

Critical Race Theory

An Introduction

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CHAPTER I

Introduction

Think of events that can occur in an ordinary day. A child raises her hand repeatedly in a fourth grade class; the teacher either recognizes her or does not. A shopper hands a cashier a five dollar bill to pay for a small item; the clerk either smiles, makes small talk, and deposits change in the shopper's hand or does not. A woman goes to a new car lot ready to buy; salespeople stand about talking to each other or all converge trying to help her. A jogger in a park gives a brief acknowledgment to an approaching walker; the walker returns the greeting or walks by silently.

You are a white person—the child, the shopper, the jogger. The responses are all from white people and are all negative. Are you annoyed? Do you, for even a moment, think that maybe you are receiving this treatment because of your race? Or might you think that all these people are having a bad day? Next suppose that the responses are all from persons of color. Are you thrown off guard? Angry? Depressed?

You are a person of color and these same things happen to you and the actors are all white. What is the first thing that comes to your mind? Do you immediately think that you might be treated in these ways because you are not white? If

so, how do you feel? Angry? Downcast? Do you let it roll off your back? And if the responses come from fellow persons of color, then what do you think? Suppose the person of color is from a group other than your own? Sometimes actions like these are mere rudeness or indifference. The merchant is in a hurry; the walker, lost in thought. But at other times, race seems to play a part. When it does, social scientists call the event a “microaggression,” by which they mean one of those many sudden, stunning, or dispiriting transactions that mar the days of women and folks of color. Like water dripping on sandstone, they can be thought of as small acts of racism, consciously or unconsciously perpetrated, welling up from the assumptions about racial matters most of us absorb from the cultural heritage in which we come of age in the United States. These assumptions, in turn, continue to inform our public civic institutions—government, schools, churches—and our private, personal, and corporate lives.

Sometimes the acts are not micro at all. Imagine that the woman or minority standing alone and ignored at the car sales lot eventually attracts the attention of a salesperson. They negotiate, and she buys a car. Later she learns that she paid almost a thousand dollars more than what the average white male pays for that same car. (See Ian Ayres, Fair Driving, 104 Harv. L. Rev. 817 [1991]).

A. What Is Critical Race Theory?

The critical race theory (CRT) movement is a collection of activists and scholars interested in studying and transforming the relationship among race, racism, and power. The

movement considers many of the same issues that conventional civil rights and ethnic studies discourses take up, but places them in a broader perspective that includes economics, history, context, group- and self-interest, and even feelings and the unconscious. Unlike traditional civil rights, which embraces incrementalism and step-by-step progress, critical race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law.

Although CRT began as a movement in the law, it has rapidly spread beyond that discipline. Today, many in the field of education consider themselves critical race theorists who use CRT's ideas to understand issues of school discipline and hierarchy, tracking, controversies over curriculum and history, and IQ and achievement testing. Political scientists ponder voting strategies coined by critical race theorists. Ethnic studies courses often include a unit on critical race theory, and American studies departments teach material on critical white studies developed by CRT writers. Unlike some academic disciplines, critical race theory contains an activist dimension. It not only tries to understand our social situation, but to change it; it sets out not only to ascertain how society organizes itself along racial lines and hierarchies, but to transform it for the better.

B. Early Origins

Critical race theory sprang up in the mid-1970s, as a number of lawyers, activists, and legal scholars across the

country realized, more or less simultaneously, that the heady advances of the civil rights era of the 1960s had stalled and, in many respects, were being rolled back. Realizing that new theories and strategies were needed to combat the subtler forms of racism that were gaining ground, early writers such as Derrick Bell, Alan Freeman, and Richard Delgado (coauthor of this primer) put their minds to the task. They were soon joined by others, and the group held its first conference at a convent outside Madison, Wisconsin, in the summer of 1989. Further conferences and meetings took place. Some were closed working sessions at which the group threshed out internal problems and struggled to clarify central issues, while others were public, multi-day affairs with panels, plenary sessions, keynote speakers, and a broad representation of students, activists, and scholars from a wide variety of disciplines.

C. Relationship to Other Movements

As the reader will see, critical race theory builds on the insights of two previous movements, critical legal studies and radical feminism, to both of which it owes a large debt. It also draws from certain European philosophers and theorists, such as Antonio Gramsci and Jacques Derrida, as well as from the American radical tradition exemplified by such figures as Sojourner Truth, Frederick Douglass, W.E.B. Du Bois, Cesar Chavez, Martin Luther King, Jr., and the Black Power and Chicano movements of the sixties and early seventies. From critical legal studies, the group borrowed the

idea of legal indeterminacy—the idea that not every legal case has one correct outcome. Instead, one can decide most cases either way, by emphasizing one line of authority over another, or interpreting one fact differently from the way one’s adversary does. It also incorporated the critique of triumphalist history, and the insight that favorable precedent, like *Brown v. Board of Education*, tends to deteriorate over time, cut back by narrow lower-court interpretation and administrative foot dragging and delay. The group also built on feminism’s insights into the relationship between power and the construction of social roles, as well as the unseen, largely invisible collection of patterns and habits that make up patriarchy and other types of domination. From conventional civil rights thought, the movement took a concern for redressing historic wrongs, as well as the insistence that legal and social theory have practical consequences. CRT also shared with it a sympathetic understanding of notions of nationalism and group empowerment.

D. Principal Figures

Derrick Bell, professor of law at New York University, is the movement’s intellectual father figure. Still active today, Bell teaches, writes occasional law review articles and memoir-type books, delivers speeches, and keeps a number of case-books current. The late Alan Freeman, who taught at the State University of New York at Buffalo law school, wrote a number of foundational articles, including a pathbreaking piece that documented how the U.S. Supreme Court’s race

jurisprudence, even when seemingly liberal in thrust, nevertheless legitimized racism. Kimberlé Crenshaw, Angela Harris, Charles Lawrence, Mari Matsuda, and Patricia Williams are major figures, as well. Leading Asian scholars include Neil Gotanda, Eric Yamamoto, and Matsuda. The top Indian critical scholar is Robert Williams; the best-known Latinos/as, Richard Delgado, Kevin Johnson, Margaret Montoya, Juan Perea, and Francisco Valdes. The reader will find their ideas discussed frequently throughout this primer.

E. Spin-off Movements

Recently, critical race theory has splintered. Although the new subgroups, which include an emerging Asian American jurisprudence, a forceful Latino-critical (LatCrit) contingent, and a feisty queer-crit interest group, continue to maintain relatively good relations under the umbrella of critical race theory, meeting together at periodic conferences and gatherings, each has developed its own body of literature and set of priorities. For example, Latino and Asian scholars study immigration theory and policy, as well as language rights and discrimination based on accent or national origin. A small group of Indian scholars addresses indigenous people's rights, sovereignty, and land claims.

F. Basic Tenets of Critical Race Theory

What do critical race theorists believe? Probably not every member would subscribe to every tenet set out in this book,

but many would agree on the following propositions. First, that racism is ordinary, not aberrational—“normal science,” the usual way society does business, the common, everyday experience of most people of color in this country. Second, most would agree that our system of white-over-color ascendancy serves important purposes, both psychic and material. The first feature, ordinariness, means that racism is difficult to cure or address. Color-blind, or “formal,” conceptions of equality, expressed in rules that insist only on treatment that is the same across the board, can thus remedy only the most blatant forms of discrimination, such as mortgage redlining or the refusal to hire a black Ph.D. rather than a white high school dropout, that do stand out and attract our attention. The second feature, sometimes called “interest convergence” or material determinism, adds a further dimension. Because racism advances the interests of both white elites (materially) and working-class people (psychically), large segments of society have little incentive to eradicate it. Consider, for example, Derrick Bell’s shocking proposal (discussed in a later chapter) that *Brown v. Board of Education*—considered a great triumph of civil rights litigation—may have resulted more from the self-interest of elite whites than a desire to help blacks.

A third theme of critical race theory, the “social construction” thesis, holds that race and races are products of social thought and relations. Not objective, inherent, or fixed, they correspond to no biological or genetic reality; rather, races are categories that society invents, manipulates, or retires when convenient. People with common origins share certain

physical traits, of course, such as skin color, physique, and hair texture. But these constitute only an extremely small portion of their genetic endowment, are dwarfed by that which we have in common, and have little or nothing to do with distinctly human, higher-order traits, such as personality, intelligence, and moral behavior. That society frequently chooses to ignore these scientific facts, creates races, and endows them with pseudo-permanent characteristics is of great interest to critical race theory.

Another, somewhat more recent, development concerns differential racialization and its many consequences. Critical writers in law, as well as social science, have drawn attention to the ways the dominant society racializes different minority groups at different times, in response to shifting needs such as the labor market. At one period, for example, society may have had little use for blacks, but much need for Mexican or Japanese agricultural workers. At another time, the Japanese, including citizens of long standing, may have been in intense disfavor and removed to war relocation camps, while society cultivated other groups of color for jobs in war industry or as cannon fodder on the front. Popular images and stereotypes of various minority groups shift over time, as well. In one era, a group of color may be depicted as happy-go-lucky, simpleminded, and content to serve white folks. A little later, when conditions change, that very same group may appear in cartoons, movies, and other cultural scripts as menacing, brutish, and out of control, requiring close monitoring and repression.

Closely related to differential racialization—the idea that each race has its own origins and ever evolving history—is

the notion of intersectionality and anti-essentialism. No person has a single, easily stated, unitary identity. A white feminist may be Jewish, or working-class, or a single mother. An African American activist may be gay or lesbian. A Latino may be a Democrat, a Republican, or even a black—perhaps because that person’s family hails from the Caribbean. An Asian may be a recently arrived Hmong of rural background and unfamiliar with mercantile life, or a fourth-generation Chinese with a father who is a university professor and a mother who operates a business. Everyone has potentially conflicting, overlapping identities, loyalties, and allegiances.

A final element concerns the notion of a unique voice of color. Coexisting in somewhat uneasy tension with anti-essentialism, the voice-of-color thesis holds that because of their different histories and experiences with oppression, black, Indian, Asian, and Latino/a writers and thinkers may be able to communicate to their white counterparts matters that the whites are unlikely to know. Minority status, in other words, brings with it a presumed competence to speak about race and racism. The “legal storytelling” movement urges black and brown writers to recount their experiences with racism and the legal system and to apply their own unique perspectives to assess law’s master narratives. This topic, too, is taken up later in this book.

G. How Much Racism Is There in the World?

Many modern-day readers believe that racism is declining or that class today is more important than race. And it is certainly true that lynching and other shocking expressions

of racism are less frequent than in the past. Moreover, many Euro-Americans consider themselves to have black, Latino/a, or Asian friends. Still, by every social indicator, racism continues to blight the lives of people of color, including holders of high-echelon jobs, even judges.

I concede that I am black. I do not apologize for that obvious fact. I take rational pride in my heritage, just as most other ethnics take pride in theirs. However, that one is black does not mean . . . that he is anti-white. . . . As do most blacks, I believe that the corridors of history in this country have been lined with countless instances of racial injustice. . . .

Thus a threshold question which might be inferred from defendants' petition is: Since blacks (like most other thoughtful Americans) are aware of the "sordid chapter in American history" of racial injustice, shouldn't black judges be disqualified per se from adjudicating cases involving claims of racial discrimination?

Federal Judge Leon Higginbotham, in refusing to disqualify himself from hearing a case, Commonwealth v. Local Union 542, International Union of Operating Engineers, 388 F. Supp. 155 (E.D. Pa. 1974).

Studies show that blacks and Latinos who seek loans, apartments, or jobs are much more apt than similarly qualified whites to be rejected, often for vague or spurious reasons. The prison population is largely black and brown; chief executive officers, surgeons, and university presidents are almost all white. Poverty, however, has a black or brown face: black families have, on the average, about one-tenth of the assets of their white counterparts. They pay more for many products and services, including cars. People of color

lead shorter lives, receive worse medical care, complete fewer years of school, and occupy more menial jobs than do whites. A recent United Nations report showed that African Americans in the United States would make up the twenty-seventh ranked nation in the world on a combined index of social well-being; Latinos would rank thirty-third. Why all this is so and the relationship between racism and economic oppression—between race and class—are topics of great interest to critical race theory and covered later.

H. Organization of This Book

Critical Race Theory addresses, in simple, straightforward language, these and additional themes characteristic of the new critical race jurisprudence. Chapter 2 presents four large themes in critical race theory—interest convergence or material determinism, revisionist interpretations of history, the critique of liberalism, and structural determinism.

Chapter 3 takes up storytelling, counterstorytelling, and the narrative turn in general; chapter 4 addresses the twin themes of intersectionality and anti-essentialism. It also considers cultural nationalism and the opposite notion that minorities should attempt to assimilate and blend into mainstream society.

Does American racial thought contain an implicit black-white binary, an unstated dichotomy in which society comes divided into two groups, whites and blacks, so that nonblack minority groups, such as Filipinos or Puerto Ricans, enter into the equation only insofar as they are able to depict

themselves and their problems as like blacks? Chapter 5 explores this issue, as well as “critical white studies.” Social scientists have long put minority groups under the lens, examining their culture, intelligence, motivation, family arrangements, music, and much more. Recently scholars on both sides of the color line have switched perspective and are examining whites as a group. One topic that critical white studies addresses is whether such a thing as white privilege exists, and what its components are. Chapter 5 also looks at the scholarship of other racial groups such as the LatCrits and critical Asian writers.

As the reader might imagine, critical race theory has come in for its share of criticism. Chapter 6 examines the main challenges that writers from both the Left and Right have leveled at this new approach to civil rights. It also includes responses to those objections. Chapter 7 describes critical race theory’s current situation. It also ponders a few relatively recent issues on the movement’s agenda, including hate speech, criminal justice, merit, affirmative action, poverty, and globalization. A concluding chapter hazards some predictions on the country’s racial future and critical race theory’s role in that future.

The reader will find in each chapter questions for discussions and a short list of suggested readings. We include hypotheticals and classroom exercises where we think these will promote understanding. We also excerpt passages from judicial decisions illustrating the influence of critical race theory. At the end we include an extensive glossary of terms, including many that are not found in this book.

QUESTIONS AND COMMENTS FOR CHAPTER I

1. Is critical race theory pessimistic? Consider that it holds that racism is ordinary, normal, and embedded in society, and, moreover, that changes in relationships among the races (which include both improvements and turns for the worse) reflect the interest of dominant groups, rather than idealism, altruism, or the rule of law.

Or is it optimistic, because it believes that race is a social construction? (As such, it should be subject to ready change.)

And if CRT does have a dark side, what follows from that? Is medicine pessimistic because it focuses on diseases and traumas?

2. Most people of color believe that the world contains much more racism than white folks do. What accounts for this difference?
3. Is race or class more important in determining one's life chances?

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