

# CRITICAL RACE THEORY

An Introduction

# Purposes / Goals for Today

- What is CRT and is it important?
- Introduce legal process and analysis to non-lawyers
- Examine new paradigms – esp. in looking at society and how it works
  - The unique perspective of those at the bottom
  - Asymmetrical relations and systems
  - How existing systems can perpetuate racism – without even trying

# ”Pre-test”

October 2022, Justice Kavanaugh asked attorney arguing to overturn affirmative action in college admissions:

- If preferences were given based on persons being descendants of slaves, would that preference be based on race?
- Yes \_\_\_\_\_?
- No \_\_\_\_\_?
  
- Will retest at the end.

# A Definition of CRT

- An **intellectual and social movement** and loosely organized framework of **legal analysis** based on the **premise** that **race is not a natural, biologically grounded** feature of physically distinct subgroups of human beings **but a socially constructed (culturally invented) category** that is **used to oppress and exploit** people of colour. Critical race theorists hold that **racism is inherent in the law and legal institutions** of the United States insofar as they function **to create and maintain social, economic, and political inequalities** between whites and nonwhites, especially African Americans. Critical race theorists are generally dedicated to applying their understanding of the institutional or structural nature of racism to the concrete (if distant) goal of eliminating all race-based and other unjust hierarchies. (Source: Encyclopedia Britannica)

# Genesis of CRT

- Extended from prior legal critiques - *Critical Legal Studies* (CLS) and the “*Legal Realist*” school before that – legal criticism is not new)
- Both CLS and CRT are **critiques of legal theories and actions** – the stuff of law schools and law journals
- But with real world circumstances and with consequences because the “law” is interconnected with society

# Critical Legal Studies (CLS)

- CLS is predicate for some of the concepts included in CRT but
- CLS focused on how those on top stay on top
- But CLS did not account for how those at the bottom stay there

# CLS Basics (the bare minimum)

- Major theme is “**indeterminacy** of law” – law is not
  - an underlying system that is consistent and produces right and just results
  - some built-in system awaiting discovery by scholars
- Rather law is the result of the haphazard outcome of the battle of competing political interests, with results based on **political power**
- Law does more than describe the **social and economic** order – it produced and reinforces the status quo of **privilege and subordination**

# Recent Illustrations

- <https://www.usatoday.com/story/news/nation/2023/04/18/child-labor-laws-targeted-lawmakers-11-states-see-weaken/11682548002/>
- Clarence Thomas and his gifts
- Recent bailouts of banks



# What Happened to CLS

- Did not progress very far:
- Too controversial and threatening
  - An attack on the status quo, esp. viz people with wealth and power
  - By calling so much into question, it suggested too much uncertainty and discomfort
- Conceptual – it asked too much (by stressing the impossible?):
  - social experimentation to find best results
  - a truly robust or high energy democracy (an involved citizenry)
  - too theoretical and insufficiently grounded
- But it did → CRT

# Critical Race Theory (CRT)

- **Law** - includes rules (statutes, regulations, etc.) and enforcement of rules (policing, judicial decisions, zoning, voting rules)
- **Race** – an elusive concept that is socially defined (more later)
- CRT (like CLS) has no set doctrine or method and the criticism is aimed at legal institutions and processes and connections to society
- CRT asserts that law is **not an unbiased referee**;
- Rather, the **law** is involved with writing & enforcing the rules of the game so that law is part of the structure of racism
- In fact, **law** (not biology) **created race** (more later)

# Overview

- Key elements of CRT
  - View from the bottom (not top down as law is usually done – even CLS did)
  - Focus is on groups rather than individuals to see effects of racism
  - See individuals not as autonomous actors but as members of groups
  - Groups are based on how and where they are actually formed, not artificially described groups
  - Look at past history and current circumstances
  - Myth busting
- The Goal / Interests of CRT
  - Understand how white supremacy came to be in America
  - To change that circumstance

# What is Racism

- **Racism is not** just an (irrational) actor(s) discriminating against a victim(s) in an observable way – racism is more than the actions of misinformed bigots
- Racism includes all of **the circumstances under which a subordinated group lives and how it is kept there** – racism is how society interacts with and affects Blacks (and similarly oppressed groups)

# One New Paradigm

- Perspective shift – to that of the victim (bottom up view)
  - Perpetrator view: racism is limited to acts inflicted on a victim by a perpetrator
  - Victim view: **racism is the conditions of existence in a perpetual underclass**
    - Objective conditions of life (jobs, money, housing, education, location of undesirable businesses or infrastructure, unequal policing)
    - Subjective consciousness associated with objective conditions - being made to feel inferior

# Remedies for Effects of Racism

- Solutions will differ based on each perspective
  - Perpetrator – neutralize the negative conduct → and all is well
    - Example: integration / desegregation
  - Victim – problem not solved until conditions of subordination are eliminated
    - Example: reparations
  - Affirmative action –
    - Perpetrator – a temporary remedy only needed until discrimination ends
    - Victim – a right that remains necessary until racism ends

# Where is CRT going?

- Proponents were / are not hopeful of changes in law or society
- With recent attacks on even the teaching Black history, they may have prescient
- DEI is Dead! :

[https://apple.news/AG8\\_JZfYMTDmS4wNt\\_4uaiQ](https://apple.news/AG8_JZfYMTDmS4wNt_4uaiQ)

# Some History

- Race was created and enforced over time – by law
- Status determined by labor status or country of origin (early America had plenty of “unfree” people) - there were different classes of persons
- Gradually blacks were pushed further down, reflecting their **political** and **economic** status
- But this class system did not clearly indicate that slavery was appropriate and the concept of “race” only arose later



# Slavery – the Birth of Racism?

- Slavery eventually needed to be enforced → enter the law:
- Constitution recognized and accommodated slavery (but did not really address it)
  - Slaves are the “3/5 of all other Persons” (Const. Art. I(3))
  - Runaway slaves recognized as property to be returned their owner
    - (Art. IV(3) of Constitution) and various “fugitive slave laws”
  - Ambivalence? Included the possibility of a future ban of the slave trade (no earlier than 1808) (Const. Art. I § 9) – but not slavery itself
  - That ban was enacted in 1808 and in 1820 slave trading became piracy

# Slavery Flourishes

- Did they hope slavery would disappear?
- Or were they just kicking the can down the road?

Whatever the intent was:

- Slavery grew instead – based on economic value of their production
- (Illegal) slave trading continued until thru 1850's

# Laws that Enforced Slavery also Created Race

- Statutes in nearly every state **defined race** – by racial classification
  - Noteworthy here: the absence of any sense of mixed race – it was “black or white”
  - This is unlike many other cultures and nations
- Slave codes also **denied Blacks several rights**, prohibiting them from:
  - Owning property (at that time focus on real property)
  - Being educated
  - Owning weapons
  - Traveling without permits
  - Testifying in court

# Laws that Enforced Slavery also Created Race

- Rules of descent for children (from the mother), hypodescent
  - general rule – children were the children and heirs of the father
  - but a new rule: children of Black women (slaves) were also deemed to be Black – and to be slaves – regardless of who the father was
  - this allowed subordination to flourish (discussed below)
  - also, a complete absence of any recognition of the possibility of Black men fathering children with white women
- Hypodescent was an important part of subordination of Blacks
- 2 rules at play:
  - Recognition – if African history present – you were Black
  - Descent – any such history made you Black (“one drop of blood” rule)

# Result of Rule of Hypodescent

- Metaphorically: white blood is unblemished and pure; black blood is a contaminated AND it overwhelms any white component (white blood cannot salvage black blood) – being White was important
- Thus a clear line between black and white that could not be crossed
- It made race immutable → conclusion that race is natural, scientific, and neutral (central to many later “scientific” justifications)
- It mattered because only Blacks could be slaves (inferior) and being White made a person superior - being White was important

# Civil War

- Opposition to slavery was not new – as indicated in the Constitution
- Tension between the states was growing – centered on slavery
  - slavery continued – and continued to be controversial
  - slave trade continued – based out of NYC – doubly controversial
  - Abolitionists became more vocal and powerful
  - Country was growing – a fear of loss of power by the slave states
- Then civil war
- Then the Civil War Amendments and Civil Rights Act

# After the Civil War – a Large Legal Effort to End Racism

- Civil Rights Amendments
  - 13<sup>th</sup> – abolished slavery
  - 14<sup>th</sup> – guaranteed privileges and immunities, due process, and equal protection
  - 15<sup>th</sup> – guaranteed the right to vote
- (First) Civil Rights Act

# And Then a Long Painful Failure

- Result – country largely unprepared (socially) for end of slavery and almost totally unwilling to permit integration
- (13<sup>th</sup>) Slavery and subjugation continued in new forms
- (14<sup>th</sup>) Courts eviscerated EP and P&I clauses
- (15<sup>th</sup>) Vote denied by various means



# Ramifications are still with us

- “Equal Protection” and “Privileges and Immunities” have never recovered
- Black and White still separate and distinct
- Racial subordination – persists, still enforced by law (e.g. courts:)
  - Then, judges accepted junk “scientific” theories that blacks were inferior – justifying slavery and later segregation
  - Now, judges assert that race is neutral – foreclosing remedies of any kind
  - Both approaches have served to continue subordination

# Possible and Actual Legal Definitions of Race

- Supreme Court has been presented with at 4 ideas of race:
- **Status-race** – race as an **indicator** of social status (and power)
- **Formal-race** – race as a (**neutral**) socially constructed category, unconnected to other categories or characteristics of race (culture, education, language, wealth)
- **Historical-race** – race as embodiment of **past and present** racial subordination
- **Culture-Race** – recognition of Black **culture and community**, the basis of cultural diversity

# What is Race Consciousness

- Race Consciousness – to examine race in all of its elements in law and society (this is what CRT is about)
- This is passe, if not taboo, now in light of “color-blind” constitution notion, which tries to avoid looking at race other than Formal Race
- But race consciousness was a hot topic 50-60 years ago
  - Integrationists vs. Black nationalists

# Conflicting Views on Race & Race Consciousness → Conflicting Views on Opposition to Racism

- Integrationists
  - Rejected idea of (re)distribution of power based on race because it assumed continuation of separate black and white communities
  - Source of racism is cognitive distortions of stereotypes and prejudices (perpetrator perspective)
  - Desired Remedy: eliminate social practice of discrimination which will lead to the elimination of the stereotypes and prejudice

# Black Nationalist View

- Black nationalists
  - Source of racism is **power** relationships (similar to CLS and Legal Realists)
  - Integration would **not** work
  - Integration reduced Black power
  - Integration was not worth giving up their own culture
  - Saw what happened to Blacks who integrated into White culture
  - Remedy: transform power relationships and provide reparations

# Example of the Different Viewpoints – School Desegregation

- *Brown v. Bd. Edu.* – agreement on the wrong (inferior schools), disagreement on the remedy (desegregation):
  - Integrationists – Yes
    - Same opportunity for all, no exclusionary acts
    - Courts had previously ordered schools to be improved – but they were not
  - Black Nationalists – No
    - It led to even less social power by destroying an organizational place in the Black community – the local schools
    - It would not work anyway – e.g. resegregation within schools
    - It forced Blacks to adopt White norms – subordinating Black culture to white culture

# Example of CRT Analysis: Race and Geography

- Persistence of racial housing segregation – and its continuing role in isolating, discriminating, and oppressing
- Self-perpetuating nature of geographical (housing) segregation
  - **Past** - Governmental policy and private action encouraged and enforced segregation creating the current circumstances
    - Restrictive covenants created and then enforced by the courts
    - FHA gave lower ratings to black neighborhoods and even classified them as nuisances so federal \$\$ was channeled to White neighborhoods and away from Black ones
    - Realtor actions and actions against realtors
  - **Present** - Race neutral policies now serve to maintain status quo – no new barriers needed – examples: zoning restrictions, wide price differentials

# So – How is the Status Quo Maintained

- Hypothetical (1) – assume:
  - Previously segregated society which created:
    - White neighborhoods - persons with most income and wealth – nicest communities
    - Black neighborhoods - persons with least income and wealth – least nice ones
    - Mixed neighborhoods between the two – “in-between” communities
  - But now all vestiges of racism, overt and covert, have been eliminated – truly color blind now – no one cares if you are White or Black – but everything else remains unchanged
  - What would happen next?



# Economics is a Sufficient Barrier – Even in the Best Case

- Whites:
  - retain their higher income jobs and stay in their more expensive homes and neighborhoods and leave mixed cities when they could afford it
- Why –
  - protect their economic position,
  - retain informal social networks based in part on location, which would continue to create better opportunities
- Blacks:
  - **If they could afford it**, move to mixed or White neighborhoods
  - For the large numbers who could not, stay put
- Results:
  - the market value for homes in Black neighborhoods and the quality of those neighborhoods would stagnate or actually sink,
- Even without racism, Whites and Blacks would end up in largely the same position they are now based solely on economic interests

# Less Than the Best Case

- Hypothetical (2) – same assumptions as above except:
  - 50% of Whites are either racist and have some fear of Blacks and 50% of Blacks fear or mistrust Whites
- Some Blacks who could move to a White neighborhood would not because of fear and some Whites would seek to exclude or shun them
- Racially identified spaces (clearly recognizable now) are created
  - Realtors would avoid showing homes in White neighborhoods to Blacks
  - \$\$ would flow to White neighborhoods to attract or keep affluent Whites
- In either hypothetical, **economic inequality and pre-existing segregation are sufficient** to maintain segregation **indefinitely**

# The Law at Work – Effects of Judicial Actions

- Race conscious efforts to address racism are just about dead
- Historical Trends:
  - *Dred Scott* – a **Status Race** case holding that Blacks are inferior. (Note: this is still permitted in private but not in public today – a critical distinction.)
  - *Plessy v. Ferguson* – a **Formal Race** case upholding “separate but equal” when the statute was facially neutral even if the effect was not (case included an **Historical Race** dissent noting that the purpose of the statute was to exclude and subordinate Blacks)
  - *Brown v. Bd. Of Education* – an **Historical Race** case finding that separate was not equal at all and holding that it is inherently unequal and with the intent to subordinate Blacks

# What is Race (Legal Definitions)

- Supreme Court has covered 4 ideas of race:
- **Status-race** – race as an indicator of social status
- **Formal-race** – race as a (neutral) socially constructed category, unconnected to other categories – disconnected from any other characteristics of race (culture, education, language, wealth)
- **Historical-race** – embodies past and present racial subordination
- **Culture-Race** – Black refers to Black culture and community, the basis of cultural diversity

# The Courts at Work More Recently

- Most recent and current – a retreat into Formal Race, which has pretty much eviscerated attempts to provide any remedies at all
- How?
  - By choosing Liberal Ideals vs. Race Consciousness
  - By using various legal propositions and rules (the "tricks of the trade")

# What is Race Consciousness

- Race Consciousness – to examine race in all of its elements in law and society (this is what CRT is about)

# Liberal Theories

- Stress or focus on
  - Impose a color blind standard
  - Impose meritocracy
  - Substitute equal treatment for equal effect
  - Only look at individuals and not at groups
  - Limit remediation to preventing future “violations”
  - Declare the battle to be over with nothing else left to do
  - Recognize the “unfairness” of “innocent” Whites being “forced” to pay for remediation for past wrongs

# Criticism of Liberal Theories

- Stress or focus on
  - Impose a color blind standard (**but use race based remedial action**)
  - Impose a **myth** of meritocracy (**assumes rules can and will be written in neutral fashion that will produce a non-discriminatory result**)
  - Substitute equal treatment for equal effect (**process over result**) (**perpetrator over victim**)
  - Only look at individuals and not at groups (**but the group is subordinated as such**)
  - Limit remediation to preventing future “violations” and **make no effort to remedy past and present inequalities**
  - **Prematurely** declare the battle to be over with nothing else left to do
  - Recognize the interests of “innocent” Whites being “forced” to pay for remediation for past wrongs (**while ignoring that they continue to benefit from past and present wrongs**)



# Legal Tools That Were (Once) Effective

## A Second Attempt Use Law to End Racism?

- *Brown v. Bd. Education* – added powerful tools in fight against racism:
  - **Disparate impact** rather than just disparate treatment (victim perspective, group focus)
  - **Strict scrutiny** of suspect laws (look at hidden pretext and effect, not just the words)
  - **Burden of proof** on the defendant to show no discriminatory intent **OR** result
  - **Use of Historical Race** analysis in analyzing effect of challenged law
- These tools were later eliminated and some are used **to oppose** remediation efforts

# Courts Change Course

- Use Formal Race rather than Historical Race (Culture Race has never been used)
  - Use the perpetrator perspective
  - Use “color blind” as a weapon of Whites against affirmative action
  - Apply strict scrutiny *against* remedial measures rather than against discriminatory results
- Stress intent (vs. outcome) –
  - Rational reasons, or good cause, for a statute or an action are now adequate despite discriminatory result (even when intent is obvious)
- Elevate status of, and defer to, local autonomy (i.e., refuse to look behind the words of the statute) – examples: zoning, school funding

# Hyper-technical Changes – the “Lawyer Stuff”

- “How” it was done
- Reversed burden of proof – now person claiming discrimination has burden
  - Related concept – disparate impact largely eviscerated
- Imported principles from tort law and other litigation principles, which corresponds to perpetrator perspective:
  - Requiring causation: perpetrator perspective (the irrational actor)
  - Requiring “privity” – connection between actor and victim (individual vs. group focus)
  - Time bars
  - Limiting scope of remedies so as to not disturb status quo
- Aversion to reparations remedies (where the rubber really meets the road)
  - Related concept: higher courts evade remedies, tell lower court to decide this

# More Criticism of the Law

- The tools and language of the law:
  - Rights – a shield from interference
  - Equality – but only in the formal sense
  - Property – settled expectations to be protected
  - Neutrality – the existing distribution of power
  - Power – the mechanisms for guarding the status quo of those tools
- Law treats as natural what it has selected (for an outcome) and then makes it appear natural & fair (e.g., encouraging Whites to resist changes to the “natural” order )
- Law used racial identity to exclude and exploit but now refuses to use racial identity for asserting rights and giving remedies

# Where are we Now?

- Near impossibility of victim being able to prove a case
- Affirmative action is now nearly dead (were Black Nationalists right?)
- Rights of Whites have supplanted victim rights
  - "Reverse discrimination"
  - Rejection of reparations -
    - Failure to comprehend or understand loss (example: Native Hawaiians)
    - Time bars
    - Refusal to connect groups over time (past and present victims vs. past and present beneficiaries)
- We have always had privileged groups and law continues to protect

# Example:

## Affirmative Action in College Admissions

- These cases cover a lot of CRT ground
- Typical case:
  - Rejected White applicant sues university alleging (reverse) race discrimination
  - University answers that affirmative action is an approved remedy for past discrimination
- Recent trend is for the plaintiff to win – as victim of discrimination
- How and why?

# The Rest of the Story (CRT Perspective)

- Affirmative action is the least “expensive” remedy that those in power were willing to provide – and it had cost very little
- Racism is not symmetrical – the dominant group (Whites) cannot be discriminated against (an oxymoron even)
- Myths are being used along with the law to support the dominant group position

# What Myths and Why are They Myths?

- Meritocracy is (1) fair and (2) used to determine admissions
  - Those in power get to define and enforce their definition of merit
  - Applicants with privilege (and wealthy parents) have several “legs up”
    - Better schools before university
    - Paid assistance in the application process
  - Preferences exist throughout society to benefit the privileged, including here
    - Legacy, donation, faculty, athlete preferences that are used to admit those students
    - All admissions are not, in fact, based on merit



# An Even Deeper Myth?

- Myth: value of degree from university = most meritorious applicants + best education = best students --> best opportunities at graduation

BUT

- Opportunity is based on connections
- Preferred students already had connections and will develop more in school
- So, being privileged + knowing others with privilege + attending schools with similarly privileged + access to privileged alumni network = best opportunities
- The best results were baked in before day 1

# So Why Did University Lose?

- **Neither** party presented evidence of other preferences – why not?
  - usual answer – affirmative action has been successful and has run its course so
    - it is no longer needed and
    - is itself unfair
  - But maybe there are other answers?

# So Why Did University Lose?

- plaintiff applicant –
  - his complaint of race discrimination disappears if many students were preferred for non-racial reasons
- defendant University –
  - Could have readily shown that affirmative action is just one of many preferences and is the one most justified
  - BUT
  - it would have destroyed the described mythology, which is valuable to it
  - It may have resulted in having to abandon all other preferential admissions or
  - It may have required more student to be admitted under affirmative action

# More Legal Analysis

- The parties and remedies sought affect the outcome
  - The named parties were White applicant vs. University
  - The real parties were the entities funding the applicant's litigation (and seeking to end all affirmative action, not just college admissions) vs. the non-meritorious Black student(s)
  - If the White applicant were the real plaintiff – all that was needed was admission to school, not the demise of affirmative action
  - If the Black student(s) had been the defendants, they would have had no reason to hide evidence of numerous other preferences
  - The named parties in effect shared a common interest in keeping the “game” and its rules in place by limiting the fight to one over **limited** affirmative action

# Example

## Groups and Voting

- Districting (not race conscious districting) is the real problem:
  - Districting places people in groups by some characteristic (geography)
  - Winner-take-all wastes some votes
  - Dominant group gets all the power as a result
  - Encourages gerrymandering – further inflating power of dominant group
- Unfair? Two assumptions here:
  - Majority of voters in a district are NOT an actual group
  - Incumbent powers determine which (actual) groups will be privileged

# Criticism of One-Person-One Vote

- Ensures only opportunity to vote, not an opportunity to elect
- Focus on the individual is to the detriment of actual groups
  - Individuals do not elect anyone – we have never had individual representation
  - Groups elect – and groups have been traditionally been the focus of who is represented but that is no longer the case
  - Winner-take-all system traces back to feudal times when the land as represented, not people; even in 18<sup>th</sup> Century America, the town was represented
    - That was fine when the group was homogenous
- But current system does not provide equal power to all groups:
  - Solution make unit of representation political, not geographic

# Our System of Government

- We do not have democracy – a rarity throughout world history
- We claim to be a republic – with direct representation – but do not have one and one was not intended
- Look at our name – not America but The United STATES of America
- Our Constitution –
  - President elected indirectly (and it was probably intended that states would control the outcome)
  - Senate originally elected indirectly – by the states
  - House – has direct election but not really direct representation because of districting

# Virtual vs. Actual Representation

- Homogenous districts = representative districts because the interests of all (or nearly all) voters are (by definition) the same.
- If territorial districts are not homogenous, some votes are wasted because some interests are not represented
- What results is virtual representation:
  - Indirect representation – the winner should represent interests of ALL persons – both voters and non-voters
  - But this only really works if there are no opposing interests
  - At best non-dominant (losing) interests are represented elsewhere in system



# More on Voting

- This runs counter to our myths of individualism and representation
  - Rational voter will only vote if he believes that his interests will be represented regardless of who wins
  - Would not vote if
    - no candidate satisfies this test or
    - He does not believe that his vote is a deciding vote
- In reality, all votes for the loser → no representation
- Race conscious districting is not a solution – excess winning votes are also wasted
- Real representation exists only when as many votes as possible → electing a representative

# A Better Way to Ensure Representation?

- Some suggestions:
  - make all positions at large – (obvious exceptions when the number of positions is too large) – vote for whomever you want
  - no districts (Constitution does not require districts)
  - cumulative voting
  - ranked choice voting
- Some desired results –
  - as many votes as possible actually elect someone (minimize wasted votes)
  - winners will represent the groups who elected them
  - all groups have equal power to elect representatives
  - no incentive to gerrymander

# Property Law and Racism

- Property law an old mechanism for domination – and racism
  - Slaves being treated as property
  - Imposition of White property law on Amerindians – after conquering them
  - Slave codes also denied Blacks right to exercise numerous property rights

# Property Rights and Racism

- Intersection of racial and economic domination / subordination
- **Property** is anything to which a value, and a right, may be attached
- **Property** is a legal construct by which certain private interests are recognized and protected:
  - Enforces (or changes) existing power structures
  - Produces inequities
  - Conscious selection of the interests protected makes it not natural but a creation of law

# What are Property Rights?

- Components of property and property law
  - Right of disposition – if not alienable, it is not property with certain exceptions (I cannot give you my license to practice law)
    - Being White is not alienable but ironically being White has value
  - Right of use and enjoyment
    - Being White had (and has advantages)
    - Not symmetrical – no such value for Blacks
      - Calling a White person Black was slander; calling a Black person White was not
      - Hypodescent

# Property Rights and Racism

- Absolute right to exclude
  - A key component of racism
    - Legislatures and courts enforced this by, *inter alia*, defining who was white enough to be White – and requiring proof of White blood
    - Accepting any less would have lessened value of being White
- Law facilitated this process by
  - Classifying (defining) race
  - Parceling out social standing to facilitate social standing (*e.g. Plessey*)
  - Legitimizing subordination by making junk science a fact
    - Eugenics, craniology, race being a blood-borne "trait"
  - Creating a façade of objectiveness

# One Result – Race Consciousness

- Law once used racial identity to exclude and exploit
- But law now refuses to use racial identity for asserting rights and giving remedies
- There is a lot more to this topic but this is a good introduction

# Why the Controversy?

- Remedies to date have been limited and have cost little (e.g., affirmative action) – which CLS & CRT both note is the norm
- Affirmative action and other remedies have already been contained if not eviscerated
- So ... why is it a controversy now?
- Who's afraid of CRT?
- Why?



# Why the Controversy?

- The powerful and privileged ?
  - That would makes sense given their position is the most at risk from significant change in status quo
  - assuming CRT had ever gained much traction socially
- And indeed they are reacting aggressively at the state and local levels of politics.
- So maybe they are concerned (despite) CRT never seeming to have gained much traction
- Will the (negative) attention give CRT new vitality?

# Why the Controversy?

- Less privileged (Whites) out of power? They have been made to feel threatened by those in power (who never give up their slice of pie)
  - by suggesting that “you” are going to be the loser here
  - a common tactic dating to Reconstruction
- And opposition seems to be a top down phenomenon, not a grass roots one

# Why the Controversy?

- Nobody? Just a meme to whip up fear in the masses – who don't even know what CRT is?
- Maybe does the vehemence of the attacks suggest a real fear of what CRT says?
- In other words – an unknown area

# CRT – a Quote to Consider

- “American traditions do not breed intellectuals; they breed propagandists and careerists focusing their gaze on the prominent and privileged and powerful and on whatever challenges are afflicting them. Intellectuals today, when focused on the opposition of our own groups [several examples listed] are ridiculed for pursuing fields that lack ‘educational value,’ and our books, courses, and departments are shut down ... we are told to keep the past in the past ...”
- “When we are told that historical writings should be irrelevant to our contemporary debates, it is not hard to figure out why. History, when taught truthfully, reveals the bigotry in our contemporary debates. Which is why the conservators of bigotry don’t want history taught in schools. It has nothing to do with the discomfort of children. It is uncomfortable for the opponents of truthful history to have the rest of us see *them*, to have their kids see *them*.” (Underline added)

Ibram X. Kendi (author *How to be an Anti-Racist*) – The Atlantic 3/23/2023:

# FINAL THOUGHTS

- Retest on the Cavanaugh question:
- Yes \_\_\_\_\_ No \_\_\_\_\_
- Is CTR correct:
  - Are we a nation systematically infused with racism?
  - CRT presents some strong evidence to support its claims.
- Are its opponents right by saying: CRT says all Americans are racists?
  - Some certainly are (e.g. white supremacists)
  - but CRT doesn't really make this claim – it's focus is on groups, not individuals

# An Interesting Comparison

- *Judgement at Nuremberg* presents a parallel involving another country and circumstances
- Should all Germans have been treated as Nazis by virtue of Nazi actions and institutions subordinating Jews?
- Should all Americans be treated as racists by virtue of racist actions and institutions subordinating Blacks
- The movie suggested an ambiguous answer, including mixed motives
- Are the answers for us equally ambiguous?
  - The Integrationist vs. Black Nationalist debate redux?

# FINAL THOUGHTS

- Other interesting and thoughtful ideas about CRT are available, *e.g.*:
  - Differential treatment by criminal justice system
  - Intersectionality (special case of Black women)
  - Amerindians (Native Americans)
  - Property law more broadly
  - Where has opposition to CRT come from
- This was just an introduction

# FINAL THOUGHTS

- Do you know more about CRT?
- Are you less confused? (it's OK if not!) Are the different perspectives discussed informative?
  - CRT view of what racism is from perspective of Blacks
  - View from the bottom
  - Victim view vs. perpetrator view
  - Asymmetrical system and relations
  - History really does matter to understand (and fix?) today



# References and Resources

- *THE CRITICAL LEGAL STUDIES MOVEMENT Another Time, a Greater Risk*, Roberto Mangabeira Unger 2015 (1986)
- *CRITICAL RACE THEORY The Key Writings that Formed the Movement*, (various authors – this is a collection of articles from other sources)(1995)
- *LAW IN AMERICAN HISTORY From the Colonial Times Through the Civil War*, G. Edward White (2012)
- *LAW IN AMERICAN HISTORY From Reconstruction Through the 1920's*, G. Edward White (2016)
- *THE CONSTITUTION OF THE UNITED STATES*
- *VARIOUS CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES*
- *Judgment at Nuremberg*, 1961 (directed by Stanley Kramer)