CRITICAL THEORY & COMMERCIAL LAW IN THE SUNSHINE

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Abstract

In recent years, Florida and other states have attempted to expel critical legal theory, critical race theory, and all things "woke" from their institutions of higher education. At a time of professional cautiousness and chilled speech, this Essay aims to bring these ideas into the sunshine. I provide a rough background on critical theory and how it helps make sense of commercial law, including Contracts and Bankruptcy, two courses I teach at the University of Florida. Critical theory can help students learn how to navigate complex systems of laws, analyze the policy implications of legal rules, and represent their future clients.

INTRODUCTION

Critical legal theory is under fire in Florida, the state where I live and teach. Newly recast as *woke* (a term coopted as the newest pejorative label in the culture wars), critical legal theory and critical race theory

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(CRT) found themselves in the sights of the Republican supermajority that dominated Florida's 2022 and 2023 legislative sessions. "Florida is where woke goes to die," pronounced Republican Governor Ronald DeSantis in his second inaugural address.[1]

This is no empty threat.[2] In 2022, Florida redefined unlawful discrimination to include any required activity that teaches unconscious bias or systemic racism.[3] It also prohibited mandatory, race-conscious activities that would either promote diversity or criticize colorblindness[4]—a tactic that traces back to executive orders issued by former U.S. President Donald Trump.[5]

Even as a federal district court enjoined House Bill 7 as unconstitutional,[6] DeSantis signed Senate Bill 266, which aims to expel diversity, equity, and inclusion (DEI) programs and personnel from Florida's public institutions of higher education.[7] The bill prohibits the

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1. *See* Matt Dixon & Gary Fineout, *'Where Woke Goes to Die': DeSantis, with Eye Toward 2024, Launches Second Term*, POLITICO (Jan. 3, 2023, 2:24 PM), www.politico.com/news/2023/01/03/desantis-2024-second-term-00076160 [https://perma.cc/8AZM-45WZ].

2. *See* Kimberlé Williams Crenshaw, *This Is Not a Drill: The War Against Antiracist Teaching in America*, 68 UCLA L. REV. 1702, 1706–07 (2022) (detailing the assault on critical race theory).

3. H.B. 7, 2022 Leg. Reg. Sess. (Fla. 2022) (the "Stop W.O.K.E. Act"). In the bill, "W.O.K.E." stands for "Wrongs to our Kids and Employees." *See infra* notes 27–28 and accompanying text.

4. *See id.* §§ 1.8(a)(5)–(6) (banning "adverse treatment," including "adverse treatment to achieve diversity, equity, or inclusion"). Section 1.8(a)(4) of the bill defined as unlawful discrimination any required activities that espouse the notion that "[m]embers of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin," apparently protecting Floridians who espouse colorblindness.

5. Exec. Order No. 13,950, 85 Fed. Reg. 66,083 (Sept. 22, 2020) (prohibiting trainings conducted by federal contractors that promote "divisive concepts"); *see also* Exec. Order No. 13,958, 85 Fed. Reg. 70,951 (Nov. 2, 2020) (establishing the 1776 Commission).

6. To date, three sets of plaintiffs have sought to enjoin House Bill 7. First, private employers challenged the law, and the federal district court granted a preliminary injunction against it as applied to private industry. *See* Honeyfund.com, Inc. v. DeSantis, 622 F. Supp. 3d 1159, 1168 (N.D. Fla. 2022). The preliminary injunction is on appeal to the Eleventh Circuit. *See* Honeyfund.com, Inc. v. DeSantis, No. 22-13135 (11th Cir. filed Sept. 19, 2022). Second, higher education plaintiffs challenged the law, both to stop its application to Florida's colleges and universities and to prevent the Florida Board of Governors and the Florida Board of Education from engaging in rulemaking to implement the bill. *See* Pernell v. Fla. Bd. of Governors, 641 F. Supp. 3d 1218, 1233, (N.D. Fla. 2022). Here, too, the federal district court granted a preliminary injunction against House Bill 7. *See id.* at 1287. That preliminary injunction, too, is on appeal before the Eleventh Circuit. *See* Pernell v. Fla. Bd. of Governors, Nos. 22-13992-J, 22-13994-J, 2023 WL 2543659, at *1 (11th Cir. Mar. 16, 2023). Third, primary and secondary education plaintiffs challenged the law to stop its application to Florida's primary and secondary school system. *See* Falls v. DeSantis, No. 4:22-cv-00166, 2023 WL 3568526 at *1 (N.D. Fla. May 19, 2023). Here, the court dismissed the case without prejudice, concluding that the plaintiffs could not demonstrate standing. *Id.*

7. S.B. 266, 2023 Leg. Reg. Sess. (Fla. 2023).

use of state or federal funds on DEI initiatives[8] and curtails the use of "theories that systemic racism, sexism, oppression, and privilege are inherent in the institutions of the United States and were created to maintain social, political, and economic inequities."[9]

Florida may be leading the charge against CRT and DEI, but it is not the only state attempting to restrict those concepts and communities. At least eighteen states now have bans or restrictions on CRT, from North Dakota to New Hampshire.[10]

This Essay adds the perspective of someone who teaches commercial law classes and uses critical theory in the classroom. This legislation does not affect "race-based" courses alone; it cuts across the curriculum. That fact may alarm some readers and encourage others. But my goal is to shed a little sunlight on how I use critical theory to teach law, in a forum that might be read not only by other law professors and university administrators, but also anyone with an interest in higher education. Doing so promotes transparency, accountability, and (I hope) academic freedom.

The Essay begins with a primer on critical theory and a close reading of the text of Florida's anti-CRT bills. I then describe how I use critical theory to help students learn the law, consider how it might be changed for the better, and take their first steps toward understanding how to represent clients. I conclude with a few thoughts on a better direction for higher education.

I. WHERE WOKE GOES TO DIE

A. *A Brief Primer on Critical Theory*

What is this "critical theory" that has fallen into disfavor in the Sunshine State and so many others? The literature is vast, so we can only engage in an embarrassingly simplified treatment here.[11] As I would

8. *See* FLA. STAT. § 1004.06(2) (2023).

9. *See infra* notes 29–30 and accompanying text.

10. *See, e.g.*, Keith E. Whittington, *Professorial Speech, the First Amendment, and Legislative Restrictions on Classroom Discussions*, 58 WAKE FOREST L. REV. 463, 467–76 (2023) (describing anti-CRT legislation across the country); Vanessa Miller, Frank Fernandez & Neil H. Hutchins, *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, 73–81 (2023); Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WK. (June 13, 2023), www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06 [https://perma.cc/KG93-95D].

11. We must, as Professor Kenneth Mack writes, "distinguish the actual scholarship on race and the law which has provoked increased interest in recent years from invented caricatures of the scholarship . . . ." Kenneth W. Mack, *Critical Race Theory and Scholarly Analyses of Race in France* 2 (Harv. Pub. L. Working Paper, Paper No. 21-43, 2021), https://papers.ssrn.com/

explain it in a seminar, critical theory views law through a lens of suspicion.[12] Even when rules appear neutral on their face, when we explore the ways that laws work in context, we find that they too often deny justice to the poor and oppressed, often in subtle ways. These injustices are not always the conscious effort of an individual actor; sometimes they are buried deep within a system.

For example, welfare programs in the United States did not always require that people seeking welfare attempt to find gainful employment if they are able to work.[13] Congress first imposed those work requirements in the 1960s, just as Black Americans became eligible.[14] Work requirements may be a good idea (we could debate that) and such requirements would not strike most people as inherently malicious. But while work requirements could be evenhanded in a vacuum, they were racist as implemented in this country in the twentieth century.

Undertaking this kind of examination is less parsimonious than, say, the economic analysis of law (an approach that I also teach) and requires some understanding of society, culture, and history. That is because, in the United States, opening our eyes to the ways that facially neutral laws can be oppressive requires an appreciation of America's original sin of racism, along with all the other forms of marginalization and subjugation that have infected our society for generations.

In the 1960s and 1970s, Professors Andrea Dworkin, Catharine MacKinnon, Martha Fineman, bell hooks, Roberto Mangabeira Unger, Duncan Kennedy, and others brought critical theory to law as part of

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abstract_id=3915926 [https://perma.cc/P9HB-T7AU]. For more fulsome overviews of the field, see generally, for example, RICHARD DELGADO & JEAN STAFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (4th ed. 2023); KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER (2019). For a recent examination of next steps in critical theory, including tying it to the new movement in law and political economy, see Samuel Moyn, Reconstructing Critical Legal Studies 2 (Aug. 4, 2023) (unpublished manuscript) (available at https://papers.ssrn.com/abstract_id=4531492 [https://perma.cc/SX5U-VSLG]) ("Had critical legal studies never existed, it would have to be invented today."); *see also* CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic, eds., 3d ed. 2013).

12. Critical legal theory has a vast family that extends across many other fields, all inspired (to some degree) by postmodern philosophy and its powerful critique of Enlightenment over-reliance on human rationality. Critical legal theory is thus of a piece with what French philosopher Paul Ricœur called the "hermeneutics of suspicion," *see* PAUL RICŒUR, LE CONFLIT DES INTERPRÉTATIONS (1969), and some of the opposition to critical legal theory may be rooted in opposition to Marxist theories of law, though the two theories are analytically distinct.

13. Joel F. Handler & Ellen Janes Hollingsworth, *Work, Welfare, and the Nixon Reform Proposals*, 22 STAN. L. REV. 907, 907–11.

14. *See, e.g.*, Nick Burns, *Welfare Queens and Work Requirements: The Power of Narrative and Counter-Narrative*, 10 TENN. J. RACE GENDER & SOC. JUST. 29, 34–35 (2020); Peter Edelman, *Welfare and the Politics of Race: Same Tune, New Lyrics?*, 11 GEO. J. ON POVERTY L. & POL'Y 389, 390–91 (2004); ROBERT C. LIEBERMAN, SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE 126–40 (1998); Handler & Hollingsworth, *supra* note 13, at 907–11.

feminist legal theory and the Critical Legal Studies (CLS) movement.[15] As the discipline grew over the next several decades, seminal thinkers like Professors Derrick Bell, Kimberlé Crenshaw, Richard Delgado, Mari Matsuda, and Patricia Williams began to emphasize the central role of race and racism in American law, including the mechanisms by which racial identities, far from being biological, are socially and legally constructed.[16]

In 1989, Professor Crenshaw coined the term "intersectionality" to describe how various types of discrimination interact.[17] Because American society manifests discrimination along axes of race, class, gender, and other characteristics, we can "map" out that discrimination onto a multi-dimensional field.[18] Professor Crenshaw's theory of intersectionality served to foreground communities who identify along multiple axes of oppression, such as queer Black women, and to show how civil rights movements that were built on single, essentialized characteristics had neglected these communities.[19]

Yet intersectionality also highlighted communities that seemed to escape oppression at every turn, like rich white men. That attention was initially more by negative inference than by design, but critical theorists soon began to examine axes of privilege, most notably in Professor Cheryl I. Harris's seminal article, *Whiteness as Property*.[20] As Professor

15. *See, e.g.*, Miller et al., *supra* note 10, at 67–68; Frank W. Munger & Carroll Seron, *Critical Legal Studies Versus Critical Legal Theory: A Comment on Method*, 6 L. & POL'Y 257, 257–58 (1984); Hugh Collins, *Roberto Unger and the Critical Legal Studies Movement*, 14 J.L. & SOC'Y 387, 387–88 (1987); ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 79–80 (1986); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685, 1776–78 (1976).

16. *See* Miller et al., *supra* note 10, at 67–68; CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xvi–xvii, xx (Kimberlé Crenshaw et al. eds., 1995); Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or "a Foot in the Closing Door"*, 49 UCLA L. REV. 1343, 1360–61 (2002); Andrew W. Haines, *The Critical Legal Studies Movement and Racism: Useful Analytics and Guides for Social Action or an Irrelevant Modern Legal Skepticism and Solipsism?*, 13 WM. MITCHELL L. REV. 685, 692–93 (1987). Of particular importance was Professor Bell's pathbreaking textbook, DERRICK BELL, RACE, RACISM, AND AMERICAN LAW (6th ed. 2008).

17. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracise Politics*, 1989 U. CHI. LEGAL F. 139, 140 ; *see also* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–44 (1991) [hereinafter *Mapping the Margins*]; Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1188–90 (1991) (calling this exercise "ask[ing] the other question").

18. *See Mapping the Margins*, *supra* note 17, at 1242.

19. *See id.* at 1242–43.

20. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1786 (1993). For a more recent application of Harris's theory that seeks to explain the process by which whiteness is

Harris and others began to set whiteness (and masculinity, etc.) under a microscope, devising phrases like "white privilege" and "white complicity," the discomfort of white communities became more palpable—a phenomenon that was itself theorized as "white fragility."[21]

This latter development gave ammunition to opponents of CRT, who accused its teachers of "divisive" pedagogy.[22] But the fuel beneath the furor may be something else entirely. Professor Katheryn Russell-Brown has criticized House Bill 7 as the functional equivalent of an anti-literacy bill, with a troubling heritage in the era of slave codes and anti-literacy laws.[23] She notes that the wave of anti-CRT legislation "arrived on the heels of massive national and international protests in the wake of George Floyd's murder, the rise of the Black Lives Matter movement, [and] demands for corporations and universities to address and teach about explicit and implicit forms of racial bias and anti-Black racism."[24]

Even though scholars built the intellectual underpinnings of critical theory in the late twentieth century, this way of thinking about law is not new. The phrase "stay woke" derives from an early twentieth-century admonition given among African American communities, particularly

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continually "renegotiat[ed] and reif[ied]," see Marissa Jackson Sow, *Whiteness as Contract*, 78 WASH. & LEE L. REV. 1803, 1829 (2022).

21. *See, e.g.*, ROBIN DIANGELO, WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM 1–5, 99–106 (2018). Of course, as many pointed out, "[c]ritical race theory is not rooted in the emotional well-being of white people." Anthony Conwright, *The Trouble with White Fragility Discourse*, AFR. AM. POL'Y F. (May 12, 2022), https://www.aapf.org/theforum-white-fragility-discourse [https://perma.cc/D9GQ-Q8P8].

22. This discomfort is likely what the drafters of the House version of the bill meant by "pedagogical methodology associated with Critical Theory." *See* H.B. 999, 2023 Leg. Reg. Sess. (Fla. 2023) (revising FLA. STAT. § 1001.706(5)(a) (2023)). Even though diving into questions of the emotional or ethical life is a pillar of many religions and philosophies, see, for example, *Psalm* 139:1–24 (NASB), not all CRT teachers do so in the classroom. In any event, if anti-CRT reformers are concerned that professors are causing their students emotional distress, the most obvious legal solution would be the torts of negligent infliction of emotional distress ("NIED") or intentional infliction of emotional distress ("IIED"). Yet the Florida Supreme Court, like many others, has observed tight limits on these torts. As to NIED, Florida law has long required a physical impact upon the plaintiff or the plaintiff's close family member. *See, e.g.*, R.J. v. Humana of Fla., 652 So. 2d 360, 363 (Fla. 1995); Int'l Ocean Tel. Co. v. Saunders, 14 So. 148, 151 (Fla. 1893). As to IIED, Florida law requires a showing of "extreme and outrageous conduct." Metro. Life Ins. v. McCarson, 467 So. 2d. 277, 278–79 (Fla. 1985) (quoting RESTATEMENT (SECOND) OF TORTS § 46 (1965)).

23. *See* Katheryn Russell-Brown, *"The Stop WOKE Act": HB 7, Race, and Florida's 21st Century Anti-Literacy Campaign*, N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2023) (manuscript at 13–15), https://papers.ssrn.com/abstract_id=4219891 [https://perma.cc/7L3H-5XT3].

24. *Id.* at 14.

with their experiences of law enforcement.[25] And the author of *Ecclesiastes* called attention to structural injustice more than two thousand years ago: "If you see oppression of the poor and denial of justice and righteousness in the province, do not be shocked at the sight; for one official watches over another official, and there are higher officials over them."[26]

B. *Florida's Anti-CRT Legislation*

Let's hold Florida's anti-CRT laws up to the light. As noted above, House Bill 7 cut back on the notions that "[a]n individual, by virtue of his or her race, color, sex, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously"[27] and that "virtues" like "merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness" are actually "racist or sexist" or were created to oppress.[28] Although the language is loose, it strikes at the heart of critical theory. Absent the court-ordered injunction, it would probably be unlawful in Florida, as part of any mandatory instruction, to teach the example I introduced above—that work requirements for welfare programs were, in fact, introduced for racist reasons.

Under Senate Bill 266, Florida institutions of higher education may not expend state or federal funds "to promote, support, or maintain any programs or campus activities" that either violate House Bill 7 or that "[a]dvocate for diversity, equity, and inclusion, or promote or engage in political or social activism."[29] The law also curtails the use of "theories

25. Law Professor Berta Hernández-Truyol has recently used this metaphor as part of her project of "awakening the law." *See* Berta Esperanza Hernández-Truyol, *Awakening the Law: A LatCritical Perspective*, 20 SEATTLE J. SOC. JUST. 927, 927 (2022); *see also* Berta Esperanza Hernández-Truyol, *Who's Afraid of Being Woke?—Critical Theory as Awakening*, 1 J. CRITICAL RACE & ETHNIC STUD. (forthcoming 2024) (manuscript at 2–4) (on file with author).

26. *Ecclesiastes* 5:8 (NASB).

27. FLA. STAT. § 760.10(8)(a)(2) (2023).

28. *Id.* § (a)(8).

29. *See id.* § 1004.06(2). The law contains a carve-out for student-led organizations, as well as programs required for accreditation or to comply with federal law. *Id.* §§ 1004.06(2)–(3). At the same time, the law forbids accreditors from taking adverse action against Florida's colleges and universities and purports to create claims for liquidated damages in the amount of any lost federal financial aid. *See id.* §§ 1008.47(3)–(4). The law directs the Board of Education and the Board of Governors to define what it means to "[a]dvocate for diversity, equity, and inclusion" or "promote or engage in political or social activism." *Id.* §§ 1004.06(2), (4). As of the time of publication, the Florida Board of Governors had proposed a draft of Regulation No. 9.016. FLA. BD. GOV. REG. § 9.016 (2023). The proposed regulation narrows the scope of the law's application to "programs or campus activities" that involve the university's mission statement, general education and prerequisite courses, student participation (but not classroom instruction), or "hiring, recruiting, evaluating, promoting, disciplining or terminating university employees or contractors." *Id.* § 9.016(2); *id.* § 9.016(1)(a)(4) (incorporating FLA. STAT. §§ 1001.706(5)(a),

that systemic racism, sexism, oppression, and privilege are inherent in the institutions of the United States and were created to maintain social, political, and economic inequities."[30] Because I teach at a law school, Senate Bill 266 does not restrict my classroom teaching.[31]

But those who teach general education courses may want to know what it says. The text, like its predecessor, is unartful.[32] To start, it is hard to figure out what comprises the list of "institutions of the United States."[33] On a narrow reading, it might include only institutions of the federal government, such as the Senate or the Supreme Court. On a broader reading, it might include institutions of state governments, too. But if that interpretation is right, when do state governments count? The Sunshine State presumably did not count as an institution of the United States prior to 1821 (when Spain ceded the territory to the United States under the Adams-Onís Treaty), nor during its seven years in rebellion against them. Either way, other institutions seem like fair game for

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1007.25 (2023)). As for prohibited conduct, however, the draft regulation muddies the waters. Advocating for "DEI" would include any attempt to "[a]dvantage or disadvantage an individual or group on the basis of race, color, sex, national origin, gender identity, or sexual orientation," as well as "promot[ing] the position that a group or an individual's action is inherently, unconsciously, or implicitly biased." *Id.* § 9.016(3). "Political or Social Activism" is helpfully limited to activities "where the university endorses or promotes a position in communications, advertisements, programs, or campus activities" and would include "any activity organized with a purpose of effecting or preventing change to a government policy, action or function, or any activity intended to achieve a desired result related to social issues," which in turn are "topics that polarize or divide society among political, ideological, moral, or religious beliefs." *Id.* §§ 9.016(1)(a)(2)–(a)(3). On my reading, the draft regulation would narrow the scope of "Political or Social Activism" by limiting it to government speech but would *broaden* the scope of DEI by sweeping in theories of implicit bias. The draft regulation's list of impermissible characteristics does not include the categories of *disability*, *religion*, and *marital status*, which are present in section 1000.05.

30. S.B. 266, 2023 Leg. Reg. Sess. (Fla. 2023). The subject of the verb "were created" is probably "institutions" and not "theories." That reading is not grammatical, but it makes more sense. General education core courses may not be based on such theories, and the Board of Governors must "periodically review the mission of each constituent university" and include a directive to the universities concerning such theories. FLA. STAT. §§ 1007.25(3)(a), 1001.706(5)(a) (2023).

31. Divya Kumar, *Florida Senate Passes a Watered-down Slate of Higher Education Changes*, TAMPA BAY TIMES (Apr. 28, 2023), https://www.tampabay.com/news/education/2023/04/28/florida-senate-higher-education-bill-diversity-equity-sb266-hb999-gender-critical-race-theory/ [https://perma.cc/C9AB-VHRG].

32. One might well suspect that the vagueness is a feature—meant to chill faculty, staff, and students from crossing buried tripwires. My own hunch is that the statutory text of Senate Bill 266 reflects legislative compromise. As originally introduced, the legislation promised to slash away majors that use "pedagogical methodology associated with Critical Theory," a concept it left undefined. *See* H.B. 999, 2023 Leg. Reg. Sess. (Fla. 2023) (revising FLA. STAT. § 1001.706(5)(a) (2023)). The final version discards that unwieldy machete for an awkward scalpel.

33. S.B. 266, 2023 Leg. Reg. Sess. (Fla. 2023).

critical scrutiny, including churches, corporations, voluntary associations, homeowners' associations, and other sovereigns.

Then the law uses the word *inherent*. Can a Florida teacher advance the view that systemic racism, sexism, oppression, or privilege are present in the institutions of the United States, but only *accidentally*, in the metaphysical sense? And does the verb *created* refer to these institutions' origins, or subsequent developments as well? Can a critical theorist assail periods of backlash because they are not beginnings?[34] How are teachers of general education courses meant to cover the Three-Fifths Compromise? Keep in mind they *must not* base their instruction on theories that institutions of the United States were "created to maintain social, political, and economic inequities," *must* cover the Fourteenth Amendment (which repealed it), and *must not* "distort significant historical events."[35]

How much of these laws will survive constitutional scrutiny remains to be seen.

First, attempts to expunge critical theory comprise obvious content-based and viewpoint-based discrimination. Under the First Amendment, states may engage in content-neutral "time, place, and manner" restrictions on the content of speech,[36] but they cannot broadly discriminate against speakers based on their viewpoint, and certainly not to "narrow the range of information open to its citizens"[37] or to "tilt public debate in a preferred direction."[38]

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34. Professor Feingold situates the "Backlash Bills" of today amid a "longstanding tradition of coordinated racial backlash and retrenchment," including Black Codes and Jim Crow, but he argues that the text of many of the bills provides for "*more* CRT in the classroom, not less." Jonathan P. Feingold, *Reclaiming Equality: How Regressive Laws Can Advance Progressive Ends*, 73 S.C. L. REV. 723, 726, 735–38 (2022).

35. *See* FLA. STAT. §§ 1007.25(3)(c), 1007.55(1)(b) (2023) ("Whenever applicable, [general education courses must] provide instruction on the historical background and philosophical foundation of Western civilization and this nation's historical documents, such as the Declaration of Independence, the United States Constitution, the Bill of Rights and subsequent amendments, and the Federalist Papers."). The Fourteenth and many other constitutional amendments stand as poignant reminders that racial minorities and women lived in this country for centuries without full enfranchisement or full protection of the laws. Indeed, they provide foundational source material for critical theorists working in critical race theory, critical feminist theory, and other fields. *See, e.g.*, Travis Crum, *The Unabridged Fifteeenth Amendment*, 133 YALE L.J. (forthcoming 2023) (manuscript at 3, 8, 11–12, 31–32), https://papers.ssrn.com/abstract_id=4390108 [https://perma.cc/L8C8-LAEP].

36. *See, e.g.*, City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1473 (2022); Cantwell v. Connecticut, 310 U.S. 296, 306–07 (1940).

37. Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 815 (citing Texas v. Johnson, 491 U.S. 397, 417–19 (1989)).

38. Sorrell v. IMS Health Inc., 564 U.S. 552, 578–79 (2011). When a reviewing court is faced with such a restriction, it employs strict scrutiny: the law is "presumptively unconstitutional" unless the government can show that it is "narrowly tailored to serve compelling state interests." Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

Second, the sweep of Florida's new laws is constitutionally overbroad. Even straightforward laws cannot punish "a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'"[39]

Third, large swaths of the two texts are unconstitutionally vague. Under the Due Process Clause, laws must "give fair notice of conduct that is forbidden or required."[40] House Bill 7 and Senate Bill 266 fall woefully short of the constitutional standard. For example, House Bill 7 does not ban disfavored concepts directly. Instead, it defines as an unlawful employment practice "[s]ubjecting any individual" to a mandatory training that "espouses, promotes, advances, inculcates, or compels such individual to believe" those concepts.[41] But what does it mean to "espouse[]" or "promote[]" a concept?[42]

The most challenging constitutional question will be what type of speech restrictions a state can impose when it pays the bill. Hutchens and Miller point out that as far back as 1967, in *Keyishian v. Board of Regents*,[43] the Supreme Court's First Amendment jurisprudence promised protection for academic freedom.[44] The problem arises, however, when public employees engage in speech as part of their official duties.[45] Here, the First Amendment sometimes allows the State to call the tune, as reflected in cases like *Pickering v. Board of Education*,[46] *Connick v. Myers*,[47] and *Garcetti v. Ceballos*.[48] Even so, Hutchens and Miller point out that the state has asked professors to serve as "independent voices"—understood that way, the state cannot *ex post* restrict their viewpoints when they speak on matters of public concern.[49]

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39. Virginia v. Hicks, 539 U.S. 113, 118–19 (2003) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).

40. FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012).

41. FLA. STAT. § 760.10(3)(c)(8)(a) (2023).

42. To be sure, the bill also contains a safe harbor for "discussion" of the disfavored concepts "provided such training or instruction is given in an objective manner without endorsement of the concepts." *Id.* § (8)(b). This supposed safe harbor feels less like a haven and more like a trap.

43. 385 U.S. 589 (1967).

44. *Id.* at 603; *see* Neal Hutchens & Vanessa Miller, *Florida's Stop WOKE Act: A Wake-Up Call for Faculty Academic Freedom*, 48 J. COLL. & U.L. 35, 47–48 (2023).

45. Hutchens & Miller, *supra* note 44, at 51–52. *See generally* Miller et al., *supra* note 10, at 81–92 (describing First Amendment jurisprudence in the domain of academic freedom).

46. 391 U.S. 563, 574 (1968).

47. 461 U.S. 138, 146 (1983).

48. 547 U.S. 410, 421 (2006).

49. *See* Hutchens & Miller, *supra* note 44, at 61; Miller et al., *supra* note 10, at 92 ("Multiple federal appeals courts have decided that public college and university faculty members possess First Amendment rights that attach to speech made in carrying out their professional duties.").

The Second Circuit recently agreed with this view.[50] Professor Keith Whittington takes the same approach, arguing that when a professor is "engaging in speech *as a professor*," they are "engaging in speech that is sheltered by the First Amendment, even though that is not true in the case of other government employees speaking in their role as employees."[51]

As for state law, Florida's Constitution provides that the Board of Governors, not the legislature, must "defin[e] the distinctive mission of each constituent university."[52] Yet Senate Bill 266 requires the Board of Governors to include an anti-CRT directive in those mission statements,[53] a statutory mandate that seems to violate the clear text of the Florida Constitution.[54]

II. "CORRUPTING" THE COMMERCIAL LAW

However the litigation turns out, my students and the larger community that supports our institutions (including legislators, donors, and taxpayers) deserve some sunlight on what critical theory is and why it matters for the study of law. And it may be especially important for community members to hear from law professors who do *not* teach

50. Heim v. Daniel, 81 F.4th 212, 226–27 (2d Cir. 2023) ("[P]rofessors at public universities are paid—if perhaps not exclusively, then predominantly—to speak, and to speak freely, guided by their own professional expertise, on subjects within their academic disciplines . . . .").

51. Whittington, *supra* note 10, at 496; *see also* Clay Calvert, *Expert Testimony by Public University Faculty: Exposing Doctrinal Deficiencies of Academic Freedom as a Legal Right and Proposing a Solution Within the Public-Employee Speech Doctrine*, 76 U. MIA. L. REV. 742, 756 (2022) (applying a similar analysis to the question of when professors may testify as expert witnesses in litigation against the state).

52. FLA. CONST. art. IX, § 7(d). This constitutional flaw may recur in other states. *See* Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 DUKE L.J. (forthcoming 2023/2024) (manuscript at 17), https://papers.ssrn.com/abstract_id=4369636 [https://perma.cc/XW79-LEYT] ("Constitutional agencies may operate to insulate a particular area of regulation from the governor and/or the legislature . . . ."); *id.* at 54–56 (noting how states promote accountability by assigning some policy areas to constitutionalized agencies); Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537, 1555–57 (2019) (describing the history of state constitutional agencies).

53. *See* S.B. 266, 2023 Leg. Reg. Sess. (Fla. 2023).

54. The Florida Supreme Court has not fully sketched out the division of responsibilities between the Legislature and constitutionalized agencies like the Board of Governors. In one of the few opinions to address the issue, the Florida Supreme Court ruled that the Legislature had authority to set tuition and fees. Graham v. Haridopolos, 108 So. 3d 597, 608 (Fla. 2013). Later that same year, the First District Court of Appeal ruled that the constitutional grant of authority to manage the university system did not extend to firearms regulation. *See* Fla. Carry, Inc. v. Univ. of N. Fla., 133 So. 3d 966, 974–75 (Fla. Dist. Ct. App. 2013). But both courts relied heavily on the "actual language used in the Constitution." *Haridopolos*, 108 So. 3d at 603; *Fla. Carry*, 133 So. 3d at 973–75. And while Article IX does not expressly mention tuition or firearms, it does expressly mention mission statements. FLA. CONST. art. IX, § 7(d).

constitutional law or "race and the law" seminars.[55] As one anti-CRT campaigner glowered, "Many parts of the law school are still doing traditional legal work—finance law, regulation, bankruptcy, etc. However, critical race theory can indeed corrupt even these areas of law."[56]

As someone whose area of law may be deemed *corrupted*, I think anyone who graduates from law school without a basic understanding of critical theory is not fully prepared to practice law. I am not alone in this view. Indeed, I am a very junior member of a long line of law teachers, going back decades, who take this stance.[57] Lawyers need to appreciate how laws really work. If they do not, their practice of law will be less effective in every respect, from counseling clients to advocating in court. Even students committed to a colorblind constitution should understand the best arguments against that position.

A. *Holistic Legal Knowledge*

First, critical theory can supply a meaningful framework for remembering the plethora of legal rules that professors expect law students to learn. Scholars of adult learning have shown that developing frameworks can facilitate the memorization of complex structures.[58] Part

55. I am not the first, and hopefully will not be the last, to expand on ways to use critical theory in the commercial law curriculum. *See, e.g.*, Etienne C. Toussaint, *The Purpose of Legal Education*, 111 CAL. L. REV. 1 (2023); (calling for the implementation of critical legal theory and movement law throughout the curriculum); Carliss N. Chatman, *Teaching Slavery in Commercial Law*, 28 MICH. J. RACE & L. 1, 3 ("Business and commercial law professors . . . typically teach as if the law occurs in a vacuum . . . .").

56. SCOTT YENOR, FLORIDA UNIVERSITIES: FROM WOKE TO PROFESSIONALISM 16 (2023).

57. *See, e.g.*, Susan A. McMahon, *What We Teach When We Teach Legal Analysis*, 107 MINN. L. REV. 2511, 2515 (2023) (calling for law students to be taught both critical and creative skill sets); Carliss N. Chatman, *Teaching Slavery in Commercial Law*, 28 MICH. J. RACE & L. 1, 7–8 (2023) (describing ways to incorporate the history of slavery into the commercial law curriculum); K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062, 1137 (2022) (professors should "tak[e] account of the histories of conquest and slavery in our understanding of property law"); Marcus Gadson, *Time to Reconcile*, 43 CAMPBELL L. REV. 223, 229–30 (2021) (describing students' reaction to new documentary evidence of the horrors of slavery); andré douglas pond cummings, et al., *Toward a Critical Corporate Law Pedagogy and Scholarship*, 92 WASH. U. L. REV. 397, 398 (2014) (faulting corporate law textbooks for failing to include critical perspectives); Elizabeth Warren, *What Is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 HARV. WOMEN'S L.J. 19, 24 (2002) (arguing for inclusion of gender-based analyses in bankruptcy courses). Indeed, the American Bar Association ("ABA") requires that law schools "provide education to law students on bias, cross-cultural competency, and racism" at least twice during their law school education. *See* STANDARDS § 303(c) (AM. BAR ASS'N 2023).

58. *See, e.g.*, PETER C. BROWN ET AL., MAKE IT STICK: THE SCIENCE OF SUCCESSFUL LEARNING 4 (2014) ("When you're adept at extracting the *underlying principles or 'rules'* that differentiate types of problems, you're more successful at picking the right solutions in unfamiliar situations.").

of it is putting human faces and stories to otherwise abstract legal rules. It is one thing to remember that minors generally cannot form enforceable contracts. It is another to imagine an LGBTQ teenager, thrown out by a hostile family, trying to contract for a job or an apartment. In my first-year Contracts course, we tackle doctrines like capacity, unconscionability, undue influence, and public policy together as gateways to court enforcement of private agreements.[59] Each doctrine raises related questions of whether contracts law operates to protect the vulnerable or to exclude the disadvantaged.

We can use critical theory to analyze remedies, too. When we discuss expectation damages and efficient breach, I point out that the party that can offer more money is not always the party that values the contract more. In the 1950s and 1960s, as a Florida court was adjudicating the now-famous dispute between the Fontainebleau and Eden Roc hotels,[60] Black celebrities and dignitaries visiting Miami (like Ella Fitzgerald, Zora Neale Hurston, Joe Lewis, and Thurgood Marshall) all checked into the Mary Elizabeth Hotel in the historically Black neighborhood of Overtown.[61] But when white city planners set out to extend I-95 through Miami, they plowed the highway right through Overtown.[62] Displacing the Black community was cheaper than the alternatives—but only in terms of dollars. This problem of how to measure value arises in other contexts as well, such as new businesses that struggle to prove lost revenues in court.[63]

In my upper-level Bankruptcy course, the dizzying array of rules can be challenging to retain. Sometimes it is just easier to remember that special rules apply to legal financial obligations, support obligations, car loans, primary mortgages, and taxes—rather than marching through the

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59. To be sure, many law professors dig into critical theory when teaching the seminal case *Williams v. Walker-Thomas*. *See, e.g.*, Duncan Kennedy, *The Bitter Ironies of* Williams v. Walker-Thomas Furniture Co. *in the First Year Law School Curriculum*, 71 BUFF. L. REV. 225, 228–29 (2023). Yet some of the other examples provide even better reasons for teaching critical theory in Contracts.

60. *See generally* Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357 (Fla. Dist. Ct. App. 1959) (deciding whether the Fontainebleau's construction interfered with the light and air on the beach in front of a neighboring hotel).

61. *See* MARVIN DUNN, BLACK MIAMI IN THE TWENTIETH CENTURY 144–46, 152 (1997); *Mary Elizabeth Hotel and the Booker Terrace Motel*, THE BLACK ARCHIVES HIST. AND RSCH. FOUND. S. FLA., INC., www.theblackarchives.org/archon/?p=digitallibrary/digitalcontent&id=188. [https://perma.cc/Z7YS-GZN5] (last visited Nov. 11, 2023).

62. *See* DUNN, *supra* note 61, at 156–58; Lance Dixon, *How Was Miami's Overtown Neighborhood Chosen as the Place to Expand I-95?*, THE NEW TROPIC (Jan. 15, 2019, 4:35 PM), https://thenewtropic.com/miami-overtown-i95/ [https://perma.cc/ML4T-QR6Q].

63. *See, e.g.*, MindGames, Inc. v. W. Publ'g. Co., 218 F.3d 652, 658 (7th Cir. 2000) (rejecting the "new business rule" for a more flexible approach).

Code section by section.[64] And tying together legal rules in critical, insightful ways leaves the student with lasting impressions of how the law currently works. For instance, as Professor Nicole Langston has pointed out, overpoliced communities cannot discharge their debts for civil traffic violations or criminal justice debt, but municipalities, police departments, and individual officers likely *can* discharge their debts for violating the civil rights of the populations they are meant to protect and serve.[65]

Similarly, running through the Bankruptcy Code to see which kinds of debtors it helps (and which it does not) can give shape to an otherwise formless morass of rules. Numerous studies undertaken over decades show that Black households are overrepresented in bankruptcy courts, reflecting numerous ways in which a host of structural economic issues spill over into bankruptcy law.[66] This feature of the Code is no accident: politics pour onto the page as Congress—influenced by lobbying groups—implements its views on morality, forgiveness, and punishment. Many students will find that a textured understanding of the rules, one that is race-, gender-, or class-conscious, will better help them navigate the Bankruptcy Code than a mnemonic device.

B. *Legal Reform*

Second, critical theory is indispensable to learning how to design and assess reform initiatives. In Contracts, we discuss noncompete clauses, both the common law approach of *Valley Medical Specialists v. Farber*[67] and the administrative ban recently proposed by the Federal Trade Commission (FTC).[68] Along the way, we discussed both efficient

64. *See, e.g.*, David A. Skeel, Jr., *Racial Dimensions of Credit and Bankruptcy*, 61 WASH. & LEE L. REV. 1695, 1710–11 (2004).

65. *See* Nicole Langston, *Discharge Discrimination*, 111 CAL. L. REV. 1131, 1134–35 (2023). Professor Langston's work builds upon the pathbreaking work of Professor Abbye Atkinson. *See, e.g.*, Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 VAND. L. REV. 917, 919 (2017).

66. *See* Pamela Foohey et al., *Portraits of Bankruptcy Filers*, 56 GA. L. REV. 573, 578–84 (2002) (summarizing literature and results of a new empirical study); Skeel, Jr., *supra* note 64, at 1720; A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725, 1743–71 (2004) (contrasting bankruptcy's "ideal debtor" to characteristics of minority debtors); A. Mechele Dickerson, *Race Matters in Bankruptcy Reform*, 71 MO. L. REV. 919, 955–60 (2006) (undertaking a similar analysis after the 2005 revisions to the Bankruptcy Code). Professor Pamela Foohey has also explored how lender discrimination results in more churches filing for bankruptcy than renegotiating their debt out of court. *See* Pamela Foohey, *Lender Discrimination, Black Churches, and Bankruptcy*, 54 HOUS. L. REV. 1079, 1081 (2017).

67. 982 P.2d 1277 (Ariz. 1999).

68. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3535 (Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910.2).

markets and the politics of class and power. Would a ban on noncompete clauses serve to protect employees or exclude them from opportunity? Should such a ban be deployed across the board, or only for certain classes or employees or in certain industries?

Similarly, in Bankruptcy, we discuss the student loan crisis. The Bankruptcy Code contains an unusual, heightened showing for discharge of student loans in bankruptcy,[69] a showing that has metastasized under an influential Second Circuit opinion, *Brunner v. New York State Higher Education Services Corp.*[70] We debate ideas like replacing the standard with a time-lapse approach (as student loans used to be treated and as some tax debts are treated now)[71] or a monetary cap (like luxury goods).[72] During this discussion, we consider Professor Abbye Atkinson's harrowing 2010 study that found that white Americans with a college education filed for bankruptcy at lower rates, but college education made no significant difference to bankruptcy filing rates among African Americans.[73] That result suggests that African Americans do not receive the same economic benefits from college as do their white counterparts.[74] We also discuss whether facilitating discharge might have an *ex ante* effect on interest rates or tuition, a law-and-economics question. Omission of either economic or critical approaches would impoverish our debate.

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69. *See* 11 U.S.C. § 523(a)(8) (providing that the bankruptcy discharge does not apply to student loan debts "unless excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents").

70. 831 F.2d 395, 396 (2d. Cir. 1987).

71. *See* John A.E. Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 44 CAN. BUS. L.J. 245, 248 (2006); 11 U.S.C. § 523(a)(1); *see also* 11 U.S.C. §§ 507(a)(3), (a)(8).

72. 11 U.S.C. § 523(a)(2)(C) (providing that certain consumer debts for "luxury goods" over a monetary cap and incurred within a specified time before the bankruptcy petition will not be discharged in bankruptcy).

73. Abbye Atkinson, *Race, Educational Loans, & Bankruptcy*, 16 MICH. J. RACE & L. 1, 3–4 (2010).

74. *Id.*; *see also* Dalié Jiménez & Jonathan D. Glater, *Student Debt Is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform*, 55 HARV. C.R.-C.L. L. REV. 131, 132–37 (2020) (demonstrating how students of color face a heavier burden in pursuing higher education). Similarly, once we have learned both chapter 7 and chapter 13 bankruptcy, we zoom out to explore what benefits each chapter provides and why consumer debtors might choose one over the other. *See, e.g.*, Pamela Foohey et al., *"No Money Down" Bankruptcy*, 90 S. CAL. L. REV. 1055, 1058–59 (2017) (uncovering that many debtors choose chapter 13 to avoid upfront attorneys' fees). As part of that discussion, we examine an empirical and methodological debate about the extent of racial steering in bankruptcy court, distinguishing between structural, cultural, and unconscious disparities. *Compare* Edward R. Morrison et al., *Race and Bankruptcy: Explaining Racial Disparities in Consumer Bankruptcy*, 63 J.L. & ECON. 269, 269–70 (2020), *with* Jean Braucher et al., *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL LEGAL STUD. 393, 393–95 (2012).

C. *Zealous Advocacy & Wise Counsel*

Lastly, critical theory can help law students learn how to represent their clients better. In Contracts, we cover *Quake Construction, Inc. v. American Airlines, Inc.*,[75] a case that, formally speaking, is about the process of negotiating deals. In 1985, American Airlines was building an addition to Chicago's O'Hare International Airport.[76] The airline decided to work with Quake Construction and sent a letter of intent asking Quake to identify its subcontractors.[77] After American Airlines met with Quake, it suddenly announced that it was no longer planning to move forward with Quake.[78] Quake then sued for breach of contract.[79]

The case eventually reached the Illinois Supreme Court.[80] The Court held that the parties' letter of intent was ambiguous as to whether they had reached an agreement.[81] Justice Stamos concurred, finding instead that the parties had reached an "agreement to negotiate."[82]

The opinion leaves a key fact mysteriously unaddressed. Why did American Airlines back out? As Professor Judith L. Maute has uncovered in her brilliant excavation of the case, the context for *Quake* begins with the 1983 election of Harold Washington, Chicago's first African American mayor.[83] Washington campaigned on a promise to include minority-owned construction companies in public works projects,[84] and, in 1985, he issued an executive order setting mandatory goals for inclusion of minority-owned businesses.[85] Under immense legal and political pressure,[86] American Airlines selected the newly formed Quake at least in part because Quake's President was Lawrence Quamina, an African American businessman.[87] The airline's keen interest in identifying Quamina's subcontractors was to ensure that Quake was not

75. 565 N.E.2d 990 (Ill. 1990).
76. *Id.* at 992.
77. *Id.*
78. *Id.* at 993.
79. *Id.* at 992.
80. *Id.*
81. *Id.* at 1000.
82. *Id.* at 1008 (Stamos, J., concurring).
83. *See* Judith L. Maute, *Race Politics, O'Hare Airport Expansion, and Promissory Estoppel: The More Things Change, the More They Stay the Same*, 69 HASTINGS L.J. 119, 128 (2017).
84. *See id.* at 130–33.
85. *Id.* at 132–33.
86. *Id.* at 132–33, 137 (describing a campaign by Reverend Jesse Jackson and a coalition of Black organizations to push American Airlines to award thirty-five percent of the work on the O'Hare expansion project to minority-owned businesses, higher than Mayor Washington's mandated goal of thirty percent).
87. *Id.* at 138.

a front for white-owned businesses.[88]

But at the initial meeting, Quamina was the only Black person in the room.[89] His subcontractors were all different from those listed on his bid; one was a white-owned business and another was a "notorious front."[90] American Airlines panicked, suspecting Quake of being a front (an accusation that Quamina denies),[91] and pulled the plug.[92]

This background is not just for legal historians. As Professor Maute raises in her discussion of the case, it can form the basis for a practical, client-focused exercise.[93]

Let's put ourselves in the shoes of American Airlines' legal team. An attorney versed in CRT would be sensitive to the racial context of Chicago and would want to understand both what really happened and how it would likely be perceived. When we first take the case, do we know why our client has pulled out of its deal with Quake? How would we find out? And once we understand roughly what happened, how do we make sense of it? Did our client discriminate on the basis of race? How will various constituencies in Chicago and around the country perceive what happened? Not to mention: how can we fix this?[94]

Now consider litigation strategy. American Airlines decided not to bring up race in its initial answer.[95] And the airline stuck with that approach all the way up to the Illinois Supreme Court.[96] Only on remand did American Airlines raise the argument in the trial court that Quake was a front.[97] But why not bring this up earlier? Was it a matter of civil procedure? Optics? And speaking of optics, does our client look better if we describe what happened, or worse?[98] Any client involved with this

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88. *Id.* at 133.

89. *Id.* at 141.

90. *Id.* at 140.

91. *See id.* at 142. Quamina "later declined any further cooperating with this research project because it brought back many painful and unpleasant memories," saying "[i]t was the opportunity of our lives and [the] road to success [was] snatched from my hands in broad daylight in front of people." *Id.*

92. *Id.* at 141.

93. *See id.* at 127.

94. American Airlines eventually brought on Powers & Sons, a Black-owned business with an established track record. *Id.* at 171. But the legal team would also be asked to investigate whether any employees needed to be terminated and what sorts of policies should be set in place to avoid similar problems in the future. *See id.* at 175.

95. *See id.* at 144.

96. *Id.* at 129.

97. *Id.* at 171–72.

98. *See id.* at 136–37. As Professor Maute points out:

> Given the extreme pressure to hire more [minority-owned business entities] for the construction project, it would have looked foolish to award Quake the contract and then promptly discharge, stating its suspicion that Quake was a

mess would want an attorney who knows something about race and the law.

Or let's put ourselves in the shoes of the Illinois Supreme Court. The Illinois Supreme Court did not address the racial tension in its opinion. It was not in the record, but race was all over the news in Chicago, and the justices likely suspected the true story. Would the opinions have been more persuasive had they brought it up *sua sponte*? If you were a justice (or a clerk), would you appreciate a law school education that gave you some tools for dealing with a dispute like this?[99]

Critical theory is *useful* for commercial law. I will add that it is bad policy to postpone this material until graduate school. The students who show up in my courses with some foundation in critical theory do better—just like those who remember a thing or two about algebra.

III. NAVIGATING THE "UPSIDE DOWN"

As Judge Mark E. Walker began his opinion in *Honeyfund*, Florida has recently "seemed like a First Amendment upside down," alluding to the dystopian parallel dimension in the television series *Stranger Things*.[100] Those who care about higher education look out at this landscape with growing unease. I have three suggestions for navigating this "upside down."

First, professors and administrators should be more outspoken about what we do and why it matters. At least here in the Sunshine State, our college and university presidents have kept a studious public silence.[101]

> front. . . . Had American followed its stated protocol, any bidder must first have incorporated and prequalified with the Small Business Administration. . . . Had American done its homework and not rushed to award the contract and start the job it could have avoided this costly mess.

Id. at 172.

99. Justice Stamos would have remanded the case for adjudication of whether the parties negotiated with each other in good faith. *See* Quake Constr., Inc. v. Am. Airlines, Inc., 565 N.E.2d 990, 1009 (Ill. 1990) (Stamos, J., concurring). His approach would have forced the parties to deal with the racial tension underlying the dispute, and—as Professor Maute points out—reminds clients and lawyers to communicate prior to making legal decisions. Maute, *supra* note 83, at 174. Tellingly, the concurrence in *Quake* was Justice Stamos's last opinion. *Id.* at 165. The son of Greek immigrants with a reputation for selflessness, Justice Stamos issued the opinion on December 3, 1990, and promptly stepped down, creating a vacancy that would be filled when Charles Freeman was sworn in—that same day—as the first Black Justice on the Supreme Court of Illinois. *Id.* at 143, 165, 168.

100. Honeyfund.com, Inc. v. DeSantis, 622 F. Supp. 3d 1159, 1168 (N.D. Fla. 2022).

101. *See, e.g.*, Adrienne Lu, *Silence from State Officials on Florida's New Anti-DEI Law Unnerves Critics, Employees*, CHRON. HIGHER EDUC. (June 26, 2023), www.chronicle.com/article/silence-from-state-officials-on-floridas-new-anti-dei-law-unnerves-critics-employees [https://perma.cc/9V5D-CT66]; Brian Rosenberg, *The Deafening Silence of Florida's College Presidents*, CHRON. HIGHER EDUC. (Apr. 6, 2023), www.chronicle.com/article/the-deafening-silence-of-floridas-college-presidents [https://perma.cc/4DCJ-YWUT].

But transparency and accountability are good things. And while First Amendment jurisprudence tries to prevent chilled speech, the cold should not bother us. Even social conservative Professor Robert P. George, who opposes most statements by departments and institutions, lists these kinds of laws as the rare occasion where silence must be broken.[102]

Second, and relatedly, we must renew our vows to academic freedom. Professors Vanessa Miller, Frank Fernandez, and Neal Hutchens have argued that these anti-CRT laws aim to undercut the educational benefits of diversity.[103] As they put it, "those who seek to ban CRT apparently want the halls of academia to be populated with diversity of complexion without diversity of ideas."[104] Against this impulse, and especially in the wake of the U.S. Supreme Court's 2023 ruling ending race-based affirmative action,[105] we must recommit ourselves to the notion of the "secular" as a common ground. A pluralistic society needs space to breathe, and secular or pluralist spaces are where that happens. That means we should commit to increased diversity. For example, we can welcome Florida's development of the Hamilton Center for Classical and Civic Education at the University of Florida[106] or the Adam Smith Center for the Study of Economic Freedom at Florida International University.[107] I see an important difference between building an expansion on the home of academic freedom and trying to evict one of its residents.

Lastly, the higher-education community (including legislators, donors, and taxpayers) should abandon this trumped-up fear of critical theory in public institutions—and, instead, *invest* in it. Not everyone needs to be an expert or build it into their curricula, but having scholars, resources, and centers for this way of thinking is a key pillar of a functioning university.[108]

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102. Robert P. George, *Universities Shouldn't Be Ideological Churches*, ATLANTIC (June 15, 2023), www.theatlantic.com/ideas/archive/2023/06/university-statements-political-issues-abortion-princeton/674390/ [https://perma.cc/XHG2-TUMA].

103. *See* Miller et al., *supra* note 10, at 63.

104. Miller et al., *supra* note 10, at 98. Similarly, as Professor LaToya Baldwin Clark points out, in the context of primary and secondary education, the anti-CRT legislation centralizes the concerns of white parents over and above parents of color. *See* LaToya Baldwin Clark, *The Critical Racialization of Parents' Rights*, 132 YALE L.J. 3000, 3050, 3060–64 (2023).

105. Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., No. 20-1199, slip op. at 22 (June 29, 2023).

106. *See* FLA. STAT. § 1004.6496 (2023).

107. *See id.* § 1004.64991.

108. A good place to start might be the recommendations that Dr. Russell-Brown and Dr. Ryan Morini proposed to the University of Florida in 2021. *See generally* KATHERYN RUSSELL-BROWN & RYAN MORINI, A WAY FORWARD: UF RACE SCHOLARS ON SUPPORT, OBSTACLES, AND THE NEED FOR INSTITUTIONAL ENGAGEMENT (2021) (explaining steps the University of Florida can take to more effectively support faculty whose work focuses on race or anti-racism).

CONCLUSION

Critical theory is complex and challenging, yet practical and helpful for understanding today's world, especially for law students. Law professors should not hesitate to give students the tools they need, and law students should not shy away from learning how to use those tools. Legal education across the board—not just constitutional law, not just "race and the law" seminars—will be better for it.