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## Empirical Intersectionality: A Tale of Two Approaches

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# Empirical Intersectionality: A Tale of Two Approaches

Ange-Marie Hancock\*

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## I. INTRODUCTION

Over the past thirty years, the intersectional turn has critically shifted how we conceptualize and interpret patterns among analytical categories<sup>1</sup> like race, gender, class, and sexuality as more than identities to be adopted, rejected, or imposed. Instead, these categories are analyzed as social constructions that, through the diffusion of power relationships, have vastly material effects. Moreover, intersectionality theory challenges the logic of how processes of racial, gender,

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1. The idea of analytical categories of race, gender, sexuality and the like is deeply complicated based on the fundamental contention that such categories are, at heart, social constructions. I use “category” and “inegalitarian tradition” here, while acknowledging their complexity mostly in the interest of space. At the same time, these social constructions—carried around in our minds, enshrined in our federal, state, and local policies, and collective sociopolitical discourses—have material effects like deportation, deaths in police custody, and environmental degradation.

class, and sexuality disparities are produced and remedied.<sup>2</sup> Intersectionality theory has been characterized as the most significant intellectual contribution of gender studies to the world.<sup>3</sup> Surprisingly, at least part of its success has been attributed to its vagueness.<sup>4</sup> Nowhere is this more true than in the empirical applications of intersectionality. When enacted empirically, intersectionality theory is usually conceptualized as a theory that fits four standards of empirical social research: (1) It explains a phenomenon. (2) It is grounded in a substantive literature. (3) It is falsifiable. (4) It is methodologically agnostic.

Is this, however, the most appropriate way to empirically operationalize the legal theory of intersectionality? This Article examines two contrasting empirical operationalizations of intersectionality theory and suggests a series of trade-offs between them, including preservation of theoretical integrity and current litigational utility. To do so, I use an ongoing research project concerning same-sex marriage, or marriage equality as it is termed by advocates, to illustrate distinct empirical methodologies that are compatible with the intersectionality-as-testable-explanation and paradigm intersectionality approaches, respectively.

By now it is well-known that Kimberlé Williams Crenshaw first publicly coined the metaphor of intersecting streets in her 1989 article, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Antiracist Practices*.<sup>5</sup> Her article has now sparked nearly twenty-five years of academic work, equality legislation, and human rights advocacy around the world. Crenshaw, a long-time law professor, emerged from a critical race theory (CRT) movement that is grounded in litigational strategies and legal praxis. Those legal roots are clearly reflected in that 1989 article about intersections through its emphasis on anti-discrimination doctrine.<sup>6</sup>

Empirical scholars have interpreted Crenshaw's argument in that article to claim that "race plus sex" discrimination was a previously unaddressed alternative explanation for disparate workplace outcomes.<sup>7</sup> Although this way of operationalizing intersectionality for empirical research is critically important as a strategy that can document discriminatory practices, experiences, or policies, it is just one of two ways of operationalizing intersectionality, and not without its costs. I call this approach the "intersectionality as testable explanation" approach.

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2. Ange-Marie Hancock, *Trayvon Martin, Intersectionality and the Politics of Disgust*, 15 THEORY & EVENT (2012), [http://muse.jhu.edu/journals/theory\\_and\\_event/v015/15.3.hancock.html](http://muse.jhu.edu/journals/theory_and_event/v015/15.3.hancock.html).

3. Leslie McCall, *The Complexity of Intersectionality*, 30 SIGNS: J. WOMEN & CULTURE SOC'Y 1771, 1771 (2005).

4. Kathy Davis, *Intersectionality as Buzzword: A Sociology of Science Perspective on What Makes a Feminist Theory Successful*, 9 FEMINIST THEORY 67, 77 (2008).

5. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Antiracist Politics*, 4 U. CHI. LEGAL F. 139, 139 (1989).

6. *Id.* at 140.

7. See, e.g., Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. 991, 1004–07 (2011).

Although intersectionality has traveled from legal studies to other empirically driven disciplines,<sup>8</sup> it remains rooted in the tenets of CRT, which articulate a more comprehensive, systemic critique of the U.S. legal system's pervasive reinforcement of racial hierarchies and perpetuation of injustice. While the "intersectionality as testable explanation" approach is instrumentally valuable, the prior assumptions required to enact it, which I discuss below, venture quite far from the theoretical tenets of intersectionality itself.

Even as early as Kimberlé Williams Crenshaw's second landmark article, *Mapping the Margins*, intersectional analysis is represented as "an approach"<sup>9</sup> and as a "way of framing the various interactions" rather than simply as an assertion of relevant identity content.<sup>10</sup> Sociologist Patricia Hill Collins also uses the word "analysis" in her definition of intersectionality. In the glossary of her tenth anniversary edition of *Black Feminist Thought*, she refers to intersectionality as an "*analysis* claiming that systems of race, social class, gender, sexuality, ethnicity, nation, and age form mutually constructing features of social organization, which shape Black women's experiences and, in turn, are shaped by Black women."<sup>11</sup> If we operationalize intersectionality in this way—as an approach to conducting empirical legal analysis rather than a theory to be proven—it is no longer a falsifiable theory. It is, as philosopher of social science Thomas Kuhn suggests, a research paradigm that identifies relevant questions left unanswered by prior race-only or gender-only approaches to empirical legal analysis.<sup>12</sup> I term this way of operationalizing intersectionality the paradigm intersectionality approach, and it too has certain trade-offs.

#### A. An Abbreviated History of the Intersectional Turn

What Collins and Crenshaw thus appear to share is twofold: (1) an analytical approach; and (2) a project to render previously invisible, unaddressed material effects of Black women's sociopolitical location visible and remediable. The title

8. This "traveling" of the theory across fields and its ramifications are not unilaterally accepted. This evolution is a subject of vast debate. See Nikol G. Alexander-Floyd, *Disappearing Acts: Reclaiming Intersectionality in the Social Sciences in a Post-Black Feminist Era*, 24 FEMINIST FORMATIONS 1, 3 (2012); Davis, *supra* note 4, at 74–76; Ange-Marie Hancock, *Intersectionality as a Normative and Empirical Paradigm*, 3 POL. & GENDER 248, 248 (2007); Ange-Marie Hancock, *When Multiplication Doesn't Equal Quick Addition: Examining Intersectionality as a Research Paradigm*, 5 PERSP. ON POL. 63, 63 (2007) [hereinafter Hancock, *Multiplication*]; Julia S. Jordan-Zachary, *Am I a Black Woman or a Woman Who is Black? A Few Thoughts on the Meaning of Intersectionality*, 3 POL. & GENDER 254, 255 (2007); Evelyn M. Simien, *Doing Intersectionality Research: From Conceptual Issues to Practical Examples*, 3 POL. & GENDER 264, 264–65 (2007).

9. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245 (1991).

10. *Id.* at 1296.

11. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 299 (2d ed. 2000) (emphasis added).

12. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 43 (3d ed. 1996).

of Crenshaw's 1989 article clearly identified the nature of her critique as not simply "feminist" but "*Black* feminist," thus refusing to subordinate race to gender in the title as well as the analysis.<sup>13</sup> More importantly for the purposes of this Article, a Black feminist critique was taken to be a unified whole, not disaggregable into a "Black" part and a "feminist" part.

With a similar emphasis on a "both/and" understanding of Black feminist analysis (instead of "either/or"), Patricia Hill Collins' landmark work, *Black Feminist Thought: Knowledge, Consciousness and Power*, published in 1990, closely followed Crenshaw in terms of publication date.<sup>14</sup> Yet, given typical time lags in publishing, Collins and Crenshaw were likely preparing specifically Black feminist analyses using very similar intersectional logic simultaneously—during the years from 1988 to 1990. Thus, perhaps the best way to frame the "moment of naming" is as a moment that occurred nearly simultaneously in legal studies and sociology. To say this does comparatively little violence to the notion that Crenshaw said it first in print, for certainly many other influences led to just such an outcome.

The point here is twofold. First, I suggest that intersectional metaphors originate from normative theory. Normative theories and empirical theories vary in their correspondence to the theoretical standards listed at the start of this Article. Most notably, while empirical theories must meet the standard of falsifiability, normative theories—particularly grand theories like critical theory, from which intersectionality emerged—do not. While we can logically conclude that, in order to empirically operationalize a normative theory, some amount of translation is required, it is not at all clear that the only way to do so is through an embrace of positivist falsifiability.

Second, intersections of race and gender (and at times class or sexuality) were at the heart of the metaphor's origin as *non-disaggregable* standpoints or social locations. The commitment to analyzing social locations of groups at the intersections—as Crenshaw, Collins, and many others supported in the decades leading up to *Demarginalizing the Intersection of Race and Sex* and *Black Feminist Thought*—changes the first-order question by making the existence of such intersectional sites of difference, agency, discrimination, and injustice a logical prior to any empirical analysis. The differences between the intersectionality-as-testable-explanation and the paradigm intersectionality approach are located in different interpretations of these points in the intellectual history of intersectionality.

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13. Crenshaw, *supra* note 9, at 1241 (emphasis added). At the time of the Crenshaw article's publication, the University of Chicago Legal Forum was but four years old, with a format of a hosted symposium in the fall of each year and submission of articles for publication in the following spring. Crenshaw's first article featuring the intersectionality metaphor, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Antiracist Politics*, was published in volume 1989, which began with a symposium in 1988.

14. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* (1990).

As noted above, the claims that together are commonly called “intersectionality” are traced to Crenshaw, who first coined the term in the late 1980s. However, intersectional metaphors have been multidisciplinary from the start. Scholars in a variety of disciplines<sup>15</sup> and geographical locations<sup>16</sup> drew upon their situated experiences and recognized the limitations of extant social movements and conventional strategic litigation to adequately address their structural marginalization. All of these scholars are part of a larger intellectual discourse about race, gender, class, and sexuality.

The claims that are commonly attributed to intersectionality emerge from a larger historical narrative about race and gender that dates back to the eighteenth and nineteenth centuries in the United States<sup>17</sup> and to the efforts in the 1960s that culminated in the 1976 United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in the international context.<sup>18</sup> Some who are steeped in Black women’s studies trace the idea of simultaneously attending to race and gender oppression to Anna Julia Cooper’s 1892 publication, *A Voice from the South*.<sup>19</sup> Fewer scholars of intersectionality are familiar with Maria Miller Stewart’s 1830 work, *Religion and the Pure Principles of Morality*, a collection of writings about the “unique” challenges facing Black women,<sup>20</sup> or Harriet Jacobs, author of the 1860 slave narrative, *Incidents in the Life of a Slave Girl*.<sup>21</sup> All three of these authors—Cooper, Stewart, and Jacobs—wrote in voices that were focused on the political ideal of self-determination and grounded in the life experiences of Black women. This intellectual tradition had three hallmarks that continue to be

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15. See, for example, Patricia Hill Collins, Bonnie Thornton Dill, Ruth Enid Zambrana, and Lynn Weber in sociology.

16. See, for example, post-colonial feminists like Israeli-born Nira Yuval-Davis of the University of East London.

17. See DUCHESS HARRIS, *BLACK FEMINIST POLITICS FROM KENNEDY TO CLINTON*, at xi (2009).

18. Nira Yuval-Davis, *Introduction to ANGE-MARIE HANCOCK, SOLIDARITY POLITICS FOR MILLENNIALS: A GUIDE TO ENDING THE OPPRESSION OLYMPICS*, at xii (2011) (“Around the world, those interested in a more comprehensive and transformative approach to social justice—whether sociologists, legal scholars, feminist theorists, policy makers, or human rights advocates—have used language and tenets of intersectionality to more effectively articulate injustice and advocate for positive social change.”).

19. See, e.g., PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* (HarperCollins 2009) (1984); BEVERLY GUY-SHEFTALL, *WORDS OF FIRE: AN ANTHOLOGY OF AFRICAN AMERICAN FEMINIST THOUGHT* (1995). See generally ANNA JULIA COOPER, *A VOICE FROM THE SOUTH* (Oxford Univ. Press 1990) (1982). Scholars like Deborah Gray-White, who wrote about Black women in slavery, and Paula Giddings, whose famous 1984 book, *When and Where I Enter*, which took its name from what are by now Anna Julia Cooper’s most famous words, were pioneers.

20. Maria Miller Stewart, *Religion and the Pure Principles of Morality, the Sure Foundation on Which We Must Build*, in *CLASSIC AFRICAN AMERICAN WOMEN’S NARRATIVES 5* (William L. Andrews ed., 2003) (1831).

21. HARRIET A. JACOBS, *INCIDENTS IN THE LIFE OF A SLAVE GIRL* (Simon & Brown 2012) (1861).

part of the Black feminist tradition: (1) Goals of empowerment and liberation; (2) Focus upon Black women's experiences and knowledge—what Collins later termed “Black feminist epistemology”;<sup>22</sup> and (3) Commitment to Black women's self-determination—power over their political, economic, reproductive and artistic lives as *Black women*, not as disaggregable identities of Black + woman.

Thus, Crenshaw and Collins' decidedly Black feminist interventions in the late 1980s were, without a doubt, part of a Black female intellectual and sociopolitical tradition that challenged rather than suborned a framing of their sociopolitical location as disaggregable into race + sex difference or discrimination. That tradition included activists like the Combahee River Collective and the National Black Feminist Organization (NBFO), who articulated a race-gender analysis that expanded to meaningfully include sexuality<sup>23</sup> and class.<sup>24</sup> These interventions in the narratives and agendas of the civil rights and second-wave women's movements used language like “double bind” and “multiple jeopardies” to critique the movements and explain the sociopolitical location and challenges facing Black women in the United States.<sup>25</sup>

This language and logic expressed what was conventionally thought of as unique to Black women. However, women-of-color feminists contending with post-colonial gender and ethnic politics in the context of international development were similarly struggling with the notion of whether a single category movement could meaningfully empower them to have autonomy over their lives. While not grounded in the U.S. Black female traditions per se, Anthias and Yuval-Davis, as well as Trinh T. Min-ha, were contending with similar questions of narrative logic and agenda setting.<sup>26</sup> For some, like Molara Ogundipe-Leslie, the

22. COLLINS, *supra* note 11, at 256.

23. HARRIS, *supra* note 17, at 6–7; see Avtar Brah & Ann Phoenix, *Ain't I a Woman? Revisiting Intersectionality*, 5 J. INT'L WOMEN'S STUD. 75, 78 (2004) (“The Combahee River Collective . . . pointed, as early as 1977, to the futility of privileging a single dimension of experience as if it constituted the whole of life. Instead, they spoke of being ‘actively committed to struggling against racial, sexual, heterosexual and class oppression’ . . .”).

24. The inclusion of class was also due to the efforts of the National Welfare Rights Organization.

25. Frances Beale, *Double Jeopardy: To Be Black and Female*, in THE BLACK WOMAN: AN ANTHOLOGY 109 (Toni Cade Bambara ed., 1970); Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 SIGNS: J. WOMEN & CULTURE SOC'Y 42, 42 (1988).

26. FLOYA ANTHIAS & NIRA YUVAL-DAVIS, RACIALIZED BOUNDARIES: RACE, NATION, GENDER, COLOUR AND CLASS AND THE ANTI-RACIST STRUGGLE (1992); TRINH T. MINH-HA, WOMAN, NATIVE, OTHER: WRITING POSTCOLONIALITY AND FEMINISM (1989). In *Woman, Native, Other*, Trinh interrogates the hierarchies of power in discourses like anthropology, postcolonial literary studies, and feminist theory to examine the challenge women of color pose to dominant narratives of gender, postcoloniality, and identity. Yuval-Davis and Anthias co-edited a series of case studies from around the world—Britain, Australia, South Africa, Uganda, Israel, Iran, Turkey, Cyprus and Italy—to demonstrate the point that gender constructs race and ethnicity, and both are deeply imbricated with nationalism and the state. WOMAN-NATION-STATE (Nira Yuval-Davis & Floya Anthias eds., 1989).

gender analysis in “feminism” was so steeped in White Western womanhood that a new concept, termed “stiwanism,” was deemed necessary.<sup>27</sup> Stiwanism stemmed from concerns akin to those that led to the emergence of Alice Walker’s “womanism” in the U.S. context.<sup>28</sup>

This need and desire to develop new conceptual lenses to better account for the pragmatic<sup>29</sup> and theoretical challenges facing women of color also proceeded in U.S. history.<sup>30</sup> In cultural studies, bell hooks produced two books—*Ain’t I a Woman? Black Women and Feminism* (1981), and *Feminist Theory: From Margin to Center* (1984)—during an era steeped in standpoint theory that again sought to adequately theorize a very specific set of Black women’s experiences.<sup>31</sup> Although not all of these scholars were doctrinaire standpoint theorists, responses to their work centered upon who can speak, and who must step back, in order to bring those on the margins of movement(s) into the center. Black feminists like hooks and Gloria Joseph articulated a visual metaphor of a center and margins<sup>32</sup> that was, in fact, the central metaphorical influence for Black feminist theory, and much multicultural feminist theory, prior to the intersectional turn sparked by Collins and Crenshaw.

It is also just as critical to note that Collins and Crenshaw wrote as members of multi-racial communities of female colleagues. Collins is part of a generation of feminist sociologists that includes Bonnie Thornton Dill, Ruth Enid Zambrana, and Lynn Weber, who was a trained psychologist who migrated to sociology. This intellectual community began to talk about intersecting or interlocking structures of oppression as it investigated women’s engagement with low-income occupational sectors, as well as their family lives, throughout the 1980s. In a similar vein, Crenshaw was joined in the legal academy by Mari Matsuda, Adrienne Katherine Wing, Margaret Montoya, and Trina Grillo, who were all thinking about a variety of domestic and international legal domains. They paid attention to evidentiary questions, which produced an often-overlooked call to revalue

27. MOLARA OGUNDIPE-LESLIE, RE-CREATING OURSELVES: AFRICAN WOMAN & CRITICAL TRANSFORMATIONS 229–30 (1994).

28. ALICE WALKER, IN SEARCH OF OUR MOTHERS’ GARDEN: WOMANIST PROSE, at xi (1983).

29. Pragmatic challenges may include the implementation of litigation or international development strategies.

30. GIDDINGS, *supra* note 19; DEBORAH G. WHITE, AIN’T I A WOMAN? FEMALE SLAVES IN THE ANTEBELLUM SOUTH (1979). Of course, there are many more scholars in this tradition than can be explicitly named here. Often cited are pioneering anthologies like ALL OF THE WOMEN ARE WHITE, ALL OF THE MEN ARE BLACK BUT SOME OF US ARE BRAVE (Gloria T. Hull et al. eds., 1982), and THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR (Cherríe Moraga & Gloria Anzaldúa eds., 1981).

31. BELL HOOKS, AIN’T I A WOMAN? BLACK WOMEN AND FEMINISM (1981); BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER (1984) [hereinafter HOOKS, FEMINIST THEORY].

32. HOOKS, FEMINIST THEORY, *supra* note 31, at ix–x; GLORIA I. JOSEPH & JILL LEWIS, COMMON DIFFERENCES: CONFLICTS IN BLACK & WHITE FEMINIST PERSPECTIVES 276 (1981).

narrative forms of testimony at trial.<sup>33</sup> And they examined broad questions of access to representation, services, and rights awareness.<sup>34</sup> Both intellectual communities seemed to fundamentally rethink the margin-center metaphor simultaneously but separately from each other, as well as from post-colonial feminists.<sup>35</sup> That these intellectual communities spoke more within themselves than across disciplinary boundaries as the ideas emerged makes it all the more remarkable that the concerns and ideas were so similar.<sup>36</sup>

Importantly, these intellectual communities were distinct—albeit not mutually exclusive—from equally productive intellectual communities in history, English, political science, and others, who sought to revalue Black women as historical actors, literary figures, and political agents.<sup>37</sup> While this inclusion project, as it has been named by a number of different scholars,<sup>38</sup> continues to be an important part of the Black feminist project, it remains conceptually distinct from a project of rearticulating the relationships between and within analytical categories. Even though moving from a center-margin frame to one of intersections first occurred in specific disciplines, the shift has since traveled far and wide throughout a variety of disciplines.

Based on this history of intersectionality, there are two key interventions intersectionality contributes to how we understand demographic difference and forms of discrimination grounded in such differences. First, identities and the differences that are attributed to them are not fundamentally disaggregable. There is something about being a woman of color that cannot be decomposed empirically into a “race” part and a “sex” part. Second, the shift from a margin-center metaphor to one of intersections reshapes the way in which scholars conceptualize power distributions. One’s membership on some single axis of disadvantage (for example, being a member of racial minority group) does not

33. CRITICAL RACE FEMINISM 3 (Adrien Katherine Wing ed., 1997).

34. *Id.*

35. See, e.g., Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, in *THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM* 51 (Chandra Talpade Mohanty et al. eds., 1991); Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271 (Carey Nelson & Lawrence Grossman eds., 1988).

36. By identifying the similarities, I do not intend to lump all of these very nuanced arguments together; however, there is enough overlap concerning questions of power, access, voice, and visibility that I think a relevant grouping is worthwhile. To do so in a comprehensive manner is beyond the scope of this Article.

37. See Alexander-Floyd, *supra* note 8, at 16 (listing a cadre of Black female political scientists who also pursued their own inclusion projects). Producing this list relates to but is distinct from “producing” intersectionality or conducting intersectional analyses.

38. Gudrun-Axeil Knapp further characterizes these studies, stating that: [M]ost of the actual studies have concentrated more or less on micro-level analyses. The predominant perspective has been looking at how different categories interact in shaping subjective experiences, often experiences of discrimination, how they determine access to resources and options and how they are taken up in constructions of identity.

Gudrun-Axeil Knapp, *Race, Class, Gender: Reclaiming Baggage in Fast Travelling Theories*, 12 EUR. J. WOMEN’S STUD. 250, 259 (2005).

prevent one from having privilege on another axis of disadvantage (for example, being heterosexual). The primary question this Article examines is, “What are the trade-offs for the two primary approaches to empirically operationalize intersectionality?” Empirical scholars have attempted to translate the two above normative insights into testable propositions, despite intersectionality’s existence as a normative theory that takes these insights as logical priors to research questions. Table 1, below, is instructive in understanding how prior research has attempted to empiricize intersectionality.<sup>39</sup>

In my previous work, I identified three distinct ways scholarship in political science, sociology, ethnic studies, and gender studies have conceptualized categories of difference like race, gender, class, and sexuality across methodological operationalizations as variables (for example, self-report race or sex), longitudinal formations or historical processes (for example, racial formations, gendered political development), and multilevel drivers of disparate outcomes (for example, individual or structural heterosexism).<sup>40</sup> Each conceptualization strategy in Table 1—unitary, multiple, intersectional—has important ramifications for research design and methodology that have not yet been systematically interrogated in the intersectionality literature.

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39. See also Hae Yeon Choo & Myra Marx Ferree, *Practicing Intersectionality in Sociological Research: A Critical Analysis of Inclusions, Interactions, and Institutions in the Study of Inequality*, 28 SOC. THEORY 129, 145–47 (2010) (interrogating empirical treatments of intersectionality).

40. Hancock, *Multiplication*, *supra* note 8, at 67.

**Table 1:** Three Empirical Approaches to Conceptualizing Categories of Difference<sup>41</sup>

	Unitary Approach	Multiple Approach	Intersectional Approach
<b>Number of Relevant Categories/Processes</b>	One	More than one	More than one
<b>Posited Relationship Between Categories/Processes</b>	None	Predetermined and conceptually distinguishable relationships	Relationships are open empirical questions to be determined
<b>Conceptualization of Each Category</b>	Static at individual or institutional level	Static at individual or institutional level	Dynamic interaction between individual and institutional factors
<b>Case Makeup of Category/Class</b>	Uniform	Uniform	Diverse; members often differ in politically significant ways
<b>Approach to Intersectionality</b>	Lip service or dismissal	Intersectionality as testable explanation	Intersectionality as paradigm/research design

*B. The Standard Approach: Intersectionality as Testable Explanation*

The intersectionality-as-testable-explanation approach seeks to subject the claims regarding discrimination or lack of access asserted by normative intersectionality theorists to a standard positivist empirical examination.<sup>42</sup> Thus, the approach takes a so-called objective position, which first requires that evidence of material discrimination be documented as real. Given intersectionality's origin in the legal academy, it is certainly logical that one popular operationalization would emphasize empirical demonstrations that discrimination, or discriminatory outcomes exist. This kind of approach is perfectly consistent with what Crenshaw and others call the "standard story" in litigation.<sup>43</sup> The standard first-order question, therefore, would be formulated as follows:

*Unitary Quantitative Formulation:* Did the litigant's race (or some other single category) have the strongest net effect on the dependent variable?

41. *Id.* at 64.

42. For a trenchant critique of this approach, see Alexander-Floyd, *supra* note 8.

43. Crenshaw, *supra* note 5, at 145.

*Unitary Qualitative Formulation:* What role does the litigant's race (or some other single category) play in the outcome of interest?

In other words, does race matter? The underlying assertion in these formulations centers upon the "but-for" veracity of the claim. For example, would a litigant have otherwise been hired *but for* his race? There have been popular challenges made by Black and other women of color feminists to account for gender, class, and sexuality as equally important. These challenges have been met with early attempts that sought to incorporate the content of additional categories but preserved the mutually exclusive logic of old identity politics. This has resulted in the following reformulations:

*Multiple Quantitative Formulation:* Did the litigant's (a) race, (b) sexuality, *or* (c) race + sexuality together have the strongest net effect on the dependent variable, all other things being equal?

*Multiple Qualitative Formulation:* How did the litigant's race *and/or* sexuality correspond to the outcome of interest?

My point in enumerating these formulations is to illustrate that all four formulations can be worthy ways to interrogate substantive issues often discussed by intersectionality theory. These substantive issues include questions of equal employment access, commensurate representation, opportunities for remedy, or successful institutional reform. The intersectionality-as-testable-explanation approach has been extremely popular across disciplines.<sup>44</sup> The primary methodological strategy of scholars who embrace the intersectionality-as-testable-explanation approach is the inclusion of additional variables and a relevant interaction term. Empirical scholarship in this vein usually claims to empirically investigate or operationalize intersectionality by leaning heavily on the substantive literature and methodological expertise of the scholar's main research interest (for example, race or gender), and giving a passing mention to, or superficially mobilizing, the second category by introducing a dummy variable (1 = female, 0 = male). This operational logic has also affected operationalizations of intersectional claims, extending to modeling of intersections of race, gender, and class variables as interaction terms. This strategy usually constitutes the primary or sole method

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44. As a broad sample of how popular this approach is across multiple fields of study, see LESLIE MCCALL, *COMPLEX INEQUALITY: GENDER, CLASS, AND RACE IN THE NEW ECONOMY* (2001), Kathleen A. Bratton et al., *Agenda Setting and African American Women in State Legislatures*, 28 J. WOMEN, POL. & POL'Y 71 (2006), Joshua Kjerulf Dubrow, *How Can We Account for Intersectionality in Quantitative Analysis of Survey Data? Empirical Illustration for Central and Eastern Europe*, 17 ASK: RES. & METHODS 85 (2008), Claudine Gay & Katherine Tate, *Doubly Bound: The Impact of Gender and Race on the Politics of Black Women*, 19 POL. PSYCHOL. 169 (1998), Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harrassment and the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235 (2006), Melanie Hughes, *Intersectionality, Quotas, and Minority Women's Political Representation Worldwide*, 105 AM. POL. SCI. REV. 1 (2011), Calvin Morrill et al., *Legal Mobilization in Schools: The Paradox of Race and Rights Among Youth*, 44 LAW & SOC'Y REV. 651 (2010), and Evelyn M. Simien & Rosalee A. Clawson, *The Intersection of Race and Gender: An Examination of Black Feminist Consciousness, Race Consciousness, and Policy Attitudes*, 85 SOC. SCI. Q. 793 (2004).

of capturing the force of intersectional claims made by theorists, depending on the author. In other words, the reconceptualizations of power (from margins and centers to intersections) is left unaddressed by this strategy.

While not explicitly conversant with empirical legal studies, this empirical operationalization strategy represents a well-intentioned merging of standard social science methods with intersectional claims that follow the social science examples of large-N studies of race and large-N studies of gender. For example, most quantitative empirical approaches to identifying causal mechanisms for disparities of race, gender, or class have clumsily or myopically attended to race and ethnicity this way. These approaches most often fit them as one or two variables into pre-existing models, despite cautions against incorporating race/ethnicity as a static categorical variable.<sup>45</sup> Usually, the argument for such an inclusion is couched in the assumptions of quantitative modeling, which privileges the generalizability and broader statistical power associated with such methodologies as particularly helpful for “scaling-up” local solutions to the state or the federal level.

### *C. A Net Effects Analysis of Intersectional Support for a “Gay Marriage” Ban*

In order to illustrate the intersectionality-as-testable-explanation approach, I selected an issue where other categories of difference—both previously explored in the intersectionality literature and not—were posited as explanations as well. The 2008 Collaborative Multiracial Political Study (CMPS) provides an outstanding large-N dataset from which an empirical model can be constructed.<sup>46</sup> In contrast to the 2008 American National Election Study, which oversampled Black and Latino voters, and was only available in Spanish and English,<sup>47</sup> the CMPS was available in six languages and contains robust samples of the four largest racial/ethnic groups: Whites, Latinos, Blacks, and Asian Americans.<sup>48</sup> The CMPS contains 4,563 respondents who voted in the November 2008 election who self-identified as Asian, Black, Latino, and White.<sup>49</sup> The survey was offered in English, Spanish, Mandarin, Cantonese, Korean, and Vietnamese, and

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45. See David Chae et al., *Conceptualizing Racial Disparities in Health: Advancement of a Socio-Psychobiological Approach*, 8 DU BOIS REV. 63, 73 (2011), and Taeku Lee, *From Shared Demographic Categories to Common Political Destinies: Immigration and the Link from Racial Identity to Group Politics*, 4 DU BOIS REV. 433, 437–39 (2007), which build upon pioneering work on racial formation by Michael Omi and Howard Winant.

46. 2008 Collaborative Multi-Ethnic Post-Election Survey, CMPS STUDY, <http://www.cmpstudy.com> (last visited Feb. 25, 2012).

47. *Id.*

48. *Id.* The Asian American sample includes the six largest national origin groups: Chinese, Asian Indian, Filipino, Korean, Vietnamese, and Japanese.

49. *Id.*

respondents were offered the opportunity to interview in their language of choice.<sup>50</sup>

Further, the CMPS collected data on a number of political issues where race had been previously situated as a predictive factor—including same-sex marriage.<sup>51</sup> Two questions are available on the issue of same-sex marriage in the dataset—one collecting attitudes regarding a U.S. constitutional amendment asked of all respondents, and one asking only California respondents about Proposition 8.<sup>52</sup> I use the question asked of all the respondents in order to more truly replicate the intersectionality-as-testable-explanation approach. This question seeks, in a general context, to target a dependent variable with both strong variation and the largest possible N:

Now I'm going to read you a list of statements about different policies. For each statement, please tell me if you strongly agree, somewhat agree, neither agree nor disagree, disagree somewhat, or disagree strongly with each policy.

....

Q15E. We need an amendment to the U.S. Constitution that would ban marriages between gays or between lesbians.

The literature on attitudes about same-sex marriage as the primary contemporary element of a progressive LGBT rights agenda suggests several factors for which the CMPS has data. Prior literature has suggested that men are more likely to favor a ban on same-sex marriage than women (sex variable), that young people are more likely to oppose a ban on same-sex marriage than older people (age variable), and that African Americans and Latinos resist same-sex marriage more than Whites and Asians (race variable), as do religious folks (religiosity/evangelical identity variables).<sup>53</sup> From this literature I constructed the following general model regarding attitudes on the Gay Marriage Ban:

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50. *Id.*

51. 2008 *Comparative Multi-Racial Survey Toplines*, CMPS STUDY <http://www.cmpstudy.com/uploads/9/0/2/9/9029704/cmps-toplines.pdf> (last visited Feb. 25, 2012).

52. *Id.* at 5, 9. Though the CMPS asked only California voters their votes on a statewide amendment regarding same sex marriage, Arizona and Florida—two other CMPS states—also featured such initiatives. Thus, the idea of a U.S. constitutional amendment may have been particularly salient among these voters, although I have not yet tested that possibility.

53. See, e.g., Kenneth Sherrill & Patrick J. Egan, *California's Proposition 8: What Happened and What Does the Future Hold?* (Jan. 2009), [http://www.thetaskforce.org/downloads/reports/reports/pi\\_prop8\\_1\\_6\\_09.pdf](http://www.thetaskforce.org/downloads/reports/reports/pi_prop8_1_6_09.pdf).

**Table 2:** General Models of Attitudes Regarding Amendment of the U.S. Constitution to Ban Gay Marriage<sup>54</sup>

	Model 1	Model 2
<b>(Constant)</b>	3.202	2.931
<b>Ideology</b>	-0.278*** (0.023)	-0.278*** (0.023)
<b>Race/Ethnicity</b>	0.093** (0.035)	0.191* (0.113)
<b>Gender</b>	0.203** (0.080)	0.381* (0.211)
<b>Evangelical Identity</b>	-0.005** (0.002)	-0.005** (0.002)
<b>Religiosity</b>	0.219*** (0.024)	0.218*** (0.024)
<b>Race × Gender</b>		-0.063 (0.362)
<b>R<sup>2</sup></b>	0.156	0.157
<b>N</b>	1660	1660

Although this general model is clearly not desirable for continued study given its low R<sup>2</sup>, the general ways in which variables are combined into a linear regression model is nevertheless illustrative of the traditional intersectionality-as-testable-explanation approach to determining whether race, gender, religiosity, and other factors play a role in predicting support or opposition to a U.S. constitutional amendment to ban marriages for gays and lesbians.<sup>55</sup> According to most scholars working in this approach to operationalizing intersectionality, the next step is to then insert an interaction term as an alternate, competing explanation (as opposed to a race-variable explanation or a gender-variable explanation) for the variation among respondents.

This model, illustrated as Model 2 in Table 2, selects the two most common variables used in such interaction terms regarding matters of intersectionality, race, and gender. Model 2 suggests that Race × Gender is not a statistically significant explanation of positions on a constitutional amendment banning gay marriage.

54. Standard errors are in parentheses; \*p < 0.10, \*\*p < 0.05, \*\*\*p < 0.01.

55. In addition to the model discussed here, the author ran other versions of the model and found that political party, age in 2008, religious identity, income, education level, and other possibly relevant variables were not significant and did not substantively change the variation explained in the models, so they are not reported or discussed here.

Further, the benefit to the explained variation is barely recognizable. This suggests that the rule of parsimony should be followed and that with regard to gay marriage bans, race and gender are autonomous rather than intersectional effects.<sup>56</sup>

However, many scholars would contend that Crenshaw's original formulations of political and structural intersectionality hide diversity within larger racial and gender groups. Another part of the intersectionality-as-testable-explanation approach, building on this particular claim, usually creates differentiated models for multiple race-gender groups, to examine whether the general model explains the variation equally well for all groups.<sup>57</sup> I conduct exactly that analysis in Models 3 through 6 (Table 3), constructing dummy variables for the race and gender variables as well as interaction terms. All models feature a dummy variable for gender (1 = male), and each contains a dummy variable for a specific race group (for example, Model 3 contains a dummy variable for Black, Model 4 has one for Latino, and so on). Each model reveals that indeed Crenshaw's original intuition was correct: the model operates differently for each race-gender pairing.

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56. See S. Laurel Weldon, *Intersectionality*, in *POLITICS, GENDER, AND CONCEPTS: THEORY & METHODOLOGY* 193, 203–04 (Gary Goertz & Amy Mazur eds., 2008) (defining each effect type).

57. See, e.g., Best et al., *supra* note 7, at 1010, 1015; Pei-te Lien, *Does the Gender Gap in Political Attitudes and Behavior Vary Across Racial Groups?*, 51 *POL. RES. Q.* 869, 877, 879, 881, 883, 884 (1998).

**Table 3:** Models of Attitudes Regarding Amendment of the U.S. Constitution to Ban Gay Marriage Differentiated by Race  $\times$  Gender<sup>58</sup>

	<b>Model 3 (Black Men)</b>	<b>Model 4 (Latino Men)</b>	<b>Model 5 (Asian American Men)</b>	<b>Model 6 (White Men)</b>
<b>(Constant)</b>	3.968	3.896	3.769	3.908
<b>Ideology</b>	-0.289*** (0.024)	-0.269*** (0.023)	-0.270*** (0.023)	-0.292*** (0.024)
<b>Evangelical Identity</b>	-0.005** (0.002)	-0.005** (0.002)	-0.005** (0.002)	-0.005** (0.002)
<b>Religiosity</b>	0.214*** (0.024)	0.223*** (0.024)	0.224*** (0.024)	0.209*** (0.024)
<b>Dummy—Race</b>	-0.125 (0.119)	-0.342** (0.132)	0.418** (0.150)	0.123 (0.111)
<b>Dummy—Gender</b>	-0.131 (0.092)	-0.235** (0.090)	-0.150* (0.088)	-0.343*** (0.101)
<b>Race <math>\times</math> Gender</b>	-0.352* (0.185)	0.141 (0.199)	-0.397* (0.216)	0.355** (0.164)
<b>R<sup>2</sup></b>	0.158	0.157	0.157	0.160
<b>N</b>	1660	1660	1660	1660

One look at this table and we notice several factors that continue to stand out as common to both a general and a race-gender differentiated set of models. First, Ideology, Religiosity, and Evangelical Identity all stand out as robust and significant predictors across all of the models regarding prediction of attitudes to a constitutional amendment to ban same-sex marriage. However, the differentiated models by race-gender pairing indicate that the most parsimonious approach—to focus on ideology, religiosity, and evangelical identity as the most important factors for every group of men—does not ring true. Indeed, for Black, Asian American, and White men, the interaction effects are larger than the autonomous effects of ideology, religiosity, and evangelical identity, though not all have necessarily higher statistical significance.

58. Standard errors are in parentheses; \* $p < 0.10$ , \*\* $p < 0.05$ , \*\*\* $p < 0.01$ .

Based on these four comparative models, Crenshaw's argument for intersectionality as an explanation of the world appears to apply not simply to women of color, but to men as well. That is, there is some diversity within racial/gender groups as to the explanatory factors for support for a ban on same-sex marriage. This set of models, with improved specification and variation explained of course, could absolutely be heralded as an effective operationalization of intersectionality at the large-N level, particularly in top academic journals of political science and sociology.

#### *D. Pragmatic Uses of the Intersectionality-as-Testable-Explanation Approach*

Three uses of this kind of operationalization strategy immediately come to mind. First, this approach could support voir dire strategies for cases like *Perry v. Brown*, the case recently granted certiorari by the U.S. Supreme Court,<sup>59</sup> or *Lawrence v. Texas*, the 2003 case that invalidated sodomy laws in thirteen states.<sup>60</sup> While earlier approaches to voir dire have been limited by "pragmatic" judges who apply *Batson v. Kentucky*<sup>61</sup> and *Georgia v. McCollum*<sup>62</sup> to jury selection by preventing little, if any, "searching" voir dire, the comparative model approach could possibly be used for exclusion of jurors for cause. While *Batson* and *Georgia* focus solely on race, *J.E.B. v. Alabama ex rel. T.B.*<sup>63</sup> extends *Batson* to cover gender. It is not clear whether it is preferable to extend *Batson* to sexual orientation; one of the central issues at stake in *Perry* is whether sexual orientation should rise to the level of race as a suspect classification.<sup>64</sup> What the intersectionality-as-testable-explanation approach does is to provide greater nuance regarding the studies of bias in a jury pool that could provide cause for dismissal of potential jurors.<sup>65</sup> It is currently an open question as to whether intersectional empirical analyses using

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59. *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012), cert. granted sub nom. Hollingsworth v. Perry, 133 S. Ct. 786 (2012).

60. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

61. *Batson v. Kentucky*, 476 U.S. 79, 96–98 (1986).

62. *Georgia v. McCollum*, 505 U.S. 42, 59 (1992).

63. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994).

64. *Perry*, 671 F.3d at 1082.

65. Law professor Abbe Smith has advocated a "vigorous defense" approach that can include the strategic use of stereotypes, in Abbe Smith, "Nice Work if You Can Get It": "Ethical" Jury Selection in Criminal Defense, 67 FORDHAM L. REV. 523, 530–31 (1998) [hereinafter Smith, *Nice Work*]. See also Abbe Smith, *Homophobia in the Halls of Justice: Sexual Orientation Bias and Its Implications Within the Legal System*, 11 AM U. J. GENDER SOC. POL'Y & L. 101, 108–09 (2002–2003); Aaron M. Clemens, *Executing Homosexuality: Removing Anti-Gay Bias from Capital Trials*, 6 GEO. J. GENDER & L. 71, 95–96 (2005) (exploring the problem of sexual orientation bias in the court system). But Smith admitted that social science research on race and gender bias in jury trials was not particularly reliable. Smith, *Nice Work*, supra, at 547. In the decades since Smith's article, such research has become much more reliable, particularly through widely accepted tests like the Implicit Association Test (IAT). Such tests acknowledge the susceptibility of self-report data to social desirability bias, and instead measure subconscious bias. Most of the work in IAT, however, has been of the single category variety, rather than of intersectional groups.

intersectionality as a testable explanation could be used to support dismissal for cause of potential jurors.

Second, and more broadly, this kind of data analysis could support claims for expanding the set of protected categories meriting strict scrutiny to include sexual orientation, in that it demonstrates ongoing generalized hostility to basic rights for LGBT individuals. This data analysis could be part of a larger litigational strategy. However, in this instance, it is not clear how much value an intersectional analysis versus a generalized, non-race-gender-specific analysis would provide in making the case.

Third, and finally, we might consider this kind of data especially relevant for pursuit of hate or bias crime certification in the criminal context, which offers certain sentencing enhancements for defendants who are ultimately convicted at either the state or federal level.<sup>66</sup> Although hate crimes at both the state and federal level represent a small percentage of criminal cases, that small subset of cases is, nevertheless, a politically salient one—that is, such cases are frequently covered in the media.<sup>67</sup> Here, the racial impact of using this data in such a way would likely have to contend with the application of such data to criminal defendants who are, broadly speaking, more likely to be disadvantaged people of color themselves.<sup>68</sup> For CRT scholars, advocating for these kinds of jury selection rules may run directly counter to CRT's struggle against a prison industrial complex that already houses so many of the intersectional groups that have been identified in this analysis as more likely to support a ban on LGBT individuals' right to marry.<sup>69</sup> The intersectionality-as-testable-explanation approach thus has immediate, pragmatic uses for lawyers and the clients they represent, but those uses may cut both ways. It is also easy to understand its broader academic appeal in the legal academy, given its compatibility with, if not fluency with, standard empirical legal studies more broadly.<sup>70</sup>

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66. See, e.g., Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, Pub. L. No. 111-84, 123 Stat. 2835 (codified as amended in at 42 U.S.C. §§ 3716–3716a, 18 U.S.C. §§ 249, 1389 (2006 & Supp. III 2010)); CAL. PENAL CODE § 422.75 (West 2005).

67. Most recently, a promising elected official running for higher office as an openly gay, Black male in Mississippi disappeared and was soon found dead. The disappearance and subsequent discovery of his death made the national news, and pressure immediately mounted for the case to be certified as a hate crime. *Man Charged in Mississippi Mayoral Candidate's Death*, WASH. POST, Mar. 1, 2013, at A2.

68. See Devon W. Carbado, *The Construction of O.J. Simpson as a Racial Victim*, in BLACK MEN ON RACE, GENDER, AND SEXUALITY 159, 159–62 (Devon Carbado ed., 1999).

69. See Christopher Chorba, *The Danger of Federalizing Hate Crimes: Congressional Misconceptions and the Unintended Consequences of the Hate Crimes Prevention Act*, 87 VA. L. REV. 319, 344–45 (2001).

70. For a comprehensive look at empirical legal studies, see generally THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 901–1001 (Peter Cane & Herbert M. Kritzer eds., 2010) (discussing the parallels between the intersectionality-as-testable-explanation and standard empirical legal studies).

*E. Limitations of the Intersectionality-as-Testable-Explanation Approach*

The intersectionality-as-testable-explanation approach to empirical intersectionality suffers from two limitations that question the conventional wisdom of simply applying standard empirical strategies to account for the shift in logic that intersectionality theory demands.

First, it translates the claims of intersectionality into narrow questions of identity influence. However, Crenshaw did not contend that intersectional identity as a social fact causes the limitations and outcomes she discussed. Instead, she noted that the limitations stem from two intertwined phenomena: legal structures of power and social movements' strategies for pursuing remedies, which are not incorporated into these standard empirical analyses.<sup>71</sup> For example, the racing-gendering processes described by Crenshaw do not equal Race  $\times$  Gender effects.<sup>72</sup> Net effects analysis requires the assumption that each independent variable (race, gender, and sexual orientation) competes with the others, holding everything else equal.

Not only does this assumption not hold in the real world, it is tied to a further assumption that there is a single causal combination—a single equation's solution—that can explain the most variation. Thus, the second limitation is this approach's blindness to the reality that most of the policy challenges raised by intersectionality theory address social problems that are causally complex.<sup>73</sup> That is, there are multiple causal recipes that sets of individuals can pursue to the same outcome of interest, whether that outcome is dismissal of criminal charges, delay of deportation proceedings, access to proper HIV/AIDS medical treatment, or high school graduation. This is an important and relevant consideration. The intersectionality-as-testable-explanation approach assumes that there is a single causal combination of factors, which is problematic for a theory that explicitly articulates wide within-group variation. In other words, the combinations of processes and disparities faced by Latinas, White females and Asian American males, may not simply feature quantitatively different roles for race and gender on the same question, but qualitatively different roles as well.<sup>74</sup>

This second limitation is particularly important. Net effects analysis is not well suited to address the three broad domains of intersectionality. According to Crenshaw, an intersectional analysis provides greater clarity about marginalized women's constrained sociopolitical location in these domains.<sup>75</sup> The first domain, *structural intersectionality*, highlights the contextual factors that produce an inability

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71. Crenshaw, *supra* note 5, at 145–50.

72. *Id.* at 151.

73. See CHARLES RAGIN, FUZZY-SET SOCIAL SCIENCE 88 (2000) [hereinafter RAGIN, FUZZY-SET]; see also CHARLES RAGIN, REDESIGNING SOCIAL INQUIRY: FUZZY SETS AND BEYOND 9 (2008) [hereinafter RAGIN, REDESIGNING] (defining “causally complex”).

74. Weldon, *supra* note 56, at 204–08; see also Lee, *supra* note 45, at 449.

75. Crenshaw, *supra* note 9, at 1283.

to obtain legal remedies that are presumed to be available to legal subjects.<sup>76</sup> The second domain, *political intersectionality*, highlights the degree to which using a single group member to serve as a prototype for policy remedies prevents the comprehensive representation, and by extension, remedy, of the obstacles created by the drivers of racial, gender, class, and sexuality disparities.<sup>77</sup> The third domain, *representational intersectionality*, addresses the ways that people who straddle multiple social locations are culturally constructed.<sup>78</sup> When framed as an “analysis” or “approach,” intersectionality necessitates attention to all three domains in order to comprehensively explain a causal outcome of interest.

One option we have is to turn away from large-N, quantitative research entirely, toward smaller-N qualitative research, to test intersectionality’s explanatory value. Qualitative research in this vein has usually focused on that general spirit, if not the letter, of Crenshaw’s original articulation. As with the net effects analysis, qualitative strategies are also prevalent among intersectionality scholars,<sup>79</sup> including those in political science,<sup>80</sup> sociology,<sup>81</sup> and psychology.<sup>82</sup> However, this work shares some of the same challenges as the quantitative intersectionality-as-testable-explanation approach.

Crenshaw’s overall point in both *Demarginalizing the Intersection of Race and Sex*<sup>83</sup> and *Mapping the Margins*<sup>84</sup> emphasized the degree to which both legal structures and social movements’ attempt to reform legal structures or change policy outcomes renders those whose lives are located at the intersection of two or more axes of marginalization (for example, those who are affected by racial processes and gender processes) invisible to the institutions and people with the power to change the rules of the game. Consistent with the inclusionist goals of Crenshaw’s and Collins’s project to render the invisible visible and commit to

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76. *Id.* at 1245.

77. *Id.* at 1252.

78. *Id.* at 1283.

79. As with the IVIT approach, examples abound. *See, e.g.*, EMERGING INTERSECTIONS: RACE, CLASS AND GENDER IN THEORY, POLICY AND PRACTICE (Bonnie Thornton Dill & Ruth Enid Zambrana eds., 2009) [hereinafter EMERGING INTERSECTIONS]; JULIA JORDAN-ZACHARY, BLACK WOMEN, CULTURAL IMAGES, AND SOCIAL POLICY (2008); Elizabeth Cole, *Coalitions as a Model for Intersectionality: From Practice to Theory*, 59 SEX ROLES 443 (2008); Elizabeth Cole & Zakiya T. Luna, *Making Coalitions Work: Solidarity Across Difference Within U.S. Feminism*, 36 FEMINIST STUD. 71, 74 (2010). As a matter of full disclosure, my early work also fell victim to these kinds of oversights. *See* ANGE-MARIE HANCOCK, THE PUBLIC IDENTITY OF THE “WELFARE QUEEN” AND THE POLITICS OF DISGUST (2004); Ange-Marie Hancock, *Contemporary Welfare Reform and the Public Identity of the “Welfare Queen,”* 10 RACE, GENDER & CLASS 31, 40 (2003).

80. HANCOCK, *supra* note 79; JORDAN-ZACHARY, *supra* note 79; Hancock, *supra* note 79.

81. EMERGING INTERSECTIONS, *supra* note 79.

82. Lisa Bowleg, *When Black + Lesbian ≠ Black Lesbian: The Methodological Challenges of Qualitative and Quantitative Intersectionality Research*, 59 SEX ROLES 312 (2008); Cole, *supra* note 79; Cole & Luna, *supra* note 79.

83. Crenshaw, *supra* note 5.

84. Crenshaw, *supra* note 9.

widescale social change on Black women's behalf, qualitative intersectionality-as-testable-explanation research's intent has mostly been to reveal the invisible struggles of women of color. Unfortunately, it has been limited by its general lack of attention to the historical context in which such individuals live, and the focus on the marginalized aspects of such individuals' social locations. That is, there is no concomitant analysis of social locations where there is agency or even privilege.<sup>85</sup> For example, most women of color are straight and possess a complicated form of heterosexual privilege, an important oversight for which Fogg Davis took Black feminist theorists to task.<sup>86</sup>

Moreover, Lisa Bowleg tellingly reveals how her original questions seeking rank-orderings from her interview subjects about which identity is more important—their race, their gender, or their sexuality—failed miserably to capture the answers to the questions she sought.<sup>87</sup> In other words, the attempted disaggregation—dictated by conventional empirical social science—obscured far more than it revealed. Such research is usually limited to one level of analysis—either the individual level or the structural level—which ignores Crenshaw's assertion that individuals attempt to navigate structural levels of power in a dynamically interactive manner.

These challenges have multiple ramifications that strongly suggest that a mere turn to qualitative methods is an incomplete response to the shortcomings of this testable explanation approach. First, the oversight has led to a conceptualization of individuals as frozen in time. Prior qualitative intersectionality research has been criticized for being inattentive to historical context. Second, the mobilization of multiple categories has been incomplete. Prior intersectionality research has been criticized for presumptions of some categories' relevance (for example, race, class, gender) over others as well as an incomplete treatment of social locations (focused solely on disadvantage without concomitant attention to sources of agency or privilege).<sup>88</sup>

In addition to this critical oversight, the qualitative intersectionality-as-testable-explanation approach has two other shortcomings. First, the approach makes it difficult to develop policy solutions that are scalable beyond an extremely localized level. Though of course qualitative research is not usually targeted towards vastly generalizable claims, the relevant question here is whether such research can be sufficiently attentive to the structural intersectionality domain and offer a critical eye to the social movements that purport to represent

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85. Choo & Ferree, *supra* note 39, at 136–37.

86. See Cathy J. Cohen, *Punks, Bulldaggers and Welfare Queens: The Radical Potential of Queer Politics*, 3 GLQ: J. GAY & LESBIAN STUD. 437, 440 (1997), for an earlier description of complex straight privilege; see also Heath Fogg-Davis, *Theorizing Black Lesbianism Within Black Feminism: A Critique of Same Race Street Harassment*, 2 POL. & GENDER 57, 72 (2008).

87. Bowleg, *supra* note 82, at 322.

88. See Choo & Ferree, *supra* note 39, at 136–37; Nancy Wadsworth, *Intersectionality in California's Same Sex Marriage Debates: A Complex Proposition*, 64 POL. RES. Q. 200, 203 (2010).

intersectionally stigmatized populations. One particularly troubling finding suggests that Crenshaw's critiques of both extant legal structures and the responses of identity-driven social movements are still justified. Dara Strolovitch found evidence of secondary marginalization, even as social movement elites expressed support for comprehensive representation of their constituencies, particularly concerns about over-stretching movement organizations' already over-taxed resources.<sup>89</sup> Elsewhere, fears of division of the movement have also emerged.<sup>90</sup> While many qualitative studies echoed this finding, the evidence for a change in strategy has emerged from experimental evidence and applied analysis.<sup>91</sup> A mere turn to qualitative data and methods in this context thus has three central limitations: (1) it still does not comprehensively attend to all three domains of intersectionality; (2) it adds an obstacle—the potential for scalability from a policy perspective is limited; and (3) like net effects, it is almost invariably susceptible to a lack of attention to historical context and comprehensive plumbing of categories' meaning to the lives of the subjects studied.

The above analysis of public opinion concerning bans on same-sex marriage illuminates the trade-offs involved in conducting a standard net-effects analysis to empirically operationalize intersectionality. The net effects approach, listed as “the multiple approach” in Table 1, requires three assumptions that take logical priors of intersectionality theory and turn them into testable hypotheses: (a) predetermination of categorical relationships; (b) static conceptions of each category; and (c) uniformity of cases within each category. All three assumptions are hallmarks of good positivist net effects scholarship, but they are not necessarily in line with normative intersectionality theory, which posits non-disaggregability and intersections as a priori assumptions within the theory. Another empirical approach allows the relaxation of these three assumptions and is discussed below.

## II. THE PARADIGM INTERSECTIONALITY APPROACH

While the implications of the shift from a metaphor of center-margin to a metaphor of intersecting oppressions has not been as widely interrogated as

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89. See CATHY J. COHEN, *THE BOUNDARIES OF BLACKNESS: AIDS AND THE BREAKDOWN OF BLACK POLITICS* 27, 54 (1999) (providing an extant definition of secondary marginalization); see also DARA STROLOVITCH, *AFFIRMATIVE ADVOCACY: RACE, CLASS AND GENDER IN INTEREST GROUP POLITICS* 15–45 (2007) (referencing findings).

90. See ANGELA GLOVER BLACKWELL ET AL., *SEARCHING FOR UNCOMMON COMMON GROUND: NEW DIMENSIONS ON RACE IN AMERICA* 146–47 (2002); see also MANUAL PASTOR JR. ET AL., *THIS COULD BE THE START OF SOMETHING BIG* 8–10 (2009); Cole & Luna, *supra* note 79, at 96.

91. For experimental evidence, see Ronnie Michelle Greenwood, *Intersectional Political Consciousness: Appreciation for Intragroup Differences and Solidarity in Diverse Groups*, 32 *PSYCHOL. WOMEN Q.* 36, 36–47 (2008), and Ronnie Michelle Greenwood & Aidan Christian, *What Happens When We Unpack the Invisible Knapsack? Intersectional Political Consciousness and Intergroup Appraisals*, 59 *SEX ROLES* 404, 404–17 (2008). See Sonia Ospina & Celina Su, *Weaving Color Lines: Race, Ethnicity, and the Work of Leadership in Social Change Organizations*, 5 *LEADERSHIP* 131,141 (2009), for applied evidence.

needed, I think it is key to understanding the shift in intellectual tradition and logic that intersectionality represents. Moreover, I think the shift points in a different empirical direction. My intent is not to dislodge intersectionality from its history, nor, as Nikol G. Alexander-Floyd warns against, to risk rendering Black women's contributions invisible,<sup>92</sup> but instead to understand the intersectional turn as exactly that—a turning point onto a new road. This new road endures thanks to both technology and the vagaries of traveling theories.

Crenshaw, Adrien Katherine Wing, Mari Matsuda, Trina Grillo, and others in the legal theory community specifically proposed revisions to a standard jurisprudential logic of mutually exclusive status categories to a relational logic that connects structural practices of racism, sexism, classism, and homophobia.<sup>93</sup> It is important to note that Crenshaw did not contend that intersectional identity as a social fact causes the limitations and outcomes she discussed. That is, the trouble is not with the intersectional bodies or identities of women of color she placed at the center of the analysis, rather, the trouble is with the politics that surround such bodies. As Crenshaw explicitly noted “Although *racism and sexism* readily intersect in the lives of real people, they seldom do in feminist and antiracist practices. And so, when the practices expound identity as woman or person of color as an either/or proposition, they relegate women of color to a location that resists telling.”<sup>94</sup> Though Crenshaw later modestly said that she did not intend to offer intersectionality as a “new, totalizing theory of identity,”<sup>95</sup> she repeatedly refers to the intersectionality as “dynamics,”<sup>96</sup> an “approach,”<sup>97</sup> a “way of framing interactions,”<sup>98</sup> or a “basis for reconceptualizing race.”<sup>99</sup> In this regard, intersectional analysis is proposed in order to answer questions left unanswerable by prior analytical approaches to race or gender, suggesting a contention that intersectionality can be thought of in paradigmatic terms by focusing on the logical shifts intersectionality theorists have made, not simply the empirically verifiable claims that emerge from such an approach.<sup>100</sup>

Thinking about intersectionality as a research paradigm proposes approaches to solving the aforementioned unanswerable questions and establishes standards by which solutions can be evaluated.<sup>101</sup> In accordance with this set of precepts,

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92. Alexander-Floyd, *supra* note 8, at 19.

93. See, e.g., CRITICAL RACE FEMINISM, *supra* note 33.

94. Crenshaw, *supra* note 9, at 1242.

95. *Id.* at 1244.

96. *Id.* at 1245.

97. *Id.*

98. *Id.* at 1296.

99. *Id.* at 1299.

100. *Id.* at 1245–52.

101. This definition of a paradigm is consistent with the arguments of Thomas Kuhn. See THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 10 (3d ed. 1996). Kuhn is by no means the final word on research paradigms, but his definition is consistent with the positivist approaches enacted on some level by most empirical intersectionality scholars.

paradigm intersectionality in this Article is broadly defined as a justice-oriented analytical framework for examining persistent sociopolitical problems that emerge from race, gender, class, sexual orientation and other sociopolitical fissures as interlocking, process-driven categories of difference.<sup>102</sup> When intersectionality is implemented as a paradigm it has the potential to meaningfully analyze complex causality—the reality that multiple causal paths can simultaneously lead to the same outcome.<sup>103</sup> In this sense, a paradigmatic approach to empirical intersectionality can provide a fount of ideas to transform the structures of legal institutions, including but not limited to judicial oversight, litigation strategies, and the kinds of remedial relief sought. In a historical moment that features the persistent retrenchment against civil rights and CRT approaches to structural change, paradigm intersectionality enables a visioning process more attentive to the current obstacles faced while remaining true to the theoretical integrity of intersectionality.

In contrast to Crenshaw's three domains of intersectionality—structural, political, and representational—paradigm intersectionality does not locate a particular domain where intersectional analysis emerges as the superior analytical lens. Instead, it is intended to provide a comprehensive empirical operationalization of intersectionality. In other words, paradigm intersectionality sets empirical standards of research for structural, political, and representational intersectionality—suggesting *how* we might empirically investigate the language barriers facing limited-English speaking immigrant women, *how* we might examine evidence of systematic failures of interest group elites to craft a political agenda that comprehensively represents an entire group's needs, or *how* we might document public identities like the strong Black woman, jezebel, or video vixen as social constructions that continue to constrain real-life women's abilities to get just verdicts in rape cases.

Paradigm intersectionality challenges Occam's Razor—the idea that the simplest answer is always the best. Indeed the claims of intersectionality theorists introduce complexity into empirical research in a number of challenging ways, particularly methodologically.<sup>104</sup> Although incompatible with net effects approaches, paradigm intersectionality provides useful ways to think about how to simultaneously incorporate five relevant dimensions of intersectional complexity, including: complexity within categories (Diversity Within) and between categories (Categorical Multiplicity, Categorical Intersection); complexity in a given historical

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102. Even though I wholeheartedly acknowledge the dynamic processual elements of such categories as constitutive of their roles in persistent social problems, for reasons of space I refer to them in a shorthand version as categories of difference throughout this Article.

103. I identify this operationalization of intersectionality at the level of paradigm to distinguish it from other scholars who conceptualize intersectionality as a concept, method, and/or normative theory.

104. McCall, *supra* note 3, at 1772.

moment as well as over time (Time Dynamics); and complexity in terms of how categories like race, gender, class, and sexual orientation are shaped by dynamic processes engaged in by individuals, groups, and institutions (Individual-Institutional Interactions).

In this Part I outline paradigm intersectionality and its tenets and then turn to an examination of the same CMPS dataset using fuzzy-set qualitative comparative analysis (fs(QCA))<sup>105</sup> to explore its causal stories regarding support or opposition to a constitutional amendment banning same-sex marriage. In so doing, I illustrate the distinct design and data demands of a paradigm intersectional approach, noting where relevant its distinctions from the intersectionality-as-testable-explanation approach to empirical intersectionality. The brief discussions of each dimension below illustrate the core improvements asserted above.<sup>106</sup>

Paradigm intersectionality demands that Categorical Multiplicity be engaged at a level concomitant to the other dimensions of intersectionality. That is, scholars are pushed to engage in a formal thought process examining which categories are worthy of inclusion in the research design according to transparent standards,<sup>107</sup> rather than simply assuming that race-gender are the only relevant categories for women of color and are somehow irrelevant to other populations—for example, class, sexual orientation, national status, and religiosity are but a few additional possibilities that can apply to those on all sides of the power axes within them. Parsimony remains encouraged without being reified, as deep substantive and theoretical knowledge of each sociopolitical category allows it to be conceptualized in the design in interaction with the other four dimensions of paradigm intersectionality.<sup>108</sup>

Paradigm intersectionality's components, Diversity Within, and Categorical Intersections, facilitate comprehensive attention to what populations share in common and systematic variation within a sociopolitical category of difference, contingently conceptualized. For example, if one seeks to understand the race-gendering experiences of women of color in Congress, the common processes affecting all of them are part of Categorical Intersections. Any systematic variation in such processes, whether attributable to individual orientations (like personality

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105. RAGIN, FUZZY-SET, *supra* note 73, at 322 (explaining that the fuzzy-set approach assesses the “sufficiency of all possible combinations of causal conditions.”).

106. See HANCOCK, *supra* note 18, at 33–62, for a comprehensive definition of each dimension and additional policy case studies.

107. Rita Dhamoon lays out several standards in her work. See RITA KAUR DHAMOON, IDENTITY/DIFFERENCE POLITICS: HOW DIFFERENCE IS PRODUCED AND WHY IT MATTERS 1–17 (2009); Rita Kaur Dhamoon, *Considerations on Mainstreaming Intersectionality*, 64 POL. RES. Q. 230, 235 (2011). There has been at least one normative application: the Trayvon Martin murder case. Hancock, *supra* note 2.

108. This focus is an important improvement to the IQIR approach to intersectionality work (design).

or prior career background) or group orientations (like political party or district characteristics) are classified as Diversity Within. In other words, attention to Crenshaw's notion of political intersectionality is incorporated a priori as a relevant lens to use in all research questions through Categorical Intersections. Likewise, Crenshaw's notion of representational intersectionality can fit into the Diversity Within element.

This decomposition of intersectional analysis into Categorical Intersections and Diversity Within builds on the arguments of Laurel Weldon<sup>109</sup> and others, but in a framework that is distinct from net effects. Instead, we reprise Crenshaw's formulation of "racism" and "sexism" discussed in the introduction to this Article, rather than rely on independent race and sex variables.<sup>110</sup> The fs(QCA) analysis of the CMPS data in the next Part will illustrate how to create causal conditions and causal recipes regarding attitudes regarding same-sex marriage.

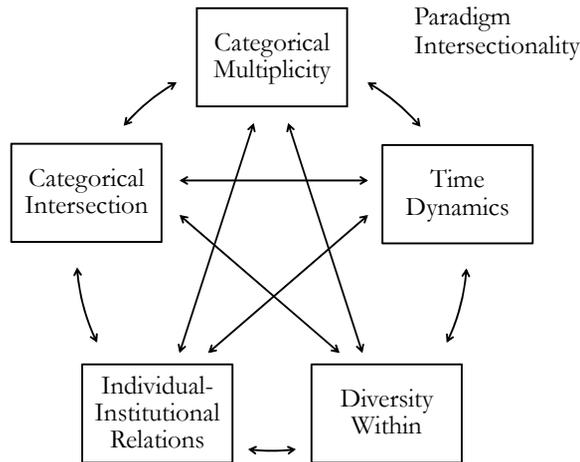
This dual-dimension framework can more faithfully account for the roles of agency and collective action among populations who may choose different strategies or have different resources available to them for utilization. The final two dimensions flesh out this conceptualization featuring two distinct processes and incorporate Crenshaw's sense that individuals and groups engage in legal structures within historical contexts. Time Dynamics focuses on the relevance of sociopolitical development across time and within a particular historical context, while Individual-Institutional Interactions join with Categorical Intersection and Diversity Within to more fully engage agency and collective action by analyzing outcomes as products of ongoing, dynamic interactions between and among individuals, groups, and institutions. In other words, Crenshaw's notion of structural intersectionality is incorporated into the analysis through Individual-Institutional Interactions, again as something to be analyzed in all empirical intersectionality research projects. Figure 1 outlines the five components of paradigm intersectionality as a proposed rubric for an empirical intersectionality research design.

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109. Weldon, *supra* note 56, at 201–03.

110. In the broader project from which this analysis is drawn, I articulate benefits for qualitative researchers. Consciously attending to both Categorical Intersections and Diversity Within pushes qualitative intersectionality-as-testable-explanation researchers to more fully engage with their rich data for potentially generalizable categorical intersections without sacrificing the uniqueness contained in Diversity Within aspects of their data.

**Figure 1:** Schematic Diagram of Paradigm Intersectionality Dimensions and Their Possible Empirical Relationships



*A. Paradigm Intersectionality's Methodological Companion: fs(QCA)*

Prior work on intersectionality as a research paradigm suggests that fs(QCA) is a complementary methodology for paradigmatic intersectionality research designs<sup>111</sup> based on their shared commitment to fully address complexity. Fs(QCA) empowers empirical researchers to make four new moves: (1) configure cases in a way that fully acknowledge the intersecting roles of racism, sexism, homophobia, and other processes of marginalization; (2) improve the operationalization of such processes by using case-oriented rather than variable-oriented empirical analysis; (3) incorporate the reality that there are multiple paths, even within race or gender groups, to the same outcome of interest; and, (4) where applicable, better incorporate the richness of narratives and other interpretive data into scalable policy proposals for social change.

Fs(QCA) is a technique amenable to paradigm intersectionality research for several reasons—most of which center upon the level of transparency, reflexivity, and calibration capacity for many measures that are often used with an alarming lack of attention to all three standards of research. Values associated with levels of membership are assigned to each of the causal conditions and outcomes. These values are based on a standardized and transparent set of cutpoints, which are created and implemented using substantive and theoretical knowledge of the topic rather than simple numeric variables at the interval or ordinal levels. Furthermore, fs(QCA) is capable of analyzing social problems with any number of causal conditions ( $k$ ), which produce  $2^k$  possible causal combinations that may produce

111. HANCOCK, *supra* note 18.

the outcome of interest. I use the language of causal conditions rather than “causal factors” and “net effects” because original data is collected and analyzed<sup>112</sup> in a manner different from traditionally conceived single or multiple-measure variables. Empirical data collection (of any size N) and thorough theoretical and substantive knowledge shape the process of calibrating and assigning fuzzy values on each condition to each case—an activity to which we now turn.

Using set theory, we create sets of people who support or oppose the ban on same-sex marriage via constitutional amendment in a way that is quite different from a variable oriented approach. To create each causal condition, we assign one of four possible values between zero and one through synthesis of the entire case. To reiterate, such assignments are not based on adding up the number of “yes” or “no” responses to a list of questions to create a continuous variable (as is often done to create an index variable) but again, through synthesis of the entire case. Neither is the fuzzy-set equivalent to an ordinal scale.<sup>113</sup> Creating this multi-value fuzzy set provides two intermediate points between the extremes of either fully in or fully out of the set as opposite ends of the spectrum—(0, 0.25, 0.75, 1).

We generally create two or more sets (fuzzy or crisp) out of each variable from the CMPS dataset. For example, in calibrating sets that account for the role of income (or education) in a particular causal condition (say, employment type), it makes more sense to create a set of high-earning individuals and a set of low-earning individuals, particularly because one of the strengths of fs(QCA) is that it does not require mutual exclusivity or corrections for what in variable-oriented logic is called “multicollinearity.” Using our ongoing example of same-sex marriage, calibrating sets in this manner might allow us to answer a key question with greater precision—is it having a high income that is linked to opposing a ban on same-sex marriage, or is it not having a low income that matters?<sup>114</sup>

From a paradigm intersectionality perspective, assuming that each of these sets would negate each other is problematic because we want to account simultaneously for both systematic commonalities (Categorical Intersections) and variation (Diversity Within) at multiple levels of analysis. It is possible to do so using fuzzy-set analyses of complex causality because set relations are not framed in a relative context or assumed to be mutually independent—they are also not assumed to be symmetric, as bivariate and multivariate correlations demand. That is, one causal condition isn’t presumed to be in competition with other possible causal conditions but is instead constructed in relation to the outcome in a qualitatively distinct manner. This is particularly relevant to the study of social

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112. The focus in this Article is on the difference in how the data is analyzed, and the data used to illustrate both approaches was collected using standard rigorous quantitative survey methods.

113. See RAGIN, REDESIGNING, *supra* note 73, at 32, 82–84, for a comprehensive explanation of the difference between index variables and fuzzy sets.

114. See *id.* at 195, for another example of this logic.

problems and their solutions because the structural forces related to the outcomes are accounted for in a complex way in the analysis. As Charles Ragin puts it,

The key issue is not which variable is the strongest (i.e., has the biggest net effect) but how different conditions combine and whether there is only one combination or several different combinations of conditions (causal recipes) capable of generating the same outcome. Once these combinations are identified, it is possible to specify the contexts that enable or disable specific causes.<sup>115</sup>

This understanding of complexity is very similar to assembling evidence for a particular legal case, where familiarity with the available details permits attorneys to assemble a particular understanding of how the evidence fits together. Certainly opposing counsel will have a different understanding of how the evidence fits together. Fs(QCA) looks at each case and determines which causal recipe from the universe of possible causal recipes each case fits in, then assigns it to that particular recipe, as we will see below.

*B. An fs(QCA) Analysis of Support for a Ban on Same-Sex Marriage*

As even the prior net effects models of different race-gender groups illustrate, support for or against a ban on same-sex marriage is not necessarily a simple causality question. This analysis uses the same large-N dataset described above—the CMPS—along with the same truncated literature review, which was limited to specific variables (net effects analysis) and causal conditions (fuzzy-set analysis). The sets are constructed from the responses to CMPS survey questions, thus using exactly the same data in an entirely different way to provide a focused comparison on design and method. Based on our same review of the prior literature on same sex marriage that was used for the net effects analysis, the following calibrations and set constructions are possible. Again, in order to focus on the method, I have deliberately limited the number of causal conditions and for the purpose of this CRT-oriented Article describe in greatest detail the causal condition of racialism. Table 4 outlines the transformations.

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115. *Id.* at 114.

**Table 4:** Calibration and Constructions of Fuzzy Sets

Causal Condition	CMPS Variables	New Fuzzy or Crisp Sets
<b>Ideological Orientation</b>	Ideology	Liberal Ideology (fuzzy) Moderate Liberal Ideology (fuzzy) Moderate Conservative Ideology (fuzzy) Conservative Ideology (fuzzy)
<b>Culture of Religiosity</b>	Religiosity Religious Denomination Charismatic Church	Religious (fuzzy) Non-Religious (fuzzy)
<b>Gender Assignment</b>	Sex	Male (crisp) Female (crisp)
<b>Evangelical Orientation</b>	Evangelical Identity	Evangelical (crisp) Non-Evangelical (crisp)
<b>Racialized Subjectivity</b>	Race/Ethnicity Linked Fate Neighborhood Composition Income Education	African American (fuzzy) Asian American (fuzzy) Latino (fuzzy) White (fuzzy)

The CMPS Ideology variable is calibrated into four separate three-value fuzzy sets: “Liberal,” “Conservative,” “Moderate Liberal,” and “Moderate Conservative.”<sup>116</sup>

Religiosity as a variable in the CMPS is likewise converted into multiple fuzzy sets—“Religious” and “Non-Religious.” Again the distinction here is that using other variables in combinations that are not simply additive (religious denomination *plus* or *multiplied by* charismatic church attendance) accounts for varying relationships between church members and their churches. Theoretically and substantively, the question of same-sex marriage is very much tied to religious

116. While it might be easy to come up with the values for each end of the spectrum (for example, survey values six and seven, “conservative” and “very conservative,” clearly receive full membership in the set of conservative ideology respondents, while survey values one and two, “very liberal” and “liberal,” are fully out of the set and the opposite arrangement for the set of liberal ideology respondents), it is not absolutely clear that we should rely only on the middle value of four for crafting a set of moderates. We might also include answers to questions regarding political party and strength of partisanship, both of which are in the CMPS dataset, to better understand the moderate set in particular, due to the rise in independent party affiliation over the past decades.

organizations. Consequently, being able to meaningfully distinguish religious denominations of CMPS respondents can make all the difference in understanding the results in two ways. First, two religious denominations—the Catholic and Mormon churches—are extremely hierarchically organized and have taken extremely public positions on same-sex marriage through their leadership. Other Christian denominations have taken comparatively lower profile positions and are less hierarchically organized in terms of communicating that message. This is especially true among evangelical, nondenominational churches, which may reach thousands if they are a megachurch, but again do not have a hierarchical, geographically dispersed leadership on the scale of the Catholic or Mormon faiths. Creating the fuzzy sets of “Religious” and “Non-Religious” as higher order constructs that include attendance at charismatic churches and religious denomination allow for us to better incorporate the individual-institutional interactions dimension of paradigm intersectionality. Second, the higher order set constructions empower us to, in Crenshaw’s terms, explicitly recognize the intersectional locations of LGBT people of faith, who traditionally keep those aspects of their lives separate because anti-gay churches are mostly used in that political intersectionality way—as prototypes for all churches among the advocates of marriage equality in the LGBT community.<sup>117</sup> This again serves the companion purpose of making the hidden or invisible—LGBT people of faith and their faith-based allies—visible in the analysis.

Building on Taeku Lee’s work,<sup>118</sup> the Racialized Subjectivity causal condition<sup>119</sup> consists of two higher-order constructs<sup>120</sup> to account for the role of race as an identity, a context, a process, and a behavior. I eschew the overreliance on the question that asks for self-reported race/ethnicity by adding considerations

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117. See MIGNON MOORE, *INVISIBLE FAMILIES: GAY IDENTITIES, RELATIONSHIPS, AND MOTHERHOOD AMONG BLACK WOMEN* 180–214 (2011), for additional detail about religion and the Black LGBT community. Another substantive reason why a more robust fuzzy measure is useful is that, although we can expect Catholics and many conservative Protestant denominations to share some political attitudes, including one on gay marriage, structurally, Catholic churches and Protestant churches are set up differently in terms of schedules of offering services. The religiosity variable starts with “every week” and includes “a few times a month,” but does not include “once a month” as an option. In other words, Catholics who attend a few times a month get communion, a very important part of Christian practice, have multiple opportunities to get communion, whereas someone who attends a church that delivers communion monthly may be just as religious (because he or she shows up on the important Sundays). Accounting for the different frequencies of communion offering allows us to more comprehensively operationalize religion as a category of difference in a third way to account for the individual-institutional interactions dimension of paradigm intersectionality, expanding our precision where net effects cannot.

118. Lee, *supra* note 45, at 438–39.

119. I have conceptualized this subjectivity as both a union of individual report measures (like linked fate and contextual factors like the racial makeup of a neighborhood) and as an intersection of the same two measures. The analysis that follows uses the former; the latter will be tested at a later date.

120. See RAGIN, *FUZZY-SET*, *supra* note 73, at 321, for a definition of higher order constructs in fuzzy set theory.

from CMPS variables that measure respondents' levels of engagement with their communities at the individual and structural levels to create combinations of racialization-based causal conditions. In addition to the more traditional self-reported questions of racial identity and perceptions of linked fate among members of the same racial group, this racialism condition includes activities that are under the respondents' control, such as the sources they sought out for political information (the CMPS asks the questions in a very useful way about whether they consume their own ethnic group's media outlets) and the ethnic composition of their neighborhoods. While most can choose their own place to live (within boundaries of course), the services available or the threat experienced around the issue of same-sex marriage varies in ways that are not fully within respondents' grasp, allowing us again to build in structural influences that account for Individual-Institutional Interactions. In addition to scores on these variables, the CMPS also collected information about respondents' personal experiences of racial and ethnic discrimination, something that is not completely within their sphere of control that can also become part of this causal condition.<sup>121</sup>

Although our net effects analysis for the intersectionality-as-testable-explanation approach did not lead us to believe that respondents' level of education or income was significantly related to positions on same-sex marriage, building such factors into this causal condition can add substantive leverage on the question in connection with neighborhood context (for example, it might be harder for one to successfully argue that one has been racially discriminated against in a neighborhood filled with co-ethnics if one is White, but in communities of color there is quite likely a heightened risk of structural racial discrimination like police or shop owner harassment; middle and upper class minorities may also be more familiar with what constitutes discrimination or harassment). These variables are also brought into consideration for creating each fuzzy-set of Racialized Subjectivity: African American fuzzy set, Latino fuzzy set, Asian fuzzy set, White fuzzy set.<sup>122</sup>

Due to data limitations, "Evangelical Identity" and "Sex" are each transformed into two crisp sets based on their corresponding CMPS variables. Of course, this limitation in the variable-oriented dataset can be counteracted in the

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121. Admittedly, a more contrarian position could contend that the interpretation of the event is well within their control, but we are limited by the survey orientation of the data in this regard—no triangulation or follow up with other sources was possible at the time by design.

122. This method also allows us to account for non-exclusivity among racial cohorts beyond the neighborhood context question. The net effects assumption of non-exclusivity of these sets in relation to each other can be fully relaxed in fs(QCA). For example, an African American living in an Asian American neighborhood is counted in some way in the Asian American set (although not full or almost full membership barring other Asian-oriented details). The reverse would be true as well. Why? Because, again, thinking about how Diversity Within, Categorical Intersections, and Individual-Institutional Interactions are all mutually constitutive dimensions of paradigm intersectionality, the neighborhood in which one lives plays a significant role in life outcomes. Therefore, to exclude that person completely from the set would be intellectually dishonest.

case-oriented context of the legal academy, which could better accommodate the variation in power, access, and privilege among women and men. Additionally, with the right data collection efforts, fuzzy gender sets could be constructed to include transgender people, who are perhaps excluded or possibly improperly assigned in this version of our dataset, which asked the survey questioner to mark the sex of the respondent rather than ask the question explicitly.<sup>123</sup> That said, I do not want to underestimate that such a data collection process would be onerous, requiring review of transcripts of proceedings, in addition to poring over decisions. As well, variances in gender conformity even when biological sex remains consistent (for example, a woman who “acts like a man” in corporate settings) could also, in a case-oriented dataset, be part of this set’s calibration.

The final set calibration concerns the outcome of interest—support for a constitutional amendment to ban same-sex marriage.<sup>124</sup> Again, because we are not “counting” in order to create the sets, we are not concerned about giving too much weight to the responses from people from California in calibrating this set, because we are making within-case comparisons. Thus, we could include the answer to the variable question we used in the net effects model, which inquired about strong agreement or disagreement with a constitutional amendment-level ban. We could use the answers on California’s Proposition 8 as part of how we create this set—ranking those who voted “Yes” as closer to full membership because they have not simply expressed the opinion of agreement but also took the step of voting their beliefs. Between the two questions, we can think of several ways in which there could be different levels of set membership: a respondent could be consistent in his or her attitude and action, or a respondent could be inconsistent in his or her answer, meaning perhaps they voted in a way inconsistent with their expressed attitude.

There are other elements of the dataset that could prove relevant,<sup>125</sup> but again for simplicity’s sake, and to provide a direct comparison to the net effects models above, I focus the calibration for this Article on these causal conditions. It bears repeating that this fuzzy-set calibration is interpretive, and therefore not the standard net effects construction of index variables. It is interpretive because it gives more meaning to the categorical variables, like religious denomination

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123. If we were using different datasets or combining the CMPS with in-depth interviews from archives like the ONE archive at USC, the Center for the American Women in Politics at Rutgers, or the Global Feminisms Project at the University of Michigan, we might have a broader way of calibrating these sets regarding gender in particular. However, for this Article, I’m focusing on the CMPS dataset’s amenability to fs(QCA).

124. We could just as easily have chosen opposition to same-sex marriage as the outcome of interest. For political organizing purposes on the marriage equality side, we may also have chosen to create an entirely different set, those who are open to persuasion for marriage equality.

125. One particular option might include exploring consistency across social issues, like abortion, for which the CMPS has an identically constructed question. Other datasets might include marital status or other features that could be used to calibrate this set.

generally, and interpretive in a paradigm intersectionality context because the interpretations pursued adhere to the interrelationships between four of the five dimensions possible in the data (Categorical Multiplicity, Categorical Intersections, Diversity Within, and Individual-Institutional Interactions).<sup>126</sup>

### C. Fuzzy-Set Analysis and Discussion

Boolean truth tables are the key analytic tool for identifying combinations of causal conditions that produce the outcome of interest—the set of voters who favor a ban on same-sex marriage. Two key measures, consistency and coverage, provide standards for assessing whether these causal recipes are worthy of attention in a manner akin to—but qualitatively different from—statistical significance (consistency) and the empirical relevance of the hypothesized set-theoretic connection in a manner akin to—but qualitatively different from—coefficient strength (coverage).<sup>127</sup> The truth table permits us to identify for which causal recipes there is strong empirical evidence and to measure the consistency of that evidence. The solution to the truth table provides measures of coverage and consistency for each recipe and the overall solution (model) as a whole.

With three causal conditions, there are 2<sup>5</sup>, or thirty-two possible combinations. The truth table displays all thirty-two possible combinations of the variables, but not all are represented empirically in the CMPS data. Table 5 thus shows a mid-stage truth table that emerged from the consideration of the set of CMPS pro-ban respondents, with the four causal combinations that accounted for 100% of the cases that are members of the set of pro-ban respondents. It is analyzed below.

**Table 5:** Truth Table of Causal Outcome of Interest—  
Set of Pro-Marriage Ban Voters<sup>128</sup>

RS	R	C	G	EI	No. of Cases	Pro-Ban	Raw Consistency	PRI Consistency	Product
1	1	1	1	1	636	1	0.645155	0.565648	0.364931
1	0	1	1	1	193	1	0.557837	0.355373	0.19824
1	1	0	1	1	178	0	0.531087	0.349592	0.185664
1	0	0	1	1	115	0	0.45889	0.174853	0.080239

126. Time Dynamics as a dimension is omitted for the purposes of this Article because we only have data at one point in time.

127. See RAGIN, REDESIGNING, *supra* note 73, at 44–45, for a more comprehensive explanation of the similarities and differences between the two sets of standards.

128. Abbreviations: RaceSub1 (RS), Religious (R), Conservative (C), Gender (G), Evangelical Identity (EI).

Table 5 lists four possible causal combinations that can be submitted to create a standard solution to the truth table. The consistency figures express the degree to which membership in that corner of the vector space is a consistent subset of membership in the outcome. Like significance, consistency “signals whether an empirical connection merits the attention of the investigator.”<sup>129</sup> Coverage assesses the empirical relevance of the necessary condition at issue, in a manner akin to strength in net effects analysis.<sup>130</sup> The truth table permits us to assess raw consistency first, using a low threshold of fifty percent in order to proceed with the analysis. Two causal recipes meet that threshold:

1. Racial Subjectivity\* Religious\* Gender\* Conservative Ideology\* Evangelical Identity,
2. Racial Subjectivity\* Gender\* Conservative Ideology\* Evangelical Identity.

**Table 6:** Solution Table for Pro Marriage Ban Truth Table

		Raw Coverage	Unique Coverage	Consistency
Complex	RaceSub*Conservative Ideology	0.779356	0.779356	0.581296
Intermediate	Evangelical Identity* Gender*Conservative Ideology*RaceSub	0.779356	0.779356	0.581296
Parsimonious	Conservative Ideology	0.779356	0.779356	0.581296
	<b>Solution Coverage</b>	0.779356		
	<b>Solution Consistency</b>	0.581296		

Table 6 provides the standard solution to the truth table analysis, where these two causal recipes are flagged (marked with a “1” on pro-ban in Table 5). Of the thirty-two causal combinations that were logically possible, two combinations were identified in the solution. Surprisingly, the solution offers three possible causal recipes, all of which feature the same solution coverage and consistency.

129. RAGIN, REDESIGNING, *supra* note 73, at 45.

130. Fuzzy-set analysis is likewise amenable to probability testing and other statistical methods.

There are a number of reasons for this outcome,<sup>131</sup> but the key point for the purposes of this Article is that the solutions going forward, from a policy perspective, may all explain the relevant causal conditions leading to inclusion in the set of people who are pro-marriage ban by U.S. constitutional amendment. Comparison of Table 5 and Tables 2 and 3 highlight the conceptual distinction between net effects analyses. Each of the models in Table 2 and 3 is considered the best sole causal path that fits the data. On the other hand, Table 5 permits three distinct causal recipes to describe the same data, with identical consistency and coverage. In this way, the notion that the arrival at support for a ban on same-sex marriage may not proceed for all survey respondents identically—that same-sex marriage is a causally complex subject—is accounted for in the fuzzy-set methodology.

It is this causal complexity approach—a multiple causal path solution—that has the most purchase for the kinds of questions examined by CRT and intersectionality scholars alike. Moreover, this approach to analyzing complex social problems where racialism plays a persistent role can facilitate the implementation of legal theories like John A. Powell’s “targeted universalism,”<sup>132</sup> allowing judges and juries to develop targeted remedies, particularly in class action cases. In contrast to a search for the single strongest variable’s net effect, the analysis here would suggest three empirically documented causal recipes that produce the outcome—respondents being included in the set of pro-ban supporters. The analysis here highlights both the suitability of fs(QCA) to paradigm intersectionality as an analytical framework and paradigm intersectionality’s applicability to a challenging social justice problem of our time, one that is coded with racial, gender, class, and sexuality norms heading in multiple directions.<sup>133</sup> Fuzzy-set qualitative analysis thus not only presents the opportunity to include additional detail in classifying each respondent, but is also quite amenable to higher-level quantitative analyses without the trade-offs associated with net effects analyses like bivariate and multiple regression, making it more useful for policy-related data analysis from a paradigm intersectionality perspective.

### III. CONCLUSIONS: A TALE OF TWO APPROACHES

The intersectionality-as-testable-explanation approach, though currently dominant in empirical intersectionality research, is by no means the only approach to empirically operationalizing intersectionality. Its pragmatic utility to current

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131. The standard threshold for inclusion is 0.75, but these recipes were significantly lower (0.65, 0.56). As well, the model again may not yet have all of the relevant causal conditions—for simplicity’s sake and space purposes, the logic of the method was privileged here.

132. John A. Powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U.L. REV. 785, 803–06 (2009).

133. HANCOCK, *supra* note 18, at 63.

legal practice is clear, as its results are already part of standard legal evidentiary guidelines in most U.S. courts. However, this approach, thanks to its consistency with widely practiced empirical methods of legal scholarship, incompletely operationalizes intersectionality, which thus limits its ability to fully challenge the legal structures that critical race and intersectionality theorists incisively critique.<sup>134</sup> Thus, its strength—its potential for immediate mobilization in the current legal system—is also its devastating limitation. For these reasons, I would contend that there are strong institutional incentives for legal scholars to conceptualize intersectionality in this way.

Yet, even in this incentive structure, there are equally strong norms of accurate theory translation. Intersectionality as a testable explanation has, as I have demonstrated, several significant inconsistencies with the basic tenets of CRT and intersectionality. These include, but are not limited to, a disaggregation strategy in net effects analysis and a simplistic, overly reductive orientation to how race, gender, sexuality, and class operate at the micro-level. If the goal is strong empirical operationalization of what intersectionality suggests about the role of narrative, the role of structures and invisibility, and the fusion, rather than the dissolution, of a race-gender-sexual-class sociopolitical location, this strategy misses the mark. For this reason, it is unlikely to produce the structural impact sought by intersectionality scholars. However, that structural impact is as much a political effort as a legal one, and perhaps other empirical strategies are better suited for that task. Would intersectionality-as-a-testable explanation have as much reach as it does if it were named, as in Table 1, a “multiple approach” rather than an “intersectional approach,” given the buzz surrounding intersectionality scholarship of late? Perhaps not.

In contrast to intersectionality as a testable explanation, paradigm intersectionality is far more consistent with the tenets of intersectionality theory, both as originally outlined by Crenshaw and Collins and in the years since by other normative theorists. It opens up methodological choices beyond standard net effects analysis and, when paired with fs(QCA), offers an equally rigorous method of large-N or small-N data analysis to answer research questions. Moreover, using fs(QCA) enables more comprehensive usage of narrative data in their entirety and all of their complexity, given its grounds in qualitative research.

That said, paradigm intersectionality, because it uses an unfamiliar method and is more associated with deconstruction and critique, is not as easily integrated into current legal praxis. Evidentiary standards could require changes before formal inclusion of the approach as a standard approach to empirical legal scholarship, particularly its strong connection to history (Time Dynamics) and structural critique, instead of exclusive focus on the individual claimant. For this reason, paradigm intersectionality requires greater vetting and honing at the same

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134. See sources cited *supra* notes 71–91.

time that efforts must be made on multiple fronts to transform the legal system at the structural level.

Given the current political landscape of polarization and retrenchment, it may not be possible to reject either method. To reject intersectionality as a testable explanation would “cede ground,” in the language of Neil Gotanda,<sup>135</sup> that CRT scholars cannot reasonably afford to lose—claimants are seeking relief and must use all available and permissible strategies to remedy the injustices that continue to pervade our society. On the other hand to ignore paradigm intersectionality would risk losing some of the most valuable structural insights of legal scholarship in a generation. Moreover, it is critical to avoid playing small ball—that is, we should eschew constantly struggling to manufacture victories by exclusively defensive play at the expense of building a strong and visionary offense. To do otherwise will limit our future ability to transform the society we sought to change by becoming change-oriented scholars in the first place.

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135. Comments made in response to an earlier version of this Article at the UC Irvine Law School’s “Critical Race Theory and Empirical Methods” symposium, April 2012.