TEXTBOOK RESISTANCE: TEXAS' BAN ON CRITICAL RACE THEORY FAILS THE EDUCATION STANDARDS MANDATED BY INTERNATIONAL LAW

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[*] J.D., University of Georgia School of Law, 2023. Many thanks to both Professor Diane M. Amann and Jacob Swanstrom for their guidance.

I. INTRODUCTION

"*We'd gotten the rope, and we got the gun, and then I tied the hangman's noose in Henry's car. We were out on a hunt.*"[1] That is how a Ku Klux Klan member described his lynching preparation in 1981. Just forty years ago. And only a few years before that, thousands of White students—all in an effort to avoid learning alongside Black children—fled from their schools.[2] Indeed, some yelled "kill them niggers" at the first-grade student trailblazers of desegregation in the South.[3] That was a short sixty-one years ago. America's not-so-distant past points to an onerous truth: the very prejudices that undergirded acts of extreme racial violence and hatred linger today. Put another way, unless miraculously eradicated in less than a lifetime, racist mindsets still haunt America. To sharpen that point, return for a moment to the height of racial violence—the extralegal killing of innocent Black people for sport (also known as lynching).

Some lynchings were parties.[4] In fact, as stated in a 2017 report by the Equal Justice Initiative, "[a]t one Kentucky lynching, young white children between six and ten years old" were present and lending a helping hand.[5]

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[1] Breeanna Hare, *Inside the Case that Bankrupted the Klan*, CNN (Apr. 11, 2021, 2:40 AM), https://www.cnn.com/2021/04/10/us/michael-donald-case-timeline/index.html.

[2] *Nine Million American Children Attend Racially and Economically Segregated Schools*, EQUAL JUST. INITIATIVE (Aug. 2, 2019), https://eji.org/news/nine-million-american-children-attend-racially-and-economically-segregated-schools.

[3] *"Massive Resistance"*, EQUAL JUST. INITIATIVE, https://segregationinamerica.eji.org/report/massive-resistance.html (last visited Apr. 7, 2023) (pointing out how in 1957 "Klansmen castrated a Black man after taunting him for 'think[ing] nigger kids should go to school with [white] kids'").

[4] EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 55 (3d ed. 2017) [hereinafter LYNCHING IN AMERICA]. In fact, photographs from these parties are readily discoverable by a quick Google search. *See* Margaret M. Russell, *Reopening the Emmett Till Case: Lessons and Challenges for Critical Race Practice*, 73 FORDHAM L. REV. 2101, 2112 (2005) ("With the advent of cameras, many lynching 'parties' resulted in macabre photographs and postcards of people who posed with corpses and body parts as 'souvenirs.'"). Also note that, in addition to Ku Klux Klan members, "[l]ynchers tended to be ordinary and respectable people, animated by a self-righteousness that justified their atrocities in the name of maintaining the social and racial order." LYNCHING IN AMERICA, *supra*, at 71.

[5] LYNCHING IN AMERICA, *supra* note 4, at 70. Elsewhere, civil rights lawyer and founder of the Equal Justice Initiative Bryan Stevenson explained that "[p]eople brought their children. They made their little kids watch human beings be burned or drowned or beaten. That has created a disease where we have become indifferent to the victimization of Black people." Ed Pilkington, *The Sadism of White Men: Why America Must Atone for its Lynchings*, GUARDIAN (Apr. 26, 2018, 7:00 AM), https://www.theguardian.com/world/2018/apr/26/lynchings-sadism-white-men-why-america-must-atone; *see also* Jonathan Capehart, Opinion, *'Hey Boy, You Want to Go See a Hangin'?': A Lynching from a White Southerner's View*, WASH. POST (June 9, 2017, 1:59 PM), https://www.washingtonpost.com/blogs/post-partisan/wp/2017/06/09/hey-boy-you-want-to-go-see-a-hangin-a-lynching-

Further evidencing children's knowledge of lynching, Black women that worked in White homes reported seeing "very small white children hang their black dolls."[6] Beyond that, White children even acted out lynchings on live Black children as part of a "game."[7] It is very possible that these children, the ten-year-old lynching spectators of the mid-twentieth century, are alive today. Further, it is possible that they may hold positions of authority[8] (or at a minimum, have the ear of their children and grandchildren). That matters because lynchings psychologically damaged both the participants and spectators by creating an inability to value Black people.[9] Put somewhat differently, this gruesome epoch in American history—marked by lynchings—is less than one generation removed and the effects remain potent to this day.[10]

Thus, America still groans with the pains of racism. And that must be addressed. To discuss how, this Note accepts the widely acknowledged principle that racism is learned; that is, no one is born believing the prejudices that underlie racial discrimination.[11] The Note further presumes, then, that learned prejudices can be unlearned,[12] and should be. Education, therefore, holds the power to address racial discrimination at its source. So, with that being the case, the greatest threat to the elimination of racism and its manifestations is a lack of education regarding America's racist past and present. A newly added provision to the Texas Education Code, Section 28.0022 (Texas Law), brings life to this threat.

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from-a-white-southerners-view (featuring a reflection written by Joe McLean in which he described how his father witnessed a lynching as a 12-year-old boy).

[6] LYNCHING IN AMERICA, *supra* note 4, at 70.

[7] *Id.*

[8] *Id.* at 71 (noting that White people that were raised in the environment of racial superiority during the lynching era "hold powerful positions today"). This is no stretch of the imagination. As of the publication of this Note, the current President of the United States, Joe Biden, and multiple members of Congress are age eighty or older.

[9] *Id.* at 65 ("Whites who participated in or witnessed gruesome lynchings and socialized their children in this culture of violence . . . were psychologically damaged."). Further, a "myriad [of] social science studies" show that bystanders of lynchings "may continue to devalue the group they victimized for years afterward and remain unable to acknowledge their actions." *Id.* at 70.

[10] Of course, this point could be made by looking to current events, but appreciating that merely a generation separates today's children from routine lynchings offers great perspective.

[11] Jane Elliot, *It's All About Ignorance: Reflections from the Blue-Eyed/Brown-Eyed Exercise*, *in* THE CAMBRIDGE HANDBOOK OF THE PSYCHOLOGY OF PREJUDICE 655, 661 (Chris G. Sibley & Fiona Kate Barlow eds., 2017) [hereinafter CAMBRIDGE HANDBOOK] ("We aren't born racist. In my view, racism is a learned response."); *see infra* Section III(B)(i)(a) (discussing the social science behind the proposition that prejudice is learned).

[12] *See* Elliot, *supra* note 11, at 664 ("[T]he problem isn't racism. . . . It is plain and simple ignorance. There is a cure for this ignorance, *and it's called 'education."*") (emphasis added); *see infra* Section III(B)(i)(b) (discussing studies that indicate that prejudice can be undone through a learning process).

Two bills, HB 3979 and SB 3, make up Section 28.0022.[13] In June 2021, Governor Greg Abbott, a Republican who took office in 2015, signed HB 3979 into law.[14] As stated by House Representative Jared Patterson, HB 3979 "eliminates Critical Race Theory (CRT) from Texas classrooms."[15] To do so, the bill sets forth restrictions on how teachers may or may not teach current events and the history of racism in America.[16] In signing HB 3979, Abbot noted that "more must be done" to "abolish critical race theory in Texas."[17] More was done, and the Texas legislature introduced and passed SB 3, which Abbott signed into law on September 17, 2021.[18] SB 3 repealed and replaced certain elements of HB 3979, making the prohibition of CRT stronger.[19]

CRT, the target of the Texas Law, is an area of thought that explores how the effects of slavery persist in America today.[20] Ergo, CRT necessarily involves a discussion of systemic racism—that is, how structures like the criminal justice system, healthcare system, and discriminatory loan practices operate to disadvantage Black people and preserve the subordination that was once mandated by law under slavery and later Jim Crow.[21] An adequate investigation of systemic racism involves investigation of controversial historical and current events—both of which are banned to an extent under the Texas Law.

Therefore, the Texas Law targeted education when it targeted CRT, which is to say it targeted the indispensable tool in destroying prejudice. This proved problematic. Indeed, it muted discussion in the classroom that was focused on racism in America and thus preserved racist mentalities, leaving prejudices unbothered and free to fester. Importantly, this failure implicates international law. The International Convention on the Elimination of All Forms of Racial

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[13] *See* H.B. 3979, 87th Sess. (Tex. 2021) (Senate Committee Substitute), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB03979S.pdf#navpanes=0; S.B. 3, 87th Leg., 2d Spec. Sess. (Tex. 2021) (introduced version), https://capitol.texas.gov/tlodocs/872/billtext/pdf/SB00003I.pdf#navpanes=0.

[14] TEX. HOUSE J., 87th Leg., Reg. Sess., at 5519 (2021), https://journals.house.texas.gov/hjrnl/87r/pdf/87RDAY61FINAL.PDF#page=43.

[15] Jared Patterson, *Texas House Passes Conservative Reforms*, JARED PATTERSON: OUR STATE REPRESENTATIVE (May 17, 2021), https://jaredpatterson.net/texas-house-passes-conservative-reforms.

[16] *See infra* notes 24–32 and accompanying text.

[17] GREG ABBOTT, OFF. OF THE TEX. GOVERNOR, LEGISLATIVE STATEMENT: GOVERNOR ABBOT SIGNS HB 3979 INTO LAW (87R) (June 15, 2021), https://gov.texas.gov/news/post/governor-abbott-signs-hb-3979-into-law.

[18] TEX. SENATE J., 87th Leg., 2d Sess. at 268 (2021), https://journals.senate.texas.gov/sjrnl/872/pdf/87S209-02-F.PDF#page=16.

[19] *See infra* note 58.

[20] *See infra* Section II(B)(ii)(a) (discussing and further detailing CRT).

[21] *See generally* Darren Lenard Hutchinson, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CAL. L. REV. 371 (2022).

Discrimination (ICERD),[22] to which the United States is a party, actively requires state parties to eliminate prejudices through education.[23] Therefore, the Texas Law puts the United States in violation of its obligations under ICERD.

This Note will explore the relationship between Section 28.0022 and ICERD in three principal parts. Part II will detail the history of the Texas Law by discussing what prompted the passage and signing of HB 3979 and SB 3, as well as the legislative history of those bills. Part II will also further define CRT and discuss how America's racial reawakening in 2020 led to a nationwide attack against CRT, an attack that Texas joined. Part III will then lay out ICERD as the legal yardstick to measure the Texas Law against. Finally, Part IV will explain why the law violates the United States' obligations under Article 7 of ICERD. The Note will conclude that for racism to decrease in America, the United States must make strides to address prejudice through education in compliance with Article 7 of ICERD. More specifically, Part IV will discuss three ways the federal government can address the Texas law and further the goals of Article 7.

II. THE NEW TEXAS EDUCATION CODE PROVISIONS IN THE MIDST OF AN AMERICAN RACIAL REAWAKENING AND THE CONSEQUENT DEBATE OVER THE TEACHING OF CRITICAL RACE THEORY

The text of the Texas Law as well as its application cannot be fully captured without first understanding the backdrop. This Part will tell the story of the Texas Law. As a matter of introduction, the relevant provisions, legislative intent, and opposition to the Texas Law will be presented. From this history, the impetus for the law: America's racial reawakening. This Part will then bridge the gap between this reawakening and the national conversation about CRT that followed. Finally, with this framework in mind, this Part will conclude by recounting some of the early instances where the Texas Law was enforced.

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[22] International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Dec. 21, 1965, S. Treaty Doc. 95-18, 660 U.N.T.S. 195 [hereinafter ICERD]. This treaty, which entered into force on January 4, 1969, has 182 parties; among them is the United States, which ratified on October 21, 1994. *See Status of Treaties: International Convention on the Elimination of All Forms of Racial Discrimination*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en (last visited Apr. 7, 2023) [hereinafter *ICERD Status*].

[23] *See infra* Section III(B).

A. The New Texas Education Code Provision: Texas Education Code 28.0022, "Certain Instructional Requirements and Prohibitions," Effective December 2, 2021

Section 28.0022 of the Texas Education Code sets out various limitations on what K–12 teachers can and cannot teach. This section will explore those specific provisions. Next, this section will offer a summary of the legislative history and intent of the two bills that comprise Section 28.0022, HB 3979 and SB 3.

i. Key Aspects of § 28.0022

To begin, Section 28.0022(a)(1) instructs that "a teacher may not be compelled to discuss a widely debated and currently controversial issue of public policy or social affairs."[24] If a teacher chooses to discuss such topics, the teacher must do so "free from political bias."[25] Further, teachers may not teach that:

- "an individual . . . is inherently racist or oppressive, whether consciously or unconsciously,"[26]
- "an individual, by virtue of the individual's race or sex, bears responsibility, blame, or guilt for actions committed by other members of the same race or sex,"[27]
- "meritocracy or traits such as a hard work ethic are racist or sexist or were created by members of a particular race to oppress members of another race,"[28]
- "the advent of slavery . . . constituted the true founding of the United States,"[29]
- "slavery and racism are anything other than deviations from . . . the authentic founding principles of the United States, which include liberty and equality,"[30] or
- "an understanding of the 1619 Project."[31]

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[24] TEX. EDUC. CODE ANN. § 28.0022(a)(1).
[25] *Id.* § 28.0022(a)(2).
[26] *Id.* § 28.0022(a)(4)(A)(ii).
[27] *Id.* § 28.0022(a)(4)(A)(v).
[28] *Id.* § 28.0022(a)(4)(A)(vi).
[29] *Id.* § 28.0022(a)(4)(A)(vii).
[30] *Id.* § 28.0022(a)(4)(A)(viii).
[31] *Id.* § 28.0022(a)(4)(C).

Moreover, in addition to barring the above topics from being made a part of a course for students, no "administrator, teacher, or staff member" may be taught, instructed, or trained to adopt any of the listed topics.[32]

It is worth noting here that in January 2023, the Texas Legislature proposed a new bill—which included all these same prohibitions—that would apply to higher education classrooms (recall Section 28.0022 governs grades K–12).[33] Under that new 2023 bill, "[a]n institution of higher education that violates this section is ineligible to receive state funds."[34] That sanction is seemingly stricter than those associated with Section 28.0022. Section 28.0022 explicitly notes that there is no "private cause of action against a teacher" for violating the provisions—but school districts "may take appropriate action involving the employment of any teacher, administrator, or other employee based on the individual's compliance with" Section 28.0022.[35]

ii. Legislative Intent of § 28.0022

Having set forth the provisions of interest, this Note will now explore the legislative intent of those provisions. There are two relevant sources of legislative intent: (1) statements made by the drafters of the Texas Law, and (2) the different iterations of the Law.

a. Explicit Intent

Texas Governor Greg Abbot signed HB 3979 into law, stating that it was "a strong move to abolish critical race theory in Texas."[36] Steve Toth, the author of HB 3979, stated that it was "one of the strongest prohibitions on Critical Race Theory in the country."[37] He also stated that "critical race theory is creating racial disharmony in the United States."[38] Additionally, Texas Representative Jared Patterson supported HB 3979, stating "CRT teaches students

[32] *Id.* § 28.0022(a)(4)(B).

[33] *See* H.B. 1607, 88th Sess. (Tex. 2023) (introduced), https://capitol.texas.gov/Search/DocViewer.aspx?ID=88RHB016071B&QueryText=%221607%22&DocType=B.

[34] *Id.*

[35] *Id.* § 28.0022(f). TEX. EDUC. CODE § 28.0022, which has been provided in part in the text, can be found in full in Appendix I, *infra*.

[36] ABBOTT, *supra* note 17.

[37] Steve Toth, *Rep. Toth Passes Bill to Protect Students from Critical Race Theory*, WOODLANDS ONLINE (May 11, 2021), https://www.woodlandsonline.com/npps/story.cfm?nppage=70006.

[38] Valeria Olivares, *Gov. Greg Abbott Signs Tougher Anti-Critical Race Theory Law*, DALL. MORNING NEWS (Sept. 17, 2021, 5:08 PM), https://www.dallasnews.com/news/education/2021/09/17/gov-greg-abbott-signs-tougher-anti-critical-race-theory-law.

that their only value is tied to their race and that all white people are bad," and that CRT "specifically targets white people as evil."[39]

SB 3, a bill that slightly altered HB 3979 and is also codified in Section 28.0022, had the same express purpose. As Representative Dan Huberty explained in the Statement of Legislative Intent: "Critical race theory is prohibited under this bill."[40] And Dan Patrick, the Lieutenant Governor who took office the same day as Governor Abbott, averred in his statement on the passage of SB 3 that "critical race philosophies" are "false ideas."[41] All that said, however, Senator Bryan Hughes acknowledged that Texas K–12 classrooms do not teach CRT.[42] Yet, he drafted the legislation anyway.

CRT was not the only target. The legislative intent of Section 28.0022 contains a similar goal of neutralizing the 1619 Project—a journalism project which endeavors to "reframe the country's history by placing the consequences of slavery and the contributions of black Americans at the very center of our national narrative."[43] Toth indicated as much, stating in reference to the 1619 Project that "my bill bolsters the teaching of the founding principles of our nation and prevents works of fiction from being taught as history."[44] In like fashion, Patrick called the 1619 Project a "myth."[45] In sum, the explicit goal of the Texas Law was to eliminate CRT and its related teachings.[46] Various versions of the text further illuminate this goal.

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[39] Jared Patterson, *Rep. Jared Patterson Highlights Session Accomplishments*, JARED PATTERSON: OUR STATE REPRESENTATIVE (June 7, 2021), https://jaredpatterson.net/rep-jared-patterson-highlights-session-accomplishments.

[40] TEX. HOUSE J., 87th Leg., 2d Sess. at 366 (2021), https://journals.house.texas.gov/hjrnl/872/pdf/87C2DAY07CFINAL.PDF.

[41] DAN PATRICK, STATE OF TEX. LIEUTENANT GOVERNOR, STATEMENT ON THE PASSAGE OF SENATE BILL 3 (July 16, 2021), https://www.ltgov.texas.gov/2021/07/16/lt-gov-dan-patrick-statement-on-the-passage-of-senate-bill-3.

[42] Emily Donaldson, *Texas Senators Approve Tougher 'Anti-Critical Race Theory' Bill But Its Success Unlikely*, DALL. MONTHLY NEWS (July 16, 2021), https://www.dallasnews.com/news/education/2021/07/16/texas-senators-approve-tougher-anti-critical-race-theory-bill-but-its-success-unlikely. Elsewhere, however, Toth claimed, referring to CRT, that "we see it popping up in public schools, that's why it needs to be addressed." Kiara Alfonseca, *Martin Luther King Jr., the KKK, and More May Soon be Cut from Texas Education Requirements*, ABC NEWS (July 23, 2021, 5:00 AM), https://abcnews.go.com/US/martin-luther-king-jr-kkk-cut-texas-education/story?id=78965364.

[43] Jake Silverstein, *Why We Published the 1619 Project*, N.Y. TIMES (Dec. 20, 2019), https://www.nytimes.com/interactive/2019/12/20/magazine/1619-intro.html.

[44] Toth, *supra* note 37.

[45] PATRICK, *supra* note 41.

[46] The new 2023 bill that would apply to college campuses has the same goal. *See* Cody Harris, FACEBOOK (Jan. 25, 2023), https://www.facebook.com/photo?fbid=587728129836815&set=a.286084796667818 ("Building on our work from last session to ban Critical Race Theory in our K-12 classrooms, I filed House Bill 1607 which will keep it from being taught at Texas college and university campuses.").

b. Changes to the Text of § 28.0022, "Required Curriculum"

Beyond what the drafters said about Section 28.0022, what the legislature did with regard to a sister provision, Section 28.002, provides insight into the legislative intent behind HB 3979 and SB 3 as a whole. As discussed, Section 28.0022 included "Certain Instructional Requirements and Prohibitions."[47] But Section 28.002, on the other hand, proscribed the "Required Curriculum" for social studies classes.[48]

To begin, the introduced version of HB 3979, according to subsection (h-1) of Section 28.002, outlined the "essential knowledge and skills that develop each student's civic knowledge."[49] In doing so, (h-1) required the understanding of documents such as the Declaration of Independence, the United States Constitution, and the Federalist papers.[50] The House, led by Representative James Talarico, pushed to add to the (h-1) list—calling specifically for writings by people of color and women, as well as documents relevant to early American race relations.[51] So, the subsequent version of the Bill included, among other writings, "the Fugitive Slave Acts of 1793 and 1850" and "writings from Frederick Douglass's newspaper, the North Star."[52] Most notably, a provision requiring the understanding of "the history of white supremacy, including but not limited to the institution of slavery, the eugenics movement, and the Ku Klux Klan, and the ways in which it is morally wrong" was added.[53]

These additions matter because of their subsequent removal. Indeed, Toth and the Senate stripped the revisions from the text.[54] This prompted Talarico to ask Toth on the floor while considering the senate amendments if it was "fair to say that any bill that strikes language condemning racism is a racist bill?"[55] Toth did not answer.[56] Ultimately, the removal sheds light on the motive behind the bill—that is, to limit in-class conversation surrounding what the author views as CRT-like material.

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[47] *See* TEX. EDUC. CODE ANN. § 28.0022.

[48] *See id.* § 28.002.

[49] H.B. 3979, 87th Sess. (Tex. 2021) (introduced), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB03979I.pdf#navpanes=0.

[50] *Id.*

[51] H.B. 3979, 87th Sess. (Tex. 2021) (Engrossed in the House), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB03979E.pdf#navpanes=0.

[52] *Id.* For the entirety of the additional documents, see *infra* Appendix II.

[53] H.B. 3979, 87th Sess. (Tex. 2021) (Engrossed in the House), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB03979E.pdf#navpanes=0.

[54] *See* H.B. 3979, 87th Sess. (Tex. 2021) (Senate Committee Substitute), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB03979S.pdf#navpanes=0.

[55] Tex. Impact, *Rep. James Talarico Questions Rep. Steve Toth on Senate Amendments to HB 3979*, YOUTUBE (May 29, 2021), https://www.youtube.com/watch?v=-u2fIRzqdSU.

[56] *Id.*

The House's suggested amendments resurfaced, however, in the signed version of HB 3979. This happened because of a last-minute procedural block by the Democrats in the House at the close of the legislative session which forced the Senate to choose between the amended bill or no bill at all.[57] In other words, if it were up to the drafters of HB 3979, these additions would be absent. This conclusion is made abundantly clear by the introduced version of SB 3, which once again removed the clauses that added diverse writings to the education requirements.[58] These changes, as Representative Harold Dutton claimed, were in an effort to "make this bill a whole lot better."[59] Given that this removal was the primary substantive change between HB 3979 and SB 3, the removal may have been what Governor Abbott meant when he said "more must be done" to abolish CRT as he signed HB 3979.[60]

Again, the clauses crept back into the signed version of SB 3. But this time, they took a different form. Rather than being listed with the required teachings, they were listed at the end of the Bill in a clause that explained how their exclusion from the main body of the text did not equate to a prohibition.[61] That raises a question similar to Talarico's question regarding HB 3979; that is, if removal was not a prohibition, why remove the materials in the first place? The answer is that—whether due to a misunderstanding of what CRT is or due to a desire to mute discussions about racism generally—the intent of the Texas Law was to prevent a complete discussion of America's racial history from taking place in Texas classrooms.

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[57] Christian Flores, *Bill Banning Critical Race Theory Still Alive Despite Procedural Move Threating It*, CBS AUSTIN (May 28, 2021), https://cbsaustin.com/newsletter-daily/as-critical-race-theory-ban-moves-closer-to-governors-desk-critics-sound-off.

[58] *See* S.B. 3, 87th Leg., 2d Spec. Sess. (Tex. 2021) (introduced version), https://capitol.texas.gov/tlodocs/872/billtext/pdf/SB00003I.pdf#navpanes=0 ("Sections 28.002(h-2), (h-3), (h-4), and (h-5), as added by H.B. 3979, Acts of the 87th Legislature, Regular Session, 2021, and effective September 1, 2021, are repealed.").

[59] Eleanor Dearman, *Bill to Restrict How Race and Racism Is Taught in Schools Headed to Texas Governor*, EDUC. WEEK (Sept. 3, 2021), https://www.edweek.org/policy-politics/bill-to-restrict-how-race-and-racism-is-taught-in-schools-headed-to-texas-governor/2021/09.

[60] *See supra* note 17 and accompanying text.

[61] S.B. 3, 87th Leg., 2d Spec. Sess. (Tex. 2021) (enrolled version), https://capitol.texas.gov/tlodocs/872/billtext/pdf/SB00003F.pdf#navpanes=0 ("During the revision of the essential knowledge and skills for the social studies curriculum beginning in 2021 and scheduled to conclude in or around 2023, the State Board of Education may not use the removal by this Act of documents, speeches, historical figures, and other knowledge and skills from specific statutory reference in Section 28.002(h-2), Education Code, as added by H.B. 3979, Acts of the 87th Legislature, Regular Session, 2021, as a reason for the removal or noninclusion of those documents, speeches, historical figures, or other knowledge and skills from the essential knowledge and skills for the social studies curriculum . . . .").

iii. Opposition to HB 3979 and SB 3

HB 3979 and SB 3 faced robust opposition before their codification in Section 28.0022. Legislators like Representative Talarico, mentioned above, fought for textual changes. Talarico also expressed opposition through statements, arguing that the law "doesn't outright ban talking about race, but the idea is to put in landmines so any conversation about race in the classroom would be impossible."[62] Similarly, Representative Jessica González urged that "SB 3 is a complete whitewashing of history and civics, and does our schoolchildren and teachers an immense disservice."[63] Representative Michelle Beckley also commented, concluding that SB 3 "does the opposite" of "build a healthy and more equitable democracy now and for our future."[64]

The opposition did not stop with legislators. Organizations, teachers, and students also voiced outrage. As of June 11, 2021, nearly 100 organizations opposed HB 3979.[65] The North Texas Commission was one, asserting that "[t]his legislation conflicts with current learning standards which allow teachers to bring emerging topics to the classroom for discussion and critical thinking."[66] Additionally, Morgan Craven, a Harvard Law School graduate and National Director of Policy, Advocacy and Community Engagement at the Intercultural Development Research Association,[67] testified to the Texas Senate State Affairs Committee, stating that "the most hurtful thing we can do is deny students the opportunity to fully explore history, current events, and the provable truths of our complex history."[68] Even an organization from outside Texas, the D.C.-based American Historical Association, wrote Governor

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[62] Jennifer Bendery, *Texas Governor Signs Law to Stop Teachers from Talking About Racism*, HUFFPOST (June 15, 2021, 8:18 PM), https://www.huffpost.com/entry/texas-republicans-ban-teachers-racism_n_60b18524e4b06da8bd76bf50.

[63] TEX. HOUSE J., 87th Leg., 2d Sess. at 390 (2021), https://journals.house.texas.gov/hjrnl/872/pdf/87C2DAY07CFINAL.PDF.

[64] *Id*. at 376.

[65] *Organizations Opposing Texas HB 3979*, INTERCULTURAL DEV. RSCH. ASS'N (IDRA) (June 11, 2021), https://www.idra.org/education_policy/organizations-opposing-texas-hb-3979.

[66] *Id.*; Patrick Svitek, *Texas Public Schools Couldn't Require Critical Race Theory Lessons Under Bill Given House Approval*, TEX. TRIB. (May 11, 2021), https://www.texastribune.org/2021/05/11/critical-race-theory-texas-schools-legislature.

[67] IDRA, founded in 1973, is "an independent, non-partisan, education non-profit committed to achieving equal educational opportunity for every child through strong public schools that prepare all students to access and succeed in college." Altheria Caldera, *IDRA Testimony Against Texas Senate Bill 3*, IDRA (July 15, 2021), https://www.idra.org/wp-content/uploads/2021/07/7.15_IDRA-testimony-against-SB3.pdf.

[68] IDRA, *Censorship is Hurtful – SB 3 and the Underlying HB 3979, Hurt All Students – Testimony*, YOUTUBE (July 15, 2021), https://www.youtube.com/watch?v=eE8zBxLcERc; *see also* Caldera, *supra* note 67 ("SB 3 . . . value[s] ignorance more than knowledge, silence about race more than guided critique, and a glorified history more than difficult truths.").

Abbott to express its opposition to the Texas Law. Its letter contended that the law "risk[s] infringing on the right of faculty to teach and of students to learn and seek to substitute political mandates for the considered judgment of professional educators, hindering students' ability to learn and engage in critical thinking across differences and disagreements."[69]

Students also testified in front of the Senate Committee on State Affairs. Yongyin Huang, a freshman at the University of Texas at Arlington, said that "the current proposal in SB 3 will only further all those student's disillusionment of our history . . . our future generations will be impacted and they will come out more divided and ignorant."[70] Alison Fernandez, an incoming freshman at the University of Texas at Austin, pointed out that SB 3 "perpetuat[es] an environment of division and racism that still remains unsolved because we can't see it and tackle it together."[71]

Teachers echoed these oppositions. Diane Birdwell, a teacher for 23 years and then-vice president of National Education Association-Dallas, testified that she was "seriously disturbed by the pro-SB 3 speakers. Not one of them is a current teacher in the classroom . . . . This bill needs to be killed. It is intimidating."[72] Additionally, Ken Zarifis, President of Education Austin, described the bill as "sad," explaining that he believed "[w]e have to admit as a state and as a nation that we've been racist, that we are racist, but that we're willing to confront it and honestly change. We shouldn't be afraid of that."[73]

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[69] Letter from Jaqueline Jones, President, Am. Hist. Assoc. & James Grossman, Exec. Dir., Am. Hist. Assoc. to Greg Abbot, Governor, & Tex. Legislators (Aug. 25, 2021), https://www.historians.org/news-and-advocacy/aha-advocacy/aha-letter-opposing-proposed-legislation-on-history-education-in-texas-(august-2021). The American Historical Association is made up of almost 12,000 historians and was "[c]hartered by the United States Congress 'for the promotion of historical studies.'" *Id.*

[70] IDRA, *SB 3 Will Make Texans More Divided and Ignorant – Student Testimony*, YOUTUBE (Aug. 2, 2021), https://www.youtube.com/watch?v=EWSIy0_e3Nw.

[71] IDRA, *Marginalized Communities Want to be Reflected in The School Curriculum – Student Testimony*, YOUTUBE (July 30, 2021), https://www.youtube.com/watch?v=w2hHUTp0eAs.

[72] *Senate Committee on State Affairs*, TEX. SENATE STREAMING VIDEO PLAYER (July 15, 2021), https://tlcsenate.granicus.com/MediaPlayer.php?view_id=49&clip_id=16395 [hereinafter Senate Hearing] Senator Hughes, introducing SB 3, claimed that CRT is "the inverse of what Dr. King taught us" because it teaches students to judge based on skin color. *Id.*

[73] *Id.*; *see also* Eric Griffey, *Critical Race Theory Protesters Swarmed a Fort Worth School Board Meeting*, SPECTRUM NEWS 1 (June 23, 2021, 5:45 PM), https://spectrumlocalnews.com/tx/south-texas-el-paso/education/2021/06/23/people-protesting-critical-race-theory-swarmed-a-forth-worth-school-board-meeting (providing that a "longtime educator" stated that SB 3 and the notion that educating on systemic racism is itself racist "would be laughable if it weren't so troubling").

Notwithstanding this vehement opposition from those it would affect the most, the bill was passed and codified in Section 28.0022.[74]

B. Backdrop to the Activities in Texas' Legislature: Racial Reawakening and Critical Race Theory in the United States

Representative Toth declared in a press release on HB 3979: "At a time when racial tensions are at a boiling point, . . . we don't need to burden our kids with guilt for racial crimes they had nothing to do with."[75] An initial audit of the palpable racial tension in the United States, therefore, is required to fully understand the impetus for the Texas Law. The racial tension to which Toth referred peaked in 2020. Indeed, "[n]o matter where you turned, you couldn't ignore reality. America was the epicenter of a racial reckoning."[76] This racial reckoning in turn led to a nationwide attack on CRT, an attack to which Section 28.0022 was a party. This Part will explore this series of events.

i. Racial Reawakening Spurred by the Deaths of George Floyd, Ahmaud Arbery, and Breonna Taylor

After the murders of George Floyd, Ahmaud Arbery, and Breonna Taylor—coupled with the disproportionate impact of COVID-19 on the Black community—many Americans were acutely aware of systemic racism. Floyd was a Black man who died after a White police officer kneeled on his neck—for nine minutes and twenty-nine seconds.[77] Arbery was a twenty-five-year-old Black man who was shot and killed while he was jogging.[78] His killers were White men who ostensibly thought they were assuming the role of law enforcement.[79] Both of these murders were captured on video in disturbing detail.[80] Subsequently, these videos suffused social media and the proximity of the two events—occurring only three months apart—increased the

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[74] *See* TEX. EDUC. CODE ANN. § 28.0022.

[75] Toth, *supra* note 37.

[76] Nicole Chavez, *2020: The Year America Confronted Racism*, CNN, https://www.cnn.com/interactive/2020/12/us/america-racism-2020 (last visited Apr. 8, 2023).

[77] Nicholas Bogel-Burroughs, *Prosecutors Say Derek Chauvin Knelt on George Floyd for 9 Minutes 29 Seconds, Longer than Initially Reported*, N.Y. TIMES (Mar. 30, 2021), https://www.nytimes.com/2021/03/30/us/derek-chauvin-george-floyd-kneel-9-minutes-29-seconds.html.

[78] Alisa Chang et al., *Summer of Racial Reckoning*, NPR (Aug. 16, 2020, 9:00 AM), https://www.npr.org/2020/08/16/902179773/summer-of-racial-reckoning-the-match-lit.

[79] *See id.*

[80] Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020), https://time.com/5851855/systemic-racism-america ("The U.S. cannot deny what is plainly before its eyes. Shocking videos depict George Floyd and Ahmaud Arbery murdered in broad daylight.").

provocative effect of the videos. Adding Taylor's death, which was not caught on video but occurred between the two murders, exasperated their impact.[81]

Protests roared.[82] Further, conversations surrounding race relations in America were becoming more common and increasingly viewed as essential. Most importantly, the conspicuous racism broadcasted on these videos sparked an increased acceptance of systemic racism as a real concept.[83] In fact, recent surveys have quantified this phenomenon. In 2015, only one-third of Americans surveyed said they thought that Black Americans were more likely to fall victim to police brutality, and in 2020, the number jumped to 57%. Additionally, the Google search for "systemic racism" reportedly rose a hundredfold over the early months of 2020.[84] This burgeoning awareness and discussion prompted a nationwide attack on Critical Race Theory.

ii. Critical Race Theory Within the Contemporary Context

This aberration—increased empathy and desire to understand how the institution of slavery might still be affecting American lives today—led to CRT falling subject to a nationwide diatribe. Before discussing this attack, however, this subsection will provide further background on its target, CRT.

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[81] Alisa Chang et al., *supra* note 78 ("George Floyd, Breonna Taylor and Ahmaud Arbery all became part of a rallying cry in cities and towns across the country, forcing the United States to confront the racism of its past and present.").

[82] Worland, *supra* note 80. Indeed, even "[i]n predominantly white cities across the country, white Americans . . . show[ed] up by the thousands in solidarity. Even small towns in rural parts of the country have joined in the protests." *Id.* Not to mention, law firms and tech giants alike contributed to the outcry. *See* Christine Simmons & Dylan Jackson, *From Big Law to Boutiques, George Floyd's Death Prompts Outrage, Some Action from Law Firm Leaders*, AM. LAW. (June 1, 2020, 6:24 PM), https://www.law.com/americanlawyer/2020/06/01/from-big-law-to-boutiques-floyds-death-prompts-outrage-some-action-from-law-firm-leaders ("Several law firm leaders in the last week sent out firmwide emails to attorneys and staff, expressing sorrow and encouraging honest talks between colleagues. . . . Big firms are not voicing outrage without support from some in corporate America. A range of companies, including Amazon, Hulu, Marvel Entertainment, Netflix Inc., Nike Inc. and The Walt Disney Co., have issued statements aligning themselves with priorities of racial justice and the Black Lives Matter movement."). Beyond statements, several law firms reportedly expanded their pro-bono practice, created fellowships, and added committees or advisory boards. Dylan Jackson, *George Floyd's Death Ushered in a New Era of Law Firm Activism and There's No Going Back*, AM. LAW. (May 25, 2021, 5:00 AM), https://www.law.com/americanlawyer/2021/05/25/george-floyds-death-ushered-in-a-new-era-of-law-firm-activism-and-theres-no-going-back-405-84104.

[83] *See* Edward Lempinen, *Khiara M. Bridges: The Hidden Agenda in GOP Attacks on Critical Race Theory*, BERKELEY NEWS (July 12, 2021), https://news.berkeley.edu/2021/07/12/khiara-m-bridges-the-hidden-agenda-in-gop-attacks-on-critical-race-theory ("During a blitz of attention to white police violence against Black people, and with communities of color suffering disproportionately from COVID-19, Americans were opening to the idea that racism could be systemic — and deadly.").

[84] Worland, *supra* note 80.

a. Origins and Evolution of Critical Race Theory

Critical Race Theory eludes uncomplicated or effortless definition.[85] Even the late Derrick Bell, who was one of CRT's founders and a professor at many top U.S. law schools, responded, "I don't know what that is" when asked his thoughts on CRT.[86] He went on to say that, to him, CRT is all about "telling the truth."[87] In the end, CRT is a vast body of scholarship with origins dating at least to the 1970s, predominantly as a movement in the legal field.[88] Accordingly, this Note cannot and does not intend to offer a comprehensive summary of CRT; it only scratches the surface in order to highlight the relevant aspects that relate to the Texas Law at hand.[89] To that end, Kimberlé Crenshaw, a leading CRT scholar who holds faculty appointments at both Columbia and UCLA law schools, describes CRT as "a way of looking at [the] law's role [in] platforming, facilitating, producing, and even insulating racial inequality in our country."[90] Despite its name, CRT is not a singular "theory" but rather an academic concept that seeks to identify the ways in which slavery and the racist mindsets that were a part of America's origin story still exist in the structures of modern-day American society.[91]

Furthermore, finding the heart of CRT, from which its various ideas flow, requires understanding that CRT was born out of a frustration with traditional legal avenues and their inability to effect lasting change. By the late 1960s, Bell was a jaded civil rights attorney with the NAACP Legal Defense Fund who, in the words of Georgetown Law Professor Janel George, "began to question the efficacy of landmark civil-rights cases."[92] After witnessing the

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[85] Janel George, *A Lesson on Critical Race Theory*, 46 HUM. RTS. 2 (2021).

[86] Jelani Cobb, *The Man Behind Critical Race Theory*, NEW YORKER (Sept. 13, 2021), https://www.newyorker.com/magazine/2021/09/20/the-man-behind-critical-race-theory.

[87] *Id.*

[88] RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 3–4 (3d ed. 2017).

[89] For more in-depth explanations of CRT, see KHIARA BRIDGES, CRITICAL RACE THEORY: A PRIMER (2019); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); DELGADO & STEFANCIC, *supra* note 88, at 17–18 (listing suggested CRT readings); THE DERRICK BELL READER (Richard Delgado & Jean Stefancic eds., 2005); RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (Juan Perea et al. eds., 2000); Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference*, 82 CAL. L. REV. 787 (1994).

[90] Ibram X. Kendi, *There Is No Debate over Critical Race Theory*, THE ATLANTIC (July 9, 2021), https://www.theatlantic.com/ideas/archive/2021/07/opponents-critical-race-theory-are-arguing-themselves/619391.

[91] *See generally* DELGADO & STEFANCIC, *supra* note 88.

[92] George, *supra* note 85. Bell even compared a civil rights lawyer that goes to the court for relief on racial issues to a "gambler who enters the card game knowing that it is fixed." DERRICK BELL, SILENT COVENANTS, BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 137 (2004).

delay and utter avoidance of the desegregation of public schools after the Supreme Court declared such segregation unconstitutional in its 1954 decision *Brown v. Board of Education*,[93] Bell concluded that "racism is so deeply rooted in the makeup of American society that it has been able to reassert itself after each successive wave of reform aimed at eliminating it."[94] Evidently, CRT's concern with systemic racism was born out of America's resistance and sometimes reversal of advances that might have been made in landmark civil rights cases.[95]

At bottom, CRT does not focus on individual culpability for racism, but instead "recogniz[es] as social and systematic what was formerly perceived as isolated and individual."[96] Indeed, CRT focusses on structures, systems, and processes.[97] And for the most part, this analysis largely remained in law

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[93] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[94] George, *supra* note 85. *See also* BELL, *supra* note 92, at 137 ("The modern views of *Brown* should, at the least, cause today's civil rights advocates to pause before seeking judicial help in the resolution of serious racial issues."). To Bell's point, the current dean of Berkeley Law School once wrote: "A half century of efforts to end school desegregation have largely failed." Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court's Role*, 81 N.C. L. REV. 1597, 1598 (2003) (citing GARY ORFIELD, HARV. UNIV. CIV. RTS. PROJECT, SCHOOLS MORE SEPARATE: CONSEQUENCE OF A DECADE OF RESEGREGATION (2001)) (referring to statistics showing that in the South, the number of Black students attending predominately White schools has steadily declined since 1988 and nationally, less than 10 percent of Black students attend predominately White schools).

[95] DELGADO & STEFANCIC, *supra* note 88, at 3 (defining CRT as a "movement" that takes "a broader perspective [than traditional civil rights] that includes economics, history, setting, group and self-interest, and emotions and the unconscious"). CRT "challenge[s] the dominant stories of a racist U.S. society." CRITICAL RACE THEORY IN EDUCATION: ALL GOD'S CHILDREN GOT A SONG 2 (Adrienne D. Dixson et al., eds., 2d ed. 2017).

[96] Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1241–42 (1991).

[97] *See* Ed Kilgore, *Why Republicans Want Voters to Panic About Critical Race Theory*, N.Y. MAG. (June 24, 2021), https://nymag.com/intelligencer/article/republicans-voters-panic-critical-race-theory.html (stating that CRT "focuses on analysis of institutions and policies, not individual culpability for injustice"); Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS (Aug. 2021), https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory ("CRT does not attribute racism to white people as individuals or even to entire groups of people. Simply put, critical race theory states that U.S. social institutions (e.g., the criminal justice system, education system, labor market, housing market, and healthcare system) are laced with racism embedded in laws, regulations, rules, and procedures that lead to differential outcomes by race."); Lauren Camera, *What is Critical Race Theory and Why Are People So Upset About It?*, U.S. NEWS (June 1, 2021), https://www.usnews.com/news/national-news/articles/what-is-critical-race-theory-and-why-are-people-so-upset-about-it ("Many Americans . . . believe racism is the product of intentionally bad and biased individuals, but critical race theory purports that racism is systemic and is inherent in much of the American way of life, no matter how far removed we are today from its origins.").

school circles and academic spaces until the recent redefinition by proponents of legislation aimed at banning CRT in K–12 education.

b. Critical Race Theory as Defined by Its Adversaries

The attack[98] on CRT "directly flows from the racial reckoning that we began to have after George Floyd was killed," according to Berkeley Law Professor Khiara M. Bridges.[99] Indeed, Imani Perry, the Hughes-Rogers Professor of African American Studies at Princeton University, told a reporter that the intense obloquy aimed at CRT was purposed to "elicit a hostility towards the progress . . . that we've begun to make in the last couple of months."[100] Put plainly, the full-fledged war on CRT, in the words of Paula Ioanide, a professor of race and ethnicity studies at Ithaca College, is "a proxy for a debate that the country is reckoning with on the right and the left over the degree to which racism is alive and well."[101] At bottom, those who think racism is not alive and well target CRT to express opposition; that being so, CRT rapidly became known by many as the politically conservative's "Boogeyman."[102]

"[D]efinitional theft" was the attack strategy, as Patricia Williams, a Distinguished Professor of Law and Humanities at Northwestern University, put it.[103] In other words, the primary battle tactic was to define CRT as something it is not. And as previously mentioned, CRT is not easily defined in concrete terms, making it susceptible to such an attack. Indeed, according to a *Leger* survey administered in collaboration with the *Atlantic*, 78% of Americans

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[98] At the time of writing, north of twenty states have proposed laws restricting the teaching of CRT, with Texas being one of five states that has enacted them. Kilgore, *supra* note 97; Ivana Saric, *Critical Race Theory Founders Respond to GOP Attacks*, AXIOS (July 25, 2021), https://www.axios.com/critical-race-theory-founders-gop-attacks-7bc8e0ca-4fc7-4dde-85e8-be9b051a3fab.html.

[99] Lempinen, *supra* note 83. It is no secret that assailants used CRT to "mobilize [Americans] against the racial awakening of the past year." Brandon Tensley, *The Engineered Conservative Panic Over Critical Race Theory, Explained*, CNN (July 8, 2021, 5:40 PM), https://www.cnn.com/2021/07/08/politics/critical-race-theory-panic-race-deconstructed-newsletter/index.html. Professor Paula Ioanide described the attack as "a manufactured crisis by the political right in response to the Black Lives Matter movement." Chris Kahn, *Many Americans Embrace Falsehoods About Critical Race Theory*, REUTERS (July 15, 2021, 2:13 PM), https://www.reuters.com/world/us/many-americans-embrace-falsehoods-about-critical-race-theory-2021-07-15.

[100] Tensley, *supra* note 99.

[101] Kahn, *supra* note 99.

[102] Tensley, *supra* note 99 ("conservative bogeyman"); Saric, *supra* note 98 (writing of the "effort to create a boogeyman" out of CRT); Ray & Gibbons, *supra* note 97 ("CRT[] has become a new bogeyman . . . ."); Lempinen, *supra* note 83 ("And so they came up with a boogeyman: critical race theory.").

[103] Cobb, *supra* note 86.

either had never heard of CRT or did not know if they had in May of 2021.[104] This allowed those who opposed CRT to define what CRT meant, in a way that would scare people away from confronting systemic racism.[105] Consider, for example, Chris Rufo, a politically conservative activist who is the "director of the initiative on critical race theory" at the Manhattan Institute.[106] He announced to his near 300,000 Twitter followers that by "steadily driving up negative perceptions" the attackers "will eventually turn [CRT] toxic, as we put all of the various cultural insanities under that brand category."[107]

The misinformation campaign, in stark opposition to CRT's purpose outlined above, argued that CRT classified all individual White persons as evil and racist.[108] Moreover, arguments that CRT itself is racist also permeated the speech of those opposing CRT.[109] For example, Senator Ted Cruz claimed that CRT "is bigoted, it is a lie, and it is every bit as racist as the Klansman in white sheets."[110]

More recently, ostensibly in an effort to disqualify Ketanji Brown Jackson—the first Black woman nominated to be a Justice on the United States

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[104] Adam Harris, *The GOP's* '*Critical Race Theory' Obsession*, THE ATLANTIC (May 7, 2021), https://www.theatlantic.com/politics/archive/2021/05/gops-critical-race-theory-fixation-explained/618828.

[105] *See* Kendi, *supra* note 90 ("The Republican operatives . . . define critical race theory . . . and then attack those definitions . . . .").

[106] *Christopher F. Rufo*, MANHATTAN INST., https://www.manhattan-institute.org/expert/christopher-f-rufo (last visited Apr. 8, 2023).

[107] Christopher F. Rufo (@realchrisrufo), TWITTER (Mar. 15, 2021, 3:14 PM), https://twitter.com/realchrisrufo/status/1371540368714428416?s=20 ("We have successfully frozen their brand—'critical race theory'—into the public conversation . . . .").

[108] Patterson, *supra* note 39 ("CRT is a radical curriculum which teaches students their only value is tied explicitly to their race and specifically targets White people as evil.").

[109] Cobb, *supra* note 86 (reporting that CRT has been called "Black-supremacist racism"). As evidence that the arguments were working, consider a Texan who said, "I define critical race theory as being racist and very divisive between the races. . . . [I]t's detrimental to the Black race . . . [and] create[s] in their little minds that they're little victims." Arman Badrei, *Opponents of "Critical Race Theory" Are Winning a Culture War in Montgomery County*, TEX. MONTHLY (Aug. 21, 2021), https://www.texasmonthly.com/news-politics/critical-race-theory-texas-schools (emphasis added); *see also* Senate Hearing, *supra* note 72.

[110] Sarah Polus, *Ted Cruz Says Critical Race Theory is as Racist as 'Klansmen in White Sheets'*, THE HILL (June 6, 2021, 5:49 PM), https://thehill.com/homenews/news/559208-ted-cruz-says-critical-race-theory-is-as-racist-as-klansmen-in-white-sheets. In addition to attacking the heart and substance of CRT, the attacks extend to associating CRT with negative current events. For instance, U.S. Rep. Ronny Jackson (R-Tex.) cited CRT by name when he argued that a 2021 terrorist attack in Afghanistan would not have occurred if General Mark Milley had not been spending so much time working on Biden's "woke social experiment" within the U.S. military. *See* Bryan Metzger & John Haltiwanger, *GOP Rep. Ronny Jackson Tried to Blame ISIS-K Attack on the Military's 'Woke Social Experiment,' Baselessly Tying the Deadly Bombing to Critical Race Theory* (Sept. 29, 2021), https://www.businessinsider.com/ronny-jackson-critical-race-theory-deadly-isis-k-terrorism-afghanistan-2021-9.

Supreme Court—Texas Senator Ted Cruz invoked CRT in his questioning.[111] He asked now-Justice Jackson whether she believed in CRT which taught that all babies are racist.[112] Further, the GOP Twitter account tweeted a picture of Justice Jackson with her initials, KBJ, crossed out and replaced by CRT.[113] As Justice Jackson noted, she had not reviewed the alleged CRT books nor does CRT come up in her work as a circuit or district court judge.[114]

This definitional theft was aimed, at least in Texas, at parents. Toth, the author of the Bill, noted that the purpose was to "protect students."[115] In the words of Lieutenant Governor Patrick, "Texas parents do not want their children to be taught these false ideas. Parents want their students to learn how to think critically, not be indoctrinated by the ridiculous leftist narrative that America and our Constitution are rooted in racism."[116] This definitional attack appealed to parents who may see CRT as threatening their parental control over their children's world views.[117] For example, Teresa Thomas said, at the Texas Senate Committee on State Affairs hearing, that SB 3 "demonstrates [a] heart for the children," emphasizing that the "parent is the first and lifelong teacher" and should be placed "at the forefront of their children's education."[118]

In sum, this animus against CRT, sparked by the racial reawakening in America, is the origin of the Texas Law. Until this point, this Note has explored the relevant provisions and intent of the Texas Law, as well as how it fits into the nationwide tug of war between acknowledging systemic racism and fighting CRT. With that in mind, this Note turns to a few of the early implementations of Section 28.0022.

C. Initial Consequences of the Texas Law

Soon after HB 3979 was passed, school districts in Texas sought to comply with its requirements by changing their operations. For instance,

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[111] Katie Rogers, *Cruz and Jackson Spar Over Antiracism Curriculum at a Private School*, N.Y. TIMES (Mar. 22, 2022), https://www.nytimes.com/2022/03/22/us/politics/cruz-jackson-antiracist-baby.html.

[112] *Id.*

[113] GOP (@GOP), TWITTER (Mar. 22, 2022, 10:52 AM), https://twitter.com/GOP/status/1506282786843410432.

[114] Rogers, *supra* note 111.

[115] *See* Toth, *supra* note 37. Indeed, the opponents of CRT argue that CRT harms children through indoctrination. *See* Kate McGee, *Texas "Critical Race Theory" Bill Limiting Teaching of Current Events Signed into Law*, TEX. TRIB. (June 15, 2021, 6:00 PM), https://www.texastribune.org/2021/06/15/abbott-critical-race-theory-law ("The bill is part of a national movement by conservatives trying to sow a narrative of students being indoctrinated by teachers.").

[116] PATRICK, *supra* note 41.

[117] Kilgore, *supra* note 97.

[118] Senate Hearing, *supra* note 72.

empowered by the Texas Law, Carroll Independent School District limited student access to books by placing yellow "CAUTION DO NOT ENTER" tape over the bookshelves in classroom libraries.[119] That was because the school administration prohibited the use of classroom libraries until every book was vetted using newly developed HB 3979 rubrics. These rubrics scored books and assigned scores of zero if (1) the "[a]uthor perspective/bias distorts content, making the material inappropriate for the use with students" or (2) the "[b]ook represents a singular, dominant narrative in such a way that it cannot be balanced with other materials/may be considered offensive."[120] This balancing language comes directly from HB 3979[121] and has come up in other contexts.

For example, an administrator instructed teachers during a training to "[j]ust try to remember the concepts of . . . 3979."[122] In doing so, the administrator said "make sure that if you have a book on the Holocaust, that you have one that has opposing, . . . other perspectives."[123]

More recently, in May of 2022, a teenager who openly espoused the "great replacement" theory—which claims that White people are being taken over by minorities—traveled to a grocery store in a Black neighborhood to kill ten people.[124] In accordance with the Texas Law's demands, a teacher in Texas told her students that this shooting may not have been racially motivated.[125] Another Texas teacher commented on the same issue on Twitter, writing, "[l]egally, I can't touch it."[126] Elsewhere in Texas, the requirement to balance perspectives was the source of trouble for Jeff Craft, an author who penned a children's book that shares the perspective of a Black child. Due to complaints surrounding CRT, a school district "temporarily" removed the

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[119] Mike Hixenbaugh, *Southlake, Texas, Schools Restrict Classroom Libraries After Backlash over Anti-Racist Book*, NBC NEWS (Oct. 8, 2021, 4:30 AM), https://www.nbcnews.com/news/us-news/southlake-texas-anti-racist-book-school-library-rcna2734.

[120] *Id.*

[121] *See* H.B. 3979, 87th Sess. (Tex. 2021) (Senate Committee Substitute), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB03979S.pdf#navpanes=0 ("[A] teacher who chooses to discuss topics described by Subdivision (1) shall, to the best of the teacher's ability, strive to explore those topics from diverse and contending perspectives without giving deference to any one perspective.").

[122] Ashley Killough, *Texas School Administrator Told Teachers to Include Holocaust Books With 'Opposing' Views When Explaining New State Law*, CNN (Oct. 16, 2021, 10:35 AM), https://www.cnn.com/2021/10/15/us/texas-schools-books-holocaust-state-law/index.html.

[123] *Id.*

[124] Mike Hixenbaugh, *Laws Restricting Lessons on Racism Are Making it Hard for Teachers to Discuss the Massacre in Buffalo*, NBC (May 18, 2022), https://www.nbcnews.com/news/us-news/buffalo-shooting-teachers-racism-laws-rcna29500.

[125] *Id.*

[126] *See* @CoachTLMack, TWITTER (May 15, 2022), https://twitter.com/CoachTLMack/status/1525989611431944194.

book and postponed Craft's visit to a Texas school.[127] Following this trend, a fourth-grade teacher in Carroll school district was reprimanded for having *This Book Is Anti-Racist* in her classroom library.[128]

Further, Texas state representative Matt Krause, who supported the Texas Law, launched an initiative aimed at freezing the use of textbooks covered by Section 28.0022.[129] In his capacity as Chairman of the Texas House Committee on General Investigating, he required school districts in Texas to perform an investigation to seek out books that might violate the Texas Law.[130] Using Section 28.0022 language, the letter targeted books that "might make students feel discomfort, guilt, or anguish . . . because of their race . . . or convey that a student, by virtue of their race or sex, is inherently racist . . . or oppressive, whether consciously or unconsciously."[131] Krause listed some 850 titles in the attached Addendum, including titles *How to Be an Antiracist* and *The New Jim Crow*.[132]

And the reach of Section 28.0022 extends beyond just books. Teachers fear punishment in the form of suspension or termination and have accordingly changed how they discuss race in the classroom.[133] In fact, some Texas teachers reportedly said they were afraid to teach on topics that even "touch[] tangentially on racism."[134] This is because teachers found vagueness in the prohibitions of Section 28.0022.[135] At least one attorney who represents Texas

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[127] Daniel Trotta, *Texas Schools Remove Children's Books Branded 'Critical Race Theory'*, REUTERS (Oct. 6, 2021), https://www.reuters.com/world/us/texas-schools-remove-childrens-books-branded-critical-race-theory-2021-10-07.

[128] Hixenbaugh, *supra* note 119.

[129] Brian Lopez, *Texas House Committee to Investigate School Districts' Books on Race and Sexuality*, TEX. TRIB. (Oct. 26, 2021, 2:00 PM), https://www.texastribune.org/2021/10/26/texas-school-books-race-sexuality.

[130] *Id.*

[131] Letter from Matt Krause, Chairman, Tex. House Comm. on Gen. Investigating, to Selected Superintendents 2 (Oct. 25, 2021), https://www.lrl.texas.gov/scanned/archive/2021/48175.pdf.

[132] *Id.* at add., 2–3.

[133] *See* Hixenbaugh, *supra* note 124 ("Fearing for their jobs, teachers in some communities are avoiding the conversation altogether . . . ."); *see also* Ileana Najarro, EDUC. WEEK (Dec. 20, 2022), https://www.edweek.org/teaching-learning/whatever-happened-with-texas-anti-crt-law/2022/12 (summarizing three Texas teachers' negative experiences with the law).

[134] Nicole Chavez, *Confusion Reigns in Texas As New Law Aims to Restrict How Race and History Are Taught in Schools*, CNN (Sept. 1, 2021, 1:02 PM), https://www.cnn.com/2021/09/01/us/texas-critical-race-theory-social-studies-law/index.html.

[135] Hixenbaugh, *supra* note 119 ("[T]he guidelines are too vague and that they are afraid of being punished by the school board . . . ."); *see also* Valeria Olivares, *A Tougher Bill Aimed at Keeping Critical Race Theory Out of Texas Schools Heads to Gov. Abbott*, DALL MORNING NEWS (Sept. 2, 2021, 1:31 PM), https://www.dallasnews.com/news/education/2021/09/02/will-texas-pass-a-tougher-bill-aimed-at-keeping-critical-race-theory-out-of-schools ("We've heard from teachers that are scared to now teach social

educators reported receiving questions from teachers, asking what exactly they are allowed to teach.[136] One teacher even expressed that she was considering quitting at the end of the year because the Law made it so difficult for her to teach.[137] And a consequence of the vagueness is the fact that parents are interpreting Section 28.0022 themselves and then implementing the law by pressuring school districts to take action.[138]

Moreover, teachers have also expressed concern over not just violating the text of the Texas law, but also "violating the spirit of the law."[139] That is because, as Randi Weingarten, union president of AFT, observed: the attack on CRT labeled CRT as "any discussion of race, racism, or discrimination."[140] This has an effect on teachers who feel a need to comply not just with the text, but also the entire motivation behind the law to ban everything encompassed by the broad CRT definition.

Finally, talks of First Amendment litigation, prompted by the chilling of teachers' speech, were among the initial consequences of the Texas Law. Early on, an attorney for the ACLU of Texas indicated early on that the

studies."); Brian Lopez, *How a Black High School Principal Was Swept Into a "Critical Race Theory" Maelstrom in a Mostly White Texas Suburb*, TEX. TRIB. (Sept. 20, 2021), https://www.texastribune.org/2021/09/18/colleyville-principal-critical-race-theory ("The vagueness of Texas' law also doesn't help educators and school administrators who will scramble to not get in trouble."); TEX. HOUSE J., 87th Leg., 2d Sess., at 390 (2021) (explaining his vote on SB 3, Representative Beckley stated, "[HB 3979's] broad language can be interpreted in ways that limit the learning, diversity, and inclusion efforts already underway in schools across Texas"); Alfonseca, *supra* note 42 ("[T]eachers and advocates say it is so vague that it could infringe on their ability to have truthful dialogue about history and racism with their students."); Gabriella Beker, *Austin ISD Teachers and Students Concerned About Impacts of Restricting Social Studies Curriculum*, AUSTIN INDEP. SCH. DIST. (Sept. 17, 2021), https://www.austinisd.org/announcements/2021/09/17/austin-isd-teachers-and-students-concerned-about-impacts-restricting ("It's pretty vague . . . . A lot of it is put on whether or not an individual in the class decides for themselves if they feel uncomfortable with the content. It's a very abstract way of restricting a curriculum.").

[136] Brian Lopez, *The Law That Prompted a School Administrator to Call for an "Opposing" Perspective on the Holocaust is Causing Confusion Across Texas*, TEX. TRIB. (Oct. 15, 2021, 7:00 PM), https://www.texastribune.org/2021/10/15/Texas-critical-race-theory-law-confuses-educators ("Paul Tapp, attorney with the Association of Texas Professional Educators, said his organization has received questions from teachers because they don't know what they can teach.").

[137] *See* Hixenbaugh, *supra* note 124.

[138] Lopez, *supra* note 136 ("Monica Martinez, a University of Texas at Austin history professor, said the law is almost being implemented by parents . . . .").

[139] *See* Beker, *supra* note 135 (writing that a U.S. History and Ethnic Studies teacher at Bowie High School, Carlen Floyd, told a reporter: "I second guess, I double-check, and I ponder, 'Am I violating the spirit of the law?' 'Am I violating the letter of the law?'").

[140] *See* Emily Jacobs, *Teacher Union President Defends Critical Race Theory As 'Accurate History'*, N.Y. POST (July 8, 2021, 3:31 PM), https://nypost.com/2021/07/08/teachers-union-president-randi-weingarten-defends-critical-race-theory.

Section 28.0022 "unconstitutionally censors."[141] Later in 2022, the ACLU of Texas, along with ten other civil rights groups, in fact penned a letter to a Texas school district, asserting that book removals due to the Texas Law violated the First Amendment.[142] Also, David Hinojosa, director of the Educational Opportunities Project at the Lawyers' Committee for Civil Rights, based in Washington, D.C., said the organization was "investigating potential legal claims."[143]

It should be noted here that all these initial impacts of the existing Texas Law, which governs grades K–12, will characterize the experiences of professors if the Texas Legislature passes HB 1607, extending this purported CRT-banning campaign to college and university classrooms.[144] A professor of government at University of Texas at Austin said as much: the law that aspires to strip funding from higher education institutions that teach CRT "would undercut his ability to have nuanced conversations about race."[145]

That said, this Note will now turn to the relevant legal yardstick, the International Convention on the Elimination of All Forms of Racial Discrimination to determine whether the Texas Law accords with established international law.

III. THE OBLIGATION TO PROMOTE TEACHING THAT COMBATS RACE-BASED PREJUDICES, WHICH THE UNITED STATES ASSUMED BY JOINING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

Up until this point, this Note has focused on the Texas Law's history and purpose, as well as its position in the context of the national assault on CRT. The 1965 International Convention on the Elimination of All Forms of Racial Discrimination, often called by its acronym, ICERD, is now the focus. As an initial matter, this Part will discuss ICERD's origins, purpose, and its

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[141] Olivares, *supra* note 135; *see also* Talia Richman & Emily Donaldson, *Gov. Abbott Signs 'Anti-Critical Race Theory' Bill into Law over Objections from Educators and Civic Groups*, DALL. MORNING NEWS (June 15, 2021, 8:20 PM), https://www.dallasnews.com/news/education/2021/06/15/gov-abbott-signs-anti-critical-race-theory-bill-into-law-over-objections-from-educators-and-civic-groups.

[142] Brooke Migdon, *Texas Civil Rights Groups Demand School District Return over 100 Books to Library Shelves*, THE HILL (Mar. 1, 2022), https://thehill.com/changing-america/respect/diversity-inclusion/596335-texas-civil-rights-groups-demand-school-district.

[143] *Id.*

[144] *See supra* notes 33–35 and accompanying text.

[145] *See* Monica Madden, *Texas Lawmaker Proposes Banning Universities From Teaching Critical Race Theory*, KXAN (Jan. 26, 2023, 1:41 PM), https://www.kxan.com/news/texas-politics/texas-lawmaker-proposes-banning-universities-from-teaching-critical-race-theory (summarizing her interview with Professor Eric McDaniel).

enforcement mechanisms. Next, this Part will discuss Article 7 of the treaty, the provision that will frame the analysis in Part III.

A. Overview of the 1965 Convention Against Race Discrimination

ICERD is a unique instrument, truly the first of its kind in many respects. In accord with its name, the preamble expresses the principal aim of "speedily eliminating racial discrimination in all its forms and manifestations."[146] This section will outline how the treaty seeks to accomplish this goal by looking at (1) the background of the treaty, (2) the obligations stemming from adoption of the treaty, (3) the enforcement mechanisms of the treaty, and (4) the United States' ratification of the treaty.

i. Background, Adoption, and Entry into Force of the Convention

Events leading to ICERD began with an outbreak of anti-Semitism, known as the "Swastika Epidemic," in the early 1960s.[147] This "epidemic" began with the desecration of a synagogue in Cologne, Germany, but the movement was global.[148] According to Simon Epstein, "nearly 2,500 incidents were recorded in 400 localities throughout the world," including Western Europe, the United States, and Latin America.[149] The initial response to this outbreak, however, was not a binding treaty. Instead, the U.N. General Assembly responded with declarations that aimed to tackle the issues of race and religion in conjunction.[150] Eventually, however, race took priority,[151] and

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[146] *See* ICERD, *supra* note 22, at pmbl.

[147] FIFTY YEARS OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A LIVING INSTRUMENT 3 (David Keane & Annapurna Waughray eds., 2017) [hereinafter FIFTY YEARS]; *see also* PATRICK THORNBERRY, THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A COMMENTARY 24 (2016).

[148] THORNBERRY, *supra* note 147, at 24 n.47.

[149] SIMON EPSTEIN, CYCLICAL PATTERNS IN ANTISEMITISM: THE DYNAMICS OF ANTI-JEWISH VIOLENCE IN WESTERN COUNTRIES SINCE THE 1950S 2 (1993).

[150] First, in 1960, Resolution 1510 (XV) noted that the United Nations was "duty bound to combat these manifestations" of "racial and national hatred, religious intolerance and racial prejudice which still exist[s] in the world." G.A. Res. 1510 (XV), at 21 (Dec. 12, 1960); *see* THORNBERRY, *supra* note 147, at 24. Then, in 1961, the Manifestation of Racial Prejudice and National and Religious Intolerance was adopted. G.A. Res. 1779 (XVII), at 32 (Dec. 7, 1962); *see also* THORNBERRY, *supra* note 147, at 25; Audrey Daniel, *The Intent Doctrine and CERD: How the United States Fails to Meet its International Obligations in Racial Discrimination Jurisprudence*, 4 DEPAUL J. FOR SOC. JUST. 263 (2011) (citing Michael B. de Leeuw et al., *The Current State of Residential Segregation and Housing Discrimination: The United States' Obligations Under the International Convention on the Elimination of All Forms of Racial Discrimination*,13 MICH. J. RACE & L. 337, 341 (2008).

[151] "The decision to separate the problem of 'religious intolerance' from that of 'racial discrimination' had been brought about by political undercurrents which had very little to

the 1963 declaration on the Elimination of All Forms of Racial Discrimination—ICERD's precursor—addressed racial discrimination without mention of religion.[152] Importantly, the General Assembly was not content with just a declaration. In fact, just two years later, on December 21, 1965, ICERD was unanimously adopted in the U.N. General Assembly.[153]

One pivotal difference between the declaration and ICERD is that the former lacked a definition for "racial discrimination."[154] ICERD, however, defined the term in Article 1:

> In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of

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do with the merits of the problem. The opposition to coverage of religious as well as racial discrimination had come from some of the Arab delegations; it reflected the Arab-Israeli conflict. In addition, many delegations, particularly those from Eastern Europe, did not consider questions of religion to be as important and urgent as questions of race." Egon Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT'L & COMPAR. L.Q. 996, 999 (1966); *see also* NATAN LERNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 4 (2015) (describing how "the decision to separate the instruments on religious intolerance from those on racial discrimination is considered a compromise solution" to overcome opposition from Arab delegations).

[152] FIFTY YEARS, *supra* note 147, at 3. Even though the original impetus for the instruments that foreshadowed ICERD was anti-Semitism, it was colonialism, apartheid, and slavery that led to the adoption of ICERD. *Id.* at 4 (explaining that ICERD's "realization came from the support of many African and Asian States for what was seen as an international statement against apartheid and colonialism"); *see also* Gay McDougall, *The International Convention on the Elimination of All Forms of Racial Discrimination*, U.N. AUDIOVISUAL LIBR. OF INT'L L., https://legal.un.org/avl/pdf/ha/cerd/cerd_e.pdf ("African States newly emerging from colonial rule into independence and gaining membership in the United Nations began setting an agenda for the United Nations that included an increasing focus on decolonization, independence for South West Africa/Namibia, an end to apartheid in South Africa and codification of the customary law against racial discrimination."); THORNBERRY, *supra* note 147, at 32 (noting how "colonial expansion" and "the justification of slavery" largely influenced the drafting of the Convention). Also, "Apartheid and colonialism were not the only forces influencing the treaty's drafting." FIFTY YEARS, *supra* note 147, at 5. The U.N. Sub-Commission visited Atlanta in 1964 to view the status of racism in the South. *Id.*

[153] THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 309 (Frédéric Mégret & Philip Alston eds., 2d ed. 2020) [hereinafter CRITICAL APPRAISAL]. The "record speed" in which the Convention was adopted is noteworthy. *Id.*; THORNBERRY, *supra* note 147, at 30 ("In adopting the Declaration, the General Assembly emphasized the importance of the speedy preparation and adoption of an international convention on the elimination of all forms of racial discrimination . . . .").

[154] THORNBERRY, *supra* note 147, at 29.

> human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[155]

Having set forth a definition of racial discrimination, ICERD became "the most comprehensive and unambiguous codification in treaty form of the idea of the equality of the races."[156] This was no small accomplishment.[157] Accordingly, 182 states, representing over 95% of the world's population, are parties to ICERD today—including the United States.[158]

ii. Summary of States Parties' Obligations Under the Convention

Out of ICERD's twenty-five Articles, seven contain substantive obligations, with the rest focusing on procedural and enforcement matters. Beginning in Article 1, ICERD defines racial discrimination. Noteworthy is the fact that Article 1, unlike the interpretation of racial discrimination under the United States Constitution, includes discriminatory "effect" independent of discriminatory purpose.[159]

Article 2, as Thornberry described it, "sets out the Convention's broadest portfolio of State 'undertakings' or obligations,"[160] urging states parties to

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[155] ICERD, *supra* note 22, at art. 1.

[156] Schwelb, *supra* note 151, at 1057.

[157] *See* LERNER, *supra* note 151, at 11 (calling ICERD "a most significant step"); Anna Spain Bradley, *Human Rights Racism*, 32 HARV. HUM. RTS. J. 1, 20 (2019) ("ICERD became the first universal human rights treaty to directly address racial discrimination."); David Keane, *Mapping the International Convention on the Elimination of All Forms of Racial Discrimination as a Living Instrument*, 20 HUM. RTS. L. REV. 236, 237 (2020) (noting that, as the first of the international human rights treaties, ICERD was "a signal moment in international law and relations") (citation omitted); Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT'L L. 283, 284 (1985) ("[ICERD] embodied the world community's declaration of an international standard against racial discrimination.").

[158] FIFTY YEARS, *supra* note 147, at 7; *see also* McDougall, *supra* note 152 (there are 182 ratifications and 88 signatories). In addition to the near ubiquitous condemnation of racial discrimination, another reason for widespread adoption may have been the fact that it was not perceived as a threat; that is, according to Stephanie Farrior, most "did not view [ICERD] as being applicable, or even needing application, within their own territory." Stephanie Farrior, *The Neglected Pillar: The 'Teaching Tolerance' Provision of the International Convention on the Elimination of All Forms of Racial Discrimination*, 5 ILSA J. INT'L & COMPAR. L. 291, 291 (1999).

[159] *Compare* ICERD, *supra* note 22, at art. 1, *with* Washington v. Davis, 426 U.S. 229, 242 (1976) (noting that, under the United States Constitution, "[d]isproportionate impact is not irrelevant, but . . . [s]tanding alone, it does not trigger . . . the strictest scrutiny . . ."). *See generally* Trotta, *supra* note 127 (discussing differences between ICERD's definition of racial discrimination and the intent doctrine in United States Supreme Court jurisprudence).

[160] THORNBERRY, *supra* note 147, at 160.

adopt policy to eliminate racial discrimination without delay.[161] Moreover, Article 3 requires states parties to "condemn racial segregation and apartheid." In essence, Article 4 mandates that state parties make racist hate speech illegal.[162] Furthermore, Article 5 enumerates several rights that states parties must, in compliance with the "fundamental obligations" of Article 2, undertake to guarantee to everyone, "without distinction as to race" or other classifications.[163] To name a few, Article 5 protects civil and political rights such as the right to marriage and the right to vote.[164] It also protects economic, social, and cultural rights, including the right to work, housing, and education. Article 6 obligates State parties to ensure that "effective protection and remedies" are available for those treated in a way "contrary to this Convention."[165] Finally, and most important for this Note, Article 7 commands States parties to address racial prejudice while "promoting understanding, tolerance and friendship" through "the fields of teaching, education, culture and information."[166] The next subsection will explore how the Convention's treaty body monitors compliance with these obligations.

iii. The Convention's Treaty Body: The Committee on the Elimination of Racial Discrimination

At the 1406th U.N. General Assembly meeting in 1965, Representative Willis from the United States asserted that ICERD is "more than a statement of lofty ideals. It provides machinery for implementation which goes well beyond any previous human rights instrument negotiated in the United Nations."[167] This "machinery" will be the subject of this subsection. Specifically, this subsection will explore how the treaty body established under the Convention, known as the Committee on the Elimination of Racial Discrimination (the Committee), oversees and encourages implementation of the provisions of ICERD.

a. The Experts

The Committee was established in 1970 as the "first international treaty-monitoring body of its kind."[168] In accordance with Article 8(1) of ICERD,

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[161] ICERD, *supra* note 22, at art. 2.
[162] *Id.* at art. 4.
[163] *Id.* at art. 5.
[164] *Id.*
[165] *Id.* at art. 6.
[166] *Id.* at art. 7.
[167] U.N. GAOR, 20th Sess., 1406th plen. mtg. at ¶ 98, U.N. Doc. a/PV.1406 (Dec. 21, 1965).
[168] FIFTY YEARS, *supra* note 147, at 1; *see also* Hadar Harris, *Race Across Borders: The U.S. and ICERD*, 24 HARV. BLACKLETTER L.J. 61, 62 (2008) ("It was the first human

the Committee is made up of "eighteen experts of high moral standing and acknowledged impartiality elected by States Parties from among their nationals, who shall serve in their personal capacity."[169] Committee members are elected and hold terms of four years.[170] And while many come from states parties, the members function independently of both the United Nations and their respective states, in an effort to insulate them from external pressures.[171] In a statement at the World Conference to Combat Racism and Racial Discrimination, the Committee described ICERD as "legally binding in character, and equipped with built-in measures of implementation."[172] This Note will now consider those various built-in measures of implementation.

b. The Committee's Measures of Implementation

ICERD has been described as a "living instrument," largely because of the "practice of the committee."[173] In essence, according to the Committee, this means that the Convention "must be interpreted and applied taking into [account] the circumstances of contemporary society."[174] The Committee accomplishes this goal through a number of processes, and this Note will focus on three: states parties reports, General Recommendations, and Concluding

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rights treaty to set up an oversight mechanism, a treaty monitoring committee . . . ."); CRITICAL APPRAISAL, *supra* note 153, at 310 ("The treaty body 'model' pioneered by CERD has been repeated many times over.").

[169] ICERD, *supra* note 22, at art. 8. These members take a solemn declaration that they will execute their position "honourably, faithfully, impartially and conscientiously." THORNBERRY, *supra* note 147, at 44. Moreover, these experts are not necessarily experts on racial discrimination. CRITICAL APPRAISAL, *supra* note 153, at 311. Past experts have been "diplomats, academics, graduates of NGO or activist sectors and national human rights institutions." *Id.* at 312.

[170] LERNER, *supra* note 151, at 78–79 (citing ICERD, *supra* note 22, at art. 8).

[171] THORNBERRY, *supra* note 147, at 35 ("Members of treaty bodies are independent and not subject to government control; equally, they are not international civil servants employed by the United Nations."); LERNER, *supra* note 151, at 78 (noting that experts should "not act as plenipotentiaries . . . or as agents or representatives of any government"); *see also* Comm. on the Elimination of Racial Discrimination, General Recommendation IX Concerning the Application of Article 8, Paragraph 1, of the Convention, 38th Sess. (1990), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7481&Lang=en (expressing "alarm[]" at "the tendency of the representatives of States, organizations and groups to put pressure upon experts").

[172] Meron, *supra* note 157 (quoting Comm. on the Elimination of Racial Discrimination, Report to the General Assembly, annex V at 109, U.N. Doc. A/33/18 (1978)).

[173] THORNBERRY, *supra* note 147, at 490.

[174] *See* Hagan v. Australia, U.N. Doc. CERD/C/62/D/26/2002, ¶ 7.3 (Comm. on the Elimination of Racial Discrimination Mar. 20, 2003).

Observations. These three procedures originate in Article 9 and "have developed significantly to become the mainstay of the Convention."[175]

The first important element of Article 9 requires states parties to submit a report detailing their compliance with ICERD every two years.[176] According to the text of the Convention, these reports are "for the Committee's review."[177] This review process is the second important procedure for the purposes of this Note. Initially, the Committee would produce informal summaries of its members' opinions regarding a state party's report. In 1988, however, the Committee began appointing a country rapporteur "to prepare a thorough study and evaluation of each State report, to prepare a comprehensive list of questions to put to the representatives of the reporting state and to lead the discussion in the Committee."[178] This process led to a "more searching" inquiry which, by 1992, resulted in a formal document that represented the collective view of the Committee.[179] These documents, known as Concluding Observations,[180] include "positive aspects" as well as "concerns and recommendations" specific to the report submitted by the state party under review.[181] The dialogue between states parties and the Committee, spurred by the filing of the reports and the issuance of Concluding Observation, is, as Frédéric Mégret and Philip Alston point out, the primary form of accountability and enforcement of ICERD obligations.[182]

Finally, the third procedural aspect important to this Note originates in Article 9(2) of the Convention, which confers on the Committee the discretion to "make suggestions and general recommendations."[183] The General Recommendations expound on the text of the Convention; in effect, they serve as a how-to-implement guide.[184] In the words of David Keane, Associate Professor

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[175] THORNBERRY, *supra* note 147, at 491. Other functions of the Committee, not discussed in this Note, are as follows: (1) the Committee hears individual claims under Article 14; (2) it facilitates inter-state disputes under Articles 11–13; and (3) it acts under its Article 9 Early Warning and Urgent Action Procedure, which allows the Committee to immediately address egregious violations to prevent worsening of the situation. *Id.* at 49–62.

[176] ICERD, *supra* note 22, at art. 9.

[177] *Id.*

[178] THORNBERRY, *supra* note 147, at 46; *see also* FIFTY YEARS, *supra* note 147, at 10 ("While the text of the treaty remains static (with no additions via protocols), [I]CERD has been the vehicle for evolution in terms of procedural innovations and interpretation of key terms.").

[179] THORNBERRY, *supra* note 147, at 47; FIFTY YEARS, *supra* note 147, at 10.

[180] THORNBERRY, *supra* note 147, at 47.

[181] *Id*. In addition to Concluding Observations, the Committee may ask state parties to submit a follow-up on the implementation of certain recommendations that were included in the Committee's Concluding Observations. FIFTY YEARS, *supra* note 147, at 10.

[182] CRITICAL APPRAISAL, *supra* note 153, at 312–13 ("The Committee's examination of state reports remains the centrepiece of its work.").

[183] ICERD, *supra* note 22, at art. 9(2).

[184] Nathalie Prouvez, *Committee on the Elimination of Racial Discrimination: Confronting Racial Discrimination and Inequality in the Enjoyment of Economic, Social and*

of International Human Rights Law at Middlesex University in London, the General Recommendations form a "doctrinal basis for the treaty bodies' interpretive work."[185] To that end, General Recommendations have discussed the interpretation of specific articles,[186] as well as matters in the world that raise novel concerns regarding racial discrimination.[187] Moreover, General Recommendations are not binding *per se* on states parties. But the Committee nevertheless questions state parties with the General Recommendations in mind, expecting states parties to have complied with the Committee's interpretations.[188] In that way, the General Recommendations affect how states parties adhere internally to their obligations and how they report on them.[189]

Additionally, General Recommendations contribute substantially to the notion that ICERD is a living instrument by ensuring that the treaty's interpretive and authoritative information always reflects the current times. For example, Article 1(2) seemingly excludes non-citizens from the scope of the treaty.[190] Yet in General Recommendation 30—because of new, "contemporary racism" against migrants and undocumented citizens—the Committee expanded Article 1(2) to address the current state of racial discrimination.[191] Evidently, as Thornberry wrote, the treaty is "interpreted based on evolving practice and current context."[192] This is important because the issues of racial discrimination are far from stagnant. The Committee, therefore, is at an

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Cultural Rights, *in* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 517, 520 (Malcolm Langford ed., 2008) (writing that via General Recommendations, "CERD has elaborated upon the scope of protection of the Convention").

[185] Keane, *supra* note 157, at 268.

[186] *See, e.g.*, Comm. on the Elimination of Racial Discrimination, General Recommendation XV on Article 4 of the Convention (1993), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7487&Lang=en.

[187] *See, e.g.*, Comm. on the Elimination of Racial Discrimination, General Recommendation XXV on Gender-Related Dimensions of Racial Discrimination (2000), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7497&Lang=en.

[188] FIFTY YEARS, *supra* note 147, at 13 (Concluding Observations are "supported by reference to relevant [General Recommendations]"); McDougall, *supra* note 152, at 2 ("General recommendations are considered authoritative interpretations of the Convention."); THORNBERRY, *supra* note 147, at 54.

[189] U.N. Off. of the High Comm'r for Hum. Rts., Manual on Human Rights Reporting 300, U.N. Doc. HR/PUB/91/1/Rev.1 (1997) (noting that Committee interpretation "*per se* is not binding on States Parties, but it affects their reporting obligations and their internal and external behaviour").

[190] ICERD, *supra* note 22, at art. 1.

[191] Comm. on the Elimination of Racial Discrimination, General Recommendation XXX on Discrimination Against Non-Citizens (2005), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?sy-bolno=INT%2fCERD%2fGEC%2f7502&Lang=en.

[192] THORNBERRY, *supra* note 147, at 490.

advantage to adapt to the current climate of racial discrimination—and contribute to the promotion of beneficial change.[193] In other words, as new vehicles of racial discrimination are birthed by a changing society, the Committee is appropriately outfitted to address such issues.[194]

iv. The United States' 1994 Ratification of the 1965 Convention Against Race Discrimination

The United States signed ICERD in 1966, just a few months after its adoption by the U.N. General Assembly.[195] But it was not until nearly thirty years later, in 1994, that the United States ratified the Convention, doing so with reservations.[196]

From the outset, commentators in the United States expressed concerns that the Convention would affect rights enumerated in its Constitution; namely, the freedom of speech guaranteed in that Constitution's First Amendment.[197] The United States placed an asterisk next to its ratification of ICERD in the form of three reservations, one understanding, and one declaration.[198] The three reservations: (1) denied any U.S. obligation under the Convention, with specific references to Article 4 and Article 7, that would restrict constitutional rights; (2) rejected any obligation under the Convention to regulate private conduct; and (3) refused to appear before the International Court of

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[193] *Id.*

[194] Prouvez, *supra* note 184, at 520 (observing ICERD's "continuing relevance and application to contemporary forms of racism suffered by specific groups").

[195] *ICERD Status*, *supra* note 22.

[196] *Id.*; *see also* Tuneen E. Chisolm, *When Righteousness Fails: The New Incentive for Reparations for Slavery and Its Continuing Aftermath in the United States*, 24 U. PA. J.L. & SOC. CHANGE 195, 213 n.99 (2021) (discussing the six presidential administrations prior to President Clinton's support of ICERD: Presidents Johnson, Nixon, and Ford failed to submit ICERD to the Senate; President Carter submitted the Convention but received resistance from the Foreign Relations Committee; and Presidents Reagan and Bush did not support the Convention).

[197] During the drafting of the Convention, the United States urged for an amendment to Article 4 that read "with due regard for the fundamental right of freedom of expression." LERNER, *supra* note 151, at 49. And upon signature, the United States wrote that it did not require or authorize any action "incompatible with the provisions of the Constitution," specifically referring to "the right of free speech." *ICERD Status*, *supra* note 22.

[198] A reservation is, according to the Vienna Convention, "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Vienna Convention on the Law of Treaties art. 2(1)(d), May 23, 1969, 1155 U.N.T.S. 331, 333. And the U.N. Human Rights Committee declared that reservations are any statements that "displays a clear intent . . . to exclude or modify the legal effect of a specific provision of a treaty." H.K. v. France, Communication No. 222/1987, ¶ 8.6, U.N. Doc. CCPR/C/37/D/222/1987 (U.N. Hum. Rts. Comm. 1989).

Justice in any action grounded in the Convention, unless the United States should give its specific consent to suit an action.[199] The reservations drew criticism from scholars and the Committee, some arguing that the reservations reduced the Convention to a mere declaratory symbol for the United States.[200]

Nevertheless, even though Article 7 of the convention was mentioned specifically in the reservation, it still creates obligations. As Stephanie Farrior noted, the reservation impacted the "substance of Article 4," not Article 7.[201] In fact, she believed that the only saving grace of the Convention was Article 7, writing that "[g]iven the United States reservations to Article 4 on hate speech, a failure to implement the other pillar of the Convention, Article 7, could render United States ratification of the treaty nearly meaningless."[202]

Committee interpretation of the reservation is similar, stating that "[s]ince [A]rticle 7 could be considered as aimed chiefly at education as a means to combat prejudice, the reservation would seem to apply mainly to [A]rticle 4."[203] As mentioned above, Article 4 specifically outlaws hate speech, a prohibition that is inconsistent with the United States Constitution.[204] The United

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[199] *ICERD Status*, *supra* note 22. In addition to the reservations, the single understanding clarifies the United States' position regarding relationship between the implementation of the Convention by the federal government and state governments, while the single declaration stated that the Convention is not self-executing within the United States. Regarding the declaration, Gay McDougall, an active member of the Committee and Fordham University Law Professor, explained that non-self-executing simply means that "[l]egislation would have to be enacted first to implement the treaty's provisions in U.S. law." *See* Gay J. McDougall, *Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination*, 40 HOW. L.J. 571, 588 (1997). McDougall emphasized that this declaration "did not, however, diminish the U.S. government's international legal obligations under the Convention." *Id.*; *see also* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declaration and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 174–75 (1999) (stating that the declaration was "political wisdom" necessary to assuage the Senate's concerns, and thus enabled ratification of the treaty).

[200] Chisolm, *supra* note 196, at 214 (asserting that the declarations, understandings, and reservations "hindered meaningful compliance with ICERD"); Trotta, *supra* note 127, at 273–74 (writing that the reservations "essentially exempted the United States from any requirement that did not already conform to United States law," making the Convention "largely symbolic"); *see also* McDougall, *supra* note 199, at 587 (stating that the reservations reflect a "practice of defensively isolating U.S. law and practice from meaningful international scrutiny" as to make the signing a mere "rhetorical commitment").

[201] Farrior, *supra* note 158, at 295.

[202] *Id.* at 299.

[203] Comm. on the Elimination of Racial Discrimination, Summary Record of the 1475th Meeting: Initial, Second, and Third Periodic Reports of the United States of America, U.N. Doc. CERD/C/SR.1475, ¶ 6 (2001).

[204] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (invalidating an ordinance that prohibited hate speech, noting that "[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects"). The United States recognized as much in its first report, submitted in 2000 to the committee that monitors compliance with ICERD; in it, the United States explicitly defended its

States has thus focused its objections on Article 4,[205] while detailing its purported compliance with Article 7 obligations in its first three reports on ICERD.[206] The next section will further discuss these obligations.

B. Article 7 Obligation to Promote Teaching that Combats the Prejudices Leading to Racial Discrimination

In this section, this Note will set forth the legal yardstick that the Texas Law will be measured against—Article 7 of ICERD. The approach of Article 7 differs from the other substantive articles in that it focuses on encouraging positive behavior rather than emphasizing what is prohibited. To begin, this section will discuss the text of the Article, the premise beneath that text, and the social science support for that premise. From there, the Note will turn to Committee interpretation of Article 7, specifically as it relates to the United States.

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reservations by stating that "American citizens applaud the fact that the First Amendment to the U.S. Constitution sharply curtails the Government's ability to restrict or prohibit the expression or advocacy of certain ideas, however objectionable." Comm. on the Elimination of Racial Discrimination, Reports Submitted by States Parties under Article 9 of the Convention, U.N. Doc. CERD/C/351/Add.1, ¶ 150 (2000) [hereinafter First U.S. Report].

[205] *See* First U.S. Report, *supra* note 204. The report specifically recalled that "[d]uring the drafting of article 4, the U.S. delegation expressly noted that it posed First Amendment difficulties," with no similar mention of Article 7. *Id.* ¶ 154. Moreover, in a statement on the U.S. reservations, the Committee did not express worry about the Article 7 reservation, but noted "particular[] concern about the implication of the State party's reservation on the implementation *of article 4 of the Convention*." Comm. on the Elimination of Racial Discrimination, Report to the General Assembly, U.N. Doc. A/56/18, ¶ 391 (2001) (emphasis added). Natan Lerner, a professor and appointed U.N. expert on freedom of expression and incitement, said in a 2015 analysis of ICERD that Article 7 "does not present any difficulties." *See* LERNER, *supra* note 151, at 66; *see also* NATHANIEL L. NATHANSON & EGON SCHWELB, THE UNITED STATES AND THE UNITED NATIONS TREATY ON RACIAL DISCRIMINATION: A REPORT FOR THE PANEL ON INTERNATIONAL HUMAN RIGHTS LAW AND ITS IMPLEMENTATION 14 (1975) (detailing, in a report written decades before the 1994 U.S. ratification, that "apart from the provisions of the Convention [Article 4(a) and (b)] where we recommend making and/or maintaining a reservation—the law of the Convention is mainly . . . already part of the law of the land"). Nathanson, then a Northwestern law professor, and Schwelb, a former deputy director of the division of human rights at the United Nations, proceeded to recommend a potential reservation to Article 5; they did not mention Article 7 at all in this regard. *Id.* at 26.

[206] *See* First U.S. Report, *supra* note 204, ¶¶ 444–64; *see also* Comm. on the Elimination of Racial Discrimination, Reports Submitted by State Parties Under Article 9 of the Convention, U.N. Doc. CERD/C/USA/6, ¶¶ 290–307 (2007); Comm. on the Elimination of Racial Discrimination, Report Submitted by State Parties Under Article 9 of the Convention, U.N. Doc. CERD/C/USA/7-9, ¶¶ 210–16 (2013).

i. The Text of Article 7 of the Convention and the Understandings that Undergird It

Article 7 of ICERD reads as follows:

> States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.[207]

In essence, Article 7 instructs state parties to do two things: first, state parties are to make pointed efforts to dismantle prejudices through the means of education. Second, state parties are required to ensure that citizens in their jurisdiction are aware of the content and requirements of ICERD. This Note will focus on the first mandate.

Article 7's educational approach is rooted in three fundamental and related understandings: first, racial discrimination has its roots in prejudice;[208] second, prejudice is not innate, but rather is learned;[209] and third, education therefore plays a pivotal role in ICERD's overall campaign to dismantle racial discrimination because it addresses the source of prejudice.[210] Indeed, according to Thornberry, the drafters of Article 7 recognized that "combating racial discrimination necessitate[d] changes of mentalities and attitudes to achieve

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[207] ICERD, *supra* note 22, at art. 7.

[208] *See* THORNBERRY, *supra* note 147, at 445 (stating the very sentiment "specifically endorsed by Article 7" is that "[p]rejudices tend to generate discrimination").

[209] Kevin Boyle & Anneliese Baldaccini, *A Critical Evaluation of International Human Rights Approaches to Racism*, *in* DISCRIMINATION AND HUMAN RIGHTS: THE CASE OF RACISM 135, 165 (Sandra Fredman ed., 2001) ("The duties [Article 7] requires of states reflect the thesis that racist ideas are not innate . . . . Unless such ideas are tackled at their source, they will continue to be handed down from generation to generation. The importance of full implementation of these [Article 7] provisions for the long-term success of the goals of ICERD and the right to equality cannot be underestimated.").

[210] *Id.*; *see also* Comm. on the Elimination of Racial Discrimination, General Recommendation No. 35, U.N. Doc. CERD/C/GC/35, ¶ 30 (2013) [hereinafter General Recommendation 35] (The Committee noted that as opposed to addressing the "flow of racist ideas . . . [a]rticle 7 addresses the *root causes*.") (emphasis added); McDougall, *supra* note 152, at 5 ("Under article 7, States parties undertake to adopt measures to short circuit prejudices before they are deeply entrenched in society.").

inter-ethnic harmony in the longer-term."[211] Social science offers robust support for the proposition that such changes are possible. According to studies performed by psychologists and other social scientists, prejudice is developed and can be reduced through education.

a. The Development of Prejudice Is a Learning Process

As an initial matter, the Cambridge Handbook of the Psychology of Prejudice defines "prejudice" as "those ideologies, attitudes, and beliefs that help maintain and legitimize group-based hierarchy and exploitation."[212] It is widely accepted that these ideologies, attitudes, and beliefs begin forming in young children. In fact, children as young as three years of age begin to group people into categories based on their race or gender.[213] These categorizations, however, are not prejudices. Categorizations instead serve as the building blocks of prejudice. In the words of one professor of psychology at the University of Sussex, Rupert Brown, "any kind of prejudiced perception, attitude, or action necessarily implies the prior application of some categorical distinction."[214]

So, prejudice stems from categorizations. Prejudice arises, however, only after children learn and assign attitudes to certain categories. In the words of psychologists Amanda Williams and Jennifer R. Steele, children must "acquire[] a sufficiently consistent positive or negative attitude toward members of that racial group" for prejudice to form.[215] Additionally, as Rebecca Bigler

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[211] THORNBERRY, *supra* note 147, at 449; *see also* Farrior, *supra* note 158, at 293 ("[T]he drafters of the Convention recognized that laws alone will not suffice in reducing discrimination.").

[212] Chris G. Sibley & Fiona Kate Barlow, *An Introduction to the Psychology of Prejudice*, *in* CAMBRIDGE HANDBOOK, *supra* note 11, at 3, 4. And importantly, "[p]rejudice can be distinguished from discrimination, which involves actions, particularly behaviors, policies, or practices that lead to inequitable outcomes or experiences for groups." LYNNE M. JACKSON, THE PSYCHOLOGY OF PREJUDICE, FROM ATTITUDES TO SOCIAL ACTION 21 (2d ed., 2020).

[213] RUPERT BROWN, PREJUDICE: ITS SOCIAL PSYCHOLOGY 159 (1995) ("There is evidence that children from as young as three years of age are aware of two of society's major social categories, gender and ethnicity."); Sabine Pirchio et al., *A Chip Off the Old Block: Parents' Subtle Ethnic Prejudice Predicts Children's Implicit Prejudice*, FRONTIERS PSYCH., Feb. 2018, at 1, 1 ("[I]nfants in their first year of life show early capacities of social discrimination such as a clearer preference for faces of their same-ethnicity, for someone speaking their language and for toys selected by someone speaking their own language.").

[214] BROWN, *supra* note 213, at 121.

[215] Amanda Williams & Jennifer R. Steele, *Examining Children's Implicit Racial Attitudes Using Exemplar and Category-Based Measures*, 90 CHILD DEV. 322, 323–24 (2019); *see also* David M. Amodio, *Implicit Prejudice and the Regulation of Intergroup Responses*, *in* NEUROSCIENCE OF PREJUDICE AND INTERGROUP RELATIONS 167, 183 (Belle Derks et al. eds., 2013) (indicating that social neuroscience research suggests that intergroup biases can be "acquired . . . [and] potentially changed.").

and Lynn Liben explained, prejudice is developed when "children . . . attach meaning to psychologically salient groups."[216]

The process of attaching meaning or negative attitudes to categorizations is where the learning necessarily must take place. Many psychologists point to what Brown called the "most obvious explanation."[217] That explanation reads like this: children learn to attribute negative associations to certain categorizations from their parents and other environmental influences.[218] Other psychologists point out that children's development of prejudice is not merely a "passive absorption . . . of the prejudices in the adult society," but rather reflects a combination of environmental factors and a child's own active formation of attitudes.[219] Either way, some form of acquiring attitudes—that is, learning—is critical to the development of prejudice in children. As Jane Elliot wrote with regard to racism, "anything you learn, you can unlearn."[220]

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[216] Rebecca S. Bigler & Lynn S. Liben, *Development Intergroup Theory: Explaining and Reducing Children's Social Stereotyping and Prejudice*, 16 CURRENT DIRECTIONS PSYCH. SCI. 162, 164 (2007).

[217] BROWN, *supra* note 213, at 149.

[218] *Id.* at 150 (recalling "empirical studies which have provided evidence of direct parental socialization of children's attitudes or which have observed correlations between exposure to mass media sources and children's prejudicial and stereotypical thinking"); Allison L. Skinner & Andrew N. Meltzoff, *Childhood Experiences and Intergroup Biases Among Children*, 13 SOC. ISSUES & POL'Y REV. 211, 215 (2019) (summarizing studies that "provides suggestive evidence that intergroup biases may be transmitted to children through subtle behavioral channels"); Pirchio et al., *supra* note 213, at 6 (finding that "it is widely acknowledged that the social environment and relevant socialization agents (such as parents) certainly play a role in shaping relevant social attitudes in children and adolescents," and that "children's implicit ethnic prejudice is positively predicted by parents' level of subtle ethnic prejudice"); JACKSON, *supra* note 212, at 130 (recognizing that "[i]t seems self-evident that children learn prejudice from the people around them"); JAMES M. JONES, PREJUDICE AND RACISM 128 (1972) ("The most important determinant of whether and/or how an individual becomes a racist is the environmental norm to which he is socialized."); Harriet Over et al., *Young Children Seek Out Biased Information About Social Groups*, DEV. SCI., May 2018, at 1, 11 ("Many theorists have assumed that a primary ingredient of intergroup bias is the internalization of positive or negative messages provided by cultural elders."); Lisa Selin Davis, *Children Aren't Born Racist. Here's How Parents Can Stop Them from Becoming Racist*, CNN (June 6, 2020, 11:29 AM), https://www.cnn.com/2020/06/06/health/kids-raised-with-bias-wellness/index.html (Sarah Gaither, Assistant Professor of Psychology and Neuroscience at Duke University, commenting that "[i]f someone is harboring certain racist attitudes, it's something that they are learning from their parents, schools, the media and the culture").

[219] BROWN, *supra* note 213, at 160.

[220] CAMBRIDGE HANDBOOK, *supra* note 11, at 661.

b. Social Science Studies Indicate that Education Can Reduce Prejudice

Psychologists agree that the learning process that is so pivotal to the development of prejudice can be undone or interrupted through various kinds of intervention. Importantly—as the drafters of ICERD recognized—evidence demonstrates that education is an effective form of intervention.[221] Lasana Harris, a neuroscientist and experimental psychologist at University College London, explained in an interview that one way to override bias or prejudice "is to undo the learning" that created the prejudice in the first instance.[222] Among a wealth of research, three studies in particular suggest how this may be done through education.

To begin, Alison L. Skinner, a professor of Psychology at the University of Georgia, along with Andrew N. Meltzoff, professor of Psychology and Co-Director of the University of Washington's Institute for Learning & Brain Sciences, summarized multiple research documents as follows: "White U.S. children who learned about the racism and discrimination faced by Black historical figures . . . subsequently showed reduced intergroup bias."[223] Similarly, a study performed by Williams and Steel found that Ethnic Studies classes had "a positive effect on students' ability to empathize with those people of color who were the focus of the course."[224] Finally, Yale psychology professor Yarrow Dunham and others performed a study that suggested the importance of exposing children to material that "cuts against" their tendencies to consume information that confirms their own biases.[225]

At bottom, social science suggests that education and discussion[226] can combat prejudice. In addition to noting the possibility of educational intervention, social scientists emphasize that such intervention should occur early in a child's life. For instance, Dominic Abrams, Professor of Social Psychology

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[221] *See* ICERD, *supra* note 22, at art. 7.

[222] Daniel Cossins, *The Roots of Racism*, NEW SCIENTIST, Aug. 29, 2020, at 43–44.

[223] Skinner & Meltzoff, *supra* note 218, at 222 (citations omitted).

[224] Janine de Novais & George Spencer, *Learning Race to Unlearn Racism: The Effects of Ethnic Studies Course-Taking*, 90 J. HIGHER EDUC., 860, 878–79 (2019) ("[W]e find a relatively consistent relationship of Ethnic Studies course-taking with positive attitudes toward racially marginalized groups.").

[225] Over et al., *supra* note 218, at 21.

[226] Davis, *supra* note 218 (Sarah Gaither, Assistant Professor of Psychology and Neuroscience at Duke University, commenting that preventing racism starts "first, by talking about race" and that talking about "things like police brutality and white privilege" is "key to dismantling racism"); Jessica Sullivan et al., *Adults Delay Conversations About Race Because They Underestimate Children's Processing of Race*, 150 J. EXPERIMENTAL PSYCH.: GEN. 395, 399 (2021) ("[F]ully mitigating racial bias will require talking about it."); Kimberly Holt Barrett & William H. George, *Psychology, Justice, and Diversity*, *in* RACE, CULTURE, PSYCHOLOGY, & LAW 3, 10 (Kimberly Holt Barrett & William H. George eds., 2005) ("[B]uilding knowledge about and familiarity with other cultures also is a way of reducing bias and prejudice.").

and Director of the Centre for the Study of Group Processes at the University of Kent, wrote that "children learn negative evaluations of various social groups at a surprisingly young age, suggesting that combating prejudice in society requires early and continuous efforts to intervene."[227] It is not only clear from social science studies that prejudice is learned, but it is also clear that early intervention through education is possible and necessary in order to combat prejudice. Which is to say, social science supports the premise of Article 7 and gives merit to the Committee's assertion that "*racism can be a product . . . of inadequate education*."[228]

ii. Interpretations of Article 7 by the Committee

Article 7 suggests that prejudice can be combated through education, and the previous subsection detailed the scientific support for that presumption. Now with that in mind, this Note will explore how the Committee envisions Article 7 compliance. During the infant days of the Convention, scholars like Stephanie Farrior, Kevin Boyle, and Anneliese Baldaccini promoted the importance of Article 7 while arguing that states parties and the Committee did not.[229] Patrick Thornberry, a thirteen-year member of the Committee, has since pointed out that "observations on the marginalization of Article 7" should be reassessed in light of the Committee's stance in General Recommendation 35.[230] In that General Recommendation, the Committee made plain that Article 7 is "mandatory" in the same way that other articles of the Convention are.[231] In fact, the Committee went on to explain that Article 7's "broadly educational approach to eliminating racial discrimination is an

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[227] DOMINIC ABRAMS, EQUAL. & HUM. RTS. COMM'N, PROCESS OF PREJUDICE: THEORY, EVIDENCE AND INTERVENTION: RESEARCH REPORT NO. 56, at 84 (2010) ("Given that stereotypes and prejudice are hard to change in adulthood, most psychologists agree that interventions must be implemented early in life to be successful."); Tobias Raabe & Andreas Beelmann, *Development of Ethnic, Racial, and National Prejudice in Childhood and Adolescence: A Multinational Meta-Analysis of Age Differences*, 82 CHILD DEV. 1715, 1731 (2011) ("Interventions in late childhood seem to be particularly important due to the permeability of prejudice development at this age."); Williams & Steel, *supra* note 215, at 324 ("Several prominent social developmental theories of prejudice suggest that early childhood is a pivotal period for the initial acquisition of racial stereotypes and preferences.").

[228] General Recommendation 35, *supra* note 210.

[229] Farrior, *supra* note 158 (referring to Article 7 as the "neglected pillar," listing ways in which it has been "virtually ignored"); Boyle & Baldaccini, *supra* note 209, at 164–65 (writing that Article 7 "deserves deeper attention from governments and CERD").

[230] THORNBERRY, *supra* note 147. *But see* McDougall, *supra* note 152 (commenting still, in 2021, that Article 7 is "often overlooked and under-utilized").

[231] General Recommendation 35, *supra* note 210, ¶ 31.

indispensable complement to other approaches to combating racial discrimination."[232]

This indispensable and mandatory obligation requires, as McDougall observed, "positive methods."[233] Positive methods are implied by the very nature of the words used in Article 7—combat, undertake, and adopt—as they imply activity.[234] That being so, the Committee has a substantial amount of guidance related to these positive methods and what constitutes "combatting" under Article 7. For instance, the Committee has offered the following examples of what it expects to see under Article 7 compliance:

- "Legislative and administrative measures taken in the field of education and teaching to combat prejudices which lead to racial discrimination;"[235]
- "Steps taken to include, in school curricula and in the training curricula of teachers and other professionals, programmes and subjects to help promote human rights issues which would lead to better understanding, tolerance and friendship among all groups;"[236] and
- "Steps taken to include in textbooks . . . about the history and culture of groups protected under the Convention."[237]

More pointedly and most importantly, in the most recent Concluding Observation to the United States, the Committee recommended "that the State party adopt a national action plan to combat structural racial discrimination, and to ensure that school curricula, textbooks and teaching materials are informed by and address human rights themes and seek to promote understanding among racial and ethnic minority groups."[238] This demand was similar to an earlier Concluding Observation in which the Committee urged the United States to "provide sufficient information on the history and culture of the

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[232] *Id.* ¶ 30 (emphasis added); *see also* McDougall, *supra* note 152 (writing that Article 7 "goes to the most important approaches to achieving the objectives of the Convention").

[233] McDougall, *supra* note 152 (writing about positive measures "such as public education campaigns, curricula in schools and cross-group cultural programs to promote understanding and the value of diversity").

[234] *See* ICERD, *supra* note 22, at art. 7.

[235] Comm. on the Elimination of Racial Discrimination, Guidelines for the CERD-Specific Documents to Be Submitted by States Parties Under Article 9, Paragraph 1, of the Convention, U.N. Doc. CERD/C/2007/1, at 14, art. 7(A)(1) (2008).

[236] *Id.* at art. 7(A)(2).

[237] *Id.* at art. 7(A)(4).

[238] Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America, U.N. Doc. CERD/C/USA/CO/7-9, ¶ 25 (2014) [hereinafter Second U.S. Concluding Observation].

different racial, ethnic and national groups living in its territory."[239] In short, the committee, as Thornberry simplified, expects states parties to endorse "anti-racist and pro-tolerance" education.[240] The next Part will apply this education-focused Committee interpretation of Article 7 to the Texas Law.

IV. TEXAS EDUCATION CODE § 28.022 VIOLATES THE UNITED STATES' VOLUNTARILY ASSUMED INTERNATIONAL OBLIGATION TO PROMOTE TEACHING THAT COMBATS RACE-BASED PREJUDICES

The Texas Law fails to follow the obligations imposed by Article 7 of ICERD; but beyond that, it is incongruent with the heart of the entire instrument. The heart of ICERD sees dialog and conversation as a solution to racial discrimination. Hence, it requires ongoing dialog between states parties and the Committee in the form of annual reports and Concluding Observations. To doubt the crucial role of conversation is, in the words of McDougall, "to doubt the potential of the Convention as a whole."[241] Because the Texas Law limits conversation, it offends the very premise of ICERD while violating Article 7 in the process.

This Part will proceed in two parts. First, it will show how the Texas Law does not combat prejudices in the ways required by Article 7. And second, this Part will explore ways in which the United States federal government can remedy the Article 7 violation.

A. Enforcement of the Explicit Text of Texas Education Code § 28.022 Would Make It Impossible to Teach in Compliance with the Article 7 Obligations

The vast majority of elementary, middle, and high schools do not teach CRT. Importantly, this Note is not advocating that they start teaching CRT as defined by its scholars. The version of CRT banned by Texas, however, is not that. Texas' version of CRT chokes out all discussion of racism. So to the extent that "CRT" simply means discussing racism, it must be included in the curriculum at all levels of schooling. That's because its absence violates Article 7. Yet the Texas Law requires that very absence.

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[239] Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, U.N. Doc. CERD/C/USA/CO/6, ¶ 38 (2008).

[240] THORNBERRY, *supra* note 147, at 440.

[241] McDougall, *supra* note 152.

i. Limited Instruction

Section 28.0022 contravenes ICERD by limiting the way in which teachers can educate students about America's racial history and its racist present. First, the text of the law flounders as it relates to Article 7's mandate to promote understanding.[242] Instead, where America's racist past is concerned, the Texas Law promotes misunderstanding. The Texas Law prevents teachers from instructing students that "slavery and racism are anything other than *deviations from, betrayals of, or failures* to live up to the authentic founding principles of the United States, which include liberty and equality."[243] The United States Constitution itself supports the conclusion that slavery and racism were not deviations, but instead were intentionally manufactured aspects of early American life. For instance, the Constitution contained clauses that explicitly protected the slave trade from 1787 to 1808[244] and also required the return of fugitive slaves.[245] Moreover, in determining a state's population for tax purposes, slaves only counted as three-fifths of a person.[246] That being the case, preventing a teacher from providing this information to students does not promote understanding, as is required by Article 7.

The Texas Law also fumbles its obligation to "combat structural racial discrimination,"[247] as required by the Committee. In fact, the Texas Law takes a calculated shot aimed in the direction of systemic racism. The law restricts teachers from instructing that "meritocracy or traits such as a hard work ethic are racist or sexist or were created by members of a particular race to oppress

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[242] ICERD, *supra* note 22, at art. 7.

[243] Tex. Educ. Code § 28.0022(a)(4)(A)(viii) (emphasis added). As an aside, even though the Texas Law fails to mention CRT once, this is the closest it gets to its claimed war on CRT. CRT believes that racism is entrenched in the very fabric of America, in part because of the institution of slavery that shaped many of this country's current structures. *See supra* Section II(B)(ii)(a). This provision fights tooth and nail to silence that belief.

[244] U.S. CONST. art. I, § 9, cl. 1.

[245] U.S. CONST. art. IV, § 2, cl. 3, *superseded by* U.S. CONST. amend. XIII.

[246] U.S. CONST. art. I, § 2, cl. 3, *modified by* U.S. CONST. amend. XIV; *see also* Roy L. Brooks, *Racial Justice in the New Millennium; From Brown to Grutter: Methods to Achieve Non-Discrimination and Comparable Racial Equality: Getting Reparations for Slavery Right—A Response to Posner and Vermeule*, 80 NOTRE DAME L. REV. 251, 278 (2004) ("No less than five provisions of the Constitution directly accept and protect slavery. The 'Three-Fifths Clause' counted only three-fifths of a slave in determining a state's population for purposes of congressional representation and any 'direct taxes.' The 'Slave Trade Clause' prevented Congress from ending the slave trade before the year 1808 but did not require Congress to ban it after that date. Somewhat redundantly, the 'Three-Fifths Clause' ensured that a slave would be counted as three-fifths of a white person if a head tax were ever levied. The 'Fugitive Slave Clause' required the return of fugitive slaves to their owners 'on demand.' Finally, Article V prohibited Congress from amending the Slave Trade Clause before 1808.").

[247] Second U.S. Concluding Observation, *supra* note 238.

members of another race."[248] History would show, however, that forms of purported meritocracy have been the hallmark of systemic racism since the Emancipation Proclamation. Case in point: Jim Crow era literacy tests that severely disenfranchised would-be African American voters.[249] And meritocracy reared its ugly head in similar ways when white Americans concocted tests to keep their fellow Black citizens out of military service during WWII.[250] To use the language of Section 28.0022, both are examples of "meritocracy . . . created by members of a particular race to oppress members of another race"[251] So, abiding by this provision of the law would necessarily prevent teachers from combating structural discrimination because they cannot even expose feigned meritocracy for what it has been—a tool of structural discrimination.

Still other portions of Section 28.0022 would hinder the obligations imposed by Article 7. Specifically, the Committee urged the United States to have teaching materials be "informed by and address human rights themes."[252] Two provisions—in large part because of their vagueness and overbreadth—work to silence teachers as they relate to human rights themes.

For one, teachers must discuss "a widely debated and currently controversial issue of public policy or social affairs" in a way that is "free from political bias."[253] This matters because material that is informed by and addresses human rights themes involves current issues of public policy and social affairs that are debated and controversial. For example, systemic racism and police brutality are both "widely debated" and "controversial" in America. Not to mention, racially motivated mass shootings and gun control are both issues that evoke intense debate, and this infant law has already forced teachers to accordingly avoid conversations about these topics altogether or

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[248] TEX. EDUC. CODE ANN. § 28.0022(a)(4)(A)(vi).

[249] *See* IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 392 (2016) (explaining that the Voting Rights Act of 1965 banned "literacy tests, poll taxes, and grandfather clauses, which were all void of racial language," yet nevertheless "had almost totally disenfranchised southern Blacks").

[250] *See* MATTHEW F. DELMONT, HALF AMERICAN: THE EPIC STORY OF AFRICAN AMERICANS FIGHTING WORLD WAR II AT HOME AND ABROAD 37 (2022) (noting that the Secretary of War during WWII, Henry Stimson, wrote in his journal that "the Army had adopted rigid requirements for literacy mainly to keep down the number of colored troops," many of whom, as Delmont noted, "attended segregated schools and were deprived of basic educational opportunities to learn how to read and write").

[251] TEX. EDUC. CODE ANN. § 28.0022(a)(4)(A)(vi).

[252] Second U.S. Concluding Observation, *supra* note 238.

[253] TEX. EDUC. CODE ANN. § 28.0022(a)(2). The original language read "without giving deference to any one perspective." H.B. 3979, 87th Sess. (Tex. 2021) (Engrossed in the House), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB03979E.pdf#navpanes=0. Nevertheless, teachers find that the change to "political bias" does not alter the meaning of this clause, and others do not recognize the change in language at all. *See* Killough, *supra* note 122 (writing of an administrator who took this clause to require that "both sides" of the holocaust must be taught).

only discuss a watered-down version of current events (one that discounts the role of race).[254] The Texas Law thus eliminates the very education that the Committee mandated.

Moreover, the clause preventing teachers from incorporating in a course that "an individual, by virtue of the individual's race or sex, bears responsibility, blame, or guilt for actions committed by other members of the same race or sex"[255] further violates Article 7 obligations due to its vagueness. To be sure, a teacher should not explicitly command a child to feel guilty because of the racist actions of another, but that is not all that the provision proscribes. The law seemingly applies to discomfort or guilt generally, and teachers have no way of knowing where the line is between instruction that will not engender guilt and instruction that will. This is especially the case when the law is enforced by parents who, at the first sign of guilt in their child, may petition for a teacher's termination for simply educating about lynching in America. This renders impossible the Committee's instruction to "provide sufficient information on the history" of Black people in America.[256]

ii. Constrained Textbooks and Teaching Materials

Additionally, and at risk of stating the obvious, the Texas Law is in no way a "step[] to include textbooks . . . about the history and culture of groups protected under the convention," nor does the law "ensure that school curricula, textbooks and teaching materials" promote human rights or understanding of racial minorities.[257] For example, the rubrics and investigations into teacher's classroom libraries are suffocating Texas curricula. Indeed, most literature contemplated by the Committee under Article 7 that would "promote understanding" or "address human rights themes" would score a near zero on the HB 3979 rubric.[258] That is because prohibiting books that endorse one perspective necessarily bans anti-racist material or, for example, material that seeks to share the perspective of a Black child in America. At bottom, enforcement of the Texas Law excludes the very types of books that the United States as a party to ICERD is required to promote.

Thus, the law does not ensure that the school curricula include books that aid in eliminating prejudice. Rather than waging war against prejudices, as is required by Article 7, the law strives to exclude books that do so. That is textbook resistance to the Committee's mandates. On the whole, both the text of the law and its enforcement have already eroded the quantity and quality of

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[254] *See* Hixenbaugh, *supra* note 124 (noting the watered-down discussions and also that "[b]ecause of th[e] confusion, we've heard from a lot of teachers who are steering clear of any conversations dealing with racism").

[255] TEX. EDUC. CODE ANN. § 28.0022(a)(4)(A)(v).

[256] *See supra* note 239 and accompanying text.

[257] *See supra* note 238 and accompanying text.

[258] *Id.*

education surrounding race in Texas.[259] Consequently, the Texas Law has led to inadequate education where racial prejudices are concerned—the very harm that ICERD sought to reverse and counteract with Article 7.

B. To Fulfill its Article 7 Obligations, the United States Must Immediately Pursue Judicial Intervention and Legislative Redress

The United States must not equivocate on the issue of education as it relates to eradicating the prejudices underlying racism. The United States can and should take steps to address the violation of Article 7 of the Convention created by Section 28.0022 and laws similar to it.

First, the Department of Justice (DOJ) must bring suits that seek to enjoin school districts from enforcing Section 28.0022 by firing teachers or otherwise punishing them. Because ICERD is a non-self-executing treaty, the grounds for this lawsuit would need to come from existing United States law—like, for example, the First or Fourteenth Amendment. That being the case, however, in its lawsuits, the DOJ can and should point out that binding international treaties—self-executing or not—instruct the interpretation of United States law.[260]

Next, United States federal agencies, including the Department of Education, should create a National Action Plan to combat prejudice and structural racism through education, as the Committee suggested.[261] The State Department, in conjunction with at least fifteen other federal agencies, created a National Action Plan regarding the promotion of Responsible Business Practices.[262] In fact, the State Department announced in 2021 that it will be "updating and revitalizing" this National Action Plan.[263] Thus, the process and capacity to create a National Action Plan that is informed by international law has been established, and the United States should mimic those steps here.

Of course, brainstorming effective policy is the core function of a National Action Plan and not the focus of this Note. But the plan should at least address steps leading to (1) further pointed research with regard to the most effective educational means of reducing prejudice; (2) increased national awareness of Article 7, specifically in local public schools; (3) federal collaboration with non-governmental educational organizations that combat

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[259] General Recommendation 35, *supra* note 210.

[260] *See* Rex D. Glensy, *The Use of International Law in U.S. Constitutional Adjudication*, 25 EMORY INT'L L. REV. 197, 198 (2011) (detailing multiple cases in which the "U.S. Supreme Court has taken it upon itself to use international law as persuasive authority to interpret various provisions of the U.S. Constitution").

[261] *See supra* notes 233–40 and accompanying text.

[262] *United States*, NAT'L ACTION PLANS ON BUS. & HUM. RTS., https://globalnaps.org/country/usa (last visited Apr. 10, 2023).

[263] *Id.*

prejudice; and (4) collaboration with local school districts regarding metrics and a baseline level of knowledge surrounding the history of the United States.

Finally, Congress should use its power under the Spending Clause to increase the federal funding of public schools on the condition that states comply with Article 7 obligations and the newly developed National Action Plan. Indeed, the federal government cannot passively expect states to comply with Article 7 of an international treaty, which is not likely the mainstay of their attention, without the use of some leverage. To be sure, there are limits to this type of legislation, but according to the United States Supreme Court in a case involving the conditioning of federal highway funds, "Congress may attach conditions on the receipt of federal funds."[264]

In essence, the legislation here would provide additional federal funds to state public education programs that will be used for initiatives that are specifically tailored to address structural racism and look to dismantle prejudices through education. Further, the legislation would allot a separate percentage of the funds for states' discretional use. This would offer encouragement for states to comply with Article 7—because if they do not, they would forfeit the right to any of the new funds.

In the end, regardless of which remedy or variation thereof is adopted, Texas—and the United States as a whole—must start taking Article 7

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[264] South Dakota v. Dole, 483 U.S. 203 (1987) (upholding use of spending power where law directed Secretary of Transportation to withhold 5% of South Dakota's federal highway funds on the condition that states prohibit persons under the age of twenty-one from lawfully purchasing alcohol). The conditions on this power are as follows:

> The conditions placed on federal grants to States must (1) promote the "general welfare," (2) "unambiguously" inform States what is demanded of them, (3) be germane "to the federal interest in particular national projects or programs," and (4) not "induce the States to engage in activities that would themselves be unconstitutional."

Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 537 (2012) (quoting *Dole*, 483 U.S. at 207–08, 210). The Court also considers whether the conditions are "so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* at 580 (quoting *Dole*, 483 U.S. at 211). At least as to the coercive aspect of this analysis, States' public education already functions with minimal funding from the federal government. *The Federal Role in Education*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/overview/fed/role.html (last visited Apr. 10, 2023) ("[T]he Federal contribution to elementary and secondary education is about 8 percent."). This makes it more likely that the Court would allow legislation conditioning the new additional funds, as opposed to if the legislation conditioned pre-existing funds that are absolutely critical to the functioning of state public education programs. *See* Stephanie Cooper Blum, *Federalism: Fault or Feature—An Analysis of Whether the United States Should Implement a Federal Pandemic Statute*, 60 WASHBURN L.J. 1, 60 (2020) (concluding—after comparing the condition in *Dole*, which was approved, and the condition in *NFIB*, which was rejected—that "[c]onditioning new funds on the implementation of the specific measure, however, would likely pass constitutional muster"). In other words, Congress must simply be careful that the legislation does not to amount to "a gun to the head" of states; and instead, is simply "relatively mild encouragement." *Sebelius*, 567 U.S. at 537.

obligations seriously. If they do not, the palpable racial tension—and frankly the racism—that still reigns in the United States will continue to fester.

V. CONCLUSION

This Note opened with a sobering reminder that America's history of racial violence and gross discrimination is not far in the rear-view mirror. The prejudices that led to lynchings fewer than a hundred years ago are the same prejudices alive and active today. The sooner that reality receives widespread acceptance, the sooner prejudices—and the racial discrimination that follows—can be reduced. Supreme Court Justice Sonia Sotomayor put it well. In a 2014 dissent in an affirmative action case, she wrote: "The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race . . . *with eyes open to the unfortunate effects of centuries of racial discrimination*."[265]

ICERD embraces that same sentiment by making the bold claim that dialog and conversation can eliminate all forms of racial discrimination. More specifically, ICERD expresses through Article 7 that education is a vehicle to achieve that end. And that is why ICERD was the standard used to scrutinize the Texas Law—because it frames the discussion around what is truly important: the pivotal role education must play if the United States is to ever divorce and recover from the potent disease of racism. It is, therefore, imperative that the United States, and Texas specifically, meaningfully engage with Article 7 of ICERD.

[265] Scheutte v. Coal. to Def. Affirmative Action, 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting) (emphasis added).

APPENDIX I

TEX. EDUC. CODE ANN. § 28.0022

(a) For any course or subject, including an innovative course, for a grade level from kindergarten through grade 12:
  (1) a teacher may not be compelled to discuss a widely debated and currently controversial issue of public policy or social affairs;
  (2) a teacher who chooses to discuss a topic described by Subdivision (1) shall explore that topic objectively and in a manner free from political bias;
  (3) a school district, open-enrollment charter school, or teacher may not require, make part of a course, or award a grade or course credit, including extra credit, for a student's:
    (A) work for, affiliation with, or service learning in association with any organization engaged in:
      (i) lobbying for legislation at the federal, state, or local level, if the student's duties involve directly or indirectly attempting to influence social or public policy or the outcome of legislation; or
      (ii) social policy advocacy or public policy advocacy;
    (B) political activism, lobbying, or efforts to persuade members of the legislative or executive branch at the federal, state, or local level to take specific actions by direct communication; or
    (C) participation in any internship, practicum, or similar activity involving social policy advocacy or public policy advocacy; and
  (4) a teacher, administrator, or other employee of a state agency, school district, or open-enrollment charter school may not:
    (A) require or make part of a course inculcation in the concept that:
      (i) one race or sex is inherently superior to another race or sex;
      (ii) an individual, by virtue of the individual's race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
      (iii) an individual should be discriminated against or receive adverse treatment solely or partly because of the individual's race or sex;
      (iv) an individual's moral character, standing, or worth is necessarily determined by the individual's race or sex;

(v) an individual, by virtue of the individual's race or sex, bears responsibility, blame, or guilt for actions committed by other members of the same race or sex;

(vi) meritocracy or traits such as a hard work ethic are racist or sexist or were created by members of a particular race to oppress members of another race;

(vii) the advent of slavery in the territory that is now the United States constituted the true founding of the United States; or

(viii) with respect to their relationship to American values, slavery and racism are anything other than deviations from, betrayals of, or failures to live up to the authentic founding principles of the United States, which include liberty and equality;

(B) teach, instruct, or train any administrator, teacher, or staff member of a state agency, school district, or open-enrollment charter school to adopt a concept listed under Paragraph (A); or

(C) require an understanding of the 1619 Project.

(b) Subsection (a)(3) does not apply to a student's participation in:

(1) community charitable projects, such as building community gardens, volunteering at local food banks, or other service projects;

(2) an internship or practicum:

(A) for which the student receives course credit under a career and technology education program or under the P-TECH program established under Section 29.553; and

(B) that does not involve the student directly engaging in lobbying, social policy advocacy, or public policy advocacy; or

(3) a program that prepares the student for participation and leadership in this country's democratic process at the federal, state, or local level through the simulation of a governmental process, including the development of public policy.

(c) A state agency, school district, or open-enrollment charter school may not accept private funding for the purpose of developing a curriculum, purchasing or selecting curriculum materials, or providing teacher training or professional development related to a concept listed in Subsection (a)(4)(A).

(d) A school district or open-enrollment charter school may not implement, interpret, or enforce any rule in a manner that would result in the punishment of a student for reasonably discussing the concepts described by Subsection (a)(4) in school or during a school-sponsored activity or have

a chilling effect on reasonable student discussions involving those concepts in school or during a school-sponsored activity.

(e) Nothing in this section may be construed as limiting the teaching of or instruction in the essential knowledge and skills adopted under this subchapter.

(f) This section does not create a private cause of action against a teacher, administrator, or other employee of a school district or open-enrollment charter school. A school district or open-enrollment charter school may take appropriate action involving the employment of any teacher, administrator, or other employee based on the individual's compliance with state and federal laws and district policies.

(g) Nothing in this section may be construed as prohibiting a teacher employed by a school district or open-enrollment charter school from directing a classroom activity that involves students communicating with an elected official so long as the district, school, or teacher does not influence the content of a student's communication.

APPENDIX II

H.B. 3979, 87th Sess., § h-2 (Tex. 2021) (Engrossed in the House)

(5) the founding documents of the United States, including:
  (A) the Declaration of Independence;
  (B) the United States Constitution;
  (C) the Federalist Papers;
  (D) the transcript of the first Lincoln-Douglas debate;
  (E) the writings of and about the founding fathers and mothers and other founding persons of the United States, including the writings of:
    (i) George Washington;
    (ii) Ona Judge;
    (iii) Thomas Jefferson;
    (iv) Sally Hemings; and
    (v) any other founding persons of the United States;
  (F) writings from Frederick Douglass's newspaper, the *North Star*;
  (G) the Book of Negroes;
  (H) the Fugitive Slave Acts of 1793 and 1850;
  (I) the Indian Removal Act;
  (J) Thomas Jefferson's letter to the Danbury Baptists; and
  (K) William Still's Underground Railroad Records;
(6) historical documents related to the civic accomplishments of marginalized populations, including documents related to:
  (A) the Chicano movement;
  (B) women's suffrage and equal rights;
  (C) the civil rights movement;
  (D) the Snyder Act of 1924; and
  (E) the American labor movement;
(7) the history of white supremacy, including but not limited to the institution of slavery, the eugenics movement, and the Ku Klux Klan, and the ways in which it is morally wrong;
(8) the history and importance of the civil rights movement, including the following documents:
  (A) Martin Luther King Jr.'s "Letter from a Birmingham Jail" and "I Have a Dream" speech;
  (B) the federal Civil Rights Act of 1964 (42 U.S.C. Section 2000a et seq.);
  (C) the United States Supreme Court's decision in *Brown v. Board of Education*;
  (D) the Emancipation Proclamation;
  (E) the Universal Declaration of Human Rights;
  (F) the Thirteenth, Fourteenth, and Fifteenth Amendments to the

United States Constitution;
(G) the United States Court of Appeals for the Ninth Circuit decision in *Mendez v. Westminster*;
(H) Frederick Douglass's *Narrative of the Life of Frederick Douglass, an American Slave*;
(I) the life and work of Cesar Chavez; and
(J) the life and work of Dolores Huerta;
(9) the history and importance of the women's suffrage movement, including the following documents:
(A) the federal Voting Rights Act of 1965 (52 U.S.C. Section 10101 et seq.);
(B) the Fifteenth, Nineteenth, and Twenty-Sixth Amendments to the United States Constitution;
(C) Abigail Adams's letter "Remember the Ladies";
(D) the works of Susan B. Anthony; and
(E) the Declaration of Sentiments;
(10) the life and works of Dr. Hector P. Garcia;
(11) the American GI Forum;
(12) the League of United Latin American Citizens; and
(13) *Hernandez v. Texas* (1954).