

## Orange County Board of Education Presentation

- Maimon Schwarzschild<sup>1</sup>

I'm grateful for the opportunity to be here and to speak with you this evening.

The educational or curricular phenomenon known as Critical Race Theory or – quite misleadingly – as “anti-racism”, has its origins in the universities and university law schools, in the writings of radical academics whose central claims were that America’s institutions – including constitutional government, separation of powers, and the Bill of Rights – are camouflages for racial oppression, and for the oppression of other groups victimized by their identities.<sup>2</sup> For several decades these claims circulated, somewhat obscurely, in the campus world: they attained traction there, in part, because they seemed to justify the growth of racial and other group preferences – in admissions, faculty hiring, and in the proliferating campus “diversity” bureaucracies. But over the past decade or so, these ideas have emerged into the off-campus world, very much including K-thru’-12 public education. One – although by no means the only – source of this is an initiative by the New York Times known as the 1619 Project, promoting and funding school lessons and curricula based on the idea that racism was central to America from the very outset, that the American Revolution was (only) fought in order to ensure that slavery would continue, and that practically everything that followed – prominently including the career and presidency of Abraham Lincoln – was irredeemably racist to the core.<sup>3</sup>

Although the claims of the 1619 Project have been thoroughly refuted and rejected by eminent historians from across the ideological spectrum, including scholars whose entire careers were on the liberal or radical Left,<sup>4</sup> the 1619 Project, and related teaching plans along the same lines, have been introduced in various school systems across the country. It is very important to recognize that in many classrooms – in fact in most classrooms where these curricula are in force – these ideas are not presented as one point of view, contested by other and very different ideas, facts, and interpretations, with pupils being taught to think independently and to develop skills of critical thinking and the evaluation of evidence.

On the contrary, there is now widespread evidence that these curricula centre on psychological techniques to “train” pupils that their race determines nearly everything about them. Pupils are separated by race for “Privilege Walks” and other classroom exercises, inculcating the idea that white pupils are privileged oppressors, and that non-white pupils are victims of this pervasive oppression. These lessons advance the claim that any counter-evidence or reasoned criticism are themselves racist and a discredited defence of whiteness. Students who venture to object to being deemed privileged,

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<sup>2</sup> See Kimberlé Crenshaw, Neil Gotanda & Gary Peller, *Critical Race Theory: The Key Writings that Formed the Movement* (1995). See also Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction* (3d ed. 2016).

<sup>3</sup> See The1619 Project: [https://pulitzercenter.org/sites/default/files/full\\_issue\\_of\\_the\\_1619\\_project.pdf](https://pulitzercenter.org/sites/default/files/full_issue_of_the_1619_project.pdf)  
But cf. David North & Eric London, *The 1619 Project and the falsification of history: An analysis of the the New York Times’ reply to five historians*, World Socialist Website, 28 December 2019:  
<https://www.wsws.org/en/articles/2019/12/28/nytr-d28.html>

<sup>4</sup> See e.g. *The New York Times’ 1619 Project*, World Socialist Website (a series of critical essays and interviews):  
<https://www.wsws.org/en/topics/event/1619>

and to being held personally responsible for white racism, are ridiculed for their “white fragility” and in effect are compelled to voice agreement as to their racial guilt.<sup>5</sup>

Quite apart from the moral or educational validity of any of this, these classroom techniques raise very serious potential legal questions and liabilities for public school systems that indulge in them.

The Constitution itself is held by the Supreme Court to forbid schools to coerce children to express agreement or adherence to any sentiment in violation of their conscience. This goes back to a 1943 Supreme Court case, *West Virginia State Board of Education v. Barnette*, decided (quite impressively) in the midst of the Second World War, involving Jehovah’s Witness school children who were expelled from school for refusing to salute the flag.<sup>6</sup> The Court held that it violates the First Amendment freedom of speech to coerce pupils to salute the flag, or to express any particular conviction or orthodoxy. As Justice Jackson – later the chief US prosecutor at Nuremberg – put it:

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. If there are any circumstances which permit an exception, they do not now occur to us.<sup>7</sup>

School systems whose classrooms divide pupils by race, or inculcate the idea of racial guilt, may face statutory liability as well.

Title VI of the Civil Rights Act of 1964 protects all students who attend schools receiving federal funding from being treated differently based on their actual or perceived race, colour, or national origin.<sup>8</sup> Such treatment includes racial harassment, defined as unwelcome conduct based on a pupil’s race or national origin. Title VI is violated if racial harassment is severe or persistent enough to constitute a hostile or abusive educational environment. The existence of a hostile environment is determined from the totality of the circumstances, but the federal Investigative Guidance for enforcement of Title VI notes that young children are particularly impressionable, and that schools have a special obligation to provide a non-discriminatory environment conducive to learning.<sup>9</sup> Title VI protects all persons from discrimination, including parents and guardians as well as students. Title VI is enforceable not only by the federal government, but also by a private right of action which permits victims – or in this context, realistically, parents – to seek relief in federal court, including monetary damages.<sup>10</sup>

Title IX of the Education Amendments of 1972 likewise prohibits discrimination on the basis of sex in any educational programme or activity receiving federal funding.<sup>11</sup> Title IX may come into play when “critical theory”-inspired lessons or curricula inculcate the idea that one sex – just as one racial group – is inherently wicked or oppressive. Title IX does not explicitly mention sexual harassment, but the US Department of Education has issued guidances stating that sexually harassing conduct by a teacher or

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<sup>5</sup> See Legal Opinion of Austin Knudsen, Attorney General of Montana, May 27, 2021 (providing examples from around the country): <https://media.dojmt.gov/wp-content/uploads/AGO-V58-O1-5.27.21-FINAL.pdf>

<sup>6</sup> *West Virginia State Board of Education v. Barnette*, 319 US 624 (1943).

<sup>7</sup> *Id.* at 642.

<sup>8</sup> Title VI, Civil Rights Act of 1964, as amended, 42 USC 2000d et seq.

<sup>9</sup> See *Racial Incidents and Harassment Against Students: Investigative Guidance*, 59 Fed. Reg. 11449 (March 10, 1994).

<sup>10</sup> See *Alexander v. Sandoval*, 532 US 275 (2001).

<sup>11</sup> Title IX, Education Amendments of 1972, 20 USC 1681.

other school employee can create a hostile or abusive educational environment in violation of Title IX.<sup>12</sup> Moreover the Supreme Court has interpreted Title IX to provide a private right of action – in other words the right of an individual to sue in federal court – for relief, including monetary damages, for sexual harassment by a federally funded educational institution or school district.<sup>13</sup>

Pupils are not alone in being subjected to racial – and other identity-group-based – stereotyping and scapegoating under “critical” and so-called anti-racism school programmes and curricula. Teachers and other school employees have been subjected to this as well. For example, the San Diego Unified School District reportedly conducted mandatory “diversity training” for teachers during this past year, in which white teachers were accused of being colonizers on stolen Native American land and told “you are racist” and “you are upholding racist ideas, structures, and policies.” The trainers demanded that the teachers “confront and examine [their] white privilege,” “acknowledge when [they] feel white fragility,” and “teach others to see their privilege.” After news of the “training” caused an uproar, school officials defended it as a form of “racial healing.” Subsequent “trainings” have reportedly been even more condemnatory of whites and “whiteness”.<sup>14</sup> Discrimination against employees on the basis of race, sex, and national origin is prohibited by Title VII of the Civil Rights Act of 1964 as amended, and harassment severe or pervasive enough to create a hostile work environment is held to be within the prohibitions of Title VII. Complaint and enforcement procedures under Title VII are complex, but here too there is an ultimate right to sue in court for relief, including monetary damages.<sup>15</sup>

There is potential for legal liability, in short, under these federal laws among others, and under state law as well, when public schools adopt racist and racially abusive classroom techniques and curricula.

More broadly, greater equality of opportunity for all in America depends crucially on the quality of public education – on students’ opportunity to acquire the verbal and mathematical skills, the discipline, and the accurate knowledge essential for citizenship and success in a free and prosperous society. Yet there is widespread educational failure in the public schools, with troubling gaps by race and social class. In the San Diego Unified School District, for example, which spends millions of dollars on “anti-racism” trainings, speeches, and “diversity audits”, only 37 percent of San Diego’s fourth-graders were scored “proficient” in reading, and only 42 percent in maths, according to standardised tests in 2019.<sup>16</sup> Black and Latino students there perform still worse than these overall averages.

“Anti-racist” curricula scarcely promise any improvement on these scores. On the contrary, prominent proponents of critical-race schooling denounce achievement-based teaching, grading, and testing as reinforcing white supremacy. The Smithsonian National Museum of African American History and Culture notoriously defined “hard work”, “objectivity”, “politeness”, and “delayed gratification” as racist hallmarks of “white culture”.<sup>17</sup> The Oregon State Department of Education’s Pathway to Equitable Math

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<sup>12</sup> See e.g. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (March 13, 1997).

<sup>13</sup> See *Cannon v. Univ. of Chicago*, 441 US 677 (1979).

<sup>14</sup> See Christopher Rufo, *Radicals in the Classroom*, City Journal, January 5, 2021: <https://www.city-journal.org/radicalism-in-san-diego-schools>

<sup>15</sup> Title VII, Civil Rights Act of 1964, as amended, 42 USC 2000e

<sup>16</sup> See The Nation’s Report Card, San Diego Overview 2019:

[https://www.nationsreportcard.gov/profiles/districtprofile/overview/XD?cti=PgTab\\_OT&chort=1&sub=MAT&sj=XD&fs=Grade&st=MN&year=2019R3&sg=Gender%3A+Male+vs.+Female&sgv=Difference&ts=Single+Year&sfj=NL](https://www.nationsreportcard.gov/profiles/districtprofile/overview/XD?cti=PgTab_OT&chort=1&sub=MAT&sj=XD&fs=Grade&st=MN&year=2019R3&sg=Gender%3A+Male+vs.+Female&sgv=Difference&ts=Single+Year&sfj=NL)

<sup>17</sup> Frederick M. Hess & RJ Martin, *Smithsonian institution Explains that ‘Rationality’ and ‘Hard Work’ are Racist*, RealClearPolicy (July 20, 2020):

Instruction calls for “visibilizing the toxic characteristics of white supremacy culture with respect to math” – the “toxic characteristics” including “Focusing on the right answer” and “independent practice valued over teamwork or collaboration”.<sup>18</sup> A professor of education at the University of Illinois states, “On many levels, mathematics itself operates as Whiteness”,<sup>19</sup> and a professor of maths education at Brooklyn College tweets that the  $2+2=4$  equation “reeks of white supremacist patriarchy”.<sup>20</sup> These might seem extreme expressions, but unfortunately they are not uncharacteristic of much that is said and written by proponents and rank-and-file practitioners of critical race theory.

On a personal note, as a law professor I try to see all sides of public and legal issues, and in my teaching and writing to present the best case for each contesting view in any dispute. Critical race theory, as actually practised in many classrooms in California and across the country, seems to me to defy any hope of defending or justifying it. Its mix of half-truths and sheer falsehoods, its stereotyping and scapegoating of entire races of people, its relentlessly divisive setting of one group against another, its visceral hostility to reasoned debate, freedom of thought, and freedom of expression, and its well-documented tendency to proceed by stealth, all evoke the practices of authoritarian and even totalitarian regimes. My own family had personal experience of some of the totalitarian regimes in 20<sup>th</sup> century Europe, and some of the tropes and techniques of ethnic studies and critical race theory, as now practised in many US classrooms, have chilling parallels in the techniques of ideological indoctrination in the schoolrooms of those regimes.

Critical race theory, as actually adapted to K-12 classrooms, has been tellingly described as the kind of curriculum that might be imposed on a defeated country by a conquering power determined to divide and demoralise the defeated population.

I urge the Board, at the very least, to ascertain as fully and as accurately as possible, what is being taught or inculcated, and in what ways, in the County’s public school classrooms, and to ensure that parents and citizens have a full opportunity to be informed about the education (or possible mis-education) being provided in Orange County.

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[https://www.realclearpolicy.com/articles/2020/07/20/smithsonian\\_institute\\_explains\\_that\\_rationality\\_and\\_hard\\_work\\_are\\_racist\\_499425.html](https://www.realclearpolicy.com/articles/2020/07/20/smithsonian_institute_explains_that_rationality_and_hard_work_are_racist_499425.html)

<sup>18</sup> Oregon Department of Education, A Pathway to Equitable Math Instruction, February 5, 2021:

<https://content.govdelivery.com/accounts/ORED/bulletins/2bfbb9b?fbclid=IwAR3U8iS7fCD-gONArQh74qlRa5IVFiTXoithZA89kMvmD0DEtmzcV9DuQdg>

<sup>19</sup> Toni Airaksinen, Prof: Algebra, geometry perpetuate white privilege, Campus Reform, October 23, 2017:

<https://www.campusreform.org/?ID=10005>

<sup>20</sup> Ben Zeisloft, Math Education Prof:  $2+2=4$  ‘trope’ ‘reeks of white supremacy patriarchy’, Campus Reform, August 8, 2020: <https://www.campusreform.org/?ID=15409>