

## Critical Race Theory Primer

By Joshua Sealy-Harrington\*

Critical Race Theory (“CRT”) is an academic field that explores the relationship between law and racial justice.<sup>1</sup> People disagree on *the extent* to which racism persists as a problem in modern day society. But *the fact* of racism’s persistence is unassailable. And CRT facilitates its identification, understanding, and remediation.

CRT is hard to define. That said, CRT can be described, in plain terms, as a field of thought that thinks *critically*, and *theoretically*, about *race*, and *racism*.<sup>2</sup> This critical/theoretical analysis upholds three central tenets, widely accepted by CRT scholars: (1) that race is a social construction; (2) that race is a means of subordination; and (3) that race neutrality upholds that subordination.<sup>3</sup> These core CRT tenets are summarized below, as an introduction to CRT.

### 1. Race is a Social Construction

First, CRT scholars understand race as a social construction. Racial identity is often understood as a biological attribute. To the contrary, critical and theoretical investigation of race reveals the opposite: that racial groups are *social*, not *biological*. This requires elaboration.

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<sup>1</sup> Khiara M Bridges, *Critical Race Theory: A Primer* (St. Paul, MN: Foundation Press, 2019) at 7 [“CRT Primer”].

<sup>2</sup> CRT Primer, *supra* at 9.

<sup>3</sup> CRT Primer, *supra* at 10-15. Bridges identifies four tenets, unlike the three I list here. But, to simplify the discussion, I have reframed her third and fourth tenets—*rejecting* race-independent thinking, and *promoting* race-dependent narratives—as a single tenet opposing race neutral analysis.

Understanding race in social terms demands unpacking the assumptions many have long held with respect to racial categories. Many people instinctively think of racial groups as biological because they have physical characteristics *related to* biology (e.g., skin colour, hair texture, etc). But subdividing humankind into biological groups involves two discrete analytical steps: (1) observing biological characteristics; and (2) claiming that certain sets of those characteristics have social significance. This second step—racialization—is what CRT critiques. For example, we do not consider people with red hair, or brown eyes, or a particular height, or a particular weight, to be specific races *per se*. But we do consider a loose amalgamation of certain characteristics relevant to the supposedly scientific racial categories that we are familiar with (e.g., Black and Brown).

The process through which certain characteristics are invested with racial significance is, fundamentally, a *social* choice (illustrated in the subjective and varying legal standards that were once used to racially categorize people in the United States).<sup>4</sup> And that social understanding of race is broadly accepted by an interdisciplinary group of experts. Indeed, “that race is socially constructed ‘began to gain wide acceptance in the 1940s’; it is the understanding of racial formation endorsed by various organizations, including the United Nations Educational, Scientific, and Cultural Organization and the American Anthropological Association; and it was confirmed by the Human Genome Project’s finding that ‘all persons, irrespective of racial ascription or identification, share 99.9% of the same genes’.”<sup>5</sup> CRT scholars join these various experts in understanding race as a social construction, rather than a biological reality.<sup>6</sup>

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<sup>4</sup> Ian Haney López, *White By Law: The Legal Construction of Race* (10th ed. 2006).

<sup>5</sup> Joshua Sealy-Harrington, “(Dis)Proving Racism: A Rebuttal to Klippenstein’s Critical Review of the Law Society of Ontario’s Report on Challenges Facing Racialized Licensees” (20 February 2020), online (blog): *Ablawg* <[https://ablawg.ca/wp-content/uploads/2020/02/Blog\\_JSH\\_DisprovingRacism.pdf](https://ablawg.ca/wp-content/uploads/2020/02/Blog_JSH_DisprovingRacism.pdf)> at 11. See also CRT Primer, *supra* at 123-124.

<sup>6</sup> See Ian F Haney López, “The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice” (1994) 29:1 Harv CR-CLL Rev 1.

That race is a social construction is not merely *descriptive*. In other words, properly understanding racial categories as socially defined is not simply an academic project. Rather, understanding race as a social construction has important *normative* consequences. The “biology” of race has been a historical—and contemporary—justification for racial inequality. In turn, reconceptualizing race as a social construction enhances our ability to see how race subordinates particular groups, the next CRT tenet I will describe.

## 2. Race is a Means of Subordination

Second, CRT scholars believe that race—or, more precisely, racism—is a means of subordination. Specifically, CRT scholars argue that race plays an *explanatory* role in society, not simply a *descriptive* one.<sup>7</sup> Put differently, whenever a racial disparity is detected—whether by social, political, or economic metrics—CRT scholars argue that, while race describes *what* is happening, racism describes *why* it happened.

How racism contributes to racial inequality is complex. Indeed, many racisms are theorized by CRT scholars:

- a) systemic racism—often, though not always, considered synonymous with structural and institutional racism<sup>8</sup>—refers to how facially neutral norms can disparately impact racialized groups<sup>9</sup> (e.g., Quebec’s secularism law which prohibits certain public officials

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<sup>7</sup> CRT Primer, *supra* at 5.

<sup>8</sup> CRT Primer, *supra* at 149.

<sup>9</sup> Ian F Haney López, “Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama” (2010) 98:3 Cal L Rev 1023. See generally CRT Primer, *supra* at 147-156.

from wearing “religious symbols”, despite racial neutrality, disparately impacts those racial groups for whom the wearing of such symbols is customary<sup>10</sup>);

- b) implicit bias refers to how individuals can unconsciously associate racialized communities with negative traits<sup>11</sup> (e.g., the sense of discomfort that many people feel when walking towards a Black man on the sidewalk<sup>12</sup>); and
- c) microaggression refers to how common interactions can harm racialized people in a manner that accumulates unbeknownst to those causing the harm<sup>13</sup> (e.g., how a white woman may be surprised by and misunderstand the significant offense taken by a Black man who she crosses the street to avoid<sup>14</sup>).

All of these racisms explain how, while societal inequality *projects onto* racial groups, it also *inflects from* racist forces.

### 3. Race Neutrality Upholds Race Subordination

Third, CRT scholars argue that race neutrality—often referred to as being “colour-blind”—upholds racial subordination. Some think that the path to racial equality is colour-blindness. In Chief Justice John Roberts’ famous words: “The way to stop discrimination on the basis of race is

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<sup>10</sup> Dan Bilefsky, “A Quebec Ban on Religious Symbols Upends Lives and Careers”, *New York Times* (7 March 2020) *New York Times*, online: <<https://www.nytimes.com/2020/03/07/world/canada/quebec-religious-symbols-ban.html>>.

<sup>11</sup> Anthony Greenwald & Linda Hamilton Krieger, “Implicit Bias: Scientific Foundations” (2006) 94:4 Cal L Rev 945. See generally CRT Primer, *supra* at 157-180.

<sup>12</sup> Art Nixon, “Black Man Walking” *LA Weekly* (13 December 2006), online: <<https://www.laweekly.com/black-man-walking/>>.

<sup>13</sup> Daniel Solorzano, Walter R Allen & Grace Carroll, “Keeping Race in Place: Racial Microaggressions and Campus Racial Climate at the University of California, Berkeley” (2002) 23 Chicano-Latino L Rev 15. See generally CRT Primer, *supra* at 181-194.

<sup>14</sup> Catharine Wells, “Microaggressions in the Context of Academic Communities” (2013) 12:2 Seattle J for Soc Justice 319 at 329 (“A microaggression is not ‘micro’ in the sense that it is less disturbing and less hurtful ... It is only ‘micro’ in the sense that privileged members of the community will regard it as trivial, if they notice it at all”). For examples of common microaggressions, see <https://sph.umn.edu/site/docs/hewg/microaggressions.pdf>.

to stop discriminating on the basis of race.”<sup>15</sup> CRT scholars, in contrast, recognize that ignoring race, in the midst of historical and ongoing racism, hides that persisting racism from view.<sup>16</sup> Indeed, to highlight the persisting effects of racism, CRT scholars often engage in “storytelling”, i.e., using personal narrative to explore the law and racial justice.<sup>17</sup> This method, perhaps most notably used by Patricia Williams,<sup>18</sup> unveils the ongoing effects of racism—and other forms of discrimination—which may go unnoticed by dominant groups.<sup>19</sup>

The classic example of the race neutrality debate is affirmative action. Affirmative action can take many forms. But, for the sake of discussion, let’s assume that a large Toronto law firm with only white partners promises that, within ten years, the racial distribution of its partnership will better reflect the racial demographics of broader society. Some would claim that this commitment not only fails to promote racial equality, but worse, is itself racist—what some call “reverse racism.”<sup>20</sup> In contrast, CRT scholars argue that race-conscious policies—like affirmative action—are integral to racial equality because race-neutral policies ignore the persisting effects of racism and overlook how “objective” notions of “merit” often covertly favour certain groups<sup>21</sup> (e.g., how recruitment at law firm “cocktail events” often favours dominant groups better versed in the etiquettes of white, male, upper-class society).

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<sup>15</sup> *Parents Involved in Community Schools v. Seattle*, 551 U.S. 701 (2007) at 748.

<sup>16</sup> Neil Gotanda, “A Critique of Our Constitution is Color-Blind” (1991) 44:1 *Stan L Rev* 1.

<sup>17</sup> CRT Primer, *supra* at 58.

<sup>18</sup> Patricia J Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991).

<sup>19</sup> For an example of storytelling in the context of Canadian law schools and firms, see Joshua Sealy-Harrington, “In Their Shoes: Diverse Stories from the Legal Profession” *Law Matters* (10 November 2016), online: <<https://www.cba-alberta.org/Publications-Resources/Resources/Law-Matters/Law-Matters-Fall-2016/In-Their-Shoes>>.

<sup>20</sup> Vann R. Newkirk II, “The Myth of Reverse Racism” *The Atlantic* (5 August 2017), online: <<https://www.theatlantic.com/education/archive/2017/08/myth-of-reverse-racism/535689/>>.

<sup>21</sup> CRT Primer, *supra* at 77-80 and 201-202.

Unlike in America, Canada has (some) race-consciousness baked into its constitutional architecture. For example, in America, affirmative action programs are tenuously constitutional.<sup>22</sup> In stark contrast, the Canadian *Charter of Rights and Freedoms* specifically *permits* affirmative action.<sup>23</sup> Similarly, the Supreme Court of Canada in *R v. Le* held that a proper s. 9 detention analysis must be race conscious, and consider “the larger, historic and social context of race relations between the police and the various racial groups and individuals in our society.”<sup>24</sup> Accordingly, while rhetoric of “colour blindness” and “merit” is still present in Canadian legal discourse, there is some sensitivity to the virtues of race-conscious policymaking.

Though brief, this CRT Primer introduces readers to some key tenets of CRT, with a view to promoting greater critical and theoretical engagement with the ways in which race and racism manifest in their own lives, and the legal profession. For those interested in further reading on CRT, the texts listed at footnotes 1, 4, 6, 9, 16, and 18, in particular, are highly recommended.

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<sup>22</sup> CRT Primer, *supra* at 345-353.

<sup>23</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15(2).

<sup>24</sup> *R. v. Le*, 2019 SCC 34 at para 76.