4. Critical race theory

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Dating from the late 1980s, critical race theory is one of the youngest movements or theories in the panorama of critical scholarship. In section 1, this contribution will briefly look at its origins in the United States; in section 2 it will describe its main tenets, elements, and theoretical tools; and in section 3 it will conclude with a discussion of the latest developments in this area.

1. ORIGINS

Critical race theory (hereinafter CRT) has been classified among postmodern legal movements, alongside critical legal studies (hereinafter CLS), feminist legal theory (hereinafter FLT), law and economics, and law and literature.[1] Two points are important to note from this classification: first, CRT originated in the United States; second, within that context, it developed in American law schools in the late 1980s.[2] The reason for classifying these various strands of jurisprudence as postmodern is that, unlike prior "modern" approaches, the postmodern ones do not try to analyze law from one universally true vantage point but rather dissect it from different angles. For example, FLT considers law in terms of what it does to women; law and economics looks at the economic implications of law; and critical race theory looks at law to or from the bottom,[3] that is, through the lens of racial minorities in the United States.

However, CRT's postmodernity is determined not only by whose nonuniversal vantage point is taken to look at law but also by the variety of intellectual sources that its authors have used. European philosophers such as Antonio Gramsci and Michel Foucault; postcolonial thinkers such as Frantz Fanon and Aimé Césaire; American

* Parts of this contribution are based, to a greater or lesser degree, on Chapter 2 of this author's *Law, Lawyers and Race: Critical Race Theory from the United States to Europe* (Routledge, 2014).

[1] On this classification see Gary Minda, *Postmodern Legal Movements* (NYU Press 1995).

[2] These are the main factors distinguishing it from other related theoretical work on race and ethnicity that has been written outside of the United States and outside of the legal context, but that has a similar name. See Philomena Essed and David Theo Goldberg (eds), *Race Critical Theories* (John Wiley & Sons 2001).

[3] Expressions taken from two founding pieces of CRT: Mari J. Matsuda, 'Looking to the Bottom: Critical Legal Studies and Reparations' (1987) 22 *Harvard Civil Rights – Civil Liberties Law Review* 323 and Derrick A. Bell Jr., *Faces at the Bottom of the Well: The Permanence of Racism* (Basic Books 1992).

radical thinkers and personalities such as Sojourner Truth, W.E.B. Du Bois, Frederick Douglass, and Martin Luther King, Jr; as well as feminist (legal) theory and the Black Power and Chicano Movements of the 1960s and 1970s, have provided inspiration for a broad body of literature.[4]

Various factors and events have been identified as providing the necessary backdrop allowing for CRT to emerge and leading to its birth in the late 1980s. Some have credited various student movements at University of California, Berkeley,[5] or at Harvard Law School,[6] as providing the necessary terrain for the emergence and the establishment of CRT in top law schools. Others have instead focused on the faculty side of the matter by considering the broader academic context of the 1970s in which radical, White Marxist and socialist professors were denied tenure and therefore had the time to spread their "radical" ideas during their un(der)employment, thus contributing to the rise of both CLS and CRT.[7]

There is little doubt about the turning point and the actual "official" birth moment of CRT in the framework of CLS. In 1986, radical CLS feminists organized a conference critiquing the patriarchy inside the CLS movement and asked CLS academics of color to organize a similar event around the topic of race in CLS. Radical feminism and CLS thus provided the intellectual and political openings within which CRT was able to develop and thrive, albeit not without difficulties. In 1987, during the tenth National Critical Legal Studies Conference, entitled "Sounds of Silence: Racism and the Law," some of the future CRT scholars raised a minority critique of CLS scholarship regarding the silence on race.[8] These critiques were not welcomed by all CLS scholars; some found it difficult to analyze their scholarship and position through the lens of White domination and racialism. And in fact, arguably the incapacity of CLS to adequately address or internalize these critiques led to its end.[9]

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[4] See in this sense Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (3rd edn, NYU Press 2017) 5. For more complete bibliographical references to (early) CRT literature (as well as Latino/a critical scholarship) see: Richard Delgado and Jean Stefancic, 'Critical Race Theory, An Annotated Bibliography' (1993) 79 *Virginia Law Review* 461; Richard Delgado and Jean Stefancic, 'Critical Race Theory, An Annotated Bibliography 1993, A Year of Transition' (1995) 66 *University of Colorado Law Review* 159; and Jean Stefancic, 'Latino and Latina Critical Theory: An Annotated Bibliography' (1997) 85 *California Law Review* 1509.

[5] Sumi Cho and Robert Westley, 'Critical Race Coalitions: Key Movements that Performed the Theory' (2000) 33 *U.C. Davis Law Review* 1377.

[6] Kimberlé W. Crenshaw, 'The First Decade: Critical Reflections, or "A Foot in the Closing Door"' (2002) 49 *UCLA Law Review* 1343, 1344–54.

[7] Richard Delgado, 'Liberal McCarthyism and the Origins of Critical Race Theory' (2009) 94 *Iowa Law Review* 1505.

[8] See more in detail on this story Kimberlé W. Crenshaw et al (eds), *Critical Race Theory: The Key Writings that Formed the Movement* (The New Press 1995) xiv–xvii.

[9] Paul Brest, 'Plus Ça Change' (1993) 91 *Michigan Law Review* 1945.

Instead, CRT began to thrive. In 1989, the first independent CRT workshop took place in Madison, Wisconsin, and the name "critical race theory" was invented.[10] From then on, for some time annual workshops were organized,[11] and a number of separate symposiums or conferences were held at different times, leading to additional publications and exchanges.[12] Even when the annual CRT workshops stopped taking place regularly, CRT's legacy continued, partly thanks to LatCrit, which began to organize annual conferences.[13]

2. MAIN TENETS

The different workshops, conferences, and symposia, and other meetings between scholars, have helped to develop a vast and diverse body of literature. It is hard to boil down this doctrinally and methodologically eclectic legal scholarship to one canonical unity. Indeed, this open-ended approach partly reflects the necessity of favoring identity over substantive criteria so as to create a safe space and a platform from which to engage in racial struggle.[14] Hence, it can be said that the main aim of CRT is not to develop a coherent, methodologically flawless theoretical framework, but in some ways it is rather an academic political enterprise. However, even political action needs some main ideas around which to develop its program, and CRT scholars have over the years defined such ideas, tenets, and goals.

These were in part identified and later refined during the Second Workshop, where discussion was organized around a seven-point description of CRT's proposed tenets, according to which CRT:

> holds that racism is endemic to, rather than a deviation from, American norms;
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> bears skepticism towards the dominant claims of meritocracy, neutrality, objectivity and color-blindness;
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> challenges ahistoricism, and insists on a contextual and historical analysis of the law;
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> challenges the presumptive legitimacy of social institutions;
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> insists on recognition of both the experiential knowledge and critical consciousness of people of color in understanding law and society;

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[10] Crenshaw, 'The First Decade' (n 6) 1354–60 and Charles R. Lawrence III, 'Foreword: Who Are We? And Why Are We Here? Doing Critical Race Theory in Hard Times', in Francisco Valdes, Jerome McCristal Culp and Angela Harris (eds), *Crossroads, Directions, and a New Critical Race Theory* (Temple University Press 2002) xii.

[11] On these early workshops see Stephanie Phillips, 'The Convergence of the Critical Race Theory Workshop with LatCrit Theory: A History' (1999) 53 *University of Miami Law Review* 1247.

[12] See e.g.: (2002) 71 *UMKC Law Review* 227–527; (2004) 61 *Washington and Lee Law Review* 1485–1799; and (2005) 11 *Michigan Journal of Race and Law* 1–273.

[13] For a list of those conferences see www.latcrit.org/content/conferences/.

[14] Crenshaw, 'The First Decade' (n 6) 1362–3.

> is interdisciplinary and eclectic (drawing upon, inter alia, liberalism, post-structuralism, feminism, Marxism, critical legal theory, post-modernism, pragmatism), with the claim that the intersection of race and the law overruns disciplinary boundaries; and
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> works toward the liberation of people of color as it embraces the larger project of liberating oppressed people.[15]

Put differently, CRT tries to challenge popular, mainstream beliefs about racial injustice, namely that (a) "blindness to race will eliminate racism," that (b) "racism is a matter of individuals, not systems," and that (c) "one can fight racism without paying attention to sexism, homophobia, economic exploitation, and other forms of oppression and injustice."[16] Some of the main intellectual tools and terms that have been developed by critical race scholars and that will be described in further detail below are, for example, "interest convergence,"[17] "unconscious racism,"[18] and "intersectionality";[19] to some extent, "colorblindness" and its critique have also played a central role in CRT's conceptual toolkit.[20]

Methodologically, legal narrative allowed to bring personal experience into academic writing and legal analysis. The main idea is that (academic) legal writing and jargon silence minorities' visions and experience and that through legal narrative and storytelling those voices can finally be heard and provide a sort of counterhegemonic account of law and its effects. For this reason, one will find that many CRT writings start with a (personal) story or are wholly written as a story.[21] Moreover, CRT theorists have always insisted that, despite their scholarly origins, work in the area is and should always be grounded in praxis and should ultimately benefit racial minorities.[22] Even 30 years after its official origins, these goals and tenets stand at the core of the CRT project and most CRT scholars would still subscribe to them.

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[15] See Phillips, 'The Convergence of the Critical Race Theory Workshop with LatCrit Theory' (n 11) 1250.

[16] Francisco Valdes, Jerome McCristal Culp and Angela Harris, 'Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millennium', in Valdes, McCristal Culp and Harris (eds), *Crossroads* (n 10) 1.

[17] Derrick A. Bell Jr., 'Brown v. Board of Education and the Interest Convergence Dilemma' (1980) 93 *Harvard Law Review* 518.

[18] Charles R. Lawrence III, 'The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism' (1987) 39 *Stanford Law Review* 317.

[19] Kimberlé W. Crenshaw, 'Demarginalizing the Intersection of Race and Sex' (1989) *University of Chicago Legal Forum* 139 and Kimberlé W. Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color (1991) 43 *Stanford Law Review* 1241.

[20] See e.g. Neil Gotanda, 'A Critique of "Our Constitution is Colorblind"' (1991) 44 *Stanford Law Review* 1.

[21] See e.g. Patricia Williams, *The Alchemy of Rights* (Harvard University Press 1991) and Derrick A. Bell Jr., *Faces at the Bottom of the Well: The Permanence of Racism* (Basic Books 1992).

[22] See e.g. Eric K. Yamamoto, 'Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America' (1997) 95 *Michigan Law Review* 821 and Adrienne Katherine Wing, 'Civil Rights in the Post 911 World: Critical Race Praxis, Coalition Building, and the War on Terrorism' (2003) 63 *Louisiana Law Review* (2003) 717.

Having outlined some of the main tenets, terms and methods that have become associated with CRT over the years, it is necessary to go into more detail on certain aspects that have come to shape CRT. In fact, in spite of the seeming methodological eclecticism, two critiques have come to stand out as informing or serving as a baseline for CRT scholarship. The first is a critique of civil rights and antidiscrimination law and the second is a critique of CLS. On the one hand, (future) CRT scholars were dissatisfied and frustrated with the limitations of the liberal civil rights movement.[23] In their opinion, the traditional approaches—from marching, to developing new litigation strategies, to filing amicus briefs—had not achieved racial reform,[24] especially because American courts had started dismantling some of the civil rights movement's achievements. On the other hand, they were also dissatisfied with the predominantly White leftist CLS movement's "trashing" of rights and with its failure to address the race factor in its analyses.[25] Put differently, CRT brought "a left intervention into race discourse and a race intervention into left discourse."[26] In a third point, I will briefly outline some other important aspects of CRT that have come to shape its scholarship.

2.1 Critiques of Civil Rights/Antidiscrimination Law

Among the writings that functioned as pathbreaker and catalyst for this line of CRT scholarship even before its birth, one can find the late Derrick A. Bell Jr's two essays dealing with *Brown v. Board of Education*,[27] the two landmark US Supreme Court judgments that had abolished legal segregation in American public schools.[28] In the first, Bell critiqued elite liberal public interest lawyers for focusing excessively on integration and desegregation without taking into account their clients' aims, namely to obtain quality education for their children.[29] In his second essay he argued that the outcome in *Brown* can be explained not so much by the fact that America became enlightened and profoundly wanted to overcome its own institutional racism, but rather that, for a limited time period, the interests of Whites converged with those of Blacks.[30] Hence, the outcome in *Brown* can only be understood when looking at what interests Whites had in this decision. Bell offers three arguments to explain why White interests

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[23] Crenshaw et al (eds), *Critical Race Theory* (n 8) xiv–xvii.

[24] See Richard Delgado and Jean Stefancic, 'Introduction', in Richard Delgado and Jean Stefancic (eds) *Critical Race Theory: The Cutting Edge* (Temple University Press 2000) xvi.

[25] Crenshaw et al (eds), *Critical Race Theory* (n 8) xxii–xxiii.

[26] ibid xix.

[27] Derrick A. Bell Jr. is considered the founding father of CRT. See Charles R. Lawrence III, 'Doing the "James Brown" at Harvard: Derrick Bell as Liberationist Teacher' (1991) 8 *Harvard Blackletter Journal* 263.

[28] *Brown v Board of Education (Brown I)*, 347 U.S. 483 (1954) and *Brown v Board of Education (Brown II)*, 349 U.S. 294 (1955).

[29] Derrick A. Bell Jr., 'Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation' (1976) 85 *Yale Law Journal* 470.

[30] Bell Jr., 'Brown v. Board of Education' (n 17) 518.

may have converged with those of Blacks at the time: first, by showing its commitment to equality, America made a strategic political move in the Cold War struggle with communist countries over influence in the developing world;[31] second, a growing fear of disillusionment and anger on the part of Black people, and i nparticular Black soldiers who had fought in the name of freedom and equality during World War II an dthen still faced discrimination in their own country, may have been an unspoken motivation behind the *Brown* decisions; and third, Whites realized that the rural south had to become industrialized, and segregation represented an obstacle in this process.[32]

Another founding article belonging to this strand was authored by Alan Freeman,[33] an exponent of CLS who argued that antidiscrimination law as interpreted by the US Supreme Court adopted the perpetrator's rather than the victim's perspective and thus failed to address the structural aspects of race discrimination by focusing on the actions of individuals. A third early piece that needs to be mentioned here was written by Charles R. Lawrence III,[34] and specifically critiqued the requirement of discriminatory intent as it was introduced by the US Supreme Court in *Washington v. Davis*,[35] thus heavily limiting the applicability of disparate impact. Moreover, Lawrence here coined the term "unconscious racism" by arguing that conscious intent cannot adequately explain racial discrimination because in American society racial bias is endemic in its social practices, and in the interaction of culture, psychology, and context.

These (early) critiques of civil rights decisions set out by CRT theorists were subsequently confirmed by the developments in the US Supreme Court's case law on race, and in particular its dismantlement of affirmative action policies and laws supposed to protect racial minorities which started with *Bakke*,[36] continuing in various forms in *Croson*,[37] *Adarand*,[38] the twin cases *Grutter* and *Gratz*,[39] *Parents Involved*,[40] *Ricci v.*

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[31] This aspect has been confirmed by Mary L. Dudziak, 'Desegregation as a Cold War Imperative' (1988) 41 *Stanford Law Review* 61 and Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton University Press 2001).

[32] ibid 524–5.

[33] Alan David Freeman, 'Legitimizing Racial Discrimination through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine' (1978) 62 *Minnesota Law Review* 1049.

[34] Lawrence III, 'The Id, the Ego, and Equal Protection' (n 18) 317.

[35] *Washington v Davis*, 426 U.S. 229 (1976).

[36] *Regents of the University of California v Bakke*, 438 U.S. 265 (1978) (declaring race-based affirmative action programmes unconstitutional by holding that affirmative action in higher education can only be justified for diversity purposes but not to remedy past discrimination, and that quotas are not sufficiently narrowly tailored to achieve that goal).

[37] *City of Richmond v J.A. Croson Co.*, 488 U.S. 469 (1989) (applying strict scrutiny to the city of Richmond's minority set-aside programme, which gave preference to minority business enterprises in the awarding of municipal contracts).

[38] *Adarand Constructors, Inc. v Peña*, 515 U.S. 200 (1995) (extending strict scrutiny also to racial classifications used by the federal government).

[39] *Grutter v Bollinger*, 539 U.S. 306 (2003) (upholding an affirmative action programme at a law school thus confirming the *Bakke* holding on using diversity); *Gratz v Bollinger*, 539 U.S. 244 (2003) (striking down an affirmative action programme because it came too close to functioning like a race-based quota, i.e. not being too narrowly tailored).

[40] *Parents Involved in Community Schools v Seattle School District No. 1*, 551 U.S. 701 (2007) (striking down a plan assigning students to public schools solely for the purpose of

DeStefano,[41] *Shelby County v. Holder*,[42] and the two *Fisher* judgments.[43] CRT scholars have critiqued some of these judgments inter alia from the point of view of colorblindness and/or that of postracialism, which will be discussed below.[44]

The case law described here has left in place fairly little of what was designed during the 1960s in order to combat race discrimination. Diversity justifications in higher education are still valid, albeit for a limited time if one is to believe and follow Justice O'Connor, who in her majority opinion stated that in 25 years such measures should no longer be necessary/constitutional.[45] Some provisions of the Civil Rights Act, such as the disparate impact ones, also still allow for race-based remedial action, despite Justice Scalia's concurring opinion in *Ricci* in which he explicitly framed a potential contrast between remedies to address potential disparate impact with the Equal Protection Clause and the principle of colorblindness inscribed into it by the Supreme Court itself.[46] The Voting Rights Act itself also still remains in place, albeit almost as an empty shell. The Supreme Court has gradually ripped the teeth out of the civil rights legislation, leaving it with little bite. It has done so by holding that any racial classification per se is discriminatory regardless of its purpose, and by establishing a symmetrical correspondence between the normative use of race to exclude people from society and the use of race as an instrument to combat racial discrimination. In its most extreme version, it does not make any distinction between race used in a benign way and race used in a discriminatory and stigmatizing way. In other words, colorblindness in American law will view "treat[ing] a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor."[47] As a consequence of the US Supreme Court's ideology, except in very few situations, race is today normatively off-limits and suspect, regardless of its use.

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achieving racial integration and balance because not amounting to a compelling state interest and not being narrowly tailored).

[41] *Ricci v DeStefano*, 557 U.S. 557 (2009) (interpreting the Civil Rights Act and requiring a higher standard for employers to take what the Supreme Court frames as race-based remedial actions so as to avoid disparate impact claims).

[42] *Shelby County v Holder*, 570 U.S. __ (2013) (declaring unconstitutional Section 4(b) of the Voting Rights Act which contained the coverage formula to identify the voting districts that would be under federal supervision due to past racial discrimination).

[43] *Fisher v University of Texas (Fisher I)*, 570 U.S. 133 (2013) (establishing that lower courts had failed to apply strict scrutiny standards to a Texas state law reserving study spots in Texas public universities to all those who graduated among the best 10 per cent of each public school regardless of their scores and grades which *de facto* functioned like an affirmative action programme) and *Fisher v University of Texas (Fisher II)*, 579 U.S. __ (2016) (finding that the lower courts had correctly applied the strict scrutiny standards outlined in *Fisher I* and upholding diversity in higher education as a compelling state interest).

[44] See e.g. Girardeau A. Spann, 'The Dark Side of Grutter' (2004) 21 *Constitutional Commentary* 221; Cheryl I. Harris and Kimberly West-Faulcon, 'Reading *Ricci*: Whitening Discrimination, Racing Test Fairness' (2010) 58 *UCLA Law Review* 73.

[45] *Grutter* (n 39) 343.

[46] *Ricci* (n 41), Scalia J concurring.

[47] *Adarand* (n 38), Stevens J dissenting.

However, in the area of critique of civil rights and antidiscrimination law, it is not only the Supreme Court's restrictive and increasingly colorblind interpretation of civil rights legislation and the constitutional Equal Protection Clause that CRT scholars have observed and critiqued. In other areas affecting racial minorities, a similar trend has been scrutinized. This is the case for the area of hate speech or racial insults as interpreted in connection with the freedom of speech in American constitutional law. Again, from a minority point of view, in the early 1950s the US Supreme Court upheld, albeit by a narrow five to four majority, a conviction for hate speech of a white supremacist who had distributed leaflets accusing blacks of rape, robbery, and other violent crimes, among other things.[48] However, since then the US Supreme Court has interpreted freedom of speech as authorizing hate speech unless it poses a clear and present danger of violence.[49] CRT scholars have critiqued this trend because this broad interpretation of free speech has a particularly pernicious effect on racial minorities and tends to favor the position of the White, male majority, and because words can indeed wound and cause direct psychological harms in the form of mental and emotional distress as well as pecuniary loss and physical damages.[50]

Undoubtedly, in their critique of civil rights and antidiscrimination law and its colorblind turn, CRT scholars have certain things in common with liberal scholars. Nevertheless, there is a difference in their explicit and unapologetic adoption of a racial minority's point of view by critiquing case law as continuing to perpetrate, in different ways, White supremacy. More traditional liberal scholars are much less comfortable in articulating such positions.

2.2 Critique of CLS

The novelty of CRT does not only reside in its critiques of liberal civil rights and freedom of speech jurisprudence. Indeed, to some extent colorblindness and civil rights critiques had already been advanced by other academics, who were not necessarily affiliated with CRT. CLS played a particularly important role here. Indeed, one of the early "founding" pieces by Alan Freeman discussed above is, strictly speaking, from someone traditionally belonging to the realm of CLS rather than to CRT.

As a first critique, CRT scholars disagree in particular with the rights-critical approach, sometimes referred to as the "rights-trashing" approach, of CLS. As was shown earlier, this is a result of the indeterminacy approach to law that is taken by CLS. On the one hand, CRT scholars share the Crits' skepticism toward the liberal vision of the rule of law and the view that rights discourses are indeterminate, that legal ideals can be manipulated, and that both tend to legitimate (racial) hierarchy and the status quo based on inequalities of wealth and power by means of seemingly neutral

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[48] *Beauharnais v Illinois*, 343 U.S. 250 (1952).

[49] See e.g. *Brandenburg v Ohio*, 395 U.S. 444 (1969), *National Socialist Party of America v Village of Skokie*, 432 U.S. 43 (1977) and *R.A.V. v City of St. Paul*, 505 U.S. 377 (1992).

[50] See for all: Richard Delgado, 'Words that Wound: A Tort Action for Racial Insults, Epithets and Name Calling' (1982) 17 *Harvard Civil Rights Civil Liberties Law Review* 133 and Mari J. Matsuda et al (eds), *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Westview Press 1993).

structured legal argumentation. On the other hand, CRT disagrees with the critiques on rights put forward by some CLS scholars. One part of those critiques states that rights are unstable because they are highly dependent on their social setting; that they do not produce determinate outcomes; that they transform real experiences into empty abstractions; and that the use of rights discourse prevents real social transformation.[51] Such transformation cannot occur because law is the expression of the ruling class's domination. Rights and rights discourse are one way in which this hegemony is being legitimized, thus inducing people to ultimately accept the domination. Due to the underlying ideology, rights cannot function as a means toward radical social transformation.

According to CRT scholars, this rights-critical position disregards the value which a rights discourse may still hold for people of color. In fact, rights are the most powerful instrument in the hands of the underprivileged and oppressed in seeking to protect themselves. Discarding rights as a hegemonic tool deprives minorities not only of an instrument against oppression but also of "a symbol too deeply enmeshed in the psyche of the oppressed to lose without trauma and much resistance."[52] Thus, CRT scholars highlight how rights are not only an external instrument, but deeply engrained and even constitutive of identities and the human psyche. Viewing rights as simply an external matter provides a limited view of the individual as a closed, monological subject, isolated from outside social and institutional influences, or in a position where such influences only provide inputs driving autonomous decisions. In this sense liberal theory and CLS share a similar position, and CRT scholars contested the Crits as mostly White, male university professors who teach at major law schools and who did not see or understand the internal aspect and symbolic relevance of rights to racial minorities and how the individual self is shaped by the relations with others and the recognition granted in the form of rights by the community.[53] Moreover, discarding rights deprives racial minorities of their only tool to respond to White domination and oppression, even though CRT scholars are quite aware that—to use Audre Lorde's essay title—"The Master's Tools Will Never Dismantle the Master's House."[54] Hence, substituting rights with some other alternative solution will only leave racial minorities worse off. By trashing rights, one ultimately risks disempowering the racially oppressed without addressing or even touching White supremacy.

This first critique leads to, and in some ways already contains, CRT's second major objection to CLS. In fact, according to the former, CLS literature fails to adequately address the role of racism as hegemony, as a tool to establish racial domination and White supremacy in American history, and the fact that this type of racial hegemony was established by means of coercion and not by consent. While the Crits' analysis is helpful in understanding the limited transformative potential which law, and in particular antidiscrimination law, can have in a hegemonic context, it bypasses the issue of racial hegemony. This specific type of domination and hegemony is different

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51 Mark Tushnet, 'An Essay on Rights' (1984) 62 *Texas Law Review* 1363.

52 Williams, *The Alchemy of Rights* (n 21) 165.

53 See Costas Douzinas and Adam Geary, *Critical Jurisprudence* (Hart 2005) 179–202.

54 Audre Lorde, 'The Master's Tools Will Never Dismantle the Master's House', in *Sister Outsider* [1984] (Ten Speed Press 2007) 110–13.

from the one assumed by CLS. While the latter posits an ideologically induced consent to establish hegemony, racial hegemony has never been about consenting to and accepting domination. It has been mostly about coercion. Moreover, CLS rarely, if ever, analyzed racism as a form of hegemony and therefore exaggerated the role of liberal ideology as hegemonic force while not considering racism's role in White domination. Given that CLS and CRT speak of two different types of hegemony, the Crits' analysis might not fit, leading to the conclusion that there might even be some aspects in liberalism and in rights that appeal to racial minorities because they have a liberationist and transformative potential.[55] This in turn leads back to CRT scholars' rights critique aimed at CLS.

However, CRT scholars did not only highlight awareness of racial domination's role or its absence in CLS literature and conscience. It also addressed a certain intellectual and racially determined divide within CLS. The traditional Crit is a White male professor more concerned with deconstructive critique of law and the theoretical aspects of the intellectual endeavor. On the contrary, academics of color associated with CLS cannot remain indifferent, cannot forget or omit their respective communities of belonging, and cannot be oblivious to the practical, everyday implications of the work done. This ultimately leads to a divide, a cleavage along the color line, where the theoretical side of CLS is White and the practical one is predominantly colored. To make matters worse, there was a sense that the line of this divide coincided with the theoretical, White side silencing and using the practical, colored side by forcing minority scholars to speak in a certain language which did not reflect their experiences, by excluding them from relevant dialogues, and on top of that by appropriating some of the cultural references in their writings.[56]

Hence, CRT's objections to CLS introduced a reconstructive minority perspective which does take rights and race into account instead of discarding them or not factoring them into the analysis. The Crits' negative, *de*-constructive, theoretical project is not sufficient for CRT scholars but has to be followed, accompanied, and integrated by a positive, *re*-constructive, practical program. Some of the pieces cited earlier under the heading of critique of antidiscrimination law and of alternative constitutional analyses detail what this program looks like and demonstrate how CRT scholars have helped to shape this school of thought and distinguish it from its predecessor.

2.3 Other Important CRT Tenets

Beyond the two fundamental aspects described here, there are two other important points in CRT scholarship that are worth highlighting. The first concerns CRT's rejection of essentialism and a strong strand of Critical Race Feminism from its beginnings. Indeed, Critical Race Feminists posited that racial subordination cannot be

[55] Kimberlé W. Crenshaw, 'Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law' (1988) 101 *Harvard Law Review* 1331, 1356–69.

[56] Harlon L. Dalton, 'The Clouded Prism' (1987) 22 *Harvard Civil Rights Civil Liberties Law Review* (1987) 435, 435–45.

fully understood if it does not take other types of subordination into account and if it does not move away from essentialist positions that have the effect of marginalizing rather than helping to build coalitions.[57] As an example, antiracist and feminist discourses focus too much on either one or the other subordinating elements and do not analyze how they interact or intersect with each other. Hence, nowadays Critical Race Theorists speak about "intersectionality," following two pathbreaking articles by Kimberlé W. Crenshaw.[58] In these pieces she highlights how feminist and antiracist movements have marginalized the experience of women of color because they both operate as if women's experiences and the experiences of people of color were mutually exclusive, without ever intersecting. This attitude has led to two problematic aspects. The first resides in the legal arena of antidiscrimination legislation, where courts fail to recognize the rights and interests of Black women due to the structure of antidiscrimination law, which forces them to frame their claims either as race or as sex discrimination but not both at the same time. Similar difficulties then emerge also at the political level, where Black women's claims and voices are marginalized in the context of feminist campaigns dominated by White women and in antiracist campaigns dominated by Black men.[59]

The second important strand of CRT scholarship concerns the analysis of Whiteness and what is today probably more broadly referred to as "Whiteness studies."[60] Instead of focusing on how law and society had ultimately constructed and subordinated Blacks and other races in the US context, here the focus of attention is shifted or, more accurately, projected onto the majority, to see Whiteness itself as the result of (an ongoing) legal and historical construction which continuously evolved and ultimately kept benefiting from the subordination of other groups and races. CRT's contribution in this area is to analyze and unveil the specific ways in which law contributed to the construction of Whiteness and of who was deemed to be White, and in which structural ways Whiteness has been not only socially but also legally protected and enforced. Two publications can be seen as constituting pathbreakers in this area. The first, by Cheryl Harris, argues that Whiteness functions like some sort of property right, which the legal system created and protects to this day.[61] The second, by Ian Haney López,[62] analyzes

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[57] See Angela P. Harris, 'Race and Essentialism in Feminist Legal Theory' (1992) 42 *Stanford Law Review* 581.

[58] Crenshaw, 'Demarginalizing' (n 19) 139–167 and Crenshaw, 'Mapping the Margins' (n 19) 1241–99.

[59] Indeed, she calls this aspect 'political intersectionality'. Crenshaw, 'Mapping the Margins', ibid. 1251 et seq.

[60] See e.g. Richard Delgado and Jean Stefancic (eds), *Critical White Studies: Looking Behind the Mirror* (Temple University Press 1997).

[61] Cheryl I. Harris, 'Whiteness as Property' (1993) 106 *Harvard Law Review* 1707.

[62] Ian F. Haney López, *White by Law* (revised 10th anniversary edn, NYU Press 2006).

the case law of the US Supreme Court, which, in a number of cases,[63] had to determine whether individuals asking for US citizenship were deemed to be White, because until 1952 that was a criterion to become a naturalized American.

This section has briefly described some of CRT's main tenets and analyses as they developed in its early days. Nevertheless, CRT has been in an expansive mode, and some of the most important developments of this expansion will be described in the next section of this contribution.

3. DEVELOPMENTS

Since its inception, CRT has been expanding and developing along various different axes. First of all, there has been an expansion in terms of analyzed groups. Indeed, there were some early critiques that Critical Race Theorists had focused too heavily on what was called the "Black/White Binary,"[64] namely the experience of Black Americans and their experience of White supremacy. This arguably marginalized or ignored the specific experiences of racism by law faced for example by Native Americans, Asian Americans, or Chicanos/Latinos, and also by LGBTQI racial minorities. As a result, today distinct bodies of literature have emerged, whose writers have at times identified as LatCrit,[65] NativeCrit or TribalCrit,[66] AsianCrit,[67] and/or QueerCrit,[68] and who have nevertheless retained the overarching themes of CRT, with which they retain good relations.[69]

Second, there has been a geographical spread of CRT's analyses. Whereas initially one could speak of a certain parochialism and focus on the American reality, today CRT has crossed various borders. Indeed, there are various publications applying CRT's tools and analyses to other regional, national, or local contexts,

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[63] *Ozawa v United States*, 260 U.S. 178 (1922) (denying American naturalization to a Japanese applicant) and *United States v Thind*, 261 U.S. 204 (1922) (denying American naturalization to an Indian applicant).

[64] Juan F. Perea, 'The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought' (1997) 85 *California Law Review* 1213.

[65] For a good overview of this vast body of literature see: Francisco Valdés, 'Afterword. Coming Up: New Foundations in LatCrit Theory, Community and Praxis' (2012) 48 *California Western Law Review* 505.

[66] See e.g. Robert A. Williams, Jr., *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (University of Minnesota Press 2005).

[67] See e.g.: Robert S. Chang, *Disoriented: Asian Americans, Law, and the Nation State* (NYU Press 1999).

[68] See e.g.: Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics and the Limits of Law* (2nd edn, Duke University Press 2015).

[69] In this sense, Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 4) 4.

such as Brazil and Latin America,[70] Canada,[71] Japan,[72] South Africa,[73] the United Kingdom,[74] France,[75] Germany,[76] Hungary,[77] Italy,[78] Serbia,[79] Sweden,[80] and more generally continental Europe.[81]

Third, there has been an expansion in terms of material scope, in the sense that, from the legal arena, CRT has managed to spread and merge into other scientific domains of the social sciences and humanities. This is only partly surprising. On the one hand, CRT analyzed how White domination plays out in and through law in the United States. This was an angle that scholars working on related issues in other scientific disciplines, such as ethnic and racial studies, Whiteness studies, cultural studies, and/or more broadly sociology, history, philosophy, and/or political sciences could relate to and had actually already been using. On the other hand, it certainly helped that CRT had drawn inspiration from nonlegal material and movements which facilitated crossfertilization and spread into other scientific domains. One domain where this spread has been particularly visible and explicit is education,[82] but the same overlaps

[70] See e.g. Tanya Katerí Hernández, *Racial Subordination in Latin America: The Role of the State, Customary Law and the New Civil Rights Response* (Cambridge University Press 2013).

[71] Carol A. Aylward, *Canadian Critical Race Theory: Racism and the Law* (Fernwood Publishing 1999).

[72] Debito Arudou, 'Japan's Under-Researched Visible Minorities: Applying Critical Race Theory to Racialization Dynamics in a Non-White Society' (2015) 14 *Washington University Global Studies Law Review* 695.

[73] Joel M. Modiri, 'Towards a (Post)Apartheid Critical Race Jurisprudence: Divining Our Racial Themes' (2012) 27 *South African Public Law* 231.

[74] Namita Chakrabarty, Lorna Preston and John Preston (eds), *Critical Race Theory in England* (Routledge 2014).

[75] Hourya Bentouhami and Mathias Möschel (eds), *Critical Race Theory: une introduction aux grands textes fondateurs* (Dalloz 2017).

[76] See e.g. Cengiz Barskanmaz, 'Rassismus, Postkolonialismus und Recht – Zu einer deutschen *Critical Race Theory*?' (2008) 41 *Kritische Justiz* 296.

[77] Domokos Lázár, 'Critical Race Theory – A magyar kritikai rasszelméleti mozgalom elméleti megalapozása', (2016) *Themis* 92–115.

[78] See e.g. Kendall Thomas and Gianfrancesco Zanetti (eds), *Legge, razza e diritti. La* Critical Race Theory *negli Stati Uniti* (Diabasis 2005).

[79] Maja Davidovic, 'Rectification of Racial Discrimination during WWII: The Case of Restitution Laws in Serbia', (2017) 4 *Contemporary Southeastern Europe* 105.

[80] Laura Carlson, 'Racism under the Law: Rethinking the Swedish Approach through a Critical Race Theory Lens' (2013) 2 *Ragion pratica* 491.

[81] Mathias Möschel, *Law, Lawyers and Race: Critical Race Theory from the United States to Europe* (Routledge 2014).

[82] See e.g. Laurence Parker, Donna Deyhle and Sofia Villenas (eds), *Race Is … Race Isn't: Critical Race Theory and Qualitative Studies in Education* (Westview Press 1999); Adrienne D. Dixson and Celia K. Rousseau, *Critical Race Theory in Education* (Routledge 2006) and Ed Taylor, David Gillborn and Gloria Ladson-Billings (eds), *Foundations of Critical Race Theory in Education* (Routledge 2009).

and crossfertilization can be found, for instance, in psychology,[83] (mental) health,[84] economics,[85] literature,[86] music,[87] and sports.[88]

The risks inherent in all this expansion and success could have been that CRT's analyses get flattened and lose their cutting edge. But the expansion has also been accompanied by a deepening of certain substantial analyses. Beyond the already mentioned nuances on the analysis of racial domination by LatCrit, Asian Crit, and/or Native Crit, there are two areas in which CRT has been particularly active recently.

The first one is linked to the election of the United States' first Black President, Barack Obama, in 2008, and the related debate on whether or not America had now become postracial. Whereas Critical Race Theorists certainly welcomed the election, they had certain misgivings about what this postracial rhetoric could do at the intellectual, political, and jurisprudential levels. One of their main concerns is that the postracial turn would allow a new alignment of the conservative colorblind discourse with (White) liberal progressive positions that had always been ambivalent about raceconscious measures. In other words, the latter, who had so far rejected colorblind ideology, might ultimately be persuaded to rally behind the new "cool" position of postracialism which promotes the same idea that race is over in the United States, albeit in different clothes.[89] One of the first comprehensive analyses of postracialism and its constitutive elements at the discursive intellectual and political level comes from Sumi Cho.[90] Other Critical Race Theorists have analyzed postracialism's (negative) impact

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[83] Gary Blasi, 'Advocacy against the Stereotype: Lessons from Cognitive Social Psychology' (2002) 49 *UCLA Law Review* 1241 and Gregory S. Parks, Shayne Jones and W. Jonathan Cardi (eds), *Critical Race Realism* (The New Press 2008).

[84] Tony N. Brown, 'Race, Racism, and Mental Health: Elaboration of Critical Race Theory's Contribution to the Sociology of Mental Health' (2008) 11 *Contemporary Justice Review* 53 and Chandra L. Ford and Collins O. Airhihenbuwa, 'Critical Race Theory, Race Equity, and Public Health: Toward Antiracism Praxis' (2010, supp. 1) 100 *American Journal of Public Health* 30.

[85] Devon Carbado and Mitu Gulati, 'The Law and Economics of Critical Race Theory' (2003) 112 *Yale Law Journal* 1757.

[86] Toni Morrison, 'Playing in the Dark: Whiteness and the Literary Imagination', in Delgado and Stefancic (eds) *Critical White Studies* (n 60) 79 – 84.

[87] John O. Calmore, 'Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World' (1992) 65 *Southern California Law Review* 2129 and Jonathan A. Beyer, 'Second Line: Reconstructing the Jazz Metaphor in Critical Race Theory' (2000) 88 *Georgetown Law Journal* 537.

[88] Kevin Hylton, *'Race' and Sport. Critical Race Theory* (Routledge 2009), and by the same author 'How A Turn to Critical Race Theory Can Contribute to Our Understanding of "Race", Racism and Anti-Racism in Sports' (2010) 45 *International Review for the Sociology of Sport* 335.

[89] See for a more detailed analysis of this point Kimberlé W. Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43 *Connecticut Law Review* 1253, 1310–36.

[90] Sumi Cho, 'Post-Racialism' (2009) 94 *Iowa Law Review* 1589.

on employment antidiscrimination litigation post-Obama's election,[91] and how postracialism affects racial performance in the workplace,[92] as well as in prisons.[93] The theorists have suggested, inter alia, that the argument that the United States has become a postracial society itself constitutes a form of systemic discrimination.[94]

The second area in which CRT has become active is connected with another societal development that has made the headlines over the past years: policing and racial profiling in conjunction with the Black Lives Matter movement. Issues of racial justice in criminal law had been far from absent in earlier CRT analyses,[95] but they came to assume a particular urgency, renewed vigor, and focus, also due to the fact that CRT was never "only" a theory but always considered itself linked to praxis, to a community, and to social/racial movements. In this sense, CRT scholars have analyzed the most recent developments in the domain with particular attention, linking it to the broader themes that had already been developed some 30 years earlier.[96]

One last word should be given to the recent election of President Trump. In certain ways, it confirmed some of CRT's main tenets: race and racism are a permanent feature of American society and law. The election of President Obama did not and could not change that fact.

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[91] Angela Onwuachi-Willig and Mario L. Barnes, 'The Obama Effect: Understanding Emerging Meanings of "Obama" in Anti-Discrimination Law' (2012) 87 *Indiana Law Journal* (2012) 325.

[92] Devon Carbado and Mitu Gulati, *Rethinking Race in Post-Racial America* (Oxford University Press 2013).

[93] Ian F. Haney Lopez, 'Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama', (2010) 98 *California Law Review* 1023.

[94] Girardeau Spann, 'Disparate Impact' (2010) 98 *Georgetown Law Journal* 1133.

[95] See e.g. Richard Delgado, 'Rodrigo's Eighth Chronicle: Black Crime, White Fears – On the Social Construction of Threat' (1994) 80 *Virginia Law Review* 503 and Devon Carbado and Cheryl I. Harris, 'Undocumented Criminal Procedure' (2011) 58 *UCLA Law Review* 1543.

[96] See e.g. Charles R. Lawrence III, 'The Fire This Time: Black Lives Matter, Abolitionist Pedagogy and the Law' (2015) 65 *Journal of Legal Education* 381 and Angela Onwuachi-Willig, 'Policing the Boundaries of Whiteness: The Tragedy of Being out of Place from Emmett Till to Trayvon Martin' (2017) 102 *Iowa Law Review* 1113.

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