

RACE, RACISM, AND THE LAW

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Course Description

In this course, we will set out to understand the complex relationship between race, racism, and law. We will ask and answer two questions. First, *how have race and racism shaped and influenced American law?* This question assumes that race and racism existed prior to laws and constituted by natural, social, or economic factors. Second, we'll ask *how has American law shaped and influenced what we understand by "race" and "racism"?* In this question, we use quotations marks to reflect the fluid meanings of these terms as determined by their intersections with law and policy.

The point of departure for the course is an exploration of race itself—what exactly is race?—and the role law plays in constructing race and ameliorating and perpetuating racism. We will begin with a frank assessment of the challenges facing conversations about race and racism as they relate to law *and* of the presumptions that each of us—students and instructor alike—might bring to this conversation due to our own personal experiences and beliefs. We will then take a look at history and begin by considering what is meant by “race,” how definitions of the term have changed over time in the United States and how race was used to naturalize the legal and political subjugation of particular social groups and how the identities of these groups have been shaped, if not established, by governmental and social practices that were themselves rationalized, afforded and endorsed by law.

Course Goals

As your professor, I have some goals for what I hope you will learn in our work together, and those goals have shaped the course content. Of course, these goals do not cover everything we should or will do together, nor do they account for the many wonderful ways you will expand upon these initial ideas. They are meant as a beginning, and as a means toward accountability in my role as your instructor.

- To define important concepts in the study of race, racism, and the law, such as: race, ethnicity, the social construction of race, racial formation, racialization, racial performance, racism, structural racism, implicit bias, colorblindness, civil rights, critical race theory; and explain their relevance to the operation of laws.
- To understand, and to be able to explain, a variety of ways in which American law has created and maintained racial categories, goals, and hierarchies, and in turn has been shaped by race and racism.
- To develop a critical perspective from which to examine legal principles, doctrines, and institutions in order to understand and to be able to explain when and how they operate within the fulfillment of a racial order.

- To understand, and be able to describe, important aspects of U.S. history as they relate to law and race, including the role of slavery in the Constitution and early republic, the role of indigenous land theft in the development of property law, the role of race in constructing citizenship and American demographics and regulating immigration to the United States, and the ways in which racism has constructed and shaped systems of employment, criminal justice, housing, and education.
- To be prepared to examine critically the ways in which race is still a salient feature in America and American law today, and consider means of redress for race-based inequality or injustice.

Accessibility and Accommodations in this Course

One of the central organizing frameworks of this course is accessibility. Accessibility is a process that never ends. If there is anything you need in order to make the classroom or course content more accessible to you as a learner, let me know, regardless of any diagnosis or formally documented accommodations you may or may not have. Chances are that if you think you might need it, someone else might be feeling the same way. To maintain a conversation about this, we will have the opportunity for an individual accessibility check-in during office hour meetings. If you would like to take advantage of this check-in, please message me so that I can make room for this conversation at the end of our office hours. This practice is done in an effort to recognize that access needs can change day to day, or even moment to moment. We'll discuss the specifics of this together when we meet.

If you need academic accommodations, please reach out to your Dean of Students at the beginning of the semester. It is better to get this process started as soon as possible because time is needed to coordinate accommodations.

Grades

The final grade in this course will be determined through a combination of class participation, reaction papers, and an in-class exam. 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%
- + Written work 25%
- + Exam: 50%

Class Participation: 25 percent of the final grade will be based on attendance and in-class participation. Each class I will solicit volunteers and call on students to add their voice to the class discussion. You will know in advance if you are going to be “on call.” Students who are on call will be expected to do the heavy lifting for that day’s reading assignment. But know that I expect everyone to complete the reading and come prepared to participate, even when they are not on call. From time to time, I may call on those who are not on call. When evaluating the quality of in-class participation, I will look to the following factors:

- Your ability to draw from the assigned readings in order to enhance discussion.
- Your ability to question and/or critique the assigned readings in order to enhance discussion.
- Your ability to translate your critiques into policy and legal interventions.
- Your productive engagement with ideas with which you disagree, whether those ideas are being put forward by the professor, a guest speaker, or your fellow students; and
- Your ability to relate the readings to real life experiences (This will not require you to share your own stories, though that is absolutely welcomed. It is an invitation for you to think about the effects of law in everyday life by drawing on lived experiences, your own or others, whether you have observed the latter or gleaned them from reputable sources).
- Your ability to pose generative questions for your colleagues, professor and guest speaker.

Written Work¹. Twenty-five (25) percent of your grade is based on other written work.

Post to Board Questions: Although there is no limit on the number of times that you post comments and questions to the discussion board after week 2. I ask that you post to the board at least four (4) times during the semester. I will also assume that a post to the board reflects something about the content and intensity of your interest in the materials that will be covered in that class session. Although conversations (i.e., threads) may be continued after a class period has occurred, please submit at least four (4) questions or comments about course materials by 10:00 a.m. on the day of the class session during which those materials will be discussed. In other words, regardless how many times one may post to the discussion board, at least four (4) of those posts must be made before the class session devoted to the materials that are the subject of the post.

Reflective Work: Reflective essays are 500 – 1000 words, depending on the assignment. They are assigned intermittently throughout the semester and **due two weeks after an assigned date**. For example, Essay 1 is assigned on August 29 and due September 12. The purpose of the reflective essays is to create another modality of communication of analysis and synthesis of ideas and themes in the course. Reflective essays are *not* a summary of the underlying material, but rather present a critical engagement. Some reflective essays will

¹ Any personal information shared in these assignments will be maintained in confidence and will not be shared with other students or any member of the Gould community, other than teaching assistants for this course, without the students’ express permission, unless the information is subject to mandatory reporting to the USC Office of Equity, Equal Opportunity and Title IX (e.g., information regarding sexual misconduct or assault involving other members of the Gould community).

require independent research and a minimum number of sources. The essays will be graded on a high/average/low basis.

- i. High: an essay that insightfully analyzes the selected material, reflecting a clear understanding of the content and engages in deliberate integration to the course.
- ii. Medium: an essay that understands the content of the selected materials but does not synthesize content with the course.
- iii. Low: an essay that is incomplete or absent of an understanding of the materials and does not address the course or does so in a cursory manner.

Exam. Fifty (50) percent of your grade will be based on the final exam. The exam will be administered by the registrar and exam team. The exam will consist of multiple essay questions and will be open-book and proctored.

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 and Class Time

Class attendance is important. Most classes will be a combination of lectures, small or large group discussion, exercises, activities and problem-solving. As noted above, class attendance and participation count towards your grade. If you know of your absence in advance, please kindly email Assistant Jessica Ortiz prior to class. If the absence is within 24 hours of class, email me directly.

The best way to show respect for your classmates, and to ensure that we all benefit from your unique thoughts and insights, is to come to class having done the reading and being prepared to discuss it. Our classes offer us an opportunity to engage in collective reflection and consolidate lessons that will inform your practice for years to come. Classes are also an important means by which we build a sense of shared purpose and community.

The primary materials for our class will be posted to Blackboard, they include legal opinions, articles, news reports, speeches, and book chapters. The class sessions are designed to help you engage deeply with these course materials.

From time to time, we will revise the syllabus based on developments in classroom discussions and current events. As necessary, I will send an email with detailed instructions for the coming week's class session, including any reading assignments or changes to the syllabus.

Finally, I welcome your ideas for readings or other materials for classes. Feel free to raise those at any time, in whatever setting you find appropriate.

Digital Technology

In order to cover all the intellectual ground before us, we must make the most of our time together. That means striving to be fully present and engaged. The use of cell phones for anything other than assistive learning support is strongly discouraged unless we are explicitly using them for a class activity. If you have an emergency situation, please do let me know.

Artificial Intelligence

You are responsible for any content that you produce or publish that includes AI-generated material: AI-generated content can be inaccurate, misleading, or entirely fabricated (sometimes called “hallucinations”), or may contain copyrighted material. Review your AI-generated content before publication. Any work that will be identified as not yours will be subject to the academic honor code.

Responsibility to our Learning Environment

A healthy learning environment is not necessarily one where we all agree, but one where we express disagreement in ways that demonstrate respect for each other as people and as learners. In this course, you will be expected to treat each other with respect, to listen to each other with an eye towards learning from others’ insights, and to express disagreement in terms that recognize that nobody has all the answers. The cases and conflicts we discuss in class are the subject of extensive, ongoing debate. Reasonable people will disagree on these topics. Our goal in the course should not be to win or resolve these debates. Rather, our goal should be to learn all we can through collective examination and study. Please engage each other with this shared purpose in mind.

Office Hours

I will hold office hours on Wednesdays 12:00 pm-1:00pm via Zoom and via Calendly appointments. From time to time, I may hold office hours outdoors near the law school, I will notify you ahead of time if there are any changes. Office hours will start the second week of class. Office hours are a great place to pose questions or to reflect on the larger implications of what you are encountering in your coursework. I will also be available to meet before or after our class.

Casebook

F. Michael Higginbotham, RACE LAW: CASES, COMMENTARY, AND QUESTIONS, Fifth Edition (2020). Available wherever textbooks are sold. Casebook referred to below as “CB.”

PART I. Introduction and Foundations

This Unit examines the legal construction of race. What is race in the United States? How was it and is it defined? It asks students to examine the concept of race through the prism of law. How does race come to be a salient signifier of social, political, and economic life? And what role does law play in the construction of racial identity? Students will examine these questions and others.

A. What is Race?

8/22/2023 | Class 1 | Introduction and Course Overview

Overview: In this class students will get an introduction to the course, its framing, and pedagogy. Students will become familiar with the responsibilities and course expectations. This class asks students to examine what does race means historically, biologically, and contemporarily in the United States.

Introduction. Defining “Race”.

- Dorothy Roberts, *FATAL INVENTION*, Chapter 1 “The Invention of Race” (16 pages)
- Origins of Race (PBS): <https://www.youtube.com/watch?v=CVxAlmAPHec>

Biological Race

- Washington Post, *Is Barack Obama Black?* (2015) (2 pages)
- Chimamanda Adichie, *How I Became Black in America*, *The Atlantic* (2023) (6 pages)
- [What Does it Mean to Be Latino?](#) NPR Code Switch Podcast episode (2021) (32 minutes)

Courts Defining Race for Legal Discrimination

- *Abdullahi v. Prada*, 520 F.3d 710 (2008)
- *Morton v. Mancari*, 417 U.S. 535 (1974)
- *Rice v. Cayetano*, 528 U. S. 495 (2000)

Pre-Class Assignment: 1-2 pages (minimum 350 words, no maximum) on “How do you define race?” AND “What do you hope to learn from this class?” There are no right answers. This is an opportunity for the professor to hear from you prior to the first class. Your answers will remain confidential. **Post on Blackboard.**

In Class:

- Group Exercise
- Video viewing: Should DNA testing influence affirmative action?
- Reading discussion

8/29/2023 | Class 2 | Constructing Race, Politics of Domination & Freedom, and Whiteness

Overview: This class deals with the phenomenon of racial construction in the United States. It starts to examine how judges, along with juries, lawyers, and litigants constructed ideas about race by way of a multifold and changing range of evidence and leads students through the politics of domination and slavery. This unit is rounded out with an understanding of how the law constructs “whiteness” as an objective fact by tracing the formation of whiteness as property through Supreme Court cases.

Construction of Race, Generally

- Chapter 1-2, Ariel Gross, What Blood Won't Tell (Supp)
- CB 55-69 (Racial Purity in Antebellum VA, People v. Hall, and Litigating Whiteness)

Politics of Domination: the Law of Race from Foundation to Reconstruction

- CB 79-111. Slavery, Free Black, and Constitution.
- CB 119-125. Southern Approach to Slavery, Hudgins v. Wright, Commentary on Hudgins.
- CB 129-130. Explaining Thomas Jefferson.
- *View* Citing Slavery Project Map, <https://www.citinglavery.org/charts>

Fugitives, Freedman, Judges and Law

- CB 144-195. Prig v. PA and Dred Scott v. Sandford
- Frederick Douglass, *What to Tell The Slave is the Fourth of the July* (Supp)

Judicial Construction of Whiteness

- Cheryl Harris, *Whiteness as Property*, 108 HARV. L. REV. 1710 (1993) (Supp)
- Optional: Paul Gowder, *Law for Black Radical Liberation*, BOSTON REVIEW, <https://www.bostonreview.net/articles/law-for-black-radical-liberation/>

Post-Class Assignment: Elect an episode of Code Switch that resonates with you and listen; write a 500 word reflective essay about the selected episode. Due in 2 weeks or September 12, 2023.

Code Switch (free podcast): <https://www.npr.org/podcasts/510312/codeswitch>

PART II. Reconstruction, Citizenship, and Sovereignty

9/5/2023 | Class 3 | Race and Law: Linguistic Abstractions and Narrative Domains & Citizenship

Overview: This class begins to examining the linguistic abstractions and narrative domains used during the early period of the civil rights law and their implications today by grounding this analysis in the Supremes Court’s betrayal of Reconstruction and it impact today (see Goodwin’s 2021 article). Second, we will examine race and its impact on the court’s interpretation of who is a citizen.

Supreme Court Post-Reconstruction

- Foner, NYT Opinion, Why Reconstruction Matters (Supp) (2 pages)
- CB 213-216. Introduction – The Supreme Court’s Betrayal of Reconstruction
- CB 895-896. Review the 13th, 14th, and 15th Constitutional Amendments.
- CB 236-249. The Slaughterhouse Cases.
- CB 281-297. The Civil Rights Cases
 - Optional: CB 229-235, 249-254 (Background & Commentary on Slaughterhouse Cases); CB 297-3019 (Commentary on the Civil Rights Cases)
- Michele Goodwin, *Law and AntiBlackness*, 26 MICH. J. RACE & L. 261 (2021) (Supp).

Race & Citizenship

- CB 301-307. Introduction to Race & Citizenship. J. Perea. Ian Haney Lopez.
- CB 307-326. Ozawa, 1922, Thind, 1923, De La Guera, 1870, Ping 1889.

Bridging Gap between Immigration & Race

- Devon Carbado, Racial Naturalization (2015). (Supp)

9/12/2023 | Class 4 | Race, Indigenous People, Native Americans, and Sovereignty

Overview: This section examines the federal government’s treatment of American Indians including relocation, discrimination, breaking treaties, and other atrocities under formal authorization. This includes how the federal government has regulated sovereignty – who would determine the rules by which they were governed? We will begin to understand the ongoing and fraught relationship between race, sovereignty, Native Americans, and the federal government. Then we will consider this relationship in context with the indigenous migration of today in a contemporary article (by Riley and Carpenter).

Sovereignty

- CB 360-387. Introduction. Johnson (1823) & Commentary; Cherokee Nation (1831) & Commentary. William Bradford.
- Ortiz, An Indigenous People’s History of the U.S
 - 57-77. Bloody Footprints.
 - 95-116. The Last of the Mohicans
 - 197-217 The Doctrine of Discovery

Indigenous Migration

- Riley & Carpenter, Decolonizing Indigenous Migration (2021) (Supp)

PART III. The Law - Racial Categorization & Racial Meaning
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9/19/2023 | Class 5 | Racial Assignment

Racial Categorization

Overview: This class deals with the phenomenon of racial categorization. It asks students to analyze the contested process of categorizing people by race and examines the manner in which courts categorize racial difference.

- *Loving v. Virginia*, 381 U.S. 1 (1967) (Supp)
- *People v. Hall*, 4 Cal. 399 (1854) (Supp)
- *Gong Lum v. Rice*, 275 U.S. 78 (1927) (Supp)

9/26/2023 | Class 6 | Racial Meaning

Overview: This class examines the construction of racial meaning through legalized segregation (*Plessy*), legalized exclusion and internment (*Korematsu*), and race-conscious remedies (*Grutter*). It also examines excerpts of the latest SCOTUS case on assigning racial meaning.

- *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Supp)
- *Korematsu v. United States*, 323 U.S. 214 (1944) (Supp)
- *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Supp)
- 2023 SCOTUS Cases (*Harvard & UNC*)
 - Listen: NPR on June 2023 Opinion (11 minutes)
<https://www.npr.org/2023/06/29/1185045354/supreme-court-ends-affirmative-action-in-college-admissions>
 - Read Time Mag. <https://time.com/6291182/affirmative-action-supreme-court-decision-overturms/>
 - Relevant Excerpts NYT (Supp)

PART IV. Methods of Analysis: Critical Race Theory, Intersectionality & Racial Capitalism

This Unit introduces students to a theoretical tool to analyze race and the law as applied to traditional legal study including feminist theory, privacy law, law and technology, immigration law, First Amendment law, and legal ethics.

10/3/2023 | Class 7 | Defining Critical Race Theory (all materials in this unit are Supp)

- Kimberlé W. Crenshaw, *The First Decade: Critical Reflections, or “A Foot Closing in the Door,”* 49 UCLA L. REV. 1343 (2002)
- Devon Carbado, *Critical What?*, 43 CONN. L. REV. 1593 (2011)
- Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind”*, 44 STAN L. REV. 1 (1991)
- *Plessy v. Ferguson*, 163 U.S. 537, 550–52 (1896)
- Mari Matsuda, *Critical Race Theory is Not Anti-Asian*, REAPPROPRIATE, <https://reappropriate.co/2021/03/mari-matsuda-critical-race-theory-is-not-anti-asian/>
- MSNBC, Kimberlé W. Crenshaw, <https://www.youtube.com/watch?v=n4TAQF6ocLU>

10/10/2023 | Class 8 | More Tools: Intersectionality, Interest Convergence, and Racial Capitalism

Overview: This class introduces students to CRT concepts of colorblindness, the theory of interest convergence, and racial capitalism. Students will be introduced to these theories, explore the relevance of its emergence, and analyze scholarly critiques and expansions on the theory.

- Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989)
- Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193 (2019)
- Robin D.G. Kelley, *What Did Cedric Robinson Mean by Racial Capitalism*, BOSTON REVIEW, <https://www.bostonreview.net/articles/robin-d-g-kelley-introduction-race-capitalism-justice/>
- *Oyama v. California*, 332 U.S. 633 (1948)
 - See Senate Bill 147 in Texas: <https://www.nbcnews.com/news/asian-america/bill-set-restrict-chinese-property-ownership-dies-texas-house-rcna86257>
- Ian Haney-Lopez, *Intentional Blindness*
- Justin Driver, *Rethinking the Interest-Convergence Thesis* (2011)
- Read [Blog](#)

PART V. Race & Class

10/17/2023 | Class 9 | Race & Class Subordination

Overview: This class will examine the relationships among race and class subordination. Students will examine antidiscrimination law through the prism of class. The class asks students to analyze how race is constructed through poverty jurisprudence.

- *San Antonio Independent School District v. Rodriguez*, 411 US 1 (1973).
- Angela Harris, *Racial Capitalism and the Law* (2021)
- Veryl Pow, *Grassroots Movement Lawyering* (2022) [focus reading on pp. 82-110, 122-end].

In Class:

- Guest Lecturer
- Watch: Geographies of Racial Capitalism with Ruth Wilson Gilmore
<https://www.youtube.com/watch?v=2CS627aKrJI>
- Reading Discussion

PART VI. Applications: Law as a Race Making Force [Based on Class Vote, Week 2]

10/24/2023 | Class 10 | TBD

10/31/2023 | Class 11 | TBD & Need to Reschedule (Halloween!)**

11/7/2023 | Class 12 | TBD

11/14/2023 | Class 13 | TBD

** = This class will be reschedule to a date/time to be determined ASAP.

Possible Topics – how race and the law intersect with these topics:

- Criminal Justice/Youth Justice (disproportionately, Racial Justice Act in CA, sentencing)
- Family Law (adoption, Indian Child Welfare Act, foster system, family regulation)
- Gender/Sex (reproductive rights, expansive healthcare, employment discrimination)
- Health (Inequities in IP patents for pharmaceuticals, vaccines, COVID response)
- Education (contemporary local laws limited CRT, books, parent choice, etc.)
- Technology/Digital Space (Digitizing Race, Algorithms, Search Engines, AI)
- Voting & Politic (Voting Rights, Redistricting, MAGA, Confederate Monuments, “Wokeness”)
- Housing (Redlining, Homeless/Unhouse communities, Subprime lending)
- Environmental (Environmental Justice, air, land & water pollution in poor communities, beach access)
- Reparations (Case for Reparations, Black Americans and Japanese, etc.)
- Race/DEIB Policies in the Workplace (laws and policies regulating behavior)