

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 key concepts related to Critical Race Theory, and to write a twenty-five page paper making an original argument related to Critical Race Theory.

Be able to generate arguments from the critical race theory perspective, and critiquing the critical race theory perspective, on particular timely topics like reparations, affirmative action, police brutality, incarceration, structural racism, etc.

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. Finally, we will develop our own diagnosis of where the movement is going and should go.

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. We will pay special attention to the topic of white backlash and state violence, in light of recent events.

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 studies 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 relentless focus on intentional discrimination.

Even as it mounted a critique of CLS and civil rights style liberalism, CRT inherited much from those two movements. From CLS, CRT inherited the view that law is neither neutral nor apolitical. In a CRT framework, some scholars argue that law plays a central role in structuring power relations that structurally favor those at the top of the racial hierarchy. From civil rights jurisprudence, CRT inherited a commitment to analyze the legal landscape through a lens that put race at the center of the inquiry.

More generally, 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 operates often to reproduce 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 an overly narrow focus on remedying intentional discrimination that leaves unaddressed structural inequality. These scholars point out that law could have adopted a much broader approach that would bring law to bear on those 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, some scholars have argued that aggressive equal protection law (for example a more robust disparate impact doctrine) could be used to address the persistent effects of structural processes like white flight.

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 and adopting a non-objective, non-neutral approach, a critique that we will discuss. We will spend our time tracing the emergence of these two commitments in the field. We will also spend time discussing critiques of radical identity politics, storytelling and other positions associated with CRT.

GRADES

Students will write a 25-page paper. 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: 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, 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 about the assigned readings or about 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 will come from your reaction papers. At the end of the course, you should have submitted nine 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 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: “ROITHMAYR CRT REACTION PAPER #1– this will make it easier for me to grade at the end. 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 complete a 25-page article, which will be evaluated in terms of the timeliness and the substance of your assignment.

The paper 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)? In the 25-page option, ideally, this central argument would appear in a short one or two paragraph abstract of the paper to appear at the beginning of the paper(s). If appropriate, have a sentence in your paper or writing assignment that begins with the phrase “This paper (op-ed, letter) 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 or writing in the existing literature on the subject or in current events? 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 the appropriate writing conventions (for public writing) or Bluebook conventions in your footnotes for the 25-page option? How free of typographical or grammatical difficulties is your writing?

Paper requirements:

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 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.

All paper assignments listed below in this section are due by 5 PM on the date indicated. The following deadlines and grade weights apply:

Central Argument and Roadmap: Sept. 30th– 15% of paper grade

First Draft: Nov. 20th – 30% of paper grade

Final Draft: Last day of exams by 5:00 p.m. – 55% 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 very 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, work on articulating a discrete and well-defined 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 narrower 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: Your first draft 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. Feedback and correspondence: Whether or not you turn in a first draft, you are required to incorporate feedback from me about the paper. 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.

You are encouraged to publish your writing, but you are not required to publish for credit!

LATE POLICY

Assignments are due at 5 PM on the day of the deadline. I am VERY generous with extensions if you ask *before* the due date and you have a decent reason. Please let me know as soon as any difficulty arises that might interfere with your meeting your deadlines.

ATTENDANCE, LAPTOPS AND CLASS TIME

Class attendance is important. I will lecture briefly at the beginning of each class, or I will circulate a recorded lecture, 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.

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 focusing narrowly on the intent of discriminatory perpetrators rather than more broadly on the impact of inequality on the victims of discrimination. Alan Freeman's work pointed out that the narrower approach left structural inequality, like white flight, wholly unaddressed by law. Derrick Bell's work argued that the much-heralded decision in *Brown v. Board of Education* came only because it advanced the material interest of whites in fighting communism and expanding the country's economy.

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

CRT emerged as part of a critique of critical theory that focused on power without focusing on race. In the late 1970s, legal scholars organized a genre of scholarship and an accompanying political movement in law schools called Critical Legal Studies (CLS.) In the late 1980s, disagreements erupted between CLS and a group of emerging scholars who were calling themselves critical race theorists. As the readings make clear, CLS took the position that legal rights were indeterminate and served as a means to consolidate material and social power. In response, CRT scholars conceded the critique but argued that rights had nevertheless 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. Scholars argued that a focus on colorblindness and intentional discrimination obscured a broader view of systematic racial inequalities in labor, wealth, housing, health care and other material distributions. 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 Pt II, Read Pt. III).

Class 8:

Alternatives to Colorblindness

Black Nationalism

Gary Peller, "Race Consciousness" 1990 DUKE L. REV. 758 (1990) (p. 127)
Read Intro, Skim Pt. I, Read Pt. II and III B.

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 expansively interpret legal concepts like "property" or "bias" to more aggressively address systemic racial inequality. (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 provocative idea that whiteness can be described as a form of legal property.

Class 9:

Property Doctrine

Synopsis in Reader, p. 201

Cheryl Harris, "Whiteness as Property," 106 HARV. L. REV. 1709 (1993) (p. 276)
(Read Pt. I and Pt. II)

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 storytelling because, in their view, using a personal narrative form puts up for discussion whether scholarship is as neutral and objective as it claims to be. 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)

Skim 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 argument that identity categories like race and gender overgeneralize and neglect important differences within the category. Many have argued that the conversations about gender have 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 pluses and minuses of identity politics as a means of organizing for social change.

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 discuss whether arguments about objectivity end up undercutting CRT's credibility.

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. IDENTITY NOT IN BLACK AND WHITE: LAT- & ASIAN-CRIT THEORY

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 and Sexuality

Queer theory and critical race theory intersected early on, but the intersection took on increased salience when the gay rights movement launched its campaign for marriage inequality. Queer/critical race theorist Russell Robinson's work represents a critical intervention into the marriage equality movement.

Class 19

Russell Robinson, Marriage Equality and Post-Racialism, 61 UCLA L. Rev. 1010 (2014) Read Pts II and III

<https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=3486&context=facpubs>

IX. 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 20:

The 1619 Project (New York Times August 2019)

<https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html>

(I will email you a pdf of the NYT stories, which are very hard to read online)

Critiques of the 1619 Project(online)

Class 21:

The Self-Reinforcing Nature of Structural Inequality

Daria Roithmayr, REPRODUCING RACISM, Introduction (2014) (online, click

“Introduction” available at <http://nyupress.org/books/9780814777121/>)

Class 22:

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. RACE AND POLICING

The topic of police brutality and race has exploded into view in the last year, owing to the death of George Floyd and social movements in cities across the globe protesting police brutality. We will read two key critical race theory authors who look at both the structural and intentional aspects of police violence

Class 23

Paul Butler, Chokehold: Policing Black Men (excerpt online)

Alex Vitale, The Limits of Police Reform in The End of Policing (excerpt online).

XI. CRT and Resistance

We will explore several topics of relevance to the country's modern racial landscape. We will look at Black Lives Matter and the role of radical organizing in the context of social movements aimed at theorizing and resisting state violence. If we have time, we will also examine the rhetoric of civility and oppression as that rhetoric plays out in conversations about undocumented immigrants, of relevance for contemporary discussions about bans and the building of walls.

Class 24

Black Lives Matter

Chapters 6 and 7, Keeanga Yamhatta Taylor, From Black Lives Matter to Black Liberation (online)

XII. Student Papers

Class 25 through 28.