

CRITICAL RACE THEORY

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Office Hours: Wednesday: 1:30-2:30 or by appt.

REQUIRED MATERIALS

The required materials for this course are:

1. Critical Race Theory: Key Writings That Formed the Movement (Eds. Crenshaw, Gotanda, Peller & Thomas 1995).
2. Miscellaneous Materials (to be provided in pdf format via my Course Page available on the USC Blackboard site).

OBJECTIVES

At the end of the class you should:

Have a sophisticated understanding and knowledge of Critical Race Theory as it has developed in U.S. legal scholarship, and understand how it has influenced U.S. legal theory.

Have developed the ability to do independent and original research on, or to think independently and apply, key concepts related to Critical Race Theory.

INTRODUCTION TO THE COURSE

This class focuses on an intellectual movement in legal scholarship called critical race theory. Beginning in the late 1980s, scholars of color developed a position on race and law that was critical of both mainstream liberal legal scholarship and traditional civil rights jurisprudence. Drawing from those beginnings, critical race theory scholarship advances two intellectual commitments, both of which we will discuss at length in class: (i) the liberal legal tradition that governs our political, social and economic institutions (even law that purports to advance race neutrality) reflects the exercise of white racial power and also works to create that racial power; (ii) notwithstanding the first premise, the law can and should be used to advance particular political commitments, specifically, to dismantle racial power and to empower communities of color. With regard to the last theme, critical race theory explicitly advocates for radical/left political commitments like anti-subordination and racial emancipation. Indeed, because the

movement adopts an explicitly political agenda, critical race theory has drawn fire for mixing academics with politics.

SPECIAL NOTE: We will spend a great deal of time discussing these concepts at a fairly theoretical level, but we will also take up some specific topics like affirmative action, hate speech, etc. You should know that the reading is heavy, in both senses of the word—in terms of volume and in terms of the sophistication of the theoretical arguments. Some articles can be a bit jargon-filled, but in these cases, I will help you translate. In class discussion, we will be applying some of the more abstract theoretical arguments to specific topics like affirmative action and housing desegregation.

ATTENDANCE, CLASS PARTICIPATION

This success of this class depends heavily on class participation in both full class and small-group discussion. A full twenty-five percent of your grade will come from attendance,¹ class preparation, participation and discussion. As reflected in the grade breakdown above, class participation grades will be based on your preparation, attendance and participation in class. I have listed the following evaluation factors to let you know how I will be evaluating class participation:

- your ability to draw from the assigned readings to enhance discussion (this is a very important factor);
- your ability to critique and raise questions regarding the assigned readings or other students' arguments;
- your ability to relate the readings to real life experiences (your own or others');
- your facilitation of class discussions by raising questions and suggesting topics for class discussion;
- your responses to questions and comments raised by other students, including demonstrations of respect for the opinions of others;
- your ability to defend your viewpoints and/or reconsider and alter them on further reflection, and your openness to considering and exploring alternative points of view;
- your willingness to enhance other students' presentations by supporting, cooperating, and enthusiastically assisting them with questions, comments and other appropriate forms of participation;

¹ For attendance purposes, absences are excused only if I approve your absence from class, or you bring me a note from your physician stating that you were unable to attend class.

REFLECTION PAPERS

Ten percent of your grade comes from “reflection papers.” For each week, you will be asked to submit, by e-mail at least one hour before class, a reflection paper--a document no longer than three pages--containing your personal reactions to what you have read the previous week. I am most interested in hearing what you thought about what you read. Did you agree or disagree? Why? What was your emotional reaction? Be creative with these pieces; feel free to put them in any format you like, including poetry, works of art, essays, personal stories, as well as a more traditional narrative or journal entry. (Please send these papers in Word format from the same email address consistently to droithmayr@law.usc.edu – this will make it easier to grade at the end.)

EXAMINATION OPTIONS AND GRADES

Grades will be assessed according to the following factors:

- Class Participation and discussion throughout the semester: 25%
- Reflection Papers on each week’s assignment: 10%
- Final Examination/Paper Options: 65%

In terms of final assessment, you will have the option to take an examination at the end of the semester, write a paper, or do both.

Paper Only Option: Should you choose the Paper Only option, sixty-five percent of your final grade will come from the grades you receive on your writing requirement. You will complete at least a twenty-five page article, which will be evaluated in terms of the timeliness and the substance of your assignment. As is described in more detail below, you will receive separate grades on a proposed topic, a first draft, and a final product. If you choose to do a paper only, then the paper must be at least twenty-five pages (including footnotes).

Dual Paper/Exam Option: Should you choose the Dual Paper/Exam option, approximately 32.5% of your final grade will come from the grades you receive on the writing requirement, and 32.5% from your exam. You will complete at least a fifteen page article, which will be evaluated in terms of the timeliness and the substance of your assignment. You will also receive separate grades on a proposed topic, an outline and a final product. Details for exam coverage are described below.

Exam Only Option: If you choose to take an examination, the exam will constitute 65% of your final grade. The exam will cover all material discussed in class. Further substantive and procedural details are provided below.

EXAMINATIONS

Substance: The final examination will be completely open book, and will be in essay format. The exam will consist of three questions. One question will ask you to demonstrate your mastery of theoretical material; one question will ask you to compare and contrast, or to critique, various theoretical approaches; and one question will ask you to apply critical race theory principles to a particular topic that has not been covered in class.

Procedure: The examination will be a take-home exam to be completed over a forty-eight hour (two day) period. You will have a maximum of forty-eight hours from the time you check out your exam until the time you turn it in. So for example, if you check out your exam at 3:00 p.m. on Dec. 3, then you must return it by 3:00 p.m. on Dec.5. At your discretion, you may choose to turn the exam in early. The exam will be available on the first day beginning the law school examination period, and will no longer be available after the last day of the examination period. You will pick up and turn in your examination to the Dean's Suite on the third floor of the law school.

Be careful about scheduling your take-home—remember, all exams must be completed no later than the last day of the exam period by 5:00 p.m. No exceptions to this cut-off date will be granted, and you may be forced to take less than your full forty-eight hours if you do not plan ahead. You must turn in two copies of your exam.

STUDENT PAPERS

For those students who choose an option that includes a paper, you are asked to write an article on a critical race theory topic of your choice. You are expected to propose a discrete original argument and support the argument with analysis, narrative or some other methodological approach. Before you worry that you will be asked to write groundbreaking scholarship, relax. We will discuss in the first class ways to generate an appropriate topic that is of interest to you. The paper must address critical race theory, and not just a topic that deals with race and the law. Papers that merely review already existing literature are not appropriate for this class assignment.

The following deadlines (by 5 p.m. Friday end of the week for all paper deadlines) and grade weights apply for both the Paper Only Option and the Dual/Paper Exam Option. Turn in all drafts from the same email address by email.

Paper Topic: Week 4--10% of paper grade

First Draft: Week 8--35% of paper grade

Final Draft: Last day of exams, by 5 p.m.-- 55% of paper grade

The following discussion gives you more information about each phase of paper writing:

1. Paper Topic: You must submit a topic early in the semester. Start thinking about topics immediately. Read the introduction to the book carefully to get a sense of what is critical race theory. Skim through the articles in your reader and think about topics that interest and inspire you. Feel free to choose a topic that is critical of critical race theory. Most students find it very helpful in deciding on a topic to meet with me for discussion. When you have chosen a topic, do a more detailed round of research to make sure no one has already written a paper advancing your central argument.

Your topic submissions should be in the following format: (i) a statement of your central argument (which should begin with the phrase “I will argue that...” and (ii) a brief roadmap. Here is an example of a topic statement:

“I will argue that contemporary antidiscrimination law unnecessarily adopts a “perpetrator” perspective that narrowly focuses on the intent of the perpetrator, rather than a broader “victim” perspective that focuses on the effects of racism on the victim. Part I outlines the difference between perpetrator and victim perspectives. This part argues that the Equal Protection clause supports the victim perspective as well or better than the perpetrator perspective. Part II applies this competing perspectives framework to recent Supreme Court decisions. Part III analyzes why the Court has chosen to adopt the relatively more narrow perspective. Part IV explores the implications of the Court’s narrow interpretation of Equal Protection law for employment discrimination.”

2. First Draft: Your first draft should approximate as much as possible a final draft in length, citations and completeness. Footnotes should be properly bluebooked. You should include headings and page numbers to make your paper more readable. Your introduction should include an opening set of paragraphs to explain why the topic is interesting and timely, followed by a refined and elaborated version of your topic statement (see above). For examples, check out the introductions in the papers in your reader.

3. Student Presentations: The last week of class will be taken up with student presentations of their papers. Drawing from the first drafts, which are due Week 4 I will select three to six student papers to be presented and discussed in class during the last three classes. Students whose papers are chosen will be asked to do a fifteen minute presentation of the central arguments of their papers, followed by a question and answer period. This opportunity is particularly useful for students who are interested in getting their papers published and pursuing an academic career. Non-presenting students are expected to have read the drafts (which will be distributed electronically) and to provide constructive suggestions and questions for the presenter's benefit.

LATE POLICY

While I hate to be overly harsh, I have had continuing problems with late papers and assignments. For all written assignments, including reflection pieces and papers, unless you get an extension before the deadline, I will deduct points in the following amounts: 30% of the value of the assignment on the first day, and 20% for each day thereafter. I am quite generous with extensions if you ask before the deadline. However, no excuses will be granted after the deadline has passed, unless you submit a doctor's note verifying that the student was unable to participate in academic activity for a certain number of days.

ASSIGNMENTS AND ARTICLE DEADLINES

Reading assignments from the reader have page numbers *in parentheses* following, to indicate the page in the reader. Other materials, which have page numbers not in parentheses (or no page numbers) will be made available online in a course page. If the document on the course page has a URL, paste that into your browser to come up with the document.

I. CRITICIZING CIVIL RIGHTS DISCOURSE

This material discusses early critical race theory work, written before the movement officially formed. Early work by critical legal studies scholars criticized anti-discrimination law for actually reproducing the power of discriminatory perpetrators rather than helping the victims of discrimination. Derrick Bell's work exposed the ideological underpinnings of the Court's decision in *Brown*, to argue that *Brown* was possible only because the decision advanced the interest of whites.

Class 1: Lecture on genesis of CRT

Introduction in Reader (xiii)

Synopsis of Part I (p. 2)

Howard Omi, *Race Theory: Culture and Politics*, pp. 175-80

[Located together with the Young-Critique of Fraser on Blackboard]

Class 2: Interpreting Antidiscrimination Law

Alan Freeman, *Legitimizing Discrimination Through Antidiscrimination Law*, 62 MINN. L. REV. 1049 (1978) (p.29)

Class 3: Interest Convergence

Derrick Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (p. 20)

II. CRITICAL RACE THEORY: CRITIQUE OF CRITICAL LEGAL STUDIES

In the late 1970s, legal scholars organized a genre of scholarship and an accompanying political movement in law schools, called Critical Legal Studies (CLS), from which critical race theory inherited a great deal. As the readings make clear, CLS had argued that rights were indeterminate and served as a means to consolidate power, while CRT argued that rights nevertheless had been pragmatically useful during the 1960s civil rights movement, and had conferred personhood on communities who had formerly been defined as property.

Class 4: Lecture on CLS and Rift between CLS and CRT

Synopsis in Reader, p. 60

Duncan Kennedy, Legal Education and the Reproduction of Hierarchy: A Polemic Against the System, Chapters 5 and 6

Class 5: CLS Rights Critique I:

Mark Tushnet, "An Essay on Rights" 62 TEX. L. REV. 1363 (1984), pp. 1-14

Class 6: CLS Rights Critique II

Peter Gabel, "The Phenomenology of Rights Consciousness," 62 TEX. L. REV. 1563 (1984) pp. 1-10

Class 7: CRT Response I

Kimberle Crenshaw, "Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," 101 HARV. L. REV. 1331 (1988), p. 103)

Class 8: CRT Response II

Patricia Williams, ALCHEMY OF RACE AND RIGHTS, Chapter VIII

III. ALTERNATIVES TO MAINSTREAM CIVIL RIGHTS IDEOLOGY

In its early years, critical race theory leveled a corrosive critique at mainstream civil rights ideology and in particular, at the colorblindness paradigm that constituted the foundation of civil rights theory. We will discuss several alternative paradigms developed by critical race theorists, including paradigms drawn from black nationalism and cultural pluralism.

Class 9: Lecture on alternative paradigms and critique of colorblindness:

Synopsis, p. 124

Neil Gotanda, "A Critique of 'Our Constitution is Colorblind,'" 44 STAN. L. REV. 1 (1991) (Parts I, III up to but not including Part III (c)) (p. 257)

Class 10: Black Nationalism

Gary Peller, "Race Consciousness" 1990 DUKE L. REV. 758 (1990) (p. 127)

Class 11: Cultural Pluralism

Duncan Kennedy, "A Cultural Pluralist Case for Affirmative Action in Legal Academia," 1990 DUKE L. REV. 705 (1990) (p. 159)

IV: CRITICAL RACE THEORY AND LEGAL DOCTRINE

Critical race theory argues that it is possible to subvert pre-existing legal doctrinal categories, like "property" or "antitrust," for radical purposes. (Put another way, it is possible to use the master's tools to dismantle the master's house.) In this section, we will discuss, for example, the

possibility of describing whiteness as a form of legal property, and describing discriminatory practices as a form of antitrust violation in which racial monopolies exercise power over competitors. In addition, we will look at an argument that the doctrinal “intent” requirement of anti-discrimination ignores unconscious racism.

Class 12: Property Doctrine

Synopsis, p. 201

Cheryl Harris, Whiteness as Property, 106 HARV. L. REV. 1709 (1993) (p. 276)

Class 13: Antitrust Doctrine

Daria Roithmayr, Barriers to Entry, A Market Lock-in Model of Discrimination, 86 VA. L. REV. 728 (2000) pp. 1-10, 13-17

Class 14: Doctrinal Intent Requirements

Charles Lawrence, The Id, The Ego and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987) (p. 235)

V. THE SEARCH FOR OPPOSITIONAL VOICE

In this set of materials, we will explore the use of narrative or “storytelling” as a method of scholarship in critical race theory. CRT scholars argue that the method of narrative permits scholars to formulate arguments not currently recognized within the framework of legal scholarship, and to put forward perspectives that have been previously excluded. We will discuss also the academic controversy over narrative forms of scholarship.

Class 15: Storytelling I:

Synopsis (p. 314)

Derrick Bell, “Space Traders” in Derrick Bell, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992) pp. 318-345

Class 16: Storytelling II:

Margaret Montoya, Mascaras y Trenzadas, 15 CHICANO-LATINO L. REV. 1 (1994) pp. 1-13

Class 17: Critique of Storytelling:

Daniel Farber and Suzanna Sherry, BEYOND REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997) pp. 72-84, 88-end

VI. THE INTERSECTION OF RACE AND GENDER

In these materials, we will talk about the intersection of race and gender, and the concept of “essentialism.” The latter is the idea that identity categories like race and gender marginalize important intersecting differences. For example, many have argued that the concept of “feminism” has suppressed the experiences of women of color in favor of white women’s experiences and issues.

Class 18: Critique of Feminists

Synopsis p. 354

Angela Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581 (1990) pp. 1-16

Class 19: Intersectionality

Kimberle Crenshaw, Demarginalizing the Intersection Between Race and Sex, 1989 U. CHI. LEGAL FORUM 139 (1989) (p. 357)

Class 20: Coalitions Between FemCrits and RaceCrits

Leti Volpp, Feminism v. Multiculturalism, 101 COLUM. L. REV. 1181 (2001)

VII. CRITICAL RACE THEORY AND POSTMODERNISM

In this highly theoretical set of articles, we will talk about postmodernism and its effect on critical race theory. Postmodernism is an intellectual position that criticizes the universalism and ostensible objectivity of many modern metanarratives—Marxism, Freudian psychological theory, scientific enlightenment, natural law, etc. We will explore whether postmodernism supports or undercuts many of the assumptions of critical race theory.

Class 21: Postmodernism and Deconstruction

Synopsis (p. 440)

Daria Roithmayr, Deconstructing the Distinction Between Merit and Bias, 85 CAL. L. REV. 1449 (1997) pp. 1-7, 9-18

Class 22: Racism and Construction of the Body

Iris Marion Young, The Politics of Identity, in JUSTICE AND THE POLITICS OF DIFFERENCE (1990)

Class 23: Political and Economic Geography

Richard Ford, The Boundaries of Race: Political Geography in Legal Analysis 107 HARV. L. REV. 1843 (1994) (p. 449)

VIII. OUTSIDE THE BLACK-WHITE PARADIGM: LAT-CRIT THEORY, CRITICAL ASIAN SCHOLARS AND GLOBAL CRITICAL RACE FEMINISM

In the mid-1990s, critical race theory scholars split again into several off-shoots. Scholars who argued that CRT had privileged both black and heteronormative positions led to the formation of LatCrit theory. Within that movement, scholars wrote developed an AsianCrit position, and FemCrits of color moved to form global critical race feminism. Many of the first-wave Race Critics attended the early conferences of LatCrit, but stopped attending when they perceived the lack of intellectual lines of inquiry or a commitment to critical scholarship.

Class 24: LatCrit Theory

Francisco Valdes, Lat-Crit: A Conceptual Overview (adapted from Afterword—Theorizing OutCrit Theories: Coalitional Method and Comparative Jurisprudential Experience RaceCrits, QueerCrits and LatCrits, 53 U. MIAMI L. REV. 1265 (1999))

Class 25: Asian-American Critical Scholarship

Robert Chang, Towards an Asian-American Legal Scholarship: Critical Race Theory, Post Structuralism and Narrative Space, 81 CAL. L. REV. 1241 (1993) pp. 1243-1266

Class 26: Global Critical Race Feminism

Laura Ho, Catherine Powell and Leti Volpp, Disassembling Rights of Women Workers Along the Global Assembly Line in GLOBAL CRITICAL RACE FEMINISM (Wing ed.). Go to Page 377 in the E-library version of this book.

IX. RACE AS PERFORMANCE

During the late 1990s, scholars began to theorize more concretely about the way in which race could be both “real” and constructed from social expectations. Drawing from postmodern literary theory in the arts, scholars noted that race in many respects could be viewed as a performance for particular audiences—the workplace, the courtroom, for example. Importantly, scholars also noted that whiteness, as a racial performance, could be performed, but from a position of power.

Class 27: Working Identity

Devon Carbado and Mitu Gulati, Working Identity: 85 CORNELL L. REV. 1259 (1999) pp. 1260-78

Class 28: Litigating Whiteness

Ariela Gross, Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South, 108 YALE L.J. 109 (1999) Introduction and pp. 156-177

Class 29: Covering

Kenji Yoshino, Racial Covering in COVERING (2006).

X. RACE, SEXUALITY AND QUEER THEORY

In conjunction with the formation of LatCrit (based in part on a perceived heterosexism of CRT,) various scholars began exploring the intersection of race and sexuality. Some perceived Queer Theory and other Lesbigan movements to privilege white positions. Others called for a coalition.

Class 30: Conflict between Sexual Orientation and Race

Darren Hutchinson, Gay Rights for Gay Whites? Race, Sexual Identity and Equal Protection Discourse, 85 CORN. L. REV. 1358 (2000) pp. 1-13

Class 31: Conflict II

Frank Valdes, Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory and Politics of Sexual Orientation, 48 HAST. L. J. 1293 (1997) Introduction and Parts I and III

Class 32: A Call for Coalition

Peggy Russell, Lesbian, Gay and Bisexual Rights and “the Civil Rights Agenda,” 1 AFR. AM. L. AND POLICY REPORT 33 (1994) Introduction and Parts II and IV

XI. RECONSTRUCTION: WHAT DO YOU GET FROM IDENTITY POLITICS?

Critical Race Theory scholars were late (if there at all) in picking up the second theme of CRT—reconstruction and reconfiguration of law to advance specific political commitments. Many of LatCrit scholars proposals looked very much like traditional civil rights reforms. Scholars outside of the CRT movement, however, engaged in a debate about the reconstructive and remedial implications of identity politics, and the intersection of these issues with class.

Class 33: Remedies I

Nancy Fraser, From Redistribution to Recognition: Dilemmas of Justice in a Post-Socialist Age pp. 97-112

Class 34: Remedies II

Iris Marion Young, Unruly Categories: A Critique of Fraser’s Dual Systems Theory

Class 35: Identity Politics

Richard Ford, Identity Politics or Politics as Identity? 1 UNBOUND 53 (2005)

XIII. RACE AND CULTURE: A DEBATE

Class 36: Antidiscrimination Law and Culture

Richard Ford, Race as Culture: Why Not? 47 UCLA L. REV. 1803 (2000)

Class 37: A Response to Ford

Leti Volpp, Righting Wrongs, 47 UCLA L. REV. 1815 (2000) Part I only

Class 38 [No class]

XIV. STUDENT PAPERS

Class 39

Class 40

Class 41

Class 42