Banning Ghosts: Critical Race Theory Bans as a Case Study for Phantom Legislation

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In light of a recent increase in legislation which purports to ban Critical Race Theory from the American classroom, this paper seeks to understand the origin and application of such statutes. This paper examines the similarities in bill text across states, provides a history of Critical Race Theory as an academic tradition to demonstrate the divergence between Critical Race Theory as understood in academia versus its characterization in statues which seek to restrict it. During the course of this exploration, the phenomenon of 'Phantom Legislation' is identified and introduced.

I. Introduction

The Set Up

In the fall of September 2022, my roommate began her residency student teaching program with her elementary education undergraduate program. She began to feel that her classes weren't teaching her anything relevant; she wasn't required to take elementary math, and yet was automatically enrolled in three 'diversity and inclusion' courses. Why weren't they teaching her anything she would apply in the classroom; why were they forcing this political agenda down her throat? Her students, she felt, needed to learn to read and write, not how to be 'anti-racists'. Resistance to this apparent encroachment of racialized and politicized content in public schools has culminated in a series of Critical Race Theory bans.

The banning of Critical Race Theory (CRT) has recently grown into a front-running issue for America's rights. Originating in academia, CRT is now more often understood as a divisive political agenda. Particular concern has arisen towards the presence of CRT ideology in public schools. As a result, thirteen states have since passed some form of *CRT ban*, legislation that prohibits mandatory training for teachers and other state employees in topics of antiracism, Critical Race Theory, or otherwise related concepts. While supporters of such bans celebrate a necessary expansion to the protections from the Civil Rights Act and 14th Amendment, critics

claim that such bans prevent an accurate depiction of American history resulting in strengthened racial division.

Critical Race Theory emerged in academia as the child of the 1970s' Critical Legal Theory, and the grandchild of Critical Theory. Critical Theory can be described as a class of philosophical paradigms that seek to reduce oppression and increase liberation (Delgado, 2017). Naturally, such theories emphasize a fundamental relationship between the oppressor and the oppressed; thus, feminism and Marxism are included in this category. Subsequently, Critical Legal Theory (sometimes called Critical Legal Studies), applies this power paradigm to the legal system, exploring how the law upholds an unequal status quo. Thus, Critical Race Theory, as one might expect, studies the relationship between race, and power. In this relationship, whites are categorized as oppressors, while racial minorities, principally blacks, fall into the oppressed class.

The nuances of Critical Race Theory as an academic tradition, however, appear to have been largely lost in their translation into legislation. The bans' language is surprisingly inclusive, and the provisions are arguably neutral. Although there is urgency in conversations in support of such bans, they appear far less novel than originally foreseen.

The Puzzle

Thus, there emerges an apparent divergence between the purpose and application of Critical Race Theory as a branch of academia and how it has manifested in so-called CRT bans. This paper seeks to explore this divergence and the extent to which CRT bans provide any real utility to their professed cause of reinforcing anti-discrimination and lessening racial division.

Methodology

I argue that CRT bans are chiefly used as opportunities to virtue signal to their base and confer support. I intend to use CRT bans as a foundational case study for a broader phenomenon which I call Phantom Legislation, as the issue they address is largely non-existent and the behavior they prescribe is constitutionally present, undisputed, and thus unnecessary. I will begin by conducting an analysis of the bills' text across states to demonstrate that despite mild variation, the legislation can all be understood as a unitary phenomenon. I'll then provide a brief history of Critical Race Theory as a scholastic discipline. Using the findings from these two inquiries I'll demonstrate the divergence in academic Critical Race Theory and its popular understanding and characterization in legislation. I will then examine the potential for these bans to have a chilling effect on the behavior of state employees. I'll then aggregate the totality of these findings to introduce the phenomenon of Phantom Legislation, which I'll define, provide additional examples of and discuss potential implications.

II. A Rose by Any Other Name is Still CRT (or is it?)

CRT Bans

The first step in my analysis is to first establish that the thirteen separate instances of legislation can all be understood as a unitary phenomenon: CRT Bans. While each bill has some degree of uniqueness, the aggregate of their stipulations and general intentions can be understood as functionally the same. Table I details the distinct provisions of each state's legislation demonstrating substantial overlap. Laws in Florida and Tennessee were the most restrictive out of the thirteen. While Montana included the fewest of the identified provisions, Critical Race

Theory was specifically mentioned as the subject of the Attorney General's Opinion which introduced the ban. Montana is in the minority when it comes to directly mentioning CRT, although Iowa and Arkansas substitute CRT with the term "Divisive Concepts". Most surprising from Table 1, is how generally uncontentious and inclusive their principles appear to be, despite their dramatic reception

Critical Race Theory in Academia

Critical Race Theory was convinced in the 1970s and 80s through Critical Legal Theory and Critical Theory in response to what proponents felt was a lack of civil rights progress (Anderson 2021). Like any other field of academia, CRT has evolved since its conception but remains nonetheless adherent to its core tenets of understanding race as a divisive social construct, and subsequently working to deconstruct the concepts and institutions founded on subjugation (Winant 2001). What differentiates CRT from other studies of race, is its assumption that racism is fundamentally normal in America, a natural consequence of the manner in which American institutions were formed (Ladson-Billings 2021). Edward (2022) identifies CRT as a form of "oppositional scholarship" in that it seeks to challenge the experiences of white Americans as the normal or aspirational standard. CRT operates on a systemic, as well as individual level in claiming that the presence of racial hierarchies is so deeply institutionalized that privilege and oppression become a normal part of life. Derrick Bell (1990) adds an additional tenet to CRT with the principle of "interest convergence", which posits that whites accommodate the preferences, desires, or needs of blacks only when their interests are aligned with such an accommodation. Importantly, although there are first principles in Critical Race Theory (as is the case with most theories and scholarship), there exists no generalized laundry list of prescriptions, that being there is no set of quantifiable social changes which CRT claims to

be in pursuit of. Thus, the call to action for Critical Race Theorists would be more closely related to philosophical deconstruction, rather than a series of policy goals.

Table 1

	MT	UT	SD	IA	OK	TX	AK	MS	GA	VA	FL	TN	NH
One identity is inherently superior to another		X	X	X	X	X	X	X	X		X	X	X
The United States is fudementally racist				X			X		X		X	X	
Individuals are inherently prejudiced based on their identity				X	X	X	X		X		X	X	X
Moral character is determined by identity		X	X	X		X	X		X		X	X	
Individuals should be discriminated against based on identity		X	X	X	X	X		X	X		X	X	X
Individuals should feel responsible for previous actions committed by members of their same identity			X	X	X	X	X		X		X	X	
Individuals should feel discomfort, guilt, anguish or any other form of psychological distress on account of their identity					X	X			X		X	X	
Preformance-based advancement (meritocracy) or the recognition and appreciation of character traits such as strong work ethic are prejudiced or were created by a particular identity to oppress members of another identity			X		X	X	X		X		X	X	
Members of one identity of sex cannot and should not attempt to treat other people with respect					X	X							X
Scapegoating or stereotyping				X			X	X				X	
Direct mention of "Critical Race Theory"	X	X								X			
Direct mention of "Divisive Concepts"				X			X		x				

Table 1. The Y-axis of the table lists the specific provisions(concepts, ideas, and behaviors) that appear in the language of CRT bans. The X-axis lists the states that currently have legislation prohibiting some or all of the listed concepts. An X denotes that the state has directly mentioned the corresponding provision in its legislation. Furthermore, the above provisions concern 'identities', the definition of which vary slightly across the legislation. While some list creed, gender and martial status, the majority identify only race and sex. For the purpose of parsimony I've unified all classes under the term 'identity'.

III. Divergence

There is a palpable difference in the language of CRT bans and Critical Race Theory as a school of academic thought. What is the extent of these differences and what are their implications? I find three areas of prohibition in these elements: **individual culpability, evaluative, and institutional**. Provisions that fall in the first classification: individual culpability, are intended to prevent students from feeling agreement related to their race and the race of others. The second category, evaluative, seeks to prevent individuals from feeling that their personal value, academic moral or otherwise, may be related to their race. The final classification: institutional, is intended to restrict the notion that American institutions are predicated, empowered, or otherwise related to racial hierarchies. Once the components of CRT bans have been sorted into these categories, their conceptual involvement with CRT scholarship becomes more discernible. If the foundation of academic Critical Race Theory is the oppressor-oppressed relationship, then the primary intention of CRT bans is the negation of this paradigm. These bans however are missing one key component of academic CRT: race. In Table I, I summarized the provisions' varying language by using "identity", to denote the concept being addressed. The bills themselves are more specific, instead highlighting a number of characteristics such as race, sex, gender, and even marital status. Notably, race is never recognized in isolation. Thus, while academic CRT attempts to deconstruct racial identity, CRT bans in school appear to be an attempt to protect all identities from the imposition of hierarchies.

CRT school bans, therefore, resemble academic CRT only to the extent that both pertain to power dynamics at the individual and institutional levels. The fundamentally racialized components of the scholarship and its intention to challenge and deconstruct racial identity are

critically absent from school-related bills, therefore seriously mitigating whatever link exists between the two.

II. Application

This paper has thus far described the phenomenon of CRT bans, analyzing the language of the legislation and identifying how such bills diverge from the academic origins of Critical Race Theory. Subsequently, my exploration turns to the application of CRT bans, asking if not authentic CRT, what is begin restricted? The laws are young enough that there cannot have been any empirical studies on quantifiable effectiveness thus for questions of application I turn to legal literature in support of CRT restriction.

Anti-Discrimination

Montana's 2021 ban on Critical Race Theory in public schools is of particular value to the present analysis, as it came in the form of an attorney general opinion (AGO), rather than a house or senate bill. The AGO format allows for a far longer preamble and explanation of the following edict. The Montana attorney general takes advantage of this and provides a thorough legal justification for the restriction. This opinion offers invaluable insight into where CRT bans may be foreseeably relevant. While in the case of the various bills, while there exists some justificatory variation amongst bans, I find Knudsen's opinion to be an appropriate representative of their general message.

The first principle for CRT bans is anti-discrimination. Knudsen opens with quotes from the framers, Justice Scalia, and Martin Luther King Jr. Subsequently, Knudsen and other legislators brace their defense on two constitutional defenses: the 14th Amendment's Equal Protection Clause, and the Civil Rights Act of 1964. The claim is generally as follows: race is a suspect class, thus, any circumstances in which race may be classified, examined, or otherwise taken into consideration are subject to strict judicial scrutiny. Following such scrutiny, the identified circumstances must be determined to be of compelling government interest. Next Knudsen evokes Title VII's hostile environment framework, which stipulates that schools must respond to racial harassment severe enough to inhibit students' ability to enjoy their education program (Knudsen 2021). Knudsen understands Critical Race Theory and anti-racism as approximate. The latter is drawn from Kendi (2019) and The Smithsonian National Museum of African American History and Culture and means that whites must consciously and continuously labor to dismantle their unique 'internalized racism" to be considered *not* racist.

It is this concept of internalized racism that most aggrieves Knudsen, as he argues that Critical Race Theory imposes a negative immutable trait upon white individuals solely on the basis of their race. Furthermore, Knudsen finds that Critical Race Theory and antiracist conventions fundamentally "exclude individuals who merely advocate for the neutral legal principles of the Constitution, or who deny or question the extent to which white supremacy continues to shape our institutions" (Knudsen 2021). Thus, Knudsen argues that the allowance of CRT-related curriculum imposes a discriminatory obligation on white students to subscribe to a highly politicized ideology and challenge their identity through the lens of race. Such obligation, Knudsen contends, is an unnecessary and harmful use of race classification and creates a hostile environment thus violating the Equal Protection Clause and Title VII.

Legislative preambles echo the same sentiment; Utah finds that CRT would “degrade important societal values and, if introduced in classrooms, would harm students' learning in the public education system”. Florida specifies that it wishes to maintain an age-appropriate curriculum which CRT is incommensurable with. The bottom line is that states’ main justification for CRT bans is an obligation to protect their students from the undeserved burden of racial classification and examination. Especially underlining that in compelling white students to think critically about their race and the potential privilege they may have conferred via their racial identity.

Promotion, Inclusion & Compulsion

Knudsen’s imperative to protect students from discrimination is echoed in supportive legal literature. Eden (2021) finds that there are three dimensions to the practical implementation of CRT bans: the prohibition of compulsion, inclusion, and promotion. The first dimension, compulsion, has to do with protecting students and teachers from an obligation to affirm, adhere to, or adopt principles of CRT as their own. While compelled speech is already securely constitutionally prevented, Eden argues that the CRT bans provide a necessary addition to address ideological concerns. Second, inclusion has to do with the admittance of CRT principles into the curriculum. Finally, there is promotion, defined in which incorporates both compulsion and inclusion with the added provision of advocating, sponsoring, approving, or endorsing (Eden 2021). Thus, Eden outlines the framework of the application of CRT bans. Notably, Eden takes issue with calling such legislation “CRT bans", as he argues it misrepresents the intention bills. For Eden and alike supporters of CRT restricting bills, the imperative is to reinforce

antidiscrimination principles that lack protection and adherence under the current status quo. There thus appears a second divergence amongst supporters in willingness to link CRT bans and Critical Race Theory.

III. Dangers and Pitfalls

There is an apparently reasonable amount of uncertainty amongst supporters of CRT bans regarding their purpose and application. While many feel comfortable mentioning Critical Race Theory directly as the object of prohibition (Knudsen 2021), others feel that it serves as a distraction from the legislation's true purpose of anti-discrimination protection. My previous analysis of the bills' language reinforces this, as some directly mention Critical Race Theory while others refer to 'divisive concepts'. The majority of bills passed make no mention of either, instead preferring to outline their own set of restricted principles. Regardless of where states fall in this schism, there has been no evident pushback from legislators as the media and public have dubbed the totality of these bills "CRT bans".

The discord among supporters provokes the examination of the laws' specificity and breadth, raising concerns over the chilling effect. My inquiry began as an intended constitutional review of CRT bans, an evaluation of the constitutional permissibility of such laws. I had originally anticipated that the bills' language would be highly politicized and specific. This assumption was complementary to a constitutional review, and I planned to challenge CRT bans using the principles of animus and targeting. Consequently, I was surprised by the legislation's inclusive and broad language. It became immediately apparent that there could be no question of animus or targeting of a particular class as the legislation. However, inclusivity may still prove to

be a double-edged sword as the breadth of CRT bans generates the potential for the chilling effect.

Defining the Chilling Effect

The *chilling effect* is a legal term that refers to the concept that provisions of certain state statutes are so vague and overbroad that they unconstitutionally deter legal speech and exercise. Schauer (1978) reasons that there are two fundamental principles upon which the chilling effect doctrine replies: 1) That all litigation and legal processes are shrouded in unavoidable uncertainty and imprecision. There always exists the possibility of erroneous adjudication and wrongful conviction; and 2) Between the two outlined evils: the wrongful allowance of speech and expression, and their wrongful limitation, the latter is the more pernicious and harmful. Schauer labels these principles as "the recognition of uncertainty" and "the principle of comparative harm". 'To Deter' and 'to chill' can be used relatively interchangeably; laws that attach harsh penalties to homicide are intended to chill their constituents away from the act of murder. Schauer deems this "benign deterrence" that intentionally chills individuals away from an activity that is legally subject to regulation. Thus, the alternative to this benign phenomenon is "invidious" deterrence of legal and protected behavior. This invidious impediment is the business of the chilling effect doctrine. My analysis of the potential chilling effect of CRT bans relies primarily on the following two cases.

Baggett v Bullitt

In the early and mid-1900s, there existed in Washington state, two state statutes obligating teachers and all other state employees to take loyalty oaths. The original statute, conceived in 1931 applied specifically to teachers, while the latter in 1955 moved to encompass all employees of the state. These oaths required affiants to swear to promote respect for the American flag, allegiance to the United States government, and promise that the signee is neither a "subversive person", nor a supporter of any "subversive organization". Born out of communist fears, "subversive" persons and organizations are described as those who would attempt to overthrow the American government or alter its constitutional form; the Communist Party is especially identified as one such organization. The statutes' ultimatum demands that employees either sign the oath in sincerity or abdicate their would-be employment.

In 1963 students, faculty, and staff at the University of Washington challenged these statutes which manifested at the university in the shape of two "oath forms". "Oath Form A" decreed that the respondent swear to support the United States constitution, flag, and institutions, as well as ensure their understanding of the concept of subversive persons and reject the communist party. "Oath Form B" omits promises of allegiance, obliges the affiant to reiterate their sworn understanding of subversion, and swear that they are unaffiliated with the Communist Party or any other subversive organizations.

The court ruled in favor of the claimants, finding that the vagueness and broadness of the statute's provision were unconstitutional. "A person", the court reasoned "is subversive not only if he himself commits the specified acts but if he abets or advises another in aiding a third person to commit an act which will assist yet a fourth person in the overthrow or alteration of constitutional government" (*Baggett v Bullitt, 360).* Furthermore, the vagueness of the statutes "offends due process", as the court reasons that benign criticisms disfavor towards the flag's

colors or academic critiques of the American judicial system would constitute a breach of contract under such oaths. Moreover, the semantic breadth of the oaths presents a fundamental challenge to the issue of enforcement, as the boundaries of what is lawful and what is illegal are uncertain and largely undefined. Thus, the court finds that prosecution of oath-breakers would rely so enormously on an adjudication that it would render the parameters of the statutes functionally non-existent.

Thus, the court found that the vagueness of the oaths prevented the oath-taker from reasonably and adequately understanding exactly what they were swearing to, leaving individuals vulnerable to undue sanctions and largely arbitrary prosecution.

Cramp v Board of Public Institutions

Similar to Bagget v Bullitt, there existed in Florida state a statute requiring all state employees to sign loyalty contracts affirming that the respondent had not lent their "aid, support, advice, counsel or influence on the Communist Party.". Failure to sign the oath could result in employment termination. In 1961, Orange County school teacher David Walton Cramp refused to sign the oath, declaring that although he was not a member of the Communist Party, nor had he lent the above services to their cause, the vagueness of the statute's language was an affront to due process. As a result, Cramp was fired from his job.

The court ruled in favor of the appellant, with Justice Stewart echoing Cramp's assertions that the vagueness of the statute was such that there were an "indefinite" number of interpretations a reasonable individual could reach. Therefore, the signing of the statute would

have left Cramp entirely vulnerable to unconstitutional and largely arbitrary criminal prosecution.

The legal logic and political conditions of the case are awfully similar to Baggett v Bullitt. Both oaths aim to bar Communist Party sympathizers or associates from state employment, particularly in public education. Both cases were ruled in favor of the claimants, citing the vagueness and breadth of the oaths' provisions as being offensive to due process. The expansive space for interpretation of the laws' application leaves far too much unknown and unmanaged. Herein lies the logic of the chilling effect, as this vast room for interpretation potentially leads the oath-taker to believe that he must cease some form of protected speech or face sanction. He is thus 'chilled' or deterred from speech when he ought not be.

CRT Bans and the Chilling Effect

I've thus defined the chilling effect and described three foundational cases which outline the imperative for, and goals of the Chilling Effect. Notably, the context and conditions of *Baggett v Bullitt* draw many parallels to those surrounding the passing of CRT bans. To what extent can it be argued that the denotation of a "subversive person" is any different from a "divisive concept" in terms of politicization and vagueness? In *Baggett v Bullitt*, a subversive person or subversive organization is defined as those who would seek to overthrow the US government. As part of the oath, respondents were required to swear fidelity to the US flag. Divisive concepts are defined as "fundamentally or irredeemably racist or sexist concepts", and such bills often include a provision prohibiting the assertion that the US is fundamentally racist or sexist. Nevertheless, in *Baggett v Bullitt*, the court inevitably ruled against the legality of the

oaths, not because of the provisions or intentions, but because the vagueness and breadth of the language were such that it could be reasonably assumed that protected legal speech may be restricted in their application.

There have yet to be any teachers or state employees who've faced prosecution related to CRT bans. Whether that is a result of their novelty, or a fundamental absence of prohibited behavior can likely never be conclusively known. The question is whether teachers who would have otherwise taught legally permissible content have unduly altered their curriculum for fear of violating the bans, due to vague and overbroad language. The challenge when it comes to the chilling effect is the measurement, particularly when it comes to speech. There has been little to no substantive empirical evidence collected demonstrating speech deterrence or alteration (Bendi 2021). A recent study conducted empirical tests on users of social media platforms whose terms and conditions allow for the removal of offensive content (Bendi 2021). It concluded that the possibility of censorship had little effect on the content of users' posts, but that the tone was significantly impacted. While this study indicated rather tepid consequences of the chilling effect, an additional empirical study from NYU Law found that laws concerning late-term abortions have a significant deterrence of "near-late-term abortions" (Canes-Wrone & Dwarf). Thus, while the empirical evidence of the chilling effect remains limited, such studies demonstrate its existence both in theory and reality.

Cramp v Board of Public Instruction provided the groundwork for the establishment of the chilling effect. The court held that the statute was so vague that it denied Cramp the due process of law. Justice Stewart delivered the court opinion:

> "...the Communist Party has on occasion endorsed or supported candidates nominated by others. Could one who had ever cast his vote for such a candidate

safely subscribe to this legislative oath? Could a lawyer who had ever represented the Communist Party or its members swear with either confidence or honesty that he had never knowingly lent his counsel?"

The idea behind these examples is that any reasonable person or professional could have unintentionally violated the unclear provisions of the oath. The provisions of the oath are so vague that violations cannot possibly be understood as sincere endorsements of or associations with the Communist Party.

The same scrutiny can be successfully applied to the equally vague language of CRT bans. Take for example the provision which prohibits the teaching that "The United States is fundamentally racist or sexist". Whether the idea this provision targets is true or not is largely irrelevant. What's critical is that in teaching an accurate and encompassing history of America this notion is more than likely to arise. As was the case with Cramp v Board of Public Instruction, what does it mean to teach that the US is fundamentally racist? Must it be explicitly saying those very words? Or could it apply to insinuations of inherent racism through source selection? If a curriculum includes readings from civil rights figures such as Malcolm X, would that constitute a violation?

I subsequently argue, that based on the legal precedent and empirical evidence, there is a reasonable concern that the breadth of CRT bans generates a chilling effect. I further argue that this deterrence is non-accidental, and that the political notoriety of these bans intensifies this effect in an intentional manner. The social and political conditions under which the chilling effect was conceived are very similar to those which currently predicate CRT bans. The foundational cases are primarily related to loyalty oaths and the Red Scare (*Wieman v Updegraff 344 U.S. 183 (1952); Bagett v Bullitt 377 U.S. 360 (1964); Cramp v Board of Public Institution*

368 U.S. 278 (1961)). Anxiety about the perceived infiltration of communism into American norms and lifestyle was just as unfounded and politicized as the current wave of panic over the same consequences of Critical Race Theory.

Furthermore, the essential cases for the chilling effect related to Communist Party inhibition are similar to CRT bans in their apparent divergence from their academic foundations. As I've discussed at length, the content of CRT bans is largely unassociated with the academic dogma of Critical Race Theory. The same can likely be said for anti-communist oaths and communism or Marxist teachings. In fact, both traditions originated from the Frankfurt School and Critical Theory. In actuality, the anti-communist oaths are far more concerned with mandating that respondents promise not to overthrow the government or associate with anyone planning to overthrow the government.

Thus, the argument for the chilling effect of CRT bans is as follows: while the measurement of the chilling effect is elusive and difficult, current empirical analyses suggest that it does exist, and that deterrence can be observed. The cases which originated the chilling effect are principally related to statutes that mandate employees of public institutions, such as public schools, sign oaths swearing that they are not associated with nor in the business of endorsing the principles of the Communist Party. These cases are glaring alike to CRT bans in their politicization, divergence from the academic principles they claim to pertain to, and most importantly, the language of their provisions is so vague and overbroad that they "afford state officials boundless justification to interfere" and do not thusly offend due process (Brennan-Marques, 2019). These distinct similarities provide the foundation for Phantom Legislation.

IV. Phantom Legislation

Introducing Phantom Legislation

Phantom Legislation is the product of this paper's analyses. My analysis of CRT bans along with the subsequent examination of the potential for such bans to generate a chilling effect has produced evidence of a new phenomenon: Phantom Legislation. Phantom Legislation (PL) refers to legislation whose primary and perhaps sole purpose is to act as political virtue signaling or as a flash bulb for a party or representative's agenda. Importantly, PL does not generate practical consequences outside of its chilling effect. I have identified and developed three basic characteristics of PL:

I. Political Notoriety

II. Breadth

III. False Principle

Political Notoriety

In 2021 The American Enterprise Institute estimated that there were somewhere around ninety-one articles covering Critical Race Theory in public schools and CRT bans (Hess, 2021). No doubt this number has grown substantially in the two years since. In the same year, a study found that conservative outlet Fox News mentioned Critical Race Theory over 1,900 times over a three-and-a-half-month period (Power, 2021). This is to say that CRT bans have achieved impressive media attention since their conception and have been effectively established as a critical and front-running issue for the American right. Media coverage has drummed up considerable controversy from the public, so much so that Critical Race Theory has adopted a colloquial quality. Hess (2021) attributes this polarizing effect to linguistic variables in media coverage. Lack of legislative quoting, cherry-picking provisions to cover, and omissions of

information about Critical Race Theory's academic roots all culminate in a picture of misrepresentation and stoking the fires of division. This portrayal of CRT bans as highly controversial, accurate or not, has elevated CRT bans to the heights of polarizing issues.

In addition to the coverage of CRT bans, the introduction and ratification of such bills have often been accompanied by videos of impassioned speeches from parents and members of the community made at school board meetings. Videos of such speeches have gained millions of viewers on platforms like YouTube and Twitter. Thus, it's this dimension of Phantom Legislation is clearly evident in CRT bans.

Breadth

As previously demonstrated the language of CRT is intentionally inclusive and broad. This breadth is a critical feature of Phantom Legislation, as it makes the practical implementation of the policy largely subjective. Preventing the idea that "one race is better than another" from public school curricula is neither controversial nor novel. However, these broad provisions effectively dampen the reactionary effect of those more potent, such as the provisions concerning meritocracy or psychological distress (See Table I). Phantom Legislation such as CRT bans includes just enough Critical Race Theory for the effect of optics but actually enforces very little.

False Principles

This feature is perhaps the easiest to grasp in the wake of my previous analysis. CRT bans immensely diverge from Critical Race Theory as understood in academia. Furthermore, there is some uncertainty concerning CRT bans' relation to the Civil Rights Act and the 14th Amendment which they claim to be extensions of. The Civil Rights Act of 1964 is primarily

about compulsion: the state compelling public schools to desegregate. There is even a provision ensuring that the state would provide funding for teachers to receive training to help them deal with problems incident to desegregation" (Civil Rights Act). CRT bans are primarily about restriction: restricting public schools from training their teachers in certain ideologies and compelling them to adhere to such ideas. Thus, it appears that CRT bans arise from *falsis principiis* and were born as a result of partisan climate, rather than an infringement of rights or an encroachment of academia into public schools.

Expanding the Principle

Phantom Legislation are statues whose primary purpose is to signal agenda alignment with a political base, rather than facilitate or restrict some behavior. This type of legislation is characterized by the following three features: political salience, false principles, and breadth. I have thus far used CRT bans as the foundational case study for this phenomenon, demonstrating how their highly politicized nature, ill-defined provisions and divergence from academic Critical Race Theory culminate in legislation that effectively bans ghosts. In the following section, I attempt to strengthen the generalizability of this theory by introducing other instances of potential Phantom Legislation. This expansion of the principle will hopefully offer deeper insight into the implications of such legislation.

Gun Advertising

It is likely important to note that currently, Phantom Legislation appears to be most present in republican aligned legislation. The reasoning behind this may be contested, however, for the purposes of this paper which hopes to serve as a foundation introduction to the

phenomenon, I've made an effort to find examples of Phantom Legislation that appeals to the right as well as the left.

Last year California passed Assembly Bill No. 2571. The measure seeks to deter youth from purchasing firearms by restricting the promotional liberty of the firearm industry. The bill prohibits "members of the firearm industry from marketing in a manner that is designed, intended, or reasonably appears to be attractive to minors". Wherein "member of the firearm industry" is defined as any individual, firm, or other entity positively associated with gun ownership, and the qualifying features for marketing to youth are as follows:

A. Using caricatures that reasonably appear to be minors or cartoon characters to promote firearm-related products.
B. Offers brand name merchandise for minors, including, but not limited to, hats, t-shirts, or other clothing, or toys, games, or stuffed animals, that promotes a firearm industry member or firearm-related product.
C. Offers firearm-related products in sizes, colors, or designs that are specifically designed to be used by, or appeal to, minors.
D. Is part of a marketing or advertising campaign designed with the intent to appeal to minors.
E. Uses images or depictions of minors in advertising and marketing materials to depict the use of firearm-related products.
F. Is placed in a publication created for the purpose of reaching an audience that is predominantly composed of minors and not intended for a more general audience composed of adults.

I will now analyze the above provisions against the criterion of Phantom Legislation to demonstrate the spectral nature of this bill.

Political Salience

While youth firearm ownership is likely not the predominant issue for the left, the issue of gun ownership and regulation certainly is. Following a nearly 50% increase in mass shootings between 2018 and 2021, liberal organizations such as March for Our Lives (MOL) have risen in response to the perception of a growing gun violence crisis in America. In 2018 MOL led protests in over 800 cities and again in 400 in 2021(Merrill and Wolf 2023). Thus, there is strong and clear evidence for the existence of gun violence as a highly politically salient issue.

Breadth

This characteristic is slightly more difficult to discern than the previous but can be observed, nonetheless. The feature of breadth concerns a lack of clarity in the definitions of certain terms and provisions. In AB No. 2571 this idea is related to discretion over what could reasonably be understood as appealing or attractive to minors. The bill's provisions indicate that colors or caricatures are related to this attraction, but not all-encompassing. Thus, there arises an issue of jurisprudence in determining which colors and, caricatures will appeal to minors and which ones will not. Admittedly, the provisions of this bill are notably more specific than those of CRT bans or the following example, however there is still a great deal of room for subjectivity in determining which characteristic meet the qualifications and which ones do not.

Anti-Drag Bills

In 2023 Tennessee's governor signed into law a bill that criminalizes performances of "adult cabaret" in public. This bill will serve as my second example of Phantom Legislation.

Political Salience

Drag and its performance in public rivals the political salience of CRT and in fact could have likely served as an equally appropriate foundational case study for PL as CRT. Besides Tennessee, twelve other states have introduced similar legislation (Burga 2023). While this paper by no means attempts to detail the history of drag performances, it ought to be noted that the existence of drag transcends far beyond its contemporary characterization, particularly in such bills. Nonetheless, amongst conservatives, there are rapidly growing concerns that childhood exposure to drag imparts some harmful gender confusion in children and diminishes parental autonomy. Although there has yet to be empirical data released on the seemingly growing quantity of publications on the subject, drag is often discussed in the same breath as CRT by conservative and liberal media outlets alike, strongly indicating its political salience.

Breadth

As was the case with political salience, the principle of breadth, and thus the potential for the chilling effect is just as strong with S.B. 3 as CRT. The bill's text defines "adult cabaret" as "topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers". To demonstrate the breadth of the law, it's

helpful to identify examples of performers or performances which may violate the provisions of the bill while still being unequivocally non-sexual in nature and meant for children. *Mrs. Doubtfire* may serve as one such example. Released in 1993 the comedy movie's plot centers around a father's bid to reconnect with his family through cross-dressing as a female housekeeper. Under the bill would the cast of Mrs. Doubtfire have been subject to jail time should they have filmed in Tennessee?

While perhaps superfluous, this example attempts to highlight how the language of the bill is vague, such that the jurisprudence required to discern which performers or performances qualify for restriction is too great.

False Principles

Sponsors and supporters of the bill have likened its necessity to that of bills that prohibit minors from being allowed entry at strip clubs. The bill invokes the term "prurient" in defining what kinds of performances are prohibited. The *princpis falsis* in the case of this bill is a precedent of obscenity, more specifically, the lack of protection of obscenity as a form of free speech. Although later superseded, Roth v. United States, 354 U.S. 476 (1957) provided the foundation for this precedent. After mailing erotic stories and explicit passages, the court found that obscenity is not a protected form of free speech as is the case with hate speech. Herein lies the divergence required to fulfill the False Principal qualification of Phantom Legislation. Although obscenity is infamously subjective and difficult to define (Jacobellis v. Ohio, 1964), the description of "adult cabaret" performances in the bill appears to have very little to do with actions sexual in nature.

V. Implications

Thus, we're left with the question: where do we go from here? The identified instances of Phantom Legislation are very likely not the first and will almost certainly not be the last. Is this a phenomenon that ought to be combated, or adapted to? I argue that it may be nearly impossible to fight Phantom Legislation from a policy standpoint. At its core, Phantom Legislation reflects the system of governance from which they arise. Policymakers wish to remain in power and thus make laws that are popular amongst their constituents. There is no easier problem to solve than one that never really existed in the first place. Phantom Legislation addresses issues that are purely political both in origin and consequence.

I argue that the most appropriate reaction to Phantom Legislation may be to put them to the test. Returning to my original case study of CRT bans, I believe that public school employees should continue to teach under the status quo. The status quo, according to the CRT bans is rife with Critical Race Theory which naturally necessitates the existence of such laws. Therefore, if instructors continue to operate under business as usual and face no repercussions, the phantom nature of the laws will be revealed. The alternative outcome is that employees face penalties or sanctions for their continued teaching of Critical Race Theory. This outcome is beneficial in two ways. The first is that it provides a specific and direct context for exactly what such laws mean by "Critical Race Theory" or "divisive concepts"; in offering examples or identifiable instances of prohibited behavior CRT bans may confer more legitimacy. Until this point, I argue that CRT bans will remain in the spectral realm. The second benefit to this outcome is that the state would be inherently required to supplant unlawful content with permissible materials. As so much of Phantom Legislation's essence is reliant on the law's breadth and vast room for various

interpretations, it seems that witnessing the practical enforcement of such statutes would offer insight into the boundaries in which CRT bans can function.

I believe that this conclusion is generalizable to the other instances of Phantom Legislation we have discussed. As enforcement seems to be the biggest issue when it comes to such laws, testing the parameters of their operation would likely be an effective method to better understand how these laws may be used in the future, if at all.

Prior to this testing-of-the-waters, the greater implications for Phantom Legislation will likely have to do with the chilling effect. Emboldened by their political notoriety, such laws' potential to chill constituents off behaviors and practices that they would normally engage in will likely be the most notable effect of Phantom Legislation. A recommendation may be made for empirical studies to begin as soon as possible measuring the degree of diversity and inclusion principles in public education institutions in states both with and without CRT bans. I suspect that in states with CRT bans, even without instances of CRT ban enforcement, the general historical accuracy of the curriculum will decrease, and America-first values will increase in the promotion.

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