

Duke Law Podcast | What Is Critical Race Theory & Why Is It Under Attack?, Part 1

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.

[MUSIC PLAYING]

SPEAKER 1: Let me tell you right now. Critical race theory is bigoted, it is a lie, and it is every bit as racist as the Klansmen in white sheets.

SPEAKER 2: Critical race theory is racism, pure and simple. And it should be rejected by every American of every race.

SPEAKER 3: The point of critical race theory originally was to think and talk about how law contributed to the subordinate status of African-Americans, of Indigenous people, and of an entire group of people who were coming to our shores.

SPEAKER 4: It's very easy to conclude that-- well, as in it, the conclusions were made in the Plessy v Ferguson decision that Blacks have enough rights that the Constitution could provide. Now it's up to them to pick themselves up.

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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' 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 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.

Here in part one of the series, we provide an accurate definition of CRT, and look back at when and why CRT began. We will also explore the contemporary attacks on CRT and the battlegrounds where these attacks are happening. In part two, we'll show how CRT can be used as a tool 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 one.

I thought we'd start our discussion by first providing a clear and correct definition of critical race theory, and how it originated. So CRT has been described as a Marxist doctrine, an ideology that threatens to overturn the advances of human civilization over the last 500 years, and a secular religion that teaches people to hate each other.

Professor James, let me start with you. Is this CRT?

OSAMUDIA JAMES: That is quite a description for an academic theory. Would it be the case that our theories had that much power, this job would be even more amazing than it already is.

At its most simple, CRT is a methodological inquiry into the nature of race, and its relationship to law and society. It's an academic lens, it's a legal lens, and it is used to help us think about the architecture and

the functioning of race. It's primarily taught in law schools, although I do think some of the commitments of CRT we see in other attempts to help people understand race and racism in American life.

TRINA JONES: And Professor Lovelace, would you agree with that conception of CRT?

TIMOTHY LOVELACE: I would completely agree. It's theory, and there are a couple of things that flow through critical race theory. In the scholarship, a couple of points just emerged that racism is ordinary, and not mere deviation from an otherwise well-functioning system, that racism is deeply structural. I think a lot of the discussion now has been around individual biases. But CRT would put forth that racism is deeply structural, talk about the social construction of race. We talk about the importance of an intersectional analysis. All of the people of color are not men. All the women are not white. That there are intersectional forms of oppression along race, gender, sex, sexual identity, class lines. And then interest convergence, and we'll talk more probably about interest convergence at some point in time. But thinking about how racial progress occurs, and whose interests have to be pacified, or at least fulfilled in some ways to advance the project of racial equality.

TRINA JONES: In addition to those core tenets, we have a belief in praxis that is taking theory and putting it into action. In addition to that, Professor James, there's a unique methodology that critics often employ, and that is storytelling and narrative. Would you speak to that?

OSAMUDIA JAMES: Yeah, I think the idea here is that we teach law students, and maybe believe ourselves as lawyers, that law is objective. And it's neutral, that there are no values that are hidden in it. But in reality, law is subjective. It's created by individual actors. People come to the law with different experiences. And critical race theory tries to acknowledge the value of those experiences, particularly from people who are not typically centered when we're thinking about making the law or even thinking about how the law is going to impact people.

So if I might, I have a small anecdote. I had a former student who was formerly incarcerated. He was a felon for life. He was in Florida where it was very difficult to expunge that. And he wanted to write about prison abolition, but also wanted to ground it in his own story of having been incarcerated for so long. And came to me and said, Professor James, I have this knowledge. I have these stories that I want to tell that are relevant to the bigger abstract questions I'm trying to explore. But I feel like I have to be objective, and I can't put myself in the text. And I said to him, oh, well, you need to just pick up some CRT books, because that knowledge that you bring is so valuable as part of the CRT tradition.

It's not unusual for critical race theorists to begin with a story, so that we can, as the reader, immediately understand what is at stake, and how people come to it. It creates a link between the reader and the author. And it helps us illustrate more forcefully what it is that CRT is trying to illuminate for us. And so I don't think every person who's ever written under the umbrella of CRT begins with narrative. But it is not dismissed as some subjective perspective that does not have any utility when we're thinking about the architecture of law, or the architecture of race.

TRINA JONES: And the claim, I assume, is not that these voices, because they are to some extent anecdotes, are universal. But they are enlightening.

OSAMUDIA JAMES: We don't draw expertise only from whoever made up the law, or even who is applying the law. But we draw expertise from people who are impacted by the law. And that commitment to narrative and storytelling broadens our lens for understanding who is an expert, and who is qualified to talk to us about how the law operates, and maybe how it might operate better.

TRINA JONES: So when did CRT originate?

TIMOTHY LOVELACE: So it originated in the late 1970's, and you see it really grow in the 1980's. Part of this was in response to the critical legal studies movement that was being criticized at the time for not being fully attentive to issues of race and racism. Derrick Bell, Kimberle Crenshaw, Richard Delgado, and others were really pushing this type of analysis and challenging critical legal studies to be more inclusive. We also see students being involved in this process. That students at places, like Harvard Law School, they were demanding more courses on race and racism. And so these students were challenging their administrators. This is a story that I tell students a lot of times, that students help to create the context for changing legal curriculum. And so we began to see more expansive courses.

Derrick Bell most famously offered a course on race, racism in the law. And he authored a casebook on that. And so those are some of the foundations of CRT.

TRINA JONES: Professor James, could you speak more to those limitations, perceived limitations?

OSAMUDIA JAMES: Yeah, an idea that moving towards colorblindness, or formally removing things like segregation in schools or in public facilities was supposed to get us to equality. Everyone was going to be treated equally, and we were going to move forward into this bright new racially egalitarian future. And that didn't happen. And so CRT is really about a group of scholars coming together to try to--

TRINA JONES: Why didn't that happen, if I may ask?

OSAMUDIA JAMES: Well, I think because people are differently situated. And that is as a function of race, but also gender, class. And the idea that Professor Lovelace mentioned that race is deeply structural. So it's built into how our institutions operate. It can be built into laws, even though race is not in the language of the law. You see that it impacts different communities and different people differently. And so the idea that-- and this is a fundamental tenet of CRT, the idea that colorblindness is going to give you equality. The CRT rejects that idea, and also rejects the idea that color consciousness necessarily produces unfair racial advantages.

And so scholars came together to try to break that down in various areas. Can we look at this in family matters? Can we look at it in tort law? Can we look at it in the failures of civil rights law itself? How far can the law go in undoing some of these imbalances?

The other thing I wanted to add, though, is that the commitments of CRT, and what CRT is trying to get at is not necessarily new. So what we're seeing is a visibility facility that's prompting attacks. But we've seen this sort of analysis in-- I look at k-12 education and progressive education at the start of the last century-- at the turn of the last century, in multiculturalism, and even the anti-racism work that everyone's talking about now, that often gets lumped in with CRT.

And in the work of Black teachers and Black parents who have always had to teach their children and teach people in their community both the reality of race in the United States, but also teach them how to navigate that, and still feel like they have control over their outcomes. And so CRT for me is really a formal academic inquiry into race. But what it's committed to, and what it's committed to breaking down is not new. And what is new I think is how visible CRT is, how visibly it's attacking things like racial hierarchy. And that's creating a lot of discomfort.

TIMOTHY LOVELACE: One way to understand the question that you asked is to think about the life of Derrick Bell. Derrick Bell had litigated school desegregation cases all around the country for the NAACP. And he, himself, saw the limits of anti-discrimination law.

For many people, Brown was the case of all time. It was the Civil Rights victory of all time. And it was supposed to usher us into a new and very modern society that was not racist. But as he began to

desegregate public schools all around America, he saw that African-American schoolchildren were still being left behind.

And so his early scholarship was deeply critical of a project that he had actually helped to create and to develop. And he saw that anti-discrimination law, as it was being conceived of, and concepts of formal equality had real limits. And so when you read the early Derrick Bell pieces, you have to understand his position in that debate. And that helps to lay the origins for critical race theory.

TRINA JONES: When did the two of you discover critical race theory? I remember reading articles by Charles Lawrence, and Kimberle Crenshaw, and Angela Harris, while I was in law school in the late 1980s and early 1990s. And I remember the impact of reading those works on me as a law student. It made the law seem relevant to my experience in a way that it had not before I discovered critical race theory.

TIMOTHY LOVELACE: So I encountered Kimberly Crenshaw first. I was taking a class in undergrad on gender politics. I was a politics major. And in the class, all of the women that were being discussed in the class were white. And I just began to ask the question, where were Black women in the syllabus? And so a friend of mine recommended Kimberle Crenshaw to me, and so that was my introduction to CRT. When I went to law school, the 50th anniversary of Brown was my first year in law school. And there were a lot of people who were obviously writing about Brown. One of the most compelling speakers at UVA, where I went to law school, was a man named Kevin Brown. Kevin Brown came to a symposium sponsored by the Virginia Law Review. And he talked about the limitations of Brown. And he talked about how the opinion in Brown one only talked about how segregation damaged Black school children. He didn't talk about how segregation damaged white school children.

I was captivated by Professor Brown, went up to him, shook his hand. Who would know that maybe a decade later, I would be his colleague at Indiana. And I was inspired by him that day, I continue to be inspired by him. He was one of the early writers in critical race theory.

TRINA JONES: Professor James, when did you discover CRT?

OSAMUDIA JAMES: So fun fact, Mari Matsuda, who is one of the founders of CRT, was my first year torts professor. And Charles Lawrence, another founder or early scholar, was my teacher for a race in American education seminar. And in that seminar, I read his article *The Id, The Ego, and Equal Protection*, which is a foundational piece in the area.

And going back to this question of how come the formal laws we have in the book are not getting us anywhere, he wrote about how unconscious racism impacts legal actors and impacts communities. And sometimes, it's an awful intentional thing. I don't like this group based on their race, and I act one way. But sometimes, it's that you discount the cost of a policy for community, because you don't regard them as highly based on their race. And that has impacts.

And he wanted to talk about how the law might respond to that. and coming up with the framework to respond to critiques that suggest, well, then everything would be subject to higher scrutiny. And no policy will ever pass. And his idea was that we could think about the meaning and the symbolism of certain areas. If we see a law with disparate impacts in education based on the history of race in education, our antennas should go up, that we should look at that law more closely.

At the time, I didn't actually know it was part of CRT. I did not understand that they were these huge pillars in the community. But it started to open up my mind to thinking about race, to being more nuanced about how race operates, to seeing behind what is on the paper that looks formerly equal.

And that shaped my interests as a law student. It shaped my interest even in practice. And then when I came back into the academy, that framework was there. So I would say CRT really formed my perspective in my academic and intellectual commitments now, as a law professor.

TRINA JONES: It's interesting that you mention Professor Lawrence's seminal work, *The Id, The Ego and Unconscious Racism*. Because he was talking about implicit bias, before implicit bias became a popular--

OSAMUDIA JAMES: Was a thing.

TRINA JONES: --before it was a thing, right?

OSAMUDIA JAMES: Yeah.

TRINA JONES: And he was doing that work in the 1980s in response to *Washington versus Davis*, I believe, in the Supreme Court's rejection of an impact or an effects test as a basis for equal protection analysis. So early critical scholarship, you mentioned that they were pillars of CRT, as well. I believe that both of them were a present in the Harvard alternative course. so there are multiple origin stories about how CRT began.

But certainly one story is with the Harvard course, where Derrick Bell was no longer teaching race and racism in American law. And the students were asking for that course to be taught, and the law school wasn't responding appropriately. And so the students organized a series of speakers to come in. And this underscores what you were saying about the power of young people to affect the curriculum in US law school.

So they brought in speakers, and Chuck Lawrence was one of those speakers. And I think Mari Matsuda was a graduate student at the time who organized this alternative course. So you were fortunate to be taught by these pillars of CRT.

So we've established that critical race theory has been around for decades. Why is CRT, if it's been around for such a long period of time, part of public discourse? Why is it under attack? And are these attacks new?

TIMOTHY LOVELACE: So these attacks are not new, in the sense that critical race theorists have always been under fire as long as they've been in law schools. That critical race theory was often a marginalized topic in the legal curricula across the country. That CRT often wasn't offered at in many places. There weren't scholars of color in particular who would offer CRT.

But outside of the legal academy, we've seen this attack emerge--

TRINA JONES: Before you go outside of the legal academy, there were attacks early on inside the academy. Particularly with regard to the methodological approach of some critics, the use of narrative and storytelling. Can you speak to those attacks within the academy?

TIMOTHY LOVELACE: Absolutely. One of the challenges is thinking about narrative, that the use of legal storytelling is not conventional when you read most law review articles. That there's a formula that many scholars use to produce law review articles. And CRT was challenging and innovating, from my perspective, legal analysis.

And there are many ways-- so I have training in history. Historians write very differently than lawyers. There are many different ways to write and execute an argument. And CRT was willing to borrow from other disciplines and other methodologies to insert more voices.

And so this innovative approach-- we now talk about being interdisciplinary in a way in which gets celebrated. Now in the legal academy, lots of people are cross-trained. But CRT was doing this decades ago, and they were willing to borrow from multiple methods. But that was not welcome initially.

TRINA JONES: I think that there were some attacks on the use of narrative by centering voices that weren't deemed to be legitimate. There was some suspicion about the insights that were being garnered from those voices. And CRT was also attacked as being anti-empirical, relying too much on anecdotes. And one of the responses that critics made, I believe and correct me if I'm wrong, is that CRT is not anti-empirical. You can supplement the narratives with empirical research. And critics actually welcomed that. And what has been shown over the last two decades is that the empirical research matches up with the anecdotes. And the stories that have resulted from people's experience.

OSAMUDIA JAMES: Yeah, and I would add that I think to the extent that critical race theorists were trying to think-- or trying to interrogate this idea of legal objectivity, and say, no, much of this is subjective. It comes from subjective places. The critique was that it was going to undermine these objective commitments we had, things like merit.

So CRT undermines this idea that our social arrangements are necessarily the product of merit and hard work, and wants to push back on that. This is not about merit-- or what we deem merit is often the product of economic and racial privileges that people have had, which give them opportunities, gives them training, gives them access. And they ascend to these positions. And we say, look at this person there are so meritorious. When in fact, let's look at this person I'm sure they worked hard, but also they're here as the result of racial benefits and shelters that they've been able to accrue.

The idea of merit dominates our discourse around affirmative action particularly to elite institutions of higher education. And so there's an excessive reliance on test scores and/or SATs, if we're thinking about college, or even also if we're thinking about law school, to determine who deserves a seat in an entering class.

And what we know is that standardized testing correlates much better with socioeconomic status, or parents SES, than it does with actual ability or even potential.

We know that men tend to score higher than women on SATs, but women do better in college relative to men. And so there are ways in which the standardized testing reliance is really reflecting things, like having had access to a prep course, having had parents who could pay for that, having been able to live in a wealthier area which gave you a better education, more opportunities. Even the idea of holding yourself out for assessment in these ways, that's a cultural commitment. And our admission procedures are rewarding that.

And so we might say, oh, everyone is at this elite school because they are meritorious. And it's not to say that people don't work hard, but it's also to say that our markers of merit are often linked to privileges that have little to do with potential or ability.

And so CRT tries to undermine that and suggest that when we use the word merit, one, not only are we rewarding people who have had privilege, but we are-- to the extent that those privileges are raised, we use a word like merit to make it seem neutral. And what we're doing is hiding racial hierarchy and racialized privileges with a word, like merit, and then using that to defend the disparities that we see. So when we see that students of color are underrepresented, we say, well, they didn't work as hard, or their scores weren't as high. And it avoids us having to say, what about these structures? What about these admissions policies Are making it so that students of color are being denied access here, even though we know they have the talent, the ambition, the commitment, the potential?

TRINA JONES: But we're at a different moment now. In 2020, 2021, 2022, the attacks are coming from outside of the academy. What is driving, in your opinion, these attacks?

TIMOTHY LOVELACE: Part of the response and the attacks on CRT emerged in response to the power of the Black Lives Matter movement. That Black Lives Matter is forcing America, and the protests were forcing America to think more critically about race.

Now one of the things I really want to put forth is that everyone critical of race or racism is not critical race theorist. I think that's a point just really worth thinking about. Lots of people are critical about race or think about race in critical ways.

Someone who pushes forth a multicultural education, and wants to think about-- or diversity, the diversity dialogue. Those are people who are trying to be critical and be more inclusive in racial terms, in let's say, something like education. But critical race theorists would actually be critical of the diversity dialogue.

They would think about the ways in which the needs, and wants, and the desires of some whites are being centered in the conversations around diversity, and not people of color.

And so with the protests, they were pushing Americans to read more than about race and racism than perhaps many Americans had ever read about race and racism. People's vocabularies were becoming more sophisticated around race and racism. And then we saw reading lists, for example, emerge.

And we know that books like *White Fragility*, the 1619 project, the books by Professor Kendi, they were catching like wildfire. And so one of the responses to these books and the popularity of these books was to have a fight about the production of knowledge itself. And the production of knowledge is deeply political.

And so with the Trump administration, one example here, was to have a 1776 project, in response to the 1619 project. And Trump began to attack diversity education. So even far broader than critical race theory, but diversity education in federal trainings. CRT was unknown to many Americans, but it became a catchy phrase for conservatives to attack things like the 1619 project and the other anti-racist books that were emerging.

TRINA JONES: So it sounds as if you're saying that the attacks, the recent attacks on critical race theory, arose from a certain moment in the aftermath of the death of George Floyd, Breonna Taylor, Ahmaud Arbery. And given the disparate effects of the COVID 19 pandemic on people of color, people were beginning to think about right racism in a different way, and beginning to realize the structural dimensions of racism.

And I think I hear you saying that these multi-racial protests, and the reading that people were doing, and the education that was happening around structural racism was perceived as a threat. And so you get push-back from certain sectors of society to that activism.

Professor James, critical race theory, right? So just the name has certain words in it that might provoke a particular response. Do you think that the name, the words that are used in the names, made this an attractive theory or target for certain sectors of society?

OSAMUDIA JAMES: Absolutely. I think about the attacks on CRT at various levels of complexity at its least complicated. This was a political strategy to galvanize white voters through a politics of racial resentment.

And Chris Rufo, a political strategist, was very open about this. This is not a secret. He's given interviews talking about how I needed to give this a framing, and the word critical seems threatening. And you combine it with race, and then theory seems excessively academic. And it feels like something that's been infiltrating. It's educating our kids without us knowing.

And really used it, got on a very popular news show, spun a story about CRT that was not true, linked it to anti-racism. So we see the two being attacked in parallel right now. And here we are. A little more complicated.

TRINA JONES: Indeed, I think he wrote on Twitter, well, we have successfully frozen their brand, critical race theory, into the public conversation, and are steadily driving up negative perceptions. And then he went on to note, quote, "we will eventually turn it toxic, as we put all of the various cultural insanities under that brand category." And he said, the goal is to have the public read something crazy in the newspaper, and immediately think critical race theory.

OSAMUDIA JAMES: Absolutely.

TRINA JONES: So that's one dimension of the attacks, right?

OSAMUDIA JAMES: Absolutely.

TRINA JONES: And you're going to talk about another dimension.

OSAMUDIA JAMES: Yeah. Well, I mean, just following up on that point that you just made, it then becomes a portal to attacking-- or to entering cultural wars, and taking down other institutions. So you're concerned about CRT in your schools. And you add to that debates about the mask mandate in schools. And we're seeing changes at school levels. We're seeing the Don't Say Gay bills, or the attacks on transgender children. And it all it's lumped into the someone is taking over your school. They're infiltrating it with these theories. And it becomes a very useful vehicle to galvanize voters in a number of political arenas.

For me, that's the least complicated story. It's a true story, but I think we could also think about it at two other levels of complexity. One, just the increased visibility, as Professor Lovelace was saying. And the aftermath of George Floyd's murder, the discussion about anti-racism education, the widespread visibility of this education. Not just in k-12 schools, but at state and local institutions, at the federal government level.

And then in private individual discourse. How To Be An Anti-Racist is a New York Times bestseller. White Fragility is a New York Times bestseller. So it permeates the discourse, and people are threatened, not just by maybe a reordering of racial hierarchies, but by the fact that it is becoming so commonplace for people to be focused on this, because that reorders power. Even if you're not so much concerned about race, you're concerned about who has power.

So that's a little more complicated. The most complicated version, we could do a whole other podcast on this, is that CRT is a direct and frontal attack on racial hierarchy and on white supremacy. And so to the extent that it forces-- it doesn't just talk about, oh, we'll all be together. Multiculturalism is nice, diversity is excellent.

Instead, it says, we have a racial hierarchy that we need to dismantle. And we are going to spend time thinking about how that hierarchy manifests in various aspects of American life. And once you're aware of it, you have an obligation to do something about it. That message is what's most threatening. And so right now, it's a dust up about CRT, but that commitment of CRT will always make it vulnerable to attack.

TRINA JONES: Is CRT being taught in k-12 education as those complex objectives?

OSAMUDIA JAMES: I don't think CRT is being taught in k-12 education. I will say, though, that to the extent that CRT is trying to censor, interrogate, dismantle, racial hierarchy, anti-racism education, which is happening, has the same commitment.

And so you see-- it was convenient to link the two together. And I think anti-racism education is a good thing, right? But to the extent that we are trying to talk to children more honestly and fully about race, and how it operates, and how it might be operating, even if you don't see, no Asians allowed on the door, that it still might be operating. I think that's really threatening. CRT becomes a convenient way to get at that issue.

TRINA JONES: Is it anti-racism education? Or is it American history, a robust telling of American history? And I'm going to turn to you, Professor Lovelace, because you are a historian.

TIMOTHY LOVELACE: I wish critical race theory was being taught in k-12 schools. Brown v Board of Education is often not even taught in k-12 schools. And so certainly Derek Bell's criticisms of Brown v Board of Education not being taught in most k-12 schools. When you look at the bills that have proliferated in states across the country, not simply the south, but across the country, we should think about critical race theory there is that racism is not simply a southern phenomenon. It's a national, and even a global phenomenon.

These bills often don't even use the term critical race theory in the attacks on allegedly critical race theory. These anti-CRT bills often attack the teaching of just American history, about the teaching of race and racism, about even diversity education. That the goal here of many of these bills is actually to strip teachers of the tools and students of the tools of learning about race and racism. And if you don't have a vocabulary around race and racism, then you can't dismantle racial hierarchy. And so that's part of the move.

I think also to think about this attack in historical perspective is critical. That the banning of books that we see now under the banner of the anti-CRT movement is nothing new. That evolution, you can think about the debates around evolution, that teaching evolution was deemed to be communist. Going back to your point, Professor Jones, initially about the red baiting of teaching evolution, that it was godless.

That there was great censorship in schools that schools are profound sites, critical sites in the culture wars. That if you give someone an education and a vocabulary to talk about a particular problem, then they might fight in different ways.

After Brown v Board of Education, there was an incredible backlash. Again, thinking about schools as critical sites in the culture wars, state legislatures created state sovereignty commissions to evade Brown, and then to investigate potential communist subversion into schools. There are legal cases here. Shelton v Tucker is one of those cases. Gibson v Florida legislative investigation committee is another instance that schools were often thought to be sites where people would learn more about race and racism, and would come together, and might fight against racism.

The last instance here is thinking about Vietnam. College campuses were critical sites for the fight against the free speech movement. College campuses were places where hippies were produced. And so there was an attack on progressive education on college campuses by conservative forces. Because they did not want these students to have a more sophisticated vocabulary around free speech, and then anti-war itself.

TRINA JONES: Yeah, and that goes back to this idea that critical race theory has three key words in it that will provoke a certain response. Particularly, if you connect it to, Professor James, what you said about the larger project of CRT being to break down this idea of white supremacy and racial hierarchy.