

# Community Legal Aid

A non-profit law firm serving the legal needs of low-income individuals and families in central northeast Ohio



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## CRT, from a law prof's POV

By Brant Lee, guest writer and Professor of Law and Assistant Dean for Diversity and Social Justice Initiatives at the University of Akron School of Law

Since January 2021, 37 states have proposed, passed, or signed into law bills restricting how teachers can teach racism and sexism. Many of these have been in response to a wave of public discourse on Critical Race Theory (CRT).

To understand the implications of these proposed statutes, we have to first understand the history behind CRT, what it is (and isn't), and how it has become the divisive issue it is today.

### Historical Development

In the late 1970's some legal scholars were dissatisfied with the state of American law with regard to race. Anti-discrimination laws adopted in the civil rights era had been in place for over a decade. The law said that in most cases, what counts as illegal discrimination is intentional, conscious racism. Without a finding of discrimination, there is no injury to fix. And the Supreme Court ruled that the effects of historical and societal racism could not be addressed through programs like affirmative action.

These scholars started to argue in various ways that these laws were inadequate. In 1989 some of them gathered for an academic workshop called "New Developments in Critical Race Theory." This is where the name "Critical Race Theory" ("CRT") was invented. As a technical matter, then, CRT is something that law professors argue and write in academic journals about. It is directly taught only in some law schools, where a seminar might be offered to upper division students as an elective.

## Ideas and Concepts

But what these professors wrote about became very influential. Essentially, they were describing American law and history from the perspective of people of color. Although no two law professors agree on everything, there are some common ideas associated with CRT. One is that race-neutral policies and unconscious bias can produce or maintain racially unfair outcomes. For example, policing street corners in mostly-Black neighborhoods rather than house parties in mostly-White suburbs puts more Black people in prison than White people, even though drug usage is about the same. Thus Black people face worse consequences for the same behavior, even absent any racist intent.

Another common idea is that race is not an immutable, biological set of characteristics, but is “socially constructed.” For example, depending on whether you define being Black by the “one-drop” rule or by the 1/16th rule, for much of the 20th century your race could change as you crossed state borders. Perhaps a third CRT concept is that race has played a significant and central role in American history that has often gone unrecognized.

Beyond any particular concept, CRT scholars generally share a perspective, that racial unfairness remains widespread in American law and life, and that there should be changes in law and policy to address it. These broad ideas gained a following in colleges and universities beyond law schools, and some of them have become more widely accepted.

## What It's Not

In the last two years, there has been a lot of talk in the news and on social media making exaggerated claims about CRT. For instance, that it is based on Marxism; that it teaches that all White people are inherently racist; that it thinks meritocracy and objectivity are merely tools of White supremacy. I have been reading CRT for 30 years and it does not make any of these claims. Although you can find individuals who say extreme things in the name of CRT, you can also find people who say free markets should allow selling children. That's not a reason to dismiss free markets.

## The Current Situation In Schools

There have been rules and regulations proposed and adopted in several states to prohibit CRT. As scholarly legal essays are not being taught in K-12 schools, what is actually being prohibited is the teaching of certain concepts, defined in exaggerated fashion. Because no one is teaching explicitly that all White people are inherently racist, one might think that these proposals will not harm anyone.

The problem is that many of those protesting CRT say that these concepts are being taught implicitly. They are claiming that books containing drawings of a hostile White crowd confronting

a Black child walking to school will infer to their children that all White people are racist. They are arguing that a book about the March on Washington will imply to White children that they should be ashamed of their race. School principals and superintendents, facing the complaints of angry parents, may choose to avoid confrontation, and books presenting stories that help Black children feel recognized will be dropped.

One prohibited concept deserves particular attention. The legislation proposed in Ohio prohibits teaching “[t]he United States is fundamentally racist or sexist.” There is a genuine debate about our fundamental identity as a country. The traditional story focuses on universal principles of liberty and equality, adopted at the Founding and slowly made “more perfect” over time. But one can understand how a Black person, observing a Constitution that kept slavery in place for over 70 years, and a government that allowed Jim Crow segregation to remain in place for almost a hundred years after that, might not be very impressed with the Founding. Perhaps in that light, racism feels more fundamental to America than those vaunted universal principles. Our identity as a country is an issue of perspectives and opinions. That debate will not be settled by statute. Ultimately, these ideas are too powerful to be bottled up, regardless of what label you put on them. But if these rules and regulations are adopted, some schools and teachers will be wounded in the process.

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