

# Duke Law Podcast | What Is Critical Race Theory & Why Is It Under Attack?, Part 2

TRINA JONES: Hello, I'm Trina Jones, the Jerome M. Culp Professor of Law at Duke Law, the Director of the Center on Race, Law, and Policy, and your host for this episode of the Duke Law Podcast. In this special two part series, we will examine one of the most controversial topics today, critical race theory.

SPEAKER 1: Earlier this year, I directed the Florida Department of Education to prohibit critical race theory in our K through 12 schools.

SPEAKER 2: When you just testified a minute ago, that you didn't if critical race theory was taught in K through 12, I will confess, I find that statement a little hard to reconcile.

SPEAKER 3: Senator, I have not reviewed any of those books, any of those ideas. They don't come up in my work as a judge.

SPEAKER 4: Getting critical race theory out of our schools is not just a matter of values, it's also a matter of national survival.

SPEAKER 5: There was a need, obviously, on the part of the right to have a way to clap back. And so they rooted around and found critical race theory as the container into which they poured the entire apparatus of antiracism.

TRINA JONES: Joining me for this discussion are two of my esteemed colleagues and friends, UNC Law Professor, Osamudia James, and Duke Law Professor, Timothy Lovelace. Professor James's scholarly focus is administrative law, civil rights and discrimination, education law, and race in the law. She has published in leading law journals, and in the pages of The New York Times, and the Washington Post. Professor Lovelace is a legal historian of the Civil Rights movement and its influence on international human rights law. He teaches American legal history, constitutional law, and race in the law, in addition to co-teaching critical race theory with me at Duke Law.

In part one of the special two-part series, we provided a definition of CRT and looked back at its origins. We also explored contemporary attacks on CRT and the battlegrounds where these attacks are happening. Here, in part 2, we'll show how CRT can be used as a framework to better understand today's legal practices and policies, from policing tactics and racial profiling, to judicial diversity and the nomination of Supreme Court Justice, Ketanji Brown Jackson. Please enjoy part two.

So I'm wondering if we might segue and discuss a contemporary issue and that is the nomination of Judge Ketanji Brown Jackson to the US Supreme Court. How might critical race theory, as we've been discussing it, help us to think about judicial diversity and the nomination process, and what we've seen in recent weeks?

OSAMUDIA JAMES: Sure, I can start. I've been thinking about this a lot because there was so much going on in the confirmation hearing and no one was using the word race, but there was a lot of dog whistle about race. And there was a lot of ways in which race was shaping what was happening. So I want to talk about merit, the idea that we are-- the narrative is that she is meritorious of that seat, and of course she is. She is, probably, one of the most qualified nominees ever, and I'd say more qualified than many people currently sitting on the Supreme Court, in terms of her background or her judicial experience, her understanding, her participation on the Civil Rights-- sorry, the Sentencing Commission.

TRINA JONES: We have a double Harvard graduate, she clerked for Justice Briar, whom she will be replacing if confirmed, she was a public defender.

OSAMUDIA JAMES: Which would be, I think, a first, right, for us?

TRINA JONES: I think the first, right. And she served on the Sentencing Commission, has been confirmed by the Senate three times, and has sat on the bench for nine years, which I think is more than any current justice before being appointed to the bench. So we have this supremely qualified person and yet--

OSAMUDIA JAMES: I get uncomfortable with the use of the word merit, because it is this race-neutral term that has been used to suggest that beneficiaries of things, like affirmative action, don't deserve those spots. Especially that black and brown people are not deserving of their spots in elite institutions.

And as I said earlier, what we deem as merit is really just a product of race and wealth and gender privilege. And so as it turns out, Judge Brown Jackson doesn't have some of those built in advantages. She went to a public school, or she didn't go to an elite, private school for K to 12. Her parents came out of the Jim Crow South, have built a life for her and her siblings, against odds that would make it more difficult for them to thrive, and yet she still achieved the pinnacle positions in the profession.

But I think CRT is important for helping us think about how do we talk about how do we construct merit, who gets to be meritorious, and also what it takes for people of color, for women, for Black women to succeed in the face of a construction of meritorious that is going to be more likely to deny them those opportunities. And so I see her as triumphing, overcoming those obstacles, but I'm also reminded of how historically we've used that framing of merit to deny positions in the Supreme Court to people like her who do deserve to be there, and maybe more so than the people who are currently there now.

TRINA JONES: So she will be the first Black woman to be appointed to the Supreme Court, but we've had black men, Justice Marshall and Justice Thomas, right? How can intersectionality help us to understand the importance of Judge Brown Jackson being appointed to the court?

TIMOTHY LOVELACE: I think two points here. First, again going to this point about judicial merit. How do we think about merit? She has been billed as an affirmative action nominee, and part of this is about race, part of this is also about her gender as well. And so we should challenge, as Professor James has said, these very fraught ideas around judicial merit. I think one insight here, is to think about justice Sotomayor. She described herself as a wise Latina who would bring particular perspectives to the court, much needed perspectives to the court. That was an intersectional approach to understanding judicial decision making.

And I think that Judge Brown Jackson, if she's confirmed-- when she's confirmed, we're going to claim that-- she will be able to bring particular perspectives to the court. It's important for us to understand, and the courts would really push this point that constitutional law is often constitutional politics. That judges are often not deciding cases in vacuums, but judges and justices often responding to the political climate of the times that they're bringing to the court.

Not simply objective ideas about law, but that constitutional law is deeply political, and that when Judge Brown Jackson is confirmed, she will bring a very valuable, and a missing, perspective. How have we been a nation with the Supreme Court for, that we would go centuries and not have a Black woman on the Supreme Court given America's demographic. That's not an accident, that racism is deeply structural. That sexism is deeply structural, and so I'm excited about Judge Brown Jackson's confirmation.

TRINA JONES: Could you explain what you mean when you say law is deeply political?

TIMOTHY LOVELACE: For many judges and justices, the traditional ideas that they simply apply precedent mechanically, that again, laws objective that if you have the same set of facts before the court, if judges and justices are being faithful to the profession then the results would likely be the same. We know that this is not true. We know that when Justice Kavanaugh is in front of an issue, or Justice Scalia was in front of an issue you could predict the ways in which they would come out, and that was being informed by their political ideologies.

When precedent is not clear often, when there's more wiggle room we might say, here you see judges and justices really interject their personal ideas about what law means. Justice Scalia said that he knew how he would come out on particular cases, even before the cases were argued, , because he was committed to a particular vision of what law should be. This is deeply political. And so I think that just exposing, and what critical race theory would have us to do is to expose these normative dimensions of judicial decision making.

TRINA JONES: So I hear you saying that context matters, experience matters, especially when you're considering highly contentious issues of the sort that find their way to the US Supreme Court.

TIMOTHY LOVELACE: Absolutely. I mean, we know how justices are going to vote even before they vote, I mean, people are counting votes. We're all legal realists regardless of your ideological position. We know that Brett Kavanaugh coming to the court was going to put forth a particular judicial vision. We know this with Judge and now Justice Barrett. People are thinking the same thing though for Judge Brown Jackson. We're all legal realists now.

TRINA JONES: You mentioned the fact that before Judge Brown Jackson's name was even mentioned that this was characterized as an affirmative action appointment. How might critical race theory help us to understand that characterization, that immediate characterization before an attempt to delegitimize the nominee before a name even surfaced? Given that other presidents have indicated a preference for a particular demographic group. Professor James?

TIMOTHY LOVELACE: Yeah, I think this dovetailed really easily for people who are opposed to her, not just her nomination, but maybe Biden having a successful nomination, it dovetailed with the idea we have around merit and how affirmative action is somehow contrary to merit. And so if you can tie her, you could call her an affirmative action nominee, then you can bring in with that. The entire narrative we have about who deserves, who doesn't deserve, who's getting unjust preferences, the innocent white people who are being denied their opportunities because we have to make up for other minorities.

And when we think about innocence, innocence derives its power from the suggestion that someone is guilty. And so my ancestors, or I wasn't responsible for this but now I'm an innocent person having to not get into the school, or not get my seat on the court, so that a guilty woman of color who hasn't worked as hard as I have, or all that. That's baked in and it's all dog whistle. We're swimming in the soup of that discourse, and so all you have to do is label her as an affirmative action nominee, and you bring in all of that and then you try to undermine the legitimacy of her nomination.

And we could also think about how CRT helps us understand even her treatment during the nomination. She was subject to hostile questioning, constant interruptions, and CRT teaches us that racism is endemic and so it will interact with other endemic forces, it will interact with patriarchy, it will interact with sexism. And so her treatment was about her being a Black woman, not just a Black nominee, not just a female nominee, but a Black, female nominee.

And so there was a way in which she had to stay very measured, and very composed, even in the face of that hostility. And you contrast that to Brett Kavanaugh, who was like, sputtering, and his face is red, and he was screaming. And the conversations about his demeanor as a justice were not live, but we were, especially Black women watching, we were very aware that she had to remain very calm because otherwise, if she responded in kind or said, hey, stop interrupting me or this is disrespectful, or even just had a little edge in her voice she'd be stereotyped as an angry Black woman.

She was not given the care that Justice Amy Coney Barrett was given. The idea that as a white woman she needed to be protected, so even if we are not happy about the nomination, we're going to treat her with respect because that's what she's do. But as a Black woman, Judge Brown Jackson wasn't given that right, and CRT would ask us why not? Well, what is it about the overlap of her race and gender that means that she was subject to a very particular hostility during that confirmation hearing? The likes of which we have not seen in any other context for any other nominee.

TRINA JONES: And the nature of some of the questions, do you think that her race and her intersectional identity of Black woman led to a certain line of questioning, right? Questions about CRT, questions about being tough on crime. Are those questions that are just being neutrally presented because she gave a speech at Michigan that involves CRT? Or because she was a defense attorney? Or do you think that they had an added dimension because she was a woman of color?

TIMOTHY LOVELACE: Absolutely, like I said, these are dynamics and narratives about people that run throughout society. And even when people say, I don't believe that, we know what the narratives are. We've grown up in them, they're part of American cultural and political and social history. And so all you have to do is bring up CRT. She doesn't do it in her work, but she's a Black woman. And so you bring up CRT and the dog whistle was, look at her, she's a Black woman, I can't say that. So instead, I will use a word like CRT to race her for you, so you all are aware of what's happening and maybe have a negative response to that.

TRINA JONES: And she thinks that if you associate it with CRT, based upon this conversation, she thinks that the United States is a racist country.

TIMOTHY LOVELACE: Yes yes, that's right.

TRINA JONES: And so on and so, and she's going to perpetuate that particular set of beliefs.

TIMOTHY LOVELACE: That's right, that's right. It was very expected, and unfortunately, sadly effective political maneuvering. Like, I'm going to claim it too, I think she'll be confirmed. But it was still devastating to watch how people weaponized race and gender in that moment to undermine her nomination, to grandstand for their own political base. And it just wasn't new, it wasn't new, we've seen this before.

TRINA JONES: She introduced herself as a mother, right? Can you speak to that dimension of her identity.

OSAMUDIA JAMES: So the narratives around mothering have been different when we're thinking about white women, then when we're thinking about women of color and Black women, in particular. And so I think there were assumptions going in about, in contrast, if we contrast Judge Brown Jackson to Judge Barrett, a presumption of competence, of motherly virtue, of joy in her children and being able to handle it all. A couple of funny jokes about how she handles it all, but I think the assumption was that she does handle it all, and that she properly places her children above all. And look, and she was still able to get as high as she did.

And so when you're talking about that against the context of reproductive justice and who can have access to abortion, I think some of this was about, well, look at this woman who's had all these children, and it's still wonderful, what's wrong with the rest of you? Who wants to somehow control how many children you have or terminate a pregnancy because it's not working for you anymore. And so those narratives surrounded Barrett, and a different set of narratives around women of color, and Black women in particular, a presumed incompetence. You think about things like the welfare queen, right? Having many children just to draw resources from the state. We think about the criminalizing of women in terms of substance abuse and thinking about Black mothers whose babies are born addicted to substance abuse as a result.

And so those narratives existed for this confirmation hearing, and I think her team had to be very careful about how to present the story of her motherhood, how to navigate the idea that we have about Black working women, and the reality that Black women have worked outside the home for a long time because they had to and that's not a bad thing. And so CRT would ask us to pay attention to those dynamics, to pay attention to how it shaped our perceptions of Barrett, how it shaped our perceptions of Brown Jackson, how the questioning might have differed and how our perceptions of her as a good mother or a bad mother are impacted by her race as a Black person and as a Black woman.

TIMOTHY LOVELACE: One of the things that's been so striking to me in the confirmation hearings has been the debates around critical race theory. Senator Ted Cruz questioned Judge Brown Jackson about her commitments to critical race theory, given the school that she serves on the board of. What's so interesting is that Senator Cruz's children go to a school that uses the texts that he criticized Judge Brett Brown Jackson for. He's the personification of the anti-CRT sentiment, and he never fails to deliver in terms of just, hypocrisy. And the CRT debates themselves just, really expose that all over again for Senator Cruz.

TRINA JONES: How might CRT help us understand this present moment when we are focusing on mass incarceration, the disproportionate engagement of Black and Brown people, with the criminal justice system?

TIMOTHY LOVELACE: Yeah, so CRT would have us to think about the long routes of mass incarceration. That controlling and policing Black bodies, again, is nothing new. That Black bodies have always been under surveillance. If we think about this in the context of the United States, go back to slavery. So critical race theorists would have us to go back to the policing of Black bodies during slavery and think about the evolution of white supremacy since that time. And how modern policing has adopted and adapted, to provide often colorblind justifications for policing Black and Brown bodies.

Critical race theory would also show the limitations of anti-discrimination law. So when you think about racial profiling, that we don't have, often, the legal tools to get at the pretext that drives much of racial profiling under the Fourth Amendment, and that the Equal Protection Clause is just, very limited as a tool to remedy racial profiling.

TRINA JONES: When you think about the surveillance of Black bodies during institutionalized slavery and the idea that Black bodies were property to be monitored, or then a threat, something to be watched, are you suggesting that those conceptions play a role in modern policing?

TIMOTHY LOVELACE: Absolutely, absolutely. That modern policing relies often on stereotypes of who's a threat, who needs to be watched, who is more criminal. When you look at criminal laws themselves,

they often produce and then reproduce the stereotypes about Black and Brown bodies. And that these forms of subordination are often tied to other forms of subordination. So we can think about criminal laws being produced in the late 19th century that classified certain crimes as felonies, because the stereotype was that Blacks were more prone to commit certain types of crimes, and so those crimes should be penalized more.

And that was tied to the political system. When we think about felon disenfranchisement laws, felon disenfranchisement laws became ways to tie these stereotypes about Black criminality to the political process, as another way to disenfranchise African-Americans. Critical race theory would also really push us to think about, that tinkering around the system, the criminal legal system is not enough to end racial subordination. So hiring just a couple of police officers of color is not going to transform the institution. Changing certain penalties is not going to transform the entire institution. That the entire institution at every turn produces and reproduces racial inequality.

TRINA JONES: So you can't change the penalties, or change the demographic characteristics of officers, and expect different outcomes. You've got to fundamentally change the institution. In what ways might one fundamentally change the institution?

TIMOTHY LOVELACE: One way to change the institution is to change prosecutors, so prosecutors have--

TRINA JONES: Or do you abolish the institution?

TIMOTHY LOVELACE: Or you might, right. So there would be some who would say abolitionism is the way to go, that the system can't be reformed. And so we should abolish the criminal legal system, whether it's policing or prisons themselves, as a way to redress and to end racial subordination. And that we should chart a new future of freedom, that we should reimagine what it means to restore those who have offended back into society. And we should think more structurally and more comprehensively about what it means for example, to have the educational opportunities to have the mental health services needed not to offend.

And so this is part of the project of critical race theory, to have a larger social imagination about how do we create the safety net and the structures so that people don't enter the criminal legal system. And this happens along race lines and along class lines. And so that kind of legal imagination and social imagination is necessary if we're going to end racial subordination.

OSAMUDIA JAMES: Even if you were thinking about, I do think abolition is something to think about. But let's say we want to keep the system we had, what policies might we change that look race neutral to us, but are in fact, are going to target particular groups of people. So when you think about what we construct as crimes, is loitering a crime? Well, who's more likely to be outside, Right if we defend the home based on Fourth Amendment jurisprudence as inviolable, you cannot enter it.

Well we know white, wealthier people are more likely to engage in drug abuse inside the home and lower income people of color are more likely to engage in drug abuse outside of the home, because for other structural reasons their homes are not always wonderful places to be. And if we decide we can never enter the home, but we will police drug abuse on the streets, who are we going to pick up as a result?

And so even the policies we make about what sorts of crimes require policing and where police can go and can't go is going to subject some people to the police more often than others. Even though we know white people and people of color use drugs at the same rates across the board.

And so those are race neutral policies that, in fact, have racially disparate impacts. And so you can't just say, oh we'll change the sentencing. You have to actually change what you've constituted as a crime. You

might have to change where you think police ought to go. I'm not suggesting police should enter the home, I am suggesting that there are lots of policies that we don't think that are related to race, and they are. And you'd to take a look at those. And disparities are the key, where are the disparities, but why are these disparities happening?

It's because of how you've constructed criminality. Even the vocabulary, the war on drugs sounds race neutral, but that's about terrorizing Black people. The war on terror sounds neutral, but that's about criminalizing and terrorizing people of Middle Eastern descent. Illegal alien, the border, national security, CRT would ask us to look at these vocabularies and see how they make invisible processes of criminalizing and marginalizing people of color under a race neutral facade.

TRINA JONES: Might we talk about reasonable suspicion and Fourth Amendment jurisprudence, and how that might produce certain racialized outcomes and it skews certain behaviors. How might critical race theory help us to interrogate this concept of reasonable suspicion?

OSAMUDIA JAMES: Yeah, when you think about-- I think the court has held that if people run from the police that is reasonable suspicion that they committed a crime. And so police may then stop you, detain you, search you, look to see what's on you, and then find a reason to justify incarcerating you. But if we understand the relationship of Black communities to the police, we understand it's actually, quite reasonable, especially in poor communities of color, to run when the police show up.

Because we see police brutality, because we see police confiscating what they find, we see police planting drugs on suspects in ways that do not happen in white communities. And so the police show up and you leave, but if we don't think about that racialized history and those racialized relationships, then we say, of course it's reasonable to conclude that you committed a crime because you're running away from the police.

TIMOTHY LOVELACE: Who is the reasonable person? And this is something that just runs through much of law. How do we construct the reasonable man? At one time, I mean, that was the term used. But what does reasonable mean? It's not objective, right? It's not neutral, it's deeply political. And that critical race theory would have us to not only deconstruct the idea of reasonableness and a reasonable person, but would also invite questions about positionality. So who's the subject that is being detailed? Who becomes the suspect as we think about suspicion.

And so I think that critical race theory just gives us, again, a toolset to pull away and to center the experiences of people of color in legal discourse. But then outside of law schools and on streets to give activists new languages so that there might be practice that activists might have a language to talk about reasonableness, can talk about what it's like to be a suspect. And so this is one of the just, brilliant moves of critical race theory, that there is practice there as well. So we can talk about it and unpack it in our law school classrooms, but then critical race theory pushes us to impart that knowledge and not keep that knowledge in the legal academy. But that there might be those outside of our doors who could benefit from that, as well.

TRINA JONES: So this idea of suspicion and how certain people become targets, and certain activities become suspicious when they're engaged in by people who are people of color is something that critics point out there's a history to that. So can we talk about voting rights? How might critical race theory help us to understand contemporary attacks or challenges to the franchise?

TIMOTHY LOVELACE: We're here in North Carolina, we're talking a lot about districting and the power districting. There are many different issues here that we might discuss. A couple of issues, is the

construction of majority minority districts. In the 1980s, late 80s and early 90s, you saw Republicans, for example, pushing the construction of majority minority districts. And the question was, why? I thought that many Republicans, for example, were opposed to thinking about race in formal ways that, government should be colorblind. What's going on here? What's that story? Many Republicans, the Bush administration for example, pushed majority minority districts because of the idea that if a district became majority minority, then the adjacent districts would become whiter and safer for Republicans.

This is the idea of interest convergence. That you had some African-Americans who wanted majority minority districts, they wanted to have the opportunity to elect representatives of their own choice or better chance of that. And you had Republicans who were otherwise chanting color blindness, willing to engage in this project because it would serve their interests, as well. And so this is one of the tenets of critical race theory, I think that's one way that it plays out.

One of the other ways that it plays out is how the term partisan in Partisan Gerrymandering, really, how we should unpack it. That the term Partisan has become a way, in some ways, to talk about race. That for example, African-Americans vote largely for the Democratic party. And so one way to deal with the questions of the need, or the push, for some to be race blind, is to talk about partisanship as a way to get at issues of race. And so critical race theorists would expose that the term Partisan is not so neutral at all. That it has a real racial impact.

TRINA JONES: And Professor James, there are voter ID laws, restrictions on same day registration, restrictions on the use of mail-in ballots, felon disenfranchisement laws, and fees, you must pay all of your fees in order to vote. Would CRT help us to understand these modern day practices in a historical frame?

OSAMUDIA JAMES: I think it would, helping us see how CRT teaches us that race changes and how we respond to race changes. As a social construction, it's moving. And so we will have new iterations of law and policy that are meant to respond to a project of racial subordination. It looks different from generation to generation, but the outcome is still the same. And so you can't have poll taxes anymore, but you can insist people pay all their fees before they vote. We don't do literacy taxes, but we make it very difficult to get souls to the polls. And so no one's allowed to vote on Sundays anymore, or no one is allowed to ballot harvest for people who live, maybe, in rural areas and can't get to voting sites very easily.

And so CRT is always asking us to re-examine what is happening, and to, as Professor Lovelace said, push the court to think about what's happening. Partisan seems neutral, but in fact, politics are not race neutral in a country where race overlaps so significantly with voting patterns. . And so when someone engages in partisan gerrymandering, or race neutral laws that seem to impact Democrats more than Republicans, that's not race neutral if we understand that people of color are more likely to vote Democrat. CRT pushes us to make those interrogations.

TIMOTHY LOVELACE: CRT would also have us to think about the durability of racism, that racism is flexible, white supremacy is flexible. And in 2008, there were many people who were saying after the election of Barack Obama that we had entered a post-racial society, that we had-- the New York Times wrote that we had entered this new moment where we had gotten beyond race. Keep on living. Donald Trump comes the emergence of all of the tactics that, Professor Jones, that you talked about. The rise in voter ID laws, many of the new attacks on the right to vote show us that we're in anything but a post-racial society, and that racism persists over time, that racial progress is never inevitable.

OSAMUDIA JAMES: Freedom is a constant struggle.

TIMOTHY LOVELACE: Freedom is a constant struggle.

TRINA JONES: So tell me how CRT has influenced your scholarship.

TIMOTHY LOVELACE: In my own work, I think I'm guided by a fundamental concept or principle in CRT, and that is that race doesn't precede law, law precedes race. That is, we use law to create racial categories to give them meaning to sustain them. And is not the case that laws just come around and are responsive to this thing called race that actually is developed outside of the law. And so there were a racial prerequisite cases, cases in which we determine who was white, who could claim whiteness, legally. And law gives those categories meaning. White people are superior, Black people are inferior, Japanese people are disloyal. How do laws construct those narratives for us and give those categories meaning? And so in my--

TRINA JONES: Are you thinking about *Hudgins versus Wrights*, *Ozawa* and *Third, line of Cases*?

OSAMUDIA JAMES: Exactly, exactly, yes. I'm sorry, thank you for making me be more detailed. That line of cases in which people who were not, maybe commonly or popular understood to be white, were saying things like, I originate from a part of the world that we call *Caucasia*, right, and so that must mean I'm *Caucasian*. And the court say, oh no, we didn't mean that, we meant who understands you as white in the population? And so a line of cases in which the court decides this is how we decide who is white, and as a result, this is how we decide who's not white.

And the court goes further in saying things like it's undisputed that white people are superior, and looking at this person we know that they wouldn't have the cultural or economic standing to be white. And so it's not just about who is white, it's about denigrating the people who don't fall into that category.

TRINA JONES: You could even take that to Justice Harlan's famous dissent, *Plessy versus Ferguson*, because that dissent is often pointed to as the origination of the colorblind thesis. But yet if you consider the sentences before he said our Constitution must be colorblind, he's talking about white supremacy.

OSAMUDIA JAMES: Absolutely, absolutely. And so yeah, law creates that content. And so in my own work, I've spent a lot of time-- I write about race law and public education. And so I've spent time trying to understand how law constructs people, how it constructs people's sense of themselves as racial actors. What does it mean? How does the law shape how you think of yourself as a person of color? How does a law shape how you think of yourself as a white person? How do educational policies that are shaped by law change how people approach the school system, and how does it impact racialized dynamics in that school system?

And so there isn't an article I write that doesn't think about, how is the law doing some of this work of constructing racial categories, of creating racialized dynamics, and then making it seem neutral?

TIMOTHY LOVELACE: My scholarship looks at the intersection of the US Civil Rights movement and international human rights law. It flows from Derrick Bell's work, his article, "*Brown versus Board*, and the *Interest Convergence Dilemma*." In the article, Derrick Bell asserts that *Brown* was not the product of the justices thinking about the associational rights of whites and Blacks, but rather *Brown* was the product of interest convergences that there were elite whites who were interested in advancing their own interests, and in their own goals, and that coincided with the Civil Rights movements struggle for racial equality and education.

In the article, he identifies a number of interest convergences. Two of the interest convergences that he identifies are really important to my work. He says that one interest convergence was that the US was fighting for the hearts and minds of the third world. And that if *Brown* essentially had gone the other way and *Plessy* was upheld, that would have provided fodder for the Soviet propaganda machine. The other

interest convergence that Brown that Bell identifies in "Brown versus Board and the Interest Convergence," is that there were African-American soldiers who were fighting abroad and they had come back home.

And so the question again was, how can America talk about democracy abroad when it was not practicing democracy at home? And Brown gave these Black soldiers who had come back home reassurances about the promise of American democracy. What my scholarship does is it really thinks about the ways in which the Cold War was shaping the Civil Rights movement and how the Civil Rights movement was shaping the development of law during the Cold War, the creation of international human rights law, specifically. That there were many interests convergences, why would the United States be involved in creating international human rights law?

Well, one way, one reason, was that the US was interested in exporting American democracy and influencing the third world, exporting democracy to these countries, these newly developing countries that were creating constitutions. And so Bell's work is always at the core of my work, and I'm a legal historian, and I'm not writing formally critical race theory. But the beauty of what Derrick Bell was able to do is that he's spawned, in one article, an entire field of scholarship. That there are many scholars who are now writing about the intersection of the Cold War and the Civil Rights movement because of his 1980 article. I mean, I think about scholars in the legal academy like Mary Dutiatt, I think about scholars outside of the legal Academy, Carol Anderson, that just incredible work is being produced, that flows from this article. And so Professor Bell is with me every day that I work on my scholarship, in his own way.

TRINA JONES: Professor James, I know that you're teaching race in the law this semester, I believe, at USC. And Professor Lovelace, you're teaching CRT here at Duke. Could you tell our listeners why you chose to teach these seminars, these courses? And how students have responded what your objectives are.

OSAMUDIA JAMES: Yeah, I was motivated by both personal factors, factors that are about me, but also factors that were about students. And so in terms of my motivations, my personal motivations, I write about race in education. But actually, I never taught a course that systematically understood race and law across multiple spheres. And so thinking about how to construct these conversations in class, it's worth it on the back end, but while you're doing it, it can be very stressful.

But I wanted to take time to think about how race operated in various aspects of the legal system. So we spent several classes thinking about race as a construction. We talked about how courts have defined race. We've talked about race and citizenship, race and political participation, race and reproductive justice, race and the criminal law system, race in k-12 education, race and higher Ed. Our final class will be about race in the law school curriculum. And so it's been a wonderful opportunity for me to move to these areas with intentionality. I learned things that I didn't know, or I'm not a voting rights scholar, and so I learned more about how to think about race in that context.

And the second reason was to be responsive to students. And last week, a student, actually a black woman student, came up to me and said, it's been so gratifying to see some of my lived experience reflected in the materials and in our conversation. And to the extent that her experience is more than being a Black woman, but to the extent that she does have a set of experiences that's linked to being a Black woman. And having felt like in her three years of law school, she hadn't had many opportunities to think about the expertise that experience has given her and how the law has shaped that experience, and maybe in good and bad ways.

And so I wanted to create a space for students to think about this with more intention. To learn that's part of being a lawyer, understanding how race operates in our system, but also to be responsive to students who were hungry. To be able to bring in more of their experience and understanding.

TIMOTHY LOVELACE: Like Professor James, I think that we're living in a particular moment where students are asking profound questions about what racial justice means. There is a racial reckoning that is unprecedented for in their lifetimes, very easily. If you think about after the murder of George Floyd and Breonna Taylor and Ahmaud Arbery, there were these protests that were happening across the country. Not simply in the places that we think where racial protests go on. So not simply in New York, not simply in La, or Chicago, or Atlanta, but there were protests going on in the suburbs. And these protests were multiracial in nature. And in fact, some of these protests were predominantly white.

And that you have a lot of students across our law school who've participated in these protests, and it's not simply students of color. That students now, Gen-Z, is deeply politicized, and they've been involved in these demonstrations and they're asking for social change, they're asking for legal change.

We also are living in a moment where there are these anti CRT bills. And part of the problem has been most of America still doesn't know what critical race theory is. And for our students who are going to go out into the world and do lots of things, I think that, with the law school, have a responsibility to educate students about what critical race theory is, I think just with large, but I think, particularly for this moment. And so, part of this is just being an institutional citizen. I think that the law school has a responsibility here, and I'm so glad that Professor Jones has allowed me to teach with her. And I've been able to learn a lot from her, in terms of her teaching style and her insights on CRT. I think the last thing here is to think about what Charles Lawrence would have us to consider, that law school classrooms are sites for social change.

OSAMUDIA JAMES: That's right

TIMOTHY LOVELACE: That we're giving our students a vocabulary, and that law schools are gatekeepers within the profession. And so some students will go out and do corporate law, but in their large law firm, I think that they should be asking questions that are guided by critical race theory. Why are there so few attorneys of color at this large law firm? Why are women and people of color in some way segregated within the firm? Why are they doing employment discrimination law, within the large law firm context, and not-- there might be other fields, other practice groups that have fewer attorneys of color, is there a market demand here? So equipping students with those types of skills and that sense of justice, I think, is really important.

And then there will be no doubt students who go on and do public interest work, and we need to equip those students as well. And so going into the classroom every day is an incredible privilege, and with that privilege comes a lot of responsibility. And I think at this moment in time, one of those responsibilities is to talk about critical race theory as a way to give students a framework to think about contemporary debates. And then, as they chart their own futures, to have a framework to make society more equal.

TRINA JONES: What have you learned from your students?

TIMOTHY LOVELACE: Gen-z is, they have a disruptive quality to them, and I mean this in the very best way.

OSAMUDIA JAMES: Disruptive, or impatient?

TIMOTHY LOVELACE: Yes, that to both. I think that Gen-Z, in their own way, they are frustrated with the slow pace of legal change. And because legal institutions have not been responsive, they've turned to the

streets and they're asking legal questions in the streets. And I think that was just a profound moment in our history, and that was a pivotal moment for them.

I think that they are willing to also, challenge certain kinds of conventions within legal education that I think is helpful. They will ask different types of questions about, even the facts of the case. They're willing to bring in their insights from other disciplines, and they are more sophisticated students around issues of gender identity, for example, that they're more inclusive in productive ways.

And so I'm learning a lot from the students this year, in a way in which I haven't learned in previous years because the students are so willing to, at times, push us, and to have different types of conversations that are less stilted, and that recognize that legal education is very political.

OSAMUDIA JAMES: I would have to agree, they are more skeptical and more demanding, so they're demanding more of their faculty. And like you said, more willing to push some of the norms of, not just the classroom, but of how law school operates. Students want to talk about things like the curve, they want to talk about admissions, they want to talk about language in the classroom, they want to talk about the faculty members obligation to moderate conversations in ways that bring people in, and don't allow people to be pushed out.

So they forced me to rethink some of the vocabulary I use. Sometimes, I think I'm making a progressive critique, and they're like, no, let me tell you why that's not good enough, you're not pushing us far enough. I mean, they are more skeptical and they've been raised at a time when norms and conventions are being exploded around them. And so they bring that sensibility into the classroom and are willing to say, well we could do this differently. And so I've learned a lot, I've learned a lot.

TRINA JONES: Nick Giovanni said, in one of her poems, "the one thing I know for certain is that the teacher is always learning," and I think that's what you've just described to our listeners. So if listeners are interested in learning more about CRT, what resources would you recommend?

OSAMUDIA JAMES: So there are a couple of great readers. If you want to get of into the foundational, the writings that created the movement, is actually I think, a book called *Critical Race Theory: Key Writings that Formed the Movement*, and it's edited by Kimberlé Crenshaw, and others who were there at the start. There's also *A Critical Race Theory: the Cutting Edge*, by Professor Delgado and Stephan Scheck.

And so there's lots of material, that a lot of your articles, there are books, there are readers that you could pick up to learn more. I would also, however, encourage people to pay attention whenever a scholar-- or not even a scholar, anyone in their community is pushing them to reconsider some of these fundamental tenets around race in the United States. If someone is pushing you to rethink colorblindness as good and call it consciousness is bad, if someone is trying to explain to you how race is animated a policy decision, even though the text of the policy is race neutral.

If someone is pushing you to think about disparities, that's critical race theory, even if it's not in a formal book or a law review article, that's someone trying to help you understand how race is operating in ways that are sometimes invisible to us. Listening in and then following up, why do you think that or what did you read, or how can I get more? It doesn't require a course or a book, although those are very useful. Sometimes it's just about listening to the work that people, scholars and non scholars, are doing around you.

TIMOTHY LOVELACE: Khiara Bridges also has a critical race primer that's excellent. And then, outside of even simply reading critical race theory, there are many resources online. So the African-American

political forum is the genius of Kimberlé Crenshaw, and she has so many resources that are available online, through talks and other materials, that are very accessible.

And then I would actually encourage people, after they've consumed those sources, to come back and read some of the other foundational texts that are prior to critical race theory. Because some of the criticisms that critical race theories are advancing, they have older roots. So I think a lot about the work of Dr. King, and he was deeply critical of structural racism in ways that would resonate with us today. And so lots of readers, there are online sources, Professor Crenshaw is among the best. And then yeah, go back and read some of those other things that we have taken for granted.

I mean, the letter from the Birmingham Jail, after you read critical race theory, then Dr. King, who's often weaponized in the CRT debates, he might become less familiar for those who would not associate him with critical race theory at all.

TRINA JONES: There's also Thurgood Marshall. One of the articles that he wrote, that I assigned to all of my students, was reflecting on the Bicentennial. And whenever I read this piece-- it was published by the Harvard Law Review, it's very short, seven pages-- where he talks about creating this more, perfect union, in how US law, including the Constitution, was flawed from the very beginning. And how it took a Civil War and many amendments to make the Constitution even workable, in terms of being inclusive of all people.

So that short essay for lawyers is, I think, a primer on critical race theory, even though we would not categorize Thurgood Marshall, Justice Marshall, as a crit. There are also online resources. So you mentioned the AAPF Kimberlé Crenshaw's organization, with their Ted Talks. Kim Crenshaw has a wonderful Ted Talk on intersectionality. And so there are resources that one can access, online, for a younger generation.

Professors Lovelace and James, this has been a wonderful discussion. What would you like people to take away from this conversation?

TIMOTHY LOVELACE: I think first, just going back to our initial remarks, is that CRT is a theory. It has a methodology, and that there are tenants that you see in CRT. And so just understanding those core tenets that many people would hold that are the staples of CRT. I say the second thing is to think about ourselves as historical actors. That the attack on CRT is, there's a genealogy of attacking even progressive ideas of race in education.

And that today's participants and the anti-CRT fervor are historical actors who understand that their attack is a valuable political strategy. It's a way to render whites as victims. It's a way to retool old tools, to advance particular positions, and that white supremacists are participating in social movements, too.

This is a tactical innovation in the fight against a social movement as we think about making Black Lives Matter. I think the last thing is, the point that I would really just emphasize, and I emphasize this earlier, but I want to say it again, that everything critical and everyone critical of race and racism, is not critical race theorist. That there might be diversity in education, as they can't be a good thing, but diversity education is not necessarily critical race theory. That there might be an anti-racist education, but that in and of itself might not be critical race theory. That, if we're intellectually honest, critical race theory offers us so much more to advance the project of racial justice than what many people give a credit for, today.

OSAMUDIA JAMES: That was perfectly said, and I think what the only thing I would add, is that this interrogation of race is central to our work as law students, as law professors, as lawyers. And that we're here to advance justice in wherever area that you're in. And I think that's a commitment for lawyers. And

so no, people don't have to become critical race theorist, they don't have to write about it. They don't have to have informed everything that they do as a academic theory. But the inquiry about how we understand race and how it shapes the law, and how that in turn shapes us in our relationships to other people, that is central to the work of attorneys. We are, after all, here to serve other people.

And so I would encourage people to one, not get manipulated the way Professor Lovelace has suggested, to really think about, can I understand this way of understanding race? Can I engage it? What is it trying to teach me? And even if I don't walk away thinking I am a critical race theorist, what has it taught me about how I have to go out and structure my professional life, my personal life, my social life? And how is that central to who I am as a lawyer?

TRINA JONES: Thank you both. So what I hear from all of that, is to our listeners, don't be afraid of critical race theory. This is a tool that will actually help us to push back against injustice and produce a space where we can all live our full selves freely.

TIMOTHY LOVELACE: Absolutely.

TRINA JONES: Thank you so much for those insights. Again, this has been a great discussion. And I hope our listeners come away with a more informed understanding of critical race theory. Thank you for listening.