

Integrating Doctrine and Diversity

Integrating Doctrine and Diversity

*Inclusion and Equity in the
Law School Classroom*

Edited by

Nicole P. Dyszlewski

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Foreword

When Professor Nicole P. Dyszlewski asked me to write the foreword for her book, *Integrating Doctrine and Diversity: Inclusion and Equity in the Law School Classroom*, I immediately replied with an enthusiastic yes. Just weeks before, Boston University School of Law (BU Law), the school where I serve as Dean, had hosted a conference entitled “Racial Bias, Disparities, and Oppression in the 1L Curriculum: A Critical Approach to the Canonical First Year Law Subjects.” During that symposium, distinguished faculty from BU Law and law schools across the country, plus 1L, 2L, and 3L students from BU Law, offered their insights about how the longstanding insistence upon presenting legal doctrine as neutral and objective and the enduring practice of ignoring hierarchy and subordination in the 1L curriculum had consistently worked to deprive students of color, LGBTQ+ students, and other students from marginalized groups of equitable access to the education offered within their institutions. Additionally, they highlighted how the same traditions and practices worked to produce law school graduates who are completely unaware of how to be critical consumers of the law and who were largely ill-equipped to represent a diverse clientele, work with and manage a diverse group of lawyers, and serve as leaders in their increasingly diverse and interdependent communities, cities, states, and nation. The lessons that faculty and students conveyed at that conference made it clear that law faculty everywhere desperately needed to learn and absorb the practical advice that *Integrating Doctrine and Diversity* promises to offer and, indeed, offers instructors about fully integrating and incorporating diversity, equity, and inclusion into all parts of their law school courses and the law school curriculum.

Tragedies from the spring and summer of 2020, such as the killings of Breonna Taylor, George Floyd, and Rayshard Brooks, reinforced the long overdue need for law schools and law faculty to transform their thinking and their operations to expose the many ways in which the law excludes and oppresses as much as it protects and includes; the numerous means by which the law maintains structures that reify disadvantage rather than tears them down; and the consistent manner in which law schools pressure students, both implicitly and explicitly, to conform to a model that was not designed with so many of them in mind.

The faculty who have provided contributions to *Integrating Doctrine and Diversity* have brilliantly uncovered these flaws, and many more, within the law, law teaching, law schools, and the legal profession. In so doing, they have pushed us all to embrace and adopt an antisubordination approach to legal education and practice, an approach that is needed to ensure that law students and lawyers are fully equipped to use the

powerful tool of law to ensure justice, rather than thwart it, whether knowingly or unknowingly.

As I read *Integrating Doctrine and Diversity*, I found myself continuously reliving my own law school experience and wishing I had attended a law school where the book's contributors had all formed a magical, dream faculty that is committed to engaging inclusive pedagogies; helping to break the silences for students lost in the new world of law, as Professor Kali Murray has so beautifully done for her own students; working toward equitable outcomes, as Professor Genevieve Blake Tung has shown us how to do through her work; uncovering biases in assigned cases and individuals' minds, as Professor Jeremiah Ho revealed an urgency for; and integrating the reflection that is necessary for an antiracist approach to professional identity development, as Professors Eduardo Capulong, Andrew King-Ries, and Monte Mills have shown us is critical. It was this type of instruction and learning that I desperately craved as a law student, as a law student who often sensed and felt that my voice and my experiences had been cast to the margins, even as the assigned cases and materials I was reading demanded otherwise, insisting to me (and others) that they offered objective, all-inclusive understandings and perspectives of the law. As a law student, I neither had the words nor the legal expertise to specify or highlight the gaps in history, context, narratology, and logic that were in my assigned reading materials; nor could I articulate, understand, or explain these very realities of mine as an outsider within a discipline and profession that had not yet figured out ways of fully including me and my experiences. *Integrating Doctrine and Diversity* offers students today those very tools. It provides them with the language, and, to some extent, the expertise that can extend the possibilities that law schools and the legal profession will provide space for them, their differing realities, and the important insights they will bring to law and society.

Just as *Integrating Doctrine and Diversity* caused me to relive my own law student experiences, it also pushed me to think more deeply about my current students' experiences and to reflect, quite sadly at times, on how much their experiences were still mirroring my own twenty-five years later. As a Dean, it is difficult to both recognize and watch how little has changed in our discipline's approach to education and our profession's approach to practice, diversity, inclusion, and equity, even as my allies and I have worked our entire careers to create change in both. However, *Integrating Doctrine and Diversity* has provided me not only with additional tools to employ in this fight, but also the hope that I need to believe that my dreams of a magical faculty—a faculty that is fully committed to integrating doctrine, diversity, equity, inclusion, and transformation in the law—can exist and flourish not just in my imagination but in all law schools across the country. As Professor Dyszlewski tells us in her introduction to *Integrating Doctrine and Diversity*, “this book is a way forward if [we] choose it, but [we] must choose it.” May all of us as faculty choose to find our way forward as teachers, mentors, scholars, and examples of what our profession can become with the right choices.

Dean Angela Onwuachi-Willig,
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Introduction

Nicole P. Dyszlewski*

This book is not going to try to convince you that diversity, equity, and inclusion in law and legal academia is critical or important or vital or necessary or long overdue. Other authors have covered this ground with care and conviction.¹ For example, in *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, Nancy Dowd and colleagues plainly state, “for law school to be relevant to women and people of color, the subject matter, examples, and stories of the law cannot revolve solely around white men.”² This book is also not going to argue that it is especially important that

* Head of Reference, Instruction, & Engagement, Roger Williams University School of Law. I would like to profusely thank my co-editors for joining on this adventure. We are a sisterhood and the introduction is a product of all of us, with my name and mistakes, only. I would also like to thank my support network of family and friends and amazing library and law school colleagues (many of whom you will meet in these chapters). Finally, I would like to thank my students, especially Zach Lyons, Michael Thomas, Linda Tappa, Jonathan Pierre, Kendra Hosein, Sebastien Voigt, Brianna Jordan, and Caitlyn Forrester-Johnson. You have taught me so much about how to be a better teacher and a better librarian by witnessing your journey through classrooms and courtrooms. I am so grateful.

1. See Henry F. Fradella, *Integrating the Study of Sexuality into the Core Law School Curriculum: Suggestions for Substantive Criminal Law Courses*, 57 J. LEGAL EDUC. 60 (2007).

For far too long, gays, lesbians, bisexuals, and transgendered (“GLBT”) people were invisible in America’s law school classrooms, and the curriculum studied was silent on matters of sexuality and the law. Not only did such invisibility and silence deny GLBT people the “privilege of community,” but it allowed generations of lawyers to be educated without regard to the social and legal concerns of this sizable minority population in much the same way women have historically experienced exclusion or alienation from legal discourse. This invisibility of GLBT students, faculty, and issues in the law school curriculum perpetuated heterosexism and individualized homophobia.

Id. at 60–61. See also Lolita Buckner Inniss, “Other Spaces” in *Legal Pedagogy*, 28 HARV. J. RACIAL & ETHNIC JUST. 67, 88 (2012) (“To take racial inclusion and the norms of CRT seriously, law schools must work to incorporate such norms throughout the curriculum in order to eliminate racial barriers to understanding.”); Alexi Nunn Freeman & Lindsey Webb, *Positive Disruption: Addressing Race in A Time of Social Change Through A Team-Taught, Reflection-Based, Outward-Looking Law School Seminar*, 21 U. PA. J.L. & SOC. CHANGE 121 (2018).

2. Nancy E. Dowd, Kenneth B. Nunn & Jane E. Pendergast, *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J.L. & PUB. POL’Y 11, 41 (2003).

Curricula and subject matter within particular course areas deserve our examination. Learning for all students must be contextualized. That is, students learn best about subjects that are interesting, familiar, and relevant to their life experiences. For law school to be relevant to women and people of color, the subject matter, examples, and stories of the law cannot

issues of diversity and inclusion are critical or important or vital or necessary or long overdue to be integrated fully in the first year curriculum. These points have been argued for many years and this is not the goal of this work.³ Instead of being a scholarly work on the value or business case for diversity, this book is something different. This text assumes you already agree that diversity and inclusion are profoundly important to the first year curriculum in American law schools and you are looking for resources on how to improve your skills or knowledge in these areas. This text also takes an expansive view of what “diversity” means in legal education and the facets of identity to which it can refer. Throughout this introduction I will use the term “diversity.” I choose this term to include a variety of issues that may touch diversity but are also distinct, such as equity, equality, inclusion, racial injustice, gender discrimination, and other forms of social inequality. I also intend diversity to be defined broadly to include race, ethnicity, religion, spirituality, national origin, citizenship, age, domicile, gender identity, ability, gender expression, sexual orientation, status, culture, difference, and the many places where those descriptors intersect. As editors, we have certain freedom to define the boundaries of the work we have created instead of allowing the boundaries of the topic to define the work for us. In this case, we are making a choice to answer the question *how* and not *why*.

The work on this book, and the writing of this introduction, began long before the summer of 2020 and the murders of Ahmaud Arbery, Breonna Taylor, George Floyd (and countless others murdered whose deaths have come before 2020 and continue beyond it). The events of 2020 have set off a much-needed change in these discussions within law and beyond it. Because of this new climate some readers may be more aware of the need for sustained curricular change and may be approaching this work for the first time, perhaps with quiet skepticism. We welcome you to this book despite how uncomfortable this might be. We do not intend the matter-of-factness on the importance of these topics to turn you away. Rather, we are adamant that this book is a way forward if you choose it, but *you* must choose it.

This book sites itself at the intersection of pedagogy and critical reflections on social diversity and the law, two fields of great importance to legal academia. Both, however, can be daunting and overwhelming in their importance and rhetoric. I can recall sitting down to read a book on teaching and feeling unease set in when the au-

revolve solely around white men. Nor should the law predominantly address the legal concerns of the wealthy, to the exclusion of the interests of middle-class Americans or the poor. If legal education is to be meaningful, then it must include what Professor Martha Fineman calls “uncomfortable conversations”: challenges to both traditional analysis but also the critiques of traditional analysis; talking about difficult issues and assumptions regarding class, race, ethnicity, and gender; not privileging any perspective by immunizing it from critical consideration and ensuring that all voices in the room are heard and respected.

Id. (referencing Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403 (2001)).

3. See Kim Forde-Mazrui, *Learning Law Through the Lens of Race*, 21 J.L. & POL. 1, 3 n.9 (2005); Cruz Reynoso & Cory Amron, *Diversity in Legal Education: A Broader View, A Deeper Commitment*, 52 J. LEGAL EDUC. 491 (2002).

thor used the phrase “pedagogical praxis.” I can also remember picking up a book on race and gender and feeling daunted by my unfamiliarity with terms like “kyriarchies.” Informed by my own experiences feeling anxious about the heft and depth of the two topics we find ourselves addressing, this text is our attempt at being reader-focused, practical, and hands-on.

We created this to be a resource by law professors for law professors. The authors come from a variety of institutions across the country and have diverse backgrounds, diverse perspectives, and diverse methodologies. We approached and selected authors to maximize diversity of identity, style, institutional affiliation, and experience. We have tried to create a space for law teachers to talk about teaching diversity based on their own experiences in the classroom and their own pedagogic styles. We have sought to create something which is not just a pep talk but also not heavy-handed. Our focus is, and has always been, on presenting tools and relevant examples to law professors in a way that is easily navigable.

Is this book necessary? Isn't diversity already being taught in the first year curriculum?

Yes and it might be. It also might not be.

Are issues related to diversity inextricably woven into the standard American first year law school curriculum? Of course.⁴ Issues of racial injustice, gender discrimination, and other forms of social inequality fill the pages of every casebook and are implicated in every narrative we tell about American law, even if they are typically unacknowledged. However, *how* professors choose to confront these issues varies.⁵ Explicitly and intentionally confronting diversity, inclusion, and equity is exhausting, time-consuming, and nuanced work. Student reactions to these topics can also be caustic, defensive, and unpredictable. Some students may be triggered by certain words, phrases, or concepts, and may find the topics uncover and expose past traumas. Consequently, some professors have learned to reduce this friction by minimizing in-class discussions of fraught topics in favor of discussions which may be more productive when measured against some other, purportedly more “objective” metric, like bar exam preparation or covering a preferred casebook.

When I've talked about this with law professors, there are several themes. Most acknowledge the importance of diversity and inclusion in the curriculum. It is not as if there are many faculty standing up to decry diversity and inclusion in the law and legal academia. Instead, professors speak about already having too much ground to cover in too few class sessions and not knowing exactly

4. Nunn, Freeman & Webb, *supra* note 2, at 124 (“Whether or not law professors explicitly discuss race in their classes, law students are absorbing lessons about race and the law. Academic silence regarding race does not mean that race is invisible or absent; rather, many argue, the void left by this silence contains the presumption that the law is for and about white people or is somehow racially ‘neutral.’”).

5. Not talking about these issues is also a choice.

how to weave diversity into their courses. These teachers want tools to learn how to facilitate difficult conversations, set the stage for these discussions, and encourage conversations within the scope of the doctrine.

When I began to engage on this topic and heard some of these concerns, I was skeptical. Was expressing a need for tools on how to integrate diversity, equity, and inclusion more seamlessly into the curriculum a pretext for not wanting to change the status quo? Was not having training or a collection of resources on integrating diversity into the curriculum an excuse for feeling uncomfortable with the discussions, and thus protecting and perpetuating whiteness and maleness? As Wendy Leo Moore states, “whether white people are not comfortable engaging issues of race because they are fearful or because they do not see race as relevant to their lives or the law, the result is racialized practices that reify white space.”⁶ The conclusion that I came to is that there is a need for resources on this topic to be available to law professors in an easy to access way and this book is one way to address some of the faculty concerns.

How is this book organized?

This book is envisioned as a Choose Your Own Adventure, of sorts.

Chapter 1 is a must-read for all. It provides the foundational grounding for anyone engaged in law school curricular development, including faculty, staff, and administrators. Readers will take away from the chapter how, on a macro level, diversity, equity, and inclusion can be integrated across the first year curriculum. Chapter 1 sets the stage for the chapters which follow. This book is organized by topics common to the 1L curriculum. It may make sense to dive directly into a later chapter after a review of chapter 1.

While we would love readers to enjoy the book in its entirety, it is organized to allow readers to skip ahead to the subjects which they find most relevant to their teaching. This book includes sections on each of the classes in a traditional 1L curriculum: civil procedure, torts, contracts, property, constitutional law, criminal law, legal writing, and legal research. Each section contains two parts. The first part includes substantive essays on how professors who regularly teach the topic have grappled with diversity issues in their own classrooms. Some pieces take the form of case studies while other paint the topic with a broader brush, suggesting a variety of methods and exercises which demonstrate how these issues can be integrated into a first year class. The second part of each chapter is an annotated bibliography collecting articles, books, videos, and other resources on how to integrate diversity, equity, and inclusion into the classroom in that particular topic. Our intent is to provide several road maps for how to integrate diversity into the traditional 1L curriculum in a way that is approachable and accessible.

6. WENDY LEO MOORE, *REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY* 96 (2007).

How did this project come about?

Slowly and with a lot of support from the RWU Law community, law librarians, and professors across the US.

The idea for this book was born of a series of difficult conversations that took place over about a year at my institution, Roger Williams University School of Law (RWU Law). A few years ago, RWU Law formed a committee of faculty, administration, students, members of the board, alumni, and staff to write a diversity and inclusion strategic plan for the law school. This was the first document of its kind that the law school had developed, and it came at a time when the number and percentage of minoritized students were at the highest in the school's history. Serving on the committee, I can attest that the year-long discussions that went into this document were challenging, engaging, thoughtful, difficult, and productive. One of the issues we discussed in our planning meetings was the way in which diversity, inclusion, equity, social justice, equality, religion, race, status, culture, difference, and intersectionality were being taught at the school. There was not much disagreement on whether these issues should be taught; it was a matter of assessing if they *were* being taught, how they were being taught, and how we could further support the teaching of these issues through the new strategic plan. These conversations, among a group in which law faculty constituted a minority, were sometimes challenging. We perceived that offering non-faculty perspectives on what should be taught and how it should be taught could conflict with what faculty viewed as their prerogative, and be viewed as a threat to their academic freedom.⁷

For better or worse, academic freedom prevents a strategic planning committee, no matter how well-intentioned, from dictating what is taught in class. Academic freedom, like tenure, is a core value in law schools but it can also be a bar to change. Academic freedom has been described as a characteristic of academia that is “likely to ground resistance to disruptive changes in legal education.”⁸ It has more specifically been described as one of the “obstacles facing the institutionalization of race in the curriculum.”⁹ The students

7. The American Association of University Professors (to which the Association of American Law Schools looks for its definition of academic freedom) states in its *Statement of Principles on Academic Freedom and Tenure* that “teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.” AM. ASS’N UNIV. PROFS., 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE 14 (1940), <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>.

8. Nicholas A. Mirkay & Palma Joy Strand, *Disruptive Leadership in Legal Education*, 22 RICH. PUB. INT. L. REV. 365 (2019).

9. See Forde-Mazrui, *supra* note 3, at 27 (“Academic freedom accords professors substantial discretion over the issues to cover within the courses they teach. Apart from courses where race is virtually unavoidable, many professors will continue to leave race out of their courses to the extent they perceive race as peripheral or too divisive. Unless law school deans or faculties are prepared to press for attention to race over individual professors’ preferences, leaving race to the classroom may leave it absent from many.”).

on the committee, less familiar with academic freedom and naïve about law school governance, tried to understand why the school could be so committed to diversity, equity, and inclusion in so many areas but could not require faculty to address these important issues in the classroom.¹⁰

These students, representative of minoritized students at RWU Law, wanted to be understood and have their perspectives heard and reflected in classroom discussions. Based on my experience working with students in this context and others, students perceive that some faculty members shut down or abruptly change conversations when classroom discussions approach the issues of diversity, equity, and inclusion.¹¹ Some students feel like their voices are not heard and that some faculty choose not to embrace difficult conversations between majority and minoritized students, instead approaching this as “beyond the scope of the class” or a distraction from the large amount of subject matter to be covered in a relatively short amount of class time.¹² In *Teaching Law By Design: Engaging Students from the Syllabus to the Final Exam*, the authors noted that “if you allow free discussion of even one policy issue, your failure to permit discussion of an issue about race or gender or politics, because you are concerned students will be upset, has the potential to send a message that you regard the issues you are ignoring as unimportant.”¹³ So therein lies the problem and the heart of this aspect of the work of the RWU committee and then this book: bridging the gap.¹⁴

10. See generally COMMITTEE A ON ACADEMIC FREEDOM AND TENURE, AM. ASS’N UNIV. PROFS., FREEDOM IN THE CLASSROOM (2007), republished in ACADEME, Sept.–Oct. 2007, at 54, <https://www.aaup.org/AAUP/comm/rep/A/class.htm>. Specifically, note the use of the word diversity in the following statement, “Modern critics of the university seek to impose on university classrooms mandatory and ill-conceived standards of ‘balance,’ ‘diversity,’ and ‘respect.’ We ought to learn from history that the vitality of institutions of higher learning has been damaged far more by efforts to correct abuses of freedom than by those alleged abuses. We ought to learn from history that education cannot possibly thrive in an atmosphere of state-encouraged suspicion and surveillance.” *Id.* at 61.

11. It is important to note that these conversations are not unique to RWU Law. This book’s introduction is about the impetus of the formation of this book and I am in no way unique in having had these conversations at my school. This phenomenon is common in law schools. I am just proud to work somewhere where the conversations are supportive, productive, and include a variety of stakeholders, including staff and students. See LEO MOORE, *supra* note 7, at 94.

12. Erin C. Lain, *Racialized Interactions in the Law School Classroom: Pedagogical Approaches to Creating a Safe Learning Environment*, 67 J. LEGAL EDUC. 780, 790 (2018) (“Avoiding and minimizing racialized interaction within the classroom is a common response among professors, but this strategy provides little cultivation of psychological safety, and it can be harmful because it provides no learning opportunity.”).

13. MICHAEL HUNTER SCHWARTZ, SOPHIE M. SPARROW, & GERALD F. HESS, *TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM* 196 (2d ed. 2017).

14. As this manuscript goes to publication, I feel compelled to give an update and further muse on these questions. Because of events inside and outside of the law school, the work of integrating diversity into the curriculum at RWU Law was prominent during the summer of 2020. And I am proud to say this story is one of success. The institution and the faculty have committed to addressing the integration of diversity, inclusion, equity, equality, and social justice into the curriculum. And the work that has been done has been exciting and difficult and fraught and challenging. There have

In my office, I have a quote on my wall from author Ijeoma Oluo that states: “do not wait until you are ready to sit down and address race to address race.”¹⁵ This quote played on a loop in my brain during our conversations about further integrating discussion of diversity, inclusion, and equity into the law school community, mission, practices, and curriculum. After a meeting one afternoon, when we were discussing resources and trainings available on integrating diversity into the curriculum, I got on the internet and found resources on these topics, just to prove they existed and could be easily accessed. What I found were books and law review articles and blog posts and speeches. What I did not find, however, was any robust compendium of practical resources on teaching diversity, inclusion, and equity in the law school classroom, across the curriculum and in specific courses.

So I did what I always do in this situation: I looked for an annotated bibliography. I didn’t find much on teaching diversity, inclusion, and equity in law schools so I did the other thing that I always do—I called another librarian to chat. And then I called another one and then I called another one. Eventually we formed an alliance of sorts. We were going to create a resource for this practical material to help those who teach our students have the resources they need. We believe that faculty should have the freedom to teach as they will. But we also believe law professors should have resources written by their peers and compiled for their convenient use. This was a tall order, but we were librarians and we were built for tall orders.¹⁶

Law librarians are experts on organizing and presenting legal information. Law librarians are experts in the discovery of, the compilation of, the harmonization of, and the presentation of information. Law librarians are also cooperative, progressive, and trusted.¹⁷ We were the natural choice for compiling and editing this book because we were willing and because we regularly work with faculty on large-scale projects. Finally, librarians are natural collaborators and this book was a project of great collaboration.

been community conversations, all-staff/faculty meetings, faculty discussions, a commitment to educating ourselves, a change in curriculum, and a renewed dedication to living our institutional values. As you will read in the next few pages, this book was born of skepticism. But it is being brought to fruition with optimism. RWU Law is engaging in this work and is living its commitment to diversity, equity, equality, and inclusion.

15. Ijeoma Oluo, *I am Drowning in Whiteness*, NPR (Oct. 1, 2017), <https://www.kuow.org/stories/ijeoma-oluo-i-am-drowning-in-whiteness>.

16. Please notice that one of us isn’t a librarian, but instead an experiential professor and pro bono administrator. Because clinical faculty have many resources on diversity and inclusion in the context of experiential education, I approached a member of the RWU community to ask her opinions about our project. She was so enthusiastic about it that she joined the team, for which we are all so thankful. She has survived many discussions which were held in law library jargon and has weathered the storm admirably.

17. See, e.g., PORTLAND RESEARCH GROUP ET AL., MAINE STATE LIBRARY: TRUSTED PROFESSIONALS SURVEY 2016, https://digitalmaine.com/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1100&context=mssl_docs (finding librarians to be among the most-trusted professionals).

The editors of this book are indebted to the contributors of the substantive and annotated pieces in this book. Additionally, we owe a debt a gratitude to those legal scholars whose work appears in each chapter bibliography, who have studied and explored these issues for many years. Their work has inspired us and helped us get through the loss and disconnection of living through a pandemic and unprecedented societal discord. This work, this scholarship, and our project has been our balm and our passion project and we are thrilled to finally be able to share this with you all.