**Critical Race Theory Fact and Fiction**

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**OUTLINE OF REMARKS**

1. **ORIGINS AND CONCEPTS SLIDE 1**

Critical Race Theory EMERGED IN LAW SCHOOLS IN THE LATE 1980S. IT FOCUSES ON THE ROLE OF RACE IN THE DEVELOPMENT OF THE LAW AND ITS ENFORCEMENT.

AT ITS OUTSET, CRT WAS CONTROVERSIAL AMONG LAW PROFESSORS. THAT NO LONGER IS THE CASE AMONG LEGAL SCHOLARS. INDEED, SOME LAW SCHOOLS TODAY REQUIRE EACH STUDENT TAKE A CRT COURSE TO GRADUATE. CRT SCHOLARSHIP HAS INFLUENCED THAT IN OTHER DISCIPLINES.

CRITICAL RACE THEORY RESPONDED TO THE **CLASS-BASED ANALYSIS** OF CRITICAL LEGAL STUDIES AND MORE LIMITED APPROACHES TO LAW REFORM. CRT REPRESENTS A DEEPER CRITICISM OF RACIAL INJUSTICE IN THE UNITED STATES. IT UNDERSTANDS RACE AS INTEGRAL TO THE STRUCTURE, SUPPORTED BY THE LAW OF U.S. SOCIETY. TAKING A SYSTEMIC APPROACH TO RACISM AND COMMITTED TO ENDING WHITE SUPREMACY, CRT REJECTED THE DOCTRINAL ANALYSIS OF THE LAW.

CRT IS ONE OF MANY WAYS OF ANALYZING THE LAW. FOR EXAMPLE, **LAW AND ECONOMICS** INCORPORATES THE TOOLS OF ECONOMIC ANALYSIS TO LEGAL RULES.

1. **SCOPE AND BREADTH OF CRT SLIDE 2**

CRT AT ITS ONSET WAS CRITICIZED FOR ONLY FOCUSING ON BLACK/WHITE RELATIONS, THE BLACK/WHITE PARADIGM. CRT HAS EXPANDED TO INCLUDE SUBORDINATION OF **LATINA/OS,** **ASIANS,** **INDIGENOUS PEOPLES,** AND **OTHER COMMUNITIES OF COLOR.**

THE RELEVANCE OF RACE TO SOME BODIES OF THE LAW IS OBVIOUS.

* **SLAVERY:** ENFORCED BY LAW AND THE U.S. CONSTITUTION. MUCH PROPERTY AND CONTRACT LAW DEVELOPED OUT OF DISPUTES OVER SLAVES. THE LEGACY OF SLAVERY AFFECTS US TO THIS DAY.
* **JIM CROW AND SEGREGATION:** IN *PLESSY V. FERGUSON,* 163 U.S. 537 (1896), THE SUPREME COURT UPHELD SEGREGATION. IN *BROWN V. BOARD OF EDUCATION,* 347 U.S. 483 (1954), THE COURT OUTLAWED RACIAL SEGREGATION OF THE PUBLIC SCHOOLS.
* **ANTI-MISCEGENATION LAWS:** LAWS BANNING INTERRACIAL MARRIAGE REMAINED IN PLACE IN SOME STATES UNTIL *LOVING V. VIRGINIA*, 388 U.S. 1 (1967).
* **RACIALLY RESTRICTIVE COVENANTS:** PROHIBITED THE SALE OF REAL PROPERTY TO NON-WHITES. POPULAR IN MANY STATES UNTIL THE MID-20TH CENTURY.
* **CHINESE EXCLUSION LAWS:** DISCRIMINATORY IMMIGRATION LAWS, SUCH AS THE CHINESE EXCLUSION LAWS, WERE IN PLACE IN THE UNITED STATES FROM THE 1800S THROUGH 1965. DISCRIMINATION REMAINS, SUCH AS TRUMP ADMINISTRATION’S MUSLIM BAN. THE IMMIGRATION LAWS DISPARATELY IMPACT NONCITIZENS OF COLOR.
* **INTERNMENT OF JAPANESE**: U.S. CITIZENS AND IMMIGRANTS DURING WORLD WAR II. UPHELD BY *KOREMATSU V. UNITED STATES*, 323 U.S. 214 (1944).
* **“OPERATION WETBACK” (1954):** THE U.S. GOVERNMENT ENGAGED IN THE MASS DEPORTATION OF PERSONS OF MEXICAN ANCESTRY, CITIZENS AND IMMIGRANTS. TODAY, APPROXIMATELY 90% OF THE NONCITIZENS REMOVED EACH YEAR ARE FROM MEXICO AND CENTRAL AMERICA. MOREOVER, DEATHS OF MIGRANTS OCCUR REGULARLY ALONG THE U.S./MEXICO BORDER.
* **TREATMENT OF INDIGENOUS PEOPLE:** THE U.S. GOVERNMENT CONDUCTED WAR AGAINST TRIBES IN THE UNITED STATES. THE EXTERMINATION EFFORT LED TO THE RENAMING OF UC HASTINGS.

**CRT DOES NOT LIMIT ITS ANALYSIS TO RACE. SLIDE 3**

* **INTERSECTIONALITY**—SOME PERSONS FACE DISCRIMINATION ON MORE THAN ONE GROUND. WOMEN OF COLOR, FOR EXAMPLE, FACE DISCRIMINATION ON ACCOUNT OF RACE AND GENDER.
* MANY CHARACTERISTICSCONTRIBUTE TO AN INDIVIDUAL’S IDENTITY. AND MAY LEAD TO DISCRIMINATION AND SUBORDINATION IN SOCIETY**-- CLASS, GENDER, IMMIGRATION STATUS, DISABILITY,** AND **OTHER CHARACTERISTICS.**

1. **COMMON FEATURES OF CRT ANALYSIS. SLIDE 4**
2. **WHITE SUPREMACY**—LAW HISTORICALLY HAS SERVED TO REINFORCE WHITE SUPREMACY.
3. **INTERSECTIONALITY**—DISCUSSED PREVIOUSLY
4. **INTERDISCIPLINARY APPROACH SLIDE 5**
5. **HISTORY**
6. **SOCIAL SCIENCE**
7. **ETHNIC STUDIES**
8. **ECONOMICS**
9. **POLITICAL SCIENCE AND MORE.**
10. **VOICE OF COLOR AND STORYTELLING:** NARRATIVE SCHOLARSHIP.
11. CRT MAY PROVE USEFUL IN ANALYZING A VARIETY OF IMPORTANT LEGAL ISSUES **SLIDE 6**
12. **CRIMINAL JUSTICE**: Analyzes systemic racial racism in the criminal justice system long before George Floyd, Breonna Taylor. Michelle Alexander, The New Jim Crow: The Mass Incarceration in the Age of Colorblindness (10th anniversary ed. 2020).
13. **VOTING RIGHTS**
14. **HOUSING**
15. **EDUCATION**
16. **HEALTH CARE**
17. **IMMIGRATION**
18. **COMPLICATING FACTORS: COLOR-BLINDNESS (RACE NEUTRALITY) OF LAW**

U.S. law today is mostly color blind. However, although the criminal laws generally do not mention race, the enforcement of the laws, such as through racial profiling, disparately affect people of color. Consider the demographics of U.S. prisons and universities.

1. **IMPROVEMENTS FOR PEOPLE OF COLOR OVER TIME:**

For example, *Brown v. Board of Education* (1954), ended Jim Crow. However, systemic racial injustices remain in our society. They include the modern de facto segregation of K-12 public schools and higher education, jails and prisons, and health outcomes.

1. **Misconceptions about CRT: Have led to states limiting the Teaching of CRT in the public schools SLIDE 7**

President Trump attacked CRT. That in turn, triggered efforts to ban the teaching of CRT in the public schools. CRT is not widely taught in the public schools.

**What (I Would Argue) Critical Race Theory is NOT**

1. Anti-White
2. Propaganda
3. Teaching Hate
4. **EXAMPLE: CRITICAL RACE THEORY AND CIVIL PROCEDURE. ALTHOUGH CIVIL PROCEDURE CAN BE VIEWED AS THE NUTS-AND-BOLTS OF THE CIVIL LITIGATION PROCESS, IT HAS RACIAL IMPACTS.**
5. **DIVERSITY OF CITIZENSHIP (AND ALIENAGE) JURISDICTION. DRED SCOTT V. SANDFORD, 60 U.S. 393 (1857) – A DIVERSITY OF CITIZENSHIP CASE.**
6. **DUE PROCESS – NOTICE AND OPPORTUNITY TO BE HEARD. POOR PEOPLE OF COLOR**
7. **CLASS ACTIONS -- TOOL FOR PEOPLE OF COLOR IN CIVIL RIGHTS, VOTING RIGHTS, PRISON RIGHTS, IMMIGRATION, ETC. CASES. *WAL-MART STORES, INC. V. DUKES,* 564 U.S. 338 (2011), CUT BACK ON CLASS ACTIONS.**
8. **PLEADING RULES LIMIT ACCESS TO THE COURTS.**

1. **JURY TRIALS -- A JURY PULLED FROM A CROSS SECTION OF THE COMMUNITY ADDS (1) LEGITIMACY; AND (2) DIFFERENT PERSPECTIVES FOR BETTER DECISIONMAKING. MANY EXCLUSIONS REMAIN, INCLUDING IMMIGRANTS, NON-ENGLISH SPEAKERS, FELONS, AND PREMEPTORY CHALLENGES.**

Q & A

**Resources**

1. Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction (3d ed. 2017)
2. A Guide to Civil Procedure: Integrating Critical Legal Perspectives (Brooke Coleman, et al. eds., 2022)