CRITICAL RACE THEORY AS LEGAL EPISTEMIC JUSTICE

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INTRODUCTION

"Critical Thinking: Not Critical Race Theory" and "Teach Truth: Not CRT," proclaimed the front and back of a T-shirt on a fellow traveler passing in the airport. I was startled by the blatant misconceptions. The core pursuits of critical race theory ("CRT") are to think critically, discover truth, and diversify knowledge about race and racism. Although I was aware of then-President Trump's executive order barring federal diversity training and bills modeled after it, nothing had prepared me for the realization that my academic subfield had become so widely criticized that it was now the subject of T-shirt slogans. A few years earlier, very few individuals outside of law schools, and possibly education graduate schools, had heard the term "critical race theory." Suddenly, there were people who had never even read a CRT article, or any legal scholarship, who thought that CRT was an imminent threat to education, society, and the nation. This fear and disdain for CRT are unwarranted and stem from a deliberate, unethical, and politically motivated effort to censor and undermine knowledge.

For the past few years, I have pondered: Why attack an academic subfield of law? Why attack CRT now? It cannot be a coincidence that curricular and book bans on CRT followed the 2020 Black Lives Matter uprising and national racial reckoning where CRT conceptualizations and vocabulary started being discussed in everyday life and chanted during protests. Anti-CRT efforts are crafted to resist antiracist social change. And the goals, strategies, and tactics of such efforts are highly epistemic in nature.[1] Simply put: these attacks on CRT are attacks on knowledge. CRT is misrepresented and halted, often preemptively, in elementary, secondary, and higher education to prevent knowing, understanding, and dissemination of knowledge about race, racism, and other systems of subordination—knowledge that supports social movements and consequent antiracist legal reform. While scholarship has highlighted the epistemic injustice of these attacks,[2] the epistemic justice of CRT, particularly its commitment and potential to advance legal epistemic justice, has not been examined.

This Essay explores CRT bans as instances of epistemic injustice and CRT as a powerful example of a legal epistemic justice endeavor. Part I provides an overview of CRT, outlines the various attacks against it, and examines some of the motivations behind these attacks. Part II explains how these attacks and efforts to silence CRT amount to epistemic injustice, homing in on a particularly pernicious form: "legal hermeneutical injustice." Part III suggests a definition for "systemic hermeneutical justice" and examines how CRT constitutes a leading endeavor toward legal hermeneutical justice. This Essay seeks to prompt further scholarly inquiry into legal epistemic injustice and stimulate our

[1] *See* Henry Lara-Steidel & Winston C. Thompson, *Epistemic Injustice? Banning 'Critical Race Theory', 'Divisive Topics', and 'Embedded Racism' in the Classroom*, 57 J. PHIL. EDUC. 862, 862-63 (2023).

[2] *See id* at 877.

collective imagination on how epistemic justice can be achieved in the law and beyond.

I. CRITICAL RACE THEORY: TRUTH, FEARMONGERING, AND PROMISE

A. *What Is Critical Race Theory?*

Critical race theory is an academic subfield of law which interrogates and deconstructs the meaning, purpose, and impact of race, racialization, and racism, especially within the context of law and other systems and institutions. CRT acknowledges the existence and impact of individualized discrimination, bigotry, and bias, but it is more focused on structural subordination and inequity. CRT is interdisciplinary, incorporating methodologies and scholarship from law, social sciences, humanities, ethnic studies, and other disciplines.[3] Rather than merely observing and describing phenomena related to race and other social identities and structures, CRT focuses on normative questions of rights and justice. CRT is both theoretical, as its name implies, and pragmatic: proposing prescriptions to mitigate and address the social inequities racism embeds. CRT approaches research questions from the "bottom up" by centering the lived experiences, narratives, and perspectives of those most impacted by racism.

CRT endeavors to embrace, incorporate, theorize, and communicate origins of knowledge that are not traditional in legal scholarship. This includes lived, experiential, ancestral, indigenous, and decolonized sources of knowledge.[4] CRT seeks to understand, theorize, verbalize, elevate, expose, problem-solve, and envision better outcomes for traditionally subordinated social groups. CRT conceptualizes and lexicalizes experiences of subjugation in ways that are comprehensible and capable of effecting change within the law and legal system.

B. *What Are the Attacks on CRT?*

Like every academic field, critical race theory has methodological limitations, policy proposals that are at times more ambitious or idealistic than administrable, and scholars who take ideological positions that cause disagreement internally or externally. CRT is neither unassailable nor a scholarly elixir that should be swallowed without question. Rather, CRT is a valuable academic approach to analyzing race and racism that should be vigorously engaged and debated. It should not be silenced. Since 2020, right-

[3] Margaret M. Zamudio, Caskey Russell, Francisco A. Rios & Jacquelyn L. Bridgeman, CRITICAL RACE THEORY MATTERS: EDUCATION AND IDEOLOGY 6 (2011) ("Critical race theorists agree that understanding the complexities of race requires insights from various academic disciplines (i.e., an interdisciplinary approach).").

[4] *See* Ryuko Kubota, *Confronting Epistemological Racism, Decolonizing Scholarly Knowledge: Race and Gender in Applied Linguistics*, 41 APPLIED LINGUISTICS 712, 724 (2020) (discussing different methods critical scholars have proposed to decolonize "the hegemony of white Euro-American academic knowledge" by replacing it with "alternative knowledge" from various indigenous and colonized communities).

wing political crusaders have made highly concerted and funded efforts to ban CRT, and silence historical and contemporary study and nuanced discussion of race, gender, and sexual identity.[5] Not only is the CRT field under fire, the term "CRT" has been co-opted to become a broad catch-all label for anything associated with a so-called "woke" political agenda or diversity, equity, and inclusion ("DEI") initiatives.[6] Thus, attacks on CRT target not only CRT concepts, but also DEI ideas, and the study of history and contemporary issues related to racism and other systems of subordination. These attacks have manifested as executive mandates, legislative actions, legal and parent advocacy, narrative campaigns, and unwitting bolstering by inadvertent advocates.

Since September 2020, there have been 859 anti-CRT attacks.[7] Since 2020, there have been fourteen federal and state executive directives against CRT.[8] The first major executive action was Trump's September 2020 executive order prohibiting federal employee diversity training addressing so-called "divisive concepts."[9] In addition to suppressing education and training on race and racism in the United States, Trump established the 1776 Commission to, in his words, ensure "patriotic education" and decry critical race theory as a "twisted web of lies," a form of "child abuse" that indoctrinates children into thinking that "America is a wicked and racist nation."[10]

[5] *See CRT Forward*, CRT FORWARD TRACKING PROJECT, https://crtforward.law.ucla.edu/map [https://perma.cc/LDE2-2V2J] (last visited Sept. 8, 2024); Peter Greene, *Teacher Anti-CRT Bills Coast to Coast: A State by State Guide*, FORBES, https://www.forbes.com/sites/petergreene/2022/02/16/teacher-anti-crt-bills-coast-to-coast-a-state-by-state-guide/ [https://perma.cc/ZR3F-WMEX?type=image] (last updated Apr. 14, 2022, 2:05 PM).

[6] *See* Act of May 15, 2023, ch. 2023-82, § 4, 2023 Fla. Laws 1015, 1021 ("A Florida [state college or university] many not expend any state or federal funds to promote, support, or maintain any programs or campus activities that . . . [v]iolate [Florida Educational Equity Act]; or . . . [a]dvocate for diversity, equity, and inclusion, or promote or engage in political or social activism . . . .").

[7] *CRT Forward*, *supra* note 5. CRT Forward "identifies, tracks, and analyzes local, state, and federal measures aimed at restricting the ability to speak truthfully about race, racism, and systemic racism through a campaign to reject CRT." *About*, CRT FORWARD TRACKING PROJECT, https://crtforward.law.ucla.edu/about/ [https://perma.cc/R29V-SPEJ] (last visited Sept. 8, 2024).

[8] *CRT Forward*, *supra* note 5.

[9] Combatting Race and Sex Stereotyping, Exec. Order No. 13,950, 3 C.F.R. § 433 (2021), *repealed by* Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13,985, 3 C.F.R. § 409 (2022).

[10] Remarks at a White House Conference on American History, 2020 DAILY COMP. PRES. DOC. 1-2 (Sept. 17, 2020); *see also* Hani Morgan, *Resisting the Movement to Ban Critical Race Theory from Schools*, 95 CLEARING HOUSE: J. EDUC. STRATEGIES, ISSUES & IDEAS 35, 36 (2022).

As of March 2024, there have been 465 legislative efforts against CRT, including sixty-one at the federal level, across forty-seven states.[11] These attacks primarily target content, conduct, or speech in educational settings. As of November 2023, at least 21 states and 145 local districts or governments had passed at least one anti-CRT or related censorship law—covering roughly half the United States's 50 million public schoolchildren.[12] Many of these attacks restrict content in K-12 curricula and ban books in public schools and libraries.[13] Anti-CRT efforts also target higher education institutions.[14] Such attacks increased in 2023.[15] Some resultant legislation and policies threaten faculty with loss of promotion, tenure, or employment for teaching about CRT, race, gender, or sexual identity.[16] Other efforts target educational institutions, such as threatening schools that have DEI-related offices with the loss of public funding.[17] Some of the legislative efforts even include criminal provisions. For instance, an Arkansas book ban enacted to prevent learning about issues related to race, gender, and sexual identity, imposes felony charges for any librarian or bookseller who provides minors materials deemed "harmful," defined by state law, in part, as material lacking "serious literary, scientific, medical, artistic, or political value for minors," or deemed "inappropriate for minors."[18]

Advocacy-led anti-CRT efforts and narrative campaigns have been particularly impactful. In January of 2024, the *New York Times* published an investigative report revealing a conservative activist-led three-year strategy

[11] *CRT Forward*, *supra* note 5.

[12] JONATHAN FEINGOLD & JOSHUA WEISHART, NAT'L EDUC. POL'Y CTR., HOW DISCRIMINATORY CENSORSHIP LAWS IMPERIL PUBLIC EDUCATION 3 (2023), https://nepc.colorado.edu/sites/default/files/publications/PB%20Feingold-Weishart.pdf [https://perma.cc/W69S-BLR8]; *see also* Jeffrey Adam Sachs & Jeremy C. Young, *America's Censored Classrooms 2023*, PEN AM., https://pen.org/report/americas-censored-classrooms-2023/ [https://perma.cc/WJ2X-4R53] (last visited Sept. 8, 2024).

[13] *See* Sachs & Young, *supra* note 12.

[14] *Id.*

[15] *See id.*

[16] *See* Act of Mar. 13, 2024, P.L. 113-2024, § 11, 2024 Ind. Acts 1742, 1747 (allowing public colleges or universities to deny, revoke, or terminate tenure if faculty member is "unlikely to foster a culture of free inquiry, free expression, and intellectual diversity within the institution," or is "unlikely to expose students to scholarly works from a variety of political or ideological frameworks that may exist within and are applicable to the faculty member's academic discipline," or is likely to subject students to ideological viewpoints unrelated to curriculum).

[17] Natalie Schwartz, *Colleges That Require DEI Statements Would Lose Federal Funding Under House Bill*, HIGHER ED DIVE (Dec. 20, 2023), https://www.highereddive.com/news/crenshaw-dei-diversity-statements-college-ban/703006/ [https://perma.cc/S96R-AA4V].

[18] Act of Mar. 30, 2023, No. 372, 2023 Ark. Acts 1913; ARK. CODE ANN. § 5-68-501 (2024). A case challenging the Act is pending. *See* Fayetteville Pub. Libr. v. Crawford Cnty., No. 23-CV-05086, 2023 WL 4849849, at *1 (W.D. Ark. July 29, 2023).

against CRT and education on race, gender, and sexual identity.[19] This coordinated effort included "a loose network of think tanks, political groups and Republican operatives in at least a dozen states" who "exchanged model legislation, published a slew of public reports and coordinated with other conservative advocacy groups in states like Alabama, Maine, Tennessee and Texas."[20] Their strategy was supposedly to "give legislators the knowledge and tools they need to stop funding the suicide of their own country and civilization."[21] The narrative campaigns sought to provoke parental fear and garner support for restrictions on teaching, as well as educational and reading materials.[22]

The comprehensive yet vague anti-CRT legislative language;[23] threats of losing funding and employment; potential for criminal consequences; broad reach of executive rulings; and the pressure of narrative and parent-involved advocacy have resulted in schools and educators adopting risk-averse approaches to antiracist, anti-bigotry, and DEI-related education.[24] Consequently, CRT and inclusive education have been chilled, even silenced, regardless of whether the legislation, executive directives, or advocacy efforts ultimately succeed or fail.

An underexplored factor that enhances anti-CRT attacks' potency involves inadvertent advocates who, in defending themselves against accusations of teaching CRT, unintentionally reinforce negative narratives and misconceptions about CRT. This scenario frequently unfolds among schoolteachers who face criticism for allegedly incorporating CRT principles into their curriculum.[25] When challenged, these educators or school administrators use distancing language to assert that their teachings are not CRT.[26] This distancing

[19] Nicholas Confessore, '*America Is Under Attack': Inside the Anti-D.E.I. Crusade*, N.Y. TIMES (Jan. 20, 2024), https://www.nytimes.com/interactive/2024/01/20/us/dei-woke-claremont-institute.html.

[20] *Id.*

[21] *Id.*

[22] Sam LaFrance & Jonathan Friedman, *Educational Intimidation*, PEN AM. (Aug. 23, 2023), https://pen.org/report/educational-intimidation/ [https://perma.cc/FL4T-8MNX].

[23] *See* S.B. 129, 2024 Leg., Reg. Sess. (Ala. 2024); Tenn. Educ. Ass'n v. Reynolds, No. 23-cv-00751, 2024 WL 1942430, at *15 (M.D. Tenn. May 2, 2024).

[24] *See* LaFrance & Friedman, *supra* note 22.

[25] *See* Olivia B. Waxman, *Anti-'Critical Race Theory' Laws Are Working. Teachers Are Thinking Twice About How They Talk About Race*, TIME (June 30, 2022, 12:37 PM), https://time.com/6192708/critical-race-theory-teachers-racism/ [https://perma.cc/3XYS-35QD].

[26] *See* Laura Meckler & Hannah Natanson, *New Critical Race Theory Laws Have Teachers Scared, Confused and Self-Censoring*, WASH. POST (Feb. 14, 2022, 6:00 AM), https://www.washingtonpost.com/education/2022/02/14/critical-race-theory-teachers-fear-laws/ ("[A]bout a month after Oklahoma's new law passed, administrators in Edmond, Okla., sent a slide presentation to staff saying that teachers should avoid using the terms 'diversity' and 'White privilege' during classroom discussions . . . .").

inadvertently perpetuates the misconception that CRT is intrinsically problematic or inappropriate for school settings. It is troubling when teachers and schools rush to state that even though they are teaching about race, racism, and racial justice, they are not engaging with a core academic field that studies race, racism, and racial justice. Not only do these public comments cave into anti-CRT efforts, but they also fuel broader populist right-wing anti-science, anti-knowledge, and anti-higher-education movements.[27]

C. *Why Is CRT Under Attack?*

While there had been political attacks on individual CRT scholars[28] and internal criticism within the discipline of law, widespread campaigns against CRT did not begin until the racial reckoning of 2020.[29] After the police murders of George Floyd, Breonna Taylor, and other Black Americans, consequent national protests, and rise of the Black Lives Matter social movement, CRT conceptualizations and terminology began to enter the mainstream. Terms like "structural racism," "white supremacy," and "legacy of slavery" became common parlance.[30] Policymakers took antiracist stances.[31] Some teachers and schools began integrating lessons or readings about racism and racial justice into their curriculum to help students understand the national events and discussions unfolding around them.[32] Even corporations began to engage with topics on racism through employee trainings, integration into advertising, and funding for antiracist advocacy work.[33]

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[27] *See generally* ISAAC KAMOLA, AM. ASS'N OF UNIV. PROFESSORS, MANUFACTURING BACKLASH: RIGHT-WING THINK TANKS AND LEGISLATIVE ATTACKS ON HIGHER EDUCATION, 2021–2023 (2024), https://www.aaup.org/file/Manufacturing_Backlash_final.pdf [https://perma.cc/HJ8X-RWST].

[28] *See Guinier Defends Her Views, Denies She Backs Quotas*, CHI. TRIB., https://www.chicagotribune.com/1993/06/05/guinier-defends-her-views-denies-she-backs-quotas/ [https://perma.cc/6JLC-UP76] (last updated Aug. 10, 2021, 2:16 AM).

[29] *See CRT Forward*, *supra* note 5.

[30] *See* Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020, 6:41 AM), https://time.com/5851855/systemic-racism-america/ [https://perma.cc/ER8K-N7GD] ("[T]he debate over systemic racism has spread across the nation and around the world.").

[31] *See* G.A. Res. 76/1, at 1-4 (Sept. 22, 2021) (discussing international leaders' shared commitment to antiracist agenda).

[32] Saharsh Agarwal & Ananya Sen, *Antiracist Curriculum and Digital Platforms: Evidence from Black Lives Matter*, 68 MGMT. SCI. 2932, 2932 (2022) ("[W]e examine the impact of racially charged events on the demand for antiracist classroom resources in U.S. public schools. . . . We find a significant increase in antiracism requests following the killing of George Floyd in 2020 . . . .").

[33] *See Commitment to Racial Equity*, JPMORGANCHASE, https://www.jpmorganchase.com/impact/our-commitments/racialequity [https://perma.cc/54GB-82A7] (last visited Sept. 8, 2024); COVINGTON, A REPORT TO WELLS FARGO & COMPANY ON ITS EFFORTS TO PROMOTE RACIAL EQUITY 2-4 (2023),

CRT had created a conceptual framework, vocabulary, and body of evidence to intellectually inform and support racial and social justice protests, policy and legal reform efforts, increased education on racism, and corporate action and investment. People of color had more accessible concepts and terminology to label, validate, and understand the racism they experienced. White people had increased access to knowledge about how racism operates and avenues for allyship. There was a shared vocabulary. CRT concepts and terms, albeit simplified and unattributed, were becoming mainstream—even being shouted and carried on signs in marches down Main Street. Right-wing think tanks and donors who oppose racial equity and multiracial democracy struck back below the belt. Rather than battling CRT with opposing facts, proof, perspectives, or other intellectual engagement, their armaments were misrepresentations, falsehoods, and fearmongering.

Right-wing advocates and donors wanted to stop antiracism education, organizing, and policy change by creating a moral panic, which requires a villain or monster. CRT was portrayed as both. An illustration of this is the unscrupulous narrative and advocacy strategies of right-wing activist Christopher Rufo. In his words, "'Critical race theory' is the perfect villain."[34] He wrote and told tall tales, disguised as journalism, such as the untruth that California teachers "wanted children to honor the Aztec gods of human sacrifice and cannibalism" when actually the lessons were about ancient Latin American culture and history.[35] In 2020, Rufo appeared on the Tucker Carlson Show, saying:

> Conservatives need to wake up. That this is an existential threat to the United States. And the bureaucracy, even under the Trump administration, is now being weaponized against core traditional American values. And I'd like to make it explicit: the President and the White House—it's within their authority and power to immediately issue an executive order abolishing critical-race-theory trainings from the federal government. And

https://www08.wellsfargomedia.com/assets/pdf/about/corporate/racial-equity-assessment.pdf [https://perma.cc/8DV4-FEYC]; Megan Armstrong, Eathyn Edwards & Duwain Pinder, *Corporate Commitments to Racial Justice: An Update*, MCKINSEY INST. FOR BLACK ECON. MOBILITY (Feb. 21, 2023), https://www.mckinsey.com/bem/our-insights/corporate-commitments-to-racial-justice-an-update [https://perma.cc/26LP-R6LV].

[34] Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict over Critical Race Theory*, NEW YORKER (June 18, 2021), https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory.

[35] Sarah Jones, *How to Manufacture a Moral Panic: Christopher Rufo Helped Incite an Uproar over Racism Education with Dramatic, Dodgy Reporting*, N.Y. MAG: INTELLIGENCER (July 11, 2021), https://nymag.com/intelligencer/2021/07/christopher-rufo-and-the-critical-race-theory-moral-panic.html [https://perma.cc/QSV4-PSFQ].

> I call on the President to immediately issue this executive order—and, and stamp out this destructive, divisive, pseudoscientific ideology at its root.[36]

The very next morning Mark Meadows, Trump's chief of staff, summoned Rufo to Washington and sought his help to draft Executive Order 13,950.[37] Although Executive Order 13,950 was rescinded after only a few months, its language still provides the basis of most anti-CRT activity, particularly measures that target supposed "divisive concepts."[38] Rufo has been explicit about the right-wing block's strategy, tweeting, "We have successfully frozen their brand—'critical race theory'—into the public conversation and are steadily driving up negative perceptions. We will eventually turn it toxic, as we put all of the various cultural insanities under that brand category."[39] Three minutes later, he added, "The goal is to have the public read something crazy in the newspaper and immediately think 'critical race theory.' We have decodified the term and will recodify it to annex the entire range of cultural constructions that are unpopular with Americans."[40]

The right-wing block has sought to delegitimize knowledge of and from marginalized communities; conceptualizations about racism; and explanations about the purpose of racism, ways it manifests and endures, and ideas about how it might be defeated or mitigated. In doing so, they have perpetuated epistemic injustice.

II. THE EPISTEMIC INJUSTICE OF SILENCING CRT

Miranda Fricker coined the term "epistemic injustice," and described it as a wrong against someone in their capacity as a knower.[41] Fricker identified two primary forms of epistemic injustice: "testimonial injustice" and "hermeneutical

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[36] Heritage Foundation, *Critical Race Theory Has Infiltrated the Federal Government | Christopher Rufo on Fox News*, YOUTUBE, at 2:58 (Sept. 2, 2020), https://youtu.be/rBXRdWflV7M [https://perma.cc/NM5P-3W5D].

[37] Wallace-Wells, *supra* note 34; Combatting Race and Sex Stereotyping, Exec. Order No. 13,950, 3 C.F.R. § 433 (2021), *repealed by* Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13,985, 3 C.F.R. § 409 (2022).

[38] *See CRT Forward*, *supra* note 5.

[39] Christopher Rufo (@realchrisrufo), X (Mar. 15, 2021, 3:14 PM), https://x.com/realchrisrufo/status/1371540368714428416?lang=en [https://perma.cc/JH4A-G9UX].

[40] Christopher Rufo (@realchrisrufo), X (Mar. 15, 2021, 3:17 PM), https://x.com/realchrisrufo/status/1371541044592996352?lang=en [https://perma.cc/C7CL-L9PU].

[41] MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 1 (2007) ("[T]he project of this book is to home in on two forms of epistemic injustice that are distinctively epistemic in kind, theorizing them as consisting, most fundamentally, in a wrong done to someone specifically in their capacity as a knower.").

injustice."[42] Testimonial injustice occurs when a speaker receives less credibility from a hearer due to prejudice on the hearer's part.[43] Hermeneutical injustice is "the injustice of having some significant area of one's social experience obscured from collective understanding owing to a structural identity prejudice in the collective hermeneutical resource."[44] Efforts to ban and silence CRT are particularly glaring instances of hermeneutical injustice and contribute to testimonial injustice.

A. *Hermeneutical Injustice*

Hermeneutical injustice can be viewed as the bedrock form of epistemic concern because it addresses the existence of collective understanding and language to interpret and articulate socially marginalized experiences and identities. Hermeneutical injustice occurs when a minoritized or subordinated social group is deprived of an epistemological framework to define the injustices they experience.[45] This occurs when there is a gap in collective interpretive resources that unfairly disadvantages these groups in making sense of their social experiences.[46] This type of injustice arises from structural prejudices that hinder marginalized groups' ability to understand, articulate, or communicate their experiences.[47]

The most common example of hermeneutical injustice, and one with which Fricker has engaged, concerns sexual harassment. Sexual harassment was originally understood narrowly to be forced and resisted sexual contact short of full assault.[48] A supervisor requesting sexual favors in exchange for a desirable promotion or the passive display of sexual materials in a shared work area which made female employees highly uncomfortable were not understood to be sexual harassment or sex discrimination. There was no shared conceptualization or vocabulary to describe these all-too-common and gendered workplace experiences. The lack of interpretive resources was not happenstance. Business, legal commentary, and oversight—whether in the executive suite, judicial

[42] *Id.*

[43] *Id.* at 17 (describing how credibility deficit can be falsely attributed to speaker due to hearer's prejudice and perception).

[44] *Id.* at 155.

[45] *See id.*

[46] *See id.* at 151.

[47] *See id.*

[48] Fricker demonstrates hermeneutical injustice through recounting Carmita Wood's workplace experience of a nonconsensual kiss by her boss at a Christmas party and describing how Wood subsequently experienced constructive dismissal. *Id.* 149-50. Fricker explains that Wood suffered "an acute cognitive disadvantage from the gap in the collective hermeneutical resource." *Id.* at 151. Furthermore, the societal lack of proper understanding of women's experiences with sexual harassment was a "collective disadvantage more or less shared by all." *Id.*

bench, or pages of law journals—were male dominated.[49] Male privilege (not experiencing these wrongs or consequent harms) and male entitlement (belief that one could engage in such behavior without consequences) hindered the development of knowledge and understanding about quid pro quo and hostile environment harassment. Unfettered retaliation, widespread disbelief of complainants (classic testimonial injustice), the potential for ridicule, and actual ridicule prevented women from discussing this shared experience, knowing that they were not alone, and fully understanding the experience. In social epistemological terms, social prejudice in the economy of collective interpretive resources about sexual harassment produced a hermeneutical injustice.[50]

Hermeneutical injustice like this is not just a wrong that produces an epistemic harm where a would-be knower is unable to cognize and communicate knowledge. It tangibly subordinates a person in terms of their dignity, liberty, agency, and humanity. While the targets of sexual harassment undoubtedly had individualized understanding of what was happening to them, there was still an epistemic and legal injustice. Without an epistemological framework to define quid pro quo and hostile work environment, female employees could not fully coalesce around the shared experience, communicate the experience to those in power, advocate for routes of redress, develop a legal cause of action, and receive remediation for sexual harassment. In this way, epistemic justice is a precondition for legal justice.

Critical feminist legal theory, largely derived from legal scholar Catharine MacKinnon's work, defined hostile work environment and quid pro quo coercion as sexual harassment and identified sexual harassment as a form of sex discrimination.[51] MacKinnon's conceptualizations of quid pro quo and hostile work environment were embraced by feminist organizers, incorporated in the 1980 Equal Employment Opportunity Commission ("EEOC") guidelines on sexual harassment interpreting Title VII, and integrated in Supreme Court case law.[52] In a unanimous opinion in *Meritor Savings Bank v. Vinson*,[53] the Supreme

[49] *See* Jaline S. Fenwick, *See Her, Hear Her: The Historical Evolution of Women in Law and Advocacy for the Path Ahead*, AM. BAR ASS'N (Nov. 15, 2023), https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-november/see-her-hear-her-historical-evolution-women-in-law/; Elana Lyn Gross, *For the First Time, the Journals at the Top U.S. Law Schools Are All Led by Women*, FORBES, https://www.forbes.com/sites/elanagross/2020/02/11/the-journals-at-the-top-us-law-schools-are-all-led-by-women-for-the-first-time/ [https://perma.cc/FC6A-B3DM?type=image] (last updated Feb. 11, 2020, 4:39 PM).

[50] *See generally* Debra L. Jackson, *Date Rape: The Intractability of Hermeneutical Injustice*, *in* ANALYZING VIOLENCE AGAINST WOMEN 39 (Wanda Teays ed., 2019).

[51] CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 32-42 (1979).

[52] *See EEOC History: 1980 - 1989*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-1980-1989 [https://perma.cc/R3K9-DDEK] (last visited Sept. 8, 2024); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).

[53] 477 U.S. at 57.

Court held that sexual harassment can be a form of sex discrimination under Title VII of the Civil Rights Act and recognized quid pro quo harassment and hostile workplace harassment.[54] CRT scholars have grappled with and supplemented MacKinnon's work, developing a body of scholarship on the intersectional experience of women of color and the unique harassment and discrimination they face in the workplace and beyond.[55]

The case study of sexual harassment provides an example of hermeneutical injustice and reveals critical legal theory's potential to learn from impacted communities, mobilize community organizers, and change laws, policies, and practices. Critical legal theory—whether feminist legal theory, classcrit, queercrit, or CRT—is vital for naming subordinated experiences and phenomena, and in turn, promoting community organizing and developing legal routes for redress.

CRT has introduced a multitude of influential concepts to better understand different types of racism and their manifestations, expressions, and impacts. CRT bans and other silencing efforts amount to hermeneutical injustice because they are motivated by structural prejudice and silence knowledge and language used to interpret and articulate socially marginalized experiences and identities related to race and racism. These attacks suppress and erase shared conceptualizations and vocabulary about racism. As a result, minoritized social groups—namely people of color—are deprived of an epistemological framework to define the racial injustice they experience. Restrictions and censorship targeting CRT deprive students, teachers, employees, and other people of a collective understanding capable of interpreting, comprehending, and communicating lived-experience knowledge and academic knowledge about racial identity and subordination.

B. *Testimonial Injustice*

Miranda Fricker identified "testimonial injustice" along with hermeneutical injustice as one of two primary forms of epistemic injustice.[56] As defined by Fricker, testimonial injustice requires a wrong against a speaker due to negative identity prejudice resulting in an unfair credibility deficit.[57] Thus, an example of testimonial injustice is when a racially minoritized person's account of the racism they experience is not believed because the interlocutor has biased perceptions of their race or does not believe racism exists. CRT bans exacerbate the risk of testimonial injustice when people of color share about racism.

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[54] *Id.* at 73.

[55] *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 147-152; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

[56] FRICKER, *supra* note 41, at 17 (noting "epistemic dysfunction" when prejudice "works against the speaker").

[57] *Id.* at 20.

As José Medina has observed, hermeneutical and testimonial injustice are closely related.

> [T]here cannot be testimonial justice without hermeneutical justice. Hearers cannot listen to a speaker fairly if there is a hermeneutical gap that prevents them from understanding and interpreting that speaker. . . . As a result of their incapacity to make sense of their life-experiences and predicaments, hermeneutically marginalized subjects enter communicative interactions in a disadvantaged position, for they are conceptually ill-equipped to make sense of certain things and they are disproportionately more likely to be ill-understood.[58]

The hermeneutical injustice of CRT bans contributes to testimonial injustice. Without the shared conceptualization of racism and its manifestations and impacts—compounded with the campaign's vilifying and discrediting CRT and DEI concepts—a listener from a privileged racial group who does not share the same lived experiences of racism may tend to disbelieve the speaker. This implicates the work of Charles Mills, who defines "white ignorance"[59] as "an absence of belief, a false belief, a set of false beliefs, a pervasively deforming outlook" causally related to whiteness, which perpetuates white privilege and obstructs racial equality.[60]

Fricker may view "white ignorance" alone as less than hermeneutical injustice because, in her perspective, it is "a dysfunction at the level of belief and evidence rather than the level of conceptual repertoire and intelligibility."[61] Here, however, in an environment where CRT and DEI concepts are banned, discredited, and vilified, there is "impoverishment in shared conceptual resources,"[62] which amounts to hermeneutical injustice. Without exposure to CRT and DEI concepts, listeners may lack the foundation of knowledge necessary to believe the speaker. Without the conceptualization that CRT provides, a knower can be unfairly discredited and experience both an epistemic wrong and epistemic harm. Further, CRT bans themselves are a form of testimonial injustice. The bans' primary purpose is to prevent speech about minoritized and marginalized racial experiences. In turn, by preventing the sharing of knowledge in an educational setting, new knowledge about race and racism cannot be generated. Testimonial injustice begets hermeneutical injustice in a cyclical fashion.

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[58] José Medina, *The Relevance of Credibility Excess in a Proportional View of Epistemic Injustice: Differential Epistemic Authority and the Social Imaginary*, 25 SOC. EPISTEMOLOGY 15, 27 (2011).

[59] Charles W. Mills, *White Ignorance*, *in* RACE AND EPISTEMOLOGIES OF IGNORANCE 13, 15 (Shannon Sullivan & Nancy Tuana eds., 2007).

[60] Charles W. Mills, *Global White Ignorance*, *in* ROUTLEDGE INTERNATIONAL HANDBOOK OF IGNORANCE STUDIES 36, 36 (Matthias Gross & Linsey McGoey eds., 2d ed. 2023).

[61] Miranda Fricker, *Epistemic Injustice and the Preservation of Ignorance*, *in* THE EPISTEMIC DIMENSIONS OF IGNORANCE 160, 173 (Rik Peels & Martijn Blaauw eds., 2016).

[62] *Id.*

This epistemic deprivation is particularly detrimental because it occurs in schools and learning spaces where knowledge production and dissemination should be primary objectives and where learning opportunities are supposed to be most available. Preventing teachers and trainers from sharing and fostering knowledge about—or even discussing—race and racism creates a gap in collective interpretive resources for all people; however, it particularly disadvantages people of color—the groups who need to make sense of their social experiences of racism. Moreover, this epistemic injustice is not by happenstance—it arises directly from prejudiced right-wing think tanks, like the Heritage Foundation,[63] and prejudiced activists, like Christopher Rufo, who advance racist beliefs and ideals.[64]

C. *Legal Epistemic Injustice*

Legal scholars write about epistemic injustice, but "legal epistemic injustice" as a concept has not been defined or explored. Legal epistemic injustice warrants deeper exploration because epistemic wrongs and harms have tangible impacts not only for the epistemic subject. At stake is also their social group(s), broader society, and the equitable and fair development of the law. As epistemic injustice describes wrongs done to individuals in their capacity as knowers, I posit that legal epistemic injustice thus refers to wrongs to knowers as legal subjects in regard to their knowledge in the legal context. It can manifest as testimonial injustice, such as when a witness's testimony in court is given less credibility than it deserves due to prejudice on the part of a factfinder or counsel qua listener. Testimonial injustice can further compound harm when credibility excess is afforded to a privileged speaker in comparison to the original underprivileged witness.[65] It can also manifest as hermeneutical injustice, where there is a gap in collective interpretive resources under the law which puts a legal

[63] Nancy MacLean, *The Heritage Foundation's Racist Origins and What that History Tells Us*, WASH. SPECTATOR (Apr. 30, 2024), https://washingtonspectator.org/heritage-foundations-racist-origins/ [https://perma.cc/EKA6-CAQY].

[64] *See, e.g.*, Jason Wilson, *Activist Who Led Ouster of Harvard President Linked to 'Scientific Racism' Journal*, GUARDIAN (Jan. 31, 2024), https://www.theguardian.com/world/2024/jan/31/rightwing-activist-christopher-rufo-ties-scientific-racism-journal [https://perma.cc/G3DJ-DGGT]; Daniel Kreiss, Alice Marwick & Francesca Bolla Tripodi, *The Anti-Critical Race Theory Movement Will Profoundly Affect Public Education*, SCI. AM. (Nov. 10, 2021), https://www.scientificamerican.com/article/the-anti-critical-race-theory-movement-will-profoundly-affect-public-education/ [https://perma.cc/4XVJ-Q4GT]; Ivory A. Toldson, *New Study Reveals the Anti-CRT Agenda Is Really About Denying Racism and Revising History*, DIVERSE (Oct. 25, 2022), https://www.diverseeducation.com/opinion/article/15302120/new-study-reveals-the-anticrt-agenda-is-really-about-denying-racism-and-revising-history [https://perma.cc/LZH4-CHMR].

[65] *See generally* Jasmine B. Gonzales Rose, *A Critical Perspective on Testimonial Injustice: Interrogating Witnesses' Credibility Excess in Criminal Trials*, 7 QUAESTIO FACTI 173 (2024).

actor (or would-be legal actor), including litigants or potential claimants, at an unfair disadvantage because there are insufficient claims, defenses, or other legal mechanisms recognized under the law to address their minoritized or marginalized experiences.

The study of epistemic injustice emphasizes the epistemic harm that knowers suffer when they are unfairly disbelieved or are not understood due to a lack of adequate concepts or language to describe their experiences or perspectives.[66] Epistemic harm is generally dignitary in nature, but legal epistemic injustice can harm a person's livelihood, liberty, and even life. For instance, when an aggrieved female employee cannot explain how hostile work environment or quid pro quo harassment amounts to sex discrimination warranting legal redress, the employee, women, and a legal system which purports to prohibit workplace sex discrimination and harassment lack the legal knowledge and vocabulary necessary for a cause of action.[67] Critical feminist legal theorist Catharine MacKinnon opened pathways for legal analysis and causes of action to address these wrongs. CRT has made similar contributions.

While it is challenging to fully ascertain the impact of CRT on the development of the law, it is clear CRT has brought forth numerous influential concepts, some original and others innovatively adapted to law, to enhance understanding of various forms of racism and their manifestations, expressions, and impacts. Some influential concepts include: anti-essentialism; colorblindness critique; decolonization of self and knowledge; interest convergence; intersectionality; permanence and pervasiveness of racism; racial palatability; racism defined to include internalized, structural, systemic, and institutional forms; social construction of race; tokenism; white normativity; white privilege; white supremacy; white transparency; and whiteness as property.[68] CRT not only helps community members and scholars understand

[66] *See* FRICKER, *supra* note 41, at 1.

[67] *See id.* at 150-51.

[68] For an explanation of anti-essentialism, see Harris, *supra* note 55, at 585-89; and Margaret E. Montoya & Francisco Valdes, *"Latinas/os" and the Politics of Knowledge Production: LatCrit Scholarship and Academic Activism as Social Justice Action*, 83 IND. L.J. 1197, 1200-02 (2008). For an explanation of the colorblindness critique, see Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991). For an explanation of interest convergence, see Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). For an explanation of intersectionality, see Crenshaw, *supra* note 55. For a reflection on the permanence and pervasiveness of racism, see DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992). For a discussion of racial palatability, see Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1792 (2003). For an explanation of how critical race theory defines racism, see *Critical Race Theory: Frequently Asked Questions*, LEGAL DEF. FUND, https://www.naacpldf.org/critical-race-theory-faq/ [https://perma.cc/25CY-TQEJ] (last visited Sept. 8, 2024) ("Critical Race Theory recognizes that racism is embedded in laws, policies and institutions that uphold and reproduce racial inequalities."). For a discussion of

race and racism, both generally and academically, it also helps judges and attorneys understand race and racism in legal-specific terms and contexts.

CRT has developed theoretical frameworks and vocabulary to explain what racism is. Racism can manifest as individual bigotry, discrimination, or internalized racism. It can also be structural when systems and institutions perpetuate racial disparities even absent discriminatory intent. The extensive CRT scholarship on structural forms of racism validates, unpacks, and explains the lived experiences of Black, Latine, Indigenous, and other people in the United States who are disproportionately subjected to policing, mass incarceration, school discipline, and other racial disparities. CRT scholars have examined the history of racism in the United States and how it impacts current racial inequities. Judges increasingly understand that racism is broader than individualized discrimination and that past racial discrimination impacts current racial problems.[69]

CRT has explained how racism operates and is expressed. For instance, CRT has helped conceptualize that the aim of racism is less about disliking different races, and more about maintaining racial hierarchy, most notably protecting white privilege,[70] and entrenching power in racial insiders through white supremacy.[71] In analyzing and crafting laws, we can rely on these concepts to

race as a social construction, see MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (3d ed. 2015) and Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994). For an overview of tokenism in the CRT context, see RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 90 (4th ed. 2023). For a discussion on whiteness as a racial norm, see IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (10th anniversary ed. 2006).

[69] *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 384 (2023) (Jackson, J., dissenting).

> Gulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past, but have indisputably been passed down to the present day through the generations. Every moment these gaps persist is a moment in which this great country falls short of actualizing one of its foundational principles—the 'self-evident' truth that all of us are created equal.

Id.; *see also* LA All. for Hum. Rts. v. City of Los Angeles, No. LA CV 20-02291, 2021 WL 1546235, at *10 (C.D. Cal. Apr. 20, 2021).

[70] White privilege' refers to the myriad of social advantages, benefits, and courtesies that come with being a member of the dominant race. . . . Scholars of white privilege write that white people benefit from a system of favors, exchanges, and courtesies from which outsiders of color are frequently excluded . . . .

DELGADO & STEFANCIC, *supra* note 68, at 90; *see* Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies* 2-4 (Wellesley Ctrs. for Women, Working Paper No. 189, 1988), https://www.wcwonline.org/images/pdf/White_Privilege_and_Male_Privilege_Personal_Account-Peggy_McIntosh.pdf [https://perma.cc/Y7MB-84XE].

[71] White supremacy refers to "a political, economic and cultural system in which whites overwhelmingly control power and material resources," and in which "relations of white

root out racism by questioning who routinely benefits from certain provisions and procedures. CRT also observes the ever-changing but permanent and pervasive impact racism[72] has, which can inspire advocates and policymakers to seek antiracist remedial measures that are equally creative and enduring. Additionally, CRT scholarship shows how using stereotypes can indicate discriminatory intent.[73]

CRT concepts also explain everyday experiences of racism through a shared vocabulary, which affirms those most impacted and explains racialized phenomena. Examples of this are a workplace dynamic where certain individuals of color—usually those with lighter skin, straighter hair, and standard American English accents—are hired or promoted due to "racial palatability,"[74] while other people of color, even from the same racial group, are not. Similarly, CRT explains the problems with tokenism in hiring, where hiring a few people of color as racial tokens is not sufficient to refute employment discrimination claims.[75] Job applicants or employees may understand these practices to be racialized and unfair, but conceptualizations like "racial palatability" and "tokenism" are crucial as they provide clear frameworks for understanding and articulating personal experiences, enabling individuals to recognize and validate their mistreatment. This shared understanding fosters collective mobilization, raises employer awareness, and drives changes in employer practices and legal standards to better address and prevent such discriminatory behaviors.

CRT has explained the law's role in socially constructing[76] race and maintaining racism. Examples include how the courts historically defined

dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings." Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129 (1989).

[72] Racism is a permanent and pervasive part of everyday life and the norm rather than the exception. *See generally* BELL, *supra* note 68.

[73] *See* Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc., 781 F. Supp. 1385, 1394 (W.D. Wis. 1992) (citing Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988)) ("Perpetuating and encouraging stereotypes of persons as lazy or wasteful and ridiculing their religious and cultural practices are classic forms of racism that enable the perpetrators not only to rationalize the oppression of such people but to reinforce identification with the dominant group.").

[74] Racial palatability is the phenomenon wherein which, other things being equal, people may prefer to associate with "nonwhites whose racial identity is not salient and whose identity performance is inconsistent with stereotypes about their racial group." Carbado & Gulati, *supra* note 68, at 1792.

[75] *See* DELGADO & STEFANCIC, *supra* note 68, at 83.

[76] The social construction of race thesis finds "that race and races are products of social thought and relations. Not objective, inherent, or fixed, they correspond to no biological or genetic reality; rather, races are categories that society invents, manipulates, or retires when convenient." *Id.* at 9.

Blackness to determine whether a person was enslaved,[77] or how courts defined whiteness to determine whether a person was eligible for naturalized citizenship.[78] These types of racial discrimination can be explained through the theorization of whiteness as property: how societal privileges and benefits are systematically reserved for white individuals, akin to property rights, and consequently reinforce racial inequality and exclusion.[79]

CRT also provides analytical tools to root out racial inequities in law, policies, and practices. Three examples are the critique of colorblindness, white normativity, and white transparency. Colorblindness is criticized by CRT as an approach that perpetuates racial hierarchy and maintains the racial status quo by disregarding the racial impacts of a law and entrenching white normativity and transparency.[80] White normativity is the implicit belief that white ideas, practices, and experiences are inherently normal, natural, and right.[81] White transparency refers to "the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific."[82] Analyzing whether a law, policy, or practice engages in these problematic tactics can help scholars, policymakers, and community members propose and select more equitable alternatives.

CRT also has the potential to support new legal claims or defenses: for instance, the concepts of anti-essentialism[83] and intersectionality[84] explain the

[77] Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 112, 121 (1998) (exploring how methods of racial determination in trials where "[enslaved people] sued for their freedom by claiming whiteness" were used "in constituting the cultural meaning of racial identities").

[78] John Tehranian, Note, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 848 (2000) (arguing changing definitions of race in naturalization litigation is necessary to "dismantl[e] . . . racial stratification" by recognizing that race is social construct).

[79] "Whiteness as property" is an analysis of "how whiteness, initially constructed as a form of racial identity, evolved into a form of property." Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1709 (1993). "Following the period of slavery and conquest, whiteness became the basis of racialized privilege — a type of status in which white racial identity provided the basis for allocating societal benefits both private and public in character." *Id.*

[80] Gotanda, *supra* note 68, at 4.

[81] *See* PATRICIA J. WILLIAMS, SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE 6-7 (1997).

[82] Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993).

[83] Anti-essentialism rejects monolithic identities and critiques "the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience." Angela P. Harris, *supra* note 55, at 585.

[84] Intersectionality is a framework to analyze the complex and cumulative way in which multiple forms of discrimination (such as racism, sexism, and classism) combine, overlap, or

unique nature of discrimination against women of color, or others with multidimensional identities. This concept can be used to reject the notion that an employer who has hired white female employees and male employees of color has a defense against allegations of discriminating in the hiring of women of color.

Thus, the impact of CRT on law is evident, with CRT concepts emerging in legal arguments, court decisions, and statutes. A prominent recent example is the California Racial Justice Act, which "prohibits bias based on race, ethnicity, or national origin in charges, convictions, and sentences."[85] On its face, this definition does not seem to differ from traditional laws prohibiting racial bias, but the law "expands a defendant's ability to gather evidence of racial bias and allows for the reversal or modification of a conviction or sentence even without the racial bias being shown to have altered the trial outcome."[86] In practice, this removes the limitations on evidence of racial bias the Supreme Court set in *McCleskey v. Kemp*.[87] Those limitations have been frequently criticized through a CRT lens, so by rejecting those limitations, the California State Legislature effectively endorsed an aspect of CRT, allowing its academic criticisms to shape legal policy.[88]

The California Racial Justice Act is not the only example of critical race theory influencing legal development. Some judicial opinions implicitly endorse critical race theory concepts, like a broader definition of racism[89] and

intersect, especially in the experiences of marginalized groups. *See* Crenshaw, *supra* note 55, at 140.

[85] PROSECUTORS ALL. CAL. & UNIV. OF S.F., THE CALIFORNIA RACIAL JUSTICE ACT 2020 LANDMARK LEGISLATION 2022 CLARIFYING CHANGES: INTRODUCTION AND OVERVIEW 6 (2023), https://www.acgov.org/board/bos_calendar/documents/DocsAgendaReg_10_26_23/PUBLIC%20PROTECTION/Regular%20Calendar/Item_1_Racial_Just_Act_overview.pdf [https://perma.cc/Q7FK-SQ7J].

[86] Hoang Pham & Amira Dehmani, *The California Racial Justice Act of 2020, Explained*, STAN. L. SCH. (Apr. 22, 2024), https://law.stanford.edu/2024/04/22/the-california-racial-justice-act-of-2020-explained/ [https://perma.cc/CQ48-7KL9].

[87] 481 U.S. 279 (1987).

[88] *See generally* Mario L. Barnes & Erwin Chemerinsky, *What Can* Brown *Do for You?: Addressing* McCleskey v. Kemp *as a Flawed Standard for Measuring the Constitutionally Significant Risk of Race Bias*, 112 NW. U. L. REV. 1293 (2018).

[89] *See* Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc., 781 F. Supp. 1385, 1394 (W.D. Wis. 1992) (citing Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988)) (explaining racism can be directed at groups through "encouraging stereotypes" rather than through individualized discrimination); Lanier v. President & Fellows of Harvard Coll., 191 N.E.3d 1063, 1093 (2022) (Cypher, J., concurring) (arguing history of racism in American society has caused legal system to be incapable of providing "a sufficient remedy for the injuries and injustices" faced by "descendant[s] of enslaved Africans and African-Americans").

intersectionality.[90] Legislatures endorse critical race theory concepts by passing statutes[91] and creating commissions[92] inspired by CRT scholarship. Proposed legal reforms created or popularized by CRT scholars, like reparations[93] and restorative justice,[94] have made their way into the mainstream. Legal advocacy itself has also been influenced by critical race theory, leading to a new kind of progressive lawyering that combines strategic litigation with community organizing tactics.[95]

These CRT concepts and reforms, and many more, reflect the lived experiences of racially minoritized and marginalized people, explain the development of racialization and racial hierarchy, and make sense of

[90] *See* B.K.B. v. Maui Police Dept., 276 F.3d 1091, 1101 (9th Cir. 2002) (citing Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991)) (acknowledging intersectional nature of employment discrimination claims by understanding that actions presented as gender discrimination can also indicate racial discrimination); Howell v. City of New York, 202 N.E.3d 569, 594 n.3 (N.Y. 2022) (Rivera, J., dissenting) (citing Crenshaw, *supra* note 73) (arguing majority was wrong not to hold police officer liable for failing to enforce Black women's order of protection, which have been historically underenforced for Black women).

[91] S. Judiciary Comm., Reg. Sess., at 6 n.5 (Cal. 2021), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB412# [https://perma.cc/L7FH-C5XP] (using Kimberlé Crenshaw's definition of "intersectionality"); Katy Steinmetz, *She Coined the Term 'Intersectionality' over 30 Years Ago. Here's What It Means to Her Today*, TIME (Feb. 20, 2020, 7:27 AM), https://time.com/5786710/kimberle-crenshaw-intersectionality/ [https://perma.cc/7J6R-5HUB].

[92] *Human Rights Commission*, S.F., https://sf-hrc.org/ [https://perma.cc/6HZC-HTE9] (last visited Sept. 8, 2024); *Human Relations Commission*, CNTY. OF SANTA CLARA, https://countyexec.sccgov.org/human-relations-commission (last visited Sept. 8, 2024); *NYC Together*, N.Y.C., https://www1.nyc.gov/site/cchr/index.page [https://perma.cc/ENF4-K7HM] (last visited Sept. 8, 2024).

[93] *See Reparations*, NAACP (2019), https://naacp.org/resources/reparations [https://perma.cc/8CD8-BQ8P]; Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/ [https://perma.cc/6XEL-D7VA].

[94] *See Our Commitment to Restorative Justice*, N.Y.C., https://www.nyc.gov/site/cchr/about/restorative-justice.page [https://perma.cc/WR6G-9GKM] (last visited Sept. 8, 2024) ("A restorative justice framework can help address . . . harm and prevent it from happening again by fostering accountability, rather than simply punishing people who commit discrimination."); Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety, Exec. Order No. 14,074, 3 C.F.R. § 371 (2023), *reprinted as amended in* 34 U.S.C., Subtit. I, Ch. 101 (stating "expanding the availability of diversion and restorative justice programs" should be part of plan to "reduc[e] racial, ethnic, and other disparities in the Nation's criminal justice system").

[95] Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 453 n.36 (2001) (arguing although community organizing needed bigger role, "legal rights can play an important role in struggles to achieve racial justice").

contemporary racism and how it manifests in the law, other systems, institutions, and everyday life. These concepts provide a powerful and empowering framework for racially minoritized and marginalized people who can understand their racialized experiences of subordination not as personal failings but structural failings. These concepts are also empowering to racially dominant groups as they can better understand their privilege and how to be a more effective antiracist ally. CRT provides ideas and vocabulary that support racial equity movements, and which can influence the law to make it more fair for all people.

Bans on CRT teaching, books, and materials restrict access to knowledge of these concepts. The central aim of bans on CRT is to stifle, if not eradicate, knowledge, understanding, and a shared vocabulary about contemporary and historical racism and other systems of subordination like sexism, heterosexism, and transphobia. Depriving students and other people of opportunities to learn about their racialized identities and experiences results in an epistemic injustice, which may hinder awareness, mobilization, and ultimately legal reform efforts and policy initiatives to address racism. Fundamentally, the anti-CRT agenda is one of epistemic injustice with the aim to diminish peoples' knowledge and, in turn, their legal rights. This includes both existing legal rights and future legal rights to combat racism.

Anti-CRT attacks exemplify legal hermeneutical injustice. The epistemic wrong is the creation of "impoverishment in shared conceptual resources" [96] by denying students and teachers the opportunity to learn about, and in some jurisdictions, discuss CRT and related concepts. This results in legal epistemic harm because the lack of shared knowledge and understanding diminishes community (including voter and constituent) support, as well as imagination and courage of policymakers and judges to engage in legal reform that address racism and other systems of subordination. This leads to a deficit in shared interpretive frameworks within the legal system, unfairly disadvantaging legal actors who have reduced or ongoing inabilities to address their marginalized experiences within the legal system due to the absence of recognized claims, defenses, or other legal mechanisms. Furthermore, the legal dimension of hermeneutical injustice is amplified because the state actors often champion these epistemic attacks through legal and policymaking channels.

III. THE EPISTEMIC JUSTICE OF CRT

There is extensive scholarship that has defined and examined epistemic *in*justice, but there is less scholarship that defines and explains epistemic justice. And even when epistemic justice is described, it remains abstract. While it is important to uncover and name injustice, it is critical to envision and build pathways toward justice. Accordingly, this final part of the Essay reflects on what epistemic justice is, identifies the core attributes and objectives of "systemic hermeneutical justice"—including a subset, legal hermeneutical

[96] *See* Fricker, *supra* note 61, at 173.

justice—and utilizes CRT as a tangible example of an effort to achieve increased systemic hermeneutical justice, specifically legal hermeneutical justice.

According to The Epistemic Justice in Community Engagement Project, which explores Miranda Fricker's scholarship, epistemic justice is:

> A virtue that accounts for human beings' essential need to communicate with others and make sense of their own experience by creating social conditions that allow people to effectively express their knowledge for the purpose of increasing others' individual understanding (testimonial) and society's collective consciousness (hermeneutical) about the diversity of human experiences.[97]

Epistemic virtues are key to individuals' ability to navigate and assess information in ways that lead to more reliable and justified beliefs. However, as Fricker indicates, epistemic justice is also an essential condition of political freedom and consequently must be "interwoven in the fabric of the liberal polity."[98] Thus, governing systems, as well as society generally, must work to foster epistemic justice. It is not merely an individual pursuit: epistemic justice needs to be systemic in scope. But what does systemic epistemic justice entail?

In determining the qualities that epistemic justice should encompass when applied to systems, we can start with Fricker's direction to "begin to get the measure of [epistemic justice] by looking first to basic kinds of epistemic *injustice*, whose negative imprint reveals the form of the positive value."[99] Thus, if epistemic injustice is "a wrong done to someone specifically in their capacity as a knower," epistemic justice is fair treatment of individuals in their role as knowers, ensuring that their contributions to knowledge are respected, acknowledged, and valued, and that they have equitable access to the means of knowledge production and dissemination.[100]

Testimonial injustice occurs when a speaker's credibility is minimized due to prejudice on the hearer's part.[101] Thus, systemic testimonial justice requires the recognition of rights and corresponding remedies for minoritized speakers. This includes both a negative right (prohibiting credibility discrediting based on protected identity classes, such as race), and a positive right (an affirmative legal entitlement to having one's credibility assessed fairly and free from systemic bias).

Hermeneutical injustice occurs when someone's social experience is obscured or misunderstood due to a gap in collective interpretive resources,

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[97] *A Brief Guide to Epistemic Injustice/Justice*, EPISTEMIC JUST. IN CMTY. ENGAGEMENT PROJECT, https://epistemicjusticeiarslce2018.wordpress.com/a-brief-guide-to-epistemic-injustice-justice/ [https://perma.cc/PYN9-BSMZ] (last visited Sept. 8, 2024) (citing FRICKER, *supra* note 41, at 176-77).

[98] Miranda Fricker, *Epistemic Justice as a Condition of Political Freedom?*, 190 SYNTHESE 1317, 1318 (2013).

[99] *Id.*

[100] *See* FRICKER, *supra* note 41, at 1.

[101] *Id.* at 17.

often stemming from structural bias or power imbalances.[102] Accordingly, at the systemic level, hermeneutical justice entails rectifying structural subordination of minoritized and marginalized social groups by ensuring they have equitable access to understanding, vocabulary, and interpretive frameworks. These frameworks should empower them to define and articulate their own lived experiences and social realities, allowing them to rectify structural subordination. Thus, this pursuit necessitates at least four attributes: (1) identification and acknowledgment of epistemic inequality, (2) guaranteed access to epistemic resources, (3) community-centered and participatory knowledge creation, and (4) antiracist and anti-subordination undertaking.

Accordingly, efforts to achieve systemic hermeneutical justice must include the following objectives:

- Identify gaps: root out gaps in collective understanding, language, and conceptual frameworks to interpret and articulate minoritized and marginalized identities and social experiences;
- Facilitate access: demand minoritized and marginalized social groups have access to epistemic frameworks, i.e., have access to methods through which they can explore and investigate the injustice they experience, allowing them to define and express that injustice;
- Be antiracist and anti-subordinationist: work to mitigate and eliminate structural prejudices so minoritized and marginalized groups can better understand, articulate, and communicate their experiences;
- Center impacted communities in knowledge production: foster accessible, shared conceptualizations and vocabulary, actively informed by and centering the interests of impacted communities regarding their minoritized and marginalized experiences so that they can make sense of and communicate these experiences;
- Protect knowledge creation: initiate and maintain educational, legal, and social resources to protect and enhance understanding, language, and interpretive frameworks concerning the experiences and identities of minoritized and marginalized groups; and
- Implement knowledge: apply the epistemological frameworks developed to analyze and improve the equity of systems and institutions, including law and education.

Legal hermeneutical justice is a subset of systemic hermeneutical justice. As defined in Part II of this Essay, legal hermeneutical injustice occurs:

> [W]here there is a gap in collective interpretive resources under the law which puts a legal actor (or would-be legal actor), including litigants or potential claimants, at an unfair disadvantage because there are insufficient

[102] *Id.* at 1.

claims, defenses, or other legal mechanisms recognized under the law to address their minoritized or marginalized experiences.[103]

In turn, legal epistemic justice requires recognizing and respecting individuals as knowledgeable agents within the legal system, ensuring their knowledge and perspectives are valued and integrated into legal contexts. Legal hermeneutical justice necessitates providing comprehensive and inclusive interpretive resources within the legal framework, enabling individuals to have fair access to claims, defenses, and other legal mechanisms that validate and address their marginalized and minoritized experiences.

Considering these essential attributes and objectives, CRT is clearly a mechanism to pursue systemic and legal hermeneutical justice. CRT was developed to fill an epistemic gap in legal scholarship and give voice to people of color and their overlooked racialized legal experiences and injustices. At its core, CRT interrogates the way systemic racism has caused and erased minoritized and marginalized experiences. It seeks to develop language, conceptualizations, and theoretical frameworks to deconstruct, understand, communicate, advocate, and address these experiences as perceived and articulated by those most impacted. This is why narrative and counter-storytelling are valued methodologies and sources of knowledge in CRT. CRT encourages people of color to define and articulate their own lived realities. CRT does not merely observe—it advocates for systems, institutions, and society to better understand, adapt, and center the experiences and needs of marginalized peoples. CRT also seeks to advance and reimagine policy and other reforms where subordinated groups can find redress and resources and thrive.

Further, CRT pursues legal hermeneutical justice. It is a body of multidimensional and interdisciplinary scholarship which strives to fill the gap in collective interpretive resources under the law so that minoritized and marginalized people can better understand their legal situations, experiences, and the rights they deserve. A central aim of much CRT scholarship is to identify legal prescriptions, whether they be strategies to work within existing law or advocate for the recognition of new claims, defenses, or other legal tactics. CRT strives to address legal actors' minoritized and marginalized experiences, level the legal playing field, and achieve equitable treatment under the law.

CONCLUSION

CRT produces both knowledge and epistemic justice, particularly legal hermeneutical justice. Accordingly, the resulting epistemic injustices from CRT curriculum and book bans are threefold. There is hermeneutical injustice and testimonial injustice from the silencing and discrediting of CRT knowledge, which diminishes a means to affirmatively create epistemic justice. Attacks on methods and mechanisms for generating epistemic justice should be recognized as particularly serious and harmful epistemic wrongs. Scholars, as well as the

[103] *Supra* Part II.

bench and bar, should be especially concerned about prohibitions on efforts to produce legal hermeneutical justice. Our legal system cannot be fair and just if minoritized and marginalized experiences are not known, understood, and addressed.

As the old maxim goes, *ipsa scientia potestas est*—knowledge itself is power.[104] Critical race theory is being suppressed because it curates, generates, and disseminates knowledge about race and racism, inspiring collective power to change laws and policies to increase racial equity. Withholding knowledge has long been an oppressive strategy for dominant social groups to maintain their power. It is imperative to protect CRT, so that people are free to teach, learn, understand, and debate the histories, identities, and social phenomena that shape life in the United States. CRT should be taught, along with other (including contradicting) theories and perspectives, from primary school through higher education. Despite what T-shirt slogans at airports or placards in schoolboard meetings might claim, fundamentally, CRT is about critical thinking and truth seeking. One need not ultimately agree with CRT, but it should be heard and engaged.

To rectify the epistemic and legal injustices stemming from CRT bans, it is imperative not only to repeal and prevent curriculum and book bans, but also to actively foster the creation of knowledge about and by minoritized and marginalized communities. One step in this direction is for legal and educational institutions and organizations to evaluate and incorporate the structural hermeneutical justice objectives detailed above. This Essay has sought to not only expose the epistemic injustices inherent in anti-CRT attacks, but to also stimulate further inquiry into legal epistemic injustice and inspire the envisioning of pathways for increased legal epistemic justice.

[104] FRANCIS BACON, 14 THE WORKS OF FRANCIS BACON 79, 95 (James Spedding, Robert Leslie Ellis & Douglas Denon Heath eds., 1900).