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Critical Race Theory and the College Classroom at ETSU

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Introduction



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Introduction

- The Critical Race Theory controversy (based on media reports):
- As the public has become more familiar with CRT through class curricula, training, and other sources, parents and politicians have raised strong objections.
- Parents have protested.
- School boards across the country have been criticized during public meetings for adopting CRT curricula and training.
- Teachers have resigned because of CRT training and CRT curriculum.



Introduction

- Some states have outlawed the teaching of CRT in K-12 classrooms. Other states are considering enacting similar laws.
 - The following states have banned CRT in K-12: Arizona, Idaho, Iowa, Texas, Oklahoma, Arkansas, Tennessee, New Hampshire, South Carolina. and Florida.
 - The following states are considering bans: Montana, Utah,, Louisiana, Missouri, Wisconsin, Michigan, Ohio, Kentucky, Alabama, Georgia, West Virginia, Pennsylvania, Rhode Island, Washington, and are considering bans.
 - The following states rejected bans: Arizona and Mississippi.
 - The following state reaffirmed the teaching of Black history and anti-racism: Delaware.



Introduction

- Some states have restricted the teaching of CRT in higher education.
 - Idaho and Oklahoma.
- Florida requires its colleges and universities to survey students on “viewpoint diversity.”
- The Montana Attorney General recently issued an opinion, declaring certain practices advocated by CRT and Antiracism to be illegal.



**Will ETSU support faculty who teach
Critical Race Theory?**



Will ETSU support CRT teachers?

The short answer is . . . **YES.**

The university supports its faculty in the teaching of many controversial subjects.

Additionally, faculty enjoy certain protections under university policy and state and federal law. However, faculty are also constrained by university policy and state and federal law.



What is Critical Race Theory?



What is Critical Race Theory?

- **According to academics:**

- Critical Race Theory (CRT) is a body of legal scholarship and an academic movement of civil-rights scholars and activists in the United States that critically examines the intersection of U.S. law and race and challenges mainstream American liberal approaches to racial justice.
- CRT examines social, cultural, and legal issues primarily as they relate to race and racism in the United States.



What is Critical Race Theory?

- **According to CRT theorists:**

- **Marxism:** Class conflict. The Proletariat v. the Bourgeoisie.
- **Critical Theory:** The Western-Marxist philosophers of *The Frankfurt School*.
 - Examines power structures to critique society and culture.
 - Argues that social problems result from societal structures and cultural assumptions rather than individual or psychological factors.
- **Critical Legal Studies:** Developed in the U.S. during the Civil Rights movement.
 - Argues that the law supports the interests of those who created it and, in this way, supports a power dynamic that favors the historically privileged and disadvantages the historically underprivileged.



What is Critical Race Theory?

- **Critical Race Theory**

- CRT is an approach to the study of race and power in society.
- It questions the legal foundations of American order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law.
- CRT has six essential tenets: (1) racism is quotidian, (2) the white majority has little incentive to eliminate racism, (3) race is a social construct, (4) society is characterized by the differential and contextual racialization of various minorities, (5) individuals are best understood through intersectionality and anti-essentialism, and (6) minorities are uniquely competent to speak on issues of race.



What is Critical Race Theory?

- The theory's "core idea" has been described as the belief that race is a social construct and that racism is not merely the product of individual bias or prejudice but also something embedded in legal systems and policies.
- Critical race theorist Marvin Lynn describes the theory this way: "A key part of the argument of critical race theory is that racism is endemic to American society because of the way society is structured" (structural racism).
- The two most widely known theorists of Critical Race Theory at the moment are **Robin DiAngelo**, author of *White Fragility*, and **Ibram X. Kendi**, author of *How to be an Antiracist*.



What is Critical Race Theory?

- **DiAngelo** defines racism to include “the acknowledgment that whites hold social and institutional power over people of color.”
 - She argues that “[r]acism is a system” created through legal enforcement and institutional control based upon racial prejudices.
 - She rejects individualism because it denies that racism is a factor in life.
 - She contends that white people are born with “unearned advantages.”
 - She bases her argument on many of the tenets of CRT and adds the contention that United States is founded upon white supremacy, the abduction and enslavement of African people and genocide of Indigenous people, and the annexation of Mexican lands” by people who had “deeply internalized patterns of domination and submission.”
 - She calls individualism and color-blindness racism. Individualism is a key privilege of dominance.



What is Critical Race Theory?

- **Kendi's** (2019) theory may be summarized by his statement:

“The only remedy to racist discrimination is antiracist discrimination. The only remedy to past discrimination is present discrimination . . . The only remedy to present discrimination is future discrimination.”
- He explains that, in the battle between racists and anti-racists “there is no neutrality” because “the only way to undo racism is to consistently identify and describe it—and then dismantle it.”
- Racial neutrality, colorblindness, and claiming to be “not racist” are the positions of racists.
- The only acceptable position is anti-racist activism.
- He advocates the adoption of an anti-racist constitutional amendment that would establish a Department of Anti-racism.



What is Critical Race Theory?

- **According to the Smithsonian National Museum of African-American History and Culture:**
 - CRT and anti-racism require white people to “acknowledge and understand their privilege, work to change their internalized racism, and interrupt racism when they see it” and make “anti-racist choices” or be deemed to be “uphold[ing] white supremacy, white dominant culture, and unequal institutions and society.”



What is Critical Race Theory?

- CRT and Antiracist training and activities sometimes involve:
 - Grouping participants on the basis of race.
 - Attributing characteristics to participants because of their race.
 - Blaming participants of one race for the situation of people of another race
 - Making participants of one race feel guilty about the circumstances in society
 - Forcing participants to acknowledge their privilege or apologize for atrocities committed by their ancestors.



What is Critical Race Theory?

- **According to CRT's critics:**
 - It's Marxism. It's revolutionary (not in a good way).
 - It's racism. It teaches racism. It promotes racism. It promotes racial hostility.
 - It's tenets are antithetical to the American value of equality before the law.
 - It's antithetical to the principle of judging people by the content of their character.
 - It's anti-scientific.
 - It is intolerant of dissent.
 - It is illegal discrimination and creates a hostile environment.
 - It's evil.



What is prohibited under the Tennessee CRT statute?



The Tennessee Critical Race Theory statute

- The statute only applies to **elementary and secondary education**, not post-secondary. **Here, it will only affect University School.**
- It prohibits the teaching of the following:
 - (1.) One race or sex is ***inherently superior*** to another race or sex;
 - (2.) An individual, by virtue of the individual's race or sex, is ***inherently privileged***, racist, sexist, or oppressive, whether consciously or subconsciously;
 - (3.) ***An individual should be discriminated against*** or receive adverse treatment because of the individual's race or sex;
 - (4.) An individual's ***moral character is determined by the individual's race*** or sex;



The Tennessee Critical Race Theory statute

- (5.) An individual, by virtue of the individual's race or sex, bears ***responsibility for actions committed in the past*** by other members of the same race or sex;
- (6.) An ***individual should feel discomfort, guilt, anguish***, or another form of psychological distress solely because of the individual's race or sex;
- (7.) A ***meritocracy is inherently racist*** or sexist, or designed by a particular race or sex to oppress members of another race or sex;
- (8.) This state or ***the United States is fundamentally or irredeemably racist or sexist***;
- (9.) Promoting or advocating the violent overthrow of the United States government;



The Tennessee Critical Race Theory statute

(10.) **Promoting division** between, or resentment of, a race, sex, religion, creed, non-violent political affiliation, social class, or class of people;

(11.) **Ascribing character traits, values, moral or ethical codes, privileges, or beliefs** to a race or sex, or to an individual because of the individual's race or sex;

(12.) **The rule of law does not exist**, but instead is a series of power relationships and struggles among racist or other groups;

(13.) All **Americans are not created equal** and are not endowed by their Creator with certain unalienable rights, including, life, liberty, and the pursuit of happiness; or

(14.) Governments should deny to any person within the government's jurisdiction the equal protection of the law.



What does the First Amendment protect?



The First Amendment

- The First Amendment prohibits the federal, state, and local governments from passing a law that:
 - Establishes religion,
 - Prohibits the free exercise of religion,
 - Abridges the freedom of speech
 - Abridges the freedom of the press,
 - Abridges the right of the people to peaceably assemble, or
 - Abridges the right of the people to petition the government for a redress of grievances.
- **Academic Freedom falls within the ambit of the First Amendment.**



The First Amendment

- As a general matter, the First Amendment protects **speech** but not **conduct** while recognizing that some conduct is expressive and, therefore, entitled to protection.
 - **Expressive conduct** is behavior that is designed to convey a message.
 - For example, displaying a red flag, flag burning, and wearing black armbands, all done in protest.
- In *Free Speech on Campus*, Erwin Chemerinsky and Howard Gillman set forth a list of things that universities can and cannot do.



The First Amendment

- A university cannot censor speech or punish a speaker merely because a person or group considers it **offensive or hateful**.
 - *Hate speech is unequivocally protected by the First Amendment.*
- A university can censor speech or punish a speaker that meets the legal definition of **harassment, true threats of violence** (not hyperbole), or other speech acts that are unprotected by the First Amendment, including **incitement to imminent lawless action, defamation** (libel & slander), **obscenity, destruction of property** (vandalism), **disruption of classes or campus activities** (disorderly conduct), or **speech inconsistent with professional standards**.
 - *Vandalism is about damage to property, not speech.*
 - *Protests must be peaceful.*



The First Amendment

- A university **cannot prevent protesters** from having a meaningful opportunity to get their views across in an effective way.
 - *This applies to the KKK to the same extent that it applies to BLM or any other group.*
- A university **can impose reasonable time, place, and manner restrictions** on protests to prevent disruption to the normal work of the campus, including the educational environment and administrative operations.



The First Amendment

- A university **cannot impose content-based speech** restrictions in dormitories.
- A university **can impose content-neutral restriction** in dormitories designed to ensure a supportive living environment for students.



The First Amendment

- A university cannot censor or punish some speakers, but not others, for putting up handbills, writing messages in chalk, or engaging in similar acts of expression.
 - No selective enforcement.
- A university can create general **content-neutral regulations** governing on-campus expression.



The First Amendment

- A university cannot engage in **content-based discrimination** against faculty, students, or other speakers or writers who seek to express themselves outside the professional educational context.
- A university can engage in **content-based evaluation** of faculty and students who are operating within the professional educational context, as long as this evaluation is **based on professional standards or peer assessments of the quality of scholarship or teaching**.
 - *The First Amendment does not prevent the university from grading or evaluating your performance.*



The First Amendment

- Faculty members may choose to provide students warnings before presenting material that might be offensive or upsetting to them.
- A university should not require that faculty provide **“trigger warnings”** before presenting or assigning material that might be offensive or upsetting to students.



The First Amendment

- A university can create “**safe spaces**” in educational settings that ensure that individuals feel free to express the widest array of viewpoints, and can support students efforts to self-organize in ways that reflect shared interests and experiences.
- A university **cannot use “safe spaces” to censor** the expression of ideas considered too offensive for students to hear.



The First Amendment

- A university cannot prohibit students or faculty from using words that some consider to be examples of “**microaggressions.**”
- A university can **sensitize students and faculty** to the impact that certain words may have, as part of an effort to create a respectful work and learning environment.



The First Amendment

- A university can ensure that all student **organizations**, as a condition for recognition and receipt of funding, **be open to all students**, and can impose sanctions on student organizations for conduct if it is not protected by principles of freedom of speech.
- A university cannot deny recognition to a student organization or impose sanctions against it for the views or ideas expressed by the organization, its members, or its speakers.



The First Amendment

- A university can censor or punish speech over the internet and social media that otherwise is not protected (see the list previously provided).
- A university cannot punish speech over the internet on the ground that it is **offensive**.



The First Amendment

- A university should expect university administrators to speak out against especially egregious speech acts and, most importantly, encourage the university community to make its own decisions about what speech acts deserve praise or condemnation.
- A university should not expect university administrators to comment on or condemn every campus speech act that some person considers offensive.



What does Academic Freedom protect?



Academic Freedom

- Academic freedom is a special concern of the First Amendment.
- **The First Amendment “does not tolerate laws that cast a pall of orthodoxy over the classroom.”** *Keyishian v. Board of Regents* (1967).
- “Academic freedom thrives “on **the independent and uninhibited exchange of ideas among teachers and students.**” *University of Michigan v. Ewing* (1985).
- “Academic freedom thrives on “on autonomous decision-making by the academy itself.” *University of Michigan v. Ewing* (1985).
 - Academic freedom belongs to the university.



Academic Freedom

- In *Keyishian v. Board of Regents* (1967), the United States Supreme Court invalidated New York’s Feinberg Law, which imposed a **loyalty oath** to the United States and **proscribed the teaching of “treasonous” and “subversive” doctrine** of Communism in the state’s colleges and universities. Faculty sued. The Court explained:

Our Nation is deeply committed to safeguarding academic freedom ... a special concern of the First Amendment, which **does not tolerate laws that cast a pall of orthodoxy over the classroom.** The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. **The classroom is peculiarly the marketplace of ideas.** The Nation’s future depends upon leaders trained through wide exposure to that **robust exchange of ideas** which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.



Academic Freedom

- The Court continued to say:

Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding, otherwise our civilization will stagnate and die.

- Yet, the Court noted that **academic freedom is not absolute**:

Because First Amendment freedoms need breathing space to survive, **government may regulate in the area only with narrow specificity** The danger of that **chilling effect** upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.



Academic Freedom

- In *University of Michigan v. Ewing* (1985), the Supreme Court reversed a decision of the U.S. Court of Appeals for the Sixth Circuit that had invalidated a university's decision to dismiss a student from an academic program.
- Noting a "reluctance to trench on the prerogatives of state and local educational institutions" and its "responsibility to safeguard their academic freedom, the Court explained:

When judges are asked to review the substance of **a genuinely academic decision** . . . they should show great respect for the faculty's **professional judgment**. Plainly, they may not override it unless it is such a **substantial departure from accepted academic norms** as to demonstrate that the person or committee responsible did not actually exercise professional judgment



What does tenure protect?



What does tenure protect?

- The General Assembly authorized the Board of Regents to promulgate a tenure policy for faculty within the state university system to “ensure academic freedom and provide sufficient professional security to attract the best qualified faculty available.” Tenn. Code Ann. § 49-8-301(a).
- Outside of providing a few general guidelines, the General Assembly left it up to the Board to “define the nature of tenure at institutions, and the rights and responsibilities of faculty with tenure.” *Id.* § 49-8-301(b)(1).
- The General Assembly defined the grounds for dismissing a faculty member with tenure, Tenn. Code Ann. § 49-8-302, and the minimum requirements for the procedure to be used for the dismissal. Tenn. Code Ann. § 49-8-303.
- Finally, the General Assembly provided for a *de novo* judicial review of the dismissal. Tenn. Code Ann. § 49-8-304.



What does tenure protect?

“Adequate cause” for termination of faculty with tenure includes the following:

- (1) **Incompetence or dishonesty** in teaching or research;
- (2) Willful **failure to perform the duties and responsibilities** for which the faculty member was employed or refusal or continued failure to comply with the policies of the board, institution or department or to carry out specific assignments, when the policies or assignments are reasonable and non-discriminatory;
- (3) **Conviction** of a felony or crime involving moral turpitude;



What does tenure protect?

- (4) **Improper use of narcotics or intoxicants** that substantially impairs the faculty member's fulfillment of departmental and institutional duties and responsibilities;
- (5) Capricious **disregard of accepted standards of professional conduct**;
- (6) **Falsification of information** on an employment application or other information concerning qualifications for a position; and
- (7) Failure to maintain the level of **professional excellence and ability** demonstrated by other members of the faculty in the department or division of the institution.

- **Most notably, faculty cannot lose tenure for their speech.**



What does the Tennessee Campus Free Speech Protection Act protect and prohibit?

<https://www.etsu.edu/universitycounsel/freespeech/campus-free-speech-protection-act.php>



Tennessee Campus Free Speech Protection Act

- Public institutions of higher education embrace a **commitment to the freedom of speech and expression for all students and all faculty.**
- Public institutions of higher education, including their faculty, shall not require students or other faculty to adopt or to indicate their adherence to beliefs or **orthodoxies** on any particular political, philosophical, religious, social, or other such subject, although institutions may require students and faculty to conform their conduct to the requirements of law and policy.
- Public institutions of higher education **shall not stifle freedom of speech and expression** by implementing vague or overbroad speech codes, establishing free speech zones, imposing unconstitutional prior restraints on speech, or disinviting speakers based on the anticipated reaction or opposition of others to the content of speech.



Tennessee Campus Free Speech Protection Act

- An institution shall be committed to maintaining a campus as a *marketplace of ideas* for all students and *all faculty* in which the *free exchange of ideas* is not to be suppressed because the ideas put forth are thought by some or even by most members of the institution's community to be *offensive, unwise, immoral, indecent, disagreeable, conservative, liberal, traditional, radical, or wrong-headed*.



Tennessee Campus Free Speech Protection Act

- Faculty are free in the classroom to discuss subjects within areas of their competence.
- Faculty shall be cautious in expressing personal views in the classroom.
- **Faculty shall be careful not to introduce controversial matters that have no relationship to the subject taught**, and especially matters in which they have no special competence or training and in which, therefore, faculty's views cannot claim the authority accorded statements they make about subjects within areas of their competence.



Tennessee Campus Free Speech Protection Act

- Most importantly:

No faculty will face adverse employment action for classroom speech, unless it is not reasonably germane to the subject matter of the class as broadly construed, and comprises a substantial portion of classroom instruction.



What ETSU values are implicated?



What ETSU values are implicated?

- People are treated with **dignity** and **respect** and are **encouraged** to achieve their full potential.
- **Diversity of people *and thought* is respected.**
- Commitment to intellectual achievement is embraced.



What ETSU policies are implicated?



What ETSU policies are implicated?

- Campus Free Speech Protection Act.
 - <https://publications.tnsosfiles.com/acts/110/pub/pc0336.pdf>
- Academic Freedom and Responsibility (Effective May 8, 2017)
 - https://www.etsu.edu/policies/academic/academic_freedom.php
- University Free Speech
 - https://www.etsu.edu/policies/student/university_free_speech.php



What are the potential legal issues with teaching CRT?



Potential Legal Issues

- There are no potential legal issues with teaching CRT as a theory or methodology.
- Some legal issues may arise with the classroom exercises and conduct.
 - **Title VI** – Prohibits race-based discrimination (including hostile environment discrimination) and retaliation
 - **Title IX** – Prohibits race-based discrimination and retaliation.
 - **First Amendment** – Prohibits compelled speech and protects student speech.
 - **Fourteenth Amendment** – Prohibits the deprivation of life, liberty, or property without due process of law (students may have a property interest in their education).
 - Statutory violations.



Potential Legal Issues

- The controversy over CRT presents novel legal issues. Lawsuits have recently been filed in various contexts. But we do not have a lot of established precedent to rely upon.
- The most pertinent legal authority is the opinion issued by Montana Attorney General Austin Knudsen on May 27, 2021. He reviewed CRT and anti-racism training, which often includes:
 - (1) grouping participants based upon their race;
 - (2) focusing on the concepts of white privilege and the inherent racism of white people,
 - (3) blaming modern white people bear for their ancestors' racism; and
 - (4) mandatory admissions and apologies from white participants.



Potential Legal Issues

- General Knudsen concluded that these activities discriminate on the basis of race, color, or national origin in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act. Specifically, he cautioned against
 - **racial segregation or classification,**
 - **racial stereotyping,**
 - **racial scapegoating,**
 - **racial guilt-tripping, and**
 - **compelled speech.**
- General Knudsen's opinion is based upon established legal principles that he applied to this new context.



What are the best practices for teaching CRT?



What are the best practices for teaching CRT?

1. Discuss theoretical constructs as theoretical constructs and nothing more. Do not attribute theoretical constructs directly at your students:

- Do not group participants based upon their race. That's racial segregation.
- Do not attribute whiteness, white privilege, and inherent racism of white people to your students. That's racial stereotyping.
- Do not blame your white students for the actions of historical white people. That's racial scapegoating and racial guilt-tripping.
- Do not require students to admit or apologize for their whiteness, white privileged, or inherent racism. That's compelled speech.



What are the best practices for teaching CRT?

2. Abide by ETSU's values.

- Treat people with dignity and respect and encourage them to achieve their full potential.
- Respect **diversity of people and thought**.
- Embrace a commitment to intellectual achievement.

3. Abide by ETSU's policies on free speech and academic freedom.

- Campus Free Speech Protection Act.
- Academic Freedom and Responsibility (Effective May 8, 2017)
- University Free Speech



What are the best practices for teaching CRT?

4. Establish clear expectations for classroom discussions. Encourage civil, respectful dialog, debate, discussion, dissention, and disagreement.
5. Model the behavior you want your students to emulate.
6. Maintain control of the discussion.
7. Keep the lecture pertinent to the class' subject matter.
8. Encourage critical thinking and logical argumentation.
9. Encourage students to bring their own perspectives and express their own opinions . . . even dissenting opinions.
10. Educate and inspire. Do not indoctrinate.



Questions?

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