

# Critical Race Theory Collides with the Law

*Can a school require students to “confess their privilege” in class?*

By JOSHUA DUNN

**K**-12 SCHOOLS ACROSS THE COUNTRY are rushing to incorporate critical race theory and intersectionality into their curricula and pedagogy. Critical race theory maintains that racism is entrenched in American society and that the law works to consolidate and sustain white supremacy and privilege. Intersectionality holds that race, gender, class, religion, and other characteristics are related and confer advantages on people if they are in the dominant group and disadvantages if they are not. A white Muslim woman, for instance, would enjoy privileges because of her race but might experience oppression because of her gender and religion.

One charter school, Democracy Prep in Las Vegas, Nevada, is learning that the hard way. In December, William Clark, a senior at Democracy Prep, sued the school, alleging that it gave him a failing grade in his “Sociology of Change” course and threatened to prevent him from graduating because he refused to confess his privilege openly as demanded by the school, the course curriculum, and the teacher.

Previously operating as the Andre Agassi Preparatory Academy, the school was taken over by New York-based Democracy Prep in 2016 as part of a nationwide expansion by that charter network. Democracy Prep modified the school’s



FOX NEWS

*Gabrielle Clark’s son William is suing Democracy Prep charter school in Las Vegas, Nevada, over a failing grade in a sociology course.*

Last year in Raleigh, North Carolina, the Wake County Public Schools held a teachers conference promoting these ideas and their application in schools. One session, “Whiteness in Ed Spaces,” advised teachers to “challenge the dominant ideology” of whiteness and to fight back when parents objected. In Loudon County, Virginia, when parents did object to the district promoting critical race theory, a Facebook group of parents and teachers who supported the practice said they should “infiltrate” groups who opposed critical race theory and use hackers to “either shut down their websites or redirect them to pro-CRT/anti-racist informational webpages.”

As school districts continue to infuse critical race theory into their curricula, they might confront another obstacle: the law.

civics curriculum to place heavy emphasis on intersectionality and critical race theory. All students are now required to take the yearlong “Sociology of Change” course. The class materials mandate that students “label and identify” their racial, religious, sexual, and gender identities and then determine whether “that part of your identity has privilege or oppression attached to it.” The course also obligates students to label white, male, Christian, and heterosexual identities as inherently oppressive and privileged because of their social dominance. The course’s teacher has labeled her own race as privileged, her gender as oppressed, her agnosticism as oppressed, and her bisexuality as both privileged and oppressed. The class content also informs students that “REVERSE RACISM IS NOT REAL!” (emphasis in original).

Clark began taking the course in fall 2020 and almost immediately protested the mandate to publicly announce and label his identities. Clark is biracial: his mother is Black and his father, now deceased, was white. He has “green eyes and blondish hair,” and, according to his complaint, “is generally regarded as white by his peers.” When he and his mother objected to the forced confessions of privilege and asked for an alternative accommodation to meet the course requirement, the school told him that if he did not complete the course, he would not graduate. Because he would not complete his required assignments, the teacher gave him a D-, a failing grade based on the school’s standards, prompting him to file suit.

According to Clark’s attorneys, Democracy Prep violated Clark’s constitutional and statutory rights. Pointing to *West Virginia v. Barnette* (1943), their complaint argues that forcing the student to publicly confess his identities as a white, male Christian and then attach “official, derogatory labels” to them violates the First Amendment’s prohibition on compelled speech. In *Barnette*, the U.S. Supreme Court struck down West Virginia’s mandatory flag-salute requirement for public school students. Writing for the majority, Justice Robert H. Jackson said that “if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

Clark’s lawyers also allege that the school’s behavior created a “hostile educational environment” in violation of Title VI of the Civil Rights Act of 1964, which says that “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Here they also point out that the school actually encourages students to “push back” against school policy but that when Clark did so they threatened and punished him.

For good measure, Clark’s complaint contends that the school’s treatment of him also violates Title IX, which forbids sex discrimination. Designating him as an “oppressor” based on his sex and gender and “categoriz[ing] and stereotyp[ing]” those identities in a “deliberately pejorative and offensive manner” constitutes sexual harassment under today’s interpretation of Title IX.

In response, school officials have made two primary arguments. First, they say that schools “have broad discretion over their curriculum . . . without running afoul of the First Amendment.” They contend that Clark was not, in fact, compelled to speak at all, because the assignments did not require him to affirm his identities publicly, and that he did not have to support any particular belief. “Courts,” the school asserts, “routinely reject students’ claims that coursework violates the First Amendment when it requires them to profess no particular

belief.” In response, Clark’s attorneys point out that he in fact did have to affirm his identities to his teacher and any other staff members who had access to his assignments. Simply because he did not have to state his identities to the entire class did not matter, because “speech is not less compelled because the speaker is not required to speak to the largest possible audience.” As well, the course required students to assent to “highly contested” claims like “people of color cannot be racist,” Clark’s attorneys say.

Second, Democracy Prep argues that giving a student a low grade and threatening to prevent him from graduating was only a “discouragement,” not a penalty. The school contends further that it would be a violation of the court’s role to intervene, that doing so would constitute acting as a “super-school board” and “directing professional educators to administer particular grades” and “teach courses using particular assignments or strategies.” This argument might well have some force with

judges and justices across the ideological spectrum who do not want to see themselves drawn into micromanaging curriculum and instruction in individual schools or classrooms. However, the same issue was raised and rejected in *Barnette* when the court ruled that the Constitution “protects the citizen against the State itself and all of its creatures—Boards of Education not excepted.”

Despite the defendants’ claims that the class and Clark’s punishment were legally unobjectionable, the school relented in early April, offering to expunge his grade and let him opt out of the course. Undoubtedly, this retreat was encouraged by a federal judge’s declaration at a February hearing that Clark was “likely to succeed on the merits” since the “speech is likely compelled.” The defendants, the judge said, would therefore have to “justify the curriculum under a strict scrutiny test,” the court’s most exacting level of review, which he said the class exercises probably could not survive.

Going forward, one might evaluate whether lawsuits like Clark’s are apt to succeed by asking what a court would say if the identities were reversed. That is, what if a teacher forced students to affirm a theory that held that being minority or female should inherently be associated with negative traits? (This is, of course, different from requiring students to acknowledge historical facts like the exclusion of women from the franchise or the existence of slavery and Jim Crow laws.) It’s hard to imagine a court saying that doing so would not violate the Constitution and civil-rights statutes. Of course, as William Clark learned, the nostrums of critical race theory and intersectionality forbid reversing those categories. But the nostrums of critical race theory and intersectionality are not the law.

*Joshua Dunn is professor of political science and director of the Center for the Study of Government and the Individual at the University of Colorado Colorado Springs.*

**Democracy Prep’s sociology course obligates students to label white, male, Christian, and heterosexual identities as inherently oppressive and privileged because of their social dominance.**