An Update on Critical Race Theory and its Demonization

"A spectre is haunting America – the spectre of Critical Race Theory" (Apologies to Karl Marx)

A few years ago when I updated my Beginner's Guide to Jurisprudence, I mentioned Critical Race Theory under the heading of "Children of CLS": "CLS has generated particularized schools of legal studies, such as Critical Race Theory, Critical Race Feminism, and Latino and Latina Critical Schools. These schools have built "upon the themes and critical understandings of law exposed by the Critical Legal Studies Movement. It also built on the insights of feminism, dealing with power and the construction of social rules. As an example of these offshoots, consider Critical Race Theory (CRT), which began to separate itself from CLS, questioning CLS as being white, male, and elite.

I didn't—and never could have—predicted that Critical Race Theory would be demonized by the Right to the extent that states would pass laws banning it from being taught. (It's hard to keep up with the state bans, but some fourteen states have banned what they call Critical Race Theory.) The Right has made CRT into a monster, but the Right's creation totally mischaracterizes CRT.

For a proposed model bill, see The Heritage Foundation's. It proposes a model bill banning the teaching of CRT. The bill's preamble posits a post-racial America:

Protecting K–12 Students from Discrimination

This is a model bill meant for state lawmakers to use regarding K-12 schools:

Whereas, the First Amendment of the U.S. Constitution protects the right to speak without government interference, but not to compel others to adopt, affirm, adhere to, or profess specific beliefs;

Whereas, the Fourteenth Amendment of the U.S. Constitution provides every American with equal protection under the law;

Whereas, slavery, legal racial discrimination, and racism are so inconsistent with the founding principles of the United States that Americans fought a civil war to eliminate the first, waged long-standing political campaigns to eradicate the second, and have made the third unacceptable in the court of public opinion, all of which means that America and its institutions are not systemically racist and confutes the notion that these should be at the center of public elementary, secondary, and postsecondary institutions; and

Whereas, in the words of civil rights activist Robert Woodson, Americans should be allowed an "aspirational and inspirational take on America's history, debunking the misguided argument that the present-day problems of black Americans are caused by the injustices of past failures, such as slavery.

The proposed bill is as follows:

a. In accordance with these provisions, no public education employee shall compel a teacher or student to discuss public policy issues of the day without his or her consent.

b. No public education employee shall compel a teacher or student to adopt, affirm, adhere to, or profess ideas in violation of Title IV and Title VI of the Civil Rights Act of 1964, including but not limited to the following:

1. That individuals of any race, ethnicity, color, or national origin are inherently superior or inferior;

2. That individuals should be adversely or advantageously treated on the basis of their race, ethnicity, color, or national origin;

3. That individuals, by virtue of race, ethnicity, color, or national origin, bear collective guilt and are inherently responsible for actions committed in the past by other members of the same race, ethnicity, color, or national origin.

c. No distinction or classification of students shall be made on account of race, ethnicity, color or national origin.

d. No course of instruction or unit of study may direct or otherwise compel students to personally affirm, adopt, or adhere to any of the tenets identified in section (b) and its subsections.

e. No course of instruction, unit of study, professional development, or training program may direct or otherwise compel teachers to personally affirm, adopt, or adhere to any of the tenets identified in section (b) and its subsections.

f. No employee of a public elementary or secondary school operating in this state, when acting in the course of his or her official duties, shall organize, participate in, or carry out any act or communication that would violate section (b) and its subsections. This shall not be construed to prohibit an employee from discussing the ideas and history of the concepts described in section (b) and its subsections.

g. Nothing in this statute prohibits teachers or students from discussing public policy issues of the day, or ideas that individuals may find unwelcome, disagreeable, or offensive.

h. Public institutions found in violation of this section are not eligible for state funding under [state K-12 education formula].

i. In addition to any relief sought through the appropriate Office for Civil Rights at the U.S. Department of Education, an individual may, in the alternative, bring a private right of action against any institution engaged in such prohibited discrimination.

In a profile in Vanity Fair, Professor Crenshaw, a leader in the CRT movement, characterizes CRT:

"Crenshaw breaks it down. Critical race theory is based on the premise that race is socially constructed, yet it is *real* through social constructions." In other words, ask yourself, what is a "Black" neighborhood? Why do we call "the hood" the hood? Labels like these were strategically produced by American policy. Critical race theory says the idea of a Black person—who I am in this country—is a legal concept. "Our enslavability was a marker of our degradation," Crenshaw explains. "And our degradation was a marker of the fact that we could never be part of this country. Our Supreme Court said this"—in the *Dred Scott v. Sandford* ruling of 1857—"and it wasn't a close decision." [Vanity Fair 9/21]

Professor Crenshaw's article, *Twenty Years of Critical Race Theory: Looking Back to Move Forward,* 43 Conn. L. Rev 1253, 1260 (2011), describes CRT in dynamic rather than static terms:

"This movement dimension of CRT is probably the least engaged aspect of its original formation and perhaps the most at risk in efforts to define, brand, and market CRT. Specifically, the view of CRT as a stable project sometimes denies the extent to which CRT was and continues to be constituted through a series of dynamic engagements situated within specific institutions over the terms by which their racial logics would be engaged.

The bills banning CRT are dishonest. They create an imaginary demon and then outlaw it, all for political propaganda purposes.