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## 'The Stop WOKE Act': HB 7, Race, and Florida's 21st Century Anti-Literacy Campaign

Katheryn Russell-Brown

*University of Florida Levin College of Law*, [russellbrown@law.ufl.edu](mailto:russellbrown@law.ufl.edu)

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“THE STOP WOKE ACT”:  
HB 7, RACE, AND FLORIDA’S 21<sup>ST</sup> CENTURY ANTI-LITERACY CAMPAIGN

*Katheryn Russell-Brown*<sup>1</sup>

ABSTRACT

Florida’s Stop the Wrongs to Our Kids and Employees Act (Stop WOKE) took effect July 1, 2022. The new law, known as House Bill 7 (HB 7), regulates how race issues can be taught in the K-20 educational system and imposes stiff sanctions for violations. This Article provides an incisive analysis of HB 7, with a particular focus on the law school classroom. It begins with a discussion of anti-literacy laws adopted during slavery and how these laws prohibited enslaved Blacks from learning to read and write. The historical analysis establishes that HB 7 is a modern-day iteration of anti-literacy laws. While early anti-literacy laws prohibited basic literacy, HB 7 prohibits teaching substantive literacy about race. Anti-literacy provides a framework for understanding the breadth and impact of HB 7. The Article investigates HB 7 through two prominent theoretical lenses, racial threat and critical race theory. These analyses predict and explain legislative responses such as HB 7. Through a series of hypotheticals, the far-reaching problems of HB 7 are revealed. This Article establishes the broad powers of HB 7. At full bore, HB 7 will drastically reduce race-related instruction and in doing so, it will likely delegitimize race scholarship and race scholars in the state of Florida.

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<sup>1</sup> Levin, Mabie & Levin Professor of Law and Director of the Race and Crime Center for Justice, at the University of Florida, Levin College of Law, Gainesville, FL 32611. The Author extends a special thank you to the following people, for their critical and helpful comments on earlier drafts: Derek Black, Robert Chang, Jonathan Cohen, Nancy Dowd, Jonathan Feingold, and Vanessa Miller. The Author also thanks UF law student Madison Jenkins for superb research assistance.

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Introduction

Nine months before Rosa Parks refused to give up her seat on a Montgomery, Alabama city bus, Claudette Colvin, a 15-year-old Black high school student refused to change her seat on a Montgomery bus. On March 2, 1955, after school ended early, Claudette walked to the bus stop. When the number 64 bus arrived, she walked onto the bus and found a seat. When more White passengers boarded the bus, the driver ordered Claudette to relinquish her seat and move to the back of the bus. Claudette did not move. The driver then phoned the Montgomery Police Department. When they arrived, the officers dragged the teenage girl off the bus, handcuffed her, and took her to jail where she remained in a cell for hours. When Claudette was later asked why she didn't move to another seat, in compliance with Montgomery's segregation laws, she responded that she had been taught that Blacks had protections as citizens. She said that in school, "We had been studying the Constitution . . . I knew I had rights." Claudette's response underscores the value of schooling that exposes students to history and rights: There's freedom in learning.

2 Colvin says that in that moment it felt as if Harriet Tubman and Sojourner Truth had pinned her to her seat and dared her to move. See PHILIP HOOSE, CLAUDETTE COLVIN: TWICE TOWARD JUSTICE (Macmillan 2009).

3 Id. at xx. Notably, the sit ins by both Claudette Colvin and Rosa Parks took place a year after the Supreme Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954), which unanimously held that separate but equal facilities are inherently unequal and violate the Equal Protection Clause of the Fourteenth Amendment.

Claudette Colvin’s story serves as a touchstone for this Article. It symbolizes the power of education to enlighten and expose students to myriad understandings and perspectives on individuals, groups of people, and systems. Her experience dramatizes the connection between education and democratic participatory action. Her story provides one of the many threads that links state action with anti-literacy. For centuries, legislation has been enacted to disappear educational curricula that centers on the history and rights of African Americans. Thus, contemporary state laws that restrict educational knowledge have a deep and troubling connection to the past. Anti-literacy laws fueled an underground literacy economy that saw enslaved Blacks risk their lives and limbs for education and possible freedom. Out of public view, Black people who learned to read and write, had to hide this knowledge.

The central goal of this Article is to establish anti-literacy as a framework for understanding Florida’s Stop the Wrongs to Our Kids and Employees Act (Stop WOKE).<sup>4</sup> Florida’s House Bill 7 (HB 7), which prohibits certain forms of race-related teaching and training in the state of Florida. This Article investigates and demonstrates the clear nexus between antebellum anti-literacy laws and HB 7, the modern-era counterpart. In fact, anti-literacy laws have been an essential way that Black people have been denied educational access. These laws, which were initially aimed at prohibiting enslaved Blacks from learning basic literacy skills, have had several iterations, including the Black codes and Jim Crow laws.

This Article charts a broad historical timeline for anti-literacy legislation. At the outset, it is important to state that there are different types of literacy. Basic literacy refers to reading and writing skills. The first anti-literacy laws and regulations were explicit prohibitions that made it unlawful for enslaved Blacks to develop the ability to read or write. Increasingly, anti-literacy laws are focused on controlling substantive literacy. Today’s anti-literacy laws ban the teaching of specific topics, specific materials, and targeted perspectives.

While anti-literacy laws have evolved over time, in all relevant ways in its contemporary manifestations these laws operate to achieve the same goals as their predecessors. Their shared objective is to minimize educational access to the truth about U.S. racial history. Teasing out the common anti-literacy threads that connect past and contemporary laws enables and invites a more rigorous analysis of HB 7 and related laws. These new laws do not constitute a new problem. They are not simply a reaction to Black Lives Matter and the social protests that erupted in 2020 after George Floyd’s murder. By identifying the integral connections between HB 7 and its legislative ancestors, this Article unpacks the legal framework and particular racialized harms of anti-literacy laws.

An anti-literacy framework reveals that bans on educational access are forms of state orthodoxy. They do not promote “individual freedom.”<sup>5</sup> Anti-literacy efforts reside along a continuum. Today, “anti-literacy” refers not to slave code prohibitions against learning rudimentary skills (e.g., how to read, how to write), but instead to laws that exist today—e.g., HB 7—that are designed to keep critical histories and rigorous critiques at bay. Today, these anti-literacy and anti-history bans assign the label “racist” to classes, assignments, and reading material that investigates racial issues. Theories and concepts that endorse racelessness, such as “colorblindness,” are promoted as objective and thus preferable.<sup>6</sup>

A critical part of understanding the anti-literacy framework is observing its trajectory. In its initial forms, exemplified by the slave codes, anti-literacy laws were primarily focused on

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<sup>4</sup> H.R. 7, 124th Leg. Reg. Sess. (Fla. 2022). The law is detailed in Part III of the Article.

<sup>5</sup> The title of HB 7 is the “Individual Freedom” Act.

<sup>6</sup> See H.R. 7, 124th Leg., Reg. Sess. (Fla. 2022).

outlawing the education of enslaved Blacks.<sup>7</sup> Over the centuries, anti-literacy was reflected in the postbellum era as separate but equal legislation, the underfunding of Black schools, and literacy tests for Black voters. The laws were designed to block Black literacy and, in this way, to strengthen the white racial hierarchy. Today, anti-literacy laws have been expanded to include the educational curriculum taught to White children. The angry, volatile, and sometimes physically threatening responses<sup>8</sup> to critical race theory (CRT) provide an example. In 2021, across the nation, mostly white politicians, parents, educators, and school boards sounded alarms regarding what their children were learning about race, racism, U.S. history, the Founders, and the workings of state systems.<sup>9</sup> The apparent goal of the anti-CRT pushback has been to keep it away from white children. While the focus has shifted and expanded to include white students, the bans which deny specific forms of educational knowledge and exposure, impact students of all races.

Two caveats are in order. First, the primary focus of this Article is on HB 7's impact on the university classroom, with particular attention on the law school classroom.<sup>10</sup> The focus of this Article is on the sections of HB 7 that are directed at undergraduate, graduate and professional school instruction. Particular attention is given to how the law impacts law professors and law school instruction.<sup>11</sup> Second, while there are some references to the First Amendment,<sup>12</sup> the specifics of how this bill infringes upon free speech protections is not a focal point of this Article.<sup>13</sup> HB 7 does, however, raise a host of First Amendment issues and

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<sup>7</sup>Throughout the article, references are made to slave codes, Black Laws, Black codes, and Jim Crow. Slave codes refer to the laws that regulated the movement and punishment of enslaved Blacks during the period of U.S. chattel slavery. Black Laws refer to the laws that regulated the movement and economic access of Black people in non-slave states. Black codes refer to laws that regulated Black lives, in the post-bellum period. Jim Crow refers to a system of laws and customs that imposed strict racial segregation in public life, from water fountains and swimming pools to chain gangs and cemeteries.

<sup>8</sup> See e.g., Gabriella Borter, Joseph Ax & Joseph Tanfani, *School boards get death threats amid rage over race, gender, mask policies*, REUTERS (Feb. 15, 2022), <https://www.reuters.com/investigates/special-report/usa-education-threats/>.

<sup>9</sup> See e.g., Katie Reilly, *Culture Wars Could be Coming to a School Board Near You*, TIME (Mar. 23, 2022), <https://time.com/6159177/school-board-elections-covid-19-critical-race-theory/>; Daniel Payne, *Critical race theory turning school boards into GOP proving grounds*, POLITICO (Sept. 8, 2021), <https://www.politico.com/news/2021/09/08/critical-race-theory-school-boards-510381>.

<sup>10</sup> It is noted that HB 7 covers a much broader base than the focal points of this Article. The legislation identifies its twin focal points as "instruction" and "employee training." In terms of its focus on classroom instruction, HB 7 covers k-20, kindergarten through university and college studies.

<sup>11</sup> Throughout the Article "professor" and "instructor" are used interchangeably.

<sup>12</sup> Florida Statute Section 1004.097(3)(a) states the following regarding the right to free speech:

Expressive activities protected under the First Amendment to the United States Constitution and Art. I of the State Constitution include, but are not limited to, any lawful oral or written communication of ideas, including all forms of peaceful assembly, protests, and speeches; distributing literature; carrying signs; circulating petitions; and the recording and publication, including the Internet publication, of video or audio recorded in outdoor areas of campus. Expressive activities protected by this section do not include commercial speech.

FLA. STAT. § 1004.097(3)(a), <https://www.flsenate.gov/laws/statutes/2018/1004.097>.

<sup>13</sup> See e.g., Keith E. Whittington, "Professorial Speech, the First Amendment, and the 'Anti-CRT' Laws" (August 12, 2022) <https://ssrn.com/abstract=4188926> or <http://dx.doi.org/10.2139/ssrn.4188926>

concerns.<sup>14</sup> In fact, minutes after it was signed into law,<sup>15</sup> four plaintiffs filed a lawsuit arguing that it violates the First and Fourteenth Amendments.<sup>16</sup>

This Article is presented in five Parts. Part I focuses on the history of anti-literacy laws. The discussion reviews the evolution of literacy laws, beginning with the slave codes. During slavery, there were intricate laws that prohibited teaching enslaved Black people to read and write. There were also laws that punished the publication and transportation of abolitionist literature that would stir enslaved Blacks to seek freedom. These anti-literacy laws punished enslaved Blacks, free people of color, and whites. Over time, the seeds of these early literacy bans could also be seen in the Black codes and in other postbellum attempts to deny equal school funding for Black children, which caused low Black literacy rates. After the Thirteenth Amendment was passed, literacy tests were used to minimize the number of Black voters. Anti-literacy campaigns also flourished in the Jim Crow era.

Part II uses two theoretical approaches to analyze the anti-literacy laws. The first is the racial threat hypothesis.<sup>17</sup> At its core, this theory predicts that the increase in size of the Black population will impact how whites view punitive criminal legal policies. That is, there is a positive relationship between an expanding black demographic and the popularity of white support for harsh criminal sanctions. The second theoretical lens is CRT. The discussion is a consideration of the role of interest convergence and interest divergence in the passage of anti-literacy laws. As the discussion establishes, over time, anti-literacy laws developed beyond simple prohibitions against learning to read and write. These laws have expanded to regulate classroom subject-matter and perspectives. This section examines CRT scholarship that investigates how race impacts educational policy,<sup>18</sup> including retrenchment,<sup>19</sup> and analyzes backlash and “frontlash”<sup>20</sup> as explanations for modern era educational bans.

Part III identifies the sections of HB 7 that focus on college and university instruction. Seven hypothetical scenarios are presented to highlight both the ambiguity and problematic breadth of HB 7. These hypotheticals raise questions that are particularly relevant to law school professors and the law school classroom. This Part also addresses the broad range of sanctions—against individuals and universities—put in place for violations of the law. The litigation sparked by HB 7 is noted in this section. The discussion examines the wide web of Florida laws that support HB 7 and enhance its power to expand the anti-literacy climate.

Part IV explores the potentially long term and long arm impact of HB 7 on the educational curriculum available at Florida universities. Specifically, this Part looks at how the presence of HB 7 exists as a threat to instructors who teach courses that address subjects within its legislative bullseye. These threats may manifest in a rising decline by instructors to teach these subjects and most worrying, the ultimate removal of “controversial” race-related courses

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<sup>14</sup> See e.g., *Falls v. DeSantis*, No. 4:22cv166-MW/MJF, 2022 U.S. Dist. LEXIS 112596 (N.D. Fla. June 27, 2022) (arguing HB 7 infringes on First Amendment guarantees).

<sup>15</sup> Ana Goni Lessan, *Minutes after bill is signed, lawsuit filed against DeSantis for 'Stop WOKE Act*, TALLAHASSEE DEMOCRAT (Apr. 22, 2022), <https://www.tallahassee.com/story/news/2022/04/22/stop-woke-act-lawsuit-desantis-florida-teachers/7412909001/>.

<sup>16</sup> *Falls v. DeSantis*, No. 4:22cv166-MW/MJF, 2022 U.S. Dist. LEXIS 112596 (N.D. Fla. June 27, 2022).

<sup>17</sup> HUBERT BLALOCK, *TOWARD A THEORY OF MINORITY-GROUP RELATIONS* (1967).

<sup>18</sup> David Gillborn, *Racism as Policy: A Critical Race Analysis of Education Reforms in the United States and England*, 78 EDUC. F. 26 (2014).

<sup>19</sup> Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign Against Critical Race Theory, Through the Lens of Critical Race Theory*, 28 WM. & MARY J. RACE, GENDER, SOC. JUST. 61 (2021).

<sup>20</sup> Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 36 STUD. AM. POL. DEV. 230 (2007).

from the university curriculum. HB 7 is a legislative attempt to delegitimize race scholars and race scholarship. Thus, the law determines not only which courses are offered, but whether professors who teach particular subjects remain at Florida universities.

Part V, the final section, considers the role of alternative educational spaces as channels for learning and sharing the histories of marginalized racial groups, outside of the formal educational context. Over generations, these spaces have played a vital role in keeping these histories alive. They have a notable resonance at this time when there are legislative attempts to ban racial history from the public-school classroom.

## I. HISTORY OF ANTI-LITERACY LAWS

In *Fugitive Pedagogy*, education professor Jarvis Givens examines the lengths to which white society went to minimize and in effect outlaw the teaching of African American history.<sup>21</sup> Across the South in particular, these efforts were met with strong push back from Black educators who dedicated themselves to teaching their students a counter Black history narrative—a history not centered on whites and whiteness.<sup>22</sup> State boards of education mandated preapproved K-12 curriculum for classroom instruction. These required lessons sought to quell any attempts by teachers to teach American history in ways that would include the input and stories of Black people and Black cultural life, state boards of education mandated preapproved K-12 curricula for classroom instruction.<sup>23</sup> These state laws reflected the deeply-held belief that educated Black people posed a radical threat to the maintenance of a white supremacist society. Responses to this threat took many forms. One reaction was the passage of legislation that required teachers to sign an anti-NAACP oath. Teachers who refused to sign the oath would lose their jobs.<sup>24</sup> Another reaction by states was to refuse to fund Black schools.<sup>25</sup> There was virulent

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<sup>21</sup> JARVIS GIVENS, *FUGITIVE PEDAGOGY: CARTER G. WOODSON AND THE ART OF BLACK TEACHING* (Harvard University Press 2021).

<sup>22</sup> See e.g., VANESSA SIDDLE WALKER, *THE LOST EDUCATION OF HORACE TATE* (2022); GLENDA GILMORE, *GENDER AND JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896-1920* (University of North Carolina Press, 1996); Diedre Houchen, *An “organized body of intelligent agents,” Black teacher activism during de jure segregation: A historical case study of The Florida State Teachers Association*, 89 *J. Negro Educ.* 267 (2020).

<sup>23</sup> Givens, *supra* note xx, at p. 1. State Department of Education of Louisiana, *Louisiana High School Standards Manual of Organization and Administration* (Section on Social Science Curriculum), Bulletin (Baton Rouge, LA: State Department of Education of Louisiana, July 1, 1929, Harvard Graduate School of Education, Gutman Library Special Collections).

<sup>24</sup> See e.g., South Carolina law, 40 1956 Session Laws of South Carolina, Act No. 741. 40 1956 Session Laws of South Carolina, Act No. 741. For instance, applications to teach in South Carolina’s Elloree school district included the following questions: (1) Do you belong to the NAACP; (2) Do you support the NAAACP in any way (money or attendance at meetings)?; (3) Do you favor integration of races in schools?; and (4) Do you believe in the aims of the NAACP?. It also states, “If you should join the NAACP while employed in this school, please notify the Superintendent and Chairman of the Board of Trustees.” Candace Cunningham, “Hell is Popping Here in South Carolina”: Orangeburg County Teachers and Their Community in the Immediate Post-*Brown* Era” 46 (2021) *History of Education Quarterly* Vol. 61(1) February 2021. See also, *The South Counterattacks: The Anti-NAACP Laws* Author(s): Walter F. Murphy Source: *The Western Political Quarterly*, Jun. 1959, Vol. 12, No. 2 (Jun., 1959), pp. 371-390.

<sup>25</sup> See e.g., ADAM HARRIS, *THE STATE MUST PROVIDE: WHY AMERICA'S COLLEGES HAVE ALWAYS BEEN UNEQUAL - AND HOW TO SET THEM RIGHT* (2021) (arguing that HBCUs are entitled to reparations for centuries of underfunding).

opposition to Black education. In many instances, there was a vigilante retort to Black education: Black schools were burned down.<sup>26</sup>

Professor Givens details how Black educators responded to these restrictive laws by creating alternative educational spaces and practices—a “fugitive pedagogy.”<sup>27</sup> African Americans developed systems of learning and education that worked around the existing oppressive political and educational framework, one that demeaned and minimized Black people’s intelligence,<sup>28</sup> Black people’s contributions to American life,<sup>29</sup> and Black life in general. In this hostile environment, Black people had to “snatch”<sup>30</sup> their education. This metaphor captures the laws that made literacy a crime for Blacks, which meant they had to hide their attempts to learn to read and write. It also captures the reality that education Blacks had access to was often fragmented and piecemeal. Further, to “snatch” describes how Black people have had to fight to learn and fight to tell the full history of race in America. Over centuries, the law has been used to disable Black literacy and minimize Black perspectives on American history.

### A. *Slave Codes & Black Laws as Prologue*

Educational practices that both minimize the role of Black people in the formation and building of the United States and deny Black literacy, are legacies of the slave codes. The slave codes are the starting point for analyzing how laws limited opportunities for Black literacy. Often, these laws were tied to religion and other social forces. Under the slave codes, state laws prescribed punishment for anyone engaged in activity that promoted literacy for enslaved Blacks. Punishment targeted enslaved Black people, free Black people, and White people.<sup>31</sup> The text of slave code legislation in eleven states, and the District of Columbia, demonstrates how laws were used to segregate and punish people who helped Blacks learn to read and write.<sup>32</sup> Black literacy was a threat to the institution of slavery. It held the potential to fill a person up with thoughts of freedom, rights, and justice.

In the 1700s, reading and writing, the core components of literacy, were viewed as separate and distinct skills.<sup>33</sup> During colonial times, in some places it was lawful for enslaved

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<sup>26</sup> These practices occurred during slavery and post-bellum. For instance, some states, such as South Carolina, had laws that rewarded informants who told authorities of schools for enslaved Blacks. *See e.g.*, E. JENNIFER MONAGHAN, *READING FOR THE ENSLAVED, WRITING FOR THE FREE: REFLECTION ON LIBERTY AND LITERACY* 335 (American Antiquarian Society 2000), <https://www.americanantiquarian.org/proceedings/44525153.pdf>. As well, from 1866 and 1876, more than 600 Black schools in the South were burned down. Harris, *supra* at 4.

<sup>27</sup> *Supra* at XX. *See infra* notes x-x for a detailed discussion of the types and role of alternative educational spaces.

<sup>28</sup> *See generally* Givens, *supra* note x.

<sup>29</sup> For example, the role of Black labor in building the U.S. economy.

<sup>30</sup> Givens, *supra* note xx, at 27 (quoting Carter G. Woodson, stating that the enslaved got their education by “snatching learning in forbidden fields”). The snatching metaphor is also found in the writings of Francis Ellen Watkins Harper, an abolitionist and teacher. She states that some enslaved Blacks “tried to steal a little from the book. And put the words together, and learn by hook or crook.”

<sup>31</sup> *See e.g.*, J. Clay Smith, *Justice and Jurisprudence and the Black Lawyer*, 69 NOTRE DAME L. REV. 1077 (1994). The Alabama Slavery Code of 1833 (Alabama Department of Archives and History) reads, “Any person who shall attempt to teach any free person of color, or slave, to spell, read or write, shall, upon conviction thereof by indictment, be fined in a sum not less than two hundred fifty dollars, nor more than five hundred dollars.”

<sup>32</sup> *Id.* at 1105-1113.

<sup>33</sup> *See* Monaghan, *supra* note x, at 316.

persons to learn to read.<sup>34</sup> In fact, “reading instruction” was viewed as an important way to spread Christianity.<sup>35</sup> The more people there were who could read, the more people there were who would have access to the Bible and its teachings.<sup>36</sup> Further, many Christians believed that the Bible authorized slavery<sup>37</sup> and facilitated docility.<sup>38</sup> In contrast, it was unlawful to teach an enslaved person how to write. This prohibition was viewed as a security measure to ensure that enslaved people could not write their own passes and thereby enable their own escape.<sup>39</sup>

In time, slave holders voiced louder objections to allowing any form of literacy for enslaved people. By the 1820s, slave-holding states began to view reading as a subversive activity.<sup>40</sup> This shift in perspective is explained by four interrelated factors: (1) Fears that enslaved persons would work together and plan their escape; (2) Concerns about the increased calls for abolition; (3) Fears that enslaved Black Christians would lead anti-slavery revolts;<sup>41</sup> and (4) Concerns about published writings by free Blacks speaking out against slavery.<sup>42</sup> The slaveholders’ responses were swift and certain. Beyond passing legislation that prohibited teaching enslaved persons to read or write, some states adopted laws that prohibited the writing, printing, and circulating of material that would “excite disaffection”<sup>43</sup>—material that might encourage enslaved persons to seek freedom or otherwise denounce slavery.<sup>44</sup> Notably these objections were anchored in concerns that enslaved Blacks would gain knowledge, directly or indirectly,<sup>45</sup> that would alter their world views. These are examples of bans against substantive literacy.

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<sup>34</sup> It is noted that there were many laws restricting the actions of enslaved people. For instance, in response to the 1739 Stono Rebellion, which took place in South Carolina, both South Carolina and Georgia enacted laws that limited enslaved Blacks’ access to canoes and horses (as possible means of escape). Monaghan, *supra* note xx at 317-318.

<sup>35</sup> See Monaghan, *supra* note x, at 314-316.

<sup>36</sup> *Id.* at 321.

<sup>37</sup> *Id.* at 324.

<sup>38</sup> *Id.* at 321.

<sup>39</sup> *Id.* at 317.

<sup>40</sup> Monaghan, *supra* note x, at 326.

<sup>41</sup> *Id.* at 326. See e.g., HERBERT APTHEKER, NAT TURNER’S SLAVE REBELLION (Dover Publications 2006). Other Blacks, some of whom had not been enslaved, initiated rebellions. See e.g., DAVID ROBERTSON, DENMARK VESEY: THE BURIED STORY OF AMERICA’S LARGEST SLAVE REBELLION AND THE MAN WHO LED IT (2000).

<sup>42</sup> Monaghan, *supra* note x at 326. See e.g., DAVID WALKER, APPEAL TO THE COLOURED CITIZENS OF THE WORLD (1829).

<sup>43</sup> *Id.*

<sup>44</sup> Louisiana enacted a very broad and punitive anti-literacy law. Beyond punishing anyone who taught reading and writing skills to enslaved people, the law stated that “any person using language in any public discourse from the bar, bench, stage, or pulpit, or any other place, or in any private conversation, or making use of any sign or actions having a tendency to produce discontent among the free colored population or insubordination among the slaves, or who shall be knowingly instrumental in bringing into the state any paper, book, or pamphlet having a like tendency, shall, *on conviction, be punishable with imprisonment or death, at the discretion of the court*” (emphasis added). U.S. v. Rhodes, 27 F. Cas. 785, 793 (C.C.D. Ky. 1866).

<sup>45</sup> In addition to gaining direct knowledge (e.g., reading), enslaved persons received information from preachers and from one another. Monaghan, *supra* notes, observes that slaveholders feared any gathering of enslaved persons could lead to revolt “Any congregation of slaves in one place was considered was considered a potential bonfire, and laws had long been passed that legislated against ‘unlawful assembly.’” *Id.* at 326-327. Unlawful assembly was interpreted to mean students meeting for school.”

Additional rationales were proffered to discourage and outlaw Black literacy. One narrative claimed that anti-literacy benefitted Blacks.<sup>46</sup> In 1831, an official of the American Colonization Society said that free and enslaved Black people were to be held “in the lowest state of degradation and ignorance.”<sup>47</sup> While some people suggested that degradation was in the best interests of enslaved people,<sup>48</sup> in fact degradation was an integral and intentional part of the maintenance of slavery. By design, enslaved persons were mistreated and denied rights so they could not ably fight against the chattel slavery system.

In 1829, Georgia made it unlawful for, “any slave, negro, or free person of colour or any white person from” teaching “any slave, negro, or free person of colour to read or write either written or printed characters.”<sup>49</sup> In 1830, Louisiana and North Carolina passed laws banning literacy instruction for enslaved people.<sup>50</sup> In 1834, South Carolina passed legislation making it unlawful for anyone to teach an enslaved person how to read or write. The anti-literacy prohibition extended beyond enslaved people to include anyone of color who taught a free Black person to read.<sup>51</sup> Under the law, whites could also face punishment, including a fine of \$100 or six months in prison. Unlike whites who violated the law, free people of color, could receive a punishment of fifty lashes (as well as a \$50 fine).<sup>52</sup>

Anti-literacy did not solely impact enslaved Blacks. Education was also blocked and discouraged for Blacks living in free states. Anti-literacy took effect through Black laws<sup>53</sup> that erected barriers for free Blacks to attain education.<sup>54</sup> In some instances, philanthropic organizations provided funding for schools and educational programs for free Blacks. The goal of these efforts was not Black equality. Some educational programs ostensibly designed to promote Black literacy in the 1800s were a ploy. For instance, the American Colonization Society along with other organizations supported a large-scale project to educate free Blacks.

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<sup>46</sup> Chris Span, *Learning in Spite of Opposition: African Americans and their History of Educational Exclusion in Antebellum America*, 131 COUNTERPOINTS 26 (2005).

<sup>47</sup> *Id.* at 30.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 333. Under the law, a Black teacher could be whipped or fined while a White person could face a \$500 fine and possible imprisonment. Georgia, Acts of the General Assembly of the State of Georgia (November and December, 1829 ((Milledgeville: Camak & Ragland, 1830. For a detailed look at the impetus for this law, see *Kim Tolley, Slavery and the Origins of Georgia's 1829 Anti-Literacy Act*, in MISEDUCATION: A HISTORY OF IGNORANCE MAKING IN AMERICA AND ABROAD 13-33 (2016).

<sup>50</sup> *Id.* at 333.

<sup>51</sup> *Id.*

<sup>52</sup> See e.g., JOHN BELTON O'NEALL, THE NEGRO LAW OF SOUTH CAROLINA (1848), [http://genealogytrails.com/scar/negro\\_law2.htm](http://genealogytrails.com/scar/negro_law2.htm).

<sup>53</sup> Black Laws are laws, rules and regulations adopted to control the economic and social access of Black people who lived in free states. *Black Codes*, HISTORY (Jan. 26, 2022), <https://www.history.com/topics/black-history/black-codes>. In 1804, Ohio was the first state to adopt a series of legal codes known as Black Laws. *Encyclopedia of Cleveland History: Black Laws*, CASE W. RESRV. UNIV., <https://case.edu/ech/articles/b/black-laws>. These laws set forth requirements for Blacks to live and work in the state, such as a \$500 bond to live in the state. *Id.*

<sup>54</sup> See e.g., Laws of Ohio, 27(1828-1829):72-73.

[N]othing in this act contained shall be so construed as to permit black or mulatto persons to attend the schools hereby established, or compel them to pay any tax for the support of such schools; but all taxes assessed on their property, for school purposes, in the several counties in this state, shall be appropriated as the Trustees of the several townships may direct, for the education of said black and mulatto persons therein, and for no other purpose whatever.

Schools would be constructed for free Blacks to attend. Once they were educated, they would be required to emigrate to Africa.<sup>55</sup>

It is noted that a number of states did not enact explicit anti-literacy codes.<sup>56</sup> However, Black people in those states (free or enslaved), were still routinely punished for attempting to learn to read or write, or for being found with implements of literacy. Historian E. Jennifer Monaghan observes, “[N]o matter where slaves lived, they invariably believed, and were encouraged to believe, that pursuing literacy skills was illegal.”<sup>57</sup> Even if a state did not have legislation prohibiting teaching and learning literacy, slave holders could still exact punishment against Blacks for engaging in actions believed to threaten the institution of slavery.<sup>58</sup> Regardless of the law on the books, whites had the ultimate authority to determine whether activities by Blacks were lawful or subject to sanction.<sup>59</sup>

Despite the harsh punishments, enslaved Black people continued to pursue literacy.<sup>60</sup> They stealthily and defiantly sought education<sup>61</sup> because they knew it was a pathway to freedom and eventually citizenship.<sup>62</sup> In fact, being able to read and write gave enslaved Blacks a language for expressing their living conditions. The inability to read or write meant enslaved people did not have words that gave voice to the breadth and depth of slavery’s harms. Illiteracy also made it less likely that they had a conceptual understanding of the depravity of enslavement.<sup>63</sup>

If the number of laws that punish a particular behavior is any indication of what a society fears, Black literacy has always been considered a threat to the status quo. Since the institution of the slave codes, laws have regulated all manner of African American literacy. The law has controlled both the education of Black people and education about Black people. The law has been both a shield and a sword. These slave codes offer a historical lens—a legislative mirror to hold up and assess the role of law in Black progress.

### B. *The Law as a Tool of Literacy*

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<sup>55</sup> See e.g., Vincent P. Franklin, *Education for Colonization: Attempts to Educate Free Blacks in the United States for Emigration to Africa, 1823-1833*, 43 J. NEGRO EDUC. 91 (1974).

<sup>56</sup> *Id.* at 338 (including Florida, Kentucky, Maryland, Missouri, and Mississippi).

<sup>57</sup> *Id.*

<sup>58</sup> Scholars have noted that there were relatively few court cases involving charges filed against someone for teaching literacy to Black people. See e.g., Case of Margaret Douglass. Douglass, a White woman, was fined for paying her daughter to teach free African Americans. Under the Virginia code, punishment was imprisonment up to six months and a maximum \$100 fine. *Id.* at 337, n. 54.

<sup>59</sup> In *Dred Scott v. Sandford*, Chief Justice Roger Taney stated that Black people, “had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.” 60 U.S. 393, 407 (1857).

<sup>60</sup> See e.g., Janet Cornelius, ‘We Slipped and Learned to Read’: *Slave Accounts of the Literacy Process, 1830-1865*, 44 PHYLON 171 (1983).

<sup>61</sup> See e.g., Derek W. Black, *Freedom, Democracy, and the Right to Education*, 116 NW L. REV. 1031, 1042-1044 (2022) (noting that Blacks went to “extraordinary lengths” to secretly learn and share their literacy with other Blacks).

<sup>62</sup> *Id.* at 1040.

<sup>63</sup> *Id.* at 1042.

After the Civil War, newly freed Black people initiated a movement for public school education and began opening schools and colleges for Black students. During Reconstruction they sought support from the Freedmen's Bureau<sup>64</sup> and Northern philanthropic groups. They were also aligned with Radical Republican lawmakers who favored public education. The push for universal education for Black people was not just to ensure that they could learn to read and write. Importantly, it also made re-enslavement much harder for Southern whites to accomplish.<sup>65</sup> It would be more difficult to deny rights to an educated Black community. After the Civil War, more than 100,000 Black people took steps to educate themselves.<sup>66</sup>

Newly-freed Blacks did what was necessary to ensure that members of their family, particularly their children, could attend school.<sup>67</sup> The schoolhouse has been described as a "fundamental vehicle,"<sup>68</sup> since education allowed Black students (children and adults) to disconnect themselves from slavery as they navigated closer towards freedom.<sup>69</sup> Black codes were the postbellum version of the slave codes. These state laws regulated all aspects of Black life, including educational attainment, such as whether Black people could attend school and if so, where and with whom.<sup>70</sup>

Following emancipation, Reconstruction brought the promise of new possibilities for Black life. The Freedmen's Bureau was established to address the needs of the people who had just received freedom. Black people engaged in widespread political organizing and activism. For instance, record numbers of Black men were registered to vote.<sup>71</sup> Reconstruction, however, was short-lived and laws designed to abolish Black literacy, Black education, and Black rights, again, ruled the day.<sup>72</sup> Following Reconstruction, the Black codes were revived. In case there was any doubt, the U.S. Supreme Court's decision in *Plessy v. Ferguson*<sup>73</sup> made "separate but equal" legal and enforceable.

The above discussion establishes the links between centuries of formal and informal laws and practices that were used to regulate basic and substantive forms of literacy. In fact, the slave codes, Black laws, Black codes, and their twentieth century version, Jim Crow<sup>74</sup>, represent

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<sup>64</sup> See e.g., Alton Hornsby, *The Freedmen's Bureau Schools in Texas, 1865-1870*, 76 SW. HIST. Q. 397 (1973).

<sup>65</sup> W.E.B. Du Bois stated, "Had it not been for the Negro school and college, the Negro would, to all intents and purposes, have been driven back to slavery." W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARDS THE HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880 667 (Library of America 2021). See generally David Tyack & Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South*, 94 Am. J. Educ. 236 (1986).

<sup>66</sup> See Black, *supra* note xx, at 1048.

<sup>67</sup> *Id.* at 1046.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See e.g., VIRGINIA WRITERS PROJECT, THE NEGRO IN VIRGINIA 237-247 (1940), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015009063051&view=2up&seq=262>. It is noted that the text refers to post-slavery laws mandating racial segregation as "Black Laws." *Id.* These are also known as "Black codes." "*Black Laws*" of 1861, 1864 and 1878, March 10, 1886, IOWA DEP'T CULTURAL AFFS., <https://iowaculture.gov/history/education/educator-resources/primary-source-sets/reconstruction/black>.

<sup>71</sup> See e.g., *Reconstruction in America: Racial Violence After the Civil War, 1865-1876*, EQUAL JUSTICE INITIATIVE (2020), <https://eji.org/report/reconstruction-in-america/>.

<sup>72</sup> See, e.g., ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (Harper Perennial 2014).

<sup>73</sup> 163 U.S. 537 (1896).

<sup>74</sup> "Jim Crow" legislation refers to a broad system of laws that managed Black access and movement across society. Jim Crow existed in various forms. This included facially neutral laws (e.g., separate but equal) that were applied in racially discriminatory ways. Jim Crow also refers to established racialized practices and social norms (how whites

variations on a theme—the criminalization of education for Black people. While these laws reflect bygone eras, newer versions of these laws have emerged to take their place. These contemporary versions are also anti-literacy laws. They determine which racial histories are allowable within the educational curriculum, how they may be taught, and *who* may be taught these histories. For instance, HB 7 dismisses the study of race and race-based theories as racist.<sup>75</sup> Anti-literacy laws limited not only the ideas and concepts that enslaved people were exposed to, these laws also limited the types of literature that Whites were allowed to read. For instance, material that was critical of slavery, such as the writings of abolitionists, was banned.<sup>76</sup> Thus, the criminalization of literacy to maintain the institution of slavery “pose[d] a pall of orthodoxy.”<sup>77</sup> Today’s anti-literacy laws are examples of how legislative restrictions on educational curricula may be misused to inculcate rather than educate students.<sup>78</sup>

“Lawfare,” a term typically used to describe how the law may be used as a weapon of war, has also been used to describe how the law has worked against the interests of Black people.<sup>79</sup> Law professor William Chin argues that the term—a combination of “warfare” and “law”—encapsulates how the law has historically regulated and restricted Blacks’ access to information.<sup>80</sup> In this way, laws operate as state tools of counterinsurgency against Black Americans.<sup>81</sup> Anti-literacy laws exemplify how the law can function as a form of social control and repression. In fact, anti-literacy laws ensured that a disproportionately high percentage of Black people were illiterate compared with Whites.<sup>82</sup> These laws are part of the foundation that enabled the use of literacy tests for voting.<sup>83</sup> These tests constructed barriers that made it

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referred to Black men and women by first name or how Black men were expected to step off the sidewalk when they encountered a white person on the street. As well, Jim Crow regulated Black people’s access to education. This included, among other things, which schools they could attend, which books they could use, who could teach Black students, and the curriculum that could be taught.

For an extensive compilation of race-related rules and laws by state, see Pauli Murray, *States’ Laws on Race and Color* (1997). The text includes a wide range of legislative material for forty-eight states (except Alaska and Hawaii) and the District of Columbia. It includes the text of state constitutions, state statutes, court decisions, state senate resolutions, and state compacts. The text features state laws that uphold racial separation as well as laws that prohibit racial discrimination.

<sup>75</sup> See H.R. 7, 124th Leg., Reg. Sess. (Fla. 2022) (adding to FLA. STAT. § 760.10(8)(a)). See e.g., Jonathan P. Feingold, *Reclaiming CRT: How Regressive Laws Can Advance Progressive Ends*, 73 S.C. L. REV. 723 (2021). Feingold observes that bills such as HB 7 (which he labels “Backlash Bills”), constitute “a modern manifestation of racially regressive lawmaking.” *Id.* at 737. He continues, “Just as lawmakers passed Black Codes and Jim Crow to reassert a pre-Civil War racial order, today’s Backlash Bills are designed, in part, to thwart any appetite for antiracist reform that emerged following the 2020 summer protests.” *Id.* at 15.

<sup>76</sup> See Black, *supra* note x, at 1061 (noting that post offices in South Carolina were required to turn over abolitionist writings, which were later burned).

<sup>77</sup> *Id.*

<sup>78</sup> See H.R. 7, 124th Leg., Reg. Sess. (Fla. 2022) (adding to FLA. STAT. § 760.10(8)(a)).

<sup>79</sup> William Y. Chinn, *Legal Inequality: Law, the Legal System, and the Lessons of the Black Experience in America*, 16 *Hastings Race Poverty L.J.* 109 (2019).

<sup>80</sup> *Id.*

<sup>81</sup> See William Y. Chinn, *Domestic Counterinsurgency: How Counterinsurgency Tactics Combined with Laws Were Deployed Against Blacks Throughout U.S. History*, 3 *U. MIAMI RACE SOC. JUST. L. REV.* 31 (2013).

<sup>82</sup> For a discussion of Black and White literacy rates post-Civil War, see ROBERT A. MARGO, *RACE AND SCHOOLING IN THE SOUTH: A REVIEW OF THE EVIDENCE* 6-32 (1990), <https://www.nber.org/books-and-chapters/race-and-schooling-south-1880-1950-economic-history/race-and-schooling-south-review-evidence>.

<sup>83</sup> See *South Carolina v. Katzenbach*, where the Supreme Court notes that beginning in 1890, most southern states made the ability to read and write a requirement to vote. 383 U.S. 301 (1966). The Supreme Court states, “these laws were based on the fact that, as of 1890, in each of the named States, more than two-thirds of the adult Negroes were illiterate, while less than one-quarter of the adult whites were unable to read or write” *Id.* at 311.

virtually impossible for Black men to exercise their newly granted right to vote under the Thirteenth Amendment.

In contemporary times, an evaluation of whether a law acts to enhance or impede literacy requires a consideration of its text and its stated goals, as well as the surrounding socio-legal-political conditions in which it exists. Indeed, sometimes laws touting literacy do not promote literacy. Historian E. Jennifer Monaghan says this:

From the perspective of history... governments promoting literacy through campaigns—or even just through universal education—have not necessarily done so with the view of promoting individual freedom. Rather, they have wished to inculcate their own political or religious agenda and promote social control.<sup>84</sup>

Professor Monaghan’s perspective offers a reflection point for evaluating Florida’s HB 7 and related laws. Anti-literacy laws and campaigns are, by design, geared to limit some groups’ exposure to forms of information and knowledge. Specifically, anti-literacy laws function to control the education Black students and other students of color receive, as well as the education that White students receive. An analysis of HB 7 requires an examination of the language of the law, the target of the law, and which actions the law prohibits and mandates. Unpacking the law will allow us to determine whether it is a tool that advances literacy or does something else.

Understanding the historical background of anti-literacy laws is essential to seeing how this past is tied to twenty-first century laws that deny the value of race-related knowledge. At both ends of the timeline, laws have been used to create voids in knowledge. In describing these laws, one scholar says that these laws represent government actions that foster the “structural production of ignorance.”<sup>85</sup> Specifically, Part II buttresses this history by identifying theories that explain how race and perceptions of race impact the enactment of legislation and policies. The racial threat hypothesis and CRT provide insightful analytical frameworks.

## II. APPLYING THEORETICAL ANALYSES TO ANTI-LITERACY LAWS

This Part provides theoretical frameworks for examining how race impacts the enactment of education laws and policies related to race. The focus is on theories or approaches that explain how legislation is enacted to “answer”—either through silence or amplification—Black voices that question or reject mainstream analyses of history. The racial threat hypothesis and CRT approaches are used as frames for this discussion. These theoretical approaches allow for a broad legal, sociological, and political assessment of HB 7. Through critique and investigation, each framework creates space for a deeper understanding of the values and concerns that are reflected in HB 7.

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<sup>84</sup> Monaghan, *supra* note xx, at 310.

<sup>85</sup> Tolley, *supra* note x, at y.

## A. Racial Threat

Over decades, the racial threat hypothesis has been a sociological mainstay. This theoretical paradigm, developed by sociologist Hubert Blalock, has been used to analyze whether an increase in the size of the Black population causes whites to perceive Blacks as more threatening and make them more likely to support harsher criminal sanctions.<sup>86</sup> Racial threat predicts that whites will interpret an increase in the number of Black people (and other people of color) as a challenge to their social and economic positions. Further, when whites believe that Blacks and other people of color pose a threat to dominant White interests, they respond by adopting harsher criminal sanctions.<sup>87</sup> There are three types of racial threat—economic, political, and symbolic.<sup>88</sup> The increased support for criminal punishment is designed to reduce the socio-political power of groups of color.

Racial threat theory offers an expansive (though not perfect) framework for asking how whites' perceptions of Blacks' presence as a threat may impact the passage of anti-literacy legislation.<sup>89</sup> The application of racial threat to anti-Black education laws is a reasonable and important extension of the racial threat hypothesis. First, this expanded analysis allows for a more comprehensive look at white perceptions that Blacks pose a threat to white interests. The impact of these perceptions are not confined to the criminal legal system.<sup>90</sup> Second, it allows the racial threat thesis to encompass legislation on education policy, which like criminal punishment is a form of state control. Sociologist Cindy Brooks Dollar describes racial threat theory:

[It]... proposes that racialization occurs when Whites use their disproportionate power to implement state-control over minorities and, in the face of a growing minority population, encourage more rigorous, racialized practices in order to protect their existing power and privileges.<sup>91</sup>

Third, while analyses of the racial threat hypothesis have primarily operationalized racial threat as an increasing Black demographic, this is not the only articulation of racial threat. Notably, not

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<sup>86</sup> See Blalock, *supra* note x, at xx.

<sup>87</sup> See Ryan D. King & Darren Wheelock, *Group Threat and Social Control: Race, Perceptions of Minorities and the Desire to Punish*, 85 SOC. FORCES 1255, 1272 (2007) (showing that White perceptions that Blacks pose an economic threat (resource drain), predicts punitive attitudes. The perceived threat is tied to the increase in size of the Black population).

<sup>88</sup> *Id.*

<sup>89</sup> Law professor Pamela Karlan's analysis of the "new countermajoritarian difficulty" overlaps with the concept of racial threat. Symposium, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. 6 (2021), <https://www.californialawreview.org/print/the-new-countermajoritarian-difficulty/>. Notably, there are features of the U.S. political system that are not based in majoritarian rule, such as the U.S. Senate and the Electoral college. The workings of these systems are partly influenced by racial demographics, including increasing and concentrated numbers of people of color in particular geographical areas. Despite the declining white population numbers, the mainstream institutions, including the U.S. Supreme Court continue to protect mainstream white interests. For additional comments on *The New Countermajoritarian Difficulty*, see notes, *infra* xx-xx. See also, Symposium, *Countering the Real Countermajoritarian Difficulty* 109 CALIF. L. REV. (2021), <https://www.californialawreview.org/print/countering-the-real-countermajoritarian-difficulty/>.

<sup>90</sup> The three constituent parts of the criminal legal system are police, courts, and corrections. With the goal of broadening and linking understandings of punishment, many researchers and practitioners use the term "carceral." See e.g., Dorothy E. Roberts, *Digitizing the Carceral State* 132 HARV. L. REV. 1695 (2019).

<sup>91</sup> Cindy Brooks Dollar, *Racial Threat Theory: Assessing the Evidence, Requesting Redesign*, 2014 J. CRIMINOLOGY 1 (2014).

all understandings of racial threat are based on an increase in the number of Black people in a particular demographic area. Some researchers have analyzed racial threat based on the size of the Black population.<sup>92</sup> For instance, in his research on racial threat, sociologist Scott Duxbury notes that where there is a large Black population, that alone (regardless of whether the Black population increases over time), may lead to the passage of harsher sentencing outcomes:

Despite little substantial growth in the black population during mass incarceration, the political and economic empowerment of black populations via Civil Rights progress, combined with large black populations in many states, likely posed a pronounced threat to white populations, driving states to adopt punitive sentencing laws.<sup>93</sup>

This is an important reconsideration of how perceptions of Black racial threat manifests in white action. Duxbury expands the definition of “threat” beyond meaning an increase in the Black population in a particular geographical area. Instead, the perception of Black racial threat may be measured instead by the increased presence of Black people in traditionally White spaces. These spaces include televisions programs, movies, commercials, books, videos, videos games, billboard advertisements, newspaper stories, awards programs, magazine covers, and social media sites. Importantly, this heightened Black presence shows up not only as entertainment but also as legal and journalistic expertise, as forms of social protest (e.g., Black Lives Matter), as nationally recognized holidays focused on African Americans (e.g., Juneteenth), and as widely celebrated observances of Black achievement (e.g., Black History Month).

Overall, the racial threat thesis offers an insightful approach for analyzing how laws are used to respond to perceived racial threats.<sup>94</sup> The political, social, and economic empowerment of Black citizens and their increasingly public voice, via social protest movements, combined with a sizeable Black population,<sup>95</sup> poses a threat to mainstream narratives. The perception that Black people constitute a social threat reflects both the hyper-visibility of Black people in the mainstream media and their hyper-invisibility in sanctuaries of power (e.g., politics, business). HB 7 reflects this dynamic. HB 7 and other laws arrived on the heels of massive national and international protests in the wake of George Floyd’s murder, the rise of the Black Lives Matter movement, demands for corporations and universities to address and teach about explicit and implicit forms of racial bias and anti-Black racism. HB 7 is a legislative reply to a perceived

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<sup>92</sup> See e.g., Kelly Welch & Allison Anne Payne, “Racial Threat and Punitive School Discipline,” *Social Problems* Vol. 57, No. 1 (February 2010), pp. 25-48; Ryan D. King & Darren Wheelock, “Group Threat and Social Control: Race, Perceptions of Minorities and the Desire to Punish” (2007) *Social Forces*, Vol. 85 (3) (March 2007), p. 1255; Michael M. O’Hair, *A Tale of Three States, Part 4: The Racial Threat Hypothesis* (2011) <https://law.marquette.edu/facultyblog/2011/12/a-tale-of-three-states-part-4-the-racial-threat-hypothesis/>

<sup>93</sup> Scott W. Duxbury, *Who Controls Criminal Law? Racial Threat and the Adoption of State Sentencing Law, 1974-2012*, 86 *American Sociological Rev.* 123 (examining 230 state-level sentencing policy changes that took place from 1975 to 2012).

<sup>94</sup> Researchers have identified criticisms of the research on racial threat. One critique is that the research has not adequately established (1) that White and Blacks have different punitive philosophies (e.g., different political preferences and social policy beliefs) and (2) that the philosophy Whites adopt rules the day. As well, some researchers have noted that few studies articulate the connection between a states’ criminal punishment laws and the size of its African American population. See *supra* note x. Scott W. Duxbury, *Who Controls the Criminal Law? Racial Threat and the Adoption of State Sentencing Law, 1975-2012*, 86 *AM. SOCIO. REV.* 123, 124-126 (2021).

<sup>95</sup> For 2021, the U.S. Census estimates Florida’s Black population at seventeen percent. <https://www.census.gov/quickfacts/FL>

Black threat—a Black insurgency into previously all-white domains, including the schoolhouse curriculum.

### B. *Critical Race Theory*<sup>96</sup>

Law professor Derrick Bell, one of the founders of CRT, identified the concept of interest-convergence.<sup>97</sup> It describes the conditions that are minimally necessary for racial progress to take place. Professor Bell states, “The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”<sup>98</sup> In contrast, interest divergence takes place when powerful groups of white people decide that racial retrenchment is preferable, previous advances may be undone.<sup>99</sup> Professor Bell concluded that the law is not an elixir for racial oppression.<sup>100</sup> Instead, depending on racialized interests, the law can act as either an ally or an enemy of Black progress.<sup>101</sup> The concepts of interest-convergence and interest-divergence provide contextualization for laws such as HB 7. They mark the legal pendulum swings between racial reform and racial retrenchment. A look at how scholars have applied CRT and other critical approaches to race and educational policies, provides important grounding for evaluating anti-literacy laws.

Sociologist David Gillborn’s research examines how changes in education policy are influenced by race.<sup>102</sup> He uses a CRT lens to discuss the multiple sites/locations for educational policy and how they reinforce the status quo.<sup>103</sup> Gillborn analyzes the 2010 Arizona law that imposed a state-wide ban on teaching ethnic studies.<sup>104</sup> He finds that the challenges to the ethnic studies program was a rejection to viewing people as part of an ethnic group. The ban demanded

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<sup>96</sup> For general background and foundational CRT scholarship, see KIMBERLE CRENSHAW ET AL., *THE KEY WRITINGS THAT FORMED THE MOVEMENT* (New Press 1995), and RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (NYU Press 2017).

<sup>97</sup> Derrick Bell, “*Brown v. Board of Education* and the Interest-Convergence Dilemma,” *Harvard Law Review*, 518-533 (1980).

<sup>98</sup> *Id.* at 523.

<sup>99</sup> *Id.* at 528 (discussing *Brown v. Board of Education*, Bell states, “Further progress to fulfill the mandate of *Brown* is possible to the extent that the divergence of racial interests can be avoided or minimized”).

<sup>100</sup> DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992). Early in his legal career, law professor Bell believed that putting progressive laws in place, ones that protected and enforced Black people’s right to vote and guaranteed civil rights protections, would substantially improve Black life. *Id.* After civil rights legislation was passed (e.g., 1964 Civil Rights Act and the 1965 Voting Rights Act) and favorable decisions by the U.S. Supreme Court (e.g., *Brown v. Board of Education*), professor Bell observed that core racial disparities were still present. *Id.* New laws and new decisions did not solve the problem. This analysis inspired professor Bell’s “permanence of racism” thesis. *Id.*

<sup>101</sup> Law professor Lani Guinier’s work expounds on the concept of “interest-divergence.” Lani Guinier, *From Racial Liberalism*, 91 *J. Am. Hist.* 92 (2004) (noting that differences in background (e.g., race and class) may make some groups less likely to join together).

<sup>102</sup> See Gillborn, *supra* note xx.

<sup>103</sup> *Id.* Gillborn summarizes sociologist Stephen Ball’s expansive conception of education policy this way: [It includes] multiple sites or contexts where policy is produced, contested, or reshaped and forms discourse, including texts and ways of speaking about particular issues and possibilities for action. This perspective includes the widest possible spectrum of policy, from pieces of national (and international) legislation through to informal institutional practices.

*Id.* at 27-28.

<sup>104</sup> Gillborn’s article also analyzes the English baccalaureate degree and how it reinforced existing racial inequalities. *Id.* at 32-36.

an educational focus on individuals.<sup>105</sup> Ironically, the anti-ethnic studies law was designed to protect Whites—as a group—from resentment and guilt.<sup>106</sup> Gillborn determines that education policy is best understood, “not as a mechanism that delivers progressively greater degrees of equity, but a process shaped by the interests of the dominant white population.”<sup>107</sup> Gillborn concludes that interest-divergence clarifies how political progress for Blacks (and other people of color), is framed as a threat to white racial interests. Using this lens, HB 7 and other legislative challenges to educational policies that support racially diverse perspectives and histories, are best viewed as part of an ongoing campaign to thwart racial progress.

Applying CRT to anti-CRT and anti-literacy laws such as HB 7, enables a nuanced understanding of how anti-CRT efforts have been employed to divert steps toward racial equity and equality. Scholars have used the principles of CRT to uncover the structures and narratives that support anti-CRT efforts. This research examines the mechanisms and patterns of racial progress, including positive reform efforts that are typically followed by retrenchment. One step forward and two steps back.<sup>108</sup>

Law professor Vivian Hamilton provides a trenchant analysis of the anti-CRT movement.<sup>109</sup> She explores the CRT/anti-CRT debate as a recent example of the “reform/retrenchment dialectic.”<sup>110</sup> Beyond a detailed look at the spark for the anti-CRT movement,<sup>111</sup> she shows how anti-CRT advocates reframed CRT as a racist educational movement. For example, anti-CRT advocates view discussions of race as problematic, preferring instead to focus on “colorblindness” and equal opportunity. As professor Hamilton notes, “[O]pponents of reform equate race consciousness in the service of advancing racial equity with race consciousness used to oppress.”<sup>112</sup> Put another way, colorblindness is good; race consciousness is bad. Opponents of CRT say that they seek to address the “indoctrination” or “inculcation” of students. However, claims that there are instructors explicitly telling students how and what they should think are anecdotal.<sup>113</sup> To date, no available empirical research validates these claims. Further, none of the cases cited involve a university or college level classroom.<sup>114</sup>

After civil rights victories or other steps denoting racial progress,<sup>115</sup> there is often a

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<sup>105</sup> For instance, the legislation prohibited courses that “advocate ethnic solidarity instead of the treatment of pupils as individuals.” H.R. 2281, 49th Leg., 2d Reg. Sess. (Ariz. 2010), <https://www.azleg.gov/legtext/49leg/2r/bills/hb2281s.pdf>.

<sup>106</sup> See Gillborn, *supra* note x.

<sup>107</sup> *Id.* at 28.

<sup>108</sup> There are various versions of this expression: one step forward, two steps back; two steps forward, two steps back; or two steps forward, three steps back. The point to be underscored is that it that progress is not linear, is not always forward moving, and sometimes moves in either direction may come in small or large steps.

<sup>109</sup> See e.g., Hamilton, *supra* at xx..

<sup>110</sup> Devon W. Carbado, *Critical What What? Commentary: Critical Race Theory: A Commemoration: Afterword*, 43 CONN. L. REV. 1593 (2011).

<sup>111</sup> See, Hamilton *supra* note xx, at 72-76.

<sup>112</sup> *Id.* at 64.

<sup>113</sup> See e.g., News Release, Office of Ron DeSantis 46th Governor of Florida, Governor DeSantis Emphasizes Importance of Keeping Critical Race Theory Out of Schools at State Board of Education Meeting (June 10, 2021), <https://www.flgov.com/2021/06/10/governor-desantis-emphasizes-importance-of-keeping-critical-race-theory-out-of-schools-at-state-board-of-education-meeting/>.

<sup>114</sup> *Id.*

<sup>115</sup> Examples include the naming of a federal holiday, passage of progressive civil rights legislation, a presidential executive order, or a U.S. Supreme Court decision.

“backlash.” The term applies to legal actions designed to rollback advances in racial justice, with the goal of retrenchment. This includes legislative bills that target and condemn any educational focus on race that is critical of the country’s founding documents and practices. Law professor Jonathan Feingold refers to these collectively as “Backlash Bills.”<sup>116</sup> Approximately 200 of these bills have been filed since 2021.<sup>117</sup> While there are different types of Backlash Bills, professor Feingold determines that as a group they can be classified as “racially regressive lawmaking.”<sup>118</sup> He defines these as legislative efforts intended to “stymie, roll-back, or otherwise obstruct efforts to realize a more racially egalitarian society.”<sup>119</sup> In this way, Backlash Bills are a contemporary iteration of the slave codes, Black laws, Black codes, and Jim Crow laws—all of which criminalized Blackness. These laws controlled racial movement, racial etiquette, and racial order. Today’s Backlash Bills were intentionally written as counterattacks to the 2020 racial protests around the nation.<sup>120</sup> Professor Feingold argues that the seemingly race-neutral language of these laws (in contrast to the language of the slave codes Black codes, and Jim Crow laws), can be turned on their heads. For instance, he says, CRT writings can be used to address and contextualize race-related course subjects, in ways that comply with the language of anti-CRT laws.<sup>121</sup>

Political scientist Vesla Weaver’s concept of “frontlash” presents an important and unusual vantage point for observing and understanding the political responses to racial threats.<sup>122</sup> Her focus is on understanding the widespread adoption of punitive policies in the U.S. criminal legal system—which have had a racially-disproportionate impact on Black people. Professor Weaver states:

Frontlash is preemptive, innovative, proactive, and, above all, strategic. Here, elites aim to control the agenda and resist changes through the development of a new issue and appropriation and redeployment of an accepted language of norms.<sup>123</sup>

As an example of frontlash, professor Weaver cites the 1930s rise in anti-communism following the popularity of unions. The groups most threatened by this allegiance (conservative legislators and business leaders), worked together to disable the labor movement by linking it to communism.<sup>124</sup> It is not clear whether laws such as HB 7 classify as frontlash. Legislation

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<sup>116</sup> See Feingold, *supra* note x. Feingold states that since 2020, “GOP officials have nearly 200 bills designed to chill classroom discussion of race, racism and related topics.” *Id.* at 7.

<sup>117</sup> *Id.* at 7. For updated numbers on these bills, see UCLA’s [UCLA's CRT Forward Tracking Project](#) or [PEN America](#).

<sup>118</sup> *Id.* at 14.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 15.

<sup>121</sup> *Id.* at 27-29. Feingold presents a hypothetical involving a social studies class. In a section on corporate America, students are provided with race/gender data of top CEOs. *Id.* According to the numbers, White men who are approximately 35 percent of the population make up 85 percent of the CEOs. *Id.* White women account for 85 percent of female CEOs. *Id.* To contextualize this material, Feingold suggests that the instructor could assign, for example, Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993). This would be in compliance with a bill that prohibits “teaching that one race or sex is inherently superior to another race or sex.” Feingold, *supra* note xx, at 28. For a discussion of a similar provision in HB 7, see *infra*, notes xx-xx. Part III: The Stop WOKE Act.

<sup>122</sup> See Weaver, *supra* note x, at xx.

<sup>123</sup> *Id.* at 238.

<sup>124</sup> *Id.* at 238-239.

proposed in response to a handful of incidents<sup>125</sup> appears to fit squarely within the traditional backlash narrative.

It may be, however, that the tsunami of anti-CRT bills introduced within the same legislative period (e.g., Backlash Bills discussed above), may be categorized as frontlash. The concept of frontlash is a valuable interpretive tool for evaluating the range of proactive, dynamic, and systemic processes that are energized by threats of racial change. The feared change could be an increase in a particular racial group's population size, an increase in political power, an increase in their media presence, or an increase in a racial group's cultural relevance. The frontlash might refer to legislative, executive or judicial actions.<sup>126</sup> While professor Weaver's discussion does not explicitly reference CRT, her frontlash concept fits within a CRT analytical framework. Frontlash gives a name to a socio-political-legal process that holds racial progress at bay by spreading a narrative that it poses a social threat.<sup>127</sup>

CRT provides a paradigm for analyzing the emergence of HB 7 and related laws. Its framework allows for an evaluation of whether HB 7 is more accurately categorized as a reaction to racially progressive movements (e.g., Black Lives Matter) or as a preemptive action designed to maintain the status quo.<sup>128</sup> Notably, the racial threat hypothesis and frontlash discussed above exist at opposite ends of the analytical continuum. The racial threat thesis examines whether whites' perceptions of an increase in the Black population is perceived as a threat and activates harsher criminal punishments. In contrast, frontlash examines how the law is used as a proactive measure to ensure racial order in the criminal legal system.

The goals of HB 7 and its legislative kin,<sup>129</sup> whether characterized as frontlash or

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<sup>125</sup> See e.g., News Release, Office of Ron DeSantis 46th Governor of Florida, Governor DeSantis Announces Legislative Proposals to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations, (Dec. 15, 2021), <https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/> (listing "national examples of Critical Race Theory," but the news release does not list any examples in Florida).

<sup>126</sup> See Karlan, *supra* note x, at x for a rich and prescient analysis of the U.S. Supreme Court's countermajoritarian decision-making in light of the country's changing racial demographics. Professor Karlan discusses how both the U.S. Senate and the Electoral college "are assisting a shrinking white conservative, exurban numerical minority to exert substantial control over the national government and its policies." *Id.* at 2325. After examining the ways in which race and racism have been historically embedded in the work of the electoral college and the Senate, Karlan states:

[T]he countermajoritarian effects on the Electoral College are, even more than in the Senate, inflected by race. The constitutional formula for allocating electoral votes has always 'sat atop' the base for allocating House seats—in the original Constitution, a base embodying the infamous, three-fifths clause.

*Id.* at 2342. The countermajoritarian reaction may meet professor Weaver's definition of frontlash. As described by professor Karlan, countermajoritarian rule is not reactive because it already exists and thus is already in action. *Id.*

<sup>127</sup> For another example of categorization of that might be considered frontlash, see Jon D. Michaels & David L. Noll, *Vigilante Federalism*, CORNELL L. REV. (forthcoming 2022). They state:

Rights suppressing laws are more than simply the conservative counterpart to progressive private enforcement regimes. And they're more than a way to insulate attacks on fundamental rights from constitutional scrutiny. They are also, if not centrally, an effort to reframe power in America, restructure intergovernmental, intergroup, and interpersonal relations, and advance an illiberal partisan political agenda.

*Id.* at 25.

<sup>128</sup> The better view may be that HB 7 and related laws are both reactive and preemptive.

<sup>129</sup> See *infra* notes x-x.

backlash are clear. These laws can be said to address what scholar W.E.B. Du Bois identified as the problem of the twentieth century: the color line.<sup>130</sup> HB 7 and related laws, have spawned the curriculum version of a “law and order” campaign. In this campaign, the main characters have been identified: the threatened harm (CRT indoctrination), the victims (students, taxpayers), the hero (tough state laws). Further, CRT opponents have attempted to repackage CRT so that it appears to be a racial threat—seemingly akin to a hate crime—that the law must punish. With the above context in mind, the next Part provides a detailed look at HB 7.

### III. THE STOP WOKE ACT:<sup>131</sup> LEGISLATION, SANCTIONS, QUESTIONS, AND COMPANION LEGISLATION

On July 1, 2022, HB 7, the Stop WOKE Act became law in the state of Florida.<sup>132</sup> The law rewrites a wide swath of the state’s educational curriculum, from kindergarten through higher education. The bill has a two-prong focus, instruction, and employment in the state of Florida. HB 7, formerly titled, “An act relating to individual freedom,” states:

[S]ubjecting any individual, as a condition of employment, membership, certification, licensing, credentialing, or passing an examination, to training, instruction, or any other required activity that espouses, promotes, advances, inculcates, or compels such individual to believe specified concepts constitutes discrimination based on race, color, sex, or national origin.<sup>133</sup>

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<sup>130</sup> W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 13 (1903).

<sup>131</sup> The expression, “woke,” is rooted in a metaphor that assesses how “awake” a person is based on their awareness and understanding of an issue—typically one involving racial or social justice. Thus, if a person is particularly knowledgeable and socially aware about a topic, they may be described as “woke.” Being “woke” may also refer to someone who knows that there is more to a news story than what has been reported in the news. Examples could include the conclusion that the 1980s inner-city crack problem was a function of both local community actors and the infiltration of crack cocaine into those communities from outside forces. Being “woke” could also refer to the conclusion that police killings of African Americans are not simply a problem of “bad apples.”

This terminology has longstanding cultural resonance in African American communities. Harold Melvin and the Blue Notes’ 1975 song, “Wake Up Everybody,” begins with lyrics, “Wake up everybody no more sleeping in bed. No more backward thinking, time for thinking ahead.” (Songwriters John Whitehead, Gene McFadden, and Victor Carstarphen). Spike Lee’s 1988 movie *School Daze* closes with a main character yelling “Wake Up!” In each of his subsequent films, Lee has had a character say, “Wake up.” Black leader Malcolm X had an exhortation, “Wake up, clean up and stand up.” <https://www.youtube.com/watch?v=z5JEhmrJcJs> The Stop WOKE Act uses “woke” to mean “anti-woke.” The legislation transforms “woke” into an acronym to match its intended target. This is a kind of legislative gauntlet throwing—attempting to disappear a term by ridiculing and redefining the term. A statement by Florida’s governor Ron DeSantis underscores this point, “I ... want Florida to be known as a brick wall against all things ‘woke’ ... This is where ‘woke’ goes to die.” Tim Craig, *Florida legislature passes bill that limits how schools and workplaces teach about race and identity*, WASH. POST. (Mar. 10, 2022), <https://www.washingtonpost.com/nation/2022/03/10/florida-legislature-passes-anti-woke-bill/>.

<sup>132</sup> The legislation, proposed by Governor Ron DeSantis was passed by a 24-15 state senate vote. H.R. 7, 124th Leg., Reg. Sess. (Fla. 2022).

<sup>133</sup> *Id.* (adding to FLA. STAT. § 760.10(8)(a)).

As to post-secondary education, the Act identifies and prohibits the teaching of specific race-related concepts.<sup>134</sup> These concepts are detailed and analyzed in this section, with a particular focus on university-level instruction. The Florida Board of Governors defines “instruction” as “the process of teaching or engaging students with content about a particular subject by a university employee or person authorized to provide instruction by the university within a course.”<sup>135</sup> The first legal challenge to the law was filed in April 2022. In *Falls v. DeSantis*, five plaintiffs and amici,<sup>136</sup> requested a preliminary injunction against the law.<sup>137</sup> In June 2022, Chief U.S. District Judge Mark Walker denied the request for an injunction for all but one of the plaintiffs.<sup>138</sup>

This Part examines the sections of HB 7 that addresses post-secondary classroom learning related to race. After a look at the pertinent sections, there is a presentation of seven hypothetical scenarios. These scenarios draw out the ambiguity and problematic dictates of the Act. This is followed by a discussion of who may pursue legal or administrative action under the law and the range of punishments available for HB 7 violations. The final section places the Stop WOKE law into a larger legislative context. It examines other Florida laws that complement and bolster the force of HB 7. Together, these laws create a web of reinforcement around HB 7 and strengthen its power as an anti-literacy law.

#### A. *HB 7 Prohibitions & Sanctions*

Under HB 7, it constitutes discrimination to subject any student or employee to instruction or training that “espouses, promotes, advances, inculcates, or compels such student or employee to believe any of the following concepts:”<sup>139</sup>

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<sup>134</sup> HB 7 includes language stating it is applicable to “K-20.” This means the law covers kindergarten through postsecondary education. See, Florida Statute, Section 1000.04:

Florida’s Early Learning-20 education system provides for the delivery of early learning and public education through publicly supported and controlled K-12 schools, Florida College System institutions, state universities and other postsecondary educational institutions, other educational institutions, and other educational services as provided or authorized by the Constitution and laws of the state.

Fla. Stat. § 1000.04 (2022), [http://www.leg.state.fl.us/Statutes/index.cfm?App\\_mode=Display\\_Statute&URL=1000-1099/1000/Sections/1000.04.html#:~:text=1000.04%20Components%20for%20the%20delivery,Early%20Learning%2D20%20education%20system](http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&URL=1000-1099/1000/Sections/1000.04.html#:~:text=1000.04%20Components%20for%20the%20delivery,Early%20Learning%2D20%20education%20system).

<sup>135</sup> See Florida Board of Governor’s Notice of Proposed New Regulation, Prohibition of Discrimination in University Training or Instruction, 10.005 (July 1, 2022), <https://www.flbog.edu/wp-content/uploads/2022/07/10.005NoticeofNewProposedRegulationJune2022.pdf>.

<sup>136</sup> Two *amicus curiae* briefs were filed in the case. See Brief for The Southern Poverty Law Center’s Learning for Justice as Amicus Curiae, *Falls v. DeSantis*, No. 4:22cv166-MW/MJF, 2022 U.S. Dist. LEXIS 112596 (N.D. Fla. June 27, 2022), [https://www.splcenter.org/sites/default/files/falls\\_v.\\_desantis\\_22-cv-00166\\_ecf\\_no.\\_35-1\\_proposed\\_amicus\\_of\\_lfj\\_and\\_ffrp.pdf](https://www.splcenter.org/sites/default/files/falls_v._desantis_22-cv-00166_ecf_no._35-1_proposed_amicus_of_lfj_and_ffrp.pdf) (arguing that the bill violates the First Amendment prohibitions against content-based speech laws); Brief for The American Psychology Association’s Division of Educational Psychology as Amicus Curiae, *Falls v. DeSantis*, No. 4:22cv166-MW/MJF, 2022 U.S. Dist. LEXIS 112596 (N.D. Fla. June 27, 2022) (arguing that the Act violates the First Amendment and is unconstitutionally vague in violation of the Fourteenth Amendment).

<sup>137</sup> *Falls v. DeSantis*, No. 4:22cv166-MW/MJF, 2022 U.S. Dist. LEXIS 112596 (N.D. Fla. June 27, 2022).

<sup>138</sup> Judge Mark Walker did not rule on plaintiff Robert Cassanello’s request for an injunction. *Id.* He later ruled that standing had been established for plaintiffs Robert Cassanello, Donald Falls, Jill Harper, and “RMJ,” but had not for Tammy Hodo. *Id.* Judge Walker also dismissed Governor DeSantis as a defendant. *Id.*

<sup>139</sup> H.R. 7, 124th Leg., Reg. Sess. (Fla. 2022).

1. Members of one race, color, national origin, or sex are morally superior to members of another race, color, national origin, or sex.
2. A person, by virtue of his or her race, color, national origin, or sex is inherently racist, sexist, or oppressive, whether consciously or unconsciously.
3. A person's moral character or status as either privileged or oppressed is necessarily determined by his or her race, color, national origin, or sex.
4. Members of one race, color, national origin, or sex cannot and should not attempt to treat others without respect to race, color, national origin, or sex.
5. A person, by virtue of his or her race, color, national origin, or sex bears responsibility for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other members of the same race, color, national origin, or sex.
6. A person, by virtue of his or her race, color, national origin, or sex should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion.
7. A person, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin or sex.
8. Such virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were created by members of a particular race, color, national origin, or sex to oppress members of another race, color, national origin, or sex.<sup>140</sup>

After listing the above eight sections, the text includes the following proviso regarding the above prohibitions:

[It] may not be construed to prohibit discussion of the concepts listed therein as part of a larger course of training or instruction, provided such training or instruction is given in an objective manner without endorsement of the concepts.<sup>141</sup>

A wide range of punishments is available for HB 7 violations. Sanctions include both administrative relief and court action. Violations constitute actionable discrimination under the

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<sup>140</sup> *Id.*

<sup>141</sup> The text states that this language refers to "paragraph (a)" which includes the eight parts already listed. at p. 11.

Florida Civil Rights Act (FCRA)<sup>142</sup> and the Florida Educational Equity Act. A complaint can be filed with the Florida Commission on Human Relations (FCHR).<sup>143</sup>

The law allows for a private cause of action that could entitle a successful complainant to injunctive relief, back pay, and compensatory damages up to \$100,000. This amount covers loss of dignity, mental anguish, and punitive damages. Where a state employee is found to have violated the law, she may be discharged from her position.<sup>144</sup> Further, the Attorney General may initiate a civil action (for injunctive relief, damages, or civil penalties), for costs up to \$10,000 per violation. This is permissible when the Attorney General has reasonable cause to believe that an individual or a group has engaged in discrimination or been discriminated against under HB 7.<sup>145</sup>

At the end of the 2022 legislative session, Florida lawmakers introduced a “conforming” bill.<sup>146</sup> Under Senate Bill 2524, a university is ineligible for performance funding if it has a “substantiated violation” of HB 7.<sup>147</sup> A violation could cost a university or college tens of millions of dollars in annual funding. Violations are determined by a “court of law, a standing committee of the legislature, or the Board of Governors.”<sup>148</sup> A violation renders the institution ineligible for performance funding in the subsequent fiscal year.<sup>149</sup>

The Florida Board of Governors’ regulations for HB 7 establish a new institutional infrastructure designed to monitor and punish alleged violations of the law. This framework makes clear that HB 7 represents a dramatic institutional shift in how race is managed in college and university classrooms in the state of Florida. The Board’s regulations require that each university adopt a regulation that prohibits the forms of discrimination delineated in HB 7.<sup>150</sup> Universities are also required to post the regulation on their websites (with other regulations).<sup>151</sup> Further, the Board regulations require that when administrators receive complaints, they must be forwarded to the office designated for these complaints.<sup>152</sup> It will then be determined whether the complaint is credible. If it is found that there has been instruction (or training) in violation of the

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<sup>142</sup> The Florida Civil Rights Act, FLA. STAT. §§ 760.01 – 760.11,

[http://www.leg.state.fl.us/statutes/index.cfm?App\\_mode=Display\\_Statute&URL=0700-0799/0760/0760.html](http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0700-0799/0760/0760.html).

<sup>143</sup> A complaint can also be initiated by the state attorney general, the Florida Commission on Human Relations (FCHR) or the FCHR commissioner. *See generally What We Do*, FLA. COMM’N ON HUM. RELS., <https://fchr.myflorida.com> (explaining the FCHR’s role in addressing discrimination in Florida).

<sup>144</sup> *Id.*

<sup>145</sup> FLA. STAT. § 760.10 (2022),

[http://www.leg.state.fl.us/statutes/index.cfm?App\\_mode=Display\\_Statute&Search\\_String=&URL=0700-0799/0760/Sections/0760.021.html](http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0700-0799/0760/Sections/0760.021.html). In December 2021, Florida governor Ron DeSantis stated that the Stop WOKE Act would allow parents to sue school districts that taught critical race theory. [Q: Does HB 7 apply SB 8 language re: private actors?] Andrew Atterbury, *DeSantis Pushes Bill that Allows Parent To Sue Schools Over Critical Race Theory*, POLITICO (Dec. 15, 2021) <https://www.politico.com/states/florida/story/2021/12/15/desantis-targets-critical-race-theory-with-bill-that-evokes-texas-abortion-bounties-1400102>.

<sup>146</sup> S. 2524, 124th Leg., Reg. Sess. (Fla. 2022), [https://www.flsenate.gov/Session/Bill/2022/2524/BillText/er/PDF\\_](https://www.flsenate.gov/Session/Bill/2022/2524/BillText/er/PDF_).

<sup>147</sup> *Id.* It is noted that while S.B. 2524 refers to a “substantiated” violation, the Florida Board of Governors Notice of Proposed New Regulation, refers to a “substantial” violation. *See supra* note x. These terms have very different meanings. It is unclear whether the legislature and Board of Governors are using the terms to have the same meaning. Given that the regulation includes “substantiate” in its definitions’ section [(1)(d)], it is likely this is the intended term. *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *See supra* pp. 1-8.

<sup>151</sup> *See supra* note X.

<sup>152</sup> *Id.* Per the regulations, a complaint may be sent directly to the Board of Governors (3)(d). *Id.* When this happens, the Board may refer the complaint to the university’s Chief Audit Executive. *Id.*

university regulation, the university must notify the Board of Governors (through the Inspector General's Office). Following this, it must be decided whether the instruction can be modified so that it is consistent with HB 7. If not, disciplinary measures or termination are possible. The Board regulations outline the multi-step process for handling alleged violations of the university regulation.<sup>153</sup>

Noticeably absent from the law is an annual, public reporting component. It should be required that students, faculty, staff, and members of the public are able to easily find out the number of complaints, nature of complaints (which type of HB 7 violation), outcomes for complaints, and sanctions for substantiated complaints. This should include demographic data on the targets of complaints (e.g., race and sex).

### *B. In the Law School Classroom*

This section offers a ground look at HB 7. Specifically, it explores the meaning and language of the bill. Additionally, there is an evaluation of the expectations it places on instructors who teach courses that address concepts, topics, and language explicitly highlighted in the bill. Seven scenarios are offered here that contextualize the potential applications of HB 7.. Each one exposes a legislative gray area of HB 7. Together, the scenarios highlight the many problematic aspects of the law.<sup>154</sup> These uncertainties leave individual professors to navigate unsafe educational terrain. This uncertainty can lead to severe sanctions, hefty fines, and loss of employment.

#### *Scenario One*

Professor X teaches a Death Penalty course at a law school. Students have been assigned a range of reading material on capital punishment, including demographic data on death row inmates and victims,<sup>155</sup> philosophical perspectives (e.g., Cesare Beccaria<sup>156</sup>), and an examination of various rationales for the death penalty (including deterrence, retribution, and rehabilitation). In addition, students have been assigned a series of death penalty cases, including *Furman v. Georgia*,<sup>157</sup> *Gregg v. Georgia*,<sup>158</sup> *McCleskey v. Kemp*,<sup>159</sup> and *Hurst v. Florida*.<sup>160</sup> As part of class discussion, students state their varied opinions on death penalty, including whether it should be constitutional. A student asks the professor “What’s your opinion about whether the death penalty operates in a racially-discriminatorily and unconstitutional manner?”

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<sup>153</sup> *Id.* at (3)(a)-(d).

<sup>154</sup> For a list of questions about the application of the law in the K-12 classroom, see Brief for Learning for Justice and Florida Freedom to Read Project as Amicus Curiae, pp. 108-112 (Exhibit 4), *Falls v. DeSantis*, No. 4:22cv166-MW/MJF, 2022 U.S. Dist. LEXIS 112596 (N.D. Fla. June 27, 2022), [https://www.splcenter.org/sites/default/files/falls\\_v.\\_desantis\\_22-cv-00166\\_ecf\\_no.\\_35-1\\_proposed\\_amicus\\_of\\_lfj\\_and\\_ffrp.pdf](https://www.splcenter.org/sites/default/files/falls_v._desantis_22-cv-00166_ecf_no._35-1_proposed_amicus_of_lfj_and_ffrp.pdf).

<sup>155</sup> See e.g., *Death Row U.S.A.*, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND (Winter 2022) <https://www.naacpldf.org/wp-content/uploads/DRUSAWinter2022.pdf>.

<sup>156</sup> CESARE BECCARIA, *ON CRIMES AND PUNISHMENT* (Taylor and Francis Publishers 2016).

<sup>157</sup> 408 U.S. 238 (1972).

<sup>158</sup> 428 U.S. 153 (1976).

<sup>159</sup> 481 U.S. 279 (1987).

<sup>160</sup> 577 U.S. 92 (2016).

Under HB 7, what range of responses is permissible? Can the professor, a death penalty scholar, give her students her informed opinion, which is based upon data and facts? HB 7 appears to say that it is acceptable for professors to give students “information,” however, “knowledge”—the synthesis and logical conclusions drawn from that empirical information—is a bridge too far. The prohibition against sharing opinions strikes at the core of professors’ expertise. The opinion question begets a continuum. What if a student asks a professor for her opinion during office hours? If not in the classroom, where are the spaces on campus that allow faculty opinion to breathe? HB 7 is silent on these questions.

It is noted that HB 7’s restrictions apply to guest lecturers.<sup>161</sup> The law’s ambiguity make it likely that if a professor invites a guest lecturer, say a death penalty defense attorney, that person might run afoul of the law for sharing their practice-informed opinions regarding capital punishment. Can the dictates of HB 7 only be met if the professor also invites a pro-death penalty attorney to speak with his class?<sup>162</sup>

Another legislative oddity arises. It appears that HB 7 allows students to share their opinions, but not faculty members. This is a peculiar educational outcome, that instructors’ voices are silenced in the very area of their expertise, while students’ voices and opinions are amplified.<sup>163</sup> HB 7 does not address how “inculcation” works. It presumes it is a one-directional phenomena.

### *Scenario Two*

In advance of a discussion and analysis of reparations in her Remedies course, Professor B assigns an article by writer Ta-Nehisi Coates.<sup>164</sup> It is the only reading

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<sup>161</sup> On the webpage for the University of Florida’s Chief Diversity Officer, it states:

If a guest speaker is providing instruction or training with the authorization of the University or any of its employees, that guest speaker may be considered a University instructor or trainer under the HB 7 laws. The University recommends that when a guest lecturer is invited into instruction or training, the inviting employee provide the guest lecturer a copy of the HB 7 laws, which can be found here, and these FAQs to be read before the speaking engagement. The guest speaker should be asked if their presentation and materials are consistent with the HB 7 laws. If they are not, the guest speaker must modify them or the presentation should be canceled.

If a guest speaker acts inconsistent with the HB 7 laws, the employee that has authorized the guest speaker must take action to remedy situation. If it can be done without causing a greater disruption to the instruction or training, the employee is encouraged to make an immediate statement to remind the speaker against endorsement or promotion of the concepts and confirm to students and trainees that they are not required adopt any of the views of the guest speaker. Otherwise, the employee should take steps to remedy the guest speaker’s statements at the next available opportunity.

<https://cdo.ufl.edu/hb-7/>

<sup>162</sup> There are additional issues regarding guest lecturers. For instance, in a situation where a student organization invites a speaker to the university, is that person enveloped within HB 7? Is a talk by a guest lecturer “instruction” under HB 7? Further, does it matter whether the student organization is publicly or privately funded?

<sup>163</sup> As a result, HB 7 reinforces existing biases in classroom participation. Research indicates that men are much more likely to raise their hands to participate in class discussion than women. Studies further show that students of color in college in predominantly White classrooms are less likely to raise their hands to participate than their White peers.

<sup>164</sup> Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (2014) <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

she assigns on the topic. The article argues in favor of specific forms of reparations for African Americans whose ancestors were kidnapped from Africa and shipped to the United States.

A variety of questions are raised by this scenario. First, does HB 7 prohibit a classroom discussion about a reparations article that supports affirmative action as a method to achieve racial equity? Does this pedagogical approach violate the Act's prohibition against teaching that someone who is white, by virtue of his race, should be discriminated against due to actions committed by White people in the past?<sup>165</sup> Further, can the assignment of this article, which has a particular viewpoint, be interpreted as inculcating, espousing, promoting, advancing, or compelling students to favor reparations for African Americans? If so, then who decides where the line is that divides teaching from inculcating?

#### *Scenario Three*

Professor R teaches an undergraduate sociology of law course. The course includes a section on race-related terminology and its impact on politics and state policies. As part of the reading and analysis of this topic, Professor R has her students read works by several scholars who discuss the origins and applications of terms such as “colorblind,” “objectivity,” “neutrality,” and “merit.” These scholars conclude that these terms are problematic because they lionize the concepts of impartiality and universal truths.

The above scenario addresses a topic that has sparked robust scholarly debate.<sup>166</sup> Is Professor R permitted to assign these readings and facilitate a discussion with her students about the role of language, law, and race? If Professor R additionally assigns reading that argues in favor of using these terms does that satisfy the HR 7 mandate? What if instead, she only assigns material that argues against using these terms?

#### *Scenario Four*

Professor G teaches a law course that includes a section on the state action doctrine. The course examines the role of criminal legal institutions in the United States. The course focuses on policing, courts, and prisons. The assigned readings and lectures examine the history of these institutions. This includes some articles and cases used to discuss how institutionalized white supremacy operated to oppress people of color, particularly indigenous peoples and African Americans. The assigned reading includes material on historical policing practices, such as the slave patrols and their present-day manifestations.<sup>167</sup>

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<sup>165</sup> See H.R. 7(4)(a)(5), 124th Leg., Reg. Sess. (Fla. 2022).

<sup>166</sup> See e.g., Jonathan Feingold, *Racing Towards Colorblindness: Stereotype Threat and the Myth of Meritocracy* 3 GEO. J. L. MOD. CRITICAL RACE PERSP. 231 (2011); EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA (2009); Adia Harvey Wingfield, *Color-Blindness is Counterproductive*, THE ATLANTIC (Sept. 15, 2015), <https://www.theatlantic.com/politics/archive/2015/09/color-blindness-is-counterproductive/405037/>.

<sup>167</sup> See e.g., KATHERYN RUSSELL-BROWN, THE COLOR OF CRIME: RACIAL HOAXES, WHITE CRIME, MEDIA MESSAGES, POLICE VIOLENCE, AND OTHER RACE-BASED HARMS 51-71 (2021) (discussion of slave patrols as first uniquely form of American policing).

The official title of HB 7, the “Individual Freedom Act,” along with its text, establish that it is designed to protect and uphold individual rights. Given this, does HB 7 punish classroom instruction on how state or federal actions help some racial groups and harm others? More specifically, does it prohibit discussing the role racism plays in understanding how state institutions’ function—are discussions of white supremacy barred by the law?

*Scenario Five*

Professor D teaches a race, crime, and law course. She has compiled a list of terms, names, concepts, narratives, foundational approaches, books, policies, cases, and incidents. These topics are essential to understanding U.S. criminal legal structures and how law, crime, and race intersect.<sup>168</sup> The list includes a diverse range of material, including the Chicago school of criminology, Rockefeller drug laws, Marion Sims (physician), the Patriot Act, and the 1619 Project. Professor D has her students review and discuss this “race and crime literacy” list and draws heavily on its subject matter for the course.

Under HB 7, can the professor assign a list of terms? Does a requirement that students familiarize themselves with the list constitute “espousing,” “promoting,” or “compelling” them to believe the concepts included on the list? The text of the legislation offers little guidance in delineating between exposing students to critical ideas and promoting critical ideas. The law makes clear that some theoretical approaches to race and history are welcome while others are not. As a practical matter, however, the legislation leaves large gaps.

*Scenario Six*

Professor T directs a center at the university where he teaches. The Center focuses on issues of race. As part of the Center’s work, Professor T runs a research lab with a group of five graduate students. During their weekly meetings, the group discusses material that the students have selected to read. The lab group also researches and prepares white papers on race-related topics. Some research topics include qualified immunity for police officers, children with incarcerated parents, and juvenile waivers.

Under HB 7 where does academic work involving an instructor and students outside of the standard classroom fit under the bill? Are student “labs” considered “instruction”?<sup>169</sup> Does it matter whether the students receive academic credit or pay for their participation? Are the same limitations placed on Professor T’s expression of opinion in the lab as in the classroom?

*Scenario Seven*

Professor J teaches Criminal Law, a required course for first year law students.

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<sup>168</sup> *Id.* at 153-166 (listing more than one hundred and fifty race and crime literacy terms).

<sup>169</sup> *See, supra* note xx. Under Florida Board of Governors Regulations 10.005 (1)(c), “instruction” is defined as “the process of teaching or engaging students with content about a particular subject by a university employee or a person authorized to provide instruction by the university within a course.”

Professor J typically arrives to the classroom fifteen minutes ahead of class time. He is in the room when students arrive. Often, students will approach him before class and ask him questions about the material, his opinion on the holding in a particular case, or his thoughts on a national news story involving issues of crime and race. Likewise, after class students approach Professor J to ask questions about the class, including his opinion on criminal law matters and news stories involving criminal law issues.

The glaring question is whether the pre-class and post-class periods fall within the zone of HB 7? Under the legislation, what are the temporal and pedagogical boundaries around “instruction”? Allowing HB 7 to act as a broad net that covers a pre and post instruction periods, may discourage professor-student interactions.

The above seven scenarios raise some of the many concerning questions about the Act. Related to these issues, how does HB 7 classify a professor stating her opinion about class-related issues during her office hours? Are office hours considered “instruction”? The hypotheticals prompt important and realistic questions about the reach and potential harms of HB 7. The scenarios make clear that the language of HB 7 is dangerously and unconstitutionally vague. Further, because the law does not appear to be rooted in empirical research findings,<sup>170</sup> it is impossible to know where the line is drawn between “inculcating” and simply teaching.

HB 7 has the power to shift Florida’s educational control away from educators.<sup>171</sup> If so, it will substantially upend K-20 education in the state.<sup>172</sup> The bottom-line query is this: Who is in charge? Who gets to determine the subject matter, format, and substance of what is taught in the college classroom? The state’s Board of Governors, the Board of Trustees at individual universities and colleges, the governor, students, parents, or professors? One of the more troubling aspects of the implementation of HB 7 is that one of the constituencies most affected by the law—instructors—were not invited to weigh in on the problem that HB 7 is ostensibly designed to solve.

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<sup>170</sup> See e.g., News Release, Office of Ron DeSantis 46th Governor of Florida, Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations (Dec. 15, 2021), <https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/> (highlights “national examples of Critical Race Theory,” but does not provide any Florida-specific examples).

<sup>171</sup> In an instance where a student makes a racially-charged remark in the classroom, HB 7 seems to diminish the instructor’s authority and discourages the instructor from engaging with the student and directly addressing the comment. For instance, let’s assume that a law student in a constitutional law or property raises his hand and says, “Slavery was a necessary evil.” Some professors will seek to use this instance as a “teachable moment.” Most professors, however, will not know how to effectively respond and will seek to quickly move on from the comment. HB 7 stands as a discouragement to address tough issues. What are the range of responses that are safe per HB 7? Does this comment fall directly under one of HB 7’s eight provisions defining discrimination? For example, is this statement an example of a member of one race is morally superior to members of another race? If so, if the instructor then acknowledges the racism within the comment by saying, “That’s a racist comment” and goes on to explain why, is that permissible under HB 7? If in fact HB 7 prohibits an instructor’s corrective response, this would be directly at odds with the goals of DEI initiatives, which most universities say they seek to support.

<sup>172</sup> At least one scholar argues that the language of laws such as HB 7 can be used in unintended ways. Proponents of racially progressive laws, he argues, “should reappropriate these regressive laws, and the language of equality they harness, for progressive ends. More concretely, stakeholders should wield Backlash Bills to defend CRT in schools.” Feingold, *supra* note xx at 1. Professor Feingold offers specific examples of how a teacher could use language in a Backlash Bill to address a curricula harm that impacts Black students (e.g., “race stereotyping”). *Id.* at 5.

Beyond questions about particular sections of HB 7, the law raises larger issues of pedagogy. The Act could be understood to mandate a “both sides” approach when teaching certain academic subjects. Does this pedagogical framework mean that a classroom lecture and discussion of U.S. chattel slavery would require a discussion of both the “bad” and so-called “good” aspects of slavery?<sup>173</sup> If so, it appears that education and instruction under HB 7 compels professors to present opposing viewpoints for every topic of study and at the same time does not allow them to offer their interpretation of empirical conclusions (which could be interpreted as “espousing” or “inculcating” students). If this is an accurate interpretation, HB 7 reduces the work of professors to professional academic interpreters—ones who can discuss the research findings and precedents in a particular area. However, they are not permitted to inform students that in their opinion some legal findings are justifiable or unjust.<sup>174</sup> These strictures are particularly concerning for legal education. Long embedded in legal education pedagogy is the goal of honing students’ critical thinking capabilities.<sup>175</sup>

HB 7 sounds alarm bells about government orthodoxy. In *West Virginia State Board of Education v. Barnette*,<sup>176</sup> the U.S. Supreme Court identified some of the dangers of government overreach in the classroom:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.<sup>177</sup>

The discussions prompted by the scenarios make clear that HB 7 has the power to rewrite statewide curriculum and undermine the work of a sizeable branch of the professoriate. This legislative shift constitutes anti-literacy—specifically it is an attack on substantive literacy. Under HB 7, professors are no longer respected, important leaders in guiding the state’s educational curriculum. Under HB 7 professors are left to figure out the rules of compliance. At one end, it may be business as usual, so long as the professor does not share her opinions with students and does not teach any of the identified subject areas. Midway along the continuum would be a professor who concludes that she should have senior administrators review her lecture notes in advance. The latter approach might be particularly attractive to untenured and

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<sup>173</sup> See e.g., W. Kamau Bell, *United Shades of America*, CNN (July 10, 2022),

<https://www.cnn.com/videos/us/2022/07/05/united-shades-critical-race-theory-schools-origseriesfilms.cnn/video/playlists/united-shades-of-america-season-4/> (interviewing people on the street, Bell has an exchange about CRT with three people – specifically, he asks whether it should be okay for a teacher to say, “Slavery is bad”).

<sup>174</sup> One question that arises is how this edict applies to settled law. For instance, under HB 7 is it permissible for an instructor to say that *Brown v. Board of Education* was properly decided? Alternatively, what about a professor who tells her law class that *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. \_\_\_\_ (2022) was wrongfully decided?

<sup>175</sup> <sup>175</sup> In a wide-ranging talk on what skills are essential for legal education, Darby Dickerson, the President of the Association of American Law Schools states, “Professors must ensure that they are teaching students to think critically. Critical thinking is deep thinking that helps us question whether information presented is reliable, fact-based, evidence-based, and unbiased.” “President’s Message: Promoting Candor” (2020) <https://www.aals.org/about/publications/newsletters/aals-news-spring-2020/presidents-message-promoting-candor/>

<sup>176</sup> 319 U.S. 624 (1943).

<sup>177</sup> *Id.* at 642.

non-tenure-track faculty members.<sup>178</sup> At the other end of the continuum, a professor could decide she no longer wants to teach race-related subject matter because she does not want to run the risk of violating HB 7. She may feel that teaching about race is a red flag, one that will bring unwanted scrutiny and threaten her position.<sup>179</sup>

### C. Companion Legislation

Assessing the full force of HB 7 requires looking beyond the law itself. It is most accurately read and understood as one law in a large, expanding unit of laws and regulations. This legislative bundle of laws was passed in the early 2020s. One example is the viewpoint survey mandated by Florida House Bill 233. The “Intellectual Freedom and Viewpoint Diversity,” survey is an annual questionnaire administered to students, staff, and faculty throughout Florida’s State University System and Florida College System.<sup>180</sup> The questionnaire is designed to measure the degree to which students are exposed to ideas they may disagree with and whether they are exposed to a range of perspectives.<sup>181</sup> The survey appears to provide professors with a clear directive as to how they should handle race-related material in their courses. The mandate that professors teach material in an “objective manner without endorsement of the concepts”<sup>182</sup> may sound benign. However, if part of the state’s evaluation of how classrooms operate is the degree to which they employ a “point/counterpoint” approach, this constitutes a sharp reformulation of curricula.<sup>183</sup> Thus, it is fair to conclude that HB 7 rewrites the classroom syllabus. Governor DeSantis has stated that viewpoint surveys are necessary to prevent state universities from becoming “hotbeds for stale ideologies” and “intellectually repressive environments.”<sup>184</sup>

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<sup>178</sup> Only a few Florida colleges and universities have online statements or guidance regarding HB 7. Universities with posted information include the University of Florida, [Understanding House Bill 7 \(ufl.edu\)](https://www.ufl.edu/understanding-house-bill-7/); University of West Florida [05-06-2022 update from the provost.pdf \(uwf.edu\)](https://www.uwf.edu/05-06-2022-update-from-the-provost.pdf); and the University of North Florida, <https://www.unf.edu/search/?q=HB%207>

<sup>179</sup> See e.g., Hamilton, *supra* note x. Professor Hamilton discusses the story of an Oklahoma middle school social studies teacher who became concerned about what she could teach after the passage of an anti-CRT law. *Id.* The teacher assigned narratives of formerly enslaved people. *id.* During class discussions, many students were moved to tears. *Id.* Though the goal of the assignment was to sharpen their understanding of history and create empathy, the teacher worried that she might face discipline or retaliation. *Id.* at 79.

<sup>180</sup> See Intellectual Freedom and Viewpoint Diversity: Employee Survey (2021), <https://s3.documentcloud.org/documents/21574590/combined-intellectual-freedom-and-viewpoint-diversity-employee-survey.pdf>. Per HB 233, the Florida Board of Governors will conduct an annual assessment on intellectual freedom and viewpoint diversity at the state universities and colleges. H.R. 233, 123rd Leg., Reg. Sess. (2021).

<sup>181</sup> The email that was sent out with the questionnaire states that the survey “is designed to assess the extent to which you feel free to express your beliefs and viewpoints on campus.” The survey has twenty-four questions. Here are four items that appeared on the 2022 survey: (1) “Students at my institution are encouraged to consider a wide variety of viewpoints and perspectives”; (2) “Students at my institution are not shielded from ideas and opinions they find unwelcome, disagreeable or even deeply offensive”; (3) “I have felt intimidated to share my ideas or political opinions because they were different from those of my colleagues”; “My institution is equally tolerant and welcoming of both liberal and conservative ideas and beliefs.” Respondents are instructed to rank statements using a five-point Likert scale.

<sup>182</sup> H.R. 7, 124th Leg., Reg. Sess. (2022) (adding to FLA. STAT. § 760.10(8)(b)).

<sup>183</sup> See *supra* notes 162-164.

<sup>184</sup> Susan Svrluga & Lori Rozsa, *In Florida, DeSantis’s plans for colleges rattle some academics*, WASH. POST (July 1, 2022), <https://www.washingtonpost.com/education/2022/07/01/desantis-florida-universities-laws/>.

A second example is that HB 233 allows students to surreptitiously record audio or video of class lectures.<sup>185</sup> Senate Bill 7044 provides a third example. It requires post-tenure reviews for all tenured professors who teach at a state university.<sup>186</sup> This postsecondary education bill, passed in 2022, requires that universities perform extensive interim evaluations of tenured faculty members.<sup>187</sup> The fourth example is that House Bill 1467 allows for greater state control and increased parental and community involvement in the educational materials that may be purchased by Florida public schools for inclusion in K-12 media centers.<sup>188</sup> This legislation provides parents with a right of action against their child’s school and individual teachers.<sup>189</sup> A fifth action is the Florida legislature’s passage of revised voter districting maps. These new maps weaken the voting power of Black citizens.<sup>190</sup> Reduced political power means that Black citizens will be less able to effectuate change in their communities, which includes their schools. Sixth, in 2022, the Florida legislature passed House Bill 1557. The bill establishes grade specifications as to when educators can discuss sexual orientation in the classroom.<sup>191</sup> A seventh example is the Florida Board of Education’s adoption of an explicit prohibition against CRT instruction (codified within HB 7).<sup>192</sup> Last, in spring 2022, Governor DeSantis prepared a seventy-page document delineating the ways in which he would wrest control and completely overhaul K-20 education in Florida.<sup>193</sup>

When viewed as a unit, the power of these laws is manifest. Working together, HB 7 and these companion laws, regulations, and documents, are poised to transform Florida’s educational

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<sup>185</sup> Under HB 233, recording may be for a student’s “own personal educational use, in connection with a complaint to the public institution of higher education where the recording was made, or as evidence in, or in preparation for, a criminal or civil proceeding.” H.R. 233 §(3)(g), 123rd Leg., Reg. Sess. (2021). Notably, the Bill’s language does not say that a student must have the professor’s permission to record (video or audiotape) lectures. *Id.* Permission is only required if the student seeks to “publish” the recording (e.g., send it to a media outlet). *Id.* Student recordings may be done openly or in secret regardless of whether the professor consents. The permission given to students to secretly record a lecture runs contrary to state law. In Florida, a two-party consent state, it is a third degree felony for someone to record a conversation with another person without permission. *See* FLA. STAT. § 934.03 (2022), [http://www.leg.state.fl.us/statutes/index.cfm?App\\_mode=Display\\_Statute&Search\\_String=&URL=0900-0999/0934/Sections/0934.03.html](http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0900-0999/0934/Sections/0934.03.html). In effect, HB 233 overrides the state recording law.

<sup>186</sup> S. 7044, 124th Leg., Reg. Sess. (2022), <https://www.flsenate.gov/Session/Bill/2022/07044/?Tab=BillHistory>.

<sup>187</sup> *Id.* Under the law, every five years, “each tenured state university faculty member” is required to take part in a substantial post-tenure review process. The post-tenure review will address, “accomplishments and productivity; assigned duties in research, teaching and service; performance metrics, evaluations and ratings; and recognition and compensation considerations, as well as improvement plans and consequences for underperformance.”

<sup>188</sup> *See* H.R. 1467, 124th Leg., Reg. Sess. (Fla. 2022), <https://www.flsenate.gov/Session/Bill/2022/1467>.

<sup>189</sup> *See id.*; News Release, Office of Ron DeSantis 46th Governor of Florida, Governor Ron DeSantis Signs Bill that Requires Curriculum Transparency (Mar. 25, 2022), <https://www.flgov.com/2022/03/25/governor-ron-desantis-signs-bill-that-requires-curriculum-transparency/>. Ironically, HB 7 prohibits instruction on systemic racism, while at the same time the law itself reflects a systemic reconstruction of Florida’s educational system.

<sup>190</sup> *See* S. 2C, 124th Leg. Reg. Sess. (Fla. 2022), [https://www.flsenate.gov/Session/Bill/2022C/2C/BillText/er/PDF;P000C0109, FLA. REDISTRICTING 2022, https://redistricting.maps.arcgis.com/apps/View/index.html?appid=2c92665fc1d14fc2becb3030e23a4595](https://www.flsenate.gov/Session/Bill/2022C/2C/BillText/er/PDF;P000C0109,FLA.REDISTRICTING2022,https://redistricting.maps.arcgis.com/apps/View/index.html?appid=2c92665fc1d14fc2becb3030e23a4595).

<sup>191</sup> *See* An Act Relating to Parental Rights (“Don’t Say Gay” Bill), H.R. 1557, 124th Leg., Reg. Sess. (Fla. 2022), <https://www.flsenate.gov/Session/Bill/2022/1557/BillText/er/PDF>.

<sup>192</sup> *See* Required Instruction Planning and Reporting, FLA. ADMIN. CODE R. 6A01.094124, <https://www.flrules.org/gateway/ruleNo.asp?id=6A-1.094124>. Notably, the rule bans the use of material from the 1619 Project and states that CRT is akin to the “denial or minimization of the Holocaust.” *Id.*

<sup>193</sup> GOVERNOR RON DESANTIS, AN ACT RELATING TO HIGHER EDUCATION (2022), <https://www.flgov.com/2022/03/25/governor-ron-desantis-signs-bill-that-requires-curriculum-transparency/>, DeSantisReportdbf4ae45-4be9-47c3-9ca8-fa577157983c.pdf (1).pdf. For an analysis of this plan, see Jason Garcia, *Ron DeSantis plotted an all-out assault on public universities*, SEEKING RENTS (June 1, 2022), <https://jasongarcia.substack.com/p/ron-desantis-plotted-an-all-out-assault>.

system. Together, they represent retrenchment—a systemic approach to dismantling curriculum that is rooted and race inclusive. By design, this law works to silence and punish the teaching of marginalized histories—thereby instituting and promoting a 21<sup>st</sup> century version of anti-literacy laws.<sup>194</sup>

#### IV. THE DOMINO EFFECT OF HB 7

It will take time to assess the full impact of HB 7. In particular, the various ways that professors adapt their curriculum to meet the requirements of the Stop WOKE law. However, the impact of HB 7 is not limited to professors who currently teach courses that address racial issues. In fact, the law’s reach is potentially quite extensive and could upend how professors across disciplines teach particular subjects in Florida college classrooms. HB 7 places instructors in its bullseye. As the central targets, instructors must decide whether and how to reframe their course material to comport with the new law. This discussion identifies HB 7’s myriad potential impacts on race and post-secondary education in Florida.

##### *A. Beyond the Classroom*

HB 7 may impact, and in some instances drive, how courses are taught. As noted in the above discussion of scenarios,<sup>195</sup> professors will have to determine whether they can continue to teach their classes the way they have in previous semesters.<sup>196</sup> If not, then they will have to assess what changes they need to make to ensure their instruction complies with HB 7. This will be a hit-or-miss calculation in the early period of the legislation.

Professors who teach courses on topics that are not traditionally viewed as race-centered (e.g., constitutional law, property, contracts, tax, zoning), might reasonably decide to avoid or minimize any race-related material or issues in those courses. These instructors may determine that HB 7 makes teaching about race, at best unattractive and at worst dangerous, as it would bring unwanted scrutiny to their classroom and threaten their tenure.<sup>197</sup> Issues of race, race

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<sup>194</sup> HB 7 and the above-referenced companion legislation have legislative forebears. In 2010, Arizona passed legislation that banned the teaching of ethnic studies. H.R. 2281, 49th Leg., 2d Reg. Sess. (Ariz. 2010), <https://www.azleg.gov/legtext/49leg/2r/bills/hb2281s.pdf>. The ban included courses that (1) promote the overthrow of the U.S. government; (2) promote resentment toward a race or class of people; (3) are designed primarily for pupils of a particular racial group; and (4) advocate ethnic solidarity instead of the treatment of pupils as individuals. *Id.*

<sup>195</sup> See *supra* notes x-x.

<sup>196</sup> It is difficult to determine exactly how many race-related courses are offered at a university. In some instances, courses are listed as part of the university’s standard course offerings and have been assigned a course number. However, that does not indicate whether or when the course is offered (each semester, once-a-year, or some other time interval). In terms of counting a university’s race related course offerings, a course might be overlooked if it does not have a race related subject matter or term included in the title. For instance, a constitutional law course or a police practices course. Another example could be a course title that references a specific racial group, e.g., “Indigenous,” “Latinos/a,” “Asian” or “white” in its title (rather than “race”). With these considerations in mind, it appears that there are relatively few race-focused courses offered at the University of Florida (fewer than two dozen courses for the Fall 2022 semester).

<sup>197</sup> See e.g., KATHERYN RUSSELL-BROWN & RYAN MORINI, A WAY FORWARD: UF RACE SCHOLARS ON SUPPORT, OBSTACLES, AND THE NEED FOR INSTITUTIONAL ENGAGEMENT (2021). Several UF faculty respondents expressed fear and about teaching race-related courses and engaging in race-related scholarship. One stated, “Scholars

relations, and racism are part of wide swath of historical and contemporary practices across a range of fields, including medicine, law, anthropology, English, and education. The impact will be felt if professors across disciplines decide to minimize race in their classrooms.<sup>198</sup>

However, the outcome may be different for race-specific courses (e.g., a course on race and law or on one on race, gender, and law) or courses that include a sizeable section on race issues (e.g., criminal law, police practices). The amount of work required to restructure a course to have it comport with HB 7's requirements, could cause some professors to decline to teach particular courses.<sup>199</sup>

If a professor declines to teach a course due to HB 7 constraints, and another instructor is not available to teach the course, this may mean that the course is no longer offered. This effectively removes the from the curriculum. This possibility is one of the possible ripple effects of HB 7. Its potential to adversely affect the courses available at a university extends beyond a few courses. It may impact whether and how race-related subjects are taught (or not taught) across universities and colleges in the state of Florida. This means that HB 7's rules will cross paths with tens of thousands of students.<sup>200</sup>

### *B. Delegitimization of Race Scholarship, Race Scholars, and DEI*

In addition to forcing a reconsideration of what is taught, HB 7 appears aimed at diminishing the value of race-related majors, such as African American Studies, Latin American Studies, and Ethnic Studies. By making race a third rail topic, the law may cause some undergraduates to re-think their choice of major (or minor) and may also make race-related areas of graduate study less attractive. If this happens, the viability of these academic programs is at stake.

If HB 7 impacts which programs are offered by university departments and in turn which programs are available to students, it will also impact race scholars. Thus, HB 7 works to delegitimize race scholarship *and* race scholars.<sup>201</sup> The law encourages skepticism of work done by scholars with race-related expertise.<sup>202</sup> This is because the language of HB 7 classifies race

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conducting work on racism are being heavily surveilled and I do not get the sense that the school will protect them” (p. 20) <https://www.law.ufl.edu/law/wp-content/uploads/UFRaceScholarshipReport-2021.pdf>

<sup>198</sup> While HB 7 includes language stating that race has a role in the curriculum, just what that role is—and where the line is drawn—is unclear.

<sup>199</sup> Some professors will be undaunted by the law. *See e.g.*, Paul Ortiz, ‘*Stop WOKE Act*’ won’t stop me from teaching challenging topics, GAINESVILLE SUN, July 3, 2022, at 1F.

<sup>200</sup> Some have argued that laws such as HB 7 will discourage students from attending college in Florida. *See e.g.*, Suzanne Lynch, “The ‘Stop WOKE’ act will send some of our best students out of Florida” <https://www.tampabay.com/opinion/2022/08/30/the-stop-woke-act-will-send-some-of-our-best-students-out-of-florida-column/>

<sup>201</sup> Whittington, *supra* note x at 26 observes that limitations placed on CRT classroom instruction may extend to CRT scholarship:

The anti-CRT proposals have thus far focused particularly on classroom speech (whether oral or discussion or classroom materials), but it is not hard to imagine those restrictions being extended to other academic contexts and the core academic freedom questions would be the same whether dealing with scholarship or teaching.

*Id.* at 26, fn 214.

<sup>202</sup> In its focus and tenor, HB 7 denigrates race-related scholarship. It is an example of how Black thought and specifically Black critiques of U.S. systems, are marginalized as somehow different, inappropriate, and ultimately deviant. Once a theoretical perspective is classified as deviant (e.g., CRT), it triggers mainstream concerns that this

scholarship as racist, biased, and as a form of indoctrination.<sup>203</sup> This means that the impact of HB 7 will be particularly harsh for faculty of color who are disproportionately engaged in race-related scholarship and teaching. As allegations of HB 7 violations are brought forward and sanctions are imposed, it is likely that it will be faculty of color who will be disproportionately accused and sanctioned under the law. Another potential response to the realities of HB 7 is academic flight from Florida's post-secondary institutions. This is particularly true for faculty who are likely to face claims, or those who see HB 7 as emblematic of even more legislative directives and curricula restrictions in the future.<sup>204</sup>

Beyond its impact on race scholarship and race scholars, enforcement of HB 7 is likely to diminish university work done to promote diversity, equity, and inclusion (DEI). The law provides little clarity as to which types of DEI activities and discussions violate the law. The text's ambiguity makes it likely that instructors and administrators will err on the side of caution. In the first week the bill went into effect there was a casualty. Following George Floyd's murder in 2020, hundreds of colleges across the U.S. posted statements on their websites expressing solidarity and support for racial justice.<sup>205</sup> The English department at the University of Central Florida (UCF) posted an anti-racism statement on its webpage.<sup>206</sup> After HB 7 went into effect, the department removed the statement, which included the following language:

We are tasked with developing the next generation of writers, thinkers, and citizens who will carry out this message until there is no longer a need to remind others that Black Lives Matter.<sup>207</sup>

Because of HB 7's vague language, it is not clear whether the anti-racism statement runs afoul of HB 7. However, less than one week later, UCF removed the anti-racism statements of several

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perspective also poses a threat to larger society. This then opens the door for legislations such as HB 7—which is designed to act as a bulwark against the evils of a racially-threatening educational system.

<sup>203</sup> H.R. 7, 124th Leg., Reg. Sess. (Fla. 2022).

<sup>204</sup> Since 2021, at least six faculty members with race-related expertise left the University of Florida (four moved to other academic institutions, two retired).

<sup>205</sup> See *CWC's Statement on George Floyd*, UNIV. FLA. COUNSELING & WELLNESS CTR. (last visited July 29, 2022), <https://counseling.ufl.edu/response-floyd/>; *A Message from NYU President Andrew Hamilton*, OUR NYU NEWSLETTER (May 31, 2020), <https://www.nyu.edu/about/leadership-university-administration/office-of-the-president/communications/a-message-from-andrew-hamilton-5-31-20.html>; *Solidarity Statement*, UNIV. TEX. AUSTIN DEP'T INTEGRATIVE BIOLOGY (last visited July 29, 2022), <https://integrativebio.utexas.edu/about/diversity-inclusivity-mission-statement/solidarity-statement>.

<sup>206</sup> See e.g., Anne Martin, *UCF removes anti-racism statements*, ORLANDO SENTINEL (July 13, 2022), <https://www.orlandosentinel.com/news/education/os-ne-ucf-antiracism-statements-20220713-b4xehqjn3jdpdia6znvvhvpyy-story.html>; Nicolle Osorio, *UCF's English Department suspends anti-racism statement following the passage of Stop WOKE Act in Florida*, ORLANDO WKLY. (July 7, 2022), <https://www.orlandoweekly.com/news/ucfs-english-department-suspends-anti-racism-statement-following-the-passage-of-stop-woke-act-in-florida-31978303>.

<sup>207</sup> *Id.*

departments, including anthropology,<sup>208</sup> philosophy, sociology,<sup>209</sup> and physics.<sup>210</sup> The UCF spokesperson stated that some of the department postings “could be seen as inconsistent with our commitment to creating a welcoming environment.”<sup>211</sup> HB 7 has bred a climate of fear. It is not possible to nurture an inclusive educational environment where members of the academic community are threatened with punishment for expressing their opinions and viewpoints.

It appears that DEI efforts are on a collision course with HB 7 prohibitions.<sup>212</sup> The law may in fact immobilize—or temporarily pause<sup>213</sup>—the work of university staff members who have been tasked with addressing academic climate issues. The broad and general legislative language combined with fears of violating the law means that DEI efforts will be at most sanitized, feel-good events.

### C. Widespread Ignorance

Studies consistently show that students graduating from high school have had little formal instruction or engagement on issues of race, racism, or U.S. racial history.<sup>214</sup> In fact, racial ignorance is not limited to high school students. It extends to the populous at large.<sup>215</sup> For instance, most people have little detailed knowledge of U.S. racial history. Most do not have passing knowledge of the Middle Passage, alien land laws, slavery, genocide, lynching, the Chinese Exclusion Act, sundown towns, redlining, or Indian removal.<sup>216</sup> Enforcement of HB 7 ensures that even fewer students will be exposed to race and history subjects as part of their undergraduate or professional school education.<sup>217</sup>

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<sup>208</sup> For the initial anti-racism statement posted by UCF’s anthropology department, see <https://sciences.ucf.edu/anthropology/antiracism-statement/> (The six-point pledge includes promises to “Decolonize our syllabi,” “Openly discuss our discipline’s historical origins in racism,” and “Examine and address implicit bias.” The relevant language in HB 7 states that instructors are prohibited from promoting the idea that a person, based on her race is inherently racist or oppressive, whether consciously or unconsciously. See, 4(a) Lines 230-232.

<sup>209</sup> Susan Svrluga, *Florida university removes some anti-racism statements, worrying faculty*, WASH. POST (July 14, 2022), <https://www.washingtonpost.com/education/2022/07/14/ucf-anti-racism-statements-removed/>.

<sup>210</sup> *Id.* The following statement was removed from the UCF sociology website, “We stand in solidarity with the many people across the world who are deeply saddened by the tragic loss of the lives of Black people at the hand of police and vigilantes in the US. Recent events have once again laid bare the longstanding and pervasive legacy of anti-Blackness at the heart of US white-supremacist culture.” *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> See e.g., Katie Clarey, *The Stop WOKE Act may put a ‘strategic pause’ on DEI efforts*, HR DIVE (May 17, 2022), <https://www.hrdiver.com/news/the-stop-woke-act-may-put-a-strategic-pause-on-dei-efforts/623750/>.

<sup>213</sup> *Id.*

<sup>214</sup> See e.g., Adrienne Van Der Valk, *Teaching Hard History*, LEARNING FOR JUSTICE (2018), <https://www.learningforjustice.org/magazine/spring-2018/teaching-hard-history>. A national survey of high school seniors found that less than one-half knew that slavery was legal in all thirteen colonies during time of American Revolution, less than one-quarter were able to identify how the Constitution protected slavery (as it was initially ratified), and less than ten percent identified slavery at the central cause of the Civil War. *Id.*

<sup>215</sup> See Emily Guskin et al., *Americans show spotty knowledge about the history of slavery*, WASH. POST (Aug. 28, 2019), <https://www.washingtonpost.com/education/2019/08/28/americans-show-spotty-knowledge-about-history-slavery-acknowledge-its-enduring-effects/>.

<sup>216</sup> See e.g., KATHERYN RUSSELL-BROWN, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE CRIME, MEDIA MESSAGES, POLICE VIOLENCE, AND OTHER RACE-BASED HARMS* (2021) (arguing for race and crime literacy and includes a list of terms, concepts and names).

<sup>217</sup> See e.g., Jennifer C. Mueller, *Advancing a sociology of ignorance in the study of racism and racial non-knowing*, 12 SOCIO. COMPASS 1-22 (2018) (addresses emerging “sociology of ignorance” in context of knowledge about race).

filed an *amicus curiae* brief in *Falls v. DeSantis*.<sup>218</sup> The brief reviews the research that examines how diversity studies impact college students.<sup>219</sup> It shows that college students who take courses that examine issues of racism and diversity have higher levels of racial understanding.<sup>220</sup> Further, the research establishes that students who have classroom engagements with diversity-related issues are more likely to become active participants in a deliberative democracy. The brief concludes:

Given the importance of curricular diversity experiences in college for students' ability to become informed citizens, laws that would censor important discussions of racism and sexism on campus are likely to inflict significant damage on students' prospects as engaged citizens in a multiracial democracy.<sup>221</sup>

Examples of this include attempts to downplay rather than acknowledge historical facts. This can lead to the curation of problematic frameworks and ideas for educational policy. For instance, a group of Texas educators sought to remove the word “slavery” from the curriculum for second graders. This attempted change was part of a larger effort to avoid topics and language that might make some students feel “discomfort.” In its place, the educators recommended slavery be called “involuntary relocation.”<sup>222</sup> Such a rebranding of slavery would fundamentally deny the centuries and generations of horror that effected millions of people and minimize its impact on today’s society. Law professor Virginia Hamilton warns of the harms of legislation that curtails race-related education, “[T]he laws increase the chances that the next generation of students will remain uninformed of the racial history of the United States and its legacy and will thus come of age unmotivated—and unequipped—to improve upon it.”<sup>223</sup>

As a substantive anti-literacy law, HB 7 makes it harder for all students to learn about and act on this country’s history. HB 7’s force is that it does not operate at the margins. It draws its power from its thick legislative coat, which includes its legislative kin,<sup>224</sup> its multi-layered sanctions, along with unequivocal support from Florida officials.<sup>225</sup> As a result, HB 7 may

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<sup>218</sup> Brief of Division 15 of The American Psychology Association as Amicus Curiae, *Falls v. DeSantis*, No. 4:22cv166-MW/MJF, 2022 U.S. Dist. LEXIS 112596 (N.D. Fla. June 27, 2022), <https://s3.documentcloud.org/documents/22038277/34-1-apa-div-15-amicus-in-supp-of-pls-mot-for-prelim-inj.pdf>.

<sup>219</sup> The brief also reviews research on teaching race in the k-12 curriculum. It states:

In addition to improving academic outcomes, when teachers explicitly engage with issues of race and racism in the classroom, this improves the levels of racial tolerance among students, no matter the race of the student...A study examining white and Black children’s responses to learning about racism found an improvement in racial attitudes.

*Id.* at 13.

<sup>220</sup> *Id.* at 19-21.

<sup>221</sup> *Id.* at 22 (citations omitted).

<sup>222</sup> Examples include a proposal by a group of Texas educators to rename slavery “involuntary relocation” in elementary textbooks. The Texas State Board of Education declined to adopt the proposal. *See e.g.*, Brian Lopez, *State education board members push back on proposal to use “involuntary relocation*, TEXAS TRIB. (June 30, 2022), <https://www.texastribune.org/2022/06/30/texas-slavery-involuntary-relocation/>.

<sup>223</sup> *See*, Hamilton, *supra* note xx, at 61.

<sup>224</sup> *See supra* notes xx-xx “Companion Legislation.”

<sup>225</sup> In December 2021, Florida Governor Ron DeSantis said, “In Florida we are taking a stand against the state-sanctioned racism that is critical race theory.” News Release, Office of Ron DeSantis 46th Governor of Florida, Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in School and Corporations (Dec. 15, 2021), <https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/>. He stated further, “We

effectively demonize, diminish, and disappear whole areas of race-related scholarship and race scholars in Florida's post-secondary educational system. The law has the potential to impact hundreds of instructors and thousands of students throughout the state. Because HB 7 creates a no-net academic tightrope, many instructors will do whatever is necessary to avoid its wrath and hold onto their jobs.

## V. ALTERNATIVE EDUCATIONAL SPACES

Whether HB 7 remains the law or not, members of racially marginalized communities will continue to create alternative educational spaces. This much is true. In these spaces, the histories and narratives of the group are shared and passed down to successive generations. These histories are understood and told through the eyes of group members. The books, the lesson plans, and other curricula material used in these spaces, reflect the little-known stories and triumphs from these communities. Alternative learning spaces, which exist outside traditional education, have been a mainstay within the Black community in particular and in other communities of color.

These learning spaces have a variety of structures. The more formal of these include schools (e.g., private and charter), weekend schools (e.g., "Saturday schools"<sup>226</sup>), summer school programs,<sup>227</sup> and church programs. The instructors may be community members, such as church members and educators. Some teach basic literacy skills. Some highlight art, science, and technology. Other programs focus on history, traditions, and culture. These programs instill pride<sup>228</sup> by highlighting the successes of Black educators, artists, lawyers, scientists, politicians, inventors, and entrepreneurs.<sup>229</sup> Overall, these programs supplement mainstream public education.

The learning spaces where alternative education takes place may be a set physical location, such as libraries, bookstores, churches, community members' basements. It may also take place at gatherings such as book clubs, library talks, church programs, sorority and fraternity meetings, and family reunions. Alternative learning spaces may also be virtual.<sup>230</sup>

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won't allow Florida tax dollars to be spent teaching kids to hate our country or to hate each other. *Id.* We also have a responsibility to ensure that parents have the means to vindicate their rights when it comes to enforcing state standards." *Id.*

<sup>226</sup> See e.g., Arce v. Douglas, declaration of plaintiff Maya Arce, who was denied access to Mexican American studies courses. As an alternative, Arce attended a weekend high school class; Karlos K. Hill, *The University Cannot Be Colonized*, THE NATION (Mar. 16, 2022), <https://www.thenation.com/article/society/kehinde-andrews-interview/> (discussing the history of Britain's Saturday school movement).

<sup>227</sup> See e.g., *CDF Freedom Schools*, THE CHILDS. DEF. FUND (last visited July 29, 2022), <https://www.childrensdefense.org/programs/cdf-freedom-schools/>.

<sup>228</sup> See e.g., Subira Kifano, *Afrocentric Education in Supplementary Schools: Paradigm and Practice at the Mary McLeod Bethune Institute*, 65 J. NEGRO EDUC. 209, 209-218 (1996), <https://www.jstor.org/stable/2967314>.

<sup>229</sup> On a much larger scale, Historically Black Colleges and Universities (HBCUs) could be categorized as alternative educational spaces.

<sup>230</sup> See *Knarrative*, a weekly online discussion with Sirius XM Radio talk show host Karen Hunter, a journalism professor at Hunter College and Dr. Greg Carr, Department Chair of African American Studies at Howard University. Professor Hunter and Dr. Carr discuss readings and delve deeply into a range of topics, including book discussions, histories of Black scholars, freedom fighters, racial terror incidents, structural institutions, and media narratives.

If past is prologue, no legislation cannot thwart learning. People will continue to find ways to learn and teach. Even if they have to “snatch” it.<sup>231</sup> The history of African Americans is replete with stories of learning history away from the classroom and textbooks. Alternative educational spaces are a bulwark against attempts to erase full accountings of history. They represent a community’s strong but decisive pushback to anti-Black, anti-literacy laws and practices.

### *Conclusion*

When fifteen-year-old Claudette Colvin asserted her right to remain in the seat of her choosing on a segregated public bus in 1955, she relied on her school lessons. The bus driver who instructed her to move from her seat, represented one version of a story. However, one of her high school teachers had presented Claudette with a compelling, alternative viewpoint. She was a citizen and she had rights under the United States Constitution. It was Claudette’s exposure to the U.S. Constitution and American history that motivated her to challenge Jim Crow rules requiring racial segregation in public transportation. Education is an instrument of freedom.

This article identifies a critical throughline. HB 7, which dictates whether and how race issues can be taught in college classrooms in Florida, is a legacy of antebellum prohibitions against literacy for Black people. This revelation uncovers the deep, historical roots of anti-literacy legislation. It also highlights the myriad forms of anti-literacy laws and the common rationales offered to sustain them. Most importantly, it establishes a holistic framework for understanding the intersection of anti-literacy and race.

A fully operational HB 7 will enable a purge of race scholarship and race scholars in Florida’s colleges and universities. This is possible as a result of the law’s unequivocal targeting of these scholars and their scholarship. This attrition will also impact university scholars who do not teach race-related issue in their courses—scholars who believe that if state orthodoxy is allowed to substitute for rigorous academic inquiry, then the mission of the university cannot be met. The harm extends beyond any punishments received by individual instructors. HB 7 determines which race-related knowledge students will carry with them out into the world. There is great danger when the state unilaterally decides to ban the teaching of certain types of knowledge. HB 7 is anti-literacy masquerading in freedom’s clothing.

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<sup>231</sup> *See supra* note x.