats to white women.¹³⁶ Thus, heterosexual status, typically a privileged category, has served as a source of racial subjugation.¹³⁷ This history complicates the apparent stability of privileged and subordinate categories; the meanings of these identity categories are, instead, contextual and shifting.¹³⁸

A multidimensional analysis also problematizes the notion of intersecting subordination, the primary focus of intersectionality scholarship. Intersectionality, for example, typically considers women of color subordinate relative to men of color and white women. The inclusion of sexuality hierarchies in a multidimensional analysis destabilizes this framework. Heterosexist domination privileges heterosexual women of

132. See, e.g., Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 15, at 12–17 (distinguishing multidimensionality from intersectionality); Valdes, *supra* note 123, at 1424–25 (analyzing intersecting whiteness, maleness, and queer status).

133. Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 15, at 12–17.

134. See *id.*

135. See Hutchinson, *Gay Rights for Gay Whites*, *supra* note 24, at 1366.

136. *Id.*

137. See *id.* at 1366–67; Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 15, at 79–96.

138. In a recent article, I examine how anti-gay theorists invoke the “whiteness”—indisputably a privileged category—of gays and lesbians to legitimate heterosexist discrimination and subordination. See Hutchinson, *Gay Rights for Gay Whites*, *supra* note 24.

color (the quintessential subjects of intersectionality) and disadvantages lesbians of color; heterosexism also marginalizes gay men of color and advantages heterosexual men of color.¹³⁹ Multidimensionality, therefore, permits a more nuanced examination of the operation of privilege and subordination among oppressed social groups.

C. Suggestions for Future Theorizing

While the race-sexuality scholarship offers both conceptual and substantive improvements over intersectionality, the work in this area must undergo further development. One of the most important unresolved issues in equality scholarship and jurisprudence is the unprotected status of sexual identity. Intersectional analyses, however, have examined two categories—race and sex—that already receive “some” protection in civil rights jurisprudence.¹⁴⁰ Because the race-sexuality theorists direct their attention to heterosexism, as well as race, class, and gender, these scholars must construct creative responses to subordination that ultimately seek to achieve different goals from intersectionality scholars: race-sexuality theorists need to persuade courts and legislatures that heterosexism warrants a civil rights remedy.¹⁴¹ The precarious status of sexual orientation in civil rights jurisprudence actually encourages discriminating defendants to concede heterosexism in civil rights cases.¹⁴² In cases of mixed racial, gender and sexual orientation discrimination, the concession of heterosexism allows for the masking of racial and gender animus.¹⁴³ Multidimensionality can facilitate the important goal of securing civil rights protection for gays and lesbians and for unveiling the mutually reinforcing relationship between racism, patriarchy, and heterosexism.

139. See *id.* at 1367.

140. I do not wish to imply that civil rights jurisprudence combats the most pervasive forms of racial inequality and patriarchy.

141. See Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of “Sexual Orientation,”* 48 HASTINGS L.J. 1293, 1335 (1997) (“The doctrinal experience with race and gender suggests that intersectionality is not well suited to sexual orientation equality claims because ‘sexual orientation discrimination’ is not formally prohibited by federal anti-discrimination statutes.”). Poverty is also an unprotected status in civil rights law. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 25–28 (1973); *James v. Valtierra*, 402 U.S. 137, 142 (1971). Multidimensional theorists should also join efforts to reshape this jurisprudence.

142. See *supra* notes 102–105 and accompanying text.

143. See *id.*

1. Multidimensionality and the False Notion of Gay, Lesbian, Bisexual, and Transgender Privilege

The pervasive and pernicious “white and wealthy” gay stereotype stands as a tremendous obstacle to gay and lesbian equality. Activists, theorists, and jurists contest the validity of gay and lesbian equality by portraying sexual minorities as a privileged class who, unlike persons of color, do not need the protection of civil rights law.¹⁴⁴ A de-essentialized and multidimensional equality theory can destabilize this harmful construct. Multidimensionality challenges the limited legal imagination that constructs gays and lesbians as a class of white individuals; anti-essentialism demands that the voices of the poor and persons of color have an audience in pro-gay equality discourse. Accordingly, multidimensionality can help counter the factual premise of the wealthy gay stereotype and can strengthen equality theory by making it responsive to the diverse needs of gays, lesbians, bisexuals, and transgender people.¹⁴⁵

Multidimensionality also examines the class effects of homophobia in order to demonstrate that, contrary to popular, misleading surveys, heterosexism imposes an economic detriment upon its victims. Thus, as a growing body of research demonstrates, gays and lesbians are disadvantaged in the competition for social resources.¹⁴⁶ Furthermore, many efforts to measure the wealth of gays and lesbians have failed because they do not take into account the racial and class dynamics of the closet. An individual’s ability to express publicly a marginalized sexual orientation, however, correlates with wealth and whiteness; thus, by studying the income and educational attainment of “out” gays and lesbians, many gay and lesbian income surveys skew the racial and class composition of the gay and lesbian community.¹⁴⁷ Multidimensionality can help destabilize

144. See *supra* notes 56–59 and accompanying text.

145. See Hutchinson, *Gay Rights for Gay Whites*, *supra* note 24, at 1383–85.

146. See M.V. Lee Badgett, *Beyond Biased Samples: Challenging the Myths on the Economic Status of Lesbians and Gay Men*, in *HOMO ECONOMICS: CAPITALISM, COMMUNITY AND LESBIAN AND GAY LIFE* 65, 69–70 (Amy Gluckman & Betsy Reed eds., 1997).

147. VAID, *supra* note 36, at 256 (arguing that “middle-class and wealthy gay people are far more likely to be visible than are working-class and poor queers”); Hutchinson, *Out Yet Unseen*, *supra* note 14, at 608 (arguing that gays and lesbians of color often do not reveal their sexual orientation “because they fear the ‘horrible risk . . . [of] further disenfranchise[ment].’” (alterations in original) (citation omitted)); Samuel A. Marcossan, *The “Special Rights” Canard in the Debate Over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 137, 160 n.69 (1995) (arguing that gays and lesbians who respond to gay and lesbian income surveys “are those who are in a position of relative comfort and security, and not those in a position of relative economic insecurity, for whom the loss of their job or home if their sexual orientation became known would be most catastrophic”).

these misleading gay wealth surveys by unveiling their flawed racial and class assumptions.

2. Multidimensionality and the Problem of Comparative Equal Protection Analysis

Multidimensionality can also encourage courts and theorists to find alternatives to the rigidly comparative analysis currently used in equal protection discourse. Under traditional equal protection analysis, a group of individuals seeking heightened judicial solicitude must show how they are "like" other protected classes.¹⁴⁸ For gays and lesbians, meeting this standard has proved impossible. Courts invariably have found that gays and lesbians, unlike persons of color and women, do not experience discrimination on the basis of some "immutable" trait and do not lack political power.¹⁴⁹

The logic of the comparative approach disintegrates under the microscope of multidimensional analysis. A rigidly comparative equal protection jurisprudence incorrectly treats gays and lesbians, persons of color, and women as separate classes. Courts then racialize gays and lesbians as white and powerful and deny them judicial solicitude. Multidimensionality problematizes this inaccurate portrait of gay privilege and offers a more honest and diverse depiction of gay, lesbian, bisexual, and transgender communities.¹⁵⁰

3. Multidimensionality and the "Separate Spheres" Analysis of Racism and Heterosexism

Finally, multidimensionality provides a response to the judicial treatment of racism and heterosexism as unrelated phenomena. Although equality jurisprudence provides a remedy for some forms of racial subjugation, courts and lawmakers routinely exclude gays and lesbians from civil rights protection. By settling on a differing legal status for racial and sexual orientation discrimination, courts imply that the two forms of oppression exist in completely separate spheres and that the law can undo racism while leaving sexuality hierarchies untouched. Multidimensionality counsels against such an approach.

Multidimensionality uncovers the untold stories of gay, lesbian, bisexual, and transgendered persons who are poor and of color; their lives undermine the notion that systems of subordination resist convergence.

148. See *supra* notes 60–72 and accompanying text.

149. See *id.*

150. For a more extensive treatment of this issue, see Hutchinson, *Gay Rights for Gay Whites*, *supra* note 24, at 1378–82, 1385–86.

The absence of an accurate racial and class analysis in gay rights jurisprudence, by contrast, allows courts and lawmakers to deny civil rights protection to all gays and lesbians.¹⁵¹ Similarly, when antiracists dismiss the importance of combating heterosexism, they allow acts of racist-homophobia to remain unchallenged.¹⁵² Furthermore, in the context of antidiscrimination litigation, courts may point to the mere presence of heterosexist bias as evidence that defendants did not act out of racial animus. Under this essentialist, "either/or" formulation, a finding of anti-gay discrimination negates discussion of racial animus. Courts may then reject plaintiffs' claims on the ground that sexual orientation discrimination is not proscribed by civil rights jurisprudence.¹⁵³ Under a "separate spheres" treatment of race and sexuality, both heterosexism and racism are clearly mutually reinforcing and immune from judicial invalidation. Heteronormative courts decline to apply heightened scrutiny to claims of anti-gay discrimination and then point to the existence of heterosexism as disproving the operation of racism. Hence, these courts fail to remedy either racial or sexual identity discrimination; both forms of discrimination are insulated from relief under an essentialist equality framework.¹⁵⁴

Multidimensionality responds to this perverse jurisprudence. Multidimensionality argues for the inclusion of sexual identity within civil rights jurisprudence and theory not because gays and lesbians are "like" persons of color but because racism and sexuality hierarchies sustain one another.¹⁵⁵ Under a multidimensional approach, a progressive sexual politics becomes critical to the advancement of persons of color because heterosexism contributes to the subordinate status of racially oppressed communities.¹⁵⁶ Multidimensionality can, therefore, serve as an important tool in the development of an adequate response to subordination.

151. See *id.* at 1385 (arguing that the "prominence of social advantage within gay and lesbian equality discourse lends credibility to an inaccurate, racialized, anti-gay discourse that would deny equality to *all* sexually transgressive individuals") (emphasis in original).

152. See Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 15, at 98 ("By ignoring how the sexualization of race subordinates gay, lesbian, bisexual and transgendered people of color, anti-racist activists and theorists permit an entire category of racial oppression-homophobic racial subordination-to escape their needed analysis and critique.").

153. See *supra* notes 73-104 and accompanying text.

154. *Id.*

155. See Hutchinson, *Out Yet Unseen*, *supra* note 14, at 633-34 (arguing for protection of sexual identity by demonstrating its relationship to racial identity).

156. See Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 15, at 20-40 (discussing the ways in which sexuality hierarchies burden persons of color).

CONCLUSION

This Symposium has provided needed space for scholars to examine important issues in equality theory and jurisprudence. Among the most compelling concerns facing contemporary scholars is the raging conflict over identity caused by essentialist equality theories and activism. Essentialism falsely constructs progressive communities as competitors, rather than as potential allies; essentialism also requires individuals to discard important aspects of their identity in order to embrace a narrow, inadequate conceptualization of equality.

A powerful intellectual movement, however, offers insightful analyses that can redirect equality theory and jurisprudence away from the failed essentialism experiment. Intersectionality theory, for example, has provided jurists, scholars, and activists with persuasive arguments regarding the need to construct more complex antistatutory theories. More recently, race-sexuality scholars have expanded the intersectionality literature with substantive and conceptual improvements. Together, these scholars are building an alternative liberation discourse that can serve as the foundation for the articulation of more comprehensive and effective theories of equality.