

UNIVERSITY OF
COLORADO LAW REVIEW

Volume 92, Issue 4

2021

**INTRODUCTION TO THE SYMPOSIUM:
THE STAKES FOR CRITICAL LEGAL
THEORY**

ELIZABETH S. ANKER* & JUSTIN DESAUTELS-STEIN**

On September 17, 2020, Donald Trump spoke at the so-called “White House Conference on American History.”¹ The conference mission, Trump explained, was to “clear away the twisted web of lies” propagated by “the left.” As Trump saw it, the problem wasn’t only that “left-wing mobs have torn down statutes of our founders, desecrated our memorials, and carried out a campaign of violence and anarchy.”² The challenge for historians was deeper, since “the left has warped, distorted, and defiled the American story with deceptions, falsehoods, and lies.”³ In order to demystify these ideological poisons, Trump charged historians with the task of standing up against the toxic propaganda machine of—wait for it—critical race theory, a “Marxist doctrine holding that America is a wicked and racist nation.”⁴ Teaching the doctrines of critical theory, Trump explained, was “a form of child abuse in the truest sense of those words.”⁵ On January 18, 2021,⁶ Trump’s Advisory 1776

*Associate Professor of English and Associate Member of the Law Faculty, Cornell University.

**Director, Center for Critical Thought, and Associate Professor of Law, University of Colorado Law School.

1. *Remarks by President Trump at the White House Conference on American History*, TRUMP WHITE HOUSE ARCHIVES (Sept. 17, 2020, 2:54 PM), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-white-house-conference-american-history/> [<https://perma.cc/SL59-ABXE>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Which, of course, fell on the Martin Luther King, Jr. Holiday.

Commission doubled down.⁷ Dedicated to helping young people “understand the history and principles of the founding of the United States,”⁸ the Commission expanded Trump’s earlier attacks on critical race theory, including the more general terrain of critical theory writ large.⁹ Naming the Frankfurt School as the intellectual source for what would later become critical race theory, the Commission Report argued that critical theory’s brand of identity politics begins by entrenching the racial and sexual identities of American citizens, proceeds to rank-order these “racial and social groups . . . with disproportionate moral worth allotted to each,” and concludes by demanding atonement and punishment in perpetuity for “America.”¹⁰ Notably, the Commission seemed fully aware that it was assigning to critical theory the very same intellectual maneuvers of a racial ideology that had once helped justify American slavery. Its Report spelled out that logic:

In portraying America as racist and white supremacist, identity politics advocates follow Lincoln’s great rival, Stephen A. Douglas, who wrongly claimed that American government “was made on the white basis” “by white men, for the benefit of white men.” Indeed, there are uncanny similarities between 21st century activists of identity politics and 19th century apologists for slavery.¹¹

In a seemingly parallel universe, in the summer of 2020 the University of Colorado established a new interdisciplinary research center, its Center for Critical Thought.¹² Modeled after similar efforts like Columbia’s Center for Contemporary Critical Thought,¹³ these Centers embody the alleged webs of lies and ideological distortions that so vex the likes of Trump and his allies. As engines for the study of critical theory, they

7. THE PRESIDENT’S ADVISORY 1776 COMM’N, THE 1776 REPORT (2021), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/The-Presidents-Advisory-1776-Commission-Final-Report.pdf> [<https://perma.cc/7ALW-UX36>].

8. *Id.* at 1.

9. *See id.* at 30.

10. *Id.* at 29.

11. *Id.*

12. CTR. FOR CRITICAL THOUGHT, <https://www.colorado.edu/center/criticalthought/> (last visited Jan. 26, 2021) [<https://perma.cc/A8LC-7WHF>].

13. COLUM. CTR. FOR CONTEMP. CRITICAL THOUGHT, <https://cccet.law.columbia.edu/> (last visited Jan. 26, 2021) [<https://perma.cc/45FQ-48GC>].

disseminate the very histories aimed at exposing deep structures of subjugation, domination, and exploitation that the Presidential Commission spectralizes as existential threats to the fabric of the American way of life. There are, of course, many fascinating features about the unfolding debate (if “debate” is really the right word here). But what merits our present focus is this: What has happened in the sociocultural climate when a “Presidential Commission” finds it perfectly justifiable to condemn teachers of critical theory, but without supporting that view with anything resembling academic credentials, citations, sources, or arguments? What does it mean when an official commission offers a caricatured display of “ideology-critique” designed to demystify critical theory itself? What are we to do with critical theory when it has seemingly devolved into such a state that it can be facilely coopted by Trump’s cronies? How did we *get* here, and perhaps more importantly, where does critical theory *go* in the future?

One starting point is to blame social media. On the one hand, in its grandeur the web grants an everlasting license for critique. In the low stakes of the Twitterverse, users like Trump have capitalized on this license to slash and burn, purporting to show truth to power. On the other hand, it is precisely this explosion of perspectives, information, viewpoints, facts, and everything else that has drummed up a background hum of false equivalences. For so many of us, media saturation can seem to induce paralysis of judgment—or the curious reverse, judgement without reflection, unrelenting criticism predicated on an absence of thought. Either we cannot decide, or we have already decided.

This combination of “critical license” with media overload churns out a popular skepticism always on the ready to “debunk.” But debunk what, exactly? And more importantly, what does this mean for academic expertise, including the spirit of critique long espoused by critical theory? Most immediately, the omnipresent skepticism, ideological warfare, and shrillness of public debate all suggest a wholesale lack of a clear and coherent understanding of what *genuine* criticism should be (whatever *that* might be). But at the same time, the dominant response from intellectuals has been predictable: to assault the debunking of facts with more rounds of facts. Scientists respond to climate skepticism and anti-vaxxers with data, all in the hopes of triumphing in the battle between fact and fiction. Watchdog groups subject misleading and false claims by politi-

cians to rigorous “fact-checking.” Journalists fend off accusations of bias by diligently representing “both sides” of an issue. And yet, these appeals to “what is really going on” can feel fruitless.

But from another point of departure, it is not so clear that greater critical distance and detachment will help us confront this apparent crisis in our very ability to *think*. Because the current mood of rampant debunking can seem to breed cavalier indifference not only to facts *per se* but also to the sorts of values and commitments necessary to orient principled political action and debate. Perhaps criticism instead needs to better theorize its relationship to praxis, or even to undertake the difficult labor of proposing, affirming, and defending substantive ideals that might help us remake our existing social structures. For instance, it goes without saying that the war on facts has led to an erosion of collective trust, so perhaps one task for critical theory is to devote itself to the rebuilding of public trust in civic discourse and process.

Yet however one responds to our present situation, there is no question that it demands a revitalization of critical practice. If the very idea of critique has become fraught—if not fully mutilated with misuse—what future can we hope for critical theory? Needless to say, citing to the so-called crisis in truth is merely one way to account for the unprecedented challenges facing critique in the present. The essays that follow offer a collection of varying explanations for this current juncture—including proposals for how we might negotiate it. Just as this issue’s contributors differ in their assessments, they similarly arrive at competing answers to the matter of how critical legal thought should respond. Similarly, although recent years have newly exposed the seeming fragility of many bulwarks of democracy, the rule of law, and civic reason, many underlying factors that enabled the Trump presidency long precede his election. As such, it is imperative to take the long view of both our contemporary geopolitical moment and the many traditions of critical thinking practiced within the academy and beyond.

Over the last decades of the twentieth century, critical theory and its offshoots spread throughout the humanities and beyond, ranging from the law school to the music school and everywhere in between. No doubt exists over that tradition’s sweeping range of influence, and if anything the 1776 Commission ironically only confirms that diagnostic authority. But how should we historicize critique? Given the specter of authoritari-

anism, it is certainly tempting to draw parallels with the era that give birth to the Frankfurt School, for some suggesting an onus to return to those roots. But those mid-century origins of theory have since developed in countless unexpected directions, merging with other philosophical schools and flowering into a rich and diverse intellectual formation. One active debate on the table therefore lies with the status of those many modes of conducting theory, including their varying usefulness and relevance to divergent fields within the academy. For instance within cultural and literary theory, some have asked about the potential trajectories of *post-critique*.¹⁴ But does *post-critique* make sense in the context of the *legal* academy? Critical theory has surely never been mainstreamed to the same extent as within other humanities and social science disciplines, so might critical *legal* theory still be in its adolescence?

From another angle, recent disregard for the rule and institutions of law might seem to suggest that critique can no longer be claimed as the exclusive province of the progressive left. Reactionary political actors have learned to weaponize the tools of critique, among other things enlisting relativism and denialism to shore up right-wing agendas. This syndrome becomes especially vivid with regard to the critiques of law historically associated with a primarily left or progressive stance. It has been a frequent premise of critical theory that “legalism,” far from being neutral, represents an inherently “liberal” if not right-wing ideology—and that unflagging allegiance to the institutions, doctrines, procedures, and rule of law in general will camouflage as well as rationalize structures of injustice and oppression. These baseline assumptions have organized much critical legal theory. However, reactionary politics today can appear to adopt a polar opposite stance toward law and legalism, instead laying active siege to the very institutions long presumed to be structural supports reinforcing the status quo and its patterns of exclusion. Far from a strictly leftist strategy, critiquing and undermining the rule of law has thus become a frequent ruse among the right. But these recognitions beg the question of how critical legal theory should approach this changing ideological landscape. Is it imperative for critical legal thinkers to shed a certain brand of skepticism and instead embrace the very legal principles, norms, and institutions long inspiring critique?

14. See, e.g., RITA FELSKI, *THE LIMITS OF CRITIQUE* (2015).

This shifting ideological terrain crystallizes the sorts of tensions confronted by the essays that follow. Many contributors to this Symposium accordingly ask whether the targets of critique should remain the same, or instead whether progressive legal theory should focus on new, different objectives and goals. For instance, the status of political economy within critical legal theory occupies multiple contributions, although their authors arrive at different conclusions. For Chris Tomlins, critical legal theorists have been too quick to cabin Marx and his influence. Tomlins therefore advocates a revitalized investment in Marx and his specific critiques of political economy. In contrast, Richard Ford cautions that not all attention to political economy is inherently helpful. In particular, many contemporary theorists have been overly preoccupied with “neoliberalism,” aggrandizing that phenomena and thereby assigning it with disproportionate analytic weight.

Other contributors venture alternate frameworks for mapping the distinctive landscape of our current geopolitical crossroads. While examining the enduring connection between critique and crisis, Ben Golder grapples with both a mood of growing desperation and the seductiveness of crisis as a mindset mirroring our contemporary moment. For Golder, the present is unparalleled precisely because the very existence of critique faces heightened jeopardy. Both Aziza Ahmed and Marianne Constable similarly contend with perceptions of escalating crisis due to mounting dangers to the public sphere and civic exchange. For Ahmed, there is a need to reexamine the relation between law, science, and expertise, including to question the frequently ambivalent attitude toward truth and “expertise” within radical social movements. Constable instead focuses on the diminishing reliability of public speech. Although that erosion of civic discourse is a byproduct of relatively unprecedented recent phenomena, Constable submits that the critical theory canon nevertheless contains resources for addressing that crisis. As Constable shows, J.L. Austin’s famed lectures on speech act theory can help us understand the capacity of utterances to “go wrong,” mutating from “promises” into “threats.”

As some of the following essays argue, our current era renders it imperative to better define critique, including to delineate its boundaries from other genres of thought. Perhaps not surprisingly, however, those contributors single out a number of different methodological impulses and objectives. For in-

stance, Jorge L. Esquirol studies the stock repertoire of recurring “critical moves” that have organized progressive legal scholarship. In taxonomizing those standard moves, Esquirol simultaneously asks whether they have at times rendered critical theory overly formulaic and insufficiently attuned to context. Enlisting the lessons of comparative legal study, Esquirol ventures a plea for greater attention to the sociopolitical effects of those staples of critique.

In this respect, there is a growing importance for left critique to distinguish itself from the sorts of cavalier naysaying and subterfuge that have ravaged democratic discourse and participation. But at the same time, critical legal theory confronts a parallel onus to justify its differences from more moderate or centrist political agendas as well as intellectual-rhetorical modes. Leti Volpp thus compares two contrasting immigration policy statements—the Immigration Platform of the Biden campaign and the “Migrant Justice Platform”—in order to highlight the troubling assumptions that can underlie liberal reform agendas. Unlike the Biden agenda, the Migrant Justice Platform models collectivist, grassroots practices of critique, underscoring the ongoing value of a progressive commitment to a principled criticism.

Seeking to distinguish progressive critique from mainstream legal reasoning, Charles Barzun argues that critical theory can be identified by its “holistic” approach aimed at analysis that is inextricably explanatory and normative. What this means is that critical legal thinkers should recognize their affinity with scholars who have at times been dismissed among the left (Barzun’s example is Catherine MacKinnon). At once, it is this holistic orientation that renders critical theory especially well equipped to analyze the common law. Analogously, Paulo Barrozo maintains that critical legal thought must separate itself from the brands of critique practiced in conventional legal scholarship, given how that tradition has served to operationalize liberalism as an ideology. Barrozo instead promotes a jurisprudence of distribution, which can be conceptualized vis-à-vis a set of elements like “epistemic confidence” and the “evaluation of means.”

Peter Gable and Peter Goodrich both offer historical accounts of critical legal theory and its evolution—although they emphasize contrasting elements of that tradition. For Gabel, both the Marxist and Critical Legal Studies variants of critical theory generate accounts of “alienation” that are incomplete

without attention to intersubjective desires for recognition. Gabel argues that those social interconnections can prove transformatively dis-alienating, just as they are frequently harnessed within radical social movements. In a similar spirit, Goodrich also seizes upon the energetic style of critical legal theory, celebrating that vitalism and the process of just becoming it can inspire. For Goodrich, the roots of theory must therefore be located in performative musicality and poetics: in what he terms “the jurisliterary.”

Other contributions to this Symposium apply theory to contemplate specific legal issues and debates, exemplifying the work of critical legal scholarship in practice. For instance, Mikhail Xifaras develops a “theory of legal characters” designed to distill the diverse attitudes of varying legal actors toward the legal system. Expanding on the frequent analogy between law and theater, Xifaras demonstrates the many ways that legal actors’ choices and behavior are inherently mediated. Here, the context of the French Constitutional Council offers a case study through which Xifaras illustrates the more global implications of his theory.

Bernard Harcourt instead looks to theoretical debates about rights in order to illustrate certain blind spots afflicting much critical legal theory. As Harcourt argues, theorists have tended either to critique rights by mistakenly reducing them to purely instrumental tools or to philosophically account for the promise of rights in ways that sever them from actual legal practice. For Harcourt, rights therefore exemplify *both* the frequent disconnect between *theoria* and *praxis* *and* the need for a constant confrontation between those domains.

Finally, while pedagogy is a theme informing many essays in this Symposium, Chantal Thomas and Daniel J. Sequeira inquire centrally into the role of the law school classroom in forging a critical mindset. In her essay, Thomas defends the role of critical theory within the law school classroom, canvassing influential critiques of legal education ventured by thinkers including Duncan Kennedy, Kim Crenshaw, and Karl Klare. Simultaneously reflecting on her own experience as a student as well as professor, Thomas offers an example from her 1L Contracts syllabus to illustrate how curriculum might be revised in ways designed to facilitate structural critiques of racism. For Sequeira, by contrast, the forms of “unsettling” intrinsic to critical legal analysis necessarily occur beyond the

classroom's purview, in spaces exempt from the homogenizing gravitational pull of a formal legal education.

The essays that follow all differently reflect on the stakes for critical legal theory. Yet while drawing varying assessments, this Symposium's contributors all agree that those stakes could not be higher: that the project of critical legal theory is as urgent as ever. In such a spirit does this Symposium set out to rethink that project, with simultaneous reference to its past, present, and future.