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Critical Race Theory

Angela P Harris, *University of California - Davis*

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Angela P. Harris

400 Mrak Hall Drive, Room 2107

University of California, Davis, USA 95616

(530) 752-3276 (voice)

(530) 754-5311 (fax)

apharris@ucdavis.edu

ABSTRACT: Critical race theory is a body of work that first emerged in American legal scholarship in the late 1980s and has since spread to other disciplines. It investigates a paradox: how does racism persist despite its nearly universal condemnation by state policy and by the norms of polite society? Rejecting the conventional liberal position that racism survives only as a relic from a less-enlightened time or as a characteristic of poorly-educated or troubled individuals, critical race theorists take the position that racism is ordinary and normal in contemporary society, indeed perhaps integral to social practices and institutions.

KEYWORDS: African-American, civil rights, critical, discrimination, ethnicity, inequality, jurisprudence, law, race, racism, theory

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Critical race theory investigates a paradox: how does racism persist despite its nearly universal condemnation by state policy and by the norms of polite society? Rejecting the conventional liberal position that racism survives only as a relic from a less-enlightened time or as a characteristic of poorly-educated or troubled individuals, critical race theorists take the position that racism is ordinary and normal in contemporary society, indeed perhaps integral to social practices and institutions. Critical race theory can thus be understood as a study of 'hegemony': how domination can persist without coercion. It can also be understood as a study of collective denial.

Critical race theory originated in American legal studies in the post-Civil Rights Movement period, out of a sense of frustration that the era's 'Second Reconstruction' had failed to extirpate racism (see Crenshaw, 1988; Ansley, 1989). Its central target of critique has been state law, and its primary methodological innovations in legal scholarship have been the use of 'storytelling,' fictional or anecdotal, to criticize legal reasoning and legal doctrine; and a method of 'reading against the grain' that refuses to take legal doctrines at face value. Substantive themes of critical race theory in law include a sustained attack on the US Supreme Court's contemporary jurisprudence of race, particularly the position that the state can and should be 'colorblind'; attempts to theorize unconscious racism or 'implicit bias' as well as 'structural racism'; the examination of race relations beyond the 'black/white paradigm'; and efforts to understand how race interlocks with other forms of oppression. Future directions for critical race theory include its migration into and collaboration with other disciplines and scholarly fields, and an interest in placing US race relations into a global political-economic context.

In contemporary US social life, it is popularly accepted that racism is a form of injustice and that state law has the moral obligation, not only to refrain from perpetrating racist acts against citizens, but to provide redress for certain victims of non-state racism as a matter of public policy. Most debates over antidiscrimination law and policy focus on the scope of these obligations. With respect to the state's obligation not to perpetrate racism itself, a question is whether antidiscrimination norms are satisfied when the state eschews all race-conscious state and non-state public action, or whether the state should undertake race-conscious actions in certain circumstances in order to remedy its own past and continuing racial discrimination. With respect to the state's obligation to remedy non-state discrimination, questions include to what extent the state should remedy 'private' discrimination at all, and where the lines between 'public' and 'private' behavior should be drawn. These debates also require a definition of what 'discrimination' means.

Writers who associate themselves with critical race theory take the position that racism is ordinary and normal in American society (Delgado, 1994), indeed perhaps integral to it. Accordingly, critical race theorists attempt to show how contemporary law—including contemporary antidiscrimination law— paradoxically accommodates and even facilitates racism. The critical race theory project inevitably calls into question fundamental assumptions about legal institutions and legal reasoning, about the trajectory of American history, and about the nature of injustice.

One tendency within critical race theory, deriving from the tradition of civil rights activism and jurisprudence, is strongly reformist in bent and seeks to galvanize moral outrage and direct it toward constructive legal change. A second influence on critical race theory is the poststructuralist tradition, within which the very possibility of overcoming racism through discursive structures such as law is considered a false hope. Critical race theory thus reflects a distinctive mix of reformist zeal and critical pessimism (A. Harris, 1994). For example, Derrick Bell has urged civil rights activists to accept that, although there is a moral duty to challenge racism, racism is a permanent feature of American society (Bell, 1992). Other scholars influenced by critical race theory pursue the hope that innovations such as the theory of 'implicit bias' can successfully reshape antidiscrimination law into a more effective tool against racism (Kang et al., 2012).

1 Origins of Critical Race Theory

Critical race theory emerged in the USA in the 1980s as a product of political, intellectual, and sociological developments in American legal academia. Politically, the 1980s were a time when many American civil rights activists and left-wing legal scholars felt themselves caught up in a conservative backlash against the gains of the 1960s. The scholars who would later call themselves critical race theorists sought explanations for why formal legal equality had produced only modest success in improving the lived experience of most African–Americans and other people of color, and why hopes for social 'integration' with whites seemed largely to have faded (Crenshaw, 1988; Ansley, 1989).

Intellectually, the early 1980s saw the heyday of Critical Legal Studies (CLS) in the American legal academy. CLS introduced into legal scholarship poststructuralist ideas that had already

permeated other disciplines focused on the interpretation of texts, including philosophy, literary criticism, and anthropology. Within legal studies, CLS scholars challenged the divide between 'law' and 'politics,' arguing that legal rules were radically indeterminate. CLS called for the deconstruction or 'trashing' of legal doctrine in order to expose the reification of legal concepts and the hegemonic function of traditional legal reasoning (Kelman, 1987). CLS also provided an intellectual opening for broad-based critiques of law based on hidden norms of race and gender exclusion. For example, the first collection of essays in critical race theory appeared under the title 'Minority Critiques of the Critical Legal Studies Movement'; its authors were CLS sympathizers who nonetheless were disappointed with CLS's failure to extensively engage with racism (Delgado, 1987; Williams, 1987).

Sociologically, the 1980s saw the gradual entry into legal academia of African–Americans and other people of color, albeit in small numbers. Many of these new scholars were drawn to study race and the law, were frustrated by the disappointing outcomes of traditional avenues of legal reform in an era of backlash, and perceived traditional civil rights scholarship as a literature that ignored the voices of people of color (Delgado, 1984). Several key figures in what would become critical race theory were radicalized as students by the departure of Derrick Bell—one of the pioneering African–American scholars critical of existing civil rights jurisprudence—from Harvard Law School because of their failure to hire an African-American woman to the tenure-track faculty. These Harvard students created their own course on race, racism and the law, and staffed it with visiting scholars from around the country. The movement known as 'critical race

theory,' and the term itself, emerged from this working group of students and teachers (Crenshaw et al., 1995).

2 Themes of Critical Race Theory

One of the earliest themes to appear within critical race theory was epistemological in nature and was reflected in a distinctive method. Why were people of color much more likely than whites to see American society as racist and to be pessimistic about the possibility of eliminating racism? Did they know something whites did not? Many critical race theorists argued that existing antidiscrimination law omitted the perspectives of the racially subordinated, and that subordinated groups in any social system have knowledge that the privileged lack. Thus, in a famous essay Mari Matsuda argued that civil rights scholarship and practice should 'look to the bottom' of society for leadership and insight (Matsuda, 1987). Some scholars argued for the existence of a distinctive 'voice of color' that needed to be heard in public policy and legal scholarship (e.g. Johnson, 1991).

Critical race theorists also frequently abandoned the third-person objective voice in their legal writing in order to openly 'tell stories.' For example, Derrick Bell's 'Civil Rights Chronicles' featured an imaginary character who could travel through time, and who used her magical powers to criticize American civil rights doctrine from the founding of the Constitution to the present (Bell, 1985, 1992). The telling of personal anecdotes or fables was intended not only to convey ideas that could not be expressed in traditional scholarly language, but also to criticize the assumption that norms of legal scholarship, legal reasoning, and legal institutions operated objectively and produced neutral assessments of public policy. Critical race theorists hoped to show that the legal scholar's 'perspectivelessness' (Crenshaw, 1989b) was in fact a perspective

aligned with white privilege. Thus, for example, Patricia Williams, trained in poststructuralist theory and CLS, used personal stories, a dense web of allusions, and literary techniques to critique the social and legal construction of racial realities (P. Williams, 1991). The assertion of a distinctive voice of color proved controversial; critical race theory, like CLS before it, was bitterly attacked as racial 'special pleading' and as degrading the rigorous standards of argument and research established by traditional legal scholarship (see, for example, Kennedy, 1989). Legal 'storytelling' was similarly attacked as sloppy scholarship and as an attempt to destroy the legacy of the Enlightenment. In this attack, critical race theory was taken to be a postmodernist assault on truth itself (see, for example, Farber & Sherry, 1997).

Drawing on the CLS tradition, critical race theorists have developed a distinctive style of 'reading against the grain,' or, put another way, have adopted a 'hermeneutics of skepticism' with respect to legal doctrine. This is often done by placing jurisprudential developments in a larger political and historical context in order to identify the continuity of racial oppression across time despite changing legal and political regimes. Thus, for example, Michelle Alexander argues that mass incarceration in the contemporary US can properly be called 'the new Jim Crow' because it restricts the life chances of African Americans in the same way as de jure racial segregation in the pre-World War II South (Alexander, 2010). Ruth Gordon argues that the multilateral regime of the World Trade Organization has set sub-Saharan Africa up to remain poor and disorganized (Gordon, 2006). Derrick Bell argues that Brown v. Board of Education, the landmark constitutional case that struck down de jure segregation in elementary education, has become a historical artifact without contemporary significance given the resegregation of American schools (Bell, 2008). Critical race theorists thus set jurisprudence within a narrative of

'preservation through transformation' – the idea that racism constantly changes in form but not effect (Siegel, 1997; see also Calmore, 1997). In this way, critical race theory represents a critique of the conventional liberal faith in social progress.

Most of the writing within critical race theory, however, has not taken on philosophical questions or even strayed very far from conventional methods of legal scholarship, but rather has consisted of a sustained attack on the US Supreme Court's race jurisprudence, particularly its constitutional jurisprudence. For example, as one scholar has it, throughout the 1980s and 1990s the Court asserted its fidelity to four constitutional 'traditions' (Hayman Jr., 1995). First, the Court increasingly favored a position of 'colorblindness,' under which all government racial classifications are presumptively unconstitutional, except perhaps when necessary to compensate a group of plaintiffs who can demonstrate the existence of conscious, deliberate racial bigotry that caused material disadvantage. Second, the Court frequently deferred to legislatures, to state and local governments, and to the discretion historically exercised by public actors such as criminal prosecutors and juries when these actors were charged with racial discrimination. Third, the Court deferred to private choices and free markets to produce the optimal allocation of resources. Fourth, the Court supported traditional indicators of 'merit' when these were challenged as racially biased.

Critical race theorists have painstakingly attempted to show how these jurisprudential developments, separately and together, block the possibility of political, economic, and social redistributions that would disrupt systemic racism. Some critiques have focused on unpacking the history and rhetorical structure of the Court's contemporary race jurisprudence to show how

it redirects but does not challenge racism (Haney Lopez, 2007). Other scholars have mounted sustained attacks on particular doctrinal developments. For example, Devon Carbado and Cheryl Harris argue that by accepting the principle that the government can legitimately employ race when it is enforcing immigration laws, the Supreme Court has sanctioned 'racial profiling' against Latinos, facilitated the merger of criminal law and immigration law with an expansion of police and prosecutorial power, and weakened constitutional protections against search and seizure in ordinary policing (Carbado & Harris, 2011).

A second theme of critical race theory is the attempt to articulate more expansive theories of race and racism than the Court's focus on conscious, intentional prejudice. Some critical race theorists have turned to economics to show how structural incentives in sites such as the workplace perpetuate racial stereotyping and racial 'cartels' (Carbado & Gulati, 2000, 2003, 2004; Roithmayr, 2010). Others draw on sociology, history, and/or geography to theorize 'institutional' or 'structural' racism (Haney Lopez, 2000; powell, 2008). A number of critical race theorists have drawn on cognitive psychology and the theory of 'implicit bias' to develop a theory of unconscious racism (Krieger, 1995; Robinson, 2008; Kang, 2010). This work builds on an early influential article by Charles Lawrence III, who attacked the Supreme Court's use of conscious 'intent to discriminate' as the touchstone for fourteenth amendment equal protection clause jurisprudence (Lawrence, 1987).

A third theme within critical race theory is a move beyond the traditional 'black/white paradigm' in the study of race relations. Much traditional US civil rights jurisprudence, and much early critical race theory, focused on caste racism against African–Americans. A number of other

critical race theorists, particularly those associated with the 'LatCrit' (Latina/o Critical Theory) movement, have criticized this focus (R. Williams, 1991; Perea, 1997), and explored the racialization of other nonwhite groups in the US, including Latinos, Asian–Americans, American Indians, and 'mixed-race' people (e.g. Chin et al., 1996; Berger, 2009; Hernandez, 1998, 2007). These scholars identify 'nativist racism' as a phenomenon distinct from, although related to, 'caste racism,' and explore the political and social 'triangulation' of racial groups defined as neither black nor white (Chang & Aoki, 1998; Chang & Gotanda, 2006-07). They have sought to recover and examine aspects of American race history, such as the Chicano struggle for civil rights, Asian exclusion, and the colonization of Puerto Rico, that have been neglected because they do not fit the traditional emphasis on African–American civil rights (Gomez, 2007; Haney Lopez, 2003; Chin, 1998; Roman, 1997). Finally, this strand of critical race theory explores the convergences and divergences between race law, immigration and naturalization law, and federal Indian law (Villazor, 2008, 2010; Johnson, 2008, 2010).

A fourth theme within critical race theory has been an effort to understand how racism interlocks with other forms of oppression, including gender, class, and sexuality. From the beginning, many critical race theorists regarded themselves as feminists, and several addressed the failure of mainstream feminism to respond to the interests and perspectives of women of color (Crenshaw, 1989a; A. Harris, 1990). Later writers in this tradition sometimes refer to themselves as 'critical race feminists' (Wing, 2003), and have produced a body of work that criticizes legal institutions and legal doctrine from the perspective of women of color. The work in this tradition has come to treat 'race' as only one axis of a multidimensional system of status oppression (Hutchinson, 1997), and, drawing on an early article by Crenshaw, much of it goes under the label of

'intersectionality' (see Crenshaw, 1989a). An offshoot of critical race theory—Latina/o Critical Theory or 'LatCrit' as it has been familiarly dubbed—has devoted itself explicitly to intersectionality, exploring the interplays of race, ethnicity, religion, national origin, class, and sexuality (Valdes, 1998). More recently, critical race scholarship has explored the relationship between race and class (Jones, 2009).

Each of these thematic strands within critical race theory has engaged with the effort to work out the implications for legal theory of understanding 'race' as a social construction, rather than a natural fact. In this broader project, some critical race scholars have imported the work of sociologists Michael Omi and Howard Winant on 'racial formation' into the legal academy, studying the influence of state law on the racialization of 'whites' and 'Mexicans' (Gomez, 2007; Haney Lopez, 1996, 1998). Others have traced the differing meanings of 'race' within judicial discourse and within social and political discourse, to show how policy and legal conflicts often involve an unacknowledged manipulation of the term (Gotanda, 1991, Hernandez 1998).

3 Future Directions for Critical Race Theory

One recent development within critical race theory has been an interest in the flip side of minority oppression: 'white privilege.' One aspect of this development is an interest in exploring white identity, facilitated by a growing literature on 'critical white studies' (Flagg, 1998; Delgado & Stefancic, 1997) and an interest in how racial discrimination affects whites (Rich, 2010). Additionally, there is growing interest in taking racial 'privilege' rather than 'discrimination' as the object of study and critique (Wildman, 2005, 1996). Here, the argument is that the traditional focus on racism's victims leaves unexamined the everyday ways in which

persons who are not victimizers nevertheless benefit from racial hierarchies. This development is in keeping with the turn away from intentional discrimination as the touchstone for racism.

A second recent development within critical race theory is an expansion into 'private law.' Some participants in an emerging 'critical tax studies' movement have imported the themes and concerns of critical race theory into their work (Moran & Whitford, 1996; Brown, 1997). A few scholars of corporate law have examined corporate law doctrine and racial diversity issues within corporations from a critical race theory perspective (Wade, 2002; Carbado & Gulati, 2004). Others have incorporated critical race theory's concerns into examinations of contract, tort, and property law (Houh, 2005; Chamallas & Wriggins, 2010; Brophy et al., 2011).

A third development within critical race theory is a movement beyond the borders of the United States. One example of this move is a growing literature in critical comparative studies of race and law (Oppenheimer, Foster, & Han, 2012; Hernandez, 2003; Wing, 2001). Another example is the incorporation of themes from critical race theory into the international law context (Richardson, 2008; Gordon, 1997) and into discussions of international human rights, foreign policy, and international trade relations (Hernandez-Truyol, 2008; Gordon, 2009; Gordon & Sylvester, 2004).

A final recent development is the migration of critical race theory into other fields of legal scholarship and other disciplines. Critical race theory explores a subject matter of interest to sociologists, political scientists, historians, and anthropologists. Laura Gomez has noted the overlap in particular between critical race theorists and law and society scholars, advocating

more collaboration (Gomez, 2004). Other scholars have argued for greater collaboration between critical race theorists and empirical researchers generally, citing the benefits to both types of scholarship (Parks, 2008; see Twine & Warren, 2000). As previously noted, a fruitful emerging collaboration between critical race theory and cognitive psychology concerns the concept of implicit bias (Kang, 2010), although others lament that 'a critical race psychology is not yet born' (Adams & Salter, 2011). Critical race theorists and economists have worked together (Carbado & Gulati, 2000, 2003, 2004; see also Ayres, 2007). Finally, ethnic studies, cultural studies, postcolonial studies, and American studies have concerns, subject matter, and methods closely allied with those of critical race theory, and scholars in these fields freely borrow from one another's work.

Critical race theory has also moved further afield, where it is sometimes referred to as 'critical race studies.' In particular, it has taken off in the discipline of education (Ladson-Billings, 1995, 2011). A handful of philosophers exploring questions of racial equality have also drawn on critical race theory in their work (e.g. Pateman & Mills, 2007).

Finally, at least one law school has established a critical race studies certificate program for its students with a program that seeks, among other things, to promote a more comprehensive and comparative approach to the study of race and law (C. Harris, 2002). This development may be a harbinger of a shift from critical race theory from the margins to the mainstream of research and teaching.

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