

PART V — CRITICAL RACE THEORY

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5.1 Race as social construct

Critical Race Theory ('CRT') is a critique of the law with an emphasis upon race. CRT scholars criticise Marxism, CLS, and feminism on the basis of their apparent blindness to the influence of race upon the operation of law and the realisation of rights.

Race is not a fixed naturalised, biological characteristic. Rather, it is a dynamic social construct whose boundaries shift over time. Constructions of race change constantly, and are products of transient social norms rather than fixed categorical structures.

Distinction between racial groups is a result of ascribing significance to certain physical, moral, and intellectual characteristics.

In this way, the self-labelled rational, Eurocentric worldview categorised itself as the most civilised racial category, against which all other categories were to be defined.

The categorisation of racial groups is a dynamic process; there may be infinite subdivisions of like characteristics, races within races, or further arbitrary divisions based upon other distinguishing characteristics (like hair colour or sexual preference).

5.2 Liberalism and race

1 *Racism*

Liberals deny the validity of a view which ascribes biological or intellectual superiority to certain groups on the single basis of race. This disdain for racism is a product of the liberal reification of the individual. Liberals assert the equal worth of all individuals, leading to legislation such as the *Racial Discrimination Act* and public awareness-raising.

Liberal critique of racism:

- Racism is a concept that is irrational and contrary to liberal ideals
- It is based upon biological arguments that are no longer scientifically or politically viable
- There is no empirical evidence supporting claims; indeed, evidence to the contrary
- Racism is simply a problem of individual ignorance and a manifestation of xenophobia

2 *Strategies used to counter racism*

Throughout recent history, civil groups have campaigned for the liberal ideal of formal equality to be extended to grant rights to members of all racial categories (see eg, the Civil Rights Movement in the United States and the subsequent extension of constitutional protections to African Americans).

See also:

- Legislation (anti-racism statutes, anti-vilification laws)

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- Cases (*Brown v Board of Education*)
- Education (civil rights movement in United States; campaigns for equality; elimination of legal classification leading to a reduction in the perception of racial differences)
- Affirmative action ('positive discrimination' in favour of disadvantaged minorities, which seeks to improve substantive equality; criticised as being unfair to whites)

A new form of racism has emerged: neo-racism. This is the view that the inherent ethnocentricity of humankind prevents harmony between coexistent cultures due to differences in cognitive paradigms and a general inability to accept the views of others (Galligan).

5.3 Critique of liberalism

1 *Legal supremacy*

Presuming one law for all is racist in itself; if the system can only acknowledge one form of law, it reflects only the needs of the dominant race and marginalises indigenous customary law.

An example of the cultural values implicit in the Australian legal system and their negative affect upon non-white claimants to be afforded equal recognition by the law.

Note especially:

- Denigration of Aboriginal witnesses; rejection of traditional testimonies
- Insensitivity to customary laws
- Favouring of white anthropologists as expert witnesses about Aboriginal culture, rather than Aborigines themselves; not trusted unless they had accepted white values
- Difficulty faced by claimants in formulating a dispute within the confines of the common law system

Cubillo illustrates the tendency of the white legal hegemony to overpower and delegitimize other cultural paradigms and their epistemological processes.

2 *Implicit race valuations*

The guarantee of formal equality between races is, according to CRT, insufficient to combat problems of racism.

- CRT draws attention to the fact that law is created by and for white people
- It questions the legal system's implicit endorsement of white, male values by our legal and its emphasis upon white values and priorities
- Legal institutions and law are permeated by arbitrary and often discriminatory racial constructs
- Laws against racism itself can be of limited efficacy in the face of a legal system that
 - is reflective of white hegemony;
 - is ostensibly white, rational, and phallogocentric;
 - presumes a single (white) legal subject; and
 - fails to account for alternative conceptions of the individual

5.4 Post-colonial studies

Looks at the present status of indigenous races living in former colonies. In Australia, Aboriginal inhabitants continue to be displaced by western laws and values. The very law which attempts to provide for equal opportunity in white society at once legitimates the European colonisation of Aboriginal territory and imports the same ethnocentric values.

- *Terra nullius* a legal fiction used to justify settlement in new areas; or
- Maybe just reflective of the inability of colonists to recognise the legitimacy (and importance) of ethnicities (and forms of knowledge) exterior to their own

The Australian legal system rests upon a shaky legal foundation, one which the courts are ill-equipped to examine. In *Mabo*, the majority were unable to question the rule of *terra nullius*, denial of which would undo the fundamental underpinnings of western law. In this way, Australian courts and government face difficulty in justifying their cultural hegemony over indigenous peoples, and are remnants of colonial rule that hinder indigenous autonomy.

In circumstances where the system's very foundation is hewn from activities illegitimate within its ideological structure, the liberal ideal of equality before the law does little to address the issue of why white law should be accorded authority over indigenous cultures, and not theirs. It is little wonder, then, that law doesn't adequately account for the needs of minorities and glorifies the hegemony of the established racial hierarchy.

5.6 Race consciousness

The liberal ideal of formal equality has the unfortunate tendency to manifest itself in outright rejection of racial discourse. Race is nullified, but its effects are not. For while the ideal of equality is all very well, 'wishing it so' is unlikely to effect real change. In this way, liberal values have the effect of ignoring real and manifest problems in society by focusing on a legal ideal which does not correspond to reality.

Race consciousness challenges the liberal approach of racial blindness, noting that race is an important factor in many interactions – both legal and otherwise (see eg Gabel and Williams – New York apartment, discrepancy in treatment).

However, race consciousness reinforces racism; it is a product of racial divisions and represents an emphasis upon separateness. Law should be looking to embrace a universal construction of humanity which transcends and encompasses race; this doesn't dismiss race entirely, and necessarily encompasses racial issues, but it doesn't make them the centre of attention. How this approach might be imported into Australian law is a sensitive issue. On the one hand, explicit recognition of the importance of race is perhaps a necessary step in producing social change; on the other, it reinforces existing race perceptions and values.

5.7 Rights

Unlike CLS (which views rights as 'alienating' and oppressive structures), CRT views rights as useful means of empowering minorities (eg, African Americans and conferral of constitutional protection). Though prone to masking the real problems of inequality, concrete rights may provide for a base level of civil liberty.

The rejection of rights by CLS is reflective of scholars' own legal protection, for they are (primarily) upper-class, white, male academics with little need for notions of basic rights. However, this is not necessarily true of all social strata. According to Williams, what is needed is not a deconstruction of rights or criticism of their efficacy in promoting justiciable outcomes, but rather their fuller realisation (CM 121).

Inequality of the rule of law

Ford Pinto (193): would they have repaired (vs compensated) if it were a luxury car? Evidence of the legal system's different effect on individuals and dependency of the rule of law upon assumptions of equality; efficacy limited in the face of such vast power differentials (consumer/manufacturer).

5.8 Summary

CRT highlights the ignorance of conventional jurisprudence to issues of race and rights.

- Law is not neutral
- Traditional liberal responses are inadequate to guarantee equality under Eurocentric laws
- The Marxist focus on classes does not sufficiently address racial issues