

Flaws in Today’s Educational Policy Discourse

William Garcia

University of Louisville

Critical Race Theory (“CRT”) is currently a hot topic in the public discourse, especially in the context of school curriculum.¹ An academic concept with historical roots dating back more than 40 years old,² the core idea of CRT is that U.S. social institutions (e.g., education, government, healthcare) contain racial injustice which leads to inequitable results from the operation of these institutions.³

Today, state legislatures and local communities have forwarded bills and policies to vilify CRT. For instance, the Florida legislature introduced the Individual Freedom Act in January 2022.⁴ The language of this bill mirrors many other bills across the country that seek to limit the teaching of CRT.⁵ An example of a common theme among these bills is that “a person should not be instructed that he or she must feel guilt, anguish, or other forms of psychological distress for actions, in which he or she played no part, committed in the past by other members of the same race or sex.”⁶ Does the teaching of the societal effects leading to racial injustice make the learner feel guilty, anguish, or other forms of psychological distress? Certainly, the police brutality that

¹ Theodore R. Johnson, Emelia Gold & Ashley Zhao, *How Anti-Critical Race Theory Bills Are Taking Aim at Teachers*, FIVETHIRTYEIGHT (May 9, 2022), <https://fivethirtyeight.com/features/how-anti-critical-race-theory-bills-are-taking-aim-at-teachers/>.

² Stephen Sawchuk, *What is Critical Race Theory, and Why Is It Under Attack?*, EDUC. WEEK (May 18, 2021), <https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05>.

³ Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS (Nov. 2021), <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/>.

⁴ Press Release, Staff, Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination (Apr. 22, 2022), <https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/>.

⁵ Kiara Alfonseca, *New Florida Bill Would Ban Feelings of ‘Discomfort’ in Teachings About Racism in US History*, ABC7 NEWS (Jan. 20, 2022), <https://abc7news.com/critical-race-theory-florida-bill-discomfort-ron-desantis-what-is-crt-in-schools/11491558/>.

⁶ FLA. STAT. ANN. § 1003.42 (West 2022).

led to the deaths of George Floyd and the bad search warrant leading to the police shooting and death of Breonna Taylor led many Americans to recognize racial injustice, and further caused some to process guilt and shame. Would the news be crossing the line portraying the newsworthy information? Stated another way, the vagueness of these anti-CRT policies has led to ongoing uncertainty from school personnel who may have unknowingly or unintentionally violated the statutory language. Further, the law may regulate protected expressions by implicating the overbreadth doctrine. This doctrine “prohibits the government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.”⁷

Let us apply just one of these constitutional doctrines, vagueness. The U.S. Supreme Court has held that civil statutes may be declared void for vagueness if obedience to the rule or standard is so vague and indefinite that it provides no guidance for one to avoid the applicability of the law.⁸ This doctrine was referenced in *Epperson v. Arkansas*,⁹ The issue at hand in *Epperson* revolved around a statute that prohibited the teaching of Darwin’s evolutionary theory.¹⁰ Although not the basis of their decision, the Court acknowledges that the infinite varieties of communication within the meaning of the word “teaching” make the statute vague.¹¹ Particularly, because the statute bans “teaching that the theory is true,” the mere acknowledgment that there is a theory would make the teacher open to liability.¹² Though each bill may vary in its specifics, these policies hoping to ban the discussion of CRT appear to lend themselves to vagueness and, therefore, are likely unconstitutional.

⁷ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 237 (2002).

⁸ *Boutilier v. INS*, 387 U.S. 118, 123 (1967).

⁹ *Epperson v. Arkansas*, 393 U.S. 97 (1968).

¹⁰ *Id.* at 98.

¹¹ *Id.* at 102-03.

¹² *Id.*

The overbreadth doctrine also likely applies to these statutes. The effects of an overly broad anti-CRT statute can be found in Missouri, where an English teacher was fired from her job after assigning a worksheet entitled “How Racially Motivated are You?”¹³ She was fired under the authority of Missouri’s version of the now popular anti-CRT laws.¹⁴ The assignment intended to supplement the class’s assigned reading of *Dear Martin*, a contemporary novel in which a teenager recounts observations about racial injustice and police brutality.¹⁵ In the inquiries following the outcry regarding the assignment, it became evident that the goal of the worksheet was simply to prepare students for conversations regarding the book, not to make students actually gauge their own racial motivations.¹⁶ It seems apparent that the vague language in these CRT bills, such as “anguish” and “physiological distress,” is based on the subjective nature of students’ feelings, with no set standard on what meets these requirements.¹⁷ Because, as seen here, the anti-CRT statute chills even language just meant to prepare the class for a discussion on a book, this situation clearly illustrates the dangers of allowing such overbroad laws.

Those in the legal and educational fields should take note of the active litigation challenging the anti-CRT laws, notably in Oklahoma and Florida. As mentioned earlier, the anti-CRT statute in Florida has problematic language. In response to Florida’s anti-CRT bill, there have been three lawsuits targeting the law in the U.S. District Court for the Northern District of

¹³ Adam Staten, *Teacher Loses Job After Assigning ‘How Racially Privileged Are You?’ Paper*, NEWSWEEK (Apr. 8, 2022), <https://www.newsweek.com/teacher-loses-job-after-assigning-how-racially-privileged-are-you-paper-1696136>.

¹⁴ MISS. CODE. ANN. § 37-13-2 (West 2022).

¹⁵ Claudette Riley, *Southwest Missouri High School Teacher Accused of Using Critical Race Theory Loses Job*, SPRINGFIELD NEWS-LEADER (Apr. 7, 2022), <https://www.news-leader.com/story/news/education/2022/04/07/greenfield-missouri-teacher-kim-morrison-accused-teaching-critical-race-theory-crt-loses-job/7264924001/>.

¹⁶ *Id.*

¹⁷ FLA. STAT. ANN. § 1003.42 (West 2022).

Florida¹⁸ One of these cases is *Honeyfund.com v. DeSantis*, in which the court held that the anti-CRT statute was impermissibly vague because it lacked explicit standards to limit enforcement of an “objectivity” standard that commanded the entire statute.¹⁹ Similarly, after the passing of Oklahoma’s House Bill 1775, the American Civil Liberties Union (“ACLU”) filed a lawsuit against the bill.²⁰ The ACLU argued that the law should be void due to vagueness.²¹ One consequence of this vagueness, according to the ACLU, is that educators at every level are confused about what they can or cannot teach.²²

As previously mentioned, all these bills and laws across the nation which seek to ban CRT from being taught or discussed in schools have remarkably similar language.²³ As such, we should anticipate legal challenges to these statutes arguing that they are unconstitutional due to vagueness and overbreadth.

¹⁸ Curt Anderson, *Judge Blocks Florida ‘Woke’ Law Pushed by Gov. DeSantis*, AP NEWS (Aug. 18, 2022), <https://apnews.com/article/education-lawsuits-florida-discrimination-16ffd7a0abd852edf611b6876f637ca6>.

¹⁹ *Honeyfund.com, Inc. v. DeSantis*, No. 4:22cv227-MW/MAF, 2022 WL 3486962, at *14 (N.D. Fla. Aug. 18, 2022).

²⁰ Katelyn Ogle, *Local Teacher Joins ACLU Lawsuit Against Anti-Critical Race Theory Law*, KFOR (Sep. 1, 2022), <https://kfor.com/news/local/local-teacher-joins-aclu-lawsuit-against-anti-critical-race-theory-law/>.

²¹ Amended Complaint at 66, *Black Emergency Response Team v. O’Connor*, No. 5:21-cv-1022-G (W.D. Okla. Nov. 9, 2021).

²² *Id.* at 67.

²³ Ray & Gibbons, *supra* note 3.