

Philosophy, Law, & Literature

IDENTITY, LAW, AND ESSENTIALISM:  
WHAT’S LOVE GOT TO DO WITH SAME-SEX MARRIAGE?

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\*Rainier Elias, J.D. The University of Idaho College of Law. I would like to dedicate this article to my family and friends, who have stayed by me through the best and the worst days of my life. Especially, I would like to mention my mom, Marcia Gary, and my partner, Eric Nickelson, for I would be nothing without them. I would also like to thank Professors Annemarie Bridy, Elizabeth Brandt, and Michael Satz, who helped me understand the concepts discussed here. Lastly, I would like to thank *the crit*, an incredible journal of change for students, practitioners, and academics.

## INTRODUCTION<sup>1</sup>

This paper will introduce a critique to contemporary uses of essentialism to justify the continuing existence of essentialized identity politics based arguments. I will accomplish that task in three steps.

In section I, I will give a brief introduction explaining my motivations behind writing this paper. I will give a brief summary of my experience writing on LGBT issues, particularly throughout the classes I have taken as an undergraduate and as a law student.

In Section II, I will provide a framework for critiquing and overcoming single-axiomatic discourse on discrimination. I will explain the contemporary conceptions of essentialism, power and identity, and argue that essentialism is the foundation of categorization. I will recognize that categorization is necessary for the development of science, and is so intrinsic to human thinking that we hardly notice using it to understand the world. I will explain the steps of essentialist analysis, emphasizing on the process of listing categories and placing the essential in the center, and the trivial in the periphery. After explaining essentialism, I will introduce the modern conception of power as the primary force behind essentialist thinking. I will explain that power dynamics manifest themselves in essentialist thinking, and that they tend to polarize discussions on the essence of human nature (assuming such exists).

In Section III, I will apply that framework to the current discussion on same-sex marriage, and explain how essentialist rhetoric does not accomplish goals of the LGBT liberation movement. By oversimplifying marriage, the current arguments lack theoretical strength, and provide for the possibility of real world complications. Specifically, I will argue that trivializing heteronormativity disallows for the opportunity to understand our inherited oppressive nature of marriage, and hinder the possibility to reconstruct marriage within true perspectives of liberation for all people, not just LGBTs.

### I. "PREFACE:" CONFESSIONS OF A JADED LAW STUDENT

This paper was born out of a class I took many years ago called "Philosophy of Law." I was only a student of theatre at the time, and much of my interest in philosophy and in law stemmed from my realization that the world I lived in was not in fact the world I thought I should be in. I felt it was pressed upon me to make a contribution to begin the changes I believed needed to happen.

After reading a hodge-podge of works concerning jurisprudence, I realized the law provided us with tools to change our society. Being particularly interested in LGBT discrimination,<sup>2</sup> I was naturally drawn to literature that discussed individual and fundamental rights that stemmed from the Constitution or from constitutional interpretation. It was not long

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<sup>1</sup> I have attempted to create a work that can be read by someone who has never engaged in these issues. I have only been successful to some extent. To achieve that goal, I have written in a semi-narrative style. At times, I will be asking you to think before moving on to the next sections. At other times, I will lose myself in the incredible complexity of my thoughts regarding the intersection of law and philosophy. I hope you can find some sense as I switch from one to the other and then back again.

<sup>2</sup> LGBT stands for Lesbians, Gays, Bisexuals and Transgenders, and is the most commonly used acronym to describe a group of individuals on the basis of their sexual orientation and gender identity.

before I found myself reading cases such as *Lawrence v. Texas*<sup>3</sup> and *Romer v. Evans*.<sup>4</sup> From there, it was not too much of a leap to envision a future in which our society recognizes the pervasiveness and unfairness that characterize homophobia. My role as a future law student, I realized, was to provide my contribution to the understanding of what constituted a “protected class” in the context of Equal Protection, and to particularly argue that classifications that target sexual orientation as a criteria were suspect and deserving of strict scrutiny analysis.<sup>5</sup>

The lens I chose to apply was that of Marxist thinking, and my argument was that, much like the dichotomous conflicts between the proletariat and the bourgeoisie, wherein the bourgeoisie exploited the proletariat for economic gains, gays and straights lived in a class-struggle. In other words, I saw sexual orientation classifications as a means of disempowering gays and lesbians not just ideologically, but also economically.

I was naïve, and largely unaware of the structure of our constitutional system. But I was not totally wrong—and in my own defense, much case law discussed the negative tax consequences that would follow a state’s recognition of same-sex marriage.<sup>56</sup> With my limited understanding, and blood pumping through my veins in rage, I looked at the entire problem from a single-axiomatic perspective. I thought the root of the problem was discrimination on the basis of sexual orientation. Thus, not only was I naïve, but I was also flat-out wrong.

Much has happened between then and now, and I am a completely different person. Mostly because law school has taken a toll on my mental sanity and my confidence, but also because I understand that constitutional analysis is much more complicated than I once thought it to be. I have concluded that my previous solution is not a solution at all, but instead it contributes to the problem. I have not changed my mind with regards to the inherent unfairness of sexual orientation classification, but I seriously question the necessity of a tiered system of scrutiny review in order for justice to be achieved for LGBTs everywhere. That is because advocating for a system that creates hierarchies of discrimination promotes injustice and separation; it does not eliminate it.

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<sup>3</sup> 539 U.S. 558 (2003). *Lawrence* addressed the constitutionality of a statute that provided criminal punishment for sodomy committed by individuals of the same sex.

<sup>4</sup> 517 U.S. 620 (1996). *Romer* addressed the constitutionality of a Colorado constitutional amendment that forbid any entity

<sup>5</sup> Much of U.S. equality jurisprudence categorizes discrimination based on the motivating factor behind it, and whether the creation of that category is an appropriate means of achieving a certain goal. That produces some strange results. For example, classifications that distinguish individuals on the basis of race are treated differently from those on the basis of gender. *Compare* *Brown v. Board of Education*, 347 U.S. 483 (1954) with *Craig v. Boren*, 429 U.S. 190 (1976). Although this article provides tools for analyzing those standards, the application of these theories will be saved for another day. For an excellent article explaining the tiered system of equality, see Suzanne Goldberg, *Equality Without Tiers*, 77 S. Cal. L. Rev. 481 (2004).

<sup>6</sup> See *Varnum v. Brien*, 763 N.W.2d 862, 897–904 (Iowa 2009). In *Varnum*, much like in other State Constitutional challenges to same-sex marriage, the government argued that allowing for same-sex marriages would bring negative tax consequences to the State because having more married couples would necessarily mean giving more tax benefits to individuals. Consequently, the State would reap less from tax revenues. Needless to say, the bargain the state makes by giving tax benefits is not without a purpose: after all, it is almost unanimously held that states have a compelling interest in promoting marriage, either as a means to promote procreation or as a means to simply promote marriage as an institution wherein individuals tend to be more successful, economically and otherwise. For further discussion on same-sex marriage in state courts, see *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (New York), *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (Washington State), *In re Marriage Cases*, 43 Cal.4th 757 (Cal. 2008) (California).

My realization that the current system of scrutiny is unworkable to achieve true justice stems from two realizations, one concerning the tiered system of constitutional review and one concerning the grounds of “classifying” any given “classification” into rational basis, intermediate scrutiny, or heightened scrutiny.

First, to accept it as a good model and framework means to accept that the hierarchy of discrimination is desirable. In other words, it means to accept that discrimination on the basis of race is more invidious than discrimination on the basis of gender, which in turn is more invidious than discrimination on the basis of sexual orientation. Although these have different historical underpinnings, they have systematically provided for otherization, separation, and exploitation by some unto others.

Whether it is for explicit economic gain, such as in slavery or traditional marriage, or maintaining ideological supremacy, such as in modern sexual orientation discrimination, to a lesser or greater extent, people suffer. The focus on the extensiveness and history of discrimination to determine what degree of scrutiny one ought to apply in constitutional review creates a distorted view on the purposes of discrimination and on the purposes of constitutional analysis, naturally generating incomprehensible results. Additionally, it is inapplicable to individuals who experience layered discrimination for presenting characteristics that place them in different minority “groups.”

The second realization is that the system relies on some validity of the “label” outside its creation for the sole purpose of “otherizing,” discriminating, and/or exploiting. In other words, to argue that sexual orientation classifications are entitled to strict scrutiny review necessarily means to recognize that there is some validity in the creation of the category in the first place. This paper will argue that such categorizations are only created to simplify the complexity of human nature, and that they have no positive validity in isolation.

## II. THE SOURCES AND OBJECTIVES OF CONTEMPORARY CATEGORIZATION

Essentialism is so ingrained in contemporary thought that one could argue that it is impossible, or extremely impractical, to do away with it.<sup>7</sup> Although essentialism is useful for us to make sense of the complex world we live in, when it comes to human nature, individuals should refrain from using it indiscriminately. That is because inherent in human essentialism is a system of power dynamics that created categories simply to oppress people, particularly by placing them in polarized places in the human condition continuum. In this section, I will attempt to define these two terms before working on a framework that incorporate them.<sup>8</sup>

### *A. Essentialism & Modern Philosophy*

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<sup>7</sup> In my experience in this year’s class, I was shocked to see that some students would go so far as to say that categorization is inherent to human nature, but not from the perspective that it had socially been constructed to be so, but almost from a biological standpoint. I reject that view, and will attempt to attack those presumptions through this paper.

<sup>8</sup> One pervasive critique to CLS is that it is impenetrable to those who are unfamiliar with Critical Theory language. In knowing that there are others out there who may be like me, speaking English as a Second Language, without training in Philosophy, I thought I would demonstrate the framework I will use by incrementally increasing the level of complexity in my arguments. Therefore, I will first talk about a relatively simple object—a table—and apply the framework to it. Then, I will apply the same framework to the marriage debate to demonstrate how problematic it becomes.

Essentialism is a “belief in true essence which is most irreducible, unchanging, and therefore constructive of a given person or thing.”<sup>9</sup> Putting this in formal logic, to conclude that something is the essence of something else means to say that the first is necessary for the second.<sup>10</sup>

Essentialist thinking is as old as philosophy itself. It is a response to answering some deep philosophical questions, and it proved helpful particularly in early stages of scientific categorization. It provided a framework for understanding what it was that any given thing really was. If one could reduce any given object to its essential categories, one could find all other objects that were like it and distinguish them from all those objects that were not. In essentialist thinking, nature often provides the raw material and is the starting point of everything we study.<sup>11</sup>

There are mainly four ways of characterizing essentialism.<sup>12</sup> On one end, maximal (or pan-) essentialism dictates that all of any given object’s characteristics and properties are essential to its very existence.<sup>13</sup> On the other hand, minimal essentialism dictates that all properties are only accidental, and therefore non-essential, leaving a very few number of essential characteristics.<sup>14</sup> I would like to briefly pause and exemplify this line of thinking through a simple exercise.

#### i. The Essence of Tableness

Think of a table. A table can be made of several different types of material: wood, plastic, metal, glass, and paper. Theoretically, it could be infinitely long and infinitely wide. It could be infinitely short and infinitely narrow. It could be any one color, any combination of colors, or colorless. It could take many shapes. The process of listing off these categories is the first step in essentialist analysis. But, according to essentialist thinking, one must go further. If everything has an irreducible essence, a center, and not every quality is essential to a thing, then some of these qualities I listed will not be in the essence or center of “tableness.” The essentialist then will embark in distinguishing essential from trivial characteristics, displacing trivial characteristics to the periphery, and closing in the essence to the center. The question, then, is: “what is a table?” What is it about a table that makes it a table, and in whose absence makes a given object no longer a table? In other words, what it is about “tableness” that even if the human mind is not capable of articulating it, some definition of [table] can be framed that is irreducible.<sup>15</sup> Irreducibility must be absolute: essentialism requires that whatever definition one concludes must include all the necessary descriptors and no unnecessary ones.<sup>16</sup> Moreover,

<sup>9</sup> DIANA FUSS, *ESSENTIALLY SPEAKING: FEMINISM, NATURE & DIFFERENCE* 2 (1989). COMMENT: the very practice of defining terms is a search for essence. Dictionaries are essential to promoting essentialist thought.

<sup>10</sup> Teresa Robertson, *Essential vs. Accidental Properties*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (FALL 2008 EDITION), Edward N. Zalta ed., <http://plato.stanford.edu/entries/essential-accidental/>.

<sup>11</sup> FUSS, *supra* note 9, at 2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 547.

<sup>16</sup> *Id.*

when those characteristics are found together in a single thing, that thing will be a table.<sup>17</sup> Thus, after listing those categories, an essentialist would indulge in separating trivial from essential characteristics.

Initially, that is not a very complex task. Whether or not any given table is red, made of oak and 4'x7'x3', as opposed to being brown, made of cherry and being 5'x6'x3' makes some difference in the varied spectrums of essentialist analysis. A maximal essentialist would say that all of the properties, such as color, composition or size, of any given table are essential to it. A minimal essentialist would find that these were all non-essential categories because variations on them would still not affect the determination that something is or is not a table. In other words, because a table can be red, white, black, brown, or any combination thereof, a table's color is only an incidental (read non-essential) characteristic of it. It follows that a minimalist essentialist would dig deeper to find the essence of tableness. They would probably argue that maybe the surface capacity is essential, because all tables must have a surface, regardless of color, shape, measurements, etc.<sup>18</sup>

## ii. The Essence of Humanness

A strong line of essentialist thinking preaches that nature is the best informant on any given thing's essence.<sup>19</sup><sup>18</sup> That point of view can be critiqued from two main perspectives. First, it disregards the reality that not all natural (even biological) characteristics of any given thing are "necessary" to the point of being informative of that thing's essence. Second, it disregards the reality that the relationship between given characteristics and between different objects can be more informative of a thing's essence than any one of the different parts. Most importantly, nature-based essentialist thought disregards the reality that socially constructed meanings to things and characteristics could be more informative than whatever its natural conditions would reveal.<sup>20</sup>

Essentialism simplifies the world around us. It allows us to process complex information quickly and respond to stimuli by grounding categorization. Although categorization is important for us to function as human beings and as a society, it presents

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<sup>17</sup> *Id.*

<sup>18</sup> The Oxford dictionary describes tables as a "piece of furniture with a flat top and one or more legs, providing a level surface for eating, writing, or working at." Definition of table

OXFORDDICTIONARIES.COM <http://oxforddictionaries.com/definition/table>. Last updated April 2012 Pure essentialist thinking would probably challenge that definition even further. On one hand, it is not necessary that all tables have one or more legs—would a table that is missing a leg (maybe it was broken, or sawed off) be any less of a table? Additionally, that one does not eat, write, or work at a table is not dispositive of "tableness:" that categorization is overinclusive and underinclusive. It is overinclusive because for it is perfectly possible that a table might have never been, be or ever be used in the course of its existence. Additionally, it is underinclusive because there are many other activities performed on tables other than eating, writing, or working at it.

<sup>19</sup> See generally, DIANA FUSS, *ESSENTIALLY SPEAKING: FEMINISM, NATURE AND DIFFERENCE* (1989).

<sup>20</sup> That is particularly true when biological traits are constructed for the purposes of categorizations. While blood-type is a fairly scientific term without sociological implications, skin tone, as a biochemical quality, is less revealing of a human being than race, a socially constructed term. The same is true of sex as a biological term, and gender as a socially constructed term. The important information that is missing from the strictly biological categories is how the socially constructed terms assign privilege and powers amongst different individuals.

substantial dangers, particularly when human beings are essentialized and categorized accordingly.<sup>21</sup>

One of the most debated questions of western philosophy has been precisely that: what is the essence of a human being, that which is determinative of what is human and what is not? Different thinkers focused on different aspects of human existence and argued that some things, above all others are so close to the essence of humanness that it ought to define it. For example, much of theology argues that variants of the human soul are the incorporeal essence of humanness.<sup>22</sup> Thus, that which does not have a soul cannot be human. The concept of labor, or the ability to work towards a certain goal has also been characterized as essential to humanness.<sup>23</sup> Additionally, human's ability to think is often considered to be at the core of humanness.<sup>24</sup> But not only metaphysical aspects of human beings have been considered close to the core of humanness: in fact, to this day, some biochemical characteristics are considered essential to humanness.

But how can that be so? How can the color characteristic of a table be a trivial trait of "tableness" and the color of one's skin be essential to one's humanness? If one were to look only at the biochemical configuration of the human body, how could one say that the color of one's skin is more important in defining humanness than the color of one's eye, or one's hair? Or how could one say that color, as a characteristic, is more relevant than one's sex, or one's weight? If these factors are biochemical, should not they all be equally relevant or irrelevant?

The answer to these questions lies not in essentialism, but elsewhere, because essentialism is only a tool, a mechanism to obtain a certain goal. While essentialism and categorization are the pillars of the scientific method, serving discrete purposes of organization, in human interaction, essentialism is the main tool of oppression. It operates not simply to categorize humans based on arbitrary criteria, but serves as the foundation for exclusion of those human beings from the center of humanness and to ground that separation as one that is unavoidable, necessary and unbreakable. In a world where knowledge is socially constructed, where not all but only some of us have the opportunity to develop understandings of what it means to be human, essentialism grounds power dynamics that ultimately guarantee powerlessness and oppression.

### *B. Modern Views On Power*

Simply stated, power is ability. The ability to speak, to act, to exist. But that simplistic view of power is incomplete, as it focuses on the individual. In a sense, if power was a mere biochemical product of our bodies and every individual's ability to speak, to act, or to exist were strictly conditioned on those biochemical configurations, then similar biochemically configured individuals would experience similar exercises of power, and therefore similar abilities to speak, to act, to exist. However, that is not the case.

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<sup>21</sup> See Debra Lyn Bassett, *The Rural Venue*, 57 ALA. L. REV. 941 (2006).

<sup>22</sup> See "Soul," ENCYCLOPEDIA BRITANNICA, 2010.

<sup>23</sup> For the philosopher Karl Marx, the concept of labor is inherent in humanness. See generally, Karl Marx and Friederick Engels, *Economic and Philosophical Manuscripts of 1844 and the Communist Manifesto*, Prometheus Books (1988).

<sup>24</sup> The conflicts of essence and existence have permeated modern thought in a chicken and egg fashion: does existence pre-exists essence, and therefore is determinative of humanness, or is there something else (thought?) that is outcome determinative?

Power exists socially, is socially constructed and distributed, and flows from powerless to powerful (and vice-versa) according to socially constructed rules. Socially speaking, power is the ability to guarantee favorable outcomes from any given circumstances.<sup>25</sup> That ability is not individual, but social: when one individual guarantees favorable outcomes for oneself, it necessarily guarantees an unfavorable outcome for at least some others. Thus, power could potentially be analyzed according to the extent to which any one person can guarantee a certain favorable outcome by getting another to do something that results in an unfavorable result for them.<sup>26</sup> Conclusively, at the very least, then, power is action (or the ability to act) and status (one who has more ability to act, “powerful,” or less ability to act, “powerless.”)

The question is, then, how can one distinguish the powerful from the powerless, and what characterizes that relationship? As an inherently amorphous concept, power must be understood not only from its individual representations, but also in the aggregate.<sup>27</sup> This is a complex task, as “power is everywhere, not because it embraces everything, but because it comes from everywhere.”<sup>28</sup>

### *C. Essentialism, Power, & Personal Identity*

Power dynamics manifest themselves as people identify characteristics in one- another to differentiate, separate and oppress one another. Throughout time and in different societies, humanness has been essentialized to separate and disempower individuals. Through social constructions of race, gender, age, sexual orientation, disability, etc., our society has separated the core of humanness and set up rules that separate some from others. Skin color, sex, age, sexual preference, and disability coexist with thousands, perhaps millions of other human traits, yet in the process of constructing and essentializing the human, it became convenient for one purpose or another to preserve versions of them in the center. More specifically, it is not skin color that was essential for humanness, but white skin color. It was not sex that was essential for humanness, but being a man. And it is not sexual orientation that matters, but whether someone is heterosexual. For the purposes of this paper, I would like to discuss these three examples of essentialist thinking as applied to humanness.

For the first example, recall the condition of blacks both during and after the abolishment of slavery. The white color of one’s skin was considered to be so close to the essence/center of humanness that not being white, essentially, meant not being human. Thus, in

<sup>25</sup> See, e.g., Isador Wallimann, *On Max Weber's Definition of Power*, 13 J. OF SOC. 231 (1977); *Id.* at Talcott Parsons, 656 J. OF SOC. (1968) (the probability within a social relationship of being able to secure one’s own ends even against opposition); Talcott Parsons & A. M. Henderson, 152 J. OF SOC. (1965) (“the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests.”); Reinard Bendix, 221 J. OF SOC. (1962) (“The probability that one actor within a social relationship will be in a position to carry out his own despite resistance.”); Raymond Aron, 101 J. OF SOC. (1964) (‘the chance of obtaining the obedience of others to a particular command’); Dennis H. Wrong, 54 J. OF SOC. (1970) (the probability that one actor within a social relationship will be in a position to carry out his own despite resistance, regardless of the basis on which this probability rests); H. H. Gerth & C. Wright Mills, 180 J. OF SOC. (1958) (In general, we understand by power the chance of a man or of a number of men to realize their own will in a communal action even against the resistance of others who are participating in the action.”).

<sup>26</sup> Allen, Amy, “Feminist Perspectives on Power”, *The Stanford Encyclopedia of Philosophy* (Spring 2011 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/spr2011/entries/feminist-power/>>.

<sup>27</sup> See MICHAEL FOUCAULT, *THE HISTORY OF SEXUALITY* 92–93 (1978).

<sup>28</sup> *Id.* at 93.

the drive to maximize economic output, it made sense to exploit a (non-white therefore) non-human tool of production. Essentialism was then so powerful that two individuals who could otherwise be similarly situated for having other similar characteristics (having approximately identical bio-chemical composition) were placed in the center (white) and in the periphery (non-whites) solely on the account of the color of their skin. All other human characteristics were trivialized in the process: that both whites and blacks could think and learn, act rationally, hurt, believe, and perform identical biochemical functions did not matter, as blacks were dehumanized on the basis of one simple characteristic: the color of their skin. The dehumanization was so powerful that it subconsciously entitled individuals to treat blacks as apolitical animals, and vestiges of that reality exist to this day.<sup>29</sup>

The second example of essentialist thinking is that which determines gender roles. Much like discrimination on the basis of race, discrimination on the basis of gender was a product of essentialist thinking. Although white women were much like white men, the facts that the bio-chemical composition of the female body had evolved and adapted for conception were overriding of her humanness. In many ways, the woman was dehumanized, as she became a vessel for the proliferation of the man's existence and for the furthering of the man's material interests. She was a machine that was designed to birth children, to clean the house, and to serve to a man's every need. A domestic slave who was not entitled to property, to status, to participation in cultural production, or even to legal existence.

The third important example I would like to mention is essentialist thinking for the purposes of analyzing human sexuality. Much like discrimination on the basis of race and gender, discrimination on the basis of gender non-conformance and sexual orientation is a product of essentialist thinking. Although heterosexual white women and homosexual white women were potentially identical aside from the question of sexual orientation, the homosexual woman was dehumanized as a sinner by our dominant religious institutions, as a criminal by our system of justice, and as a lunatic by the sciences. By placing heterosexual orientation and biological gender conformance at the center of humanness, anything non-heterosexual or non-gender conforming was necessarily in the periphery, and therefore less human.

These examples of essentialist constructions of humanness are few within a large amalgam of axes that exist and operate together to separate and disempower individuals.<sup>30</sup> For the purposes of this paper, I will only use these three characteristics, as well as the identity politics movements that have embraced them as examples of essentialist thinking producing social injustice. However, the same points can be made about other axes, including socioeconomic class (rich in the center, poor in the margins), religious affiliation (dominant in the center, minority in the margins), etc. The point I want to make is that the development of single-axiomatic theories of identity for the purposes of oppression, regardless of their compounded effect, are the product of an idea that the human condition could be essentialized to a particular trait: sex, race, or sexual orientation. The construction of the essence of humanness preserves the most amount of power within the white, male, Anglo-Saxonic, heterosexual, young, disability-free individual in the center of economic dominance as well as the control of cultural production as a matter of default.

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<sup>29</sup> See generally, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

<sup>30</sup> See generally, Francisco Valdez, *Sex and race in Queer Legal Culture: Ruminations on Identities and Inter-Connectivities*, 5 S. CAL. REV. L. AND WOMEN'S STUDIES 25 (1995).

#### *D. Identity Politics & Essentialism*

Before applying and critiquing the essentialist method in the context of the same-sex marriage debate, I would like to quickly address the modern conception of identity politics and its relevance in the context of the LGBT rights movement.

Identity politics are political arguments rooted in an identified group's experience. Identity politics focuses on how one characteristic present in all those groups' members affected their collective and individual experiences. Historically, identity politics arguments have focused on a characteristic that members share, and, for that characteristic alone, experienced systematic social oppression. It has included race, gender, sexual orientation, socioeconomic class, religious affiliation, and claim of sovereignty, among others.

Identity politics, in many ways, is a product of essentialist thinking. On one hand, it is a response to the systematic oppression that resulted from the essentialization of the human condition down to one given characteristic that was considered reprehensible. It calls for membership and association of individuals who were, as a matter of experience, excluded from society and from the political process on the basis of a criterion that is arbitrary or otherwise suspect. Identity politics based organizations tend to have single-minded objectives: to eliminate power dynamics on the basis of one single axis in the pursuit of true equality. Thus, organizations such as the NAACP and Lambda Legal tend to focus on questions of racial equality and sexual orientation equality, respectively.<sup>31</sup>

Identity politics sought to accomplish the main goal of deconstructing the social construction of those categories and to demand respect for individuals based on respect and legitimation of the category.<sup>32</sup> By arguing for respect for a peripheral category, it seems as if identity politics proponents ask to belong to the center, to that very center that excludes them. That is a very troublesome proposition, particularly because it accepts that categorization as true, or relevant, on grounds other than the negative reason why it was socially constructed to begin with. But even more troublesome is that it is yet another product of essentialist thinking, and thus plagued with fallacies that are inherent to it.

Identity politics requires essentialist thinking on two fronts. First, individuals must essentialize their existence to the one axis of their identity that is the source of their negative social experience. Second, communities must essentialize their membership to one category that binds all. Both sacrifices are problematic and strengthen the power-dynamics that allowed for oppression to exist. It blinds individuals within from the reality that within any given axiom of humanness, other axis coexist that ultimately create different levels of oppression.<sup>33</sup> Thus, an attempt to essentialize the oppression of women inherently brings within it the danger of

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<sup>31</sup> This reality is changing. For example, the NAACP's mission statement has been broadened to not just eliminate race-based discrimination, but to generally "ensure the political, educational, social and economic equality rights of all persons." See <http://www.naacp.org/pages/our-mission>.

<sup>32</sup> Cressida Heyes, *Identity Politics*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Spring 2012 Edition), <http://plato.stanford.edu/entries/identity-politics/>. As Sonia Kruks puts it: what makes identity politics a significant departure from earlier, pre-identarian forms of the politics of recognition is its demand for recognition on the basis of the very grounds on which recognition has previously been denied: it is *qua* women, *qua* blacks, *qua* lesbians that groups demand recognition. The demand is not for inclusion within the fold of "universal humankind" on the basis of shared human attributes; nor is it for respect "in spite of" one's differences. Rather, what is demanded is respect for oneself *as* different (2001, 85).

<sup>33</sup> See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

producing race and class-based bias conclusions, which would ultimately lead any results towards being beneficial to only a discrete minority of women.

### III. FITTING IDENTITY POLITICS THROUGH ESSENTIALISM: WHAT'S LOVE GOT TO DO WITH IT?

Identity politics movements must continue to change and to refrain from using essentialist rhetoric in the process of fighting for equality. That it is politically advantageous to advocate for change based on criteria that people can easily place themselves as supportive or adversarial of may present some logistical advantages, but the theoretical shortcomings and real world consequences are too significant to take that risk blindly.

Think, for example, of the LGBT rights movement. Organizations such as Lambda Legal and Human Rights Campaign (HRC) focus solely on issues of LGBT equality through policy, lobbying and impact litigation. Presumably, its main beneficiaries are individuals who are oppressed by sexual orientation and gender identity discrimination. However, a closer look reveals some fallacies in essentializing oppression through the lens of sexual orientation to the exclusion of other axis. Take a look, for example, at the fight for LGBT equality through marriage. Can that be said to be true equality? That marriage brings with it a number of benefits that are undoubtedly beneficial is unquestionable. But do those benefits truly benefit all gay people, as to warrant the expectation that they should all stand behind that cause? Skepticism is warranted.

Discussions on LGBT equality through marriage have been polarized and essentialized based on litigation strategies employed by parties in controversies at the federal circuit. The basis of their litigation is to determine the purposes and nature of marriage, and of course, each party employs essentialist reasoning to their own best advantage. On one hand, marriage advocates essentialize marriage down to its economic and emotional characteristics. Gay marriage proponents argue that marriage is about the property relationships between the spouses and between individuals who love one another. In the process of drawing these realities to the center, proponents trivialize heteronormativity, procreation and religion as non-essential components of civil marriage. Gay marriage opponents do the opposite. Without touching the property aspect of marriage, opponents essentialize marriage down to its traditions of heteronormativity and condition all other aspects of marriage to it. In other words, the property relationships, affection, procreation and faith only matter to the extent that they exist within heteronormativity. Both views are theoretically flawed and have substantially troublesome real world applications.

In the current debate, essentialism cannot be a theoretical tool for gay marriage advocates or opponents because it leads to false understandings of what marriage truly is. On the outset, the task of essentializing marriage is suspect, particularly with the material interests at stake in litigation. But how could one find the true essence of marriage from those characteristics I just mentioned?

Could marriage be essentialized down to its economic underpinnings? That would be overinclusive and underinclusive by definition. In other words, marriage has existed for much of our history without the State sanction, control, or incentives in the form of property benefits. The view that marriage serves economic purposes in a given relationship relies on a major assumption: that the parties have economic interests at stake upon entering the marriage relationship. In other words, it assumes that marriage will substantially address issues of

control, joint ownership and disposition of property belonging to the spouses. But is a marriage between two low-income individuals who own no property any less of a marriage than one between two high-income individuals who own property? One thing is clear: individuals, gay or straight, who own property and get married have substantial incentives to preserve those incentives because it is in their material best interests to do so. If that is the case, then the attempt to essentialize marriage to economics for the purposes of gay liberation is beneficial not to all gays, but mostly to gays who have property.

Above all, the fact that we can recognize that a marriage still exists without material interests ultimately undermines the conclusion that economics is essential to marriage. But that does not warrant the conclusion that economics ought to be trivialized: marriage benefits are important to the overwhelming majority of married people who own property. Not to mention that there are people who marry strictly for economic reasons. Thus, economics should not be considered an essential characteristic of marriage, neither one of its trivial characteristics. Economics should be taken in consideration along with other factors, at the risk of being done away with by a society that has accepted the trivialization of economic benefits inherent in the status quo of marriage.

Could marriage be essentialized to its heteronormativity? Same-sex marriage opponents' arguments systematically focus on the importance of heterosexual tradition in marriage laws, arguing that procreation and child-rearing, the two foundations of marriage, can only be furthered in a heterosexual setting. Same-sex marriage proponents argue that heteronormativity is trivial in marriage, putting forth expert evidence that same-sex couples often become parents, and that children are just fine in that setting. They are both incorrect and correct at the same time.

On one hand, it is undeniable that our Christian-influenced system of laws has not contemplated marriage without procreation as a central component. That we can envision a society that accepts individuals marrying one another regardless of their gender is but a development of human thought that rejects discrimination. However, trivializing heteronormativity ultimately weakens the theoretical foundations of the gay liberation movement. The pervasiveness of heteronormativity, its workings to oppress married women, to remove their ability to own property, to essentially enslave them in the domestic setting, was inseparable from marriage for much of its existence. In a reality where economic inequality prevenient from marriage and its particular impacts on women have not yet been overcome, trivializing heteronormativity empties the liberalizing nature of the LGBT rights movement. But that is simply a theoretical limitation. The real-world consequences can be seriously damaging.

The failure to acknowledge heteronormativity as an important characteristic of marriage could allow for the same power dynamics that disempowered women in traditional marriage to disempower individuals within same-sex relations. As oppression through heteronormativity is but one form of power dynamics, it is perfectly conceivable that the trivialization of heteronormativity leaves plenty of space for other types of power-dynamics that achieve the same goals of heteronormativity to oppress individuals in same-sex marriages. In other words, individuals in same-sex relations may be somewhat immune from gender-bias within the relationship, but that does not mean that they are immune from other sources of bias, such as race, class, disability, or otherwise.

## CONCLUSION

The examples of economics and heteronormativity are only two, among many. But economics and heteronormativity illustrate the dangers behind essentializing marriage down to an irreducible form. Both proponents and opponents within the same-sex marriage debate ought to avoid essentializing marriage down to an irreducible form to avoid the risk of trivializing aspects of marriage that are important and in their best interests to preserve. At the very least, same-sex marriage proponents have a responsibility to avoid trivializing heteronormativity in the process of advocating for equality. That responsibility stems from the foundations of the LGBT liberation movement—the understanding that discrimination on the basis of sexual orientation was a tool to preserve heteronormativity within marriage. Trivializing heteronormativity thus erases a substantial component that ensured the oppression of women without actually seeking to remedy it. In doing so, winning marriage equality will only allow for the same power-dynamics that have existed in heteronormative marriage to be translated into the same-sex marriage setting and will consequently limit equality to a very narrow category of LGBT individuals.

The appropriate approach is to address marriage in the full mess that it actually is: An institution that simultaneously stands for union and separation; that permitted traditional families to thrive but for other individuals to be oppressed; that economically empowers the wealthy but makes little impact on the poor that was created to foster procreation, but that never required it; and an institution that was built on discrimination on the basis of age, sex, gender, wealth, social class, and just about every axis of human identity. Once we can recognize what marriage truly is without trivializing parts of it so that we can obtain the immediate benefit of a victory in court, we will be in a better position to reinvent marriage and to not just talk the equality talk, but walk the windy road of equality walk.