Critical Freedom: ABA Standards 208 and 303(c)

ABA Standard 208: Academic Freedom and Freedom of Expression

. . . (b) A law school shall adopt, publish, and adhere to written policies that encourage and support the free expression of ideas. A law school's free expression policies must:

(1) Protect the rights of faculty, students, and staff to communicate ideas that may be controversial or unpopular, including through robust debate, demonstrations, or protests . . .

(c) Consistent with this Standard, a law school may:

(1) Restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, or that unjustifiably invades substantial privacy or confidentiality interests.

(2) Reasonably regulate the time, place, and manner of expression.

Relevant ABA Interpretations

Interpretation 208-3

Standard 208(a) does not preclude a law school from identifying the courses that will be taught, requiring courses to cover particular content, or requiring faculty, students, or staff to clarify in appropriate circumstances that their views are not statements by or on behalf of the law school.

Interpretation 208-5

Subsection (c) recognizes that law schools may restrict speech consistent with the First Amendment of the United States Constitution.

Interpretation 208-6

Effective legal education and the development of the law require the free, robust, and uninhibited sharing of ideas reflecting a wide range of viewpoints. Becoming an effective advocate or counselor requires learning how to conduct candid and civil discourse in respectful disagreement with others while advancing reasoned and evidence-based arguments. Concerns about civility and mutual respect, however, do not justify barring discussion of ideas because they are controversial or even offensive or disagreeable to some.

Academic freedom is conceptually different than free speech in ways the AAUP has summarized:

- The First Amendment is premised on an "equality of status in the field of ideas." All expressions are given equal protection under the law.
- Academic knowledge is premised on an inequality of status between differing ideas. Faculty members routinely reject certain ideas as lesser than others, and train their students to do the same. Without this process of designating certain ideas as less worthy than others, knowledge would not progress. [not a marketplace of ideas—some things you must leave on the shelf]
- Academic freedom does not protect some speech that may be protected by the First Amendment—for example, that which manifests disciplinary incompetence.
- First Amendment rights are focused on the individual.
- Academic freedom rights are regulated by the collective—peers determine what constitutes disciplinary competence.

The Supreme Court has repeatedly recognized that academic freedom is a right bound up with the 1st Amendment protections. **But the interplay remains uncertain**: "Is academic freedom a separate 1st Amendment right, or does the 1st Amendment simply apply distinctively in the university context?"

ABA Standard 303(c)

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.

Hypos at the Intersection of ABA Standards 303(c) and 208

I offer two realistic hypos in the context of supplying antiracism education in a law school classroom.

The first lies at the intersection of ABA Standards 303(c) and 208—an instructor charged with teaching a course (or some other presentation or segment) in fulfillment of the Standard 303(c) requirements (thus explicitly a course on race/racism) who chooses to ground the course in CRT (and perspectives from other critical schools of legal knowledge), as I do in my own course. This is squarely a situation Standard 208 is designed to safeguard, and the professor would be protected from student, other faculty and administration, or third party upset over that instructional choice of [critically-sourced] teaching perspective and focus.

Another Hypo: 1L Curriculum

The second hypothetical I pose involves a law professor who is assigned to teach a class that ostensibly doesn't include race explicitly in its official course title (for example, Contracts) or in any assigned course description, but for which the professor decides in the exercise of her academic freedom to infuse with or build around critical race insights. In this hypo, the professor has both decided to bring race into the classroom where it isn't explicitly in the course title (nor likely the course description), and to teach race/racism through a critical lens. Here, the law school might permissibly require its teachers to "cover particular content" within the meaning of Interpretation 208-3 to Standard 208, such as bar exam issue/subject coverage. Because since race pervades virtually every legal issue and social relation, it is no stretch to conclude that a professor could cover any required topic within an assigned course while still teaching that topic through a CRT lens. In fact, the decision to teach what has been seen traditionally as a race-neutral or race-irrelevant course through a CRT lens that exposes omnipresent racial realities is the very type of "idea" whose free expression deserves protection under Standard 208 despite the controversy it might engender among some. At the same time, a faculty decision to teach a subject in my second hypothetical without revealing any racial dimensions is itself a political and affirmative decision that presumably would be protected (absent a school mandate to include racial content) under Standard 208.

Examples of Problematic State Laws Include:

- Anti-CRT laws
- Equal idea time laws

State Anti-CRT Laws and the ABA Standards

What happens if the defenders of anti-CRT laws argue the allowance to administration in Standard 208 to prevent "**expression that violates the law**" permits such state laws to trump the professor's otherwise freedom of expression rights protected by accreditation to teach critical perspectives? Does "law" refer solely to federal constitutional freedom of expression and its limited exceptions as Interpretation 208-5 seems to suggest, or does it extend to state restrictions on speech?—albeit those state anti-CRT restrictions themselves may run afoul of the federal Constitution. Apart from any direct prohibition of classroom speech, commentators have warned about the impact of anti-CRT/divisive concept laws in chilling discussion of race in law school classrooms, especially in the context of teaching antiracism under ABA Standard 303(c). Does Standard 208 add anything to protect the instructor in a state with anti-CRT laws or to lessen any chill on teaching antiracism in those states? Maybe not. The law school's ABA accreditation dictates do not relieve instructors (and their schools) from complying with state law, absent an exception in the anti-CRT law for accreditation compliance, as Tennessee has provided.

And even with an accreditation exception, the failure of Standard 303(c) to specify explicitly the tenets of its required antiracism education means the instructor might fear invoking or crediting CRT explicitly by name, or even to surreptitiously teach its lessons and principles without acknowledgment of any CRT source, as that could run counter (either in fact or in fear) to some of the very broadly phrased prohibited divisive concepts under some state laws. Classroom antiracism content is thus chilled regardless of any explicit accreditation exception. Standard 208 arguably doesn't remove the chill. Although Standard 208 seemingly protects the instructor from institutional discipline in choosing how to teach antiracism, it likely does not protect the professor (or the school) from any external sanctions under state anti-CRT law. Therefore, while it adds protection for the professor within the home institution, ultimately a professor in a divisive concepts state is not relieved from the pressure to chill classroom racial discussion to avoid anything that can be tied to CRT or its supposed tenets.

State Requirements of Equal Idea Time

Texas law applicable to K-12 prevents teachers from being compelled to discuss any "currently controversial issue public policy or social affairs," and requires that any teacher who chooses to discuss the topic must "strive to explore that topic from diverse and contending perspectives without giving deference to any one perspective."). S.B. 3, 87th Tex. Leg. Sess. (2021).

Consider new **Indiana** law where university professors are at risk of being denied tenure or promotion, or even losing their already gained tenure, if they are found to fail to promote intellectual diversity:

> [E]ach board of trustees of an institution shall establish a policy that provides that a faculty member may not be granted tenure or a promotion by the institution if, based on any past performance or other determination by the board of trustees, the faculty member is:
>
> (1) **unlikely** to foster a culture of free inquiry, free expression, and intellectual diversity within the institution;
>
> (2) **unlikely** to expose students to scholarly works from a variety of political or ideological frameworks that may exist within and are applicable to the faculty member's academic discipline; or
>
> (3) **likely,** while performing teaching duties within the scope of the faculty member's employment, to subject students to political or ideological views and opinions that are unrelated to the faculty member's academic discipline or assigned course of instruction.

Indiana Senate Enrolled Act No. 202 (2024) (also providing a post-tenure review for such issues conducted every five years, as well as providing that nothing in the law shall limit "free speech of any individual beyond any employment requirements established by the institution.").

Problematic Federal Laws Could Include:

- Enactment Following the Project 2025 Gameplan

Project 2025 Quote

“Attacking the Accreditation Cartel

For a college to participate in federal financial aid programs, it must be accredited, but accreditors have been abusing their quasi-regulatory power to impose non-educational requirements and ideological preferences on colleges.

The Secretary of Education should refuse to recognize all accreditors that abuse their power.”

Impact: ABA could be forced to repeal 303(c) to avoid imperiling member school eligibility for financial aid