

CRITICAL RACE THEORY
Professor Daria Roithmayr
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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 (if a hyperlink is not provided, these more recent materials are designated in the assignment as “online” and located at www.dariaroithmayr.com under “Scholarship and Teaching,” organized alphabetically.)

OBJECTIVES

At the end of the class you should:

- Have a sophisticated understanding and knowledge about the intellectual history of Critical Race Theory, as it has developed in U.S. legal scholarship.

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

INTRODUCTION TO THE COURSE

This class focuses on Critical Race Theory, a radical left intellectual and political movement focusing on race and racism that emerged in law schools in the late 1980s. We will spend much of our time tracing the intellectual history of the movement through key writings that formed the center of the movement. We will investigate the emergence of CRT's major intellectual and political commitments, as well as its political split-offs, renegades, and internal dissenters. We will also discuss at length the development of a trenchant critique by liberal and conservative scholars.

In the context of tracing the movement’s intellectual history, we will spend time dissecting and critiquing critical theory concepts like intersectionality, racial essentialism and interest convergence. We will also cover specific legal topics, like police brutality, affirmative action in education, and immigration.

What is Critical Race Theory? Beginning in the late 1980s, scholars of color developed a radical position on race and law that simultaneously critiqued radical left legal scholarship on class (the CLS movement – critical legal studies) and criticized with equal vigor conventional civil rights jurisprudence. Critical race theorists argued that critical legal paid

too much attention to class and not enough to race; likewise, CRT scholars critiqued civil rights jurisprudence for being too reformist and overly narrow in its dominant focus on intentional discrimination.

Drawing from those beginnings, CRT scholarship has advanced two central intellectual and political commitments, both of which we will discuss at length in class:

(i) The liberal legal tradition that governs our approach to law in fact reproduces racial inequality and white supremacy. This is true even for and perhaps especially for US anti-discrimination law. For example, CRT scholars argue that the civil rights legislation of the 1960s (Title VI, VII and VIII) adopted too narrow a focus on remedying intentional discrimination, rather than a broader focus on the structural processes (school financing, segmented labor markets, residential segregation) that reproduce racial inequality;

(ii) Notwithstanding the first premise, law can and should be used to dismantle white supremacy and to empower communities of color. For example, aggressive equal protection law could be used to address structural processes like white flight that reproduce racial inequality.

In connection with both intellectual premises, Critical Race Theory explicitly adopts a radical/left political commitment to redistribution and racial emancipation. Indeed, because the movement adopts an explicitly political agenda, CRT has drawn fire for mixing academics with politics, a critique that we will discuss. We will also spend time discussing critiques of radical identity politics, storytelling and other positions associated with CRT.

GRADES

Students will choose between writing a twenty-five page paper or three ten-page papers on topics of their choice. (The twenty-five page paper option may be used to fulfill your substantial research project and the ten-page papers may be used to fulfill your substantial writing requirement.) Reaction pieces will constitute part of the course evaluation. Finally, a significant percent of the course grade will come from class attendance and participation. Come to class expecting to participate in a vigorous discussion, and to have your views challenged!

More specifically, grades will be assessed according to the following factors:

- + Attendance, class participation and discussion throughout the semester: 25%
- + Reaction papers: 10%
- + Student Paper(s): 65%

CLASS PARTICIPATION AND DISCUSSION

The success of this seminar depends heavily on class participation. Class attendance and participation are mandatory (see below for details). A full twenty-five percent of your grade will come from attendance,¹ class 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.

WEEKLY REACTION

Ten percent of your grade comes from your reaction papers. At the end of the course, you should have submitted fourteen reaction papers. You can choose for which classes you will submit entries. For that class reading, you will be asked to submit by e-mail by at least half an hour *prior* to the class a document one page or less in length articulating your reaction

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

to the assigned reading – whether you find the argument convincing and why, whether you had a strong negative reaction, connections between the reading and current events and the way the material’s arguments might be extended. (I like to draw on the reaction papers in prepping for class, hence the half hour advance.)

NOTE: Please send papers in Word format from the *same email address consistently* to droithmayr@law.usc.edu. Label the entry in the subject heading of the email like this: “CRT REACTION PAPER #1– this will make it easier for me to grade. You should turn in your weekly reaction paper no later than a half hour prior to the relevant class.

STUDENT PAPERS

Sixty-five percent of your final grade will come from the grades you receive on your writing requirement. You will choose between completing at least a twenty-five page article or three ten-page papers, either option of which will be evaluated in terms of the timeliness and the substance of your assignment.

Papers will be graded on the basis of the following criteria:

- Clarity of your central argument(s). How clear and specific is (are) your central argument(s)? Ideally, this central argument should appear in a short one or two paragraph abstract of the paper to appear at the beginning of the paper(s). Have a sentence in your paper that begins with the phrase “This paper will argue that...”
- Contextual background and support. Do you explain why your argument is timely and why readers should care about it? How well do you situate your paper in the existing literature on the subject? How well do you supply the necessary context—history, empirical data—to aid readers in understanding both your topic and your analysis?
- Persuasiveness and strength of your argument. How well do you develop the argument using supporting analysis, existing research or data, or other methodology? How strong and persuasive is the argument that you set out? Do you choose the strongest line of argument?
- Originality and creativity. How novel or fresh is your central argument and supporting analysis or interpretation?
- Consideration of counterargument. How well do you anticipate and respond to potential counterarguments from fellow travelers or the opposite side of the aisle?
- Mechanics and format. How clear, organized and well-structured is your writing? How well have you adhered to Bluebook conventions in your footnotes? How free of typographical or grammatical difficulties is your writing?

Paper requirements:

I. Twenty-five Page Option: For the twenty-five page option, 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 (by critiquing it or by developing an argument that draws on its insights, for example) and not just a topic that deals with race and the law. Papers that merely review already existing literature are also not appropriate for this class assignment.

The following deadlines and grade weights apply:

Central Argument and Roadmap: Friday of Week 4– 15% of paper grade

First Draft: Friday of Week 7 – OPTIONAL

Final Draft: Last day of exams by 5:00 p.m. – 85% of paper grade

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

1. Central Argument and Roadmap:

You are asked to submit a central argument and roadmap early in the semester. Start thinking about this assignment now. Read the introduction to the book carefully to get a sense of what critical race theory is. Skim through the articles in your reader and think about topics that interest and inspire you. When you have chosen a topic, think about what will be your central argument. Then do a more detailed round of research to make sure no one has already written a paper advancing your central argument.

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

“This paper 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 provides important theoretical background for the argument. This part discusses the theoretical difference between perpetrator and victim perspectives. Part II applies the binary framework to recent Supreme Court decisions. This part argues that the Equal

Protection clause supports the victim perspective as well or better than the perpetrator perspective. This part also argues that contemporary anti-discrimination law might well have adopted the victim perspective rather than the perpetrator perspective. 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."

You can see that a fair amount of work goes into the topic statement. By the time you submit your topic, you should already have done enough research to determine that your argument is original, and enough thinking to flesh out both the tentative argument and the roadmap. You must include both the central argument and the roadmap in your submission. You will integrate both of these in the introduction of your first draft. Start early--students who leave this assignment until the last minute report that it is pretty hard to come up with a central argument and roadmap on the fly.

2. First Draft (Optional): If you would like me to give you feedback on your first draft, it should approximate as much as possible a final draft in length, citations and completeness. 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 your central argument and roadmap. For helpful examples, check out the introductions in the papers in your reader.

3. Office Meeting: Whether or not you turn in a first draft, you are required to meet with me at some point between the submission of your topic and your final draft. Most students find it most helpful to set up a meeting around the rough outline stage, once they have sketched out the paper's central argument (see above) and roadmap and filled in the roadmap a bit.

4. Final Draft: Your paper should be complete and polished, in correct blue-book format for research papers with footnotes. If you have received comments on the first draft, these should be addressed or explained.

II. Ten-Page Paper Option

For the ten-page paper(s) option, you are asked to write three short papers of at least ten pages in length (including footnotes) on three critical race theory topics (see the above discussion on either developing or critiquing a critical race theory argument for more guidance) that appear in the readings or as a topic covered in the syllabus. As before, you can choose to critique the material we read for class, or to extend the argument to a specific topic area, but your argument must be original. For each paper, you are expected to support the argument with appropriate research and analysis.

This option is a bit more subject- and time-constrained: you should submit your ten page paper no later than twenty-one days (including weekends and all holidays) after the particular topic that you are writing about is covered in class.

Let me encourage you to email me your topic prior to beginning your writing process. When you email me the topic, you should sketch out very briefly the argument you will make. Your submissions should include a statement of your central argument in a format that begins with the phrase “I will argue that...” So for example, here is a topic submission that might have preceded a critique of Alan Freeman’s article on antidiscrimination law.

“I will argue that Freeman’s argument on the ‘victim’ perspective, which focuses on the effects of racism on the victim, unnecessarily ignores the possibility of a more expansive reading of antidiscrimination law, in particular with regard to the affirmative obligations of Title VII in remedying past discrimination in housing markets.”

You are required to meet with me on one of your three papers, to get feedback after you submit it. Strategically, most people will find it helpful to arrange a meeting after the first paper of the three.

LATE POLICY

While I hate to be overly harsh, I have at times had problems with late papers and assignments. For all written assignments, including reflection pieces and papers, the following policy applies. Unless you get an extension *before* the deadline, I am compelled to deduct points in the following amounts for assignments turned in after the deadline: 30% of the value of the assignment on the first day, and 20% for each day thereafter. I am VERY generous with extensions if you ask *before* the deadline and you have a decent reason. 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. I will review special circumstances that do not involve health on a case-by-case basis. Technological difficulties will not be considered as an adequate special circumstance.

ATTENDANCE AND CLASS TIME

Class attendance is very important. I will lecture briefly at the beginning of each class, so that we are all on the same page with the material theoretically. The remainder of the class will be small or large group discussion, exercises, activities and problem-solving. As noted above, class attendance and participation count towards your grade. If you accrue more than three unexcused absences, you will need to meet with me before you are allowed to continue the course.

ASSIGNMENTS

I. PRECURSORS: CRITICIZING CIVIL RIGHTS DISCOURSE

This material discusses critical race theory work written before the movement officially formed (in 1989). Early work by critical legal studies scholars criticized anti-discrimination law for operating to reproduce the power of discriminatory perpetrators rather than helping the victims of discrimination. Alan Freeman's work criticized civil rights law for focusing on the perpetrator rather than the victim. 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. Read the Introduction assigned in Class 1 (and all the introductions to sections assigned) carefully, as a great deal of the movement's intellectual history is summarized in these introductions. [Note: All page numbers refer to the reader. Many online articles will not be assigned in their entirety.]

Class 1:

Introduction

Introduction in *Critical Race Theory: Key Writings* (hereinafter "Reader") (p. xiii)

Synopsis of Part I in Reader, p. 2

Radical Critique of Anti-discrimination Law

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

Class 2:

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. Disagreements erupted between CRT and CLS over the question of individual rights. As the readings make clear, CLS took the position that legal rights were indeterminate and served as a means to consolidate power. In response, CRT argued that rights had been pragmatically and symbolically important during the 1960s civil rights movement.

Class 3:

CLS Rights Critique

Mark Tushnet, "An Essay on Rights," 62 *TEX. L. REV.* 1363 (1984) (online)

Class 4:

CRT Response I

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

Class 5:

CRT Response II

Patricia Williams, ALCHEMY OF RACE AND RIGHTS, Chapter: The Pain of Word Bondage, (Online)

III. CRITIQUE OF RACIAL LIBERALISM AND THE COLOR-BLIND PARADIGM

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 modern civil rights theory. We will discuss this critique of colorblindness as well as several alternative radical paradigms developed by critical race theorists, including black nationalism.

Class 6:

Critique of the Color-blind Paradigm

Synopsis in Reader (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 7:

Colorblindness in Law Firms

Devon Carbado and Mitu Gulati, "The Law and Economics of Critical Race Theory," 112 YALE L. J. 1157 (2003) (Online) (Skim Part III, Read Part IV).

Class 8:

Alternatives to Colorblindness

Black Nationalism

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

IV: CRITICAL RACE THEORY AND LEGAL DOCTRINE

Critical race theorists argue that legal doctrine does much work in reproducing racial inequality and racial subordination. Some scholars also suggest that it is possible to hijack pre-existing legal doctrinal categories, like "property" or "antitrust," to serve 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. In addition, we will discuss whether one could use

the concept of antitrust and monopoly to critique the structural inequality of modern socio-economic arrangements.

Class 9:

Property Doctrine

Synopsis in Reader, p. 201

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

Class 10:

Doctrinal Intent Requirements

Jerry Kang, "Trojan Horses of Race," 118 HARV. L. REV. 1489n (2005) (online) (read carefully pp. 1491-1536 and skim rest)

Before class, please complete the online test for racial bias at

www.implicit.harvard.edu. Click on Research and choose the racial bias test.

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 have used the method of narrative because in their view, doing so questions the objective and neutral position of scholarship, and permits scholars to formulate arguments not currently recognized within the framework of legal scholarship. CRT came under significant fire from scholars outside the movement, who argued that narrative was not well-suited to scholarly objectives, and weakened the claims of the movement. We will discuss the academic controversy over narrative forms of scholarship.

Class 11:

Storytelling I

Margaret Montoya, "Mascaras y Trenzas," 15 CHICANO-LAT. L. R. 1 (1994) (online)

Class 12:

Storytelling II: Critique of Storytelling

Daniel Farber and Suzanna Sherry, BEYOND REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997) (Online)

Richard Posner, The Skin Trade (Online)

VI. THE INTERSECTION OF RACE, GENDER and SEXUALITY

In these materials, we will discuss the intersection of race and gender, and the concept of "essentialism," the idea that identity categories like race and gender neglect important differences within the category. Many have argued that the concept of "feminism" has ignored the way that white women's experiences differ from the experiences of women of color. We will study intersectionality as a set of arguments about the power of labeling identity and the legal claims that correspond to identity categories.

Class 13:

Critique of Feminists

Synopsis in Reader, p. 354

Angela Harris, "Race and Essentialism in Feminist Legal Theory," 42 STAN. L. REV. 581 (1990) (Online) (read closely Intro and Parts II and IV, skim Part V.)

Class 14:

Intersectionality

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

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. Grossly oversimplified, postmodernism is an intellectual school of thought that criticizes universalism and the ideas of objective knowledge and truth that form the core of many "grand theories" like Marxism, Freudian psychological theory, scientific enlightenment, natural law, etc. We will investigate deconstructive arguments in particular, and will explore whether postmodernism supports or undercuts the assumptions of CRT.

Class 15:

Deconstruction Lite

Gary Peller, "Reason and the Mob," TIKKUN (online)

Synopsis in Reader, p. 440

Class 16:

Geography and Political Economy

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 and CRITICAL ASIAN SCHOLARS

In the mid-1990s, Critical Race Theory scholars split again into several off-shoots. A number of scholars argued that CRT had privileged both black and "heterosexist" positions; this grouping led to the formation of Lat-Crit theory. Within the Lat-Crit umbrella, another small group of scholars developed an Asian-Crit position. Likewise, Fem-Crits of color moved to form global critical race feminism. Many of the first-wave Race-Crits attended the early conferences of Lat-Crit, but were uncomfortable with the shift to a separate analysis for each group. We will discuss whether the spin-offs were intellectually supportable and politically a good idea.

Class 17:

Lat-Crit Theory

Ian Haney Lopez, "Race, Ethnicity and Erasure: The Salience of Race to Lat-Crit Theory," 85 CAL. L. REV. 57 (1996) (online) Skim Intro, read closely pp. 72 (top page number) to 92.

Class 18:

Asian-American Critical Scholarship

Mari Matsuda, "We Will Not Be Used: Are Asian-Americans the Racial Bourgeoisie?" In WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER AND THE LAW (read pp. 149-59) (1997) (online)

Vijay Prashad, Anti-D'Souza, "The Ends of Racism and the Asian American," 24 AMERASIA (read pp. 23-40) (1998) (online)

IX. RACE, SEXUALITY AND QUEER THEORY

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

Class 19:

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) (Online)

Class 20:

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) (Online)

X. Structural Inequality

More recently, Critical Race Theory has taken up the question of structural inequality: the argument that even in the absence of explicit or implicit bias, structures (like the market, meritocracy, bureaucratic process, institutional scripts, social and economic networks) reproduce racial subordination. We will investigate notions of merit and claims about social and economic networks in particular, and debate arguments for reparations in the context of these structural claims.

Class 21:

Critique of Merit

Duncan Kennedy, CULTURAL PLURALIST CASE FOR AFFIRMATIVE ACTION, 1990 DUKE L. J. 705 (1990) (p 159)

Class 22:

The Self-Reinforcing Nature of Structural Inequality

Daria Roithmayr, REPRODUCING RACISM, Introduction (2014) (online, click “Introduction” available at <http://nyupress.org/books/9780814777121/>)

Class 23:

The Case for Reparations

Ta-Nehisi Coates, “The Case for Reparations,” THE ATLANTIC MAGAZINE (2014) (available at <http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>)

X. CURRENT TOPICS

One of the critiques of Critical Race Theory focuses on the intrinsically constraining limitation of a movement situated partly if not wholly in law. Critics suggest that more radical formulations of resistance to racial subordination can’t be generated from within a scholarly space that is at least nominally committed to recognizing the legitimacy of law as a significant priority. We will explore the role of radical organizing in the context of Ferguson and the Black Lives Matter movement, testing both the movement and its relationship to law to discern the impact of the above-described critique. We will also take think about the way in which critical race theory’s commitments might translate to political and doctrinal positions on the hot issues of (i) immigration and pejoratively labeled “anchor babies,” and (ii) mass incarceration, both topics about which an entire quarter of reading could be devoted.

Class 24:

The Ferguson Report

Department of Justice (available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf)

Class 25:

Black Lives Matter

“The Long Repressed History of Black Leftism,” AL JAZEERA, July 28, 2015, available at:

<http://america.aljazeera.com/opinions/2015/7/the-long-repressed-history-of-black-leftism.html>

Claudia Rankine, “The Condition of Black Life is One of Mourning,” THE NEW YORK TIMES, June 25, 2015)

(available at <http://www.nytimes.com/2015/06/22/magazine/the-condition-of-black-life-is-one-of-mourning.html? r=0>)

Class 26:

Immigration

Leti Volpp, “Civility and the Undocumented Alien,” in CIVILITY, LEGALITY AND JUSTICE IN AMERICA (Austin Sarat ed. 2014) (online) (skim intro, skim more closely pp. 83-89, read closely from pp. 89 to end).

Class 27:

Politics and Friendship: A Discussion with Jacques Derrida

(Centre for Modern French Thought, University of Sussex, 1 December 1997)
(Online at <http://www.livingphilosophy.org/Derrida-politics-friendship.htm>)

XI. Student Papers

Class 28-30.