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### 'Race, Racism, and American Law': A Seminar from the Indigenous, Black, and Immigrant Legal Perspectives

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## ARTICLES

### **‘RACE, RACISM, AND AMERICAN LAW’: A SEMINAR FROM THE INDIGENOUS, BLACK, AND IMMIGRANT LEGAL PERSPECTIVES**

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INTRODUCTION .....	2
I. OUR APPROACH: THEMES, GOALS, AND COLLABORATION .....	9
A. Common Threads and Themes .....	9
B. Self-Disclosure, “Objectivity,” and Reflective Practice.....	12
C. Collaboration .....	17
D. Lawyering Skills .....	19
II. THE CLASS: OBJECTIVES, SCHEDULE, AND ASSESSMENTS .....	20
III. HOW THE CLASS UNFOLDED: ISSUES AND RELATED EVENTS.....	26
IV. LESSONS LEARNED.....	28
APPENDIX .....	39
SYLLABUS—SPRING 2018.....	39
FINAL ASSESSMENT 1—INDIAN LAW ISSUES.....	46
FINAL ASSESSMENT 2—REPARATIONS.....	47
FINAL ASSESSMENT 3—IMMIGRANT RIGHTS.....	48

## INTRODUCTION

The events of fall 2016 exploded the myth of a post-racial America that some believed had been ushered in by Barack Obama's presidency.<sup>1</sup> With the U.S. presidential campaign in full swing, soon-to-be President Donald Trump disparaged Muslims as terrorists, Mexicans as rapists and murderers, and African Americans as poor.<sup>2</sup> Trump's racist demagoguery came amidst the momentum of the Black Lives Matter, Standing Rock, and Dreamer movements—mass mobilizations that sought to end the police killings of Black people, protect Native American treaty rights, and grant immigrant minors legal status.<sup>3</sup> Once again, the racial divide that has defined this nation since its inception

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1. See Nikole Hannah-Jones, *The End of the Postracial Myth*, N.Y. TIMES MAG. (Nov. 15, 2016), <https://www.nytimes.com/interactive/2016/11/20/magazine/donald-trumps-america-iowa-race.html?smid=pl-share> [<https://perma.cc/SS7H-MR89>] (“The miracle Obama worked in 2008 and 2012 was to stitch together, at least in part, the racial lines that have always fractured this country. What we saw last week was those lines being torn apart again.”).

2. See David Leonhardt & Ian Prasad Philbrick, *Donald Trump's Racism: The Definitive List*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/interactive/2018/01/15/opinion/leonhardt-trump-racist.html> [<https://perma.cc/9WJ9-8N5R>] (listing various racist comments made during Trump's 2016 presidential campaign); see also Nia-Malika Henderson, *Race and Racism in the 2016 Campaign*, CNN POLITICS (Sept. 1, 2016, 5:07 PM), <https://www.cnn.com/2016/08/31/politics/2016-election-donald-trump-hillary-clinton-race/index.html> [<https://perma.cc/67S2-QC9N>] (quoting Trump asking African Americans, “You're living in poverty, your schools are no good, you have no jobs, 58% of your youth is unemployed—what the hell do you have to lose?”). Here, we focus on race and racism, however, we recognize that the 2016 election also surfaced broader issues of intersectionality related to gender and sexual harassment. See *infra* note 104 and accompanying text.

3. See generally Jelani Cobbs, *The Matter of Black Lives*, NEW YORKER (Mar. 14, 2016), <https://www.newyorker.com/magazine/2016/03/14/where-is-black-lives-matter-headed> [<https://perma.cc/7RKP-SN28>] (explaining the origins of the Black Lives Matter movement); Saul Elbein, *The Youth Group That Launched a Movement at Standing Rock*, N.Y. TIMES MAG. (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/magazine/the-youth-group-that-launched-a-movement-at-standing-rock.html> [<https://perma.cc/HA5Y-2HKA>] (detailing Native American youth activists' attempt to halt the construction of the Dakota Access pipeline through sacred land); Joanna Walters, *What Is DACA and Who Are The Dreamers?*, GUARDIAN (Sept. 17, 2017, 11:30 AM), <https://www.theguardian.com/us-news/2017/sep/04/donald-trump-what-is-daca-dreamers> [<https://perma.cc/EDK6-SWD7>] (describing the Deferred Action for Childhood Arrivals program which provides temporary protection to undocumented migrants who arrived in the United States as children, also known collectively as “the Dreamers”).

reemerged in the national discourse with an intensity that exposed the fallacy of post-racialism.<sup>4</sup>

The national anger, confusion, and vulnerability sown by that fall's campaign reflected and reverberated in our community in Montana. They fractured our law school, our university, our state, and our city along lines of difference, not the least of which was racial.<sup>5</sup> We would not know until November that Trump would be elected president. We would not know until after his inauguration that he would harden and intensify his racist agenda.<sup>6</sup> But we sensed a new era had dawned, and therefore, we and our students needed to understand the undercurrents and urgencies of the moment. In response, we sought to reaffirm an anti-racist agenda and harness the ferment by finding common ground in the legal treatments of Native Americans, African Americans, and immigrants. That is how our

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4. Compare Hannah-Jones, *supra* note 1 (“It was an absolution that let [White voters who switched parties to vote for Trump] reassure themselves that Donald Trump’s raucous campaign hadn’t revealed an ugly racist rift after all, that in the end, the discontent that propelled the reality-TV star into the White House was one of class and economic anxiety, not racism.”), with DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* 7-9 (1992) (“Black people [are] disadvantaged unless whites perceive that nondiscriminatory treatment for us will be a benefit to them. . . . [E]ven when nonracist practices might bring a benefit, whites may rely on discrimination against blacks as a unifying factor and a safety valve for frustrations during economic hard times.” “[Y]et conservative white politicians are able to gain and hold even the highest office despite their failure to address seriously any [social] issues. They rely instead on the time-tested formula of getting needy whites to identify on the basis of their shared skin color, and suggest with little or no subtlety that white people must stand together against the Willie Hortons, or against racial quotas, or against affirmative action. The code words differ. The message is the same. Whites are rallied on the basis of racial pride and patriotism to accept their often lowly lot in life, and encouraged to vent their frustration by opposing any serious advancement by blacks.”).

5. Kathleen Stone, *No One Else in Sight: Black Student Experience at UM*, MONT. KAIMIN (Nov. 29, 2016) [http://www.montanakaimin.com/features/no-one-else-in-sight-black-student-experience-at-um/article\\_9c3d5da8-b4f6-11e6-8b42-f3e6e92ba50c.html](http://www.montanakaimin.com/features/no-one-else-in-sight-black-student-experience-at-um/article_9c3d5da8-b4f6-11e6-8b42-f3e6e92ba50c.html) [<https://perma.cc/9S77-ZJ8X>] (describing incidents of racism at the University of Montana campus in the days after Trump’s election).

6. *Ramos v. Nielsen*, 321 F. Supp. 3d 1083, 1131-32 (N.D. Cal. 2018) (“President Trump repeatedly expressed his animus towards non-white immigrants on the campaign trail and after entering office, and explicitly linked those sentiments to his proposed immigration policies and priorities. Most directly, at a meeting about [Temporary Protected Status] on January 11, 2018, President Trump expressed his disdain for persons from Haiti and El Salvador, and his Administration then took action to terminate [Temporary Protected Status] for those countries a mere 7 days later. . . . Plaintiffs have plausibly pled that President Trump’s racial and national-origin/ethnic animus was a motivating factor in DHS’s [Temporary Protected Status] termination decisions and thus have plausibly stated an equal protection claim.”).

seminar, “Race, Racism, and American Law from the Native American, African American, and Immigrant Legal Perspectives,” came to be.

Inspired by Derrick Bell’s groundbreaking textbook,<sup>7</sup> we sought to investigate race and racism in American law and offer students a forum for understanding these issues. None of us were experts on race and racism. Nonetheless, we knew, inchoately, that race and racism were forged at the intersection of conquest, slavery, and immigration, and that law and lawyering played a critical, often decisive, role in their history. We were also deeply aware of how the past is present—that is, how these legacies endure—and that the plight and struggles of Native Americans, African Americans, and non-White immigrants remain flashpoints of conflict. We therefore approached the topic from these three perspectives. In doing so, we made a conscious and explicit choice to reject the historically scattering forces of race and racism in the law, striving instead to model, continue, and deepen a dialogue of inclusion and equality. This decision informed much of our collaborative course planning and design.

Our community also informed the design, content, and challenges of our seminar. Montana is an interesting place to teach this course. Outside of being “the last best place,”<sup>8</sup> the perception of Montana is that it is White, right, and heavily armed.<sup>9</sup> This perception is grounded in truth, but the reality is more complex. Although the state is overwhelmingly

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7. DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* (6th ed. 2008).

8. Annick Smith, *Still the Last Best Place?*, *MISSOULIAN* (Jan. 27, 2018) [https://missoulian.com/news/local/still-the-last-best-place/article\\_73900631-bf8e-5e15-96b8-d079cad566f4.html](https://missoulian.com/news/local/still-the-last-best-place/article_73900631-bf8e-5e15-96b8-d079cad566f4.html) [<https://perma.cc/3792-5FVP>] (speaking on the title of his eponymous book which gave birth to the slogan, “Kittredge came up with it while drinking gin and tonics at Chico Hot Springs. He says he was inspired by Abraham Lincoln’s words, “The last best hope of Mankind . . .” and our view of Paradise Valley: the Yellowstone River glinting below, meadows bright with wildflowers, and snow-dusted mountains all around us. Montana.”).

9. See *Quick Facts: Montana*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/mt> [<https://perma.cc/U7N6-99WH>] [hereinafter U.S. CENSUS BUREAU, *Quick Facts: Montana*] (estimating 89.1 % White alone in 2018); see also *United States Presidential Elections in Montana*, WIKIPEDIA, [https://en.wikipedia.org/wiki/United\\_States\\_presidential\\_elections\\_in\\_Montana](https://en.wikipedia.org/wiki/United_States_presidential_elections_in_Montana) [<https://perma.cc/A455-ZVMB>] (last updated Mar. 8, 2019) (voting for two Democratic presidential candidates since 1952); see also Phil Drake, *NRA Endorses Gianforte and Rosendale, Targets Tester*, *GREAT FALLS TRIB.* (Sept. 12, 2018, 3:05 PM), <https://www.greatfallstribune.com/story/news/2018/09/12/nra-endorses-gop-montana-races-gianforte-rosendale-tester-williams/1280401002/> [<https://perma.cc/TU5E-TWNW>] (reporting on the National Rifle Association’s attempt to unseat U.S. Senator Jon Tester (a Democrat with an “A-” rating from the NRA) in favor of Matt Rosendale (a Republican with an “A” rating from the NRA)).

White, Montana is also home to seven Native American reservations, and the Native American population, which comprises an estimated 6.7% of the state, is growing faster than the White population.<sup>10</sup> While Latinos account for an estimated 3.8% of the state population, they are also one of the fastest growing demographics in the state with a 36.7% increase in recent years.<sup>11</sup> Over 12% of the state's population lives below the federal poverty line—including nearly 14.4% of children under the age of 18.<sup>12</sup> More than a third of those living in poverty are Native Americans.<sup>13</sup>

Perhaps surprisingly to those beyond its borders, Montana also has a deep history of diversity, inclusion, and anti-racist struggle. Butte, Montana, once one of the richest cities in the world and home to the most millionaires per capita (the original One Percent), spawned multiracial labor unions, made up of workers coming to Butte from far-flung European and Asian countries.<sup>14</sup> Foremost among these unions were the Industrial Workers of the World and the Western Federation of Miners,

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10. *Tribal Nations*, MONT. GOVERNOR'S OFF. INDIAN AFF., <https://tribalnations.mt.gov/tribalnations> [<https://perma.cc/SL4J-ZTZW>] (“[H]ome to 7 Indian reservations and the state-recognized Little Shell Tribe of Chippewa Indians.”). U.S. CENSUS BUREAU, *Quick Facts: Montana*, *supra* note 9 (2018 estimation). Compare U.S. CENSUS BUREAU, C2010BR-10, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 7 (2012), <https://www.census.gov/history/pdf/c2010br-10.pdf> [<https://perma.cc/P5V5-24A2>] (finding the Native American population increased 18.5% from 2000 to 2010), with U.S. CENSUS BUREAU, C2KPROF/00-MT, MONTANA: 2000, at 2 (2002), <https://www.census.gov/prod/2002pubs/c2kprof00-mt.pdf> [<https://perma.cc/ZEN7-YP85>] [hereinafter U.S. CENSUS BUREAU, MONTANA: 2000], and U.S. CENSUS BUREAU, CPH-1-28, MONTANA: 2010, at 34 (2012), <https://www.census.gov/prod/cen2010/cph-1-28.pdf> [<https://perma.cc/GUR2-M2WU>] [hereinafter U.S. CENSUS BUREAU, MONTANA: 2010] (finding the White population increased 7.6% from 2000 to 2010).

11. U.S. CENSUS BUREAU, *Quick Facts: Montana*, *supra* note 9 (2018 estimation). Compare U.S. CENSUS BUREAU, MONTANA: 2000, *supra* note 10, with U.S. CENSUS BUREAU, MONTANA: 2010, *supra* note 10 (finding the Latino population increased 36.7% from 2000 to 2010).

12. U.S. CENSUS BUREAU, *Quick Facts: Montana*, *supra* note 9 (2018 estimation).

13. *Poverty Data*, TALK POVERTY, <https://talkpoverty.org/poverty/> (from menu, select 2018; then select “Montana”) [<https://perma.cc/K4H4-FL6P>].

14. See *History & Culture*, CITY-COUNTY BUTTE-SILVER BOW, <https://co.silverbow.mt.us/481/History-Culture> [<https://perma.cc/TE93-T3K2>] (“As copper mining ramped up and the city grew, it attracted workers from all over the globe, creating a unique cosmopolitan setting . . . This situation led Butte to the forefront of labor organization and unionism, and it was one of the first cities in the world where the battle between labor and management played out.”); *Montana Mining Towns*, WESTERN MINING HIST. (2018), <https://westernmininghistory.com/state/montana/> [<https://perma.cc/PA36-H93Z>] (“Butte was the greatest mining camp in the world and grew to a frontier metropolis of over 100,000 inhabitants.”).

which championed interracial organizing.<sup>15</sup> Though these unionizing efforts were violently suppressed by wealthy interests of the time,<sup>16</sup> many Montanans still view union organization and participation across racial lines as integral to the state's history.

Because of its history, the state is politically more complex than a “red-state” denomination suggests: in the same election in which Trump bested Hillary Clinton by more than 20%,<sup>17</sup> the state also re-elected Democratic Governor Steve Bullock.<sup>18</sup> For many years, both of our Senators were Democrats, while our one House Representative was Republican.<sup>19</sup> The Montana Women's March in January 2017, which drew more than 10,000 participants, was one of the largest political rallies in the state's history.<sup>20</sup> And, though the state maintains a strong pro-gun and anti-government culture, Montana ranks only sixteenth in gun ownership per capita, and

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15. See PATRICK RENSHAW, *THE WOBBLIES: THE STORY OF THE IWW & SYNDICALISM IN THE U.S.* 60 (1967) (describing the founding of the Western Federation of Miners (WFM)). See Red Jack, *Crossing the Color Lines, Crossing the Continents: Comparing the Racial Politics of the IWW in South Africa and the United States, 1905-1925*, LIBCOM.ORG (Aug. 7, 2011, 7:08 PM), <https://libcom.org/history/crossing-color-lines-crossing-continents-comparing-racial-politics-iww-south-africa-unit> [<https://perma.cc/YK6V-BTZH>] (discussing the anti-racist commitment of the Industrial Workers of the World (IWW), and the integral role WFM played in the early IWW).

16. See, e.g., RENSHAW, *supra* note 15, at 207-08 (“Although [Frank] Little's antiwar attitude was very unpopular it was not super-patriotism that motivated his murderers. They were almost certainly agents of the copper trust who wanted to rid themselves of a dangerous IWW agitator in a dangerous industry . . . Frank Little had been a tireless organizer in the metal mines of Arizona and Montana in 1916–17. . . . This act of savage barbarity shocked Butte and the entire labor movement.”).

17. *2016 Montana Presidential Election Results*, POLITICO (Dec. 13, 2016, 1:57 PM), <https://www.politico.com/2016-election/results/map/president/montana/> [<https://perma.cc/Y95W-Q3YX>] (showing that Donald Trump received 56.5% of the vote, while Hilary Clinton only received 36% of the vote).

18. *Montana Governor Results: Steve Bullock Wins*, N.Y. TIMES (Aug. 1, 2017, 11:26 AM), <https://www.nytimes.com/elections/results/montana-governor-bullock-gianforte> [<https://perma.cc/22WK-9HU3>].

19. See *List of United States Senators from Montana*, BALLOTPEDIA, [https://ballotpedia.org/List\\_of\\_United\\_States\\_Senators\\_from\\_Montana](https://ballotpedia.org/List_of_United_States_Senators_from_Montana) [<https://perma.cc/PA7E-5LAM>] (from 2007 until 2015); see also *List of United States Representatives from Montana*, BALLOTPEDIA, [https://ballotpedia.org/List\\_of\\_United\\_States\\_Representatives\\_from\\_Montana#2000s](https://ballotpedia.org/List_of_United_States_Representatives_from_Montana#2000s) [<https://perma.cc/X7VJ-HQGD>] (since 1997).

20. Erin Loranger, *Biggest Stories of 2017: Women's March was One of Montana's Largest Political Gatherings*, INDEP. REC. (Dec. 30, 2017), [https://helenair.com/news/local/biggest-stories-of-women-s-march-was-one-of-montana/article\\_63f3c985-96ec-55fb-a4cf-6db624b3359b.html](https://helenair.com/news/local/biggest-stories-of-women-s-march-was-one-of-montana/article_63f3c985-96ec-55fb-a4cf-6db624b3359b.html) [<https://perma.cc/7H8D-CN53>].

(due to its small population) is not even in the top ten states for the total number of registered guns.<sup>21</sup>

Montana is also home to various White supremacist and other fringe groups.<sup>22</sup> In late 2016 and early 2017, White supremacists, emboldened by the national political climate, sought to assert their racist agendas in Montana.<sup>23</sup> Richard Spencer, a neo-Nazi and “alt-right” leader, currently lives in Whitefish, Montana, only a few hours north of our campus in Missoula.<sup>24</sup> Spencer and other White supremacists, including Andrew Anglin of the Daily Stormer, attempted to organize an armed rally in Whitefish on January 16, 2017.<sup>25</sup> They referred to the rally, intentionally set to fall on the national holiday to honor Dr. Martin Luther King, Jr., as the “James Earl Ray Day Extravaganza,” after the man who assassinated Dr. King.<sup>26</sup> They billed it as an anti-Semitic tribute to the election of President Trump.<sup>27</sup> Although Anglin ultimately called off the rally due

21. Jeff Edwards, *Gun Ownership Mapped: How Many Guns Each State Had In 2017?*, HUNTING MARK, <https://huntingmark.com/gun-ownership-stats/> [<https://perma.cc/Q987-F8NR>] (22,133 registered guns and 21.06 guns per capita).

22. *Hate Map*, SOUTHERN POVERTY L. CTR. (2018), <https://www.splcenter.org/hate-map?state=MT> [<https://perma.cc/J8RE-JZT5>] (identifying seven hate groups in Montana).

23. Kirk Siegler, *Descending on a Montana Town, Neo-Nazi Trolls Test Where Free Speech Ends*, NPR (Jan. 23, 2018, 5:03 AM), <https://www.npr.org/2018/01/23/579884628/victims-of-neo-nazi-troll-storm-find-difficulties-doing-something-about-it> [<https://perma.cc/K4LV-MVC4>].

24. *Id.*; see also *Gersh v. Anglin*, CV 17-50-M-DLC-JCL, 2018 WL 4901243, at \*1 (D. Mont. May 3, 2018) (“Richard Spencer’s racist views and his family connection to Sherry Spencer [his mother] were common knowledge in Whitefish, which has become home to several vocal white nationalists in recent years. In response to growing concerns about the increased presence of white nationalism in the region, the Whitefish community has repeatedly and publicly reinforced its commitment to treating all residents with dignity and respect. For example, the Whitefish City Council approved an anti-hate resolution in December 2014, and community organizations began to distance themselves from the Spencers.”).

25. Siegler, *supra* note 23; Keila Szpaller, *Police: White Supremacist ‘James Earl Ray’ March on MLK Day in Whitefish Unlikely*, MISSOULIAN (Jan. 5, 2017), [https://missoulian.com/news/state-and-regional/police-white-supremacist-james-earl-ray-march-on-mlk-day/article\\_7a1cd12a-882a-5e86-94bc-893428088d45.html](https://missoulian.com/news/state-and-regional/police-white-supremacist-james-earl-ray-march-on-mlk-day/article_7a1cd12a-882a-5e86-94bc-893428088d45.html) [<https://perma.cc/24NN-7WS6>] [hereinafter Szpaller, ‘James Earl Ray’ March]. Following Anglin’s anti-Semitic harassment campaign against Whitefish resident and real estate agent Tanya Gersh, Mrs. Gersh, represented by the Southern Poverty Law Center, sued Anglin for invasion of privacy, intentional infliction of emotional distress, and violations of Montana’s Anti-Intimidation Act. *Gersh v. Anglin*, CV 17-50-M-DLC-JCL, 2018 WL 4901243, at \*1, \*2 (D. Mont. May 3, 2018). In a significant ruling, District Court Judge Dana Christensen held that the lawsuit could not be dismissed on First Amendment grounds. *Gersh v. Anglin*, 353 F. Supp. 3d 958 (D. Mont. Nov. 14, 2018).

26. Szpaller, ‘James Earl Ray’ March, *supra* note 25.

27. *Id.*; see also *Richard Bertrand Spencer*, SOUTHERN POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/individual/richard-bertrand-spencer-0>



to the strong anti-racist response from the Whitefish community,<sup>28</sup> Spencer continued to foment his racist, neo-Nazi messages.<sup>29</sup> Four months later, Spencer helped organize the “Unite the Right” rally in Charlottesville, Virginia, where a White supremacist killed Heather Heyer and injured nineteen others.<sup>30</sup> Montana is also home to the Freeman, a group that refuses to recognize the sovereignty of any other government and, in the mid-1990s, was involved in an eighty-one-day standoff with the Federal Bureau of Investigation.<sup>31</sup>

It was in this local and national environment that we developed and taught our course. We have now done so twice—the first time in a one-credit, week-long format in January 2017, and the second as a two-credit, semester-long seminar in the spring of 2018. For our inaugural class, we met for three hours daily for one week; for our second class, we met for two hours weekly for thirteen weeks. We write this essay to share what we learned about how academics can respond to the present environment through collaboration, teaching, and hopefully, inspiring in students an enduring commitment to rid society of racism.

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[<https://perma.cc/PE8G-79BJ>] [hereinafter SOUTHERN POVERTY L. CTR., *Richard Bertrand Spencer*] (“Spencer, flush with victory [responding to the election of Donald Trump], offered the toast, ‘Hail Trump, hail our people, hail victory!’ to the nearly 200 attendees. He was met with a handful of stiff-armed salutes from the crowd.”).

28. Szpaller, *‘James Earl Ray’ March*, *supra* note 25 (stating that Whitefish Police Chief said the event was unlikely to take place, and calling the threats “rhetoric”); *see, e.g.*, SOUTHERN POVERTY L. CTR., *Richard Bertrand Spencer*, *supra* note 27 (“But when Anglin threatened to bus in ‘skinheads from the Bay Area’ for an armed protest against the town’s small Jewish population, to be held on Martin Luther King Jr. Day, Spencer was forced to backpedal. Spencer tried to play the march off as a ‘joke[.]’”).

29. Phil Helsel & The Associated Press, *Hundreds Protest Speech by White Nationalist Richard Spencer at Texas A&M*, NBC NEWS, <https://www.nbcnews.com/news/us-news/hundreds-protest-speech-white-nationalist-richard-spencer-texas-m-n692871> (last updated Dec. 7, 2016, 3:46 AM) [<https://perma.cc/DQE3-CFTD>] (eliciting a counter event, chants of “No love for Nazis,” and signs such as “Aggies against the alt-right”).

30. *Sines v. Kessler*, 324 F. Supp. 3d 765, 779, 785-86 (W.D. Va. 2018) (“Spencer invited white supremacist groups to visit and hold events around the statue with the intent of intimidating nonwhite and Jewish individuals and their allies. . . . During . . . planning, Spencer made statements that plausibly demonstrate an agreement to engage in violence. . . . Defendant Spencer ‘directed and incited physical assaults and violence, the use of open flames, and the intimidation of minority residents and those who advocate for equal rights for minority citizens’ at the rally.”).

31. Danny Lewis, *Twenty Years Ago Today, the Montana Freeman Started Its 81-Day Standoff*, SMITHSONIAN (Mar. 25, 2016), <https://www.smithsonianmag.com/smart-news/twenty-years-ago-today-the-montana-freeman-started-its-81-day-standoff-180958568/> [<https://perma.cc/Y7NU-ATPL>].

## I. OUR APPROACH: THEMES, GOALS, AND COLLABORATION

While our seminar grew from the turbulent months surrounding the 2016 presidential election, the intensity of that time reinforced our commitment to approach the topics of race, racism, and American law in as thoughtful and as responsible of a way as possible. We sought to model collaboration,<sup>32</sup> rigorous inquiry, and respectful, challenging dialogue. These goals emerged from our professional relationships with one another while developing and preparing for the class, and eventually, informed the primary themes of the course, as well as our approach to classroom dialogue and student assessment.

### A. *Common Threads and Themes*

From the start, we brought together our three areas of expertise—Indian law, criminal law, and immigration law—to explore how race and racism defined each field and impacted the experiences of Native Americans, African Americans, and immigrants.<sup>33</sup> While we understood some of the connections among race, racism, and our specific subject areas, we soon discovered numerous common threads interwoven among them—many of which implicated or relied on standard, historical constructions of race and racism. These common connections, punctuated by some fascinating divergences,<sup>34</sup> soon elucidated the themes of our course and motivated our course structure.

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32. The ability to collaborate is one of our school's student learning outcomes. See *Our Mission, Goals, and Graduates*, U. MONT. ALEXANDER BLEWETT III SCH. L., <http://www.umt.edu/law/files/admissions/student-learning-outcomes.pdf> [<https://perma.cc/4VVFV-S37B>] [hereinafter U. MONT. ALEXANDER BLEWETT III SCH. L., *Our Mission, Goals, and Graduates*].

33. We use the term "Indian law" to be consistent with the legal term of art referring to the area of federal law affecting or governing individual Native Americans. It is also important to understand that, due to President Nixon's "Southern Strategy," issues of race for African Americans are largely discussed as questions of criminality. The authors understand and reject the equation of "Black" with "criminal," but recognize that the conversations in the law about racism against African Americans are often centered in the criminal law. John Lantigua, Opinion, *Before Trump, There was Nixon and His Divisive Southern Strategy*, MIAMI HERALD (Mar. 2, 2017, 7:18 PM), <https://www.miamiherald.com/opinion/op-ed/article63683222.html> [<https://perma.cc/Y9AX-EGCM>]; James Boyd, *Nixon's Southern Strategy*, N.Y. TIMES (May 17, 1970), <https://www.nytimes.com/1970/05/17/archives/nixons-southern-strategy-its-all-in-the-charts.html> [<https://perma.cc/69US-7NT4>].

34. E.g., *Morton v. Mancari*, 417 U.S. 535 (1974) (upholding a hiring and promotion preference for Indians in jobs with the Bureau of Indian Affairs as a political, not a racial, classification).

First, in our early readings and discussions, it was readily apparent that the conquest of America's indigenous people, enslavement of Africans, and control of largely non-European immigration to the country were each rooted in or justified by race and racialized laws and judicial decisions. For example, the legal fiction of federal supremacy over indigenous lands manufactured by the Supreme Court and excused by Chief Justice John Marshall,<sup>35</sup> enabled the dispossession of Native American lands, which, in some cases, were almost immediately available as plantation lands for Southern slave owners.<sup>36</sup> This combination of cheap land and free labor, along with technological improvements, jumpstarted the American economy and sparked the "Great Divergence" from prior eras of population and resource limitations.<sup>37</sup> The influx of cheap labor and foreign technology brought about by the mass immigration of the early twentieth century would later build on this primitive capital accumulation to make the United States a modern industrial state and global power.<sup>38</sup> At the root of this growth—

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35. *Johnson v. M'Intosh*, 21 U.S. 543, 591 (1823) ("However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.").

36. EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM* 93 (2014) (noting "'Alabama Fever,' . . . the fervent belief that every white person who could get frontier land and put enslaved people to work making cotton would inevitably become rich.").

37. *Id.* at 78-83 ("The world's per capita income over the past 3,000 years shows that a handful of societies, beginning in Great Britain, were shifting onto a path of sustained economic expansion that would produce higher standards of living and vastly increased wealth for some—and poverty for others[.] . . . In those societies that it benefited the most, this transformation built fundamentally upon one key shift: increasing the amount of goods . . . produced from a given quantity of labor and land."); *see also* KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* 823, 834 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., Random House, Inc. 1906) (1867) ("The discovery of gold and silver in America, the extirpation, enslavement and entombment in mines of the aboriginal population, the beginning of the conquest and looting of the East Indies, the turning of Africa into a warren for the commercial hunting of black-skins, signalled the rosy dawn of the era of capitalist production." "[C]apital comes dripping from head to foot, from every pore, with blood and dirt.").

38. *See generally* BAPTIST, *supra* note 36, at 412-20 ("From markets built on the labor and the bodies of enslaved people, and from the infrastructure laid down to ship the product in and out, came economic growth."); *see generally* HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES: 1492–PRESENT* 382-83 (20th ed. 1999) (recounting the 1920s; the rise of populism in response to immigration, the rise of the Ku Klux Klan in response to calls for racial equality,

the very opportunity identified as “the American dream”—were the legal justifications for conquest, slavery, and immigration, all of which centered on race.<sup>39</sup> Racism was and is, in other words, built into the laws of property (both real and chattel), criminality, and immigration.<sup>40</sup>

Second, as a result of identifying these connections, we focused on the racist legal justification for conquest, slavery, and immigration controls: the fabrication and maintenance of Whiteness, White privilege, and White supremacy as reasons for economic dominion. When it addressed indigenous, African, and immigrant peoples, the American legal system focused on their race and their perceived non-White racial characteristics in order to limit their legal rights and relegate them as slaves and non-citizens. The negative relief of these laws and decisions defined the “White race.”<sup>41</sup> We therefore found that we needed to investigate the material foundations, privileges, and immunities of Whiteness as it was inextricably bound with its social meaning.<sup>42</sup>

Finally, exploring Whiteness forced a necessary discussion of popular and historical misconceptions of race being biologically- or scientifically-based. Relying on the work of Ian F. Haney López,<sup>43</sup>

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advancements in technology and the arts; stating, “[t]here was some truth to the standard picture of the twenties as a time of prosperity and fun . . . [b]ut prosperity was concentrated at the top.”).

39. See generally ZINN, *supra* note 38, at 23 (“There is not a country in world history in which racism has been more important, for so long a time, as the United States.”).

40. Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 3-4 (1994) [hereinafter Haney López, *The Social Construction of Race*] (alluding to *Hudgins v. Wright*, “[T]he law serves not only to reflect but to solidify social prejudice, making law a prime instrument in the construction and reinforcement of racial subordination. . . . I assert that no body of law exists untainted by the powerful astringent of race in our society.”).

41. See IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 2* (1996) [hereinafter HANEY LÓPEZ, *WHITE BY LAW*] (“ . . . Whiteness exists at the vortex of race in U.S. law and society[.]”).

42. We relied on one particularly power anecdote from TIM WISE, *WHITE LIKE ME: REFLECTIONS ON RACE FROM A PRIVILEGED SON 19-23* (2005) (describing his experience, or lack thereof, with corporal punishment as a child compared to his friends of color).

43. See, e.g., HANEY LÓPEZ, *WHITE BY LAW*, *supra* note 41, at 10 (“Race can be understood as the historically contingent social systems of meaning that attach to elements of morphology and ancestry.”); see also Haney López, *The Social Construction of Race*, *supra* note 40, at 24 (“[The] glaring misconceptions—that race and racism are the product of individuals and that this society is fully committed to social justice for minorities—not only survive but for most people in America provide the very heart of the understanding of race.”).

Justin Desautels-Stein,<sup>44</sup> and others,<sup>45</sup> we developed a foundation for attacking those ideas and, in Desautels-Stein's words, thought about "race as a verb—a tool with which to justify the superiority of Whites over non-Whites[.]"<sup>46</sup> This cemented our commitment to exploring race, racism, and American law through these three lenses.

*B. Self-Disclosure, "Objectivity," and Reflective Practice*

We found it necessary from the very beginning to explicitly state our commitment to racial equality and relate our formative experiences of race and racism. In making transparent our assumptions and aspirations, we sought in these self-disclosures—which we continued throughout the seminar—to reject the myth of detached objectivity and model reflective practice instead. Here, we acknowledged "positionality," the feminist theory of knowledge that is "a rejection of objective, neutral truth in favor of a truth 'situated and partial[,] . . . emerg[ing] from particular involvements and relationships . . . [that] define the individual's perspective and provide the location for meaning, identity, and political commitment.'"<sup>47</sup> We considered the contingency of knowledge of particular importance in this moment given the return of open racism and, with it, the "plasticity" of race in both its regressive and progressive senses.

Professor Capulong is a first-generation immigrant from the Philippines. At age fourteen, he and his family fled the Marcos dictatorship and sought and were granted political asylum in the United States, where he later gained citizenship.<sup>48</sup> Shaped by that experience, he worked as a journalist, organizer, and lawyer in various immigrant and

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44. See Justin Desautels-Stein, *Race as a Legal Concept*, 2 COLUM. J. RACE & L. 1, 17 (2012) ("The claim here is therefore that the idea of race was invented to satisfy a critical social need on the part of the oppressor class.").

45. See, e.g., ARIELA J. GROSS, *WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* 304 (2008) ("If law acts to leave in place, or is indifferent to, continuing racial hierarchy outside the courtroom, then its neutrality in fact reinforces cultural racism because it assumes that if 'blood' has not led to the resulting 'differences,' culture must have done so. It sends the message that these continuing differences are acceptable, or that there is nothing that can be done about them.").

46. Desautels-Stein, *supra* note 44, at 42.

47. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1727 n.71 (1993) (quoting Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 880 (1990)).

48. For a description of the Capulong family's flight, see THOMAS PLATE & ANDREA DARVI, *SECRET POLICE: THE INSIDE STORY OF A NETWORK OF TERROR* (1981).

working-class communities in New York and the San Francisco Bay Area, where he lived prior to moving to Montana. His views on race and racism come from a longstanding involvement in these as well as other communities' political struggles and from a bi-racial (White/Jewish) nuclear family and a multiracial extended family. Professor Capulong practiced immigration law prior to teaching law.

Professor Mills began his legal career working for the general counsel of an Indian tribe and then spent nearly ten years as in-house counsel for that tribe. As a tribal attorney, he became acutely aware of the manner in which the American legal system addressed Native Americans, and the direct connection between history and the present-day legal issues faced by tribes and their members. For example, the Supreme Court's 1823 decision in *Johnson v. M'Intosh*, which sought to legitimize the federal government's claim to indigenous lands and laid the foundation for the ongoing role of the federal government in managing and overseeing those lands.<sup>49</sup> The federal role in tribal land management remains a critical issue affecting tribal self-determination and economic development efforts.<sup>50</sup>

In addition to the ongoing relevance of historical precedents in federal Indian law, this body of law is interlaced with race and racism, the legacies of which continue to reverberate for attorneys working in the field. In *Johnson*, for example, Chief Justice Marshall excused his novel approach of applying the European legal tradition of discovery in the "New World" by "justif[ying it] in the character and habits of the people whose rights have been wrested from them."<sup>51</sup> Relying on racist stereotypes of Indians as "savages," Marshall expounded beyond the

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49. *Johnson v. M'Intosh*, 21 U.S. 543, 588 (1823) ("Conquest gives a title which the Courts of the conqueror cannot deny . . ."); see also COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.03, at 997-99 (Nell Jessup Newton ed., 2012) ("[T]he Indian title of occupancy includes the full and exclusive possession, use, and enjoyment of the land . . . [.]" but the United States retains "ultimate title," and that split of title contributed to the formation of the ongoing federal trust relationship to Indian tribes.).

50. See, e.g., Valerie Volcovici, *Trump Advisors Aim to Privatize Oil-Rich Indian Reservations*, REUTERS (Dec. 5, 2016, 5:23 AM), <https://www.reuters.com/article/us-usa-trump-tribes-insight/trump-advisors-aim-to-privatize-oil-rich-indian-reservations-idUSKBN13U1B1> [<https://perma.cc/KSB4-6LDL>] ("Leaders of Trump's coalition did not provide details of how they propose to allocate ownership of the land or mineral rights - or to ensure they remained under Indian control.").

51. *Johnson v. M'Intosh*, 21 U.S. 543, 589 (1823).

property law basis of the decision and cemented racialized inferiority into the foundation of the Supreme Court's Indian law jurisprudence.<sup>52</sup>

In more recent times, however, the Supreme Court has separated Indian law from other areas of civil rights and race-related questions. In 1974, for example, the Court, relying on the long-standing recognition of tribal sovereignty under federal law, described membership in an Indian tribe as a political, rather than racial, classification.<sup>53</sup> Tribal members could therefore receive a hiring preference in jobs with the Bureau of Indian Affairs (BIA) without running afoul of the 1972 Equal Employment Opportunity Act's prohibition on racial discrimination in federal employment.<sup>54</sup> Consistent with the Court's approach, Indians continue to be singled out for distinct legal treatment, sometimes in service of their interests,<sup>55</sup> sometimes not.<sup>56</sup> Therefore, the role of race and racism in federal Indian law is at once both explicitly foundational and entirely irrelevant.<sup>57</sup>

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52. *Id.* at 590-91 (“To leave them in possession of their country, was to leave the country a wilderness[.]” “[T]he Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but deemed incapable of transferring the absolute title to others.”).

53. *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (“The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. . . . In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly *sui generis*.”).

54. *Id.* at 546-48, 554 (“Congress has sought only to enable the BIA to draw more heavily from among the constituent group in staffing its projects, all of which, either directly or indirectly, affect the lives of tribal Indians.”).

55. *See, e.g.*, Indian Child Welfare Act of 1978, 21 U.S.C. §§ 1901-1963 (2018) (establishing “minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture” to “promote the stability and security of Indian tribes and families[.]”). *But see* *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018) (finding the Indian Child Welfare Act violative of the Fifth Amendment, Article I, the Tenth Amendment, and the Administrative Procedure Act).

56. *See, e.g.*, *United States v. Antelope*, 430 U.S. 641, 642-44, 646, 648-49 (1977) (upholding federal convictions of felony-murder when the murder of a non-Indian occurred on a reservation and the corresponding state statute lacked a felony-murder provision, relying on *Mancari*, “[R]espondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d’Alene Tribe. . . . Respondents were, therefore, subjected to the same body of law as any other individual, Indian or non-Indian, charged with first-degree murder committed in a federal enclave. . . . [T]he National Government does not violate equal protection when its own body of law is evenhanded[.]”).

57. *See* Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 1043, 1045 (2011) (identifying the underlying ideas of the

This complexity contributes to the challenges faced by attorneys working for and on behalf of Indian tribes and their members. In his practice, for example, Professor Mills often struggled with the implications of relying upon foundational Indian law cases to support the interests of his tribal clients while recognizing the often explicitly racist language of those decisions.<sup>58</sup> The tension between relying upon American law to advance indigenous interests while working to reject the law's construction of race and use of racism remains a central challenge for those practicing Indian law.<sup>59</sup>

Beyond his professional interests, Professor Mills's personal experiences with race also animated his perspective on the class. As a male of European descent growing up in small, rural, majority White communities, he witnessed the racist taunts and comments of classmates toward the few of his fellow Classmates of Color. Attending high school in a reservation border town, he witnessed the segregation between privileged, White students from town and the Native students bussed in from the nearby reservation, many of whom were isolated and taunted. Through sports, however, Professor Mills connected with a range of his peers across racial, cultural, and socioeconomic divides. His experience

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*Mancari* doctrine, “[T]hat race is a formal and politically meaningless designation that ought not to be recognized in legal decision making and that Indianness is reducible to voluntary civic participation.” Believing, further, that, “Once the integrated relationship between Indian racialization and Indian political rights is clarified, it becomes clear in the Indian context that, far from being a static and irrelevant designation, race is a shifting and flexible concept with significant historical and political content.”); Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1132 (2012) (lamenting, “In terms of current legal doctrine, the *Mancari* rule . . . is probably the best courts can do. The categories ‘federally recognized tribe’ and ‘tribal member’ are political, even while they also include the racialized history of the federal government’s treatment of Native peoples. Given that courts are unlikely to engage in the deep, contextual analysis necessary to untangle the racial from the political in ways that will reverse eliminationist policies, it is better to stick with *Mancari*’s good-enough formulation.”); Bethany R. Berger, *Race, Descent, and Tribal Citizenship*, 4 CAL. L. REV. CIR. 23, 23 (2013) (arguing tribal citizenship laws requiring descent are not racist, are relatively political, and constitutional).

58. See, e.g., *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877) (“It is presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race.”).

59. See *Duro v. Reina*, 495 U.S. 676, 709 (Brennan, J., dissenting) (“This country has pursued contradictory policies with respect to Indians.”); see also Seth Davis, *Tribal Rights of Action*, 45 COLUM. HUM. RTS. L. REV. 499, 528 (2014) (“[U]nder the black letter law, the United States has both limited the exercise of Indian Tribal sovereignty and assumed the responsibility to protect tribal interests.”).



building connections based on common interests and passions informed the valuable skills on which he eventually relied as legal counsel in Indian Country and in his work with predominantly Native communities.

Professor King-Ries identifies as an American male of Scottish, Irish, and German ancestry. Having been born during the Civil Rights Movement and growing up comfortably upper-middle class in St. Louis—a city with a strong history of racism, manifested by slave auctions on the courthouse steps, racial covenants, and segregated suburbs—he is uncomfortable identifying as White. As a child, he was aware of the racism against African Americans and the unequal economic realities between Black and White. His family employed an African American woman as a maid and belonged to a racially-segregated country club. His family's folklore is that his grandfather used education to move his working-class German immigrant family into the upper-middle class. His grandfather was a plumber who never finished high school. Professor King-Ries's father was a lawyer who worked as a CPA. In reality, his father made the most of the opportunities provided to him as a White male: he was a World War II veteran and the GI Bill allowed him to afford college and law school. He purchased his first home through a Federal Housing Administration loan. Professor King-Ries's father ultimately rose to upper management in an international accounting firm.

Looking back, Professor King-Ries can see the direct benefits that he received from growing up White in a racist country. African Americans were excluded from the very government programs that allowed his parents to acquire education, housing, and economic security. As a result, his parents provided him with the opportunity to pursue higher education and obtain job security. In other words, he is the product of White privilege and has struggled throughout his life to counteract his racist upbringing.

Prior to becoming a professor, Professor King-Ries was a deputy prosecutor for nearly a decade with the King County Prosecutor's Office in Seattle, Washington. While he primarily prosecuted domestic violence offenders, he spent some time prosecuting drug crimes during the Clinton Administration's version of the "War on Drugs." Under federally-funded programs, thousands of street-level drug dealers, mainly of crack cocaine, were arrested and prosecuted.<sup>60</sup> Due to mandatory minimums and

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60. These operations—called "Buy/Busts"—involved an undercover officer purchasing drugs from a street-level dealer using previously marked bills. After completion of the drug deal,

sentence enhancements for selling drugs in a public park or within 1,000 feet of a school or school bus stop (effectively the entirety of downtown Seattle),<sup>61</sup> even first offenders were routinely sentenced to several years in prison. While these dealers clearly broke the law, the decision to focus law enforcement and prosecution efforts on street-level dealers meant that, almost uniformly, the defendants were African American and other People of Color in a city that was predominately White.<sup>62</sup> Typically, during their trials, the defendant would be the only Person of Color in the courtroom: represented by White public defenders and convicted by all-White juries.

### C. Collaboration

For two years, we met on a near-weekly basis. Initially, we began as more of a research and discussion group. We researched a multidisciplinary range of race-related literature, assigned ourselves readings, and met to discuss them. Later, as we moved toward class preparation, we settled on the readings for each portion of the class and met to study these readings and discuss the class's themes. These meetings, however, became much more than their straightforward tasks suggest. They became a forum for deep exploration, debate, and reflection. Indeed, as the semester wore on, they became, in essence, an advanced version of the seminar.

To begin with, the vast canon on the subject produced wide-ranging, eye-opening exploration. Beyond our explicit course topics were

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uniformed officers arrested the dealer and anyone who helped set up the deal, and they attempted to recover the money used for the sale and any additional drugs. Joseph Goldstein, *Undercover Officers Ask Addicts to Buy Drugs, Snaring Them but Not Dealers*, N.Y. TIMES (Apr. 4, 2016), <https://www.nytimes.com/2016/04/05/nyregion/undercover-officers-ask-addicts-to-buy-drugs-snaring-them-but-not-dealers.html> [<https://perma.cc/R53Z-DEJT>]; see also Thomas Frank, Opinion, *Bill Clinton's Crime Bill Destroyed Lives, and There's No Point Denying It*, GUARDIAN (April 15, 2016, 7:00 AM), <https://www.theguardian.com/commentisfree/2016/apr/15/bill-clinton-crime-bill-hillary-black-lives-thomas-frank> [<https://perma.cc/86B7-6SU2>] (“The drug identified with black users (crack) was treated as though it were 100 times as villainous as the same amount of cocaine a drug popular with affluent professionals.”).

61. WASH. REV. CODE ANN. § 69.50.435 (West 2019).

62. Compare *QuickFacts: Seattle City, Washington; United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/seattlecitywashington,US/RHI125217#viewtop> [<https://perma.cc/7KPX-URPZ>] (estimating Seattle is 68.6% White and 7.1% Black), with *Race and the Incarceration of Drug Offenders*, HUM. RTS. WATCH, <https://www.hrw.org/reports/2008/us0508/4.htm> [<https://perma.cc/QA6U-XLPR>] (comparing prison admissions for drug convictions in Washington; White: 31.9%, Black: 44.5%).

countless other foci of discussion—the constitutive nature of law in the construction of race; the relationship between race and class; the role of the railroad in conquest, slavery, and immigration; the concept of “illegal immigrant” in the context of Native American treaty rights; the role of immigration in the transfer of technological expertise; the connection between the Second Amendment and Southern state slave patrols; the evolution of those slave patrols and company security into the modern police force; U.S. foreign policy in Central America; domestic violence in Indian country; and so on. Given our diverse backgrounds and viewpoints, these discussions also led to debate, most notably on the concept of “White privilege” and the promise and reality of constitutional rhetoric. We debated whether and how most Whites have or have not “benefited”—or continue to do so—from racism. Echoing a debate that arose between Ta-Nehisi Coates and Cornel West at around the same time,<sup>63</sup> we interrogated the relationship between race and class, their inextricable nature, and the centrality of one to the other. Throughout these exciting, often intensely personal,<sup>64</sup> deliberations, we confronted the promise and limits of law, vacillating between its oppressive functions and its liberatory capacities.

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63. John Eligon, *Past Debates Echo in Split Between Cornel West and Ta-Nehisi Coates*, N.Y. TIMES (Dec. 22, 2017), <https://www.nytimes.com/2017/12/22/us/past-debates-echo-in-split-between-cornel-west-and-ta-nehisi-Coates.html> [<https://perma.cc/7WV4-L73F>] (“This current dispute stems from Dr. West asserting in a column in The Guardian that Mr. Coates’s analysis of racism and white supremacy fails to account for broader factors like class and patriarchy, and that he is not critical enough of former President Barack Obama. Mr. Coates rebutted in a string of Twitter posts with excerpts from his work that included criticisms of Mr. Obama, and analyses of gender, poverty, war and other areas that Dr. West said he had failed to address. . . . [Mr. Coates’s] only mention of Dr. West was to congratulate him on the anniversary of the publication of ‘Race Matters.’ . . . Dr. West has been highly critical of Mr. Coates, for instance, for not centering capitalism in his analyses of white supremacy.”); see generally Cornel West, *Opinion, Ta-Nehisi Coates is the Neoliberal Face of the Black Freedom Struggle*, GUARDIAN (Dec. 17, 2017), <https://www.theguardian.com/commentisfree/2017/dec/17/ta-nehisi-Coates-neoliberal-black-struggle-cornel-west> [<https://perma.cc/EX8J-WM4X>] (“Coates and I come from a great tradition of black freedom struggle. He represents the neoliberal wing that sounds militant about white supremacy but renders black fightback invisible.” Further disagreeing with Coates’s worldview because, Dr. West believes, it “omits the centrality of Wall Street power, [U.S.] military policies, and the complex dynamics of class, gender, and sexuality in black America . . . . In short, Coates fetishizes white supremacy. He makes it almighty, magical and unremovable. What concerns me is his narrative of ‘defiance[.]’ For Coates, defiance is narrowly aesthetic . . . . It generates crocodile tears of neoliberals who have no intention of sharing power or giving up privilege.”).

64. In discussing reparations, for example, we joked about writing personal checks to one another to compensate for past racial injuries.

Finally, we took these meetings as opportunities for self-reflection. We sought to probe our own biases—personally, professionally, and pedagogically—and how they affected our engagement, prognoses, and legal strategy. Our discussions were academic, politically-charged, and intense. The three of us have different experiences with race and racism, professionally, politically, and personally. We often disagreed, regularly said stupid things, hurt each other’s feelings, and felt insecure, uncertain, and inept. But (thanks to everyone’s unfailing good humor) we always felt compelled to keep at it. Uniformly, we have felt that this collaboration has been the most difficult and rewarding undertaking in our academic careers.

Throughout the course, we continued to meet prior to each class session to discuss that week’s agenda, learning outcomes, and division of labor. These discussions and our collaborative approach continued to enhance our work both in and out of the classroom.

#### *D. Lawyering Skills*

In addition to our foundational commitments to rely on our three areas of expertise, develop common threads among them, and surface our personal connections with race and racism, we also felt it important to encourage our students to develop lawyering skills to put that knowledge to work. By doing so, we hoped to follow in the long tradition of lawyers seeking racial justice and to inspire our students to pursue opportunities to reject the individual and systemic use of law as an oppressor. This approach led us to incorporate literature on progressive lawyering in our syllabus.<sup>65</sup> We combined lawyering skills with the development of student values on social justice and the role of lawyers in such pursuit, which aligned the course with our institutional mission to “[prepare] students for the people-oriented practice of law by integrating theory and practice in a competency-based curriculum[.]”<sup>66</sup> The approach was consistent with our law school’s student learning outcomes, among which are cross-cultural competence and the recognition of diversity, equality

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65. We assigned articles on rebellious and movement lawyering, which stand in the tradition of people’s, poverty, community, public interest, etc., lawyering. See Eduardo R.C. Capulong, *Client Activism in Progressive Lawyering Theory*, 16 *CLINICAL L. REV.* 109 (2009) (analyzing scholarship on movement lawyering).

66. *Mission and Values*, U. MONT. ALEXANDER BLEWETT III SCH. L., <http://www.umt.edu/law/about/default.php#mission> [<https://perma.cc/D5XS-Y4G5>].

of opportunity, and access to justice for underserved communities.<sup>67</sup> We struggled with the challenge of how best to build such skills into our course, and we ultimately relied upon our final assessments to try and bridge the gap between the largely conceptual classroom discussions of race and racism and the practical world into which our students would soon enter.

## II. THE CLASS: OBJECTIVES, SCHEDULE, AND ASSESSMENTS

After working through the course framework, we developed a set of course learning outcomes to guide our approach to the class and goals for our students. As set forth in our spring 2018 syllabus:<sup>68</sup>

[b]y the conclusion of the course, students should be able to:

1. Understand the nature of race and racism as a system of socio-legally constructed hierarchy of power and privilege—not biologically grounded attitudes of individual difference;
2. Articulate the role of law in the reification of race and perpetuation of racism;
3. Identify the ways in which racism pervades criminal, Indian, and immigration law and materially disadvantages non-whites;
4. Analyze the current struggles against racism in each of these areas;
5. Recognize the limitations of and opportunities presented by modern antidiscrimination law to address racism; and
6. Explore ways by which to use law and lawyer to combat and eradicate racism.

To help our students reach these objectives, we scheduled the course to begin with readings and class sessions focusing on the common and foundational themes described above. Thus, the first three classes provided an Introduction, the Socio-Legal Construction of Race, and Racial Justifications: Conquest, Property, Slavery, and Labor. We began the class with a cursory treatment of modern, race-blind antidiscrimination law. While we referred to current race-related

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67. U. MONT. ALEXANDER BLEWETT III SCH. L., *Our Mission, Goals, and Graduates*, *supra* note 32.

68. See appendix for syllabus.

jurisprudence throughout the class, it is important to note that we did not delve into it in any significant fashion; we designed the course not as one on the topic per se, but rather on the deeper theoretical foundations of race and racism. Thereafter, we divided the remaining classes among each of us and our areas of specialty, with two classes each focusing on “Native Americans and Indian Law,” “African Americans and the Criminal Justice System,” and “Immigrants and Immigration Law” in that order. We wrapped up the semester with a class open for questions, answers, criticism, and group discussion, and three class sessions dedicated to student presentations required as part of their final assessments.<sup>69</sup>

To model positional inquiry and reflective practice (as discussed in Section I.B above), we opened the class by asking our students to think about how they identify racially and when they first became aware of race. We started this discussion by sharing our own identification and awareness, again as summarized above. It seemed that all of the political, racial, economic, and cultural divides in the state were reflected in our students. In our seminar of twenty-one students, most self-identified as White, a few self-identified as Latinx,<sup>70</sup> African American, or Native American. Many were gun owners. Due to the self-selecting aspect of an elective class and the topic, a majority of the students were liberal or left-leaning. Their stories ranged from little exposure to People of Color to heartbreaking accounts of the cost of racism in their lives and the lives of their families.

Following the introductory exercise, we discussed the meaning of race and racism in the present era and examined current events, such as the 2016 White supremacist marches in Charlottesville, Virginia; President Trump’s travel ban and immigration policies; and recent police shootings of African American men. We concluded the introductory class by discussing antidiscrimination laws and recent Supreme Court precedent addressing race and school busing and admission.<sup>71</sup> By doing so, we

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69. See appendix for final assessments.

70. We use this term intentionally here. *But see* Daniel Alvarenga, *No, Hispanic and Latinx Aren’t a Race. Here’s a Breakdown*, MEDIUM (Oct. 11, 2017), <https://medium.com/aj-news/no-hispanic-and-latinx-arent-a-race-here-s-a-breakdown-55bdbfb57132> [<https://perma.cc/J8UC-EJH4>] (defining and distinguishing the differences between Hispanics, Latinx, and other races).

71. *See generally* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (declaring racially-determinative plans used to achieve student body diversity equivalent to

hoped to provide a basic primer on the law's current approach to race and racism and to set the stage for our students to interrogate that approach more deeply and contextually.

By tackling the socio-legal construction of race in our second class, we aimed to undermine that common ground and destabilize our students' likely conception of race as an objective or scientific fact. We walked through readings from Haney López and Desautels-Stein that addressed both the social/legal construction of race and Whiteness and reviewed the law's varied treatment of race over the last century.<sup>72</sup> This latter discussion built a framework for recognizing the law's "background" and "foreground" rules, all of which are built upon the misconception of race as inherent and objective rather than fabricated and perpetuated by law and society.<sup>73</sup> We used that framework throughout the course to help analyze the law's treatment of race over time. We then concluded our second class with a discussion of Whiteness and White privilege.

As homework before our third class, we required our students to take one of Harvard University's Project Implicit tests addressing implicit bias.<sup>74</sup> We then began the class by talking about the students' test results and reactions. Almost uniformly, our students discovered that the test results showed an implicit bias against Persons of Color (as we did in our own testing), which shocked, disheartened, and upset most of them. We used that discussion to highlight the distinctions between bias and racism and between individual and systemic racism. The third class then brought together the racial connections at the base of property, slavery, and labor that underlie the very heart of American democracy. In an effort to capture these links, we began constructing a timeline consisting of important cases, laws, and events in American history relating

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the surrounding communities in school districts either declared unitary or who never legally segregated students, violative of the Fourteenth Amendment's guarantee of equal protection).

72. HANEY LÓPEZ, *WHITE BY LAW*, *supra* note 41; Haney López, *The Social Construction of Race*, *supra* note 40; Desautels-Stein, *supra* note 44.

73. See Desautels-Stein, *supra* note 44, at 31-34 (comparing "background rules," "... the biological concept of race invented in the sciences [which] steadily migrated into legal discourse," with "foreground rules," "... which involve attempts to *protect* an already existing, pre-legal racial identity through legislation.").

74. *Project Implicit*, HARV. U., <https://implicit.harvard.edu/implicit/selectatest.html> [<https://perma.cc/8F42-EGC8>].

specifically to the treatment of Native Americans, African Americans, and immigrants.<sup>75</sup>

After these three introductory classes, each of us led classes focused on our particular areas of expertise and linked readings, discussions, and issues in each of those classes back to the common themes of the course. In discussing Indian law, for example, Professor Mills used historic cases to establish the use of race and racism in the law to justify the theft of indigenous land and the subjugation of Indian tribes and Indian people, but then pivoted to the Supreme Court's distinction of Indians as a political, not racial, classification in *Morton v. Mancari*.<sup>76</sup> The Indian law-focused classes also investigated the use of blood quantum as a basis for Indian status and tribal membership, and it ended with discussion of more recent Supreme Court precedent seemingly calling into question whether that basis should be considered racial.<sup>77</sup> Professor King-Ries used his classes to explore the historic subjugation of African Americans, and that subjugation's current manifestation in the overrepresentation of African Americans in the criminal justice system. In addition, the class delved into the aspects of criminal law connecting police shootings of African Americans with systemic racism, implicit bias, and heuristics. Professor Capulong began his module with basic facts about immigrants and immigration and a historical summary of immigration law and policy.<sup>78</sup> He then examined the link between immigration and the U.S. economy, and he ended with a discussion of the legal challenge to

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75. Our timeline also reflected the evolution of "race science" in the law and the law's evolution from classical liberalism through modern liberalism and into neoliberalism as described by Desautels-Stein. See Desautels-Stein, *supra* note 44, at 17-29, 30-50.

76. *Morton v. Mancari*, 417 U.S. 535, 553 n.24, 554 (1974).

77. See, e.g., *Rice v. Cayetano*, 528 U.S. 495, 514 (2000) ("Ancestry can be a proxy for race[]" when classifying Native Hawaiians); *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 641 (2013) ("This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee.").

78. As it happened, the first class on race and immigration law happened on a day when Immigration and Customs Enforcement (ICE) agents conducted raids in Missoula. See Dillon Kato, *ICE Arrests 16 in Montana After U.S. Attorney General Announces New 'Zero Tolerance' Policy*, MISSOULIAN (June 15, 2018), [https://missoulian.com/news/crime/ice-arrests-in-montana-after-u-s-attorney-general-announces/article\\_c0929314-368a-5439-8aad-8494527f0cea.html](https://missoulian.com/news/crime/ice-arrests-in-montana-after-u-s-attorney-general-announces/article_c0929314-368a-5439-8aad-8494527f0cea.html) [<https://perma.cc/327D-F3H9>] ("Ten of the arrests were in a raid of a morel mushroom harvesting camp in Mineral County. Two other people were picked up in an ICE raid in Whitefish. The other four people were arrested in isolated incidents around western and central Montana.").



President Trump's travel ban<sup>79</sup> and the use of racial profiling in immigration stops, especially how such profiling has been used (and challenged) here in Montana.<sup>80</sup>

The open class we scheduled—itsself the result of the many questions and high emotions provoked by heated, at times unruly, class discussions—coincided, coincidentally, with the fiftieth anniversary of the murder of Dr. Martin Luther King, Jr. In light of this coincidence, we took the opportunity to listen to Dr. King's "Mountaintop Speech," because it touched on many of the themes in our course, and it emphasized that the challenges of our current time are not necessarily new—the struggle against structural racism in American law continues.<sup>81</sup>

Finally, we required our students to prepare group presentations and individual written assignments as part of their final assessments. In structuring our assessments, we created problems focusing on the three legal perspectives. We aimed to use the assessment as a means to challenge our students to connect practical legal skills to the structural and systemic obstacles we discussed in class.<sup>82</sup> Students self-selected into three groups, organized by topic area. Drawing on conflicts across the country with conservative speakers on college campuses, for example, the Indian law-related question demanded that students develop a strategy for advising the University about both a blood quantum-based tuition waiver policy for Native American students and the (hypothetical) speakers and protesters who would show up to challenge that policy as unconstitutionally race-based and discriminatory. Students choosing the

79. See, e.g., *Trump v. Hawaii*, 585 U.S. \_\_\_, 138 S. Ct. 2392 (2018) (upholding the travel ban).

80. See, e.g., *Statement on Border Patrol Racial Profiling of U.S. Citizens on Montana Border*, ACLU MONT. (May 22, 2018, 12:15 PM), <https://www.aclumontana.org/en/news/statement-border-patrol-racial-profiling-us-citizens-montana-border> [<https://perma.cc/45LL-9DYP>] (reporting the detainment and interrogation of two people heard speaking Spanish); see also Judgment, *Rios-Diaz v. Butler*, CV-13-77-BU-DLC-CSO (D. Mont. 2015) (restricting Montana Highway Patrol contact with U.S. Department of Homeland Security, Immigration and Customs Enforcement, and Customs and Border Patrol).

81. *Here is the Speech Martin Luther King Jr. Gave the Night Before He Died*, CNN (Apr. 4, 2018, 10:07 AM), <https://www.cnn.com/2018/04/04/us/martin-luther-king-jr-mountaintop-speech-trnd/index.html> [<https://perma.cc/WX7Z-FYUW>]. Dr. King's perspective is instructive: "... I'm happy to live in this period [because] we have been forced to a point where we're going to have to grapple with the problems that men have been trying to grapple with through history, but the demands didn't force them to do it. . . . All we say to America is, 'Be true to what you said on paper.'"

82. See appendix for final assessments.

African American-focused assessment were given the role of working for a congressperson and preparing a briefing on possible legislative responses to the United Nations' Working Group of Experts on People of African Descent report calling for reparations to African Americans. The students were tasked with making a case for and against reparations and the practical challenges presented by implementing a reparations package. The immigration law-focused assessment put students in the role of a public defender representing an El Salvadoran national stopped and detained because of his appearance. Students had to both refute the legal basis for using race (via "appearance") as a factor in assessing immigration status,<sup>83</sup> and challenge the legality of immigration detainers by U.S. Immigrations and Customs Enforcement (ICE) as racially discriminatory.<sup>84</sup> In this assessment, students were given the task of developing an argument to overturn *U.S. v. Brignoni-Ponce*—U.S. Supreme Court precedent allowing the use of "Mexican appearance" as a factor in immigration stops.<sup>85</sup>

Beyond the classroom, we also organized an informal, semi-regular film series over the course of the semester, during which we showed four films dealing with race. We sought films that shaped and informed our concepts (and, perhaps, cemented our misperceptions) of race and racism in America. We soon found ourselves with a long list of films that we felt would provoke further conversation and supplement our work in the classroom.<sup>86</sup> Rather than just have evening movies, however, we also developed questions and discussions for each film, and for our opening film, "Get Out," enlisted a colleague from the African American studies department across campus to introduce the film and lead the discussion

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83. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975) ("The likelihood that any given person of Mexican ancestry is an alien is *high enough to make Mexican appearance a relevant factor*, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.") (emphasis added).

84. See, e.g., *Policy Number 10074.2: Issuance of Immigration Detainers by ICE Immigration Officers*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Apr. 2, 2017), <https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf> [<https://perma.cc/SA8R-5VKS>].

85. *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975).

86. *WIND RIVER* (Acacia Filmed Entertainment 2017) (telling a murder mystery set on a Native American reservation); *GET OUT* (Universal Pictures 2017) (depicting modern racism through dark comedy); *HARVEST OF EMPIRE* (Getzels Gordon Productions 2012) (detailing the history of Latinos in America); *BLAZING SADDLES* (Warner Bros. 1974) (parodying racism in the Old West through the adventures of a Black sheriff).

after the movie. Throughout our course preparations and teaching, we also relied on short video clips, usually comedic or satirical takes on race and racism, as a way to lighten the classroom or transition from topic to topic.<sup>87</sup>

### III. HOW THE CLASS UNFOLDED: ISSUES AND RELATED EVENTS

We decided on all of our practical skills exercises and final assessments prior to the beginning of the semester. While we tried to anticipate related real-world scenarios for our students, we did not anticipate the degree to which our final assessments and general class themes would be so exactly reflected throughout the semester. In addition to the national ferment surrounding the Trump presidency, DACA<sup>88</sup> and immigration, the removal of monuments to the Confederacy, and the continued police shootings of African Americans, the local context in which we taught our class was also infused with issues of race. After the White supremacist rally in Charlottesville erupted in violence, the Helena city council decided to remove a 1916 monument to the Confederacy, which they took down mid-semester.<sup>89</sup> Also during the semester, a conservative university donor sponsored a controversial right-wing academic to speak on campus.<sup>90</sup> Mike Adams's prior exchanges with his own students and on social media were characterized by racist, sexist, homophobic, and anti-Muslim speech.<sup>91</sup> In addition, the law

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87. See, e.g., *Chappelle's Show: The Racial Draft* (Pilot Boy Productions et al. 2004).

88. Andrew Chung, *U.S. Court Orders Trump Administration to Fully Reinstate DACA Program*, REUTERS (Aug. 3, 2018, 8:30 PM), <https://www.reuters.com/article/us-usa-immigration-daca/us-court-orders-trump-administration-to-fully-reinstate-daca-program-idUSKBN1KP014> [<https://perma.cc/Z2GD-V6WP>].

89. See HELENA CITY COMM'N, SUMMARY OF ADMINISTRATIVE MEETING (Aug. 16, 2017), [http://www.helenamt.gov/fileadmin/user\\_upload/City\\_Commission/SMA/2017/SMA08-16-17.pdf](http://www.helenamt.gov/fileadmin/user_upload/City_Commission/SMA/2017/SMA08-16-17.pdf) [<https://perma.cc/4ZL9-DCYK>] (Commission Discussion of Removal of a Confederate Fountain at Hill Park); Thom Bridge, *Protesters Arrested as City of Helena Removes Confederate Fountain*, MISSOULIAN (Aug. 18, 2017), [https://missoulian.com/news/local/protesters-arrested-as-city-of-helena-removes-confederate-fountain/article\\_7412f161-50e1-58d4-b0a6-113965b22768.html](https://missoulian.com/news/local/protesters-arrested-as-city-of-helena-removes-confederate-fountain/article_7412f161-50e1-58d4-b0a6-113965b22768.html) [<https://perma.cc/PZ5-MDCG>] (counting fifteen to twenty protesters).

90. Keila Szpaller, *University of Montana School of Journalism Rejects Conservative Cole Lecturer*, MISSOULIAN (Oct. 19, 2017), [https://missoulian.com/news/local/university-of-montana-school-of-journalism-rejects-conservative-cole-lecturer/article\\_f4b8740d-5588-5915-9ead-a862f605ff98.html](https://missoulian.com/news/local/university-of-montana-school-of-journalism-rejects-conservative-cole-lecturer/article_f4b8740d-5588-5915-9ead-a862f605ff98.html) [<https://perma.cc/G7KP-X82H>].

91. See Mary Emily O'Hara, *Free Speech or Harassment? Controversial Professor Tests the Limits*, NBC NEWS (Nov. 30, 2016), <https://www.nbcnews.com/feature/nbc-out/free-speech-or-hate-speech-controversial-professor-tests-limits-n689841> [<https://perma.cc/CQ4L-ZVHS>].

student chapter of the Federalist Society sponsored a lecture by U.S. Court of Appeals Judge Jay Bybee, an author of the Bush Administration's "torture memos" which justified the use of torture against detainees in the war on terror, primarily people of Middle Eastern descent and Muslim faith.<sup>92</sup> Students in the law school—including students in our seminar—both supported and protested these speakers. There were other related events as well. Three different times during the semester, students participated in walkouts to recognize the victims of school shootings and to protest the lack of congressional action on gun control.<sup>93</sup> We used these actions to explore the connection between slavery and the Second Amendment.<sup>94</sup> Toward the end of the semester, U.S. Immigrations and Customs Enforcement officers conducted multiple immigration raids throughout Missoula. In addition, several incidents of racial profiling—primarily of Latino individuals—by local law enforcement made the news. In one incident, several Montana residents were stopped by a police officer because they appeared Hispanic and were speaking Spanish.<sup>95</sup> The officer indicated that he stopped them because it was unusual to hear people speaking Spanish in Montana.<sup>96</sup>

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92. Dillon Kato, *Federal Judge, Author of Bush-Era Torture Memo, Speaks at UM*, MISSOULIAN (Mar. 6, 2018) [https://missoulian.com/news/local/federal-judge-author-of-bush-era-torture-memo-speaks-at/article\\_c29e59e4-af1c-5db5-b14c-0dafacda214c.html](https://missoulian.com/news/local/federal-judge-author-of-bush-era-torture-memo-speaks-at/article_c29e59e4-af1c-5db5-b14c-0dafacda214c.html) [https://perma.cc/QQ5L-DY3D].

93. *University of Montana Enough! School Walkout*, MISSOULIAN, [http://missoula.com/events/free/university-of-montana-enough-school-walkout/event\\_ab796dbc-1674-11e8-b83a-0765088373b9.html](http://missoula.com/events/free/university-of-montana-enough-school-walkout/event_ab796dbc-1674-11e8-b83a-0765088373b9.html) [https://perma.cc/9HZX-EU7R]; Eric Whitney, *Montana Students Plan Another School Walkout Against Gun Violence*, MONT. PUB. RADIO (Apr. 19, 2018), <http://www.mtpr.org/post/montana-students-plan-another-school-walkout-against-gun-violence> [https://perma.cc/896T-ATLN].

94. Jeremy Scahill, *White Supremacy & Second Amendment*, INTERCEPT (Mar. 6, 2018, 5:01 AM), <https://theintercept.com/2018/02/28/intercepted-podcast-white-supremacy-and-the-church-of-the-second-amendment/> [https://perma.cc/9U23-KB78]; Saul Cornell & Eric M. Ruben, *The Sale-State Origins of Modern Gun Rights*, ATLANTIC (Sept. 30, 2015), <https://www.theatlantic.com/politics/archive/2015/09/the-origins-of-public-carry-jurisprudence-in-the-slave-south/407809/> [https://perma.cc/PRR3-ZF4A].

95. *Border Patrol Reviewing Stop of Women Who Spoke Spanish*, MISSOULIAN (May 21, 2018), [https://missoulian.com/news/local/border-patrol-reviewing-stop-of-women-who-spoke-spanish/article\\_e0556e2f-3590-5ae5-be73-b7dab42fd2a4.html](https://missoulian.com/news/local/border-patrol-reviewing-stop-of-women-who-spoke-spanish/article_e0556e2f-3590-5ae5-be73-b7dab42fd2a4.html) [https://perma.cc/AU6F-LMKT].

96. *Id.*

## IV. LESSONS LEARNED

The preceding sections largely describe our course and the current societal context. In this section, we share lessons from teaching it in this current context. This is the part of the paper that gives us the greatest pause. As we disclosed earlier, we were not experts on race or racism when we jumped into this class. We continue to not be experts on race and racism. The primary lesson we learned—repeatedly and painfully—is to approach the subject with the greatest humility. In that spirit, we offer the following tenuous observations.

*Racist Myths, Ideology, and Basic Education.* Our tripartite approach necessitated a broad and critical engagement of U.S. history. Not surprisingly, for many of our students, this was their first serious exposure to history “from below”—i.e., from the perspective of Native Americans, African Americans, and immigrants. Like most of us, their secondary and post-secondary educations dealt only superficially with conquest, slavery, and immigration. This proved a challenge for us as we constantly had to address basic premises and provide basic race-related education in order to reach more complex legal questions.

Repeatedly throughout the course, we drew inspiration from—and marveled at the insight and prescience of—James Baldwin. In an October 16, 1963 speech to teachers, Baldwin observed, “What passes for identity in America is a series of myths about one’s heroic ancestors.”<sup>97</sup> We pushed our students to honestly examine their racial identities and we tried to examine these “myths about one’s heroic ancestors.” Montana is a place where many people have especially powerful myths of their heroic ancestors. Many take great pride in their homesteading history and rarely connect federal Indian law and policy and the treatment of Native Americans with their family’s claim to a farm or ranch. For many of our students, it was their first time confronting this aspect of American history: the hypocrisy between our nation’s founding documents’ expression of equality, the role of the law in the creation of race, and the institutionalization of racism. As Baldwin observed, the role of myths about race and (we would add) the law—particularly for White America—is powerful and pervasive.<sup>98</sup> This was certainly true for many

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97. JAMES BALDWIN, *A Talk to Teachers*, in COLLECTED ESSAYS 678, 683 (1998).

98. *Id.* at 678-86.

of our students. In light of their choice to enter the legal profession, identifying and interrogating these myths was personal and difficult.

One of the benefits of exploring race and racism from three different perspectives was that it provided three different examples of the use of law to create race and racism. This repetition removed judicial and congressional decisions away from the viewpoint that they were accidental or situational, and highlighted the intentional aspect of the legal system's use of race: the creation and protection of a system of White supremacy. Furthermore, our investigation across these areas of the law highlighted how this aspect of race—the legal fabrication and insulation of White supremacy—is foundational to our entire legal system and, therefore, largely unquestioned as a matter of our national (and personal) identity. Interestingly, as the students interrogated history—the country's and their own—and identified the foundational aspect of race in those histories, they began to see race and racism everywhere. They repeatedly identified both individual racist acts and examples of systemic or institutionalized racism. It may have been a result of the current racial climate or an example of confirmation bias, but it felt as if the students had a glimpse of the Matrix.<sup>99</sup> This is due to the fundamental and hidden nature of race and racism.

We want to emphasize the word “glimpse.” Throughout the course and our discussions, there persisted a sense of tenuousness. Moments of insight or understanding often felt elusive and temporary. Clarity would slip through our fingers like sand or water and the same ground would need to be revisited multiple times. This is one of the challenges of confronting race in America. Because of its foundational and fundamental nature, race and racism are everywhere and nowhere at the same time. Prevailing ideology—that is, the assumption that racism is an anomaly rather than a premise—also exerts a powerful, often decisive influence. When, for example, the Chief Justice of the United States Supreme Court, joined by a majority of his fellow Justices, flatly denies the presence of race, racism, and racial discrimination by admonishing the country to simply “stop discriminating on the basis of race,”<sup>100</sup> the challenge of digging deeper only intensifies, particularly for attorneys committed to the rule of law. As a result, our discussion often went into

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99. THE MATRIX (Warner Bros. 1999).

100. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

uncharted territories and our regular mantra was, “So, where are we and what are we doing?” It is sort of like trying to see air or gravity. This can be tricky for students who are rightfully concerned about assessments and “whether this is going to be on the test.”

*Race and Racism: Personal, Systemic, and Political.* A connected challenge is that racism is both personal and systemic. It is an aspect of individual identity—over which it feels we have responsibility and accountability—and it is systemic—for which responsibility and accountability are much harder to personalize. As Baldwin put it, “[T]he great force of history comes from the fact that we carry it within us, are unconsciously controlled by it in many ways, and history is literally *present* in all that we do.”<sup>101</sup> Or to paraphrase Karl Marx, we make our own history but not under circumstances of our choosing.<sup>102</sup> For our students, there was often a reluctance to identify that racist aspect of their histories. We saw this in two different ways.

First, on the personal level, the students often expressed resistance to the results of their Project Implicit tests. Many of our students viewed racism as a generational issue: older people are racist because of the times in which they grew up; times have changed, and the younger generation doesn't see race in the same way. Therefore, they could understand and explain their grandparents' racism as a product of their times but not as bearing on the students themselves. They see themselves as being part of a post-racial generation. Yet, the results of their implicit bias tests often contradicted their own self-image. There were two particularly interesting examples. The first was for a White male veteran of the armed services. He fully and strongly embraced the military's pride in being more egalitarian and non-racial than society. In the service, he worked as equals with People of Color and had many People of Color as colleagues and friends. He was devastated by his test results that showed a strong preference for Whites. The second example was a bi-racial woman who identified as White and African American. Her test results also showed a preference for Whites, which conflicted with her feelings about her parents. Every one of our students was surprised at their results

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101. JAMES BALDWIN, *The White Man's Guilt*, in COLLECTED ESSAYS 722, 723 (1998) (emphasis original).

102. KARL MARX, THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE 5 (Daniel de Leon trans., Project Gutenberg 2006) (1852).

and resisted their implications; many retook the tests, some several more times.

We observed an additional dynamic in the class that is obvious to People of Color but less so for Whites: racism is real and deeply felt. Racism works exactly as intended: as an oppressive system of power which exacts a heavy, daily toll on People of Color. It also exacts a psychological cost from everyone—Whites and People of Color. We challenged our students to be open to race and racism on a personal level and they began to see race and racism everywhere. This was a new and difficult experience for many of them, particularly the White students. They expressed a wide range of feelings, including frustration, anger, depression, guilt, and paralysis. For the Students of Color, these feelings were not new. For the White students, these feelings were new, and they were the other side of the most significant aspect of “White privilege”: not having to deal with race and suffer its consequence on a daily basis. While we were excited that students were actually, consciously experiencing race, it also meant that we had to handle those emotions and try to give our students a positive way to manage them and the accompanying cynicism and hopelessness that come with such an intractable problem. In part, this was the motivation behind the practical skills aspect of the final assessments: we wanted the students to confront the limitations of the current antidiscrimination law and to think creatively about how to move beyond those limitations.

Honestly, the final assessments were the least successful. Notwithstanding our commitment to surfacing our personal connections with race and privilege at the very beginning of the course, we struggled throughout the semester to provide a detailed and comprehensive academic inquiry into our topic without stripping it of its necessary (and inescapable) personal and emotional content. Initially, while acknowledging our personal connections, we aimed to focus primarily on the academic pursuit as a way to minimize, if not eliminate, the potential for emotional and challenging personal conflicts in the classroom. We soon realized, however, that a purely academic inquiry is impossible and, at the very least, would alienate Students of Color and others who bear the emotional and personal burdens of racism. In fact, when seeking student input about the course near mid-semester, a number of our students commented on the lack of a personal dimension in the course and challenged our academic and conceptual approach. By the



conclusion of the class, we agreed that we needed to do more to connect with the personal nature of race, racism, and the law, and we intend to improve upon that shortcoming in future iterations of the course. As one student put it in an evaluation, “The class discussions were too often tethered to a very abstract academic theory or paper. I think that I would have gained more from the class if we had the opportunity to have more personal, candid discussions.” In the future, we need to provide additional support for our students’ emotional reactions particularly because the final group projects did not provide the positive counterbalance that we hoped for. This of course is due to the stubborn nature of the problem.

Relatedly, we also found that authentic engagement of these issues required sustained self-disclosure—lots of it. It is impossible to talk about race and racism without disclosing where each of us is coming from—how we self-identified, how our views on race were shaped, what we believed politically, and how we felt. Self-disclosure showed the depth of the problem—none of us are immune from racism—and modeled the struggles we personally go through in addressing it. In so doing, we found ourselves straddling the line between “objectivity” and political agenda. By dispensing with what Michael Pollan referred to recently as the professional “mask of detachment,”<sup>103</sup> said to be key to rigorous academic pursuit, we invariably became simultaneously interlocutor and subject. This pedagogical divide is of course less a line than a gradation, but we found that teaching race and racism—particularly at this moment—posed unique challenges.

Over the course of preparing and teaching the class we regularly found ourselves returning to the question of whether White privilege is an illusion for poor, working-class Whites or whether, regardless of class, one’s Whiteness still results in benefits beyond those accruing to similarly situated non-Whites. At an academic level, we could connect the literature from our course, discussing implicit biases and the impact of privilege, to the 2016 election.<sup>104</sup> At this level, the power of White

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103. See MICHAEL POLLAN, *HOW TO CHANGE YOUR MIND* 227 (2018) (borrowing the idea from a protocol of underground therapy of Leo Zeff, a legitimate, yet underground, psychedelic therapist, “[Psychedelic] [g]uides should . . . be willing to drop the analyst’s mask of detachment, offering their personalities and emotions, as well as a comforting touch or hug to the client undergoing a particularly challenging trip.”).

104. See Charles M. Blow, Opinion, *White Extinction Anxiety*, N.Y. TIMES (June 24, 2018), <https://www.nytimes.com/2018/06/24/opinion/america-white-extinction.html> [<https://perma.cc/>

privilege seemed to extend from the streets of Ferguson and Charlottesville all the way to 1600 Pennsylvania Avenue.

At a more personal level, however, the debate forced a much more nuanced reckoning with the benefits that accrued to each of us as a result of our economic success, education, or appearance. Part of the challenge was that our students did not see themselves as “privileged.” They were part of the ninety-nine percent. Most came from working-class families, many from families that struggled to have sufficient resources for necessities like food, housing, and insurance. By and large, they did not attend elite or exclusive colleges. Many were the first in their families to attend college, much less law school. The majority took on significant debt to achieve their goal of becoming a lawyer. And yet, they are predominantly White. Fortunately, one student powerfully discussed her own “White privilege” even in the context of her underprivileged upbringing: an extremely abusive, violent, racist, alcoholic father; severe economic hardship and dislocation; domestic violence and sexual abuse in her intimate relationships; marginalization due to sexual orientation; and struggles with drug and alcohol addiction.

The recognition of our own privileges challenged our academic analysis of privilege more broadly, and it demanded deep self-examination and assessment regarding our own biases and perceptions of privilege. The result of this recognition and “checking ourselves” further supported our ability to be up front with our students about our identities and the privileges we have been afforded.

*Race, Racism, and the Political Economy.* Even with our limited exploration, we found quickly that we could not separate the issue of race and racism from the political economy—for that was where these issues took seed. Race and racism were the justification for economic plunder—conquest, slavery, and immigrant exploitation. Race and class are, therefore, inextricably linked, and the role that law and lawyering played in both is an unavoidable dimension of inquiry.<sup>105</sup> Extended discussion in this realm proved beyond the ken of our course thus far, but we believe it is necessary to explore it more deeply in the future.

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UEJ7-53QF] (“Trump is president and is beloved by his base in part because he is unapologetically defending whiteness from anything that threatens it[.]”).

105. See HANEY LÓPEZ, *WHITE BY LAW*, *supra* note 41, at 17 (“[T]he very purpose of some laws was to create and maintain material differences between races, to structure racial dominance and subordination into the socioeconomic relations of this society.”).

*Intersectionality.* Another area in which our course fell short was dealing with intersectionality. Our approach of focusing on Native Americans, African Americans, and immigrants allowed us to find commonalities and differences. As mentioned, we were also able to layer on some aspects of class and implicit bias. This was by design and felt productive. However, we were still not able to be completely inclusive or reach other important currents of intersectionality; namely gender, sexual orientation, and other aspects of identity. This is an area in which we will need further consideration before we teach this class again.

*The Classroom: Free Speech, Hate Speech, and Debate.* The class also gave us limited insight into managing the tension between free speech and protecting the educational experience of marginalized students. We tried to encourage an honest and open dialogue in class on a painful and personal topic. We wanted all viewpoints to be expressed and we observed strong disagreements among students. Generally, Americans only discuss race in times of conflict, so we tried to model a more collaborative and less adversarial approach. While the three of us had different views of the line between free speech and hate speech, dealing with hate speech was not the challenge. Hate speech is easy because it violated our rules about respecting opposing viewpoints and expressing one's views in respectful ways.

The greater challenge was dealing with students who were either unwilling to interrogate their positions in light of the course materials or who challenged or outright rejected the premise of the class, i.e., that race, racism, and American law are intimately intertwined. The expressions of those viewpoints prompted heated debate, particularly around issues of free speech on college campuses. For example, at least one student felt emboldened to challenge examples of Black overrepresentation in the criminal justice system. During those debates, we struggled to retain control of the classroom, protect the rights of all our students to express their views and avoid harm, and model our intended objective of free, open, and civil dialogue over contested and intensely personal issues. Sometimes, we succeeded and the classroom environment, though intense, was electric with engagement and passion. Other times, we failed, and students disengaged from class discussion, expressed their displeasure with each other in personal terms, and even walked out of class.

In reflecting on these situations, we found ourselves wrestling with the very question that brought us together in the first place—our desire to effectively promote education and educated dialogue around issues of race, racism, and American law. Part of the unwillingness to deeply engage these subjects may stem from the conflicted and heated way we tend to confront race in America. Often, the topic feels like it demands absolutes, for the consequence of admitting ignorance, expressing confusion, or acknowledging complexity—even complicity—is to be labelled a racist. Forcing people into absolutes made it difficult to find opportunities for deeper discussion and growth. The racism and denial unleashed by the Trump era compounds this problem. We recognized that, like every other class, our readings, teaching, and coursework would not connect with every student in the same way. Nonetheless, our seeming inability to establish common ground on even the basic premise of our course reflected to us the potential intractability of the national discourse on these complex issues. This is an area that we will need to consider more prior to our next class offering.

*Responding to the Political Moment, Collaboratively and Flexibly.* We are in a new era, one of political polarization that calls into question the rights and liberties many of us took for granted. The Trump Administration, conservative members of Congress, and the Supreme Court have all moved—and by all accounts will continue to move—farther to the right. The right-wing agenda has been met with broad, grassroots resistance that found expression in various electoral races. Notably, for example, open socialists won elections in Seattle and New York.<sup>106</sup> This polarization itself is a reflection of a deeper, indeed international, crisis in neoliberalism, and it will raise fundamental legal questions that the academy will need to address.<sup>107</sup> In this period, we foresee increasing confusion among our students. We also suspect that race-related incidents will continue to dominate the news. And since race

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106. John Nichols, *A Socialist Wins in Seattle*, NATION (Nov. 26, 2013), <https://www.thenation.com/article/socialist-wins-seattle/> [<https://perma.cc/9GNR-WPRC>] (Seattle City Councilmember Kshama Sawant); John Nichols, *Alexandria Ocasio-Cortez Wins as a Democratic Socialist With a 21st-Century Vision*, NATION (June 27, 2018), <https://www.thenation.com/article/alexandria-ocasio-cortez-wins-democratic-socialist-21st-century-vision/> [<https://perma.cc/45QW-GAXZ>] (U.S. Representative Alexandria Ocasio-Cortez).

107. Nancy Fraser, *The Crisis of Progressive Neoliberalism*, L. & POL. ECON. (Jan. 25, 2018), <https://lpeblog.org/2018/01/25/the-crisis-of-progressive-neoliberalism/> [<https://perma.cc/8DMY-9QBA>].

and racism, as we've found, is implicated in a breadth of issues, we see a need to respond quickly to events and create courses or modules that can address them. As mentioned, we attempted to do this in a number of instances that occurred on our campus during the course. A corollary lesson we draw from this is that we can teach these subjects—or more accurately explore them alongside our students—even if we do not regard ourselves as experts on the topic.

We dedicated ourselves to continually examining the near-daily events occurring outside of the classroom which were relevant to our course, while still covering our prepared material in order to establish the framework necessary for our students to analyze those issues. We regularly found ourselves taking time from our planned curriculum to discuss other events and issues occurring around us, which resulted in both richer class discussions and challenging transitions back to our (often historic and academic) course material. In addition, however, we found that focusing on current events heightened the emotions and potential for conflict, both among our students and among us. Current events are of course also fluid and difficult to analyze in real time and choosing some meant ignoring others perhaps equally worthy of attention. Ultimately, balancing the intensely personal and emotional aspects of issues around race and racism and our intended academic study of those topics presented the most significant challenge for us over the course of the semester. The difficulty of this balance manifested itself in many ways, including among the three of us, with our students generally, and among individual students in the class.

These issues will require greater collaboration across fields of discipline, not just within law but across the university. Academic disciplines are, of course, arbitrary divisions to begin with, often dictated by market needs. As fundamental questions arise, they will require interdisciplinary analyses and solutions. Indeed, we found it necessary in preparing for this class to consult with a colleague from the African American studies department, who is an expert in White supremacy.

*Towards Multiracial Solidarity.* Much as we sought to do so, we were not able to incorporate as much as we wanted to of the history of multiracial solidarity—and in particular in the context of our predominantly White class, the role of Whites in the fight against racism. In our class preparations, we spoke repeatedly about the need to historicize the waves of European immigration in order to disaggregate

national origin from Whiteness and cultural pride from racist oppression. Some of our students self-identified as White, but reluctantly so. That sentiment demonstrated the historical contingency and plasticity of Whiteness and provided the concrete basis for multiracial solidarity. In the future, we intend to examine this tradition of multiracial solidarity much more closely.

*Racial Equality: Reality and Promise.* Finally, we found ourselves coming back again and again to the reality and promise of racial equality—on the one hand the foundational, daily brutality of White settler colonialism and, on the other, the possibility of the distinctly American project of multiracial equality. Here, we struggled with the capacity of our institutions—the Constitution, in particular—and, indeed, of our socioeconomic system itself—for this is where race and racism are and continue to be rooted—to deliver on that promise. Often, we saw only tragedy and hypocrisy and felt only despair, cynicism, and hopelessness. Yet, just as present is the potential actualization of that promise, if only fleeting, owing to the heroic struggles of those who believe in and dedicate themselves to such a future. Law—or more precisely the concept of it—constitutes an essential element of this struggle and its future, even as it remains deployed to undermine them.<sup>108</sup> We therefore tried, and in the future will try, to articulate more sharply the tension between reality and promise in the legal arena.

We uniformly agree that preparing and teaching this class has been one of the most professionally and personally rewarding experiences of our careers. Based on their feedback, many of our students felt similarly about taking the course. That is not to say, however, that it has been the easiest or most enjoyable experience. In our regular discussions, our readings, in the classroom, and throughout the semester, we each found ourselves at times overcome with the weight of the issues on which we were focusing and, at times, reacted to the intensity of the topic with anger, frustration, cynicism, hopelessness, and despair. That formed one of the most important lessons from the course—thinking, learning, and

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108. See Karl Klare, *Law-Making as Praxis*, 40 *TELOS* 123, 135 (1979) (“We must begin to see our work, our relationships to our clients, our self-definition in counseling and in the courtroom, as itself part of the process of articulating and foreshadowing the legal forms of the future. The fact that we must live and work within alien institutions we do not control, which do not permit us collectively to guide our own destiny, ought not prevent us from conceiving of our own participation in the legal process to the extent possible as an experiment in the possibility of our freedom.”).

talking about race, racism, and American law is hard. The issues are real, the emotions are raw and intense, and the discussions are difficult, sometimes impossible. But, they have to happen. We learned that, no matter the ill feelings, personal challenges, ignorance, or unwillingness to take these issues on, doing so is the only way to get to the intertwined roots of race, racism, and American law.

APPENDIX

RACE, RACISM, AND AMERICAN LAW  
SPRING TERM 2018  
SYLLABUS

Wednesdays, 10 a.m.-12 p.m.  
Room 203

Professors Capulong, King-Ries,  
and Mills

SEMINAR DESCRIPTION AND OBJECTIVES

This seminar examines race and racism in contemporary U.S. society and the role that law and lawyers play in perpetuating and combating them. Situating our inquiry in the current rise of and resistance to white supremacy, we will investigate the concept of race and roots of racism, trace their development in the Indian, African-American, and immigrant contexts, and interrogate the opportunities and limitations of law and lawyering in addressing them.

STUDENT LEARNING OUTCOMES

By the conclusion of this course, students should be able to:

1. Understand the nature of race and racism as a system of socio-legally constructed hierarchy of power and privilege—not biologically grounded attitudes of individual difference;
2. Articulate the role of law in the reification of race and perpetuation of racism;
3. Identify the ways in which racism pervades criminal, Indian, and immigration law and materially disadvantages non-whites;
4. Analyze the current struggles against racism in each of these areas;
5. Recognize the limitations of and opportunities presented by modern antidiscrimination law to address racism; and
6. Explore ways by which to use law and lawyer to combat and eradicate racism.



## REQUIREMENTS AND ASSESSMENT

In addition to your attendance and participation, which will account for 20% of your grade, your final grade will be based on the completion of a final project, which will include both a written and a presentation component. Except for individual students completing their AWR in this course, each student must choose one of six final project topics based on three prompts that relate to our areas of focus, i.e., Indians and Indian law, African-Americans and criminal law, and immigrants and immigration law. Work on the final projects will be done collaboratively by groups of students taking on the same topic. Although the presentation component may be done collaboratively and will be made to the rest of the class, each student will be responsible for completing the written component individually. This final paper must be five to ten pages in length, written in 12-point font. It should be double-spaced with one-inch margins on all sides. **It is due not later than 5 p.m. on Friday, May 18.** *We will not accept late papers.* Students who choose to complete their AWR requirement in this course will also have the opportunity to present their papers in class. We will use Classes 11, 12, and 13 for these presentations.

## SCHEDULE

The following is our schedule, readings, and assignments. Please note that these are subject to change. Should there be a conflict between these and what we announce in class, please abide by the latter.

Class	Readings	Assignments
1—January 24: Race, Racism, and American Law— Introduction  ○ Race and racism in contemporary society; modern anti- discrimination law	○ Syllabus  ○ Majority opinion in <i>Parents Involved in Community Schools v. Seattle School Dist. No. 1 (2007)</i>  ○ Review materials on Moodle re: current events	

<p>2—January 31: The Socio-Legal Construction of Race</p> <ul style="list-style-type: none"> <li>○ Biology v. sociology; history, “plasticity”, and dynamism of race; white supremacy; racism; “background” and “foreground” rules</li> </ul>	<ul style="list-style-type: none"> <li>○ Lopez, <i>Social Construction of Race</i> (1994)</li> <li>○ Desautels-Stein, <i>Race as a Legal Concept</i>, pp. 1-55 (2012) (excerpted)</li> <li>○ LOPEZ, WHITE BY LAW, pp. xxi-24; 139-142 (2006) (excerpted)</li> <li>○ MEMMI, RACISM, Appx. B, pp. 183-196</li> <li>○ TIM WISE, WHITE LIKE ME (excerpt)</li> </ul>	
<p>3—February 7: Racial Justifications: Conquest, Property, Slavery, and Labor</p> <ul style="list-style-type: none"> <li>○ Racism as justification for white property, labor, economy; race and racism in the Indian, African-American, and immigrant contexts; clerks and marriage; reparations</li> </ul>	<ul style="list-style-type: none"> <li>○ <i>Johnson v. M’Intosh</i>, 21 U.S. 543 (1823)</li> <li>○ <i>Waldron v. U.S.</i>, 143 F. 413 (D. S.D. 1905)</li> <li>○ PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA, pp. 131-159 (2009)</li> <li>○ Nicholson, et al., <i>Facts on Immigration Today: 2017 Edition</i> (Center for American Progress), at <a href="https://www.americanprogress.org">https://www.americanprogress.org</a>.</li> </ul>	<p>Prior to class, please complete your assigned test from Project Implicit, <a href="https://implicit.harvard.edu/implicit/takeatest.html">https://implicit.harvard.edu/implicit/takeatest.html</a></p>

	org/issues/immigration/reports/2017/04/20/430736/facts-immigration-today-2017-edition/	
4—February 14: Race, Racism, and Federal Indian Law—Roots and Development	<ul style="list-style-type: none"> <li>○ <i>U.S. v. Rogers</i>, 45 U.S. 567 (1846)</li> <li>○ <i>U.S. v. Kagama</i>, 118 U.S. 375 (1886)</li> <li>○ <i>Elk v. Wilkins</i>, 112 U.S. 94 (1884)</li> <li>○ <i>U.S. v. Sandoval</i>, 231 U.S. 28 (1913)</li> <li>○ <i>Morton v. Mancari</i>, 417 U.S. 535 (1974)</li> <li>○ <i>U.S. v. Antelope</i>, 430 U.S. 641 (1977)</li> </ul>	
5—February 21: Race, Racism, and Federal Indian Law—Modern Challenges	<ul style="list-style-type: none"> <li>○ <i>Rice v. Cayetano</i>, 528 U.S. 495 (2000)</li> <li>○ <i>Adoptive Couple v. Baby Girl</i>, 133 S.Ct. 2552 (2013)</li> <li>○ <i>U.S. v. Bryant</i>, 136 S.Ct. 1954 (2016)</li> <li>○ Treuer, <i>For Indian Tribes, Blood Shouldn't be Everything</i>, NY Times (<a href="http://nyti.ms/1B30WxJ">http://nyti.ms/1B30WxJ</a>)</li> </ul>	

<p>6—February 28: African Americans and the Criminal Justice System</p> <ul style="list-style-type: none"> <li>○ Slavery; Jim Crow; mass incarceration; anti-discrimination law; Black Lives Matter</li> </ul>	<ul style="list-style-type: none"> <li>○ DOJ Ferguson Report (excerpt)</li> <li>○ ALEXANDER, THE NEW JIM CROW (2010) (excerpt)</li> <li>○ Coates, <i>The Case for Reparations</i>, in WE WERE EIGHT YEARS IN POWER (2017) (excerpt)</li> <li>○ Jewel, <i>Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives</i>, 76 MARYLAND L. REV. 663 (2017)</li> </ul>	
<p>7—March 7: African Americans and the Criminal Justice System, cont'd</p>	<ul style="list-style-type: none"> <li>○ Richardson and Goff, <i>Self-Defense and the Suspicion Heuristic</i> (2012) (excerpt)</li> <li>○ Fradella, Morrow, White, <i>Terry and SQF Viewed through the Lens of the Suspicion Heuristic</i> (2016)</li> <li>○ <i>Floyd v. City of New York</i> (2013) (excerpt)</li> </ul>	
<p>8—March 14: The Muslim Ban, the Mexican Wall, and “Illegal Aliens”</p>	<ul style="list-style-type: none"> <li>○ Boswell, <i>Racism &amp; U.S. Immigration Law</i> (2003) (excerpt)</li> </ul>	

<ul style="list-style-type: none"> <li>○ Citizenship, revisited; immigrants and legality; race and immigration law: exclusion, the border, the interior enforcement; Muslim travel ban</li> </ul>	<ul style="list-style-type: none"> <li>○ Akram &amp; Johnson, <i>Race, Civil Rights &amp; Immigration Law After 9-11</i> (2002) (excerpt)</li> <li>○ <i>State of Hawaii v. Trump</i> (9th Cir. 2017)</li> </ul>	
<p>9—March 21: Racial Profiling and the Fight for Immigrant Rights</p> <ul style="list-style-type: none"> <li>○ Racial narratives in immigration litigation; rebellious lawyering</li> </ul>	<ul style="list-style-type: none"> <li>○ Montana Code Annotated § 44-2-117, at <a href="http://leg.mt.gov/bills/mca/title_0440/chapter_0020/part_0010/section_0170/0440-0020-0010-0170.html">http://leg.mt.gov/bills/mca/title_0440/chapter_0020/part_0010/section_0170/0440-0020-0010-0170.html</a></li> <li>○ Immigration &amp; Nationality Act § 287(g), at <a href="https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-9505.html">https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-9505.html</a> and <a href="https://www.ice.GOV/287g">https://www.ice.GOV/287g</a></li> <li>○ 18 U.S.C. § 1373</li> <li>○ Johnson, <i>How Racial Profiling Became Law</i> (2010)</li> <li>○ <i>Rios-Diaz v. Butler</i> (2015) (judgment)</li> </ul>	

	<ul style="list-style-type: none"> <li>○ Montana Highway Patrol GR-9 (2015)</li> <li>○ Bermes, <i>Montana Supreme Court denies petition</i> (2017) at <a href="https://www.bozemandailychronicle.com/news/montana-supreme-court-denies-petition-in-immigration-case/article_31ea68cd-1fa4-5ce5-bbc5-7fa25f3ade63.html">https://www.bozemandailychronicle.com/news/montana-supreme-court-denies-petition-in-immigration-case/article_31ea68cd-1fa4-5ce5-bbc5-7fa25f3ade63.html</a></li> <li>○ <i>Francis v. DeMarco</i> (2018)</li> </ul>	
<b>Spring Break—March 26-30</b>		
10—April 4: Open Class		
11—April 11: Presentations		
12—April 18: Presentations		
13—April 25: Presentations and Wrap up		

**Race, Racism, and American Law**  
**Final Assessment 1—Indian Law Issues**

The University of Montana allows a tuition waiver (as financial assistance) for a number of categories of students attending schools in the UM system. The UM Board of Regents policy regarding tuition waivers includes the following category of student eligible for such a waiver:

American Indian Waiver. Persons who have one-fourth (1/4) American Indian blood or more or are enrolled members of a state recognized or federally recognized Indian tribe which is located within the boundaries of the State of Montana are eligible for a waiver upon demonstration of financial need.

In light of the University's recent financial struggles, however, the Regents have begun considering revisions to the existing tuition waivers. Therefore, tuition waivers are a topic for discussion at the May 2018 meeting of the Board of Regents, which will take place here at the University Center on the UM campus.

Word of the issues to be discussed at the Regents' meeting has gotten out and, while some are concerned about the financial impact of the tuition waivers, others, like Citizens Equal Rights Alliance (CERA), are planning to protest the American Indian Waiver specifically. In fact, a newly chartered UM student group, Campus CERA, is planning a large public protest to take place on the campus oval just before and during the May Regents' meeting. Campus CERA has already invited many prominent white supremacists to attend and give speeches decrying the American Indian Waiver as unconstitutionally race-based and discriminatory.

The Regents, UM administrators, and UM Legal Counsel are all concerned about the potential for violence and unrest at the protest and Regents' meeting.

Subgroup 1: Please develop a strategy for the University to address the concerns related to the American Indian Waiver.

Subgroup 2: Please develop a strategy for the University to address the potential protest and speeches planned for the May Regents' meeting.

**Race, Racism, and American Law**  
**Final Assessment 2—Reparations**

Recently, the United Nations' Human Rights Commission stated that "civil rights laws [in the United States] are not being fully implemented, and even if fully implemented, they are insufficient to overcome and transform the institutional and structural racial discrimination and racism against people of African descent. Mass incarceration, police violence, housing segregation, disparity in the quality of education, labour market segmentation, political disenfranchisement and environmental degradation continue to have detrimental impacts on people of African descent, despite the application of civil rights laws." In its report on racism in the United States, the United Nations' Working Group of Experts on People of African Descent made many recommendations, including that "[p]ast injustices and crimes against African Americans need to be addressed with reparatory justice."

You work for a Congressperson. In anticipation of Black History Month (February 2018), your boss is considering introducing legislation responding to the UN report's call for reparatory justice. The Congressperson would like you to do the following:

Subgroup 1: Please develop a presentation on the case for, and against, reparations for African Americans in the United States.

Subgroup 2: Please develop a presentation on how reparations would be made to African Americans in the United States.



**Race, Racism, and American Law**  
**Final Assessment 3—Immigrant Rights**

Your client, Armando Hernandez, is a 20-year-old El Salvadoran national who was arrested by Lake County Sheriff deputies on Saturday, February 3.<sup>1</sup>

That evening, Hernandez was a passenger in a car driven by his friend, Chloe Richardson. Both residents of Polson, they were driving down to Missoula at around 7 o'clock for a night out when they were stopped by Montana Highway Patrol near Pablo for speeding. After issuing Richardson a ticket, the officer began asking Hernandez—who was wearing an El Salvador national soccer team jacket—about his immigration status. Hernandez replied—in accented English—that he was “legal” and handed the officer a Salish Kootenai College ID card.

The officer apparently called Immigration and Customs Enforcement (ICE) because when he returned to Richardson's car (some 30 minutes later), he told Hernandez he was, in fact, “illegal” and ordered him out of the car. Despite protests from Hernandez and Richardson, Hernandez complied and was patted down by the officer. The search yielded a small bag (about a gram) of marijuana. After finding the marijuana, the officer placed Hernandez under arrest, contacted the Lake County Sheriff's office, and upon the latter's arrival, remanded Hernandez to their custody.

You are a public defender assigned to represent Hernandez.

Subgroup 1: Develop and present an argument supporting a motion to suppress the marijuana found on Hernandez and specifically advancing a racial profiling claim. In your argument, directly refute *U.S. v. Brignoni-Ponce* by arguing that race can *never* be a factor in assessing immigration status.

Subgroup 2: The district judge has granted your motion to suppress and has ordered Hernandez released immediately. However, ICE has asked for an “immigration detainer,” requesting the Lake County Sheriff to continue to detain Hernandez until ICE agents can re-arrest and deport him. Hernandez is, in fact, undocumented, although he was eligible for DACA (he fled El Salvador when he was 16 and crossed the border

2019]

*RACE, RACISM, AND AMERICAN LAW*

49

without inspection). Develop and present an argument against ICE's request specifically advancing the claim that immigration detainees are racially discriminatory.

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1. All names and facts in this assignment are fictitious.