NEPC Review: How to Regulate Critical Race Theory in Schools: A Primer and Model Legislation (Manhattan Institute, August 2021)

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Summary

The Manhattan Institute's *How to Regulate Critical Race Theory in Schools: A Primer and Model Legislation* manufactures a case against Critical Race Theory (CRT), building on a foundation of right-wing talking points. The report offers model legislation to counter the purported CRT-inspired indoctrination in schools. This review examines some of the ways that the report mischaracterizes CRT. The review also explains how and why the model legislation might, if adopted, lead to anti-discrimination lawsuits. For these reasons, the Manhattan report does not provide serious guidance to lawmakers interested in understanding or legislating about issues related to race in schools.

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I. Introduction

Leading up to the 2021 elections, Republican candidates nationwide took aim at the supposed racialized indoctrination of children occurring in public schools. For example, Virginia Governor-elect (takes office on January 22, 2022) Glenn Youngkin famously told a Fox News audience that "...there's no place for critical race theory in our school system," and that he would ban it "on day one" of his term.[1]

In this contentious political context, the Manhattan Institute published *How to Regulate Critical Race Theory in Schools: A Primer and Model Legislation* in August 2021.[2] Authored by James Copland, this report argues that schools across the United States are requiring students and teachers to "express identity-based opinions and worldviews" in Critical Race Theory (CRT)-influenced trainings and school activities.[3] It notes parental and legislator objection to these activities, explains how CRT provides their foundation, and proposes model legislation designed to respond to the supposed threat CRT poses to public education and parental rights. The model legislation purports to provide guidance for conservative lawmakers to enact sweeping legislation that will inoculate public schools from CRT.

Although the report provides false and misleading information, it will likely be used in the 2022 midterm elections by right-wing politicians to attack what they term the "woke" agenda in education.[4] The report's misrepresentation of both CRT and the facts of how American schools actually do address race, however, rule it out as a serious guide to lawmaking.

II. Report's Findings and Conclusions

The report's model legislation represents its findings and conclusions. In a series of guidelines the report lays out for what "bills responding to CRT"[5] *should* do (facilitate greater transparency, prohibit government-compelled speech, and clarify public school choices) and what such legislation should *not* do (stifle the marketplace of ideas, proscribe or discourage classroom discussion of race and racism, condition curriculum on individual student "discomfort" or "distress," strain school budgeting, or undermine educational pluralism in non-district schools).[6] As such, it applies to public elementary and secondary schools. But, it excludes private K-12 schools (even if they receive some direct or indirect state support) and public higher educational institutions.[7]

The model legislation has four sections:

Section 1 states the purposes of the legislation. Section 4 provides for severability if any of the provisions are declared invalid for any reason. Sections 2 and 3, summarized below, are the heart of the model legislation.

Section 2 addresses transparency in the use of training and teaching materials. It requires public schools, including public charter schools, to post on their websites for public view all their training, instructional, and curricular materials "on all matters of nondiscrimination, diversity, equity, inclusion, race, ethnicity, sex, or bias, or any combination of these concepts with other concepts."[8] The posting must identify the source of the materials (including the teacher if the teacher created them) and provide a description of and link to the materials. Section 2 also requires that schools post on their websites their procedures for the "documentation, review, or approval of the training, instructional, or curricular materials used for staff and faculty training or student instruction."[9] Section 2C exempts smaller schools from these requirements.[10]

Section 3 enumerates a set of "beliefs or concepts"[11] that are disallowed in schools: That the United States [or any state] is fundamentally or irredeemably racist or sexist; that an individual, by virtue of sex, race, ethnicity, religion, color, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; that an individual, by virtue of sex, race, ethnicity, religion, color, or national origin, should be blamed for actions committed in the past by other members of the same sex, race, ethnicity, religion, color, or national origin; or that an individual's moral character is necessarily determined, in whole or in part, by his or her sex, race, ethnicity, religion, color, or national origin.[12]

Section 3 then prohibits schools from the following with respect to any of the above beliefs or concepts: from directly or indirectly (by hiring contractors) compelling staff or students to affirm them; from using public funds to hire contractors that would engage staff or students in advocacy or would advocate for them (except if the school makes clear that it does not sponsor, approve, or endorse them and allows staff and students to opt out); and from requiring staff or students to participate in any training, seminar, etc. that promotes them. Finally, it prohibits teachers or administrators from offering students any course credit for political activism or lobbying, or for participating in any internship or similar activity that involves "social or public-policy advocacy." Public charter schools are exempted from some

of these prohibitions on the grounds that charter school enrollment is not mandatory.[13]

Finally, Section 3 specifies that it should not be construed as limiting speech protected by the First Amendment, voluntary attendance at any trainings, individual access to sources that advocate any of the central beliefs/concepts, or discussion/assignment of materials related to them.[14] It does, however, require the educational entity to make clear that it does not sponsor, approve, or endorse the concepts or materials involved.[15]

The model legislation delegates enforcement of its provisions to state attorneys general or district attorneys, who may sue a public school district for alleged violations.[16]

III. The Report's Rationale for Its Findings and Conclusions

The report claims to address widespread parental discontent with schools indoctrinating students to adhere to Critical Race Theory.[17] It cites a June 2021 *YouGov/Economist* study as indicating that of Americans who claimed knowledge of CRT, 56% opposed it and 38% supported it.[18] In support of this position, it also cites several news reports that detail controversial instances of parents and others protesting the use of CRT materials and practices in public schools.[19] In addition, *How to Regulate Critical Race Theory in Schools* notes that 25 states have introduced bills aimed at curtailing forms of what it calls "racial instruction and indoctrination."[20] Noting that that some of the proposed legislation overreached,[21] the report frames its model legislation as a way for legislators to address the basic principles it enumerates in a way that should pass constitutional muster.[22]

IV. Report's Use of Literature

The report justifies the need for its model legislation with a series of sensational anecdotal reports about students and teachers forced to participate in racially charged indoctrination activities, all published in the Manhattan Institute's *City Journal* by an author who has explicitly declared his effort to demonize CRT.[23] It misleadingly points to these anecdotes as evidence of widespread forced indoctrination of students and teachers.

Aside from that, the report cites but misrepresents important literature. While in the brief history and explanation of CRT, the report offers cites relevant works, it reduces the complex legal analyses in the literature to the equivalent of soundbites[24] that are then used to mischaracterize CRT and its proponents in ways likely to trigger negative reactions by conservative Whites. It associates CRT, for example, with words such as "Progressive" and "Marxist."[25] It rejects the fact that CRT is not taught in K-12 schools as inconsequential because, it argues, CRT principles have indirectly made their way into public schools via popular books about race and from teachers who learn about it in their university training.[26] Combined with the anecdotes that open the report, the report's presentation of the literature amounts to an argument that CRT is the foundation of a widespread effort by public schools to forcibly indoctrinate students and teaching staff to support an anti-conservative,

anti-civil rights, anti-White, and anti-American agenda.[27] This line of argument serves as the report's justification for its conclusion that "The fundamental question involves not what we call these ideas and programs, or their origins, but their appropriateness—and the appropriateness of the legislative responses being promulgated in response."[28]

To understand the history and context of Critical Race Theory, it is important to note how the legal understanding of racial discrimination changed from the 1950s-60s to the 1970s-80s. The predominant legal definition of race discrimination during the 1950s and 1960s was principally focused on proscribing actions that were motivated by "racial animus"—which was, after all, the basis for slavery, disenfranchisement, and segregation statutes. This definition allowed the government greater ability to institute policies and programs designed to ameliorate the present effects of the consequences of America's past of racial oppression. The legal view of race discrimination as racial animus underwent a subtle, but significant, shift in the 1970s and 1980s towards "color blindness" (i.e., transcending racial considerations by ignoring them) as the way to resolve racial issues. As a result, taking race into account to attenuate the present effects of past and current racial discrimination became increasingly problematic.

Just months before the 1989 gathering of legal scholars for the first workshop in what was to become Critical Race Theory, this shift toward color-blindness culminated in the Supreme Court's 5-4 *City of Richmond v. Croson* decision[29] striking down a government contracting set aside program for minority businesses in Richmond, Virginia. At the time, although over half of Richmond residents were Black, a five-year study revealed that only 0.67% of the city's prime construction contracts had been awarded to minority businesses.[30] This decision affirmed the understanding that taking race into account for the purposes of remedying the present effects of America's racial past was now to be considered a new form of racism.[31] To reach its decision the Supreme Court had to discount a long list of significant socioeconomic factors—including family income, poverty rates, wealth, unemployment rates, home ownership, crime victimization rates, college graduation rates, and life expectancies—that revealed large racial disparities between Whites and people of color, especially Blacks.[32]

As "color-blind" thinking was applied to solutions to racial inequality, it substantially reduced the ability to distinguish between policies and programs directed towards dismantling the present effects of our past history of racial discrimination and racially discriminatory policies and practices that were part of the slavery and segregation eras that produced those racial disparities. In addition, as CRT proponent Gary Peller noted, racial-justice reform in countless institutions was halted before its work was done.[33] A myriad of social practices and policies that reinforced and perpetuated racial inequality were now defended using the language of race-neutrality, standards, and meritocracy. Further, dominant American cultural ideas that normalize the racial disparities in important socioeconomic conditions (such as the increased importance of using standardized tests to determine admissions to selective higher education institutions and employment decisions) were strengthened and legitimated.

Critical Race theorists rejected color-blindness for legal purposes (**not** in interpersonal relationships), because they argued that legal "color-blindness" in a racially unequal society freezes into place existing racial disparities. These scholars asserted that the only way to

combat institutional practices that create the disparities was to act consciously and intentionally in an effort to dismantle those practices. They further maintained that color-conscious intentionality under the law is necessary to dismantle beliefs that have normalized racial disparities. Significantly, and in contrast to how it the report presents it, the focus of this color consciousness is less individual belief th'n the institutional policies and practices and dominant cultural ideas that buttress a racially unequal society. *How to Regulate Critical Race Theory in Schools* fails to provide any of this history or context in its literature review. The result is that readers are led to believe the falsehood that CRT is focused on interpersonal relationships when in fact it is focused on the law, dominant cultural ideas about race, and institutional structures and practices.

The report's misleading characterization of Critical Race Theory in its literature review and its sloppy reasoning serves as the cornerstone of its attack on efforts by schools to teach accurately about the history of slavery, racism, how they have shaped American institutions and practices, and their ongoing impacts on American society, culture, politics, and economics.

V. Report's Methods

The report based the model legislation on guidelines it laid out.

VI. Review of the Validity of the Findings and Conclusions

There are a number of problems with the proposed model legislation.

As a general matter, public school transparency (the focus of Section 2) should be the norm, not the exception. Similarly, students should not be compelled to affirm particular political or social views as a condition of their schooling (the focus of Section 3).

However, singling out the nondiscrimination, diversity, equity, and inclusion materials falsely characterized as CRT materials raises equal protection concerns. The Ninth Circuit's ruling in *Arce v Douglas,*[34] the Arizona law that led directly to the elimination of the Mexican American Studies (MAS) program used in Tucson, was unconstitutional, speaks to this problem. The court reasoned that "the statute and/or its subsequent enforcement . . . would still be unconstitutional if its enactment or the manner in which it was enforced were motivated by a discriminatory purpose."[35] Just as the Arizona statute was enacted almost entirely with the MAS program in mind,[36] here the model legislation is designed almost entirely with teaching about slavery, segregation, disenfranchisement, racism, and their ongoing impacts in mind.

Materials that are required to be posted on a school's website for parental review are those that are likely to offend White parents, but not parents of color. According to Section 2 of the model legislation, material for a history class about the contribution of Black troops to the

Civil War (for example, Lincoln's statement that he could not have saved the Union without them[37]) would require posting.[38] However, Mark Twain's *Adventures of Huckleberry Finn*, which has long encountered objections from Black students and their parents but does not address nondiscrimination, diversity, equity, inclusion, race, ethnicity, sex, or bias, would not.[39]

Similarly, Section 3.A.2's prohibition on compelled speech specifically related to racism, sexism, and oppression is clearly directed at teaching about the history and current impact of slavery, segregation, disenfranchisement, and racism. This may have a chilling effect on teachers' addressing race and racism, for fear that if they teach about the existence of any institutional racial biases, they may be accused of running afoul of the law. Section 2 requires that teachers who create race-related curriculum materials be named on the school's website for at least two years.[40]

Additionally, the enforcement mechanism provides for district attorneys to sue public school districts. Thus, those wanting to ban anti-subordination teachings in school will have the deep pockets of the government to litigate their concerns. In contrast, those who want to fight against attacks on such measures are required to fund their own litigation costs.

Moreover, to the extent that lack of transparency or compelled speech are a problem, they can already be addressed through existing laws and court decisions. Making additional requirements on school districts through a state law specifically designed to "respond" to concerns about CRT[41] when other state laws already address the issues in a more general context is an inefficient use of legislative efforts/local resources.

VII. Usefulness of the Report for Guidance of Policy and Practice

The report and its underlying model legislation are not useful to policymakers. If adopted, the proposed model legislation would likely produce contentious litigation. This prospect should give pause to anyone interested in crafting sound public policy. Unfortunately, this report is less about sound policy than it is about creating partisan talking points and unproductive controversy. It does not offer serious lawmakers a guide to effective legislation.

Notes and References

1 Williams, M. (2021, November 1). Youngkin: 'Day one, I'm going to ban' CRT [blogpost]. *CSNNews*. Retrieved November 17, 2021, from https://www.cnsnews.com/blog/megan-williams/youngkin-day-one-im-going-ban-crt

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3 Copland, J. (2021, August 26). *How to regulate Critical Race Theory in schools: A primer and model legislation* (p. 9). Manhattan Institute. Retrieved October 15, 2021, from https://www.manhattan-institute.org/copland-critical-race-theory-model-legislation

4 National Republican Senatorial Committee (2021, November 17). NRSC, RGA conduct post-election poll in VA [press release]. Retrieved November 17, 2021, from https://www.nrsc.org/press-releases/nrsc-rga-conduct-post-election-poll-in-va-2021-11-17/

5 Copland, J. (2021, August 26). *How to regulate Critical Race Theory in schools: A primer and model legislation* (p. 5). Manhattan Institute. Retrieved October 15, 2021, from https://www.manhattan-institute.org/copland-critical-race-theory-model-legislation

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7 Private schools are excluded even if such schools receive some direct or indirect state support. Post-secondary schools are excluded in order to not "stifle the marketplace of ideas" the report deems critical to higher education.

Copland, J. (2021, August 26). *How to Regulate Critical Race Theory in Schools: A primer and model legislation* (p. 5). Retrieved October 15, 2021, from https://www.manhattan-institute.org/copland-critical-race-theory-model-legislation

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10 The report implies that for smaller schools, the costs of the transparency requirements (straining school budgets) may outweigh their benefits. There is no definition of "smaller."

Copland, J. (2021, August 26). *How to regulate Critical Race Theory in schools: A primer and model legislation* (pp. 6, 12). Manhattan Institute. Retrieved October 15, 2021, from https://www.manhattan-institute.org/copland-critical-race-theory-model-legislation

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23 Rufo, C.F. [@realchrisrufo] (2021, March 15). *We have successfully frozen their brand—"critical race theory"—into the public conversation and are steadily driving up negative perceptions. We will eventually turn it toxic, as we put all of the various cultural insanities under that brand category*. [Tweet]. Twitter. Retrieved November 16, 2021, from https://twitter.com/realchrisrufo/status/1371540368714428416

24 For example, "White people are necessarily complicit in racism by way of their adherence to, and benefit from, dominant cultural norms that invest them with sociopolitical capital 'whiteness'" (p. 3)

Copland, J. (2021, August 26). *How to regulate Critical Race Theory in schools: A primer and model legislation* (pp. 3-4). Manhattan Institute. Retrieved October 15, 2021, from https://www.manhattan-institute.org/copland-critical-race-theory-model-legislation

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29 City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989).

30 City of Richmond v. J. A. Croson Co., 488 US 479-80.

31 The Court would go on to issue additional decisions that undercut the use of race to respond to the need to disestablish the continuing effects of America's history of racial discrimination. For example, in Shaw v. Reno, 509 US 630 (1993). the court struck down a redistricting plan that allowed North Carolina to elect the first black person to Congress since 1901. And in Parents Involved in Community Schools v. Seattle School District No. 1 551 US 701 (2007), the Court struck down the use of individual racial classifications in order to further the voluntary integration of public schools, thus, ruling unconstitutional the very type of school desegregation plans it had encouraged school systems to adopt in the 1960s and 1970s.

32 To see current racial disparities in many of the above indicators look at statistics from the Joint Economic Committee of the United States Congress, The Economic State of Black America in 2020 (2021), available at https://www.jec.senate.gov/public/_cache/files/ccf4dbe2-810a-44f8-b3e7-14f7e5143ba6/economic-state-of-black-america-2020.pdf

33 Peller, G. (2021, June 30). *I've been a Critical Race Theorist for 30 years. Our opponents are just proving our point for us. Politico*. Retrieved December 6, 2021, from https://www.politico.com/news/magazine/2021/06/30/critical-race-theory-lightning-rod-opinion-497046

34 Arce v. Douglas, 793 F. 3d 968 (9th Cir. 2015).

35 Arce v. Douglas, 793 F.3d 977.

36 Arce v. Douglas, 793 F.3d 973.

37 See: *The collected works of Abraham Lincoln*, Volume VII, p. 499-501 (*Letter to Charles D. Robinson*, August 17, 1864 (ed. Roy P. Basler 1953)

38 Ironically, such material would have to be posted on the websites of any of the 240 schools nationwide that are named for leaders of the Confederacy, when the school's name itself offends Black parents but does not fall into the category of materials covered by the proposed legislation.

Equal Justice Initiative (2020, September 16). *The truth about confederate-named schools*. Available at https://eji.org/news/the-truth-about-confederate-named-schools/ (half of them attended by student bodies that are majority Black or nonwhite).

39 Brown, K. (1992). *Do African-Americans need immersion schools?: The paradoxes created by legal conceptualization of race and public education*. 78 Iowa L. R. 813 (1993).

Also not required to be posted would other objectionable curricular materials that downplays the history of racial discrimination blacks endured and underplays the significance of blacks to the progress of the nation and world. See:

Goldstein, D. (2020, January 13). Two states. eight textbooks. Two American stories. *New York Times*, p. 1. Retrieved December 6, 2021, from https://www.nytimes.com/interactive/2020/01/12/us/texas-vs-california-

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