LIBERTY UNIVERSITY

Liberty University Law Review

Volume 17 | Issue 3 Article 6

October 2022

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ARTICLE

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Timon Cline[†] *and Neil Shenvi*[‡]

ABSTRACT

The national debate over Critical Race Theory (CRT) continues to grow and deepen. Some Christians seemingly find CRT legitimate, useful, and non-threatening to Christian theological commitments. This view is incorrect. CRT is in fundamental conflict with Christianity due to its misguided perspectives on law, morality, truth, and justice. Although CRT is more than "just a legal theory," this article examines CRT's legal origins and outlook, showing the inevitable tension between its claims and a Christian understanding of reality. This article also calls attention to several policy proposals suggested by CRT scholars to demonstrate how they are incompatible with Christian views of divine moral law and procedural justice.

I. INTRODUCTION

The national debate, both inside and outside the church, over the merits and demerits of Critical Race Theory (CRT) continues to grow.[1] The

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[1] *See generally* Tara J. Yosso, *Whose Culture Has Capital? A Critical Race Theory Discussion of Community Cultural Wealth*, 8 RACE ETHNICITY & EDU. 69, 73–74 (2005) (summarizing CRT tenets); Aja Y. Martinez, *Critical Race Theory: Its Origins, History, and Importance to the Discourses and Rhetorics of Race*, 27 FRAME J. LITERACY STUD. 9 (2014) (providing an accessible overview of CRT's development); MARI J. MATSUDA ET AL., WORDS THAT WOUND 6–7 (Robert W. Gordon & Margaret Jane Radin eds., 1993).

authors of this article are Christians and staunch critics of CRT but nevertheless regularly engage with Christians who find CRT legitimate, useful, and non-threatening to Christian theological commitments.

One retort that we have repeatedly encountered in this setting is the claim that CRT is *just* a legal theory developed by certain scholars between the late 1960s and 1980s to examine the interaction of racism and law.[2] The intent of this "*just* a legal theory" quip is often to show that our criticisms of CRT are overblown or misplaced and that our concerns are due to a misunderstanding of the essence and purpose of CRT—namely, that it's merely a variant mode of legal analysis.[3] The further insinuation is that—as an esoteric *legal* theory—CRT cannot possibly present a clear and present threat to the church or to the doctrine and life of her members.

Of course, it is true that CRT originated within legal scholarship.[4] However, it did not stay there for long, nor was it intended to.[5] CRT was meant to defy disciplinary lines, and its early advocates hoped it would have an impact beyond the scope of legal theory: "Critical Race Theory does not simply seek to understand the complex condominia of law, racial ideology, and political power. We believe that our work can provide a useful theoretical vocabulary for the practice of progressive racial politics in contemporary America."[6]

In truth, CRT scholarship increasingly traverses disciplinary boundaries and spawns new disciplines.[7] In the foreword of Richard Delgado's and Jean Stefancic's seminal text *CRT: An Introduction,* Angela Harris boasts that CRT literature is "read in departments of education, cultural studies, English, sociology, comparative literature, political science, history, and

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[2] *See* Yosso, *supra* note 1, at 73; Martinez, *supra* note 1, at 17–18.

[3] *Cf.* Angela Harris, *Foreword to the Third Edition of* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION, at xiii, xv–xvi, (3d ed. 2017); RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 11 (3d ed. 2017).

[4] Martinez, *supra* note 1, at 17.

[5] *See id.* Harris, *supra* note 3, at xvi.

[6] CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xxvii (Kimberlé Crenshaw et al. eds., 1995) [hereinafter KEY WRITINGS].

[7] *See, e.g.*, Sumi Cho et al., *Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis*, 38 SIGNS 785, 787 (2013).

anthropology . . . ."[8] Delgado and Stefancic add that its ideas are deployed by political scientists, women's studies professors, "[s]ociologists, theologians, and health care specialists."[9] New applications for its commitments, insights, and fundamental worldview are seemingly endless. Accordingly, the "*just* a legal theory" rejoinder is a remarkable oversimplification of CRT, one that contradicts the interdisciplinary dynamics and intents of critical social theory scholarship itself, and erroneously ignores the undeniable outgrowth of CRT in popular culture and national politics.

But granting for the sake of argument that CRT is *just* a legal theory, our opinion regarding CRT does not change. The assumptions and central tenets of CRT regarding law present myriad problems—especially for Christians. In this article, we show that CRT, even narrowly construed as merely a legal discipline, is still in fundamental conflict with Christianity and is based on misguided and deleterious views of law, morality, truth, and justice.

Our article is organized as follows: Part I sketches the origin of CRT. Understanding the historic antecedents of CRT is important to fully grasp its unique pathologies. Part II articulates CRT's view of law and the outcomes (intended and unintended) that follow. Part III provides several examples of how the ideas of CRT play out in practice. In these sections we provide minimal critique, aiming instead to accurately describe CRT by drawing heavily on the writings of critical race theorists themselves. Part IV presents a Christian critique of the critical race theorists, paying particular attention to CRT's denial of a divine moral grounding for the law, its cynicism, its rejection of procedural justice, and its views of gender and sexuality. Finally, Part V offers a brief conclusion.

II. ORIGIN STORY

A. From Formalism to Realism: Law as Fiat

The story of CRT begins with the legal realism movement of the early twentieth century.[10] Legal realism rejected what it called "formalism"; the idea that legal rules could be gleaned from self-evident first principles and

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[8] Harris, *supra* note 3, at xvi.

[9] DELGADO & STEFANCIC, *supra* note 3, at 7–8.

[10] Martinez, *supra* note 1, at 17.

that stable, repeatable answers to legal controversies could be deduced from agreed upon premises.[11] Formalism or traditional legal thought presumed that law could, at least potentially, be rational, apolitical, and fairly technical, operating as a sort of "institutional regulative principle."[12] The realists argued that formalists erroneously pretended that law was isolated from parallel social phenomena, characterizing it as a naïve dependence on the myth of apolitical, neutral methodologies.[13]

Put another way, contra the classical tradition which endured into the nineteenth century, law was no longer reason *plus* will, but will *only*.[14] Obligation to legal commands is derived simply from the coercion of a recognized authority.[15] As Brian McCall has said, reflecting on modern legal movements, "[i]f law is merely an artificial fabrication of men, then it can be whatever men want it to be."[16] On this view, law need not be reasonable in the classical sense. Law is binding if those in power ordain it, and politics is reduced to little more than a contest for "the levers of power."[17]

Realists engaged in this "debunking" exercise to expose inconsistencies in legal holdings and prove that something other than impartial fealty to transcendent principles and neutral procedural rules was governing the

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[11] *See* Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 437 (1930); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 699–700 (1931); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1235–36 (1931).

[12] KEY WRITINGS, *supra* note 6, at xviii.

[13] Linda Greene, *Race in the Twenty-First Century: Equality Through Law?*, *in* KEY WRITINGS, *supra* note 6, at 292.

[14] *See, e.g.*, Emilios Christodoulidis, *Critical Theory and the Law: Reflections on Origins, Trajectories and Conjunctures*, *in* RESEARCH HANDBOOK ON CRITICAL LEGAL THEORY 7, 14, 26 (Emilios Christodoulidis et al. eds., 2019).

[15] *See id.* at 12–13.

[16] BRIAN M. MCCALL, THE ARCHITECTURE OF LAW: REBUILDING LAW IN THE CLASSICAL TRADITION 4 (2018). "[The] relationship between law and reason is clearly distinguished from positivism, which accepts as law anything that meets the currently reigning procedural requirements for making a law. For the natural law system, such is not sufficient; to be a law, the rule and measure must agree with or stand in the faculty of reason, not merely the will." *Id.* at 12–13. In this context, *inter alia*, "reason" refers to means being fitted to justifiable ends by a proper authority for the common good. Furthermore, law, to be reasonable, must be "rooted in the metaphysical realities of human nature . . . ." *Id.* at 21.

[17] *Id.* at 5.

adjudication process.[18] Interacting political interests were the true drivers of legal regimes, with law itself being little more than a facade.[19]

B. From Realism to CLS: Law as Politics

Critical legal studies (CLS), the direct precursor of CRT, picked up where the realists left off, adopting its cynicism towards legal reasoning while pushing it farther. Drawing on emerging social theories of the New Left and Critical Marxist scholarship from Europe,[20] CLS presupposed that "the legal system is 'tilted' in favor of the powerful."[21] Law, like everything else, is not insulated from human power dynamics; judges are glorified policy makers, as the realists had held. But unlike the "vulgar" or "scientific" Marxists,[22] CLS appreciated that law is not merely an ideological reflection of concrete socio-economic reality, but rather that law acts to constitute the power dynamics and social interests that it in turn reflects.[23]

Stated differently and in the spirit of Antonio Gramsci, law "masks the fact that 'we could choose [or] act differently.'"[24] Law is a justification for

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[18] G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L.J. 819, 823 (1986).

[19] *See* James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PENN. L. REV. 685, 749 (1985).

[20] *See generally id.* at 688; White, *supra* note 18, at 837, 837 n.85–86 (citing as examples: Theodor Adorno, Jurgen Habermans, Max Horkheimer, and Herbert Marcuse of the Frankfurt Institute; Michael Foucault and Jacques Derrida of the "French linguistic philosophers"; and the renewed interest in Antonio Gramsci, George Lukacs, and Jean-Paul Sartre on the New Left).

[21] Mark V. Tushnet, *Critical Legal Theory*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 80, 83 (Martin P. Golding & William A. Edmundson eds., 2005). *See generally* Akbar Rasulov, *CLS and Marxism: A History of an Affair*, 5 TRANSNAT'L LEGAL THEORY 622 (2014) (discussing the relationship between CLS and Marxism).

[22] John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 393 n.9 (1984); Boyle, *supra* note 19, at 721–22.

[23] Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1350–52 (1988) (outlining a Gramscian theory of legal hegemony).

[24] John Stick, *Charting the Development of Critical Legal Studies*, 88 COLUM. L. REV. 407, 408 (1988) (reviewing MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987)). Whilst most CLS scholars would not identify with classical Marxism, the influence of the neo-Marxist tradition and later continental movements is evident. *See* Boyle, *supra* note 19, at 734.

the way things are and, by extension, a mere mechanism of coercion.[25] As the unofficial CLS mantra goes, law is politics by another means.[26] Under a CLS paradigm, law is "ideology." As Emilios Christodoulidis helpfully explains, colloquially ideology refers to a set of ideas or beliefs, whereas "in the understanding of critical theory it is related to a *function*. This function is to sustain relations of domination . . . ."[27] The larger point is that law is not based in transcendent principles predicated on human nature but rather functions as a mechanism of coercion in service of preexisting structures of domination, both reflecting and contributing to them.

CRT sprang from certain intramural conflicts within CLS. The latter reached its zenith in the 1960s and 1970s.[28] But as we will see, the emergence of CRT from CLS did not imply that CRT rejected the basic outlook of CLS. Far from it.

C. From CLS to CRT: The Great Divorce

Just as CLS adopted and developed many of the same principles as the legal realist movement, CRT adopted and developed many of the same principles as CLS. What, then, led critical race theorists to create a discipline that would separate from and eventually overshadow CLS?

First, critical race theorists felt that CLS was too abstract (especially on race) and too purely deconstructive.[29] CLS had a penchant for "trashing"

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[25] *See* Alan Hunt, *The Theory of Critical Legal Studies*, 6 OXFORD J. LEGAL STUD. 1, 45 (1986); AILEEN KAVANAGH & JOHN OBERDIEK, ARGUING ABOUT LAW 572 (Aileen Kavanagh & John Oberdiek eds., 2009); *see also* Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 576–83 (1983).

[26] Tushnet, *supra* note 21, at 80; Schlegel, *supra* note 22, at 411.

[27] Christodoulidis, *supra* note 14, at 12.

[28] *See generally* White, *supra* note 18 (charting the rise and development of CLS); Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back To Move Forward*, 43 CONN. L. REV. 1253 (2011) (providing a detailed history of the emergence of CRT); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991) (surveying the impact of CLS).

[29] Crenshaw, *supra* note 28, at 1292 ("Absent a robust frame through which the institutional and dynamic dimensions of racial power could be captured and discussed, what remains is simply the individual realm of good faith, common political commitments, and lack of personal bias."); *see also* MATSUDA ET AL., *supra* note 1, at 3 ("Critical race theory cannot be understood as an abstract set of idea or principles. Among its basic theoretical themes is that of privileging contextual and historical descriptions over transhistorical or purely abstract ones.").

Western legal regimes—holding special disdain for the "myths" of the law's determinacy, coherence, intelligibility, and legitimacy.[30] Given that CLS envisioned law as inescapably political, it sought to expose the political presuppositions behind purportedly neutral procedures and adjudicatory methods.[31]

However, the trashing exercise, in part, created friction between racial minority and white scholars within the movement and eventually led to the CLS–CRT divorce.[32] Not only did CLS scholarship not sufficiently incorporate a critique of racial power,[33] but it also failed to recognize at least the pragmatic (political) use of "rights discourse"—which CLS argued was too individualistic, indeterminate, and artificial, and, therefore, alienating[34]—and other "liberal" legal mechanisms.[35] In the lived experience of the "crits of color," rights discourse held immense, if merely instrumental, subversive and transformative power that went beyond the decidedly less urgent question of whether legal results were determinate.[36]

To illustrate imperfectly, CRT might posit that the entire American electoral system is engineered to suppress black participation, but it is nevertheless willing to employ existing democratic means to subvert and

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[30] *See* Tushnet, *supra* note 21, at 88; Schlegel, *supra* note 22, at 407.

[31] Alan Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1230–31, 1233 (1981).

[32] *See* Michael Fischl, *The Question that Killed Critical Legal Studies*, L. & SOC. INQUIRY 779 (1992) (chronicling the demise of CLS); *see also* MATSUDA ET AL., *supra* note 1, at 2 ("We are outsider law teachers who work at the margins of institutions dominated by white men.").

[33] *See* KEY WRITINGS, *supra* note 6, at xxv*; see also* Crenshaw, *supra* note 28, at 1296–97; MATSUDA ET AL., *supra* note 1, at 4–5; Crenshaw, *supra* note 28, at 1264 ("Adding to that number were several others . . . attracted by its critical stance against hierarchy, but often frustrated by the currency of arguments that cast doubt on the viability of race as a unit of analysis or the utility of race consciousness in deconstructing hierarchy.").

[34] *See generally* Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L REV. 1563 (1984); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1371–82 (1984).

[35] *See, e.g.*, Tushnet, *supra* note 21, at 88; Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 308–10 (1987) [hereinafter Delgado, *The Ethereal Scholar*]. *See generally* Richard Delgado*, Liberal McCarthyism and the Origins of Critical Race Theory*, 94 IOWA L. REV. 1505 (2009) (discussing the three-fold genesis of CRT).

[36] *See* Delgado, *The Ethereal Scholar*, *supra* note 35, at 304–07.

dismantle the system, whereas CLS (in this example) would elect to totally abstain from participation.

Accordingly, to many sympathetic racial minority scholars, the CLS paradigm was limiting rather than enabling liberation. Cynicism overwhelmed activism. While CLS mastered the art of "negation" and the "immanent critique,"[37] it failed to turn critique into a force for change, especially for the racially marginalized.[38] From the perspective of the then-emergent CRT cadre, CLS was producing little more than the armchair philosophy Marx so detested.

Second, critical race theorists believed that CLS did not take race seriously enough. From the CRT perspective, CLS failed to acknowledge the "particularity of race" and the "racial character of 'social interests'" within a "racialized state."[39] In other words, CLS lacked "color-consciousness."[40] By affirming that race is a social construction, as CRT does, CLS went too far—or not far enough—by insisting that race *should* be irrelevant to law and policy.[41] By contrast, CRT affirmed that race is not a biological category but insisted that race is "real" in that it does matter for law and policy in a racialized society wherein people are "raced."[42] Race consciousness, then, argued CRT, was essential for social change.[43] CLS's problem was that, like most liberals in the late 1980s, it exhibited a general indifference to questions of racial ideology and racialized systems of domination; it paid no attention to how the law worked to crystalize racial domination (i.e., white supremacy).[44] The liberalism of CLS instigated resistance to the "race turn" within the movement and presented an impasse.[45]

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[37] *See* Christodoulidis, *supra* note 14, at 10–26 (discussing negation and immanent critique).

[38] *See generally* Delgado, *The Ethereal Scholar*, *supra* note 35.

[39] KEY WRITINGS, *supra* note 6, at xxvi.

[40] *Id.*

[41] *See id.*

[42] *Id.*

[43] *Id.*

[44] KEY WRITINGS, *supra* note 6, at xxviii–xxix*; see also* Crenshaw, *supra* note 23, at 1336.

[45] *See* Crenshaw, *supra* note 28, at 1291–92.

Though CRT distanced itself from CLS's deconstructivist excesses,[46] none of this narrative suggests that CRT forsook the basic assumptions and convictions of CLS, *viz.*, its outlook on the law.[47] On the contrary, CRT repurposed (and expanded) said fundamentals for their allegedly neglected concerns.[48] Indeed, the "critical perspective" of law pioneered by CLS provided the "basic building blocks" for CRT,[49] so that the political commitments of "traditional civil rights scholarship"—while maintaining its distinctions from the same[50]—could be linked with the methods of CLS.[51] CRT continued to critique the liberal (traditional) legal language of objectivity and neutrality, etc.[52]

To summarize thus far, the key move made by CRT in its formal break with CLS was the introduction of "racial ideology as a necessary component of hegemony."[53] CRT also coupled race consciousness with legal consciousness—how CLS described its awareness of the traditional legal norms, ideas, and traditions that provided law with its veneer of neutrality, objectivity, and "process perspective."[54]

III. RACE AND LAW

Having sketched the history of CRT, we turn next to its core themes as they relate to the law and legal theory. We'll mention four: radical

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[46] *See generally* Jack M. Balkin, *Deconstruction's Legal Career*, 27 CARDOZO L. REV. 719 (2005) (identifying problems with the integration of deconstructive critiques into legal thought by CLS).

[47] KEY WRITINGS, *supra* note 6, at xxvi–xxvii; Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 741, 743, 745 (1994).

[48] Harris, *supra* note 47, at 751.

[49] KEY WRITINGS, *supra* note 6, at xxii.

[50] Harris, *supra* note 47, at 741; *see, e.g.*, Daniel Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893, 894 (1994).

[51] Harris, *supra* note 47, at 741*; see also* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1253 (1991).

[52] *See, e.g.*, Richard Delgado & Jean Stefancic, *Hateful Speech, Loving Communities: Why Our Notion of 'Just Balance' Changes So Slowly*, 82 CAL. L. REV. 851, 861 (1994).

[53] KEY WRITINGS, *supra* note 6, at xxx.

[54] *See* Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CAL. L. REV. 935, 937–38 (1994) (discussing the "process perspective" categorization of constitutional process values and that such valuation results in racial injustice).

reconstruction, law as Eurocentrism, the call to context, and skepticism towards truth.

A. "Jurisprudence of Reconstruction"

As mentioned above, CRT did not represent an outright rejection of CLS. Rather, as Kimberlé Crenshaw puts it, critical race theorists were initially "attracted to and repelled by certain elements of liberal civil rights discourses and, at the same time, attracted to and repelled by certain discursive elements within CLS."[55] Accordingly, CRT combined "radical," "modernist," and "postmodernist" narratives."[56]

First, the radical narrative—locating problems "deep [within the] structure of American law" rather than on the surface doctrines that typically occupy legal theorists—lived on in conjunction with a conviction that racism was "an inescapable feature of [W]estern culture, and [that] race is always already inscribed in the most innocent and neutral-seeming concepts" and the traditional civil rights goal of emancipation.[57]

Second, the modernist narrative assumed that dominant groups engage in ideological obfuscation, eschewing "the way it really is" in favor of comforting myths.[58] The modernist critique also aimed to combat false consciousness by challenging what it saw as false conceptions of "racism."[59] Critical race theorists believe that dominant groups tend to wrongly define "'racism' as an intentional, isolated, [and an] individual phenomenon, equivalent to prejudice" rather than "as a structural flaw [of] society" at large.[60] The immediate end goal here, often accomplished through "storytelling," is "ideological transformation," which is a subversion of the "confident certainties" of liberal society.[61] Though critical race theorists are

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[55] Crenshaw, *supra* note 28, at 1287.

[56] Harris, *supra* note 47, at 743.

[57] *Id.*

[58] *See id.* at 751.

[59] *Id.* at 751–52. "False consciousness" is a view of the world that sees things as they "appear to be" rather than as they really are. *Id.* at 751.

[60] *Id.* at 752.

[61] *See id.* at 753, 756–57, 759. "Storytelling" from a modernist perspective "is offered, not to raise questions about knowledge and the social construction of reality or to cast doubt on the neutrality or comprehensiveness of legal categories, but to move the reader into a shock of truth that will persuade, outrage, and stir to action." *Id.* at 757.

often accused of relativism, they are thoroughgoing modernists with respect to the objective immorality of racism, oppression, domination, etc.[62]

Finally, the postmodernist narrative questioned whether any "way it really is" exists behind the status quo, opting rather to embrace the "politics of difference" and submit to the perpetual competition of competing ideologies.[63] Instead of subverting the modernist critique, the postmodern posture of CRT enables deeper questioning.[64] Per Angela Harris, "[e]ven ideas like 'truth' and 'justice' themselves are open to interrogations that reveal their complicity with power."[65] As Gary Peller describes postmodernism in critical legal scholarship:

> [Postmodernism] suggest[s] that what has been presented in our social-political and our intellectual traditions as knowledge, truth, objectivity, and reason are actually merely the effects of a particular form of social power, the victory of a particular way of representing the world that then presents itself as beyond mere interpretation, as truth itself.[66]

Equipped with this postmodern sensibility, critical race theorists questioned the extent to which any "real reality" underlying the ideology of law exists at all.[67] Perhaps, "ideology is all there is."[68] And ideology is always merely a mechanism of constraint.

One might think that the tension between these various competing strands would be unbearable: How does one synthesize radical, modernist, and postmodernist tendencies within a single movement? The simple answer is that CRT is intensely pragmatic.[69] The motive force behind CRT is and has always been the antiracist, liberatory impulse.[70] When modernist

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62 *See* Harris, *supra* note 47, at 751, 754, 759.

63 *Id.* at 751, 760–61.

64 *See id.* at 748–50.

65 *Id.* at 743.

66 Gary Peller, *Reason and the Mob: The Politics of Representation*, TIKKUN, July/Aug. 1987, at 28, 30.

67 *See* Harris, *supra* note 47, at 748–49.

68 *Id.* at 749.

69 *See id.* at 757 n.87.

70 *Id.* at 743.

ideas further their goals, critical race theorists are happy to embrace them. But they are just as happy to discard these ideas when postmodernist or radical tools work better.

B. "Law as Eurocentric Enterprise"

Gazing at the law through a newly affixed lens of racial power, CRT reconceived it as fundamentally Eurocentric, white, and male, and therefore racist, misogynist, and patriarchal.[71] From this perspective, law is simply one piece of ideology in the hegemonic apparatus that promotes *white* values and interests, not just a class tilt, over and against the "Other."[72] Indeed, the presupposition here, drawn from postcolonial theory, is that white, Western culture cannot define itself absent this process of negating whatever is deemed *not* Western.[73]

Per Kenneth Nunn, law contributes to the white hegemony by directing cultural and institutional practices, "determin[ing] which ideas and practices are valued," and providing both a veneer of legitimacy—and a mechanism of normalization—to white dominance.[74] Nunn explicitly refers to law "as an instrument of cultural domination."[75]

In short, it is the fault of law, not "misguided or venal individuals," that sexism, racism, classism, and all other ailments allegedly "endemic to Western societies" exist.[76] Appeals to the natural law and the like as a metaphysical and moral basis for law are interpreted by Nunn and other critical race theorists as false narratives of justification and legal myths that

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[71] *See generally* Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 BYU L. REV. 515 (2000) (discussing the uses and misuses of Antonio Gramsci's work regarding hegemony as it relates to law).

[72] Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 L. & INEQ. 323, 365 (1997) ("The law operates as a key component in a vast and mainly invisible signifying system in support of white supremacy."). The concept of "the Other" is borrowed from postcolonial theory and originates with Frantz Fanon. *See generally* Afaf Ahmed Hasan Al-Saidi, *Post-Colonialism Literature the Concept of* Self *and the* Other *in Coetzee's* Waiting for the Barbarians: *An Analytical Approach*, 5 J. LANGUAGE TEACHING & RSCH. 95, 96–98 (2014) (providing a brief overview of the concept).

[73] *See generally* ANIA LOOMBA, COLONIALISM/POSTCOLONIALISM 31 (3d ed. 2015) (discussing postcolonial theory generally).

[74] *See* Nunn, *supra* note 72, at 351.

[75] *Id.* at 328.

[76] *Id.* at 329–31.

legitimize oppression.[77] In truth, no such higher law exists and, therefore, Western law is even more untrustworthy.[78] For Nunn and others of his persuasion,[79] "Law is an artifact of a Eurocentric culture, and as such it reflects the cultural logic, epistemology, axiology, ontology, ethos and aesthetic choice of Eurocentric culture."[80] Accordingly, fundamental "concepts like 'property' and 'consideration'" (in contract formation) are mere *reifications* of Eurocentric preferred social order and values that necessarily subjugate the non-white "Other."[81]

Not only does law elevate whites by codifying their preferences and preserving their cultural dominance,[82] but it is also a constitutive element of race itself. "Racial power, in our view, was not simply—or even primarily—a product of biased decision-making on the part of judges, but instead, the sum total of the pervasive ways in which law shapes and is shaped by 'race relations' across the social plane."[83]

To go a step further, Tommy Curry suggests that even the act of reasoning about law:

> [D]istracts the subject from thinking about the White cultural hegemony and supremacy of European traditions implied in encountering law through this very Western thought. Legal reasoning, in convincing the subject that there is an applied and objective method found through European philosophical analysis, persuades the subject that "reasoning" is not a particular cultural enterprise.[84]

To engage in this reasoning is to engage in "Eurocentricity [that the law supports] through its false universalism and . . . privileging of the European

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[77] *Id.* at 341–44.

[78] *See id.* at 339–40.

[79] *See, e.g.*, Tommy J. Curry, *Shut Your Mouth When You're Talking to Me: Silencing the Idealist School of Critical Race Theory Through a Culturalogical Turn in Jurisprudence*, 3 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 1, 5, 38 (2011) (Curry self-professedly takes Nunn's critique for granted in route to asserting his own "Culturalogics").

[80] Nunn, *supra* note 72, at 350.

[81] *See* Harris, *supra* note 47, at 747, 763–64, 763 n.111.

[82] *See* Nunn, *supra* note 72, at 359–60.

[83] KEY WRITINGS, *supra* note 6, at xxv.

[84] Curry, *supra* note 79, at 23 (footnote omitted).

historical experience. Eurocentric law presents itself as rational, transcendent, objective, without ideological content and applicable to all."[85] In other words, for a black person to accept traditional legal reasoning is to assimilate to their own oppression.

C. Situational Jurisprudence

This shift in hegemonic analysis from CLS to CRT produced new presuppositions and strategies for critiquing (and "re-imagining") law. As CRT developed, several identifying elements came into view.

First is the belief that racism is endemic to Western society, especially in America.[86] "Thus, the question . . . is not . . . how racial discrimination can be eliminated while maintaining the integrity of other interests implicated in the status quo"; instead, CRT asks "how these traditional interests and values serve as vessels of racial subordination."[87] Second, CRT is skeptical of "dominant legal claims of neutrality, objectivity, color blindness, and meritocracy."[88] Third, CRT "insists on a contextual/historical analysis of the law."[89] And fourth, CRT demands "recognition of the experiential knowledge of people of color . . . in analyzing law and society."[90]

Each of these theses reinforces and assumes the others. At the bottom, and from the get-go,

> Critical Race Theorists argued that the law reinforces racial hierarchy, reflects the viewpoints of privileged classes, serves as a weak vehicle for social change, is indeterminate and unable to provide fixed predictable outcomes for civil rights litigants, and is inherently non-neutral (and biased towards the protection of social privilege).[91]

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85 Nunn, *supra* note 72, at 358.

86 MATSUDA ET AL., *supra* note 1, at 6.

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.*

91 Darren Hutchinson, *Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187, 1192 (2004).

Critical race theorists insist that a problem of "traditional scholarship" is that it opts for universalism over particularity.[92] In response, CRT issues a "call to context" and advocates for a situational approach to evaluating cases and controversies.[93] CRT argues that the traditional framing of cases under some rubric of general rules established by precedents muddles the moral calculus.[94] To critical race theorists, no situation is sufficiently like another to be decided under a general rule derived from the former.[95] "Political and moral analysis is situational," says Richard Delgado.[96] "[T]ruths only exist for this person in this predicament at this time in history."[97]

To combat artificial claims of universality and the like, Delgado advocates a *situational* approach to controversies.[98] For example, most people may believe that fraud (intentional deception for monetary or personal gain) is everywhere and always wrong. But critical race scholars would rebut this assumption by insisting that rights, wrongs, and truths (plural) only exist in, and are defined by, the historical moment; they are purely contextual (i.e., socially constructed).[99]

Therefore, whether it is wrong (and justiciable) that someone lied for profit in a particular situation is dependent on the *context* of that particular situation. That is, everything but the actual act itself must be considered to determine whether a wrong (a crime) was actually committed and, in turn, whether it should be punished.[100] A key, and predictable, question for critical race theorists in this scenario will be the relative, racialized power dynamics in play. The moral (and legal) calculus, per CRT, is determined by the relative power dynamics and the aim of their subversion.[101]

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92 Nunn, *supra* note 72, at 358.

93 *See* Richard Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872, 1873 (1990).

94 Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1, 10 (1991).

95 *Id.* at 10–11.

96 *Id.* at 11.

97 *Id.*

98 *Id.*

99 Gloria Ladson-Billings, *Just What Is Critical Race Theory*, *in* FOUNDATIONS OF CRITICAL RACE THEORY IN EDUCATION 11, 20–21 (Edward Taylor et al. eds., 2016)*; see also* MATSUDA ET AL., *supra* note 1, at 6.

100 Delgado, *supra* note 94, at 10–11.

101 *Id.*

D. "What is Truth?"

Given the above, it is predictable that we find Delgado opining "[f]or the critical race theorist, objective truth, like merit, does not exist, at least in social science and politics. In these realms, truth is a social construct created to suit the purposes of the dominant group."[102] Early on, critical race scholars like Charles Lawrence decried the "ideology" of objective truth as a "dominant account[] of social reality."[103] This is a feature, not a bug, of CRT. If knowledge is socially constructed and there is no "there" "out there," then, by definition, truth is subjective—at least socio-political truth, the only actionable variety.[104] Skepticism of objective truth—or ascertainable transcendent moral knowledge—obviously impacts CRT's view of law, as already partially demonstrated.

CRT scholars deny that law constitutes, or is derived from, "a moral order ordained by God (natural law)."[105] Instead, CRT holds "as the legal realists before them, that the law comes about through the personal and political articulations of values that judges, policy-makers, and decision-makers take as truth."[106] The result, as Curry rightly discerns, is that jurisprudence (the study of law) is transformed into "a sociology of law" taken up with uncovering "how subjects create the values and knowledge we call law."[107]

This claim is distinguished from the simple fact that human (i.e., positive) law receives its moral content from outside of itself.[108] Historically, in the classical and Christian traditions, this meant that jurisprudence was epistemologically ordered to higher sciences, *viz.*, theology and

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[102] RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 104 (2d ed. 2012).

[103] Charles R. Lawrence III., *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2253 (1992).

[104] KEY WRITINGS, *supra* note 6 at xiii; *see also* MATSUDA ET AL., *supra* note 1, at 3 ("Critical race theorists embrace subjectivity of perspective and are avowedly political.").

[105] Curry, *supra* note 79 at 19.

[106] *Id.*

[107] *Id.*

[108] WILLIAM BLACKSTONE, COMMENTARIES *38 ("Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these.").

metaphysics.[109] From thence human law received its fundamental principles and assumptions from Scripture and nature.[110] On this basis, jurists are to prudently apply rules to context such that the legal system can be properly ordered to the common good as defined by the higher sciences, the external regulative principles of law.[111]

But if there is no God's-eye view then, indeed, the critical race theorists are right. If value, virtue, and vice are all dictated by politically negotiated human whims then there is no point in imagining a transcendent basis for any of it. "Truth," under the "postmodern" narrative of CRT, is an ideological construct in service of power.[112] Furthermore, there is no basis for adjudication other than one's own political commitments, one's own interests, and legal confrontation merely becomes one site of political conflict, one site of power distribution, and one site of oppression. Law is but another way for the powerful to limit the utopian imaginations of the powerless, ensuring that no other ways of organizing human life can be imagined.

But, as Jeffrey Pyle has rightly observed, "[W]hen critical race theorists treat civil rights law as a species of interest-group politics, they surrender the moral high ground of constitutional principle and risk being seen as just another group clamoring for benefits."[113] In other words, if the law is simply

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[109] *See, e.g.*, JAMES KENT, AN INTRODUCTORY LECTURE TO A COURSE OF LAW LECTURES, IN AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805 945–47 (Charles S. Hyneman & Donald S. Lutz eds., 1983)*; see also* EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955).

[110] *See* NEILS HEMMINGSEN, ON THE LAW OF NATURE: A DEMONSTRATIVE METHOD 30–31 (E. J. Hutchinson ed., trans., 2018); FRANCISCUS JUNIUS, THE MOSAIC POLITY 23, 54 (Andrew M. McGinnis ed., Todd M. Rester trans., 2015) ("[H]uman law is that which humans, proceeding by reason, produce from the preceding laws, accommodated first to common just, honest, useful, and necessary conclusions, then to particular determinations for the condition of persons for whose good it is produced, the things or matters concerning which it is produced, and for the circumstances which occur to them."); MATTHEW HALE, OF THE LAW OF NATURE 5–28 (David S. Sytsma ed., 2015) (defining law generally in classical fashion).

[111] *See* Rafael de Arízaga, *Jurisprudence as a Subaltern Science,* IUS & IUSTITIUM (Sept. 7, 2020), https://iusetiustitium.com/jurisprudence-as-a-subaltern-science/.

[112] *See generally* Harris, *supra* note 47.

[113] Jeffrey J. Pyle, *Race, Equality and the Rule of Law: Critical Race Theory's Attack on the Promises of Liberalism*, 40 B.C. L. REV. 787, 791 (1999).

race-infused group politics, what incentive do dominant racial groups have to listen and cater to subdominant ones?

What CRT does know, for sure, is that oppression exists, oppression is bad, and a future state of "equity" is desirable.[114] These things are repeatedly asserted *a priori* in CRT literature.[115] The result of a legal theory that mocks "formalist" and "proceduralist" practices and which is governed by a single analytical metric (i.e., racial power dynamics) with the goal of (redefined) "equity" is a purely outcome-based legal theory. In the next section, we will provide several examples of the kinds of positions and policies that are the inevitable outworking of CRT's ideological framework.

IV. LAW AND PRAXIS

To summarize the last section, CRT's basic outlook entails that law is a mechanism for subordination. Law is not based on universal principles of justice but is instead a tool by which the ruling class (specifically, whites) justifies and protects its dominant social position. The role of CRT is therefore twofold: (1) to expose the ways in which seemingly neutral and objective legal reasoning masks the defense of white interests and (2) to dismantle and reconstruct the law in ways that promote racial equity.

As legal scholars Daniel Farber and Suzanna Sherry have pointed out, CRT's stated goal has always been to transform law post haste.[116] "If literary theorists, historians, and philosophers are like theoretical physicists, then [critical race theorists] are the equivalent of the engineers who convert scientific theory into operating machinery."[117] This is self-evidently the case, not a point of derision but an accurate representation of CRT aspirations. For decades, CRT scholarship has not only espoused a transformation of legal theory and the fundamental basis of law, but of legal practice and law itself.[118] In this section, we provide several examples of what this transformation looks like. Within each example, the unifying tenets of CRT can be spotted in operation.

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[114] *See* MATSUDA ET AL., *supra* note 1, at 6–7.

[115] KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 28 (2019).

[116] DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 35 (1997).

[117] *Id.*

[118] *Id.*

A. Impact Over Intent

One slogan from popular culture that is rooted in CRT is "impact over intent."[119] In other words, the impact of a law, policy, or action is more significant than the intent behind that law, policy, or action. In popular discourse, this mantra is often applied to accusations of interpersonal racism,[120] but the same reasoning has long been applied by critical scholars to legal decisions.[121]

In general, critical race theorists have argued that because racism is ubiquitous, ordinary, and unconscious, courts cannot ascertain whether the purpose behind a policy is racist.[122] Intentional discriminatory action, they claim, is nigh impossible to prove.[123] To get at *real* equity, then, courts should ditch the purpose-based test in favor of an impact-based approach focusing only on harm to victims.[124]

Implicit in the CRT response is the outcome emphasis of equity, and at a real cost. The element of intention is integral to many areas of American law—even evaluations of common-law marriages require a showing of intent—but most obviously in criminal law. To convict an accused of a crime, a subjective state of mind (i.e., *mens rea*) must accompany criminal

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[119] *See, e.g.*, *Intent vs. Impact: Why Does it Matter?* ANTI-DEFAMATION LEAGUE (Oct. 28, 2022), https://www.adl.org/resources/lesson-plan/intent-vs-impact-why-does-it-matter.

[120] *See, e.g.*, LAYLA F. SAAD, ME AND WHITE SUPREMACY: COMBAT RACISM, CHANGE THE WORLD, AND BECOME A GOOD ANCESTOR 162–68 (2020) (discussing "intent"); IJEOMA OLUO, SO YOU WANT TO TALK ABOUT RACE 162–78 (2018) (outlining the intent-impact dichotomy).

[121] DELGADO & STEFANCIC, *supra* note 3, at 27–28.

[122] *See, e.g.*, Catherine Prendergast, *The Economy of Literacy: How the Supreme Court Stalled the Civil Rights Movement*, 72 HARV. EDUC. REV. 206, 206–29 (2002); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Kimberlé Crenshaw & Gary Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683 (1998). *C.f.* Washington v. Davis, 426 U.S. 229, 240–41 (1976); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979) (holding that disparate impact on women in law must be intentional in order to constitute sex discrimination); Mobile v. Bolden, 446 U.S. 55 (1980); McClesky v. Kemp, 481 U.S. 279 (1987); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

[123] *See* BRIDGES, *supra* note 115, at 37.

[124] *See* RICHARD DELGADO, THE COMING RACE WAR? AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE 21–22 (1996); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection Reckoning with Unconscious Racism*, *in* KEY WRITINGS, *supra* note 6, at 237.

acts. To put it bluntly, intention is what separates murder from involuntary manslaughter. This standard, applied and satisfied in various ways throughout criminal law, is an expression of the Western legal system's concern that, insofar as is possible, only guilty people are punished.

Knowledge, purposefulness, or willfulness—in criminal law, malice—in wrongdoing is paramount in establishing culpability, and thereby justification for punishment. Foresight, recklessness, and, yes, result or impact are all evidence of intent but *not* necessarily definitive. Obviously, in the context of antidiscrimination law, the stakes are much lower. The "punishment" for a discriminatory law is its invalidation, not imprisonment or execution. Nevertheless, the logic of intent and guilt in criminal law pervades legal reasoning across subjects and, in a sense, holds them together. Without intent as an element of a violation, mistake, self-defense, and other justifications for wrongdoing have no place. Neither is the happenstance of life accounted for.

Under the theory of near-mono-causality of CRT, however, this is no matter. When society is racialized, and disparate impact is a result of racism *simpliciter*, then the purpose or intent of a law has no place in the calculus.[125] *Impact is everything*. Indeed, some theorists argue that intent requirements "stabilize rather than dismantle the raced and gendered social order."[126] In the end, the intent element is just another vestige of white dominance and, therefore, disposable for the sake of equity. As Kimberlé Crenshaw and Catherine MacKinnon have noted in their proposed "Equality Amendment," intent should not be a requirement "because discrimination is not a moral failing of individuals but a pervasive social practice of power—epistemic, practical, and structural. No one need intend to perpetuate discrimination for it to persist."[127]

B. Race-Based Jury Nullification

In a 1995 Yale Law Journal article, Paul Butler argued for racially based jury nullification. In other words, "the race of a black defendant is

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[125] *See, e.g.*, Erin Roycroft, *The Fiction of Intent: Why the Equal Protection Clause is Incapable of Remedying Inequality in the Criminal Justice System*, 1 SOC. JUST. & EQUITY L.J. 182 (2018).

[126] Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: An Equality Amendment*, 129 YALE L.J. F. 343, 350 (2019).

[127] *Id.* at 361.

sometimes a legally and morally appropriate factor for jurors to consider in reaching a verdict . . . . [F]or pragmatic and political reasons, the black community is better off when some nonviolent lawbreakers remain in the community rather than go to prison."[128]

Butler says this because he believes that the American criminal justice system, being that it is "controlled by white lawmakers and white law enforcers," is irreparably corrupt.[129] For Butler, jury nullification on the basis of the racial makeup of the jurors is a means to, contra Audre Lorde, "dismantle the master's house with the master's tools."[130] Objections to Butler's obviously controversial thesis are dismissed because "[c]riminal conduct among African-Americans is often a predictable reaction to oppression. Sometimes black crime is a symptom of internalized white supremacy; other times it is a reasonable response to the racial and economic subordination *every* African-American faces *every* day."[131] Accordingly, black jurors should sometimes acquit the black accused because "[p]unishing black people for the fruits of racism [i.e., crime-inducing internalized oppression] is wrong if that punishment is premised on the idea that it is the black criminal's 'just deserts.'"[132] Throughout the article, Butler does not consider falsely accused black citizens. He presumes criminal guilt but nevertheless argues that other black citizens are dutybound to acquit them at trial because the fault of the crime truly lies with white supremacy.[133]

This is not overstating the case. Butler explicitly says that "criminal law is racist because, like other American law, it is an instrument of white supremacy. Law is made by white elites to protect their interests and, especially, to preserve the economic status quo . . . ."[134]

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[128] Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995).

[129] *Id.* at 679.

[130] *See id.* at 680 n.10.

[131] *Id.* at 680 (emphasis added).

[132] *Id.*

[133] *Id.* at 705–14 ("In this section, I explain why African-Americans have the moral right to practice nullification in particular cases.").

[134] Butler, *supra* note 128, at 693 (footnote omitted).

C. Free Speech or Free Hate?

> *[W]e do not separate cross burning from police brutality nor epithets from infant mortality rates. We believe there are systems of culture, of privilege, and of power that intertwine in complex ways to tell a sad and continuing story of insider/outsider . . . .* [135]
>
> *[R]acist speech constructs the social reality that constrains the liberty of nonwhites because of their race.*[136]

Within CRT literature, the primary function of protected or free speech is as a shield for racist hate speech, however subtle, that constructs and reinforces the racist social reality.[137] It is, therefore, supremely violent and oppressive. The method of evaluation of any speech inevitably descends into analysis of relative power dynamics, not "truth" as such, for truth is itself a problematic, socially constructed category, a form of "power-knowledge" by which "discourse" is dictated.[138]

To return to an earlier point, at bottom, the conflict with CRT is one over truth itself. Faber and Sherry concur: "One possibility would be to debate the truth of [CRT] ideas. The problem, of course, is that the two sides espouse different theories of truth and commitments to different forms of persuasion. It is the very concept of 'truth' that is in dispute."[139] The entire theory behind a culture of free speech, from Milton's *Areopagitica* (1644) onward, is predicated on a stable conception of truth "out there," that there is a "there out there."[140] If "truth" is reduced to a product of social construction in service of the powerful, then Stanley Fish is right, there is no

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135 MATSUDA ET AL., *supra* note 1, at 136*; see also id.* at 68–74, 91–93, 129.

136 *Id.* at 62.

137 *Id.*

138 *Id.* at 7–10.

139 FARBER & SHERRY, *supra* note 116, at 50.

140 *See* JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND (Judith Boss & David Widger eds., Project Gutenberg 2006) (1604) (ebook), https://www.gutenberg.org/cache/epub/608/pg608-images.html; JOHN STUART MILL, ON LIBERTY, at 38–40 (Curtis Weyant & Martin Pettit eds., Project Gutenberg 2011) (ebook), https://www.gutenberg.org/files/34901/34901-h/34901-h.htm.

such thing as free speech, and, *maybe*, it's a good thing too.[141] All there is, is group preference backed by power. The root question raised by CRT is the perennial inquiry of Pontius Pilate.[142]

D. Department of Antiracism

A more recent example of a problematic CRT-inspired proposal has been posited by the most popular purveyor of antiracism, Ibram Kendi.[143] In a 2019 interview with *Politico*, Kendi suggested a new constitutional amendment, the contents of which would be the principle that "[r]acial inequity is evidence of racist policy," making racial inequity unconstitutional.[144] The same amendment, in turn, would establish a Department of Antiracism (DOA) "comprised of formally trained experts on racism and no political appointees."[145] The DOA would have carte blanche authority to preclear all local, state, and federal policies "to ensure they won't yield racial inequity," and to furthermore "monitor public officials for expressions of racist ideas"—"racist ideas" presumably being any ideas that would yield racial inequity in theory or practice.[146]

Most obviously, Kendi's proposed omnicompetent DOA would run roughshod over key legal doctrines established to combat corruption and misuse of power including separation of powers, judicial review, accountability, and equal sovereignty (i.e., federalism). Given relevant precedent as it stands, the deference afforded to such an administrative

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[141] STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO (1994).

[142] *John* 18:38.

[143] We acknowledge that Kendi is not a self-professed practitioner of CRT, though he has acknowledged his admiration of, and indebtedness to, CRT thinkers. Yet, there is clear affinity between certain ideas employed by Kendi and those of CRT, as is the case with the proposal highlighted above. It is entirely consistent with CRT assumptions and tenets. We are persuaded by the intellectual genealogy (and crosspollination) narrative recently presented by Aaron Sibarium. Aaron Sibarium, *How Critical Race Theory Led to Kendi: Pop 'Antiracism' is the Logical Conclusion of CRT*, WASH. FREE BEACON (July 14, 2021), https://freebeacon.com/culture/how-critical-race-theory-led-to-kendi/.

[144] Ibram X. Kendi, *Pass an Anti-Racist Constitutional Amendment*, POLITICO MAG. (2019), https://www.politico.com/interactives/2019/how-to-fix-politics-in-america/inequality/pass-an-anti-racist-constitutional-amendment/.

[145] *Id.*

[146] *Id.*

agency would be boundless, so too then would its actions, as Kendi makes no effort to deny—that is the whole point.[147] And since the pursuit of antiracist "equity" is perpetual—racism, remember, is assumed to be normal, permanent, and pervasive—so too would be the purview and duration of the DOA.[148] Perhaps no one is taking Kendi's policy ideas seriously, but the fact they can be seriously espoused in an outlet like *Politico* without being laughed out of print is concerning. In any case, the point is that CRT-inspired legal policy can lead to Kendi's concerning conclusions.

Other examples of the policy outgrowth of CRT could be added to the abbreviated list above. Policing and the like are, of course, of interest to CRT scholars and have been long before #DefundThePolice caught fire.[149] However, this small subset is sufficient to show that the ideas of CRT are not purely theoretical. Like all critical social theories, CRT was always intended to unite theory with praxis. Therefore, anyone who embraces CRT as an analytic framework will be driven to apply it. And because CRT is not limited to the law, its application will likewise be broad. The principles of CRT will shape how we view education, history, politics, philosophy, and theology.

However, in keeping with our main thesis, we turn next to how CRT conflicts with Christianity *even when it is so artificially restricted to its legal origins*. We call attention to this conflict in four areas: CRT's rejection of divine or natural law as the basis for human law, its intense cynicism, its rejection of procedural justice, and its views on gender and sexuality.

V. CRT AND CHRISTIANITY

Careful readers likely will have already anticipated the many conflicts between critical race theory and Christianity. However, in this section, we lay them out explicitly. Our contention is that, at the most fundamental level, CRT misunderstands the interaction of law, morality, and justice. Consequently, the conflicts we highlight are deep and irreparable. Moreover, these conflicts will inevitably spill into our theology, even if we

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147 *Id.*

148 *Id.*

149 *See, e.g.*, I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1 (2019).

are stubbornly committed to erecting an arbitrary barrier between CRT as a legal theory and the rest of our lives.

A. CRT and Divine Law

First, CRT's convictions about law not only fail to explain but actively undermine the idea that there exists some universal moral standard or divine law that human laws are meant to reflect. We already noted that CLS and CRT deny the transcendence of law itself.[150] To them, law is no more than an artifact of human agency, a purely contingent, socially and historically determined construct with no basis in the natural order. To quote Tommy Curry once again at greater length:

> Instead of the law being a moral order ordained by God (natural law), or the general will of a society, CLS and CRT scholars believe, as the legal realists before them, that the law comes about through the personal and political articulations of values that judges, policy-makers, and decision-makers take as truth. This theory takes issue with Langdellian formalism, which holds that the law is an autonomous system of truths that endure beyond the intervention of culture or social context. As a result[,] . . . jurisprudence became a sociology of law that focused on how subjects create the values and knowledge we call law.[151]

Note here what Curry is not doing. He is not merely claiming that fallible humans have incorrectly discerned or implemented God's moral law accessible through natural law. Nor is he only claiming that all concrete instantiations of law are necessarily influenced by underlying moral standards and directed to substantive moral ends. Rather, he is saying that moral values themselves are the creations of humans and that law is nothing more than these creations, all of which are negotiable.

As alluded to already, human lawmaking must receive data from superior sources of knowledge.[152] A Christian theory of law understands that human law must draw its morality from the natural law outside of itself.[153] Just as the will follows the last judgment of the intellect, the law adheres to the moral principles discovered, examined, and made cogent by philosophy and theology and applies them to concrete human

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150 *See supra* Part II.A.

151 Curry, *supra* note 79, at 19 (footnote omitted).

152 *Supra* notes 108–10.

153 *Id.*

circumstances as a rule of right (or moral) action.[154] This view understands that one's basic conception of morality and the world will inevitably dictate the function of law on the ground. If a source of transcendent moral order is lacking, then law's purpose will be corrupted; it will become a rule of expedience rather than a rule of righteousness. It will be pure will and no reason (i.e., pure positivism).

Ironically, because of its failure to connect human law to a hierarchy of law ultimately rooted in God's character, reason, and will, CRT provides no basis for an obligation to fight inequality or injustice—decidedly moral categories—at all. No authority transcendent of human legal regimes exists to demand responsibility. Under CRT's approach, there is no real obligation to advocate for anyone or anything apart from one's own interests within the relative power relations of society. In short, CRT presents the rule of men, not the rule of law, because it does not believe there is a difference.

B. CRT and Cynicism

Second, CRT examines law and legal theory with a hermeneutic of suspicion and casts law as another form of power-grabbing politics—a fundamentally Marxist outlook.[155] What is left of law, after CRT has reoriented it, is—and it must be said, ironically—unstable, unworkable, and, in effect, amoral. In this way, CRT's cynical attitude toward the law is a self-fulfilling prophecy: if we begin to treat the law merely as a device for imposing our political will on others, it will not be long before our political opponents return the favor. If law cannot obligate, then power must: *might makes right*.

Moreover, the rule of law requires some measure of confidence in law. If law (not *some* laws, but *all* law) is reduced to a reflection or instigator of relative power dynamics, why does anyone have any reason to obey it? In insisting that law is no more than group self-interest, CRT discards basic Christian principles and resorts to pure political pragmatism to the great detriment of the common good. If no higher law stands behind human law regimes, then it is impossible to orient law to substantive moral ends or

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[154] *See generally* THOMAS AQUINAS, *Prima Secundæ Partis Question 90: The Essence of Law* (art. 1) *in* THE SUMMA THEOLOGIÆ OF ST. THOMAS AQUINAS n.p. (Fathers of the English Dominican Province trans., 2d rev. ed. 1920) (n.d.).

[155] *See* Alan Hunt, *Marxist Theory of Law, in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 350, 350–60 (Dennis Patterson ed., 2d ed. 2010).

human goods outside of the lawmaking process itself. Law becomes redundant.

Two retorts are possible, one secular and one religious, both of which we have encountered regularly. First, given our country's horrific racial history, isn't some cynicism warranted? Given the ways in which our nation's laws did, indeed, function to preserve white supremacy, shouldn't we be skeptical of their supposed objectivity? Second, shouldn't the Christian doctrine of total depravity incline us toward CRT's cynicism? Aren't lofty statements about the law's nobility more a product of Enlightenment optimism about the nature of man than a realistic assessment of its construction at the hands of sinful humans? In this way, isn't CRT congruent with a biblical worldview?

In response to the first claim, we'd note that theorists of all stripes recognize the potential for bigotry, self-interest, and greed to influence laws and legal reasoning. No reasonable person believes that the laws that humans enact are free from all stain or blemish. What CRT is proposing is something far more radical and qualitatively distinct, namely, that the regime of law is *just* a mechanism for subordination. This is not just healthy skepticism but a universal acid that will eat away the foundations of a functional body politic. In the same way, all parents recognize that their children may sometimes behave well to secure extra dessert, screen-time, or presents. But a parent who assumes that good behavior is *just* self-interest concealed beneath a thin veneer of virtue is headed toward a dysfunctional family.

Our critique is not based on the idea that all instantiations of human law are, in fact, just, equitable, or oriented to the common good. Rather, we simply insist that each instance of an unjust law must be demonstrated and that the existence of unjust laws is not cause for rabid cynicism about law as such. Furthermore, as Christians, we believe that law is not inescapably indeterminate because the natural law can, in fact, be apprehended and just, reasonable applications made.[156] Additionally, heinous as it is, racism is one sin among many. A biblical view would be attuned not only to the influence of the sin of racism on legal decisions, but also to the influence of the sins of idolatry, sexual immorality, pride, etc. We would ask, then, whether it is reasonable to think that a jurisprudence affixed with a singular lens of racial

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[156] *See generally* AQUINAS, *supra* note 154.

power—mono-causality—can truly offer the comprehensive and just adjudicatory model it claims.

Regarding the second claim, that total depravity should lead us to expect self-interest at the heart of every human action, the simplest response is that critical race theorists are highly selective in their application of this principle. After all, if self-interest drives all legal reasoning, what of their own legal reasoning? Shouldn't we ask *cui bono* when it comes to the critical race theorists' own activism (and the hefty salaries that often accompany it)? This is the Achilles' heel of CRT's cynicism. Any true application of the doctrine of total depravity cannot exempt the speaker from its analysis. Additionally, the biblical doctrine is best limited to the motives of the human heart, not every result of our actions. A contractor may build a house with the singular, selfish motive of personal gain, yet it doesn't follow that the house is poorly built and needs to be demolished. In the same way, a good law is a good law whether the human lawgiver instituted it out of self-interest. This, again, recalls the necessity of a transcendent basis on which law can be assessed.

Where CRT directs our attention to the subtle ways in which laws supposedly reify white supremacy, Christians should instead focus on the laws themselves. Laws need to be judged based on their actual content, not because of the supposed but undemonstrated motives of the men and women who wrote them or interpreted them. Albeit, methodologically, discerning the intended purpose of a law may help interpreters discern its proper and equitable application or use—its *ratio legis*. This is not, however, the same exercise as delving into the hidden motives and desires of the drafter as if those too had been written into law.

CRT's cynicism ought to be a non-starter for Christians who recognize that the legitimacy of human laws is dependent on the degree to which they reflect God's eternal moral law apprehended through the natural law and, in turn, its republication in Scripture.[157] Laws can, of course, be ill-formed. This does not imply that law qua law is a Eurocentric means of oppression.

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[157] *See generally* DAVID MARK HAINES & ANDREW A. FULFORD, NATURAL LAW: A BRIEF INTRODUCTION AND BIBLICAL DEFENSE (Davenant Institute ed., 2017) (providing a highly readable introduction to natural law).

C. CRT and Equity

A third problem with CRT is its rejection of "procedural justice," i.e., systems of rules impartially applied. As a basically outcome-based legal theory, CRT has no real patience for traditional mechanisms of friction, so to speak, in human adjudication. It pledges no fealty to, but rather decries, procedural fairness and interpretive consistency—both of which are integral to the rule of law and anything approximating a justice system of equality. It decries allegedly outdated standards of procedural fairness and interpretative consistency as "formalist" and counterproductive. We think this attitude creates problems for Christians who are called to impartiality in their dealings and are provided with wise and advisory procedural models for settling disputes in Scripture itself.

One problem with outcome-based theories is that, paradoxically, whilst methodologically streamlined they are difficult to hold accountable. An outcome-based legal theory must still contain within it some metric for *measuring* outcomes and, by extension, the viability of the theory itself. Said metric is increasingly defined as *equity*, or equality of outcome controlling for past, present, and future (racial) injustices.

The CRT paradigm, with the above metric and theory of law in mind, necessitates a range of morally and procedurally unaccountable policies. And here we can begin to see the deleterious effects of CRT as *just* a legal theory. If the sole metric of policy and adjudication is CRT "equity," then other legal standards and processes previously relied upon to establish guilt are jettisoned. The outcome-based, "equity"-governed jurisprudence (i.e., "equality of results"[158]) of CRT yields certain, sometimes shocking, results.[159] Christians should—at a minimum—recognize that, lacking omnipotence, equality of outcome cannot be the sole criterion by which "justice" is measured. If it were, then wealth inequality could be immediately solved by looting the property of the wealthy, and disparate incarceration rates could be solved by imprisoning the innocent. These procrustean solutions are obviously outside the bounds of any sane, Christian approach to justice.

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[158] RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE 71 (1995).

[159] Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 377 (1992).

But more realistically, any outcome-based "law in context" theory threatens the rule of law—the fundamental ideal of impartiality in our legal system. CRT as legal theory subverts this principle in the most egregious of ways by respecting persons, so to speak, according to both (perceived) status and immutable characteristics, just in the converse of what is typically contemplated. The oppressed person is favored over the oppressor, the poor person over the rich person, and so on. Butler's article on race-based jury nullification, discussed above, is a case in point.[160]

Critical race theorists justify their rejection of legal impartiality on the grounds that (1) it doesn't exist and (2) it prevents them from righting wrongs.[161] Yet, embracing partiality for the sake of social reengineering elevates human capacity beyond its capability—ironic for a theory marked by its cynicism. That is, it assumes a pseudo-omniscience of the theory at the outset by presuming motives, intent, and causality as fundamentally racist and further presumes to know the solution thereto. This is the kind of folly of fallen human judgment that standards like the rule of law are meant to mitigate against, if imperfectly.

What is more, given that CRT is self-consciously activist and governed by an alternative vision of society, all means become justified by the end, and the metaphysical and epistemological limitations of human beings are ignored, or rather denied, in the pursuit of said vision. This is an arid and, dare we say, dangerous, approach to law, one that is incompatible with basic Christian beliefs that undergird much of Western legal thought. What is more, the CRT vision, paradoxically, frustrates the pursuit of earthly justice, which all Christians are called to do.[162]

D. CRT and Sex/Gender

Because we have chosen to focus on CRT's use as a legal framework, we only briefly touch on a final area of conflict: CRT's conceptualization of gender and sexuality. This subject is less pertinent to legal issues but is the source of one of the most profound conflicts between CRT and Christianity.

From its inception, CRT recognized that race was only one of many sites of social and legal subordination.[163] For example, in 1989, at the very start of

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160 *See* discussion *supra* Part IV.B.

161 BRIDGES, *supra* note 115, at 49.

162 *E.g.*, *Isaiah* 1:17; *Micah* 6:8.

163 *See generally* Crenshaw, *supra* note 122.

the CRT movement, Kimberlé Crenshaw coined the term "intersectionality" to describe how race and gender interacted to produce unique forms of marginalization.[164] Just four years later, she co-edited *Words that Wound* along with Mari Matsuda, Charles Lawrence, and Richard Delgado, all co-founders of CRT.[165] That work offers one of the earliest lists of the "defining elements" of CRT and the final item on their list states that:

> 6. Critical race theory works toward the end of eliminating racial oppression as part of the broader goal of ending all forms of oppression. Racial oppression is experienced by many in tandem with oppressions on grounds of gender, class, or sexual orientation. Critical race theory measures progress by a yardstick that looks to fundamental social transformation. The interests of all people of color necessarily require not just adjustments within the established hierarchies, but a challenge to hierarchy itself.[166]

This same emphasis on gender roles and heterosexism as forms of oppression suffuses the CRT literature, especially within subfields such as Critical Race Feminism and Queer-Crit.[167] Obviously, these assumptions clash with the historic Christian belief that gender roles and sexual norms, rightly understood, are not oppressive social constructs, but are God-ordained.

VI. CONCLUSION

In this article, we've limited our discussion of CRT to its use as a legal framework. Nonetheless, we've shown how the basic assumptions of CRT clash with a Christian view of law, power, justice, morality, and truth. To the extent that Christians embrace CRT as a tool to analyze law and race,

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164 *Id.*

165 MATSUDA ET AL., *supra* note 1.

166 *Id.* at 6–7.

167 *See, e.g.*, CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 2d ed. 2003) (including forwards by Richard Delgado and Derrick Bell and articles by Kimberlé Crenshaw and Angela Harris thereby showing the interdisciplinary overlap between CRT and CRF); Kendall Thomas, *Practicing Queer Legal Theory Critically*, 6 CRITICAL ANALYSIS L. 8–22 (2019) (offering a brisk introduction to the posture and mood of queer praxis vis a vis law).

they are embracing a tool that will obscure as much as it illuminates and distorts whatever truths it discovers. It should go without saying that critical race theorists can and do occasionally offer insights that Christians can affirm and appreciate. Nonetheless, Christians must reject CRT's core tenets at a fundamental level, even when their scope is restricted to purely legal questions.

That said, one of the greatest dangers of CRT in practice is that it is not restricted to purely legal questions but naturally bleeds into other areas of inquiry. For example, a cynical view of legal interpretation flows seamlessly into a cynical view of biblical interpretation. Can we plausibly insist that jurists routinely and unconsciously manipulate the law to protect their white male privilege yet insist that white male theologians do not do the same? Can we insist that law is unavoidably Eurocentric and needs to be decolonized while continuing to subscribe to the Eurocentric creeds of the Reformation? Can we complain that universal legal values are an illusion while simultaneously insisting that God's moral law is universally binding on all human beings across time and culture? Can we insist that gender roles and sexual norms are the oppressive product of the white supremacist heteropatriarchy while attending a church that supports traditional marriage and male eldership?

We believe that the kind of schizophrenic thinking required to maintain such distinctions is not only a theoretical but a practical impossibility. The doctrinal drift visible within some segments of the church today is a testament to how the assumptions of CRT will slowly (or quickly) erode basic biblical commitments. CRT will hinder, not help, efforts toward racial unity, justice, and healing. While we can appreciate truth when critical race theorists affirm it, we must firmly reject the ideology.