

# On the Theory and Practice of Equality: A Critical Race Theory Backgrounder

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## *Executive Summary*

Recent education conflicts have pitted parents and activists against school boards and administrations. Protestors have accused school districts of grounding K-12 schooling in Critical Race Theory (CRT), teaching anti-Western, anti-American history and civics, and dividing people into oppressors (whites) and oppressed (minorities). But CRT defenders say that CRT is an academic field, taught in law schools, and not what protestors say it is. This backgrounder covers the main principles of CRT as expressed by its scholars.

CRT defenders are right, to the extent that CRT is not the catch-all category covering every multiculturalist-diversity-inclusion-antiracist initiative. CRT in many ways is even more revolutionary, even though it is called a mere academic field.

CRT scholars have explicitly disparaged the notion of colorblindness and equal treatment under the law. Instead, CRT emphasizes the disparate impact of law and policy. Generally held CRT principles include the following:

- That disparities in racial outcomes are proof of systemic racism.
- That systemic racism doesn't require racist attitudes or actions, only that whites benefit from a policy or action.
- That equal treatment and colorblindness are social fictions.
- That progress in civil rights only occurs when civil rights converge with the interests of white elites. Such progress has reversed, because the interests of whites and nonwhites increasingly diverge.
- That "truth" is the manifestation of the dominant white narrative. Persons of color hold counternarratives that should be given equal space.

This backgrounder speculates on what applied CRT would look like. Reducing systemic racism in education (i.e., applied education CRT) would include, by implication: moving funds, resources, and personnel away from majority white districts; dropping testing as an assessment; and ultimately, race-norming test results.

Finally, reducing systemic racism means CRT activists would work towards overturning Supreme Court precedents and bring back quotas in education, contracting, employment, and other areas. CRT as an academic subfield in law schools has the potential to produce future lawyers, law professors, judges, and a sympathetic Supreme Court that could accomplish this end.

## ***Introduction***

This past year, parent groups have accused school boards and school districts of grounding K-12 schooling in Critical Race Theory (CRT). Local parent groups accuse school districts of teaching anti-Western, anti-liberal history and civics classes and dividing people into white oppressors and minority victims. According to National Public Radio, there were at least 165 parent groups across the nation protesting CRT as of June 2021.<sup>1</sup>

In response, CRT defenders say that CRT is merely an academic field taught primarily in law schools. It's not what the popular conservative critics say it is, they claim. CRT defenders accuse the critics of turning CRT into the umbrella under which falls all diversity, equity, and inclusion activities, courses, and instruction. Stephen Sawchuk of *EducationWeek* [sic] notes that the Heritage Foundation's backgrounder on CRT, for example, places numerous issues under the CRT label, "including the 2020 Black Lives Matter protests, LGBTQ clubs in schools, diversity training in federal agencies and organizations, California's recent ethnic studies model curriculum," and so forth.<sup>2</sup>

What's missing in the conflict over CRT? What's at stake? CRT is way more than a set of abstract legal theories, but CRT defenders such as Sawchuk are right, in that it is not the catch-all category covering every multiculturalist-diversity-inclusion initiative. As this backgrounder will show, CRT, as expressed in its academic scholarship, explicitly addresses the notion of a colorblind society, a colorblind Constitution, and equal treatment before the law. To quote Richard Delgado and Jean Stefancic, two notable CRT scholars:

"Most, if not all, CRT writers are discontent with liberalism as a means of addressing the American race problem."<sup>3</sup>

Delgado and Stefancic argue that mainstream liberals are part of the problem, because post-Civil War liberalism is based on concepts of a neutral, colorblind Constitution, Constitutional rights, and equal treatment under the law. But liberalism, they argue, does not advance America's racial minorities. And American liberals have "moved on" since the seventies (now dealing with climate change, sexual orientation, paid parental leave, and other issues). This has resulted in liberal complacency on race, an increasingly active conservatism, and what Delgado and Stefancic see as backsliding of minority gains.<sup>4</sup>

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<sup>1</sup> National Public Radio, "Uncovering Who Is Driving the Fight Against Critical Race Theory in Schools," June 24, 2021. <https://www.npr.org/2021/06/24/1009839021/uncovering-who-is-driving-the-fight-against-critical-race-theory-in-schools>.

<sup>2</sup> Stephen Sawchuk, "What Is Critical Race Theory and Why Is It Under Attack?" *EducationWeek Spotlight*, June 2021, 2. <https://www.edweek.org/products/spotlight/spotlight-on-critical-race-theory>; Jonathan Butcher and Mike Gonzalez, *Critical Race Theory: The New Intolerance and Its Grip on America* (Washington, DC: The Heritage Foundation, December 7, 2020). <https://www.heritage.org/civil-rights/report/critical-race-theory-the-new-intolerance-and-its-grip-america>.

<sup>3</sup> Richard Delgado and Jean Stefancic, "Critical Race Theory: An Annotated Bibliography," *Virginia Law Review* 79 (1993): 462. [https://scholarship.law.ua.edu/fac\\_essays/143](https://scholarship.law.ua.edu/fac_essays/143).

<sup>4</sup> For a list of CRT major figures and fellow travelers, see Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction, 3<sup>rd</sup> Edition* (New York: New York University Press, 2017), 26-31.

In its place, these scholars of CRT believe that conventional liberalism must be replaced by a new understanding and new action, in the form of Critical Race Theory (CRT). However, the label of “theory” is misleading, for its advocates conflate theory and practice. As this essay will show, CRT as laid out by its academic proponents is an entirely different paradigm and worldview. It requires a complete reorganization of the legal and moral world as we know it.

CRT credits its roots to Critical Legal Studies, which emerged in the 1970s alongside several American ideological movements (e.g., Black and Chicano power, anti-colonialism, and American feminism). CRT, like Critical Legal Studies, presents the law as the maintenance of power. In other words, statutes, regulation, judicial decisions, and the Constitution function to maintain the hierarchical social structure. The establishment of Critical Legal Studies was a break-through moment, supported by the intellectual-ideological culture in academe that included the highly influential Critical Theory movement of the Frankfurt School.<sup>5</sup> According to one noted British law professor:

“Critical legal studies [sic] is the first movement in legal theory and legal scholarship in the United States to have espoused a committed Left political stance and perspective.”<sup>6</sup>

CRT broke off from Critical Legal Studies because CRT founders such as Derrick Bell, Kimberlé Crenshaw, and Richard Delgado felt that Critical Legal Studies was too theory-oriented and not practical and action-oriented. CRT’s founders argued that race and white supremacy were central to American law. Studying American law through the prism of race was intended to change politics, society, and culture, not just change the law. CRT held its first workshop in 1989, and the movement has only grown since then.<sup>7</sup>

Over time, a sizeable body of CRT work has emerged. These scholars differ in details and emphasis, but they share a common paradigm. They also are part of an intellectual-academic culture with many ideological sympathizers in such fields as sociology and anthropology.

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<sup>5</sup> The Critical Theorists of the Frankfurt School invert the major tenets of Karl Marx’s original work on class, labor, capitalism, and revolution. Critical Theory’s emphasis is on society, culture, and social change. Critical Theory was highly influential among the New Left, especially Herbert Marcuse’s essay, “Repressive Tolerance.” For Marcuse, “tolerance” was a false front. True tolerance requires “intolerance toward prevailing policies, attitudes, opinions, and the extension of tolerance to policies, attitudes and opinions which are outlawed or suppressed. ... [W]hat is proclaimed and practiced as tolerance today, is in many of its most effective manifestations serving the cause of oppression.” In advanced democratic capitalist societies, the biases of the privileged are embedded in repressive tolerance. Herbert Marcuse, “Repressive Tolerance,” in Robert Paul Wolff, Barrington Moore, Jr., and Herbert Marcuse (eds.), *A Critique of Pure Tolerance* (Boston: Beacon Press, 1969), 95-137.

<https://www.marcuse.org/herbert/publications/1960s/1965-repressive-tolerance-fulltext.html>. Delgado and Stefancic also mention other European theorists and various American activists (e.g., Sojourner Truth, Martin Luther King, the Black and Chicano Power Movements). Delgado and Stefancic, *Critical Race Theory: An Introduction*, 5.

<sup>6</sup> Alan Hunt, “The Theory of Critical Legal Studies,” *Oxford Journal of Legal Studies*, 6 no. 1 (Spring, 1986): 1.

<sup>7</sup> For brief history, see Delgado and Stefancic, *Critical Race Theory: An Introduction*, 4-7.

## ***Critical Race Theory: America's Problems Are Systemic; Racism is Systemic.***

CRT writers repeatedly say America's race problem is systemic, that America is faced with "systemic racism." What does this mean?

First, in the CRT view, Americans' conventional view of racism is wrong. The mainstream view is that racism has declined since the fifties, because there is a significant drop in the belief in white superiority and support for racial segregation.<sup>8</sup>

In contrast, "systemic racism," according to CRT scholars, means that "racism" is not just a matter of individual attitudes, prejudices, and behaviors. Attitude changes is window-dressing. In the CRT view, *American institutions, laws, policies, and practices as currently constituted cannot redress racial wrongs*, no matter what Americans now feel about race.

Systemic racism means that whites, without being conscious of doing so, always take advantage of their white privilege.<sup>9</sup> Ergo, the guilty confessions of whites professing "oppressor status" will have no general effect without action towards changing institutions, laws, and policies. No amount of confession or atonement can cause the needed change.

CRT is thus premised on the notion of white domination as the center of all institutions, policies, and practices, and the notion that racism is system-wide. As such, CRT ultimately rejects the Constitution, colorblindness, and equal protection under the law (as the law is shot through by immoral compromises, unfulfilled promises, and reactionary obstructionism).

### *The Social Fictions of a Colorblind Constitution and Equal Treatment Under the Law*

For CRT, laws that are colorblind on paper actually perpetuate systemic racism. Law professor Neil Gotanda in 1991 argued that the colorblind Constitution is a false narrative.

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<sup>8</sup> For example, in 1972, 31% of whites in the South favored segregated schools. In 1985, almost no respondents believed such, so the General Social Survey removed the question. In 1972, 48% of Southern whites said they would not vote for a black for president. In 2010, only 6% of white Southerners said the same. A Gallup survey found that 87% in 2013 approved of black-white marriages, compared to only 4% in 1958. The one caveat to this is that the percentage saying race relations are not good has increased, from 30% in 2008, to 46% in 2016 and 57% in 2021. Anna Marin Barry-Jester, "Attitudes Toward Racism and Inequality Are Shifting," 538 (June 23, 2015). <https://fivethirtyeight.com/features/attitudes-toward-racism-and-inequality-are-shifting/>; Gallup, "Race Relations" (2021). <https://news.gallup.com/poll/1687/race-relations.aspx>.

<sup>9</sup> Peggy McIntosh, "White Privilege: Unpacking the Invisible Knapsack," *Peace and Freedom Magazine* (July/August 1989), 10-12. [https://psychology.umbc.edu/files/2016/10/White-Privilege\\_McIntosh-1989.pdf](https://psychology.umbc.edu/files/2016/10/White-Privilege_McIntosh-1989.pdf); Joshua Rothman, "The Origins of 'Privilege,'" *The New Yorker*, May 12, 2014. <https://www.newyorker.com/books/page-turner/the-origins-of-privilege>.

“[T]he United States Supreme Court’s use of color-blind constitutionalism—a collection of legal themes functions as a racial ideology—fosters white racial domination.”<sup>10</sup>

In other words, colorblindness, like anti-racism attitudes, is a fiction. One cannot engage in everyday social relations and not consider race, nor can an individual, if white, fail to benefit from racial privilege. A denial of race’s salience perpetuates the hierarchical relationships among groups. To the extent that Americans see “race” as immutable and see the categories as fixed, there is a recognized habit of static racial classification, skin color, physiognomy, and ancestry.<sup>11</sup>

In this vein, other CRT scholars argue that colorblindness and equal protections “protects unequally.”<sup>12</sup> The mainstream doctrine of equal protection places limits on the use of race as a corrective measure. The Court has set “a very high bar” against efforts to bring down policies and practices that disparately impact communities of color. In very rare cases, race is allowed as a factor, as in cases involving diversity in higher education. The Court however explicitly rejected the use of racial quotas as a corrective.

“[T]he Supreme Court’s deployment of this impoverished conception of ‘equal protection,’ ... is now utilized by the Court to restrict the remedial uses of race while maintaining a very high bar against challenges to a wide array of practices that burden and disempower minoritized communities.”<sup>13</sup>

### *Racial Differences = Systemic Racism*

Professor and author George Lipsitz gives multiple examples of disparate impact, where policies and practices of alleged white domination do not explicitly declare a racial intent but have that effect. The charge is that laws and policies are colorblind on paper but racist in fact. For example, “colorblind” policies and laws involve:

- Credit-worthiness for loans and mortgages;
- Physical and mental health outcomes;
- Crime and punishment outcomes;
- Testing in education and access to special programs;
- Employment, licensing, and contracting;
- Voter identification cards, polling location, and number of polling places;
- School district funding; and
- Within-district versus cross-boundary school busing.

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<sup>10</sup> Neil Gotanda, “A Critique of ‘Our Constitution is Colorblind,’” *Stanford Law Review* 44, no. 1 (November 1991): 2.

<sup>11</sup> Gotanda, “A Critique of ‘Our Constitution is Colorblind,’” 1-68.

<sup>12</sup> Kimberlé Williams Crenshaw, Luke Charles Harris, Daniel Martinez HoSang, and George Lipsitz, “Introduction,” in Kimberlé Williams Crenshaw, Luke Charles Harris, Daniel Martinez HoSang, and George Lipsitz (eds.), *Seeing Race Again: Countering Colorblindness Across the Disciplines* (Oakland CA: University of California Press, 2019), 15.

<sup>13</sup> Crenshaw et al., “Introduction,” 14.

The examples are of disparate racial results, from seemingly neutral laws and policies.<sup>14</sup> It follows from the CRT paradigm—a law’s *disparate impact is evidence of racism*.

If colorblindness and equal treatment are social fictions and if disparate impact is proof of systemic racism, this would also mean an alternative, revisionist history of civil rights law and the civil rights movement. This CRT revisionist view starts with Derrick Bell’s reinterpretation of *Brown v. Board*.

## ***CRT’s Revisionist Civil Rights History***

### *Interest Convergence*

Derrick Bell was the first to suggest civil rights law should be judged by a new standard based on the concept of interest convergence. Under this standard, any progress occurs only when civil rights converge with the interests of whites, especially white elites. Bell presents *Brown v. Board* in this revisionist light.<sup>15</sup>

Bell acknowledges that some whites in the 1950s, like the abolitionists in the nineteenth century, acted on the basis of moral principles. But, he observes, there was not a sufficient number of whites motivated by moral principle alone to bring about desegregation.<sup>16</sup>

Bell argues that desegregation as ordered in *Brown* was based on other, more pragmatic interests of white elites (i.e., the federal government and the Supreme Court). What white interests would be advanced by overturning prior decisions and mandating desegregation? Bell posited:

“[T]he decision in *Brown* to break with the Court’s long-held position on these issues cannot be understood without some consideration of the decision’s value to whites, not simply those concerned about the immorality of racial inequality, but also those whites in policymaking positions able to see *the economic and political advances at home and abroad that would follow abandonment of segregation*.”<sup>17</sup>  
[Italics added.]

In the 1950s, the international interests were substantial, as America was in the middle of the Cold War. Desegregation would further America’s Cold War credibility in its contest with the Soviet Union for the allegiance of the Third World. *Time* magazine noted the importance of the case, especially in countries where American segregation hurt American international standing. “[I]t will come as a timely reservation of the basic American Principle that ‘all men are created equal.’”<sup>18</sup> The importance of the Cold War was put forth in a Supreme Court amicus

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<sup>14</sup> George Lipsitz, “The Sounds of Silence: How Race Neutrality Preserves White Supremacy,” in Kimberlé Williams Crenshaw, Luke Charles Harris, Daniel Martinez HoSang, and George Lipsitz (eds.), *Seeing Race Again: Countering Colorblindness Across the Disciplines* (Oakland, CA: University of California Press, 2019), 24-44.

<sup>15</sup> Derrick A. Bell, “*Brown v. Board of Education* and the Interest-Convergence Dilemma,” *Harvard Law Review* 93, no. 3 (1980): 518-33.

<sup>16</sup> Bell, “*Brown v. Board of Education* and the Interest-Convergence Dilemma,” 525.

<sup>17</sup> Bell, “*Brown v. Board of Education* and the Interest-Convergence Dilemma,” 524.

<sup>18</sup> *Time Magazine*, as quoted in Bell, “*Brown v. Board of Education* and the Interest-Convergence Dilemma,” 524.



brief in which the federal government explicitly mentioned the importance of desegregation as furthering national security and foreign policy goals.<sup>19</sup>

*Brown* would also further the national interest by reassuring blacks, especially World War II veterans, that the principles of equality and freedom would be realized at home. It would counter criticism by black actor and Soviet apologist Paul Robeson, who declared in 1949 that “[i]t is unthinkable . . . that American Negroes would go to war on behalf of those who have oppressed us for generations . . . against a country [like the Soviet Union] which in one generation has raised our people to the full human dignity of mankind.”<sup>20</sup> *Brown* would refute Robeson’s claim that life for blacks would be better in the Soviet Union.

Bell raises a third national interest furthered by *Brown*—that Southern modernization from a rural plantation economy could only happen if segregation were ended. Otherwise, segregation would be an impediment to industrialization. Bell notes that desegregation would mean some whites (the poor) would not benefit but feel betrayed, since *Brown* was a significant change from past practices. Desegregation undercut the belief of poor and working-class whites that white elites would secure the social position of lower-class whites as a barrier to black mobility.<sup>21</sup>

Since *Brown*, black interests were furthered by court mandated desegregation in the South, which also furthered federal interests, especially the interests of the federal judiciary. The opposition by Southern governments posed a threat to the supremacy of judicial review. As such, the courts justified post-*Brown* desegregation orders “as a reaffirmance of the supremacy of the judiciary on issues of constitutional interpretation.”<sup>22</sup> For these reasons, civil rights progress after *Brown* only occurred when there was a convergence of interests between blacks and whites, in particular, white elites, according to Bell.

In Bell’s view, progress in civil rights had reversed by the late seventies, as evidence in the policy defeats—no mandatory metropolitan desegregation encompassing white suburbs and black urban districts; no mandatory busing between schools and across districts; no significant increase in black administrators and teachers across school systems among other policy failures. Moreover, there was significant white flight to the suburbs and to private schools. These failures showed that the interests of whites and nonwhites had diverged.



Bell’s concepts of interest convergence and interest divergence gave meaning to what happened when the interests of white elites and elite students of color diverged at Harvard law school, over the search for a professor of color to replace Derrick Bell. The controversy led to an argument and eventually protests over Harvard’s hiring criteria, disparate impact based on race, and the meaning of “merit.” Many protesters would become active in the CRT movement.

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<sup>19</sup> Bell, “*Brown v. Board of Education* and the Interest-Convergence Dilemma,” 524.

<sup>20</sup> Quoted in Bell, “*Brown v. Board of Education* and the Interest-Convergence Dilemma,” 525.

<sup>21</sup> Bell, “*Brown v. Board of Education* and the Interest-Convergence Dilemma,” 525-26.

<sup>22</sup> Bell, “*Brown v. Board of Education* and the Interest-Convergence Dilemma,” 529.

## *Harvard, Merit, and Replacing Derrick Bell*

Derrick Bell, the only tenured black professor in 1992 left Harvard (for a second time). When he left, there were no faculty to teach Bell's class on the Constitution and minority issues. To students, according to Kimberlé Crenshaw (a Harvard law student at that time), "the course was an essential component of a basic legal education that Harvard was failing to deliver,"<sup>23</sup> along with a dearth of minority faculty and attention paid to minority issues.

The dean's view was of picking "an excellent white professor over a mediocre black one."<sup>24</sup> But the issue according to Crenshaw was the criteria used in determining merit, i.e., definitions of "excellence" versus "mediocre." There was a failure to debate whether Harvard's informal markers of merit were biased in favor of white males: "[a] degree from an elite law school, membership on a law review, and a Supreme Court clerkship."<sup>25</sup>

Harvard failed to find a faculty member of color to teach the course, despite students putting forth 30 minority candidates who in the eyes of the students were *not* mediocre. Harvard hired 10 white males that year.

According to Crenshaw, needing faculty of color was more than needing role models. It was ultimately one of perspective and epistemology—of living the life about which they would teach.<sup>26</sup> For that reason, in the eyes of these students, race *must* be a condition of hiring. For Crenshaw and other law students, the standards used by Harvard epitomized white male privilege.

## ***Power, Knowledge, the Narrative, and the Counternarrative***

The centrality of "living the life" evolved into CRT's emphasis on the persons' of color counternarrative. A person of color would have different facts, a different epistemology, and a different view of racial hierarchy.

CRT emphasizes the counternarrative, often through story-telling. CRT thus rejects the notion of an objective set of "facts." Delgado and Stefancic refer to this as "naming one's own reality."<sup>27</sup> Trial lawyers engage in narrative and counternarrative—one side tells a story about what happened, the other tells a counternarrative—i.e., they present two (or more) theories of the case. There is a long tradition of narrative within communities of color. CRT scholarship presents distinctive perspectives of minority counternarratives.<sup>28</sup>

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<sup>23</sup> Kimberlé Crenshaw, "Unmasking Colorblindness in the Law: Lessons from the Formation of Critical Race Theory," in Kimberlé Williams Crenshaw, Luke Charles Harris, Daniel Martinez HoSang, and George Lipsitz (eds.), *Seeing Race Again: Countering Colorblindness Across the Disciplines* (Oakland, CA: University of California Press, 2019), 60.

<sup>24</sup> Crenshaw, "Unmasking Colorblindness," 61.

<sup>25</sup> Crenshaw, "Unmasking Colorblindness," 62.

<sup>26</sup> Crenshaw, "Unmasking Colorblindness," 64.

<sup>27</sup> Delgado and Stefancic, "Critical Race Theory: An Annotated Bibliography," 462.

<sup>28</sup> On legal story-telling, see Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction, 3<sup>rd</sup> Edition* (New York: New York University Press, 2017), 44-54.

In a similar vein, education professor Daniel G. Solórzano has written extensively on the importance of experiential knowledge “as legitimate, appropriate, and critical to understanding, analyzing, practicing, and teaching the law.”<sup>29</sup> Methods of counternarrative to offset racial stereotyping in teacher education include “storytelling, family history, biography, scenarios, parables, chronicles, and narratives.”

For CRT scholars, then, what we call “truth” and “objective facts” are parts of the majoritarian narrative, or what they call “normative whiteness.” Created and maintained by whites, the majoritarian narrative manifests itself in the form of unstated premises, for example, the assumption of black criminality, Muslim terrorism, undocumented Hispanics, etc.<sup>30</sup> In fields such as education, measures of academic achievement and rewards are based on normative whiteness.

### ***CRT: Free Speech is Hate Speech***

Finally, CRT scholars were major contributors to the debate over hate speech versus free speech. In their 2017 textbook on CRT, Delgado and Stefancic summarize the early work on CRT and speech.<sup>31</sup> Work such as that of Mari Matsuda and Charles I. Lawrence, among others, criticized the conventional view of the First Amendment, that the solution to hate speech is more speech.<sup>32</sup> The CRT position is that hate speech inflicts harm and courts should provide remedy. Delgado and Stefancic note that courts already provide relief for various kinds of speech (e.g., defamation) and propose “a new independent tort,” where victims of deliberate hate speech could sue for damages.

Delgado and Stefancic observe however that the courts have struck down campus speech codes and plaintiffs have rarely gained relief. CRT scholars hope that hate speech torts could succeed under legal theories of hostile environment. They have been pushing for a “broader, more policy sensitive approach” and have critiqued the notions of more speech as the best remedy for hate speech; that hate speech acts as a “pressure valve” for racial conflict; and that focusing on hate speech ignores “the real problem” of race in America.<sup>33</sup>

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<sup>29</sup> Daniel G. Solórzano, “Images and Words That Wound: Critical Race Theory, Racial Stereotyping, and Teacher Education,” *Teacher Education Quarterly*, 24 no. 3 (1997): 7. <http://rws200jspencer.pbworks.com/w/file/attach/105875184/Images%20and%20Words%20that%20Wound.pdf>; See also Solórzano and Yosso on the importance of the counternarrative. Daniel G. Solórzano and Tara J. Yosso, “Critical Race Methodology: Counter-Storying as an Analytical Framework for Education Research,” *Qualitative Inquiry* 8 no. 1 (2002): 23-44. <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.459.5572&rep=rep1&type=pdf>.

<sup>30</sup> Delgado and Stefancic, *Critical Race Theory: An Introduction*, 86.

<sup>31</sup> Delgado and Stefancic, *Critical Race Theory: An Introduction*, 125-27.

<sup>32</sup> Mari Matsuda “Public Response to Racist Speech: Considering the Victim’s Story,” *Michigan Law Review* 87 (1989), 2320. <https://repository.law.umich.edu/mlr/vol87/iss8/8/>; Charles Lawrence III, “If He Hollers, Let Him Go: Regulating Hate Speech on Campus,” *Duke Law Journal, Frontiers of Legal Thought II. The New First Amendment* 1990, no. 3 (June 1990): 431-83. [https://www.jstor.org/stable/1372554?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/1372554?seq=1#metadata_info_tab_contents); Delgado and Stefancic, *Critical Race Theory: An Introduction*, 33-35.

<sup>33</sup> Delgado and Stefancic, *Critical Race Theory: An Introduction*, 126.

Based on CRT principles and the CRT view of the Constitution, the general CRT view is that the First Amendment functions as a bulwark supporting the racial status quo. Speech that is abusive should not be protected, and hate speech is abuse. A thorough analysis of CRT's reinterpretation of the First Amendment is beyond the scope of this backgrounder. It should be presented as a separate piece where CRT's main principle and concepts summarized in this backgrounder serves as a backdrop for a fuller CRT-First Amendment analysis.



## ***CRT Subfields: Education***

CRT has created numerous subfields: Dis Crit, Hebrew Crit, Black Crit, Lat Crit, Asian Crit, and Tribal Crit.<sup>34</sup> CRT scholars have also focused on the “intersectionality” of race, gender, class, sexuality, and/or language. CRT scholar Kimberlé Crenshaw came up with the concept, to describe how race, class, gender, and sexual orientation, among other factors, are interconnected. Intersectional analysis focuses on the categories’ interdependence as well as their differences.<sup>35</sup>

CRT also blends in with many intellectual approaches in the social sciences. The latter share a common perspective with CRT, in particular the subfields of race and sociology, race and criminology, racial microaggressions and implicit bias studies in social psychology, and post-colonial counternarratives in anthropology.

CRT has had an impact on schools of education. Some education professors have adopted the CRT paradigm, moving CRT from abstract legal theory to education-oriented research, curriculum change, and teacher education.

Education has had a long tradition of liberal-left scholarship and activism, originating in the American progressivism of Wilson, Dewey, and others. Jay Schanlin summarizes:

“It started over 100 years ago in the Progressive era, when the education schools first emerged as a body of experts who focused on “teaching” as a

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<sup>34</sup> See Subini Ancy Annamma, David Connor, and Beth Ferri, "Dis/ability critical race studies (DisCrit): theorizing at the intersections of race and dis/ability," *Race Ethnicity and Education* 16 no. 1 (2012): 1–31.

<https://doi.org/10.1080/13613324.2012.730511>; Michael J. Dumas, kiyana miraya ross., “‘Be Real Black for Me’: Imagining BlackCrit in Education,” *Urban Education* 51, no. 4 (February 23, 2016): 415-42.

<https://journals.sagepub.com/doi/abs/10.1177/0042085916628611>; Latina and Latino Critical Theory Inc., “About LatCrit” (N.D.). <https://latcrit.org/about-latcrit/>; Samuel D Museus and Jon Itikar, “An Asian Critical Theory (AsianCrit) Framework,” *Academia* (2013): 18-29. [https://www.semanticscholar.org/paper/An-Asian-Critical-Theory-\(AsianCrit\)-Framework-Museus-Iftikar/384cab1af98d2e09c507ae326fe4a32b35ac8fb3](https://www.semanticscholar.org/paper/An-Asian-Critical-Theory-(AsianCrit)-Framework-Museus-Iftikar/384cab1af98d2e09c507ae326fe4a32b35ac8fb3); Daniel Ian Rubin, “Hebrcrit: A New Dimension of Critical Race Theory,” *Social Identities* 26, no. 4 (2020): 499-514.

<https://www.tandfonline.com/doi/abs/10.1080/13504630.2020.1773778>; Bryan McKinley Jones Brayboy, “Toward a Tribal Critical Race Theory in Education,” *The Urban Review* 37, no. 5 (December 2005). <https://nau.edu/wp-content/uploads/sites/49/2018/04/Toward-a-Tribal-Critical-Race-Theory-in-Education.pdf>.

<sup>35</sup> See Delgado and Stefancic, *Critical Race Theory: An Introduction*, 10-11, 58-63.

science; many of those experts were socialists who were open about their intentions to change the nation.”<sup>36</sup>

And eventually, there were the cultural Marxists, critical pedagogy, the multiculturalists, and eventually “the union of critical race theory and education.”<sup>37</sup>

In the mid-nineties, education scholars Gloria Ladson-Billings and William F. Tate IV laid out major CRT issues in school inequity.<sup>38</sup> Like other CRT scholars, they look at race disparities, but they further argue that society is based in property rights. As such, race intersects with property rights, in the form of neighborhood boundaries and school district property taxes. CRT creates an analytic tool through which social and, consequently, school inequity can be understood.<sup>39</sup> The social structure as well as the culture make race the central cause of “school inequity.”<sup>40</sup>

In 2018, Dixon and Anderson reviewed 20 years of CRT education research, focusing on major CRT principles, attacking colorblind ideology and equal treatment, and concentrating on the concepts of counternarrative and interest convergence.<sup>41</sup>

### *The Counternarrative in Education Research*

CRT in education places the counternarrative of persons of color as alternative frames to normative whiteness. Much of the CRT education scholarship has been in presenting the counternarrative, in order to disrupt the “reality” of normative whiteness.

These counternarratives serve to critique the racial stereotypes as embedded in the dominant culture. For example, Dixon and Anderson summarize education counternarratives such as the experiences of black middle and high school students and of black students’ success in K-12 mathematics.<sup>42</sup> These and similar stories, they argue, critique the basic dominant narrative of black students “being unable or unwilling to learn.”<sup>43</sup> Other scholars focus on parents of color and their counternarrative regarding encounters with schools and schooling. The parents’ counternarrative highlight “the means by which schools structure inequality and the ways that parents and children of color resist and persist.”<sup>44</sup> Others present the counternarratives

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<sup>36</sup> Jay Schandlin, “Executive Summary,” *The Politicization of University Schools of Education: The Long March through the Education Schools* (Raleigh, NC: The James G. Martin Center for Academic Renewal, February 2019). <https://files.eric.ed.gov/fulltext/ED594180.pdf>.

<sup>37</sup> Schandlin, *The Politicization of University Schools of Education*, 40.

<sup>38</sup> Gloria Ladson-Billings and William F. Tate IV, “Toward a Critical Race Theory in Education,” *Teachers College Record* 97 no. 1 (Fall 1995): 47-68. <https://www.unco.edu/education-behavioral-sciences/pdf/TowardsCRTEduca.pdf>.

<sup>39</sup> Ladson-Billings and Tate, “Toward a Critical Race Theory in Education,” 48.

<sup>40</sup> Ladson-Billings and Tate, “Toward a Critical Race Theory in Education,” 50.

<sup>41</sup> Adrienne D. Dixon and Celia Rousseau Anderson, “Where are We? Critical Race Theory in Education 20 Years Later,” *Peabody Journal of Education* 93, no. 1 (November, 2017): 121-31. <https://www.tandfonline.com/doi/abs/10.1080/0161956X.2017.1403194>.

<sup>42</sup> Dixon and Anderson, “Where are We?” 123-24.

<sup>43</sup> Dixon and Anderson, “Where are We?” 123.

<sup>44</sup> Dixon and Anderson, “Where are We?” 124.

of black educators and brings to light the polarized setting and fear of retaliation facing black educators against white local elites.<sup>45</sup>

### *Colorblindness in Education Versus Interest Convergence*

Dixson and Anderson reiterate the CRT idea that colorblindness, as both a Constitutional and society-wide principle, is a social fiction. Efforts to lessen racial disparities occur only when the interests of students of color and whites in power converge. For example, the St. Louis desegregation plan was a case of interest convergence, where local elites offered black students the chance to attend schools in white county districts, while city magnet programs were offered to whites in surrounding districts.<sup>46</sup>

Dixson and Anderson list six significant education-related CRT principles guiding research:

- That disparities are the “logical outcome of a system of achievement premised on competition;”<sup>47</sup>
- That education policy and practices perpetuate racial inequity and normative whiteness, where white norms and white privilege define “normal;”
- That current education policies and practices embody the superiority of whites and inferiority of persons of color;
- That education should focus on the relationship between current education practices and a history of racism;
- That education should focus on intersectionality—how race interacts with gender, class, sexuality, and/or language; and
- That CRT in education should be action-oriented, not just research-based.

So, what could follow if the principles turned into policy and practice? CRT scholars have been vague about its implementation but I list some possibilities.

### *CRT Implementation in Education: Some Possibilities*

CRT scholars are vague as to what should happen. I look at several possibilities in education that would come about, based on CRT principles. Districts and states could move towards a major increase and re-distributing of funds. CRT implementation could require federal legislation allowing race-norming. Or schools could abandon testing altogether.

Finally, CRT implementation could lead to overturning Supreme Court precedent and bringing back racial quotas in education. I discuss each of these possibilities.

**Funding Minority over White Schools.** Funding for school districts generally comes from individual states (48% of funding) and from counties (44% of funding). School districts receive only 8% from the federal government, typically for special programs such as those for students with disabilities. Fewer overall funds go to poor urban districts compared to suburbs, because a

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<sup>45</sup> Dixson and Anderson, “Where are We?” 124.

<sup>46</sup> Summarized in Dixson and Anderson, “Where are We?” 126.

<sup>47</sup> Dixson and Anderson, “Where are We?” 122.

large portion comes from local property taxes. Within districts, schools with a large percentage of students of color receive fewer funds, resources, and staff.<sup>48</sup> CRT action would target federal and state legislation to eliminate racial disparities between states, favor minority over white districts within states, and favor minority over white schools within a district. Most funds, resources, and staff would go to majority minority schools.

**Race-Norming of Tests.** The CRT approach in education also implies the necessity of race-norming in all testing. What does this mean? Currently, all national tests such as the SATs are calculated as scores and percentiles. To race-norm a test, a test would be recalibrated as percentile scores but only within races. Often called “within group score conversion,” race-norming was the testing practice nationally for the General Aptitude Test Battery for federal and state government jobs. Action would require overturning the ban on test race-norming in the 1991 Civil Rights Act.<sup>49</sup> Reporting only race-normed scores would cover up the racial disparities in national testing. Institutions would not report scores and percentiles by race, in contrast to the current practice of the College Board, where they publish summary statistics of race, gender, SAT scores, and their percentiles.<sup>50</sup> The race-norming approach would also apply to the MCATs, the LSATs, the GREs, and other national tests.

**No More Testing.** Rather than race-norming, programs could eliminate testing altogether. This has been the route chosen recently by exclusive magnet high schools such as Thomas Jefferson in Fairfax County and Lowell High School in San Francisco.<sup>51</sup> This past year, several colleges and universities have dropped submission of SAT/ACT scores as a requirement for admissions.

**Quotas.** Finally, true CRT implementation would target reversal of Supreme Court decisions and bringing back quotas. The logic of CRT means that where there is a disparity, there’s a need for quotas. In education, this would mean explicit quotas in admissions in higher education and overturning *Bakke* and the diversity standard. It would mean explicit student quotas in AP,

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<sup>48</sup> Grace Chen. “An Overview of the Funding of Public Schools,” *Public School Review* (March 31, 2021). <https://www.publicschoolreview.com/blog/an-overview-of-the-funding-of-public-schools>; Linda Darling-Hammond, “Inequality in Teaching and Schooling: How Opportunity Is Rationed to Students of Color in America,” in Brian D. Smedley, Adrienne Y. Stith, Lois Colburn, and Clyde H. Evens (eds.), *The Right Thing to Do, The Smart Thing to Do: Enhancing Diversity in the Health Professions: Summary of the Symposium on Diversity in Health Professions in Honor of Herbert W. Nickens, M.D.* (Washington, DC: Institute of Medicine, 2001).

<https://www.ncbi.nlm.nih.gov/books/NBK223640/>

<sup>49</sup> Linda Gottfredson, “The Science and Politics of Race Norming,” *American Psychologist* 49, no. 11 (November 1994): 955-63. <http://www1.udel.edu/educ/gottfredson/reprints/1994racenorming.pdf>; Paul S. Greenlaw, and Sanne S. Jensen, “Race-Norming and the Civil Rights Act of 1991,” *Public Personnel Management* 25, no. 1 (March 1996): 13–24. <https://doi.org/10.1177/009102609602500102>.

<sup>50</sup> In 2020, for example, if using total SAT scores, a score of 1200 would rank as the 92<sup>nd</sup> percentile for blacks, 88<sup>th</sup> percentile for Hispanics, 67<sup>th</sup> percentile for whites, and 44<sup>th</sup> percentile for Asians. An Asian score at the 92<sup>nd</sup> percentile would be slightly over 1500. A white score at the 92<sup>nd</sup> percentile would be slightly under a 1400. See CollegeBoard SAT, “Total and Section Score User Group Percentile Rank by Gender and Race/Ethnicity” (2020). <https://collegereadiness.collegeboard.org/pdf/sat-percentile-ranks-gender-race-ethnicity.pdf>.

<sup>51</sup> Diane Dresdner and Sharon Wunder, “Thomas Jefferson High School’s New Admissions Policy is the Right Course,” *Washington Post*, July 23, 2021. <https://www.washingtonpost.com/opinions/2021/07/23/thomas-jefferson-high-schools-new-admissions-policy-is-right-course/>; Ida Mojadad, “School Board Votes 5-2 to End Selective Admissions Policy at Lowell,” *San Francisco Examiner*, February 9, 2021. <https://www.sfexaminer.com/news/school-board-votes-5-2-to-end-selective-admissions-policy-at-lowell/>

honors, and gifted-talented programs, and explicit job quotas in K-12 and higher education professions.

The unanswered questions concern what would have to be done legislatively and what action would be required through the courts. And, assuming all these reforms, will they lead to substantial closing of the academic gap between groups? Attempts to close the gap have been implemented for over half a century, with little to show in terms of positive outcomes. Why would these reforms be different?

## ***Conclusion: CRT's Main Principles and Implications***

CRT defenders are right, in that CRT is not the all-inclusive category covering every diversity-inclusion-equity initiative. CRT in many ways is even more revolutionary, even though it is called a mere academic field. CRT scholars have explicitly critiqued the notion of colorblindness and equal treatment before the law. The emphasis is instead on the disparate impact of laws, policies, and practices. The following are the general principles held by CRT proponents.

- Disparate outcomes are proof of systemic racism.
- Equal treatment and colorblindness are social fictions.
- Persons of color have a difference narrative. Objective truth is merely the manifestation of the dominant white narrative. The counternarrative of minorities should be given space.
- Applied CRT would include (by implication) race-norming test results; dropping testing as an assessment; and moving funds, resources, and personnel away from majority white districts.
- Finally, reducing systemic racism means CRT action towards overturning Supreme Court decisions and bringing back quotas for programs, admissions, and jobs.

While lawmakers and parents seek to ban CRT, the debate is really about how to properly teach history and civics. How and at what age should educators show the connection between the past and current inequalities? Critics of CRT argue that the approach pits children of color against whites, dividing Americans into two groups, oppressors and oppressed. How can students be taught this while not scapegoating whites and instilling minority defeatism?

CRT proponents are quite vague about its application. Reducing systemic racism in education (i.e., applied education CRT) would include, by implication, race-norming test results; dropping testing as an assessment; and moving most funds, resources, and personnel away from majority white districts.

The full implementation of CRT means bringing back quotas.

The same kind of speculation that I undertook regarding education can be applied to other areas—e.g., licensing, contracting, and jobs; jury trials and criminal justice; loans and mortgages; and medicine, wellness, and healthcare.



Ultimately, “just an academic theory in the law schools” understates the potential impact of CRT on future lawyers and judges. Law schools are their training ground. And CRT implementation could happen via the courts. After all, it took about 50 years to create a significant cadre of conservative lawyers, professors, and judges, eventually moving from a liberal Supreme Court to the current conservative one. It may take a generation or two, but CRT’s potential to fundamentally transform America is there.



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