

ABA STANDARD 303(C) AND DIVISIVE CONCEPTS
LEGISLATION AND POLICIES:
CHALLENGES AND OPPORTUNITIES

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ABSTRACT

This article by six clinicians discusses the challenges and opportunities of new ABA Standard 303 (c), including the implications of and interactions between Standard 303(c) and “divisive concepts” laws and other threats to representation, academic freedom, and free speech in legal education. The article also highlights the intersection of Standard 303(c) and Standard 303(b)(3), which addresses professional identity formation; discusses opportunities to adapt current curriculum and teaching and create new curricular responses to meet the new accreditation standards and interpretations; and explores ways to resist increasing limitations and find a supportive academic community to sustain hope and resilience.

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INTRODUCTION: CHALLENGES AND OPPORTUNITIES
(KAREN TOKARZ)

Legal education plays a crucial role in shaping the attitudes, beliefs, professional identities, and actions of future lawyers. Acknowledging this crucial role, and in response to a June 2020 letter signed by 150 law deans to the American Bar Association (ABA) Council of the Section of Legal Education and Admissions to the Bar,¹ the ABA House of Delegates in 2022 passed two new curricular requirements that all ABA-accredited law schools must meet.

The first, ABA Standard 303(b), requires that students be given “substantial opportunities” for “the development of a professional identity.”² The second, ABA Standard 303(c) requires that:

A law school shall provide education to law students on bias, cross-cultural competency, and racism:

- (1) at the start of the program of legal education, and
- (2) at least once again before graduation.

For students engaged in law clinics or field placements, the second educational occasion will take place before, concurrently with, or as part of their enrollment in clinical or field placement courses.³

Although the form or content of the required opportunities for education on bias, cross-cultural competency, and racism are not prescribed in Standard 303(c) or in an interpretation, the Standard recognizes that the first year curriculum, law clinics, and field placements are uniquely situated to offer opportunities for law students to develop these skills and to experience the role of the legal profession in eliminating bias, discrimination, and racism individually and systemically. Accordingly, Standard 303(c) places the

1. Letter from Alicia Ouellette, President & Dean Albany L. Sch., et al., to members of the Council of the ABA Section of Legal Educ. & Admissions to the Bar, AM. BAR ASS'N (2020) (requiring law schools to provide training on bias, cultural competency, and racism for law students, explaining that “such skills are essential to professional competence, legal practice, and being a lawyer”).

2. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2022-2023 Standard 303(b) (AM. BAR ASS'N 2022) [hereinafter ABA Standard 303(b)].

3. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2022-2023 Standard 303(c) (AM. BAR ASS'N 2022) [hereinafter ABA Standard 303(c)].

upper-class teaching requirement squarely on clinics and externships if the second educational occasion does not occur before a student takes a clinic or externship.

Interestingly, the ABA brought bias, cross-cultural competency, racism education, and professional identity formation together, assuring—as the deans suggested—that “the importance of cross-cultural competency to professionally responsible representation and the obligation of lawyers to promote a justice system that provides equal access and eliminates bias, discrimination, and racism in the law should be among the values and responsibilities of the legal profession to which students are introduced.”⁴ New Interpretation 303-6 explicitly identifies bias, cross-cultural competency, and (anti)racism as values integral to membership in the legal profession⁵ and values that should be explored as part of the student’s professional identity development in law school pursuant to Interpretation 303-5.⁶ Thus, the interpretations integrate bias, cross-cultural competency, and anti-racism into professional identity formation.

The ABA also provided new Interpretations 303-7⁷ and 303-8⁸ to assist with the implementation of Standard 303(c). These Interpretations assert that Standard 303(c) mandates can be met through first year orientation programs, lectures, courses, and other law school educational experiences.⁹ The form or content of the required opportunities for professional identity formation and education on bias, cross-cultural competency, and racism are not prescribed in Standard 303(c) or in the Interpretations. However, the Standard inherently recognizes that the first year, law clinics, and field

4. See ABA Standard 303(b), *supra* note 2; Letter from Alicia Ouellette, President & Dean Albany L. Sch., et al., to members of the Council of the ABA Section of Legal Educ. & Admissions to the Bar, *supra* note 1.

5. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2022-2023 Interpretation 303-6 (AM. BAR ASS’N 2022) [hereinafter ABA Interpretation 303-6].

6. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2022-2023 Interpretation 303-5 (AM. BAR ASS’N 2022) [hereinafter ABA Interpretation 303-5].

7. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2022-2023 Interpretation 303-7 (AM. BAR ASS’N 2022) [hereinafter ABA Interpretation 303-7].

8. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2022-2023 Interpretation 303-8 (AM. BAR ASS’N 2022) [hereinafter ABA Interpretation 303-8].

9. Leo Martinez, *American Bar Association Section of Legal Education and Admissions to the Bar Report to the House of Delegates, Resolution 300*, AM. BAR ASS’N H.D. (Feb. 2022), <https://www.americanbar.org/content/dam/aba/administrative/news/2022/02/midyear-hod-resolutions/300.pdf> [https://perma.cc/2JXE-PEYN].

placements are situated to offer opportunities for law students to develop these skills and to experience the role of the legal profession in eliminating bias, discrimination, and racism individually and systemically.

Standard 303 positively confirms the importance of incorporating critical topics on identity, bias, and cross-cultural competency into the law school curriculum. However, it presents challenges for law faculty in various respects. It has prompted objections from some legal academics on the basis that it encroaches on the independence of law schools to set their own curriculum and policies and violates the academic freedom of individual faculty members. Further, as highlighted in this article, it presents serious challenges for faculty, including clinicians, in states with laws and regulations that restrict discussions of race, racism, gender or sexuality, and other identified “divisive concepts.”¹⁰

For background, near the end of President Donald Trump’s term of office in September 2020, he issued Executive Order 13950, euphemistically titled “Combating Race and Sex Stereotyping,” which invoked Martin Luther King, Jr., the Montgomery bus boycott, and the Selma-to-Montgomery marches to prohibit federal workplace training programs that taught, advocated, or promoted divisive concepts.¹¹ This Order had the effect of eliminating or substantially altering diversity, equity, and inclusion training programs not only in federal government agencies and for federal government contractors, but also in private organizations and academic institutions concerned about being penalized and losing valuable federal funding, contracts, or accreditation.¹²

Although President Biden revoked this Orwellian Order on his first day in office,¹³ divisive concepts legislation and policies have continued to grow substantially in federal government, as well as local school districts, city and county governments, and states across the country, such as Tennessee, Georgia, and Montana,¹⁴ largely fueled by conservative legislators seeking

10. We use the term divisive concepts to refer generally to the certain views that are being regulated by state legislation and policies. Divisive concepts can vary from state to state and generally consist of ideas relating to race, racism, gender or sexuality, but can include other ideas such as the role of government or political affiliation. *See, e.g.*, TENN. CODE ANN. § 49-7-1902(1) (2022).

11. Exec. Order No. 13,950, 85 Fed. Reg. 60683 (Sept. 22, 2020).

12. *See Nat’l Urb. League v. Trump*, No. 1:20-cv-03121-APM, 2020 WL 6391278 (D.D.C. Oct. 29, 2020).

13. Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 25, 2021) (titled *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*).

14. This article discusses divisive concepts legislation and regulation in Tennessee, Georgia and

to limit topics that can be explored in public classrooms and public programs.¹⁵ The laws have been driven in large part by opposition to diversity, equity, and inclusion (DEI) policies, offices, and training programs, and critical race theory (CRT), a movement that challenges the ability of conventional legal strategies to deliver social and economic justice.¹⁶ CRT has its underpinnings in the work of legal scholars and lawyers, such as Derrick Bell,¹⁷ and has become a unified movement coordinated by legal scholars such as Kimberlé Crenshaw, Richard Delgado, Jean Stefancic, Dorothy Brown, and others.¹⁸

Since 2020, a total of 240 federal, state, and local entities across the country have introduced 750 anti-CRT bills, resolutions, executive orders, opinion letters, statements, and other measures.¹⁹ At present, 2023 is set to outpace all anti-CRT activity from 2020-2022.²⁰ In recent months, conservative lawmakers have targeted DEI and CRT by name in various federal appropriations bills for Fiscal Year 2024, such as the National Defense Authorization Act; the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act; and the Department of Homeland Security Appropriations Act.²¹ Many states have introduced divisive concepts-related legislation to restrict teaching and

Montana. See discussion *infra* Sections II–V.

¹⁵ See Vanessa Miller, Frank Fernandez, and Neal H. Hutchens, *The Race to Ban Race: Legal and Critical Arguments Against State Legislation to Ban Critical Race Theory in Higher Education*, 88 Mo. L. Rev. 61, 73–76 (2023), <https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=4594&context=mlr>

¹⁶ C.f. Rashawn Ray & Alexandra Gibbons, Commentary, *Why Are States Banning Critical Race Theory?*, BROOKINGS (Nov. 2021), <https://www.brookings.edu/articles/why-are-states-banning-critical-race-theory/#:~:text=Opponents%20fear%20that%20CRT%20admonishes,teachings%20about%20racism%20in%20classrooms> [<https://perma.cc/3EK9-VPU4>] (Discussing CRT as a theory addressing institutional issues).

¹⁷ DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987).

¹⁸ See CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Peller, & Kendall Thomas, eds., 1995); RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2017); DOROTHY A. BROWN, CRITICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS (2017). See also Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. Times (Nov. 8, 2021), <https://www.nytimes.com/article/what-is-critical-race-theory.html> [<https://perma.cc/Z5A8-LSCJ>].

¹⁹ CRT FORWARD, <https://crtforward.law.ucla.edu> [<https://perma.cc/WN2P-T6FZ>] (last visited Aug. 3, 2023).

²⁰ *Id.*

²¹ *Id.*

discussing topics such as racism, sexism, related aspects of American history, and, increasingly, LGBTQ+ identities; several of those states have imposed such bans legislatively or by issuance of Executive Orders.²² While the bulk of the early bills focused on curriculum in elementary and secondary education, lawmakers are increasingly targeting higher education.

During the summer of 2022, several law school clinicians, including myself and some of the co-authors of this piece, initiated a national webinar to discuss challenges and opportunities posed by the impending implementation of Standard 303(c). At the American Association of Law Schools (AALS) Conference on Clinical Legal Education in May 2023, the authors herein presented a panel that grew out of that webinar to discuss the implications of and interactions between Standard 303(c) and divisive concepts laws and other threats to representation, academic freedom, and free speech in legal clinics, externships, and experiential skills courses, as well as other courses in the legal curriculum; to exchange strategies for adapting current practices and creating new activities in response to the new accreditation standard and interpretations; and to explore avenues for hope.²³ The American Association of Law Schools (AALS) Conference on Clinical Legal Education in May 2024 also will include a panel on “Lessons

22. See Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WEEK (May 5, 2023), <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06> [<https://perma.cc/AK4B-84AG>]; see also Jeremy C. Young & Jonathan Friedman, *America's Censored Classrooms*, PEN AM. (Aug. 17, 2022), <https://pen.org/report/americas-censored-classrooms/> [<https://perma.cc/XE65-LZH4>].

23. ABA Standard 303 Opportunities and Challenges, Including Divisive Concepts Statutes, AALS Conference on Clinical Legal Education, San Francisco, CA (May 2023), https://memberaccess.aals.org/eweb/DynamicPage.aspx?WebKey=AAB86C0B-95A5-4381-ADAB-F52FAC1DE244&RegPath=EventRegFees®_evt_key=e9b95c80-bdf6-4044-a2e2-d93f6508be80&Site=AALS [<https://perma.cc/XMT6-K2VN>]. The authors also attended and were inspired by another panel on Section 303(c) at that conference. “Beyond Checking the Box: Delivering Meaningful Instruction on Bias, Cross Cultural Competency, and Racism Under ABA Standard 303(c),” AALS Conference on Clinical Legal Education, San Francisco, CA (May 2023), https://memberaccess.aals.org/eweb/DynamicPage.aspx?WebKey=AAB86C0B-95A5-4381-ADAB-F52FAC1DE244&RegPath=EventRegFees®_evt_key=e9b95c80-bdf6-4044-a2e2-d93f6508be80&Site=AALS [<https://perma.cc/XMT6-K2VN>]. The panelists included Laurie A. Barron, Roger Williams University School of Law; Carmia N. Caesar, George Washington University Law School; Daniel J. Ellman, Wayne State University Law School; Niya Fonville Swint, Campbell University; Norman Adrian, Wiggins School of Law; Amy Sankaran, University of Michigan Law School; and Susan B. Schechter, University of California, Berkeley School of Law. Both panels generated stimulating discussions and highlighted multiple innovative examples regarding the implementation of Section 303(c) in law school courses.

Learned From Divisive Concepts States,” with Sherley Cruz, one of the co-authors herein; Kristine Kelley, University of Tennessee; and Aleksandra Chauhan, University of South Carolina.

The essays in this piece reflect discussions that occurred during the webinar, the panel, and since then across the country. Like you, some of us are in states that have formally adopted explicit and dramatic anti-CRT legislation and policies; others like myself are in states that are in the process.²⁴ As you will glean from the insights shared by my colleagues below, we see this as a time for faculty and law schools to demonstrate by concrete action a commitment to professionalism, diversity, and inclusion, and take steps to resist and challenge these policies. We see this is a time for faculty who have a sense of security, seniority, and power to use their privilege to support and stand in solidarity with colleagues who are challenged by restrictive legislation, regulation, or policies. We see this as a time to explore ways to sustain energy and optimism, build community within and outside our academic homes, and develop resistance and resilience. And, we see this as a time for faculty and law schools to seize this important opportunity to enhance legal education and the legal profession.

I. A CLINICIAN’S PERSPECTIVE IN TENNESSEE (BECKY L. JACOBS)

*First they came for the socialists, and I did not speak out—
because I was not a socialist.*

*Then they came for the trade unionists, and I did not speak
out—because I was not a trade unionist.*

*Then they came for the Jews, and I did not speak out—
because I was not a Jew.*

²⁴ Several Missouri school districts and upper-level government officials have endorsed anti-CRT policies in schools and other settings, e.g., Missouri Republican elected officials have pre-filed more than 20 bills aimed at restricting LGBTQ and religious rights ahead of the 2024 legislative session. See Karen Bayless & Jonathan Shoreman, *More than 20 bills restricting LGBTQ rights filed*, ST. LOUIS POST-DISPATCH (Dec. 15, 2023).

Then they came for me—and there was no one left to speak for me.

—Martin Niemöller²⁵

Tennessee, where I teach, has legislated on the divisive concepts issue on two separate occasions. Some might conclude that, as an older, tenured, and fairly privileged white woman, I would not be greatly impacted by this legislation. However, I have been challenged not only by how best to manage the interaction between Standard 303(c) and the law in my courses, but also by my utter failure to adequately respond to the pain and fear that the law has caused in more vulnerable faculty, such as that described by my talented colleague Sherley Cruz in this article. This legislation has some impact on everyone in the educational settings to which they apply.

By way of background, Tennessee's original divisive concepts law was passed in 2022,²⁶ and it defines a divisive concept very broadly as one suggesting that:

- One (1) race or sex is inherently superior or inferior to another race or sex;
- An individual, by virtue of the individual's race or sex, is inherently privileged, racist, sexist, or oppressive, whether consciously or subconsciously;
- An individual should be discriminated against or receive adverse treatment because of the individual's race or sex;
- An individual's moral character is determined by the individual's race or sex;

25. This quote is attributed to the German pastor Martin Niemöller. There are different versions of the statement as Niemöller used the phrases frequently during his post-war lecture tour, during which he often changed the list of victims. However, the quote is part of the permanent exhibition at the U. S. Holocaust Memorial Museum and has been since its opening in 1993. See *Martin Niemöller: "First They Came For..."*, HOLOCAUST ENCYCLOPEDIA (last visited Oct 17, 2023), <https://encyclopedia.ushmm.org/content/en/article/martin-niemoeller-first-they-came-for-the-socialists>.

26. TENN. CODE ANN. §§ 49-7-1901, 49-7-1902 (2022).

- An individual, by virtue of the individual's race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
- An individual should feel discomfort, guilt, anguish, or another form of psychological distress solely because of the individual's race or sex;
- A meritocracy is inherently racist or sexist, or designed by a particular race or sex to oppress another race or sex;
- This state or the United States is fundamentally or irredeemably racist or sexist;
- Promotes or advocates the violent overthrow of the United States government;
- Promotes division between, or resentment of, a race, sex, religion, creed, nonviolent political affiliation, social class, or class of people;
- Ascribes character traits, values, moral or ethical codes, privileges, or beliefs to a race or sex, or to an individual because of the individual's race or sex;
- The rule of law does not exist, but instead is a series of power relationships and struggles among racial or other groups;
- All Americans are not created equal and are not endowed by their Creator with certain unalienable rights, including, life, liberty, and the pursuit of happiness;
- Governments should deny to any person within the government's jurisdiction the equal protection of the law;
- Includes race or sex stereotyping; or

- Includes race or sex scapegoating... ”²⁷

The law prohibits public institutions of higher education from penalizing, discriminating against, or adversely treating students or employees due to their refusal to support, believe, endorse, embrace, confess, act upon, or otherwise assent to a divisive concept.²⁸ Nor can students or employees be required to endorse a specific ideology or political viewpoint or be asked about their ideological or political viewpoint to be eligible for hiring, tenure, promotion, or graduation.²⁹ It also explicitly reminds individuals that they can pursue all available equitable or legal remedies should they believe that a violation has occurred.³⁰ However, it excludes from its application cases in which there may be conflicts with that institution’s academic accreditation requirements,³¹ such as the ABA accreditation Standards.

Not satisfied with the 2022 version, the Tennessee legislature added several amendments to the original law in 2023 that establish a system for reporting and making publicly available alleged violations and complaints regarding the divisive concepts restrictions and that require institutions to report violations, including those by individual professors.³² The amendments also prohibit bias or favoritism in the treatment of student groups and the use of school property; e.g., student-invited guest speakers may not be denied solely based upon race, religion, or non-violent political ideology.³³

Tennessee lawmakers rely upon the rhetoric of freedom of expression and thought and upon the ideals of civil discourse and intellectual pursuit to justify the divisive concepts law.³⁴ However, I and many of my colleagues feel great uncertainty about its scope, despite the carve out in the law for compliance with academic accreditation standards. Statements from the

27. TENN. CODE ANN. § 49-7-1902(1) (2022).

28. TENN. CODE ANN. § 49-7-1903(1) (2023).

29. TENN. CODE ANN. § 49-7-1903(2) (2023).

30. TENN. CODE ANN. § 49-7-1903(4) (2023).

31. TENN. CODE ANN. § 49-7-1906(4)(B) (2022).

32. TENN. CODE ANN. § 49-7-1903(4) (2023). Tennessee Higher Education Freedom of Expression and Transparency Act, H.B. 1376, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023) (amending TENN. CODE ANN. tit. 49, chs. 7–8).

33. *Id.*

34. Consider the name of the 2023 Act, the Tennessee Higher Education Freedom of Expression and Transparency Act.

University that academic freedom and First Amendment protections continue to be recognized under both the original and the amended version of the law are not particularly reassuring given the law's encouragement to report violations and the reminder to those feeling aggrieved that they can pursue all available equitable or legal remedies in a court of competent jurisdiction. The statute may not directly suppress specific speech, but it has definitely had a chilling effect in classrooms: one focus group reported that its members' classrooms had been significantly impacted as they felt the need to restrict the way they engaged with issues of race and racism.³⁵

here have been relatively few direct lawsuits.³⁶ In my personal experience, these types of laws appear to have acted more as a state-sanctioned approval of much more aggressively offensive conduct and speech both in and out of the classroom with little fear of repercussions. The Tennessee law has created tension in some aspects of my interactions at the law school. Suddenly, previously noncontroversial Standard 303-related content provoked snide comments or roused debate, such as a discussion of Hofstede's cultural dimensions theory³⁷ or the data on the interaction of gender and/or race and negotiations.³⁸

35. Laura Beth Kelly, Laura Taylor, Cara Djonko-Moore, & Aixa D. Marchand, *The Chilling Effects of So-Called Critical Race Theory Bans*, 37 RETHINKING SCHS. 2 (2023), <https://rethinkingschools.org/articles/the-chilling-effects-of-so-called-critical-race-theory-bans/> [https://perma.cc/BVP8-9NXS]. The focus group in question included 31 practicing and prospective K-12 teachers, discussing Tennessee's "Prohibited Concepts in Instruction" law, passed in 2021 by TENN. CODE ANN. § 49-6-1019 (2021). Group members reported that:

these perceived restrictions, in many cases, extended well beyond the specific topics prohibited in the state legislation. Uncertain how to interpret the law's vague language and fearful of the consequences of being 'caught' teaching a prohibited concept, most teachers we spoke with described how the new law led them to be less confident in their ability to teach about race and racism, and so they expected to subsequently engage in this type of teaching less often.

Id.

36. Dylan Saul, *School Curricula and Silenced Speech: A Constitutional Challenge to Critical Race Theory Bans*, 107 MINN. L. REV. 1311, 1328, nn.93-100 (2023).

37. See GERT HOFSTEDE, GERT JAN HOFSTEDE & MICHAEL MINKOV, *CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND* (3d ed. 2010). Another scholar has discussed the Standard 303(c) implications of this material. Ilhyung Lee, *The "Divisive Concepts" Laws and Americans of Asian Descent*, 75 SMU L. REV. F. 212, 216-17 (2022).

38. Many Alternative Dispute Resolution and Negotiation casebooks include materials related to this topic. See, e.g., Jeffrey Z. Rubin & Frank E.A. Sander, *Culture, Negotiation, and the Eye of the Beholder*, in CARRIE J. MENKEL-MEADOW, LELA PORTER LOVE, ANDREA KUPFER SCHNEIDER & MICHAEL MOFFITT, *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* (3d ed. 2018); Carrie Menkel-Meadow, *What Difference Does 'Gender Difference' Make?*, 18 DISP. RES. MAG. 4-7 (2012),

Accordingly, I find myself obsessively attuned to my syllabi, my assignments, my class plans, my lecture notes, and my responses to students vis-à-vis content. Because the legislature has not defined the standard for determining whether a student feels “discomfort, guilt, anguish, or another form of psychological distress solely because of the individual's race or sex[.]”³⁹ one is left in the liminal of this ambiguity. As one scholar notes: “One question is whether this [is] a subjective or an objective standard. Is the discomfort in the eye of the racial beholder? Or should the feeling be reasonable? If the latter, does the statute contemplate a universal standard of reasonableness, or one that varies from race to race?”⁴⁰

My concerns are not just those that might be considered relatively mundane, i.e., legal exposure, employment consequences, or public humiliation, concerns that produce my general state of anxiety. They also include the fact that Tennessee is awash in guns.⁴¹

in LEONARD L. RISKIN, CHRIS P. GUTHRIE, RICHARD C. REUBEN, JENNIFER K. ROBBENOLT, NANCY A. WELSH & ART HINSHAW, *DISPUTE RESOLUTION AND LAWYERS, A CONTEMPORARY APPROACH* 253 (6th ed. 2019); *See also* LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* (2003).

39. *See* TENN. CODE ANN. § 49-7-1902 (2022).

40. Ilhyung Lee, *The "Divisive Concepts" Laws and Americans of Asian Descent*, 75 *SMU L. Rev.* 212, 216 (2022).

41. Data indicate that Tennessee has a gun death rate that is over 50% higher than the national average and ranks as one of the top ten in the nation for number of deaths by firearm. Katherine Oung, *Tennessee Gun Laws: What You Need to Know*, *VAND. HUSTLER* (Apr. 17, 2023), <https://vanderbilthustler.com/2023/04/17/tennessee-gun-laws-what-you-need-to-know/> [https://perma.cc/P3YE-QHF5]. The state's gun laws are very permissive. Tennessee has allowed for carry of both open and concealed handguns without a permit since 2021, and it does not appear to require training for certain handgun purchases. TENN. CODE ANN. § 39-17-1307(g) (2021). The law originally applied to those aged 21 and above and those aged 18-20 serving in the military. *Id.* In a recent settlement agreement, Tennessee's Attorney General agreed not to prosecute those ages 18 to 20 for from carrying handguns or obtaining permits to carry handguns on the basis of age alone. Agreed Order, *Beeler v. Long*, No. 3:21-cv-152 (E.D. Tenn. Jan. 23, 2023), [https://perma.cc/QAC5-2J73]. With some exceptions, including those with felony convictions, with records of certain domestic violence offenses, or with reported mental health problems, anyone over the age of 18 can purchase and carry rifles and shotguns without a permit. TENN. CODE ANN. § 39-17-1316 (2021). Tennessee does not impose background check requirements on private sellers. *See* 18 U.S.C. § 922 (Although federal law requires sellers of licensed firearms to conduct background checks before a sale, the law does not apply to unlicensed private sellers.). Nor does it have a “red flag” law that would allow a family member or law enforcement officer to seek a court order to temporarily prevent an individual in crisis from accessing guns. *See Extreme Risk Laws*, EVERYTOWN, <https://www.everytown.org/solutions/extreme-risk-laws/> [https://perma.cc/BNY6-K4GL] (last visited Oct. 17, 2023). Tennessee imposes few restrictions on where guns are allowed. It specifically authorizes full-time employees, including faculty, of state public colleges or universities with permits to carry concealed handguns under certain conditions. TENN. CODE ANN. § 39-17-1313(a) (2021). The state does not have a gun storage law, going so far as to explicitly

The ready availability of weapons raises the stakes for even small upsets, with threats seemingly more real and imminent given the violent political rhetoric flooding our airwaves.⁴² Violence in law schools is not unfamiliar,⁴³ and divisive concepts issues are very much part of the public discourse in Tennessee. The ouster of two Black members of its state legislature by that body's white majority recently made global headlines.⁴⁴ Tennessee is the birthplace of the Ku Klux Klan⁴⁵ and reportedly hosts the annual conferences of a number of white supremacy groups at its state parks.⁴⁶ The University of Tennessee campus itself has been the site of far-right extremist activity. A campus landmark, The Rock, an enormous bolder that represents free expression on campus, was defaced with a swastika following a vigil honoring the victims of the shooting at Pittsburgh's Tree of Life synagogue and on other occasions,⁴⁷ and student organizations have invited controversial figures and organizations associated with white nationalism and antisemitism to speak on campus, including far-right influencer John Doyle, Proud Boys founder Gavin McInnes, and the Center for Bio-Ethical Reform, an anti-abortion group that displays Holocaust imagery to attract attention to its cause.⁴⁸ Even the law school, where the

authorize the storage of guns in car trunks. *Id.*

42. See generally Alexander C. Kafka, *Managing Political Tensions*, CHRON. HIGHER EDUC. (July 2021); Daniel L. Byman, *How Hateful Rhetoric Connects to Real-World Violence*, BROOKINGS (Apr. 9, 2021), <https://www.brookings.edu/articles/how-hateful-rhetoric-connects-to-real-world-violence/> [https://perma.cc/K6WA-PKDH].

43. Francis X. Clines, *3 Slain at Law School; Student Is Held*, N.Y. TIMES (Jan. 17, 2002), <https://www.nytimes.com/2002/01/17/us/3-slain-at-law-school-student-is-held.html> [https://perma.cc/F79W-UPCP].

44. See, e.g., Nadine Yousif, Brandon Drenon, & Melisa Goh, *Lawmakers Expelled: What to Know about the 'Tennessee Three'*, BBC (Apr. 7, 2023), <https://www.bbc.com/news/world-us-canada-65182502> [https://perma.cc/EG45-PFNA].

45. *December 24, 1865, KKK Founded*, HISTORY, <https://www.history.com/this-day-in-history/kkk-founded> [https://perma.cc/6TXJ-46W2] (last visited June 12, 2023).

46. Natalie Allison, *Why White Nationalists are Descending on Tennessee's State Parks*, TENNESSEAN (Nov. 20, 2017), <https://www.tennessean.com/story/news/2017/11/19/forced-out-private-venues-white-nationalists-descending-tennessee-state-parks/830444001/> [https://perma.cc/QT83-KLGC].

47. Alexandra DeMarco, *The Rock was Defaced with Anti-Semitic Hate Once Again*, DAILY BEACON (Sept. 12, 2019), https://www.utdailybeacon.com/campus_news/the-rock-was-defaced-with-anti-semitic-hate-once-again/article_2c25aa44-d56d-11e9-8e5e-979c1e1dd053.html [https://perma.cc/NR94-2N3K].

48. Aurora Silavong, *UT Professor, Political Candidate Gregory Kaplan Targeted by Mailer on Heels of Statewide Antisemitism Report*, DAILY BEACON (Nov. 15, 2022), https://www.utdailybeacon.com/city_news/politics/ut-professor-political-candidate-gregory-kaplan-targeted-by-mailer-on-heels-of-statewide-antisemitism-report/article_2cb3ad4a-6452-11ed-bc22-

atmosphere is generally very collegial, is not immune to ideological conflict, some of which has caused deep divisions on campus and in the community.⁴⁹ The divisive concepts law has made teaching the Standard 303(c) requirements more fraught for anyone in this environment.

Despite my paranoia and general disquiet over the threat posed by relevant legal or political restrictions, the commitment of faculty and students to speak out on topics related to divisive concepts inspires optimism and gives me hope. Faculty in states with adopted or pending divisive concepts laws continue to offer and to develop instruction on the mandates set forth in Standard 303 on professional identity, cultural competency, bias, and racism. They do so in creative ways, resisting explicit and self-censorship to help students develop critical thinking skills and provide them with the training, information, and tools that they need to exercise independent professional judgment and to render the candid advice required by the Rules of Professional Conduct.⁵⁰ This sometimes takes great courage.

I am not referring to myself here as courageous. I realize that I am in a much better position than some of my colleagues who teach in other states with divisive concepts laws that do not offer “accreditation compliance” as a possible defense. For example, Idaho’s law places numerous restrictions on public institutions of higher education, school districts, or public schools related to gender, racial, ethnic, religious, color or national origin tenets, including in any course of instruction or unit of study.⁵¹ The law singles out Critical Race Theory and states that it “exacerbate[s] and inflame[s] divisions on the basis of sex, race, ethnicity, religion, color, national origin, or other criteria in ways contrary to the unity of the nation and the well-being of the state of Idaho and its citizens.”⁵² The only exclusion in the 258 statute pertains to the required collection or reporting of demographic data by covered institutions.⁵³ Some faculty are facing specific negative

0fc0dcb84221.html [https://perma.cc/NN46-GGDB].

49. See, e.g., Maureen Sullivan, *First Amendment Protects 'Instapundit' Professor But He May Quit Twitter Anyway*, FORBES (Sept. 30, 2016), <https://www.forbes.com/sites/maureensullivan/2016/09/30/first-amendment-protects-instapundit-professor-but-he-may-quit-twitter-anyway/?sh=62b981325de1> [https://perma.cc/SR5P-SUJH].

50. MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS’N 2013).

51. IDAHO CODE ANN. § 33-138 (West 2022).

52. IDAHO CODE ANN. § 33-138(2) (West 2022).

53. IDAHO CODE ANN. § 33-138(4) (West 2022).

workplace impacts related to divisive concepts-related issues, e.g., the Texas Lieutenant Governor’s proposal to make teaching CRT a ground for tenure revocation, to make tenure review an annual occurrence, and to end tenure for all new hires at Texas public universities and colleges.⁵⁴

Some educators fear bodily harm, as discussed herein by my colleague, Andrew King-Ries.⁵⁵ This fear, however, has not deterred faculty from continuing to provide instruction and to create new materials that help students attain “the cross-cultural competence to [deliver] professionally responsible representation” and that introduce them to a lawyer’s obligation to seek the administration of justice “in a system that provides equal access and eliminates bias, discrimination, and racism in the law.”⁵⁶ This aligns with the aspirations set forth in the Preamble to the Model Rules of Professional Conduct, another required law school subject, that urge lawyers to achieve “the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession’s ideals of public service.”⁵⁷

Those of us teaching in states with divisive concepts statutes who are committed to Standard 303(c)’s objectives also are buoyed by our welcoming and supportive community. This includes faculty colleagues in states without these statutes, some of whom may join our ranks at some point. We find one another in our offices, campuses or towns, online, and at conferences, but, wherever we encounter one another, it has been my experience that we find comfort and reassurance as well as concrete advice and materials.

My students also inspire me and make me incredibly proud. Many still actively engage, publicly and in the classroom, with topics related to the

54. See, e.g., Kate McGee, *Lt. Gov. Dan Patrick Proposes Ending University Tenure to Combat Critical Race Theory Teachings*, TEX. TRIB. (Feb. 18, 2022), <https://www.texastribune.org/2022/02/18/dan-patrick-texas-tenure-critical-race-theory/> [<https://perma.cc/P73B-QSSD>].

55. See *infra* p. 21; See also *Death Threats are Forcing Professors Off Campus*, KXLY (Jan. 25, 2023), https://www.kxly.com/news/education/death-threats-are-forcing-professors-off-campus/article_1f9104da-18b7-544d-a609-a1257ae8658e.html [<https://perma.cc/WP8N-78R2>].

56. ABA Interpretation 303-6 emphasizes “the importance of cross-cultural competence to professionally responsible representation and the obligation of lawyers to promote a justice system that provides equal access and eliminates bias, discrimination, and racism in the law should be among the values and responsibilities of the legal profession to which students are introduced.” ABA Interpretation 303-6, *supra* note 5.

57. MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS’N 2013).

divisive concepts debate.⁵⁸ Their passion often drives classroom interactions and course design, and even those of us who might otherwise be more self-censorial are compelled to address these topics to respond fully and adequately to these students. Even in the absence of ABA Standard 303(c), students would insist on a curriculum that mirrors its requirements; they enroll in clinics that serve underserved communities; they enroll in topical classes; they write for relevant journals; and they invite speakers and plan symposia and other events that explore these subjects and introduce them to broader audiences.⁵⁹

58. See, e.g., Alexa Schwerha, *Law Prof to File Bar Complaint Against Stanford Students Who Heckled, Harassed Federal Judge*, DAILY CALLER (Mar. 20, 2023), <https://dailycaller.com/2023/03/20/law-professor-bar-complaint-stanford-students-heckled-harassed-federal-judge/> [<https://perma.cc/P2ZL-3NGW>]. John Banzhaf, Professor Emeritus of Law at George Washington University Law School, publicly indicated that he intended to file a complaint with bar admission authorities regarding students who protested Federal Judge Kyle Duncan at a controversial event at Stanford Law School on March 9, 2023. *Id.* Duncan, a Trump appointee to the US Court of Appeals for the Fifth Circuit, opposed same-sex marriage rights before being appointed to the bench, and, since his appointment, he has participated in rulings restricting abortion, blocking Covid vaccine mandates, and refusing to refer to a prisoner by her preferred pronoun. David Leonhardt, *Free Speech (or Not) at Stanford - A Federal Judge Spoke at Stanford Law School. Chaos Ensued*, N.Y. TIMES (Mar. 24, 2023), <https://www.nytimes.com/2023/03/24/briefing/campus-free-speech.html> [<https://perma.cc/MJL4-SWWA>].

59. For example, while the Tennessee legislature was finalizing the original divisive concepts statute, the University of Tennessee College of Law's *Journal of Race, Gender, and Social Justice* sponsored "The Miseducation of CRT: Censorship and Critical Race Theory," a symposium that featured "experts who [discussed] what CRT actually is, how the media and politicians have turned it into a negative thing, and how the anti-CRT legislation is affecting the state of Tennessee and Tennessee teachers." See *The Miseducation of Tennessee: Censorship and CRT Symposium*, UNIV. TENN. J. RACE, GENDER & SOC. JUST. (Mar. 10, 2022), https://calendar.utk.edu/event/the_miseducation_of_tennessee_censorship_and_crt_symposium [<https://perma.cc/W5Q8-TSBB>]. The original legislation was effective on April 8, 2022.

II. A CLINICIAN'S PERSPECTIVE IN TENNESSEE (SHERLEY CRUZ)⁶⁰

A. Preserving Our Authentic Selves

They tried to bury us, but they didn't know we were seeds.

—Dinos Christianopoulos, poet.⁶¹

Undoubtedly, the wave of divisive concepts⁶² legislation has had a chilling effect on our teaching. A shockwave was felt throughout academia when Nikole Hannah-Jones, a Pulitzer Prize-winning author and a former professor at the University of North Carolina (“UNC”), was denied tenure at UNC likely due to critiques about her being a Critical Race Theory scholar.⁶³ The push to silence CRT scholars has forced many faculty to consider how the legislation will impact our work and whether we will change the way we teach to avoid the repercussions. We see the consequences of engaging in Justice, Equity, Diversity, and Inclusion (“JEDI”) work in “red” states.⁶⁴ Although Nikole Hannah-Jones has been

60. Author's note: I was born in the Dominican Republic, the daughter of immigrant parents who worked factory jobs to support their family. I am a first-generation college graduate and, in 2019, I became the first (and as of the printing of this article, the only) Latinx tenure-track faculty member at the University of Tennessee Knoxville College of Law. I am an emerging Crit scholar whose research explores the intersections of race, gender, low-wage workers, and access to justice. “Crit” is a catch-all for Critical Race Theory (sometimes referred to as CRT), Feminist Theory, LatCrit, and other genres of “critical” scholarship that take a critical look at the “status quo,” society, culture, and systemic structures.

61. Dinos Christianopoulos, *The Body and the Wormwood* (1979).

62. See *Divisive Concepts Legislation*, NAT'L COAL. FOR HIST., <https://historycoalition.org/divisive-concepts/> [<https://perma.cc/5LTW-ZH9K>] (last visited Oct. 29, 2023) (explaining why this legislation is misleading and dangerous); see also *Tracking American Civics Legislation*, CIVICS ALL. (Sept. 11, 2023), <https://civicsalliance.org/civics-bill-tracker/> [<https://perma.cc/J9CW-J8TC>] (providing a running list of divisive concepts bills and legislation). It is worth noting that some Crit Scholars and social justice activists dislike the term divisive concepts. The topics that are being censored are not divisive. They are topics that make up American history and identify critical social and societal issues that need to be part of conversations, and curriculum, about justice, power, and equality. See *supra*, notes 14–15.

63. Katie Robertson, *Nikole Hannah-Jones Denied Tenure at the University of North Carolina*, N.Y. TIMES (July 15, 2022), <https://www.nytimes.com/2021/05/19/business/media/nikole-hannah-jones-unc.html#:~:text=Nikole%20Hannah%2DJones%2C%20a%20Pulitzer,approve%20the%20journalism%20department's%20recommendation> [<https://perma.cc/PV45-6XWE>].

64. See *Tracking American Civics Legislation*, *supra* note 59 (running list of divisive concepts

able to rise above the humiliation, financial loss, and disruption to her academic career, she continues to face critiques of her scholarship and even death threats because she chose to stand up against the censorship and remain authentic to herself and her work.⁶⁵ She is joined by countless higher-education faculty who teach in states with divisive concepts legislation who have modified or stopped teaching about topics related to the legislation, have been denied tenure, have lost their jobs, or have left their institutions or academia to due to censorship, fear, and the risk of teaching about race and inequity in divisive concept states.⁶⁶

B. Unique Challenges for Some Faculty

Faculty of color, faculty without the security of tenure, and faculty who otherwise feel marginalized, isolated, or are “the only”⁶⁷ at an institution who teach or write about topics associated with the divisive concept legislation have experienced enormous levels of stress and anxiety. Some of us have felt silenced and our curriculum has been disrupted. Some of us have decided to leave our institutions or academia.⁶⁸ Many “Crit” faculty of color or those of us who teach or write about the topics related to the legislation at Predominantly white Institutions (PWIs) already felt (whether

bills and legislation includes Alabama, Arkansas, Florida, Georgia, Kentucky, Montana, South Carolina, Tennessee, and Texas); *see also Critical Race Theory Ban Status*, WORLD POPULATION REV. (Apr. 2023), <https://worldpopulationreview.com/state-rankings/critical-race-theory-ban-states> [<https://perma.cc/YY2H-LS35>].

65. Clyde W. Ford, *Op-Ed: I never imagined that being a Black author could put me in harm's way*, L.A. TIMES (Apr. 5, 2022), <https://www.latimes.com/opinion/story/2022-04-05/black-authors-targeted-threats-book-banning> [<https://perma.cc/T6DL-UFVX>] (describing Hannah-Jones' experience with threats and slurs because of her scholarship).

66. *See* Daniel Golden, *Muzzled by DeSantis, Critical Race Theory Professors Cancel Courses or Modify Their Teaching*, PROPUBLICA, (Jan. 3, 2023), <https://www.propublica.org/article/desantis-critical-race-theory-florida-college-professors>; *See also* Olivia B. Waxman, *Anti-'Critical Race Theory' Laws are Working. Teachers Are Thinking Twice About How They Talk About Race*, TIME MAG. (June 30, 2022), <https://time.com/6192708/critical-race-theory-teachers-racism/> [<https://perma.cc/YDE9-97YF>]; Ashley Woo, Sabrina Lee, Andrea Prado Tuma, Julia H. Kaufman, Rebecca Ann Lawrence, & Nastassia Reed, WALKING ON EGGHELLS—TEACHERS' RESPONSES TO CLASSROOM LIMITATIONS ON RACE- OR GENDER-RELATED TOPICS: FINDINGS FROM THE 2022 AMERICAN INSTRUCTIONAL RESOURCES SURVEY (2023), https://www.rand.org/pubs/research_reports/RRA134-16.html. Needs PERMA

67. By “only,” the author refers to being the “only” faculty member from a historically under-represented group (e.g., women, Latinx, LGBTQ+, etc.). I.e., the only faculty of color, LGBTQ+, Crit Scholar, etc.

68. *See* Waxman, *supra* note 65.

actual or perceived) that our teaching, scholarship, and our identities were under a microscope. The additional scrutiny has added an extra layer of not-belonging and othering — especially if we teach in conservative or “red” states.

The divisive concept restrictions are more than just a workplace nuisance or inconvenient workaround. Studies show that students are harsher on teaching evaluations of historically under-represented faculty.⁶⁹ Women and faculty of color experience bias at all stages of their academic careers, from the hiring process through tenure and promotion.⁷⁰ As “the only,” or one out of few, it can be challenging to feel like we belong, both on and off campus.⁷¹ It is not just about having to use “code words” in our syllabus, triple-thinking whether a reading excerpt or exercise might offend a student, or replaying an incident in our mind because we may have implied that the student was exhibiting racial bias or that they were making assumptions based on racist ideology.

We are witnessing hate, racism, and division at levels that can only be compared to the Jim Crow era. By entering academia, especially at a PWI in a conservative state, we expect resistance to our ideas, and at times to our very existence in this space. We know that students will test our authority, question our intelligence, and critique our teaching. We have also accepted that we may be the only Black or Brown family in the neighborhood. We might have to travel to give our children broader cultural experiences. You get used to the locals commenting “[y]ou aren’t from around here, are you?”

We knew it would take considerable effort to build community and

69. See Rebecca J. Kreitzer & Jennie Sweet-Cushman, *Evaluating Student Evaluations of Teaching: a Review of Measurement and Equity Bias in SETs and Recommendations for Ethical Reform*, 20 J. ACAD. ETHICS 73 (2022); see also Troy Heffernan, *Sexism, racism, prejudice, and bias: a literature review and synthesis of research surrounding student evaluations of courses and teaching*, 47 ASSESSMENT & EVALUATION HIGHER EDUC. 144 (2021); and Monica Colon-Aguirre, Nicole A. Cooke & Amelia Gibson, *Racism and Bias in Student Evaluations of Teaching*, ALISE 2020 PROC. (2020), <https://www.ideals.illinois.edu/items/116417> [<https://hdl.handle.net/2142/108788>].

66. See Deborah N. Archer, Caitlin Barry, Gautam Hans, Derrick Howard, Alexis Karteron, Shobha Mahadev, & Jeffrey Selbin, *The Diversity Imperative Revisited: Racial and Gender Inclusion in Clinical Law Faculty*, 26 CLINICAL L. REV. 127 (2019); see also KerryAnn O’Meara, Dawn Culpepper & Lindsey L. Templeton, *Nudging Toward Diversity: Applying Behavioral Design to Faculty Hiring*, 90 REV. EDUC. RSCH. 311 (2021); and Needhi Bhalla, *Strategies to Improve Equity in Faculty Hiring*, 30 MOLECULAR BIOLOGY CELL 2744 (2023).

71. Bonita K. Butler, Hansel Burley, and Aretha F. Marbley. “Coping with the Unexpected: Black Faculty at Predominately White Institutions.” *Journal of Black Studies* 30, no. 3 (2000): 453–62. (available at <http://www.jstor.org/stable/2645946>).

establish a sense of belonging. This current moment in time, however, is different. For historically underrepresented faculty and particularly those of us who are “Crit” scholars, our very existence is under attack. When you live in a state that bans books about your history in America, denies medical treatment for self-affirming care, prohibits life-saving medical care, and whose political leaders publicly spew hate and intolerance from their official offices it makes it difficult to be resilient and rise above the noise.⁷² It hurts. It is real. We are not watching the hate play out on the news or social media. They are direct attacks on our sense of self and existence.

C. Navigating the Challenges

We continue to do the work because it is important. We continue to push the boundaries of the divisive concepts legislation because it is necessary. We cannot teach the next generation of attorneys without unpacking how implicit bias and racism are embedded in our legal system or how it has led to systemic and structural inequality. We learn to navigate the dangerous waters by finding places of refuge and support.

Support from our home institution is critical. Our faculty needs to be committed to our success, support our growth, and appreciate our teaching and scholarly contributions. It is nearly impossible to maintain our mental and physical wellness while facing these not-so-micro attacks on our sense of self.⁷³ We cannot teach our students to grow, succeed, and lead if we are in a constant state of anxiety and insecurity. It also takes a strong network of support outside of our home institutions.

I am fortunate that our state’s divisive concept law has an exception that protects faculty who are teaching subject matters that are required for

72. See TENN. CODE ANN. § 49-6-1019 (2021) (prohibited concepts in instruction); TENN. CODE ANN. §63-1-700 (Youth Health Protection Act); see also HRC Staff, *ICYMI: Governor Lee Signed Tennessee’s Anti-Transgender Sports Ban into Law: Making it the State’s 15th Anti-LGBTQ+ Law Since 2015*, HUM. RTS. CAMPAIGN (May 1, 2023), <https://www.hrc.org/press-releases/icymi-governor-lee-signed-tennessees-fourth-anti-transgender-sports-ban-into-law-making-it-the-states-15th-anti-lgbtq-law-since-2015> [<https://perma.cc/7FJV-8U8W>]; Nadine Yousif, Brandon Drenon & Melisa Goh, *Law Makers Expelled: What to Know about the Tennessee Three*, BBC (Apr. 7, 2023), <https://www.bbc.com/news/world-us-canada-65182502> [<https://perma.cc/Z38W-YQHU>].

73. See Rita Kohli, Alison G. Dover, Uma Mazyck Jayakumar, Darlene Lee, Nick Henning, Eddie Comeaux, Arturo Nevárez, Emma Hipolito, Andrea Correno Cortez, & Margarita Vizcarra, *Toward a Healthy Racial Climate: Systemically Centering the Well-being of Teacher Candidates of Color*, 73 J. TCHR. EDUC. 52 (2022) (study exploring how structural racism impacts faculty of color).

accreditation.⁷⁴ The new ABA Standard 303(c) requires law schools to incorporate meaningful opportunities to learn about cross-cultural communications, professional identity formation, implicit bias, and racism.⁷⁵ While the validity of the Tennessee legislation has yet to be tested, and we do not have guarantees that the university or state will provide us with legal defense, the exception provides law school faculty a sense of protection to continue to teach JEDI subject matters. Some academic disciplines, however, do not require JEDI curriculum as part of their accreditation, leaving many of my pre-tenure and contract-based colleagues vulnerable.⁷⁶

We need faculty who have a sense of security, seniority, and/or power to use their privilege to support us and stand in solidarity with us. We need to build community within and outside of our academic home. Finding affinity-related spaces (whether based on race, gender, areas of scholarship, or other identities) can help us reduce some of our anxiety and uncertainty while providing us with strategies to combat some of the systems of oppression, bias, and racism that are intrinsically woven into academia.⁷⁷ We need spaces where we can share our stories, find mutual support, feel free to discuss issues, and engage in our work without fear of repercussions or judgment. Connections with faculty outside of the law school campus can also lessen our sense of isolation. Having networks off-campus and at other institutions can provide some anonymity to discuss personal and professional concerns.⁷⁸

74. See TENN. CODE ANN. § 49-7-1906(4)(B) (2022) (the provisions are not applicable if will cause failure to comply with applicable academic accreditation).

75. TENN. CODE ANN. § 49-6-1019 (2021) (prohibited concepts in instruction); ABA Standard 303(c).

76. Faculty members at other colleges and schools within the university that do not have accreditation standards that require faculty to teach about racial inequities and other Justice, Equity, Diversity, and Inclusion topics do not have the same protection.

77. See Farima Pour-Khorshid, *Cultivating Sacred Spaces: a Racial Affinity Group Approach to Support Critical Educators of Color*, 29 TEACHING EDUC. 318 (2019); and Joseph A. Whittaker, Beronda L. Montgomery, & Veronica G. Martinez Acosta, *Retention of Underrepresented Minority Faculty: Strategic Initiatives for Institutional Value Proposition Based on Perspectives from a Range of Academic Institutions*, 13 J. UNDERGRADUATE NEUROSCIENCE EDUC. 136 (2015); see also Jennifer J. Linderman et al., *10 Strategies for Retaining Faculty of Color*, U. MICH. ADVANCE PROGRAM (Oct. 2022), https://advance.umich.edu/wp-content/uploads/2022/10/faculty_retention_strategies_digital.pdf [<https://perma.cc/5CL2-2UUF>] (strategy and resource list).

78. Some examples of affinity-related conferences and workshops include Graciela Olivarez Latinas in the Legal Academy (GO LILA), <https://conferences.law.stanford.edu/go-lila-workshop-2023/>, John Mercer Langston Scholars Writing Program, Lutie A. Lytle Conference, & AALS Clinicians

The need for solidarity and brave spaces to unpack the trauma, inequity, and hostility that we face as faculty of color is powerfully described and documented in *Presumed Incompetent*, a collection of stories and essays by and about women in academia.⁷⁹ We need to shed our “fake it, till we make it” mantras and let colleagues, whom we can trust, know that we are struggling. Whether pushing the boundaries of the anti-CRIT and anti-DEI legislations to stay true to your teaching philosophy and scholarship goals or developing “code words” to describe your curriculum and programming in different ways, having someone recognize that you are facing these barriers and getting support to navigate the challenges alleviates stress and anxiety. We do not need to face these obstacles alone, and support can come from the most unlikely places.

D. Hope as Resistance

The collective resistance against the silencing of our voices gives me hope. Since the introduction of divisive concepts legislation, my colleagues have gone the extra mile to let me know that they value me, my scholarship, and the experiences that I bring to our law school. Whether stopping by my office to let me know that they will advocate for me if I receive any pushback about my teaching or scholarship, sharing articles about the importance of authoring pieces that reflect our authentic voice; or simply checking in with me to see how I am doing, my faculty has demonstrated that my voice and identity matters.⁸⁰

The actions of my colleagues across the University who have banded together to support everyone impacted by this legislation gives me hope. They have sought guidance from the United Campus Workers union.⁸¹ They

of Color Workshop; see also Carliss Chatman, *Honoring Lutie A. Lytle and John Mercer Langston with our Words* 78 WASH. & LEE L. REV. 5(2022), (available at <https://ssrn.com/abstract=4057700>) (describing the history of the Langston Scholars and Lutie writing conferences.)

79. See GABRIELLA GUTIERREZ Y MUHS, YOLANDA NIEMAN, CARMEN G. GONZALEZ & ANGELA P. HARRIS, *PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA* (2012); see also YOLANDA FLORES NIEMANN, GABRIELLA GUTIERREZ Y MUHS & CARMEN G. GONZALEZ, *PRESUMED INCOMPETENT II: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA* (2020).

80. MAYNARD, GOLDBURN, *Killing the Motivation of the Minority Professor*, 107 MINN. L. REV. 245 (2022) (available at <https://ssrn.com/abstract=4052148>).

81. UNITED CAMPUS WORKERS, <https://ucw-cwa.org/> [<https://perma.cc/2KVL-YQYT>] (last visited Oct. 29, 2023).

invited Pen America⁸² to campus to discuss our free speech and academic freedom protections.

I have hope because this generation of students expects and demands that we critically reflect and work to dismantle the racism and inequity that exists throughout our legal system. The clinical teaching community across the country gives me hope as we lead the charge not only to implement the ABA 303 standards, but also to take a critical look at curriculum to create real and meaningful opportunities to end systemic and structural racism within academia and throughout our legal system. I have hope because we cannot let the voices of a few undo the decades of courage, sacrifice, and work that have opened the doors for a Dominican woman like me—whose parents emigrated to the United States and worked long hours in factories in search of the American dream—to become a tenure track law-professor at a flagship university.

III. A CLINICIAN’S PERSPECTIVE IN GEORGIA (KENDALL KEREW)

Never, ever be afraid to make some noise and get in good trouble, necessary trouble.

—John Lewis⁸³

A. The Georgia Landscape

At the same time the ABA approved Standards 303(b)(3) and (c), the University System of Georgia (USG) was responding to Georgia Representative David Knight’s eleven-page request for “information about courses, curriculum, jobs and research that focus on topics such as anti-racism and social justice,” identification of “areas where university administration spending has greatly increased in the last five years,” and “details on ‘efforts represented as increasing institutional diversity, equity,

82. PEN AMERICA, <https://pen.org/> [<https://perma.cc/H8UV-GMVG>] (last visited _Oct. 29, 2023).

83. Press Release, Congressman Colin Allred, Allred Statement on the Passing of Congressman John Lewis (July 18, 2020), <https://allred.house.gov/media/press-releases/allred-statement-passing-congressman-john-lewis>. needs perma

inclusion, advocacy and activism.”⁸⁴ In addition, both chambers of the Georgia General Assembly were working on legislation to prohibit the teaching of divisive concepts about race.⁸⁵ While the Georgia House Bill focused only on K-12, the Georgia Senate Bill 377 extended the prohibition to all state colleges and universities within the USG, including its law schools.⁸⁶ Worried about Senate Bill 377’s constitutionality, the authors of both Bills ultimately agreed to forgo Senate Bill 377 in favor of House Bill 1084.⁸⁷ House Bill 1084, the Protect Students First Act, was signed by Governor Kemp in April 2022.⁸⁸ As passed, the Protect Students First Act states that “any curriculum, classroom instruction, or mandatory training program whether delivered or facilitated by school personnel or a third party engaged by a school or local school system, shall not advocate for divisive concepts” and “an individual, while performing official duties as part of his or her employment . . .” must refrain from “espousing personal political beliefs” regarding divisive concepts.⁸⁹ The Act applies to K-12 only⁹⁰ – for now.

It has been over a year since the Protect Students First Act became law in Georgia, and it has been over a year since the ABA added 303(b)(3) and (c) to its curricular requirements. More states have moved to ban the teaching of divisive concepts in colleges and universities. In the face of the threat that Georgia will try to follow suit, the USG has renewed its commitment to academic freedom and freedom of expression. First, in April

84. Eric Sturgus, *Georgia lawmaker targets work focused on anti-racism, social justice*, ATLANTA J.-CONST. (Feb. 10, 2022), <https://www.ajc.com/education/georgia-lawmaker-targets-work-focused-on-anti-racism-social-justice/A7ZDE6Q7GNE3HG0U5MPY3KJFZU/> [https://perma.cc/TDM7-B3X2]; Letter from David Knight to Teresa MacCartney, (Feb. 4, 2022), https://pdfhost.io/v/RKX8Mun80_Legislative_information_request_letter.

85. See Rebecca Rhym & Dori Butler, *HB 1084: Protect Students First Act*, 39 GA. ST. U. L. REV. 49 (2022) (legislative history and analysis of House Bill 1084).

86. *Id.* at 54.

87. *Id.* In response to the press, Senator Bo Hatchett, who authored and introduced Senate Bill 377, explained, "It would be unconstitutional for us to apply that to higher education because of protections that professors have, so it would be very difficult to enforce with professors. So we're potentially looking at doing an urging resolution, just urging the University System to have some type of policies to prevent that." Abraham Kenmore, *Georgia Legislature drops effort to regulate USG teaching race, but K-12 proposals ongoing*, AUGUSTA CHRON. (Mar. 20, 2022), <https://www.augustachronicle.com/story/news/2022/03/20/usg-exempted-rules-teaching-race-k-12-proposals-move-forward/7049598001/> [https://perma.cc/9CU5-F95W].

88. Rhym & Butler *supra* note 82, at 58; see also GA. CODE ANN. § 20-1-11 (2022).

89. See GA. CODE ANN. § 20-1-11 (2022).

90. See *id.*

2023, the USG adopted a statement of principles regarding academic freedom and freedom of expression that affirmed “the 1940 Statement of Principles on Academic Freedom (from the American Association of University Professors).”⁹¹ Second, in May 2023, the USG amended and expanded its policy on Freedom of Expression and Academic Freedom.⁹² This new, expanded policy statement initially gave me hope because it suggests that the USG will not follow the lead of the states that are banning divisive concepts and DEI offices in state colleges and universities; to do so would be in direct contravention to this policy.⁹³

But, political pressures are powerful. Money talks. And both politics and money appear to have influenced the legislature’s decision to cut \$66 million from the USG’s budget for fiscal year 2023, a cut the Chancellor openly criticized.⁹⁴ In response to the criticism, the Lieutenant Governor

91. *Board of Regents Approves Statement of Principles Regarding Academic Freedom and Freedom of Expression*, U. SYS. GA. (Apr. 20, 2023), https://www.usg.edu/news/release/board_of_regents_approves_statement_of_principles_regarding_academic_freedom_and_freedom_of_expression [https://perma.cc/73N5-25SZ]; Abraham Kenmore, *University System leaders update stance on academic freedoms on Georgia college campuses*, AUGUSTA CHRON. (Apr. 22, 2023), <https://www.augustachronicle.com/story/news/state/2023/04/22/academic-freedom-free-speech-principles-approved-by-usg-regents/70135540007/> [https://perma.cc/TNY8-D3NL]. The USG also added two other values, in addition to the 1940 Statement. These are:

- USG values the diversity of intellectual thought and expression, which shall be reflected in a student body and faculty that respect the individuality and beliefs of all.
- The BOR values our faculty and the important role they play in teaching, conducting research and providing service. Faculty have the right to be unburdened by ideological tests, affirmations and oaths. The key basis for hiring, promotion and tenure should be achievement and a commitment to student success.

Id.

92. *Board of Regents Policy Manual, 6.5 Freedom of Expression and Academic Freedom*, U. SYS. GA., <https://www.usg.edu/policymanual/section6/C2653> [https://perma.cc/P8JT-UNL9] (last visited Nov. 5, 2023); Letter from Sonny Perdue to Univ. Sys. of Ga. Presidents, (May 17, 2023), https://www.usg.edu/policymanual/assets/policymanual/documents/May_BOR_2023_Policy_Announcement_and_exhibit_1.pdf.

93. Matthew Boedy, *Opinion: Regents must honor commitment to academic freedom in Georgia*, ATLANTA J.-CONST. (May 19, 2023), <https://www.ajc.com/education/get-schooled-blog/opinion-regents-must-honor-commitment-to-academic-freedom-in-georgia/GNFXGFZK7RDE5EGAXYDWRYOKEE/> [https://perma.cc/N2X5-VUE9].

94. Vanessa McCray & James Salzar, *Sonny Perdue: \$66 million university cut ‘incredibly disappointing’*, ATLANTA J.-CONST. (Mar. 30, 2023), <https://www.ajc.com/education/sonny-perdue-66-million-university-cut-incredibly-disappointing/FXXYEQYCYJBS3A367X4D3VRGNA/> [https://perma.cc/4YJS-4KXE]. See Ben Anderson, *UNG president calls state budget cuts ‘concerning’ in letter to faculty*, YAHOO (Mar. 31, 2023), <https://www.yahoo.com/lifestyle/ung-president-calls-state->

requested the USG to report the amount of money going to DEI programs at the state's colleges and universities.⁹⁵ This request, which came just one week after the USG adopted the statement of principles regarding academic freedom and freedom of expression, specifically mentioned the “series of disturbing events, including a public event at Stanford University at which a DEI administrator participated in the ‘shouting down’ of an invited campus speaker, have drawn new attention to the role of DEI programs and personnel on college campuses.”⁹⁶ In July 2023, the Lieutenant Governor made his purpose clear upon receipt of the USG's response by stating, “I am committed to ensuring taxpayer dollars are spent wisely to support a higher education system that equips our students with critical skills needed for future success — *not on advancing divisive concepts and political agendas* I know Chancellor Perdue shares in this commitment.”⁹⁷ Given its tie to DEI funding, this statement is troubling as is the assertion that the Chancellor agrees with it. Before this statement, I was hopeful that the USG would not succumb to the financial pressure the legislature is putting on it. I am trying to remain optimistic. Actions speak louder than words.

This is this political reality in which I teach. It is full of contradiction. Nothing is certain. Nothing is safe. I do not have tenure, nor am I fully promoted. I have job security akin to tenure pursuant to ABA Standard 405(c).⁹⁸ But what does that mean when in 2021, the USG proposed measures to effectively eviscerate tenure, a move that prompted the AAUP to censure an entire university system?⁹⁹ Tenure is meant to protect

budget-010400254.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAGIiiaAU26xIMYMiGgQo09S_bWHDcRmN7h-Qpl8QayJSxRK4U7R8ifbkdGsPb9CCAXqmyNmHI3MQINjOigR0_NsxMcx4DStfGaJZT5mtglZaY4-TI9vdhA9LUOPcJtH-o9Q1_JuDAD4TuNtm7vx2UwiYeZVxysbckfX4q9R32z_m. Needs perma

95. James Salzar & Vanessa McCray, *Georgia lieutenant governor goes after college spending on diversity programs*, ATLANTA J.-CONST. (Apr. 26, 2023), <https://www.ajc.com/politics/georgia-lt-governor-goes-after-college-spending-on-diversity-programs/SMPVNETSZRCWBKF5O7TFSAWRZQ/> [https://perma.cc/EBS7-LHN9].

96. *Id.*

97. Vanessa McCray & James Salzar, *Georgia universities tell lt. governor: Millions spent on diversity efforts*, ATLANTA J.-CONST. (July 3, 2023), <https://www.ajc.com/education/georgia-universities-response-to-lt-gov-millions-spent-on-diversity-efforts/ICTT4HE4LFHTFA6WHGBACFYDTA/> [https://perma.cc/4RYS-CAVT] (emphasis added).

98. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2022-2023 Standard 405(c) (AM. BAR ASS'N 2022).

99. *AAUP Censures University System of Georgia*, AM. ASS'N UNIV. PROFS. (Mar. 5, 2022), <https://www.aaup.org/news/aaup-censures-university-system-georgia> [https://perma.cc/NU9S-ABN7]

academic freedom. Academic freedom and the security of position is necessary if I am to teach about cross-cultural competence, racism, and bias in a hostile political climate without fear of retaliation. I am fearful, but I will not let fear win.

B. Good Trouble, Necessary Trouble

I direct Georgia State University College of Law's Externship Program and teach a required externship seminar. The externship seminar facilitates student exploration of their emerging professional identities while in the role of lawyer at their field placement.¹⁰⁰ Each of the seven seminar classes, which were designed and implemented well before Standard 303(b)(3), focuses on a specific aspect of lawyering effectiveness.¹⁰¹ The last class specifically explores each student's cultural self-awareness and incorporates exercises, reflections, and discussion on cross-cultural competence, racism, and bias. To the extent students do not receive a second educational occasion before students take an externship, Standard 303(c) requires me to teach about race, bias, and cultural competence in the externship seminar. Moreover, as stated above, Interpretation 303-6 underscores that "the importance of cross-cultural competency to professionally responsible representation and the obligation of lawyers to promote a justice system that provides equal access and eliminates bias, discrimination, and racism in the law are *values* of the legal profession."¹⁰² Interpretation 303-5 defines professional identity formation as including, but not limited to, "an intentional exploration of the *values*, guiding principles, and well-being practices considered foundational to successful

("The AAUP released a report [] emphasizing the magnitude and singularity of the USG's attack on tenure and academic freedom, which affects more than 5,800 tenured faculty members in twenty-five colleges and universities and confers on the University System of Georgia the dubious distinction of being the only system of public higher education to take such a radical action in nearly fifty years."); Giulia Heyward, *Georgia's University System Takes On Tenure*, N.Y. TIMES (Oct. 13, 2021), <https://www.nytimes.com/2021/10/13/us/georgia-university-system-tenure.html> ("The Board of Regents . . . approved the new policy, which is the only one of its kind in the country, according to the American Association of University Professors.").

100. See Timothy W. Floyd & Kendall Kerew, *Marking the Path from Law Student to Lawyer: Using Field Placement Courses to Facilitate the Deliberate Exploration of Professional Identity and Purpose*, 68 MERCER L. REV. 767, 807 (2017) (description of the seminar).

101. *Id.*

102. ABA Interpretation 303-6, *supra* note 5 (emphasis added)

legal practice.”¹⁰³ The two are inextricably linked; Cross-cultural competence, racism, and bias education is essential to the training of future lawyers and to the legal profession.

I recognize that as a white, cisgender woman, I have privilege. Sometimes that very fact makes me question my teaching in this space. Am I the right person to be teaching about race, cross-cultural competence, and bias? What if I say the wrong thing? What if a discussion I am facilitating retraumatizes a student? What if my students do not feel that they can freely engage in discussion? I ask my students these questions and pay particular attention to the responses I receive from my BIPOC students. They think what I am doing is necessary. They feel heard. They think I need to be doing my part. Yet I know that I will invariably have students who do not want to engage, who do not think they have anything to learn, and are unreceptive to these professional values.

This year is the first year a student took a picture of one of my PowerPoint slides on cognitive bias during class. Internally, I started to panic. I have never had that feeling while teaching, even with my classes being recorded. While I hoped and believed the reason was to remember the content, I could not help but question—what if it was not? What next? I remind myself that this feeling of vulnerability is nothing new.

Several years ago, prior to the launch of the externship seminar, a site supervisor objected to a final reflective essay I assigned because of one of several prompts asked students to reflect on “any conduct by your supervisor, other attorneys, or courtroom personnel that you think indicated racial or gender insensitivity.” The site supervisor did not talk to me about the “problematic assignment,” but instead went to the law school administration, requesting anonymity. The administration asked me about the assignment and said that there had been a complaint. I asked who made the complaint and why they did not attempt to talk to me first. The administration would not identify the complainant. I got angry. How could my decision to include that prompt rise to the level of an inquiry by the administration? Why did the supervisor not talk to me directly? I could not help but think that a tenure track professor would have never been questioned like that.

The irony was that after years of using that final assignment, I had

103. ABA Interpretation 303-5, *supra* note 6 (emphasis added).

decided earlier in the semester to replace the final assignment because the new seminar was going to incorporate several deeper, pointed assignments about cultural competence, racism, and bias. I did not want the administration or the supervisor to conclude that I changed the assignment because of the complaint. I refused to discuss the assignment with the administration unless the supervisor discussed it with me first. The supervisor called me. I explained the reason I had included the prompt. The conversation was a good one. But what if the administration had not respected my point of view? What if the supervisor refused to talk to me directly? What if the conversation had not gone well?

That leads me to a unique aspect of externships. Our teaching involves site supervisors who give our students the opportunity to experience the realities of legal practice. Are the supervisors reinforcing the education on cross-cultural competence, bias, and racism required by Standard 303(c)? What if the supervisor believes that teaching of what they deem to be divisive concepts should be prohibited? To ensure that supervisors know about the new ABA Standards, the Georgia Association of Legal Externships conducted a site supervisor training in September 2022.¹⁰⁴ During the training, we talked explicitly about Standard 303(c) and cross-cultural competence, racism, and bias in the legal profession. As a professor at a public law school and knowing the political climate, I was nervous to co-lead the training. But, once again, I found reassurance in knowing that what I was discussing was part of our accreditation standards.

I found it helpful to tie our training to the values of the profession through the Aspirational Statement on Professionalism,¹⁰⁵ which the Supreme Court of Georgia adopted in 1990, and which is part of the professional orientation at every Georgia law school. The pertinent part of the Aspirational Statement states:

As a lawyer, I will aspire:

(c) To avoid all forms of wrongful discrimination in all of my activities including

104. Georgia Association for Legal Externships, *Pathways to the Profession VII: The Supervisor's Role in Professional Formation* (Sept. 9, 2022).

105. *Lawyer's Creed and Aspirational Statement on Professionalism*, STATE BAR GA. (Oct. 9, 1992), <https://lj9.362.myftpupload.com/wp-content/uploads/2019/07/1-Lawyers-Creed-and-Aspirational-Statement-Clean-Copy-v-2013-new-logo-seal.pdf> [<https://perma.cc/UC29-MCKA>].

discrimination on the basis of race, religion, sex, age, handicap, veteran status, or

national origin. The social goals of equality and fairness will be personal goals for

me.

(d) To preserve and improve the law, the legal system, and other dispute resolution

processes as instruments for the common good.¹⁰⁶

While the Aspirational Statement is not binding, it is an affirmative statement of the values each Georgia lawyer should hold in promoting equality and fairness. It is through this lens that I and my externship colleagues can address cross-cultural competence, racism, and bias in the profession with our supervisors and help them establish ways to implement anti-racist supervision techniques.

In addition to teaching externships, I teach Contracts and Elder Law. In those classes, I have found that being intentional about integrating discussions about cross-cultural competence, racism, and bias into my teaching has made a difference, even if incrementally.¹⁰⁷ It has resulted in real conversations about the people behind the cases, the ways race and the law intersect, and broadened the legal topics my students choose to explore in their upper-level writing requirement papers. It has also allowed me to have real conversations with BIPOC students about their experiences in law school.

Each year, a handful of my Contracts students come to my office in the first semester of law school questioning everything, wondering whether coming to law school was the right choice, expressing surprise at how jarring the structure of law school is, seeking reassurance, and wondering how a few short weeks have led them to question everything. I am thankful my students feel that they can talk to me. I listen, I offer advice, I keep

106. *Id.*

107. I have incorporated ideas and concepts from two excellent resources. *See* INTEGRATING DOCTRINE AND DIVERSITY (Nicole P. Dyszlewski, Raquel J. Gabriel, Suzanne Harrington-Steppen, Anna Russell, & Genevieve B. Tung, eds., 2021); TERI A. MCMURTRY-CHUBB, STRATEGIES AND TECHNIQUES FOR INTEGRATING DIVERSITY, EQUITY AND INCLUSION INTO THE CORE LAW CURRICULUM: A COMPREHENSIVE GUIDE TO DEI PEDAGOGY, COURSE PLANNING, AND CLASSROOM PRACTICE (2021).

teaching intentionally, and I hold my breath. Invariably, they adjust. They adjust to what law school is. They check a piece of themselves at the door. But, why should they have to? This year, one of my Black students posed that very question after reading Bennett Capers' essay, *Law School as a White Space*.¹⁰⁸ She wants to do something about it. She believes she can make change. And despite everything, I believe she can too. That gives me hope. She will make trouble. Good trouble. Necessary trouble. And, I will too.

IV. A CLINICIAN'S PERSPECTIVE IN MONTANA (ANDREW KING-RIES)

A. Critical Race Theory, Anti-Racism, and Anti-Trans Regulation

In May of 2021, the Montana Attorney General issued an opinion stating that

In many instances, the use of 'Critical Race Theory' and 'antiracism' programming discriminates on the basis of race, color, or national origin in violation of the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, Article II, Section 4 of the Montana Constitution, and the Montana Human Rights Act.¹⁰⁹

According to the Attorney General:

The gravamen of CRT and antiracism's theories. . .rely on the popular shibboleths of 'systemic,' 'institutional,' or 'structural' racism. A minimal investigation into these

108. Bennett Capers, *The Law School as a White Space*, 106 MINN. L. REV. 7 (2021).

109. 58 Mont. Att'y Gen. Op. No. 1 at 1 (May 27, 2021). The opinion was in response to a question presented by the Montana Superintendent of Public Instruction, the state official charged with running public K-12 education, and is, therefore, limited in application to public K-12 education. The language of the opinion is broad and appears to suggest that it would apply to any public institution. For example, several times, the Attorney General's opinion applies its rationale to "schools, other government entities, or employers." *See id.* at 19–21, 23–24. However, the opinion on its face is limited to K-12 education, is grounded in the compulsory nature of K-12 education, makes no mention of higher education, and has never been applied to higher education. *Id.*

claims exposes them as hollow rhetorical devices devoid of any legally sufficient rationale for purposes of civil rights law, as well as a threat to stability of our institutions.¹¹⁰

Further, “Antiracism therefore assigns immutable negative characteristics to individuals solely based upon their race or ethnicity. And it manages to frame any philosophical disagreement or objection to this assignment as—you guessed it—racism.”¹¹¹

While the Attorney General acknowledged that there may be legitimate educational aspects to Critical Race Theory and antiracism and that the teaching of these concepts “may” be protected by the First Amendment,¹¹² the Attorney General states “the law will not tolerate schools, other government entities, or employers implementing CRT and antiracist programing in a way that treats individuals differently on the basis of race or that creates a hostile environment.”¹¹³ Specifically, the Attorney General found that using Critical Race Theory and antiracism violates state and federal law as illegal racial segregation, race stereotyping, and race scapegoating.¹¹⁴ For example, the Attorney General stated:

Government entities may not engage in racial stereotyping, which means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or to an individual because of his or her race. . . Prohibited race stereotyping includes all exercises that ascribe specific characteristics or qualities to all members of a racial group, particularly when participation in such exercises is compulsory or acceptance of certain stereotypes is required as part of the grading criteria. Schools, other government, entities, and employers may not use materials that assert that one race is inherently superior or inferior to another. Individuals may not be forced to participate in “privilege walks” that treat students differently based on race. Individuals may not be forced to admit privilege or

110. *Id.* at 16–17.

111. *Id.* at 10.

112. *Id.* at 19.

113. *Id.*

114. *Id.*

punished for failing to do so. Members of certain races cannot be forced to “reflect,” “deconstruct,” or “confront” their racial identities or be instructed to be “less white” (or less of any other race, ethnicity, or national origin).¹¹⁵

Significantly, the Attorney General’s opinion states that “the Office of the Attorney General stands ready to assist [the Office of Public Instruction], as well as parents, students, employees, and other individuals with complaints of unlawful race-based discrimination,” whether under state or federal law.¹¹⁶

Prior to the 2023 Montana legislative session, many had anticipated divisive concepts legislation, similar to those passed in Florida, Tennessee, and many other states, would be advanced in Montana, a state in which the Republican Party controlled both houses of the state legislature and the governor’s office.¹¹⁷ Instead, the legislature decided to focus its efforts on a separate divisive concept: rights for transgender individuals.

The Montana legislature passed four bills that many have characterized as being “anti-trans.”¹¹⁸ First and foremost, the legislature passed a law that recognizes only two genders: male and female.¹¹⁹ According to the legislature, a male is someone who produces, or has the capacity to produce, sperm.¹²⁰ Women are those who produce, or have the capacity to produce,

115. *Id.* at 20–21.

116. *Id.* at 24. “Schools or other entities that violate state or federal civil rights laws jeopardize their funding and may be liable for damages. There are a variety of legal avenues available for victims of discrimination. For violations of the Individual Dignity Clause and the MHRA, individuals should file complaints with the Montana Human Rights Bureau. For violations of Title VI and the Equal Protection Clause, students and parents may either file a lawsuit directly against their school or file a complaint with the U.S. Department of Education. For violations of Title VII, employees should file a complaint with the U.S. Equal Employment Opportunity Commission.” *Id.*

117. While many bills were proposed, none made it to the governor’s desk. *See, e.g.*, H.B. 814, 68th Leg., 2023 Reg. Sess. (Mont. 2023) (requiring intellectual diversity on campus); H.B. 837, 68th Leg., 2023 Reg. Sess. (Mont. 2023) (requiring schools to post materials and give students and parents an opt-out to any education on “critical theory instruction” or “human sexuality instruction”).

118. ACLU, *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, <https://www.aclu.org/legislative-attacks-on-lgbtq-rights?state=MT> [<https://perma.cc/CMC2-8B9L>] (Last updated Nov. 3, 2023); Dan Rosenzweig-Ziff, *Son asked Montana governor to veto anti-trans bill. It didn’t work*, WASH. POST (Apr. 28, 2023, 9:30 P.M. EDT), <https://www.washingtonpost.com/nation/2023/04/28/montana-lgbtq-gianforte-son-gender/>, [<https://perma.cc/X7N8-2FWM>].

119. S.B. 458, 68th Leg., 2023 Reg. Sess. (Mont. 2023).

120. *Id.*

eggs.¹²¹ In other words, the legislature removed any legal recognition for transgender individuals. In addition, the legislation applied these definitions to over forty different portions of the Montana Code Annotated, including those prohibiting discrimination on the basis of sex, gender, gender identity, or gender expression in employment, housing, medical care, education, and civil rights.¹²²

The legislature also banned gender-affirming medical care for transgender individuals.¹²³ Second, the legislature removed bullying of transgender individuals from prohibited conduct, specifically finding that intentional misgendering of transgender individuals by teachers, students, or administrators does not constitute bullying.¹²⁴ Finally, the legislature banned public drag shows as obscenity.¹²⁵ Combining the Attorney General Opinion with the recent legislation, Montana law prohibits teaching or training about antiracism in K-12 schools, denies legal recognition to transgendered individuals, and permits discrimination against transgendered individuals.

B. ABA Accreditation Regulation of Law Schools

As the accrediting body for law schools, the ABA requires law schools to have non-discrimination and equal opportunity policies for students,

121. *Id.*

122. *Id.* See also Orion Rummler, *Narrow legal definition of sex in Montana bill would jeopardize protections for trans people*, PBS (Apr. 1, 2023), <https://www.pbs.org/newshour/nation/narrow-legal-definition-of-sex-in-montana-bill-would-jeopardize-protections-for-trans-people> [<https://perma.cc/KTX5-4A8T>].

123. S.B. 99, 68th Leg., 2023 Reg. Sess. (Mont. 2023).

124. H.B. 361, 68th Leg., 2023 Reg. Sess. (Mont. 2023).

125. H.B. 359, 68th Leg., 2023 Reg. Sess. (Mont. 2023). The constitutionality of these laws will certainly be challenged in the courts, buttressed by the opinions in other jurisdictions. For example, a federal district court recently ruled that the Tennessee Adult Entertainment Act prohibiting drag shows was an unconstitutional violation of the First Amendment. See Emily Cochrane, *Judge Finds Tennessee Law Aimed at Restricting Drag Shows Unconstitutional*, N.Y. TIMES (June 3, 2023), https://www.nytimes.com/2023/06/03/us/politics/tennessee-drag-ruling.html?action=click&pgtype=Article&state=default&module=styleIn-trans-legislation&variant=show®ion=MAIN_CONTENT_1&block=storyline_top_links_recirc [<https://perma.cc/3FXY-GTS7>]. A federal district court judge in Montana issued a preliminary injunction blocking HB 359 from taking effect. See Lou Kettering, *Federal judge blocks Montana restrictions on drag performances*, JURIST (Oct. 15, 2023, 11:35 AM), <https://www.jurist.org/news/2023/10/federal-judge-blocks-montana-restrictions-on-drag-performances/>.

faculty, and staff.¹²⁶ These policies explicitly prohibit discrimination on the basis of, among other protected classes, race, gender, gender identity or expression, and sexual orientation.¹²⁷ Further, the ABA requires that law schools “demonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.”¹²⁸ The same commitment to diverse inclusion in the profession applies to students, faculty, and staff.¹²⁹

As discussed earlier, in 2022, the American Bar Association furthered its commitment to diversity and inclusion by adopting changes to the accreditation standards for law schools to require that law schools teach about bias, cross-cultural competency, racism, and professional identity.¹³⁰ Interestingly, the ABA incorporated each of these ideas together, stating that “the importance of cross-cultural competency to professionally responsible representation and the obligation of lawyers to promote a justice system that provides equal access and eliminates bias, discrimination, and racism in the law should be among the values and responsibilities of the legal profession to which students are introduced.”¹³¹

Divisive concepts prohibitions in states that apply them to higher education (whether as legislation or Attorney General opinions) are potentially in conflict with the ABA’s Accreditation Standards. Specifically, legislation denying legal recognition for transgender individuals and prohibiting teaching of Critical Race Theory or antiracism runs counter to Standard 303 and its Interpretations.¹³² Setting aside the questionable constitutionality of these divisive concepts prohibitions, I

126. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2022-2023 Standards 205(a), (b), 206 (AM. BAR ASS’N 2022).

127. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2022-2023 Standard 205(b) (AM. BAR ASS’N 2022).

128. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2022-2023 Standard 206(a) (AM. BAR ASS’N 2022).

129. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2022-2023 Standard 206(a)–(b) (AM. BAR ASS’N 2022).

130. ABA Standard 303(c), *supra* note 9.

131. ABA Interpretation 303-6, *supra* note 5.

132. Due to the fact that the Montana Attorney General’s opinion is limited to K-12 education, law school and courses in higher education about race, racism, antiracism, and Critical Race Theory are not prohibited. *See* discussion *supra* note 106.

would like to focus on some of the more concrete challenges of this conflict, particularly for those of us who teach at public law schools in states with divisive concept prohibitions.

The series of anti-transgender legislation passed by the Montana Legislature has the negative consequences intended by the legislature on the lives of transgender individuals: denial of legal recognition, of legal protections against discrimination in many areas of their lives, and of necessary and medically appropriate medical care. Those intentional harms also cause additional intentional negative consequences on members of the LGBTQ+ community. Every member of the LGBTQ+ community has had to recalibrate their level of safety and their tolerance for living in a state that actively denies their existence.¹³³ As a direct result of the legislative session, recent hires who identify as LGBTQ+ have reconsidered their offers of employment as professors and have decided against joining the Montana University System.¹³⁴ For the law school, in particular, efforts to increase the diversity of the faculty as required by the ABA are being directly undermined.¹³⁵ Of course, these consequences also apply directly to staff as well.¹³⁶

As mentioned, the ABA diversity efforts extend to students. Imagine welcoming a new class of first year law students. Given recent trends, several members of the new class will identify as transgender. I am preparing for the conversation about how Montana law denies them legal recognition and protection from discrimination. I am worried about how we support these students and attempt to deal with the pain caused by not having their identities reflected in the law. We have known for years that the failure to have students' identities acknowledged in law school has been

133. See Meghan Krausch, *Amid Right-Wing War on Higher Ed, Montana State Students Fear for Their Lives*, Truthout (June 20, 2023), <https://truthout.org/articles/amid-right-wing-war-on-higher-ed-montana-state-students-fear-for-their-lives/> [<https://perma.cc/M9NT-PMB9>]; Traci Rosenbaum, *After Recent Threats, LGBTQ+ Students Say They Don't Feel Safe on MSU Campus*, BOZEMAN DAILY CHRON. (Apr. 12, 2023), https://www.bozemandailychronicle.com/news/education/after-recent-threats-lgbtq-students-say-they-dont-feel-safe-on-msu-campus/article_5b00345a-d560-11ed-a3ff-3b029876c5be.html [<https://perma.cc/7THQ-KNA7>]; Ernesto Londoño & Azeen Ghorayshi, *Fight or Flight: Transgender Care Bans Leave Families and Doctors Scrambling*, N.Y. Times (July 6, 2023), <https://www.nytimes.com/2023/07/06/us/transgender-health-care-bans.html?searchResultPosition=5> [<https://perma.cc/4DKU-CLP9>].

134. Based on conversations with university administrators and employees.

135. *Id.*

136. *Id.*

harmful and traumatic to students of difference.¹³⁷ While requiring education on bias, cross-cultural competence, racism, and professional identity could help, efforts to mitigate emotional harm will fall on the entire community of faculty, staff, and administrators concerned about our students' well-being.

For those of us whose teaching addresses areas of the law considered to be divisive concepts, the quandary will be even greater. We are in a conflicted space in which the subject matter of our classes is directly or potentially within legal prohibition. For example, as a clinician, my students and I examine professional and racial identities and students are asked to consider the impact of bias, cross-cultural competence, and racism on their clinical work and how to confront those impacts in their legal careers. Further, I teach *Race, Racism, and American Law*,¹³⁸ a course in which we explore the central role of the legal system in creating the concept of race and in perpetuating racial hierarchies. I hope my students gain a substantive understanding of race and racism and explore their own racial identities in the contested context of racial identities in the United States.

In clinic and *Race, Racism, and American Law* we never “assign[] immutable negative characteristics to individuals solely based upon their race or ethnicity” or “assert that one race is inherently superior or inferior to another.”¹³⁹ We do spend significant time in and outside of class exploring our racial identities and considering and reflecting on the historical, cultural, social, and legal impacts of those identities. There is no question that this is intensely personal work, and all students, regardless of how they identify, find it challenging, difficult, and—at times—uncomfortable. The goal is not that students feel bad about their race; on the contrary, the express desire is that students of all races develop strong, healthy, and positive racial identities. Further, we attempt to provide our students the skills needed to address the role the legal system has played in

137. See Shaun Ossei-Owusu, *For Minority Law Students, Learning Can Be Intellectually Violent*, AM. BAR ASS'N J. (Oct. 15, 2020), https://www.abajournal.com/voice/article/for_minority_law_students_learning_the_law_can_be_intellectually_violent [https://perma.cc/P3KE-2QXA].

138. I began co-teaching this class in 2016 with Professor Eduardo Capulong (now at CUNY Law School) and Professor Monte Mills (now at the University of Washington School of Law). Most recently, I have had the pleasure of co-teaching this class with Professor Kekek Stark, also at the University of Montana Blewett School of Law.

139. See 58 Mont. Att'y Gen. Op. No. 1 at 20-21 (May 27, 2021).

the creation of race and perpetuation of racism.¹⁴⁰ Finally, we consider the importance of developing an antiracist professional identity that combines the substantive knowledge of race and racism with the skills needed to address hierarchical power imbalances in the legal system based on race and racism.

Clinics and substantive race and racism courses like mine meet portions of the amendments to Standards 303(b) and 303(c). First of all, the classes provide education on “bias, cross-cultural competency, and racism.”¹⁴¹ Further, they seek to “reinforce the skill of cultural competency and their obligation as future lawyers to work to eliminate racism in the legal profession.”¹⁴² Finally, these classes also provide opportunities for students to form “the development of a professional identity” and to explore the intersection between professional identity development and education on race and racism.¹⁴³ Of critical importance, these classes are required by the American Bar Association’s accreditation standards, and those standards have the potential to be in conflict with the law in divisive concept states.

As a result, despite having taken every effort to comply with the Attorney General’s opinion by treating all students the same regardless of race, I have significant concerns about legal action being brought against me and having to defend my courses and myself in court.¹⁴⁴ My family and

140. See Eduardo R.C. Capulong, Andrew King-Ries & Monte Mills, *Race, Racism, and American Law: A Seminar from the Indigenous, Black, and Immigrant Legal Perspectives*, 21 ST. MARY’S L. REV. ON RACE & SOC. JUST. 1 (2019) (information on the structure of the course); see also Eduardo R.C. Capulong et al., *Antiracism, Reflection, and Professional Identity*, 18 HASTINGS RACE & POVERTY L.J. 3 (2021) (information on the role of reflection and the development of an antiracist professional identity).

141. See ABA Standard 303(b), *supra* note 2, at 18.

142. See ABA Interpretation 303-7, *supra* note 7, at 19.

143. ABA Standard 303(b), *supra* note 2, at 18; ABA Interpretation 303-6, *supra* note 5, at 21 (“[T]he importance of cross-cultural competency to professionally responsible representation and the obligation of lawyers to promote a justice system that provides equal access and eliminates bias, discrimination, and racism in the law should be among the values and responsibilities of the legal profession to which students are introduced.”).

144. Clearly, I am of the opinion that there are solid legal arguments that the content of my classes does not violate the Montana Attorney General’s Opinion or the recent anti-transgender legislation, and in no way do I concede any arguments to the contrary. In addition, the Montana Attorney General’s opinion is in violation of the University of Montana’s antidiscrimination policy. See *Discrimination, Harassment, and Retaliation Policy*, UNIV. MONT. (Aug. 13, 2023), <https://www.umt.edu/policies/browse/personnel/discrimination-harassment-and-retaliation> [<https://perma.cc/V2K8-GAJE>] (“The University of Montana, together with our Affiliates, commits to a learning and working environment that emphasizes the dignity and worth of every member of its community that is free from discrimination, harassment, and retaliation based upon race, color, religion,

I worry that our livelihoods are in jeopardy. After consultation with other professors and university administrators here, my concerns remain to such an extent that I have a defense attorney on retainer. It is precisely this chilling effect on free speech and academic freedom that underlies divisive concepts restrictions. Given the vehemence of the rhetoric surrounding the “culture wars”¹⁴⁵ and the coordinated effort to restrict, ban, and outlaw divisive concepts, the degree to which I work in a conflicted space seems to be increasing.¹⁴⁶ Unfortunately, the violent reactions to this vehement rhetoric—reflected in multiple school shootings and other politically motivated killings and attempted killings—have added fears about my physical safety, the safety of my students, and the safety of my family to the list of concerns about which my family and I have serious discussions before each semester.¹⁴⁷ So far, the conversation has continued to be that we cannot live in fear, and that the importance of addressing race and racism in the legal system and helping students develop antiracist professional identities weighs more heavily in our ongoing risk calculus.

It is important to understand that I have these concerns as a tenured faculty member who identifies as a cis-gendered, white male of Scottish, Irish, and German ancestry. I have significant job security and extensive privilege in American society. All the concerns that I feel are magnified for my tenure-track, non-tenurable, BIPOC, and LGBTQ+ colleagues. Further,

national origin, creed, service in the uniformed services (as defined in state and federal law), veteran status, sex, gender, age, political ideas, marital or family status, pregnancy, physical or mental disability, genetic information, gender identity, gender expression, or sexual orientation (taken together, generally, “protected-class harm”). An inclusive environment is necessary to a healthy and productive University community. The University will take appropriate action to prevent, resolve, and remediate protected-class harm.”)

145. See Kiara Alfonseca, *Culture wars: How identity became the center of politics in America*, ABC NEWS (July 7, 2023, 5:24 AM), <https://abcnews.go.com/US/culture-wars-identity-center-politics-america/story?id=100768380> (discussing the origin and history of the “culture war”).

146. Adam Nagourney & Jeremy W. Peters, *How a Campaign Against Transgender Rights Mobilized Conservatives*, N.Y. TIMES (Apr. 17, 2023), <https://www.nytimes.com/2023/04/16/us/politics/transgender-conservative-campaign.html?smid=nytcore-ios-share&referringSource=articleShare> [<https://perma.cc/5Q4V-3UXB>].

147. See, e.g., Michael S. Schmidt, Alan Feuer, Maggie Haberman, & Adam Goldman, *Trump Supporters’ Violent Rhetoric in His Defense Disturbs Experts*, N.Y. TIMES (June 14, 2023), <https://www.nytimes.com/2023/06/10/us/politics/trump-supporter-violent-rhetoric.html?searchResultPosition=5> [<https://perma.cc/S25W-92WX>]; see also Mary Harris, “A Car Crash in Slow Motion”: *Why Increasing Anti-LGBTQ Violence Feels Inevitable*, SLATE (Jan. 4, 2023), <https://slate.com/news-and-politics/2023/01/club-q-shooting-drag-show-attacks-groomer-panic-anti-lgbtq-violence-inevitable.html> [<https://perma.cc/U6QM-4BWW>].

my concerns persist despite having been a prosecutor for nearly a decade and having direct experience with threats to my personal safety. I do not consider myself given to hyperbole or to being overly risk averse.

Finally, it is also important to understand that I am not expressing these concerns to criticize the adoption of the new accreditation standards. The amendments to Standard 303 are vital. I am very hopeful that, if law schools embrace the spirit of 303's requirements as to race and professional identity development, the new standards will result in a legal system and a system of legal education that is more equitable and just for everyone.

V. A CLINICIAN'S PERSPECTIVE IN INDIANA (CARWINA WENG)

A. Challenges

This is a deeply personal piece. I am not asking for any reader's sympathy, reassurance, or judgment. I ask that the reader make meaning of my story for themselves.

I previously taught and still live in a state, Indiana, that does not yet have the full range of divisive concepts content bans for K-12 or higher education,¹⁴⁸ despite vigorous attempts to enact them. Indiana is currently a religious, politically conservative¹⁴⁹ and overwhelmingly White¹⁵⁰ state. These factors absolutely affected how I taught the subjects now required in Standard 303(c), long before the standard came to be.

Then and now, my greatest challenges are psychological and emotional: am I kidding myself by saying that empathy and meeting my students where

148. The Indiana legislature did not pass a divisive content bill this past session. Now, though, Republican Indiana Rep. Jim Banks, who is running for the U.S. Senate, introduced a bill that blocks consideration of DEI policies and the racial composition of applicants, students, faculty, and staff as factors in accreditation of institutes of higher learning. Fairness in Higher Education Accreditation Act, H.R. 3803, 118th Cong. (2023).

149. *Political Ideology Among Adults in Indiana*, PEW RSCH. CTR. (2023), <https://www.pewresearch.org/religion/religious-landscape-study/state/indiana/political-ideology/> (identifying 41% of Indiana adults as politically conservative, and, within evangelical Protestant groups, 59% as politically conservative, as compared to 47% of Catholics, 41% of mainline Protestants, and 22% of those who are not affiliated with a religious group).

150. *Indiana Census Quick Facts*, U.S. CENSUS BUREAU (July 1, 2022), <https://www.census.gov/quickfacts/fact/table/IN/PST045222> [<https://perma.cc/NZK2-MVTH>] (estimating Indiana is 84% White; 10% Black; 8 % Hispanic/Latino; 3% Asian; .4% Native as of July 1, 2022).

they are, based on what they disclose or I observe in class, is why I teach the way I do? Or am I still afraid and too scared to bring my authentic self to teaching this material? Am I doing more harm than good by focusing on community in my classroom when the systems in which I work and live undermine what I teach about implicit bias, cross-cultural competence, and racism? Am I channeling the right mix of my own identities and values into the way that I teach? Am I at least fostering hope that real change might come?

I try to teach, especially subject matters in which issues of diversity, equity, and inclusion are particularly salient, from a point of authenticity as a person and a teacher. I try to engage students and nudge them closer to seeing these subjects as important values in the law and skills for lawyering. The tensions these goals create and even the appropriateness of my being an instructor of these subjects in Indiana continue to confound me.

Let's start with authenticity: I am a cisgendered straight female immigrant of East Asian descent. I am a first-generation U.S. college and law student. I have felt like an outsider in the U.S. ever since I first moved to southern Indiana from Connecticut during first grade. I have recollections of schoolmates asking me questions about what I ate, how I looked (slanty eyes!), and making fun of my name ("Carwina Wing-Wong"). The low point came in fifth grade Social Studies, when the teacher asked all of us what our nationalities were. Students proudly proclaimed, "Polish, German, Scots, Irish, Chinese (me), etc." The teacher then told us that we were all wrong—except me. I was Chinese, he said, and everyone else (who are all White) was American. I was too scared to say anything and internalized his belief, shared by my community, that I was a non-American, or as the stereotype is now named, a "perpetual foreigner."¹⁵¹

Fast forward a few decades, and I am back in Indiana as a clinical law professor. Different city, same non-Americanness. This time, it's a kid at the city pool yelling excitedly to a friend, "Hey, she speaks English, just like we do!" I want to yell back, "That's because I've been speaking it longer than you've been alive!" or even better, "It's the only language I'm fluent in!" But I do not because I'm mature, sort of. And I do not like calling attention to myself and cannot be sure what, if any, the public response might be.

151. 3.6 – *Perpetual Foreigner – Systemic Racism Against Asian Americans*, ASIAN AM. EDUC. PROJECT, <https://asianamericanedu.org/perpetualforeigner.html>. (last visited Nov. 28, 2023)

That is one part of who I am: someone seen as non-American, which means that I am not fully accounted for in the primarily binary Black-White American race dynamic. During elementary school in Indiana, when consent-decreed busing of Black children into predominantly White schools like mine began, I realized how important it was in terms of privilege to be White-adjacent, which was where the “model minority” stereotype put me anyway. I also was mostly just confused but compliant when the school asked me, a White child, and a Black child to pose together for photos for the annual report. I do not think I even knew the other two children.

Before returning to Indiana, I attended law school in New York City and worked and taught in New York City and Boston. I was used to being accepted as a person of color (not claiming to have the same experiences as people who are Black or Brown, just also discriminated against based on race) as well as a foreigner (“would you please interpret for this Chinese-speaking litigant?”). But in Indiana, I am not underrepresented as a matter of national statistics, and my lived experience as a person of East Asian descent does not count, even with some faculty of color, except for marketing or optics or when the case needs to be made that an East Asian faculty candidate should qualify for a diversity hire line of funding.

Because of these and other experiences, I have developed a strong commitment to empathy and community building. Practicing these skills and values is how I cope with what my students have taught me is ongoing race-based trauma. But my experiences of living in Indiana make it very hard for me to find even a small community where I can be me. My masks must be so much stronger and nonporous here that they become me. Or I them.

Now to challenges in teaching Standard 303I content. As a clinician and a person, I strove to create a safe haven in my clinic, focused on empathy and reciprocity among the students and with the clients. That made teaching the content now mandated in Standard 303(c) so much easier. But it was so much harder, exhausting, and harmful in the mandatory professional responsibility course, which is predominantly White and filled with students who are resentful that the course focuses on professional identity formation, not MPRE preparation. Trying to create a somewhat safe space, trying to meet so many students where they are, trying to center and validate the experiences and views of BIPOC students without putting them on the spot or asking them to teach their peers, trying to respond to microaggressions

no matter how unintentional and directed at students and at me specifically, trying to model and encourage empathy. No wonder people prefer to approach these subjects from an intellectual distance.

My primary fear, though, is that I am hurting the BIPOC students in the mandatory professional responsibility class by the way I teach, that I am undermining my goal of safety and authenticity. One instance stays with me: we were having a discussion on implicit bias and stereotypes. The class had been sharing their experiences of being targeted by and expressing unconscious bias. One student, a White male, made a comment about stereotypes and other kinds of implicit bias based on appearance, giving the example of redheaded people (he did not appear to have red hair). I recall making a deliberately gentle comment that the salience of skin color and hair color stereotypes was vastly different. Other students quickly jumped in, some more vociferously. I learned later that some of the BIPOC students considered my response woefully inadequate, even a betrayal and re-traumatization. They saw my responsibility as teacher to strongly validate their perspectives. I saw my role as gently guiding based on where I assessed a student to be.

Both views are valid, and I know intellectually that I do not hold sole responsibility for how students process what and how I teach. But I have to question myself—did my East Asian femaleness hold me back (meek, unqualified to weigh in on race matters, afraid of the White student and law school response, afraid to be the nail that sticks up¹⁵²) from a more emotional, authentic, and centering response? Am I using this individualized pedagogical approach to justify my personal fears and discomforts? Am I causing more harm to BIPOC students in my class and to myself than good to the predominantly White class with this approach? I do not have good answers to these questions. It is the process of reflection, not the answer that matters, as long as I do not become paralyzed.

I know my experience is not unique. I share this story because I came to realize that the challenge was that I was asked to continue teaching this professional identity class so that some students might find a pocket of relative psychological safety when no institutional change and no support to me was forthcoming. So, I was harming myself by teaching the way I teach *and* not clearly helping students in the moment or when they left my

152. A Japanese proverb states that “The nail that sticks up gets hammered down.”

class for the larger racist institution that was also exploiting me. Yet I wanted to keep harming myself for the sake of the students who might appreciate my poor efforts and because I could not say no to the institution. I could not stop myself from teaching the course until the school decided not to teach it as an experiential, coordinated course. I should have stopped teaching it a few years earlier to staunch my own bleeding.

These events all happened before Standard 303(c) came out. I applaud it as an effort to respond to racism in our country, in our profession, and in our schools. I am glad that it offers a small safe haven for colleagues in public institutions in states that ban explicitly or effectively encourage self-censorship in teaching divisive concepts. But I decry it as so much window dressing because it focuses on inputs not outputs, because it does not mandate training or support for the teachers who already teach this content or will be tasked with implementing it, and because it does not change the structural hidden curriculum that makes 303(c) potentially more harmful and retraumatizing. Making 303(c) subjects mandatory and emotionally and existentially meaningful cannot be effective without requiring structural change.

So, I have one definitive answer to my ongoing questions: I cannot teach students this content in a large mandatory course. It hurts too much; it reminds me too much of the academy's failure to change in structural ways. I can only help others who self-select into teaching bias, cross-cultural competence, and racism. This way, I get more emotional distance and more emotional support.

B. Hope

To build community requires vigilant awareness of the work we must continually do to undermine all the socialization that leads us to behave in ways that perpetuate domination.

—bell hooks¹⁵³

Like my colleagues here, I do actually find hope overall in the promulgation of Standard 303(c). I recognize from a broad, long-term

153. bell hooks, *Teaching Community: A Pedagogy of Hope* 36 (2003).

perspective that requiring the teaching of bias, cross-cultural competence, and anti-racism in legal instruction is an important step toward equity. I am encouraged by the number of faculty who are interested in compliance in a meaningful way.

I am hopeful that the way I teach still has meaning for me and for students in small, elective classes. When I was teaching an experiential course on anti-racist lawyering outside of Indiana, I was called a White supremacist by a student of East Asian descent. She was voicing what a sizeable portion of the class thought (I agree that my behaviors were racist and fell short of their hopes.) My course was so traumatizing for her that she asked not to come to class anymore.¹⁵⁴ As her presence had been continuously disruptive and as I could see how much she was hurt by being in class, I agreed that she could do the work of the course asynchronously. I spent the rest of the semester repairing my relationship with her, like-minded students in the class, and the students who did not know what the heck had happened. By the end of the semester, a much better state had evolved. The student was able to accept my apologies and efforts to continue to help her learn and to apologize for her behavior. The students who had been in agreement with her came to accept where I come from (“we don’t always agree with Carwina’s views, but she really cares about us”), and all the students and I gained some more agency and skill in intentionally practicing anti-racist and empathetic behaviors.

I am most encouraged by the students attending and considering law schools now. Overall, they are more aware of and accepting of the affective components of the Standard 303(c) topics. They are willing to push schools to address the psychological and emotional dimensions of instruction and the hidden curriculum. They are far more adept at speaking up and

154. One of the perils of teaching these concepts is that psychodynamics can be more fraught between and among teachers and students in courses in which they are the content. *See generally* Laura Smith, Susan Kashubeck-West, Gregory Payton, and Eve Adams, White Professors Teaching About Racism: Challenges and Rewards, 45.5 *The Counseling Psychologist* 651-68 (2017) (discussing challenges white professors face in teaching about racism and comparing these challenges to those faced by BIPOC professors). I am not trained as a therapist. But basic understanding of therapy and good support from people who are trained is essential to navigating the emotional and psychological dimensions. Being unprepared or inadequately prepared for these dimensions of an intellectual discussion can be disorienting, frightening, and traumatizing. *See, e.g.,* Vincent Lloyd, *A Black Professor Trapped in Anti-Racist Hell*, COMPACT MAG. (Feb. 19, 2023), <https://compactmag.com/article/a-black-professor-trapped-in-anti-racist-hell> [<https://perma.cc/D6UK-82QQ>] (depicting personal experience of student reactions to academic treatment of racism)

practicing allyship. Because of who they are, I am able to frame divisive content bans as yet another dying gasp of very fearful and powerful people. As long as I can protect myself emotionally, I am going to bet on the younger generations.

CONCLUSION

In summary, ABA Standard 303(c) provides good news and the bad news about opportunities and challenges for legal educators and legal education. The recent actions of law school deans and the ABA Council of the Section of Legal Education and Admissions to the Bar are monumental steps in the evolution of law school accreditation enhancing legal education and the legal profession. Schools across the country have already increased curricular focus on diversity, cross-cultural competency, and anti-racism, beginning in the first year through the upper-class curriculum. Many colleagues across the country have developed relevant Standard 303(b) and 303(c)-related research and coursework.

The other good news is the strength and resilience of the community of legal educators being built around Standard 303(c) to challenge these limitations, offer support, and share resources. The authors of this piece are clinicians, but the support group has a much broader nationwide membership with increasing gatherings, conferences, coursework, scholarship, and legal challenges.

However, for those who teach in states with divisive concepts statutes or other legal or political restrictions, or where such restrictions are being considered, the bad news is the uncertainty, intimidation, and fear that may cast a pall over our instructional activities. But, if you experience a panicked moment, have a question, or want to brainstorm, pick up the phone or type out an email—you will receive a collegial, comforting, and supportive voice along with some useful guidance or material, if requested, from our team of authors and others across the country.¹⁵⁵

155. For just some examples of faculty efforts in this regard, see e.g., ABA Standard 303: Curriculum (c) website hosted by the University of Buffalo School of Law at *ABA Standard 303: Curriculum (c)*, UNIV. AT BUFF. SCH. OF L., <https://www.law.buffalo.edu/beyond/aba303c.html> [<https://perma.cc/SN8C-XL8R>] (Last visited Nov. 28, 2023); *Holloran Center for Ethical Leadership*, UNIV. OF ST. THOMAS, <https://law.stthomas.edu/about/centers-institutes/holloran-center/> [<https://perma.cc/LE9U-M5VB>]; NEIL W. HAMILTON & LOUIS D. BILIONIS, LAW STUDENT PROFESSIONAL DEVELOPMENT AND FORMATION: BRIDGING LAW SCHOOL, STUDENT, AND EMPLOYER

Our final hope and belief is that this is a defining moment for legal education and the legal profession. And, we hope that we will capture this moment and not let these laws and their chilling effects impact teaching or student learning or access to courses or resources.

GOALS (2022); KIMBERLY O'LEARY & MABLE MARTIN-SCOTT, MULTICULTURAL LAWYERING: NAVIGATING THE CULTURE OF THE LAW, THE LAWYER, AND THE CLIENT (2021); INTEGRATING DOCTRINE AND DIVERSITY (Nicole P. Dyszlewski, Raquel J. Gabriel, Suzanne Harrington-Steppen, Anna Russell, & Genevieve B. Tung, eds., 2021); TERI A. MCMURTRY-CHUBB, STRATEGIES AND TECHNIQUES FOR INTEGRATING DIVERSITY, EQUITY AND INCLUSION INTO THE CORE LAW CURRICULUM: A COMPREHENSIVE GUIDE TO DEI PEDAGOGY, COURSE PLANNING, AND CLASSROOM PRACTICE (2021); Kim Diana Connolly & Elisa Lackey, *The Buffalo Model: An Approach to ABA Standard 303(c)'s Exploration of Bias, Cross Cultural Competency, and Antiracism in Clinical & Experiential Law*, 70 WASH. U. J. L. & POL'Y 1 (2022); Norrinda Brown Hyatt, *Freedom Pedagogy: Toward Teaching Antiracist Clinics*, 28 CLIN. L. REV 149 (2021-2022).