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Whiteness as Guilt: Attacking Critical Race Theory to Redeem the Racial Contract

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Whiteness as Guilt: Attacking Critical Race Theory to Redeem the Racial Contract

Marissa Jackson Sow

ABSTRACT

The year of racial justice awakening following George Floyd's 2020 murder have been accompanied by a rise in attacks on Black thought, including Critical Race Theory, led by far-right activists who are invested in maintenance of a white supremacist status quo in the United States. This Essay uses artist Kara Walker's 2014 *Sugar Sphinx* to contextualize the critiques on Critical Race Theory and other manifestations of Black intellectualism as a campaign for perpetual absolution of white guilt, and even redemption of white supremacy, that is openly embraced by white nationalists but also secretly nourished—and cherished—by the white liberal elite.

AUTHOR

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INTRODUCTION

President Joe Biden did something extraordinary in his inaugural address on January 20, 2021, naming and denouncing white supremacy from the steps of Capitol Hill,¹ where a mob comprised primarily of fascists, white nationalists, and their angry right-wing populist sympathizers had attempted to overthrow the government and overturn Biden's election just two weeks prior.² That President Biden does not hold particularly progressive views on racial justice or any other political issue made the moment all the more stunning. Indeed, the admission by a white American president that white supremacy was a major force requiring denunciation, disavowal, and a promise of disinvestment therefrom was not only remarkable, but also controversial. President Biden had admitted, on behalf of the entire nation, to the guilt of the nation for relying upon white supremacy for its power—guilt that President Barack Obama had taken great lengths to deny in his own inaugural address twelve years earlier.³

The moment stood in stark contrast to the images of the January 6, 2021 Capitol Hill Riot: The rioters hoped that their violent raid of the Capitol would embolden fascists and ethnonationalists in their crusade against a multicultural America that had been contemplating the dismantlement not only of Confederate monuments, but of the legal and economic order that those monuments represented. Biden's speech on the steps of the Capitol also served as a discursive and symbolic rejection of the image of his predecessor's endorsement of white supremacist violence. In June 2020, President Donald Trump notoriously stood in front of St. John's Church in Washington, D.C. after ordering the spraying of tear gas on activists peacefully protesting George Floyd's murder,⁴ silently holding

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1. Kat Stafford & Aaron Morrison, *Biden Repudiates White Supremacy, Calls for Racial Justice in Inaugural Speech*, PBS NEWSHOUR (Jan. 20, 2021, 6:49 PM), <https://www.pbs.org/newshour/politics/biden-repudiates-white-supremacy-calls-for-racial-justice-in-inaugural-speech> [https://perma.cc/7DAJ-JR68].
 2. *Capitol Riots Timeline: What Happened on 6 Jan. One Year Ago?*, BBC (Jan. 6, 2022), <https://www.bbc.com/news/world-us-canada-56004916> [https://perma.cc/VDF6-68XY].
 3. See Barack Obama, President, United States of America, *President Barack Obama's Inaugural Address*, (Jan. 21, 2009), <https://obamawhitehouse.archives.gov/blog/2009/01/21/president-barack-obamas-inaugural-address> [https://perma.cc/7VTK-62FK]; ROXANE DUNBAR-ORTIZ, *AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES* 115–16 (2015).
 4. See Evan Hill, Ainara Tiefenthaler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [https://perma.cc/GY3D-F3VP].

a Bible in his hands⁵ to communicate to his supporters that his use of his extreme white male privilege to engage in unjustifiable acts of violence against the American citizenry was the establishment of a new norm—a resilient and universal innocence and immunity for white people committing violence, expressly on the basis of their whiteness.

President Biden’s denunciation of white supremacy led conservative activists and pundits to announce that his words offended them.⁶ By merely acknowledging the existence of white supremacy, Biden was interfering with a system of whiteness that had been negotiated and constructed for their collective benefit, and which always received more than the benefit of the doubt. As a result, conservative pundits labeled the speech divisive, accusing Biden of wrongfully accusing them of being racists.⁷ In a society that has been educated to believe that racism would die out over time, the reaction of conservatives and the far right to basic acknowledgments of the role that racism has played in American society even after the Trump presidency has been shocking; after all, how could anyone but an overt racist absorb a rejection of racism as a personal affront? *Only a hit dog will holler.*

It is possible that those conservative and alt-right commentators who took offense to President Biden’s speech did not realize that they were revealing their own commitments to white supremacy, though their protestations of and concerted attacks on critical accounts of American history reveal their explicit investments in white supremacy and their defenses and celebrations of white nationalism.⁸ The ever-escalating attacks on Critical Race Theory and works

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5. Trump’s attack on the protesters was widely decried, including by U.S. military officials, and it was described, in the New York Times, as a “burst of violence unlike any seen in the shadow of the White House in generations.” See Peter Baker, Maggie Haberman, Katie Rogers, Zolan Kanno-Youngs & Katie Benner, *How Trump’s Idea for a Photo Op Led to Havoc in a Park*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/2020/06/02/us/politics/trump-walk-lafayette-square.html> [https://perma.cc/5FS9-GDU5]. The violent dispersal of the protesters was a surprise move by the President, who had no other intent aside from providing a photo op portraying his domination and repression of social justice protests that had swept the nation. “The president’s movement surprised nearly everyone, as he intended, including law enforcement. The Washington police chief said he was notified only moments beforehand.” *Id.*
 6. Karl Rove and Rand Paul were among the many critics of the inaugural address. See Noah Rothman, *Republican Backlash to Biden’s Inauguration Points to Post-Trump Challenges*, NBC THINK (Jan. 23, 2021, 1:30 AM), <https://www.nbcnews.com/think/opinion/republican-backlash-biden-s-inauguration-points-post-trump-challenges-ncna1255409> [https://perma.cc/LM9E-ZLUM]. Karl Rove said that he was “offended by the speech” and Paul criticized the address as “thinly veiled innuendo.” *Id.*
 7. See *id.*
 8. See Anthony Pahnke, *How the Far Right Got a Stranglehold on the West*, AL JAZEERA (Mar. 31, 2021), <https://www.aljazeera.com/features/2021/3/31/how-the-far-right-got-a-stranglehold-on-the-west> [https://perma.cc/5MZH-NVBX]; Katanga Johnson & Jim Urquhart, *White Nationalism Upsurge in U.S. Echoes Historical Pattern*, SAY SCHOLARS, REUTERS (Sept. 4, 2020,

authored by nonwhite people (and Black people specifically) are an American manifestation of a global resurgence in authoritarian white nationalism and a highly organized alt-right movement that is organizing to secure global white domination throughout the Americas and Europe. Academic and political movements such as Critical Race Theory (CRT), Critical Legal Studies, ethnic studies, postcolonial theory, and Négritude have, for decades, enhanced students' understandings of white supremacy's role as the root of evil systems such as colonialism, caste, and race- and color-based systems of slavery.

After George Floyd's murder, longstanding global condemnations of racism⁹ transformed into efforts to eradicate white supremacy in all of its forms—posing a severe threat to those most deeply invested in the power and privileges of whiteness. No longer satisfied with operating in the shadows, the signatories to the whiteness contract have decided that white supremacy, condemned as guilty, must be redeemed.

Progressive scholars of criminal law question the assumptions of guilt attaching to criminal convictions within a justice system that pushes people of color to enter guilty pleas regardless of whether they have committed an offense in violation of criminal laws.¹⁰ This Essay advances my exploration of whiteness as contract by questioning assumptions of innocence attaching to people raced as white, whether within a criminal law context or beyond. A feature of whiteness is the presumption, and even a guarantee, of innocence for those raced as or

12:09 PM) <https://www.reuters.com/article/us-global-race-usa-extremism-analysis/white-nationalism-upsurge-in-u-s-echoes-historical-pattern-say-scholars-idUSKBN25V2QH> [<https://perma.cc/E36L-RMDR>].

9. The United Nations, for example, adopted the International Convention on the Elimination of All Forms of Racial Discrimination in 1965. See G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination (Dec. 21, 1965) [hereinafter ICERD]. Notably, the United States signed the Convention in 1966, but did not ratify the convention until 1994. See Yusra Suedi, *Black Lives Matter, the USA and the UN Convention Against Racial Discrimination*, OPINIOJURIS (Aug. 6, 2020), <http://opiniojuris.org/2020/06/08/black-lives-matter-the-usa-and-the-un-convention-against-racial-discrimination> [<https://perma.cc/NMD8-7UV6>] (noting that the United States signed the ICERD in 1966 and ratified it in 1994, though the United States also submitted reservations to the Convention relating to free speech). Hadar Harris, formerly the Executive Director of the Center for Human Rights and Humanitarian Law at American University's Washington College of Law, has referred to the ICERD as “the first major human rights treaty to enter into force as part of the international effort to codify the Universal Declaration of Human Rights.” Hadar Harris, *Race Across Borders: The U.S. and ICERD*, 24 HARV. BLACKLETTER L.J. 61, 62 (2008).
10. See Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. 2501, 2501 (2020), in which Professor Roberts explores how “scholars often discuss people who have criminal convictions in a way that appears to assume crime commission,” which “obscures crucial failings of the system, muddies the role of academia, and, given the unequal distribution of criminal convictions, risks compounding race- and class-based stereotypes of criminality.”

perceived to be white in courts of law and in public opinion, even in the face of incontrovertible evidence of their culpability.¹¹ Viewed within the contractual context, innocence is a term of whiteness—it is very literally part of whiteness’s bargain, a key element of the negotiated package. Conversely, a guilty Blackness is also part of the whiteness contract, and this helps to understand the structuring of the American criminal justice system to disproportionately prosecute and convict Black people, the psychological associations that people make with Blackness and guilt,¹² and the popularity of the idea that CRT and Black thought generally are guilty of being un-American, and thus, immoral. The assumption of white innocence must be revoked, along with the entirety of that racial contract, in order to dismantle white supremacy and achieve a just society. This Essay thus considers the attacks of the white right on CRT not just as a defense of white people as innocent, but also as a redemption of a right for white people to be guilty when the appearance of innocence is impossible or politically disadvantageous.

I. FROM INVISIBLE TO VISIBLE INK: ATTACKING CRITICAL RACE THEORY AND RENEGOTIATING THE RACIAL CONTRACT

There is an obsession, within mainstream American discourse, with the characterization of racism as fringe and absurd. This is harmful, both because it is not true that racism is only the problem of political extremists, and also because it allows those who are firmly in the mainstream of society to classify their own perpetuations of white supremacy as not racist, and therefore, banal. On one hand, it is totally logical to criticize the attacks on CRT as ridiculous and separated from reality: It is true that nobody is reading Derrick Bell to first graders,¹³ and it is also true

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11. See *id.* at 2507 (“When we emphasize the extent to which misdemeanor convictions track something other than factual guilt, we risk suggesting that, in the felony context, we need not be significantly concerned vis-à-vis the relationship between conviction and factual guilt. And when we speak of those without convictions as having lived law-abiding lives, we risk endorsing a flip-side assumption that absence of conviction equals factual innocence.”).
 12. See Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison Lewis Di Leone, Carmen Marie Culotta & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Criminalizing Black Children*, 106 J. OF PERSONALITY & SOC. PSYCH. 526 (2014). In this study, the researchers found that Black boys are implicitly associated with apes and considered older and less innocent than their white peers. *Id.* at 526.
 13. Many conservative and far-right critics of Critical Race Theory and discussions of racism in the United States claim that Critical Race Theory is taught to young children and causes young white children to hate themselves. See Khaleda Rahman, *Mike Pence Claims CRT Teaches Kindergarteners to Be “Ashamed of Their Skin Color”*, NEWSWEEK (July 17, 2021, 8:08 AM), <https://www.newsweek.com/mike-pence-claims-crt-teaches-kindergarteners-ashamed-their-skin-color-1610712> [<https://perma.cc/7BLZ-YV8Z>]; *Fresh Air: Uncovering Who Is Driving the Fight Against Critical Race Theory in Schools*, NPR, at 3:37 (June 24, 2021),

that the idea that informing schoolchildren that American slavery happened will cause them to hate white people can most generously be labeled as far-fetched. Conversely, the opponents of CRT are engaged in a strategic approach to first condemn it as un-American before applying the CRT label to all academic and cultural work by nonwhite authors whom they find to be even minimally threatening to white supremacy, as well as to any discussion of systemic racism or diversity.¹⁴ These opponents are keenly, if tacitly, aware that if white supremacy is to flourish in a society that is, in a formal sense, antiracist, then white supremacy must be aligned with the virtues of patriotism and challenges to white supremacy must be associated with threats to America.

In previous work, I have challenged readers to abandon the prevalent paradigm of race and racism which characterizes racism as interpersonal animus amongst and between persons of innately distinct genotypes and ethnicities.¹⁵ I have encouraged a departure from the idea that race exists within the human body: Instead I propose that we should accept that race is imposed upon the human body through legal definitions, strategic ideologies, structural steering, and brute force, and that race is negotiated by and for America's white body politic,¹⁶ which has become loud, enraged, and deadly during the present resurgence of right-wing populism.

Whiteness, I argue, is a contract: It is a bargained-for status that is given force by law, structured by state institutions, operationalized by the state's policies, facilitated by government and commercial contracting, and sustained by largely unspoken and often unconscious consensus that the status must be protected from

<https://www.npr.org/2021/06/24/1009839021/uncovering-who-is-driving-the-fight-against-critical-race-theory-in-schools> [<https://perma.cc/C877-76NJ>] ("So you have a situation where virtually all school districts confronted about this are saying, we don't teach Critical Race Theory. It's not part of our curriculum.").

14. See *id.* at 3:48 ("Opponents [of Critical Race Theory] are using Critical Race Theory as really more of a catchall to include anything teaching students about systemic racism, any mention of white privilege, and, really, the definition that they're using has expanded to include anything related to equity, diversity and inclusion.").
15. See Marissa Jackson Sow, *Whiteness as Contract*, 78 WASH. & LEE L. REV. 1803, 1810–11 (2022) (characterizing white supremacy as a system bargained-for by people raced as white that gives them exclusive rights to the domination of political and economic capital) [hereinafter Jackson Sow, *Whiteness as Contract*]; Marissa Jackson Sow, *Coming to Terms: Using Contract Theory to Understand the Detroit Water Shutoffs*, 96 N.Y.U. L. REV. ONLINE 29, 41–42 (2021) (describing the goals of white supremacy as the creation and maintenance of "stark economic domination" by white people over nonwhite people).
16. See Jackson Sow, *Whiteness as Contract*, *supra* note 15, at 1820–22 (describing the racialization of American society by United States Supreme Court jurisprudence—including the explicit exclusion of Black people from legal personhood and the American social contract in *Dred Scott v. Sanford*, 60 U.S. 393 (1857), and the inability of federal antidiscrimination laws to dismantle white supremacy).

dilution or disruption by those excluded from the bargain.¹⁷ The recent resurgence of white nationalism during the Trump era demonstrates that the signatories to the bargain do not occupy the fringes of American society. Rather, they presently dominate middle America and have been centered in mainstream American press and political discourse.

Whiteness and innocence are, and must be, oxymoronic. This is easier to understand and accept once one accepts that race—including whiteness—is not intrinsic to a person, but rather an identity that is placed upon them.¹⁸ Whiteness is a predatory, exploitative contract; it only agrees to benefits, and concedes nothing (and because whiteness is contracted by, for, and with white people, it need not concede anything).¹⁹ The predation and exploitation are experienced by those outside of the contract, who also happen to be the objects of the contract. Consequently, in the bifurcated world that the negotiation of whiteness creates, the monopolization of benefits for which whiteness bargains leaves the absence of such benefits for those excluded from whiteness. This means that whiteness's monopolization of innocence and its exemption from guilt mean that there is no innocence left for non-whiteness (and Blackness in particular). Indeed, this also means that just as innocence is the exclusive property of whiteness, guilt is the portion and plight of non-whiteness (and of Blackness in particular).²⁰

Because the formation and maintenance of whiteness are premised upon brutality—exclusion from the category, colonization, enslavement, massacre, and state violence—it must lobby for a political innocence knowing that it is inherently and permanently ineligible from moral innocence. For people raced as white to achieve redemption, they must first be liberated from the chains of whiteness—which requires them to view such liberation as a blessing, or as a win instead of a loss. This is, of course, a non-starter for the white supremacist, who is all too aware that whiteness is why, under current conditions, they win instead of losing.

In a review and contextualization of Charles Mills's theory of the racial contract, writer Adam Serwer described the racial contract as “a codicil rendered

17. See *id.* at 1810–11.

18. See *id.* at 1816 (noting that “the creation of race is a mechanism of delegating privilege and power to some while withholding it from others, which was made possible via the development of ideology justifying the forcible seizure of land; the abduction, sale, and enslavement of generations of Afro-descendant human beings; and the massacres of Indigenous nations”).

19. See *id.* at 1822–23 (describing the violent reactions to perceived breaches of the whiteness contract by people raced as white).

20. See Adam Serwer, *infra* note 21 (describing the “underlying assumptions of white innocence and black guilt” as part of Charles Mills's racial contract). See generally CHARLES MILLS, *THE RACIAL CONTRACT* 21 (1997) (describing a race-based social contract that designates white people as members of the body politic (and therefore imbued with positive traits) and excludes Black people therefrom (relegating them to inferior, negative traits and statuses)).

in invisible ink.”²¹ The attacks on Critical Race Theory have much to do with attacking the ability of scholars to call attention to that contract with their own visible ink; in a society where formal equality between races is the law of the land, the racial contract must remain invisible in order to operate. The attacks on CRT serve this invisibilizing purpose. If, however, the laws of the land can be changed so that anything labeled as CRT is legally verboten, as white nationalists desire, and white supremacy can be practiced and celebrated in the open, then the racial contract can be renegotiated such that it, too, can be written in visible ink. If white supremacy is no longer sinful in America, it can be openly celebrated, and if there is a right to white supremacy, it follows that there is no right to interfere with white supremacy. And that is how Critical Race Theory, and anyone accused or suspected of association therewith—no matter how distorted the definition of the field—becomes guilty.

The attacks on Critical Race Theory are part of a multi-decade effort by the American political far right to secure permanent political dominance, and this effort has found motivation in obvious threats to the whiteness contract. The far right’s resistance to Barack Obama’s presidency was visceral and overtly racist. Donald Trump was an early antagonist of Obama, stoking highly racist and xenophobic “birther” claims about the 44th President meant to criminalize and delegitimize Obama,²² while also laying the foundation for Trump’s own candidacy and eventual victory, seen as the manifestation of “whitelash” against the atrocious racial contractual breach of having been led and governed by a Black person.

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The Trump presidency was not merely marked by association or affiliation with white nationalism. Rather, the Trump administration, and the populism that made it possible, relied heavily on white pride and white audacity to justify its white nationalism and corresponding draconian policies.²³ Donald Trump relishes in

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21. Adam Serwer, *The Coronavirus Was an Emergency Until Trump Found Out Who Was Dying*, NEW YORKER (May 8, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/americas-racial-contract-showing/611389> [<https://perma.cc/JX65-8SLW>].
 22. See Adam Serwer, *Birtherism of a Nation*, ATLANTIC (May 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/birtherism-and-trump/610978> [<https://perma.cc/8XUB-6NNA>] (recounting Trump’s embrace and perpetuation of the baseless theory that Barack Obama was Muslim and not a United States citizen, and further noting that Trump’s popularity in polls increased after his embrace of the theory).
 23. See Sean Collins, *Trump Once Flirted With White Nationalism. Now It’s a Centerpiece of His White House*, VOX (July 21, 2020, 7:50 AM), <https://www.vox.com/21313021/trump-white-nationalism-supremacy-miller-bannon-immigration> [<https://perma.cc/4WG6-59E4>]. Trump

being guilty, but never convicted. Before becoming the forty-fifth President of the United States, he infamously bragged about getting away with sexual assault²⁴ and bragged that he could shoot someone and get away with it.²⁵ The notorious distinction of being twice-impeached and twice-acquitted embodies the paradox of white guilt—Trump represents the ability, and better still, the authority, to defy norms and violate laws without having to absorb the negative consequences of his actions. Not religiously devout, Trump chose to stand in front of Lafayette Square with a Bible in his hand for the sole purpose of declaring himself innocent of a tear gas attack he ordered on social justice protesters.²⁶ In that moment, he never claimed that he was not responsible for the violence, of which he was extremely proud; he was simply declaring his acts to be acts of righteousness. Such is the magic of Trump for his followers: He proudly leverages his whiteness in the service of being guilty and innocent all at once—and achieving this privileged status for all people raced as white is the goal of Critical Race Theory’s opponents.

The only real check on Trump’s power was his defeat at the polls in November 2020, and even then he refused to accept the defeat. Senior members of his party and inner circle reportedly knew about, supported, and even helped to organize an insurrection to overturn the election results,²⁷ and the results of the

notoriously stoked racism and xenophobia at various points throughout his presidency and during his presidential campaigns. See Li Zhou, *Trump’s Racist References to the Coronavirus are His Latest Effort to Stoke Xenophobia*, VOX (Jun. 23, 2020), <https://www.vox.com/2020/6/23/21300332/trump-coronavirus-racism-asian-americans> (reporting on Trump’s use of anti-Asian terms in reference to the coronavirus). Infamously, Trump also referred to Haiti, El Salvador and some African nations as “shitholes” and asked why it was not possible to attract more immigrants from Norway to the United States during a bipartisan meeting with U.S. Senators at the White House. See Ali Vitali, Kasie Hunt & Frank Thorp V, *Trump Referred to Haiti and African Nations as ‘Shithole’ Countries*, NBC NEWS (Jan. 11, 2018), <https://www.nbcnews.com/politics/white-house/trump-referred-haiti-african-countries-shithole-nations-n836946> [<https://perma.cc/6REF-W6TT>].

24. See Libby Nelson “*Grab ‘em by the Pussy’: How Trump Talked About Women in Private is Horrifying*,” VOX (Oct. 7, 2016, 5:08 PM), <https://www.vox.com/2016/10/7/13205842/trump-secret-recording-women> [<https://perma.cc/KTK2-U7WB>].
25. See Colin Dwyer, *Donald Trump: “I Could . . . Shoot Somebody, and I Wouldn’t Lose Any Voters,”* NPR (Jan. 23, 2016, 5:00 PM), <https://www.npr.org/sections/thetwo-way/2016/01/23/464129029/donald-trump-i-could-shoot-somebody-and-i-wouldnt-lose-any-voters> [<https://perma.cc/WEH9-7ZP6>].
26. See Baker, Haberman, Rogers, Kanno-Youngs & Benner, *supra* note 5 and accompanying text.
27. See Yamiche Alcindor & Alex D’Elia, *GOP Lawmakers Were “Intimately Involved” in Jan. 6 Protest Planning, New Report Shows*, PBS NEWS HOUR (Oct. 25, 2021 6:45 PM), <https://www.pbs.org/newshour/show/gop-lawmakers-were-intimately-involved-in-jan-6-protest-planning-new-report-shows> [<https://perma.cc/89V4-AULE>] (citing a Rolling Stone investigative report detailing the direct involvement in the planning of the January 6 2021 Capitol Hill Riot by high-level GOP officials, including White House staffers); Hunter Walker, *Exclusive: Jan. 6 Protest Organizers Say They Participated in “Dozens” of Planning Meetings With Members of Congress and White House Staff*, ROLLING STONE (Oct. 24, 2021, 8:33 PM),

riot were deadly. Among the casualties was a woman by the name of Ashli Babbitt, a 35-year-old Air Force veteran and avid Trump supporter who was shot by Capitol Police after she and her fellow rioters used clubs to smash the windows in a door to the Speaker's Lobby.²⁸

Unlike the unarmed young Black men and boys who have become posthumously famous for being killed by law enforcement, Babbitt has largely been treated like a victim, even though she was killed while perpetrating high federal crimes.²⁹ Unsurprisingly, far right activists have lionized Babbitt as a martyr despite their usual defenses of police when deployed against Black civil rights activists.³⁰

Unlike the white rioters who attempted to violently overthrow the American government, law enforcement officials in Kentucky decided that Breonna Taylor's innocence—even as a crime victim—was impossible. On-duty Louisville Police Department officers infamously shot Taylor, a Black, 26-year-old EMT, to death on March 13, 2020 while she slept in her apartment. None of the officers has ever faced criminal charges for killing Taylor, though one of the officers was charged with wantonly endangering her neighbors.³¹ The police officers who killed Taylor did so while executing a controversial no-knock warrant. According to official records, the officers were looking for evidence that would connect Taylor to Jamarcus Glover, Taylor's ex-boyfriend, who had a history of trafficking controlled substances. They found none.³² Still, Louisville prosecutors³³ and other

<https://www.rollingstone.com/politics/politics-news/exclusive-jan-6-organizers-met-congress-white-house-1245289> [<https://perma.cc/X2GF-FDVX>].

28. Press Release, United States Attorney's Office for the District of Columbia, Department of Justice Closes Investigation into the Death of Ashli Babbitt (Apr. 14, 2021) <https://www.justice.gov/usao-dc/pr/departement-justice-closes-investigation-death-ashli-babbitt> [<https://perma.cc/ALA2-TJUM>].
29. The federal government launched a criminal investigation of the police officer who shot Babbitt. *See id.*
30. *See* Michael Biesecker, *Ashli Babbitt a Martyr? Her Past Tells a More Complex Story*, ASSOCIATED PRESS (Jan. 3, 2022), <https://apnews.com/article/ashli-babbitt-capitol-siege-a15c7e52a04d932972b7a284c7a8f7df> (recalling that "former President Donald Trump and his supporters have sought to portray her as a righteous martyr who was unjustly killed").
31. *See* Meredith Deliso, *Why the Wanton Endangerment Charge in Breonna Taylor's Case is About Her Neighbors and Not Her*, ABC NEWS (Sept. 23, 2020, 3:17 PM) <https://abcnews.go.com/US/wanton-endangerment-charge-breonna-taylors-case-neighbors/story?id=73197251> [<https://perma.cc/N8FW-CT8H>].
32. *See* Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html> [<https://perma.cc/37MZ-XXJN>].
33. Jemele Hill noted that local prosecutors offered Breonna Taylor's ex-boyfriend a plea deal on the condition that he would name Taylor as a member of his criminal organization. Says Hill, "Authorities also seemed to work overtime in looking for ways

members of the American public took great lengths to condemn Taylor to guilt after her death, promulgating the idea that her association with criminals somehow tarnished her own innocence and made her death more reasonable.³⁴ The difference between the Right's valorization of Babbitt and demonization of Taylor could not be starker, or more racial. Because of the terms of the whiteness contract, innocent Black people's characters are regularly assassinated even if, and after, they are unlawfully killed by the state.³⁵

The war on Critical Race Theory is a contemporary attempt to invalidate Black innocence and validate white guilt by preemptively labeling forms of Black witness-bearing such as Critical Race Theory as unreliable, unbelievable, divisive, unpatriotic, and—stunningly—racist. The ideological conditioning upon which whiteness is premised works tirelessly to program every American to associate whiteness with innocence, benevolence, and magnanimity. This programming is effective, despite overwhelming evidence of white supremacy and modern racial formation as the cause of death, destruction, and despair for the billions of people unfortunate enough to be raced as nonwhite since European colonization began centuries ago. This ideological conditioning, upon which the whiteness contract depends,³⁶ is threatened by Critical Race Theory and any works of journalism, history, art, literature, music, or science that tell the stories of life from the

to make Taylor culpable in her own death. . . . This is what a cover-up looks like, not a tragedy." Jemele Hill, *Stop Calling Breonna Taylor's Killing a "Tragedy"*, ATLANTIC (Sept. 29, 2020,) <https://www.theatlantic.com/ideas/archive/2020/09/tragedy-means-blaming-black-people/616528> [<https://perma.cc/UVP4-2CKP>].

34. For example, one Georgia schoolteacher was condemned for telling students that she held Taylor responsible for her death because of Taylor's association with Jamarcus Glover. See Emma Austin, *Georgia Teacher Faces Backlash After Blaming Breonna Taylor for Her Own Death*, LOUISVILLE COURIER J., <https://www.courier-journal.com/story/news/local/breonna-taylor/2021/02/27/teacher-later-apologized-blaming-breonna-taylors-death-herself/6851946002> [<https://perma.cc/7ML6-CUCX>].
35. The willingness to indemnify whiteness and completely camouflage white guilt by creating guilt within dead Black bodies knows no limits whatsoever. As people across the nation and around the world mourned the victims of the January 9, 2022 Bronx fire, comments on New York Times reporting of the fire ranged from sympathetic to xenophobic and racist—some readers took the opportunity to criticize members of the victims Gambian community for participating in polygamous marriages and accused them of not trying to assimilate into American culture. See, e.g., Marie, Comment to Kimiko de Freytas-Tamura, At *"Touray Tower," the Broken Heart of New York's Gambian Community*, N.Y. TIMES (Jan. 12, 2022), <https://www.nytimes.com/2022/01/12/nyregion/gambian-residents-bronx-apartment-fire.html> [<https://perma.cc/HQ6R-JA48>] ("This reporting should be a case study on integration or rather non-integration. . . . While food imports from their countries may be harmless, not learning the language [and] having multiple wives . . . is the recipe for parallel societies which are and remain often socially disadvantaged societies."). Though the victims of the fire, many of whom were children and one of whom was only two years old, had done nothing to deserve their fate, they were still, somehow, guilty of something.
36. See MILLS, *supra* note 20, at 81–82.

perspective of the decolonized, nonwhite mind. Critical Race Theory, thus, must be found guilty, and put to death, so that whiteness may be redeemed.

II. A SUBTLETY: THE THIN LINE BETWEEN WHITE GUILT AND WHITE PRIDE

The enemies of Critical Race Theory have not been satiated by their attacks on the theory itself; by inaccurately (and intentionally) applying the label of Critical Race Theory to a wide range of creative, artistic, and academic work, far right activists have also been able to declare war on thought and art created by people of color, and especially Black people.³⁷ Attacks on Critical Race Theory have become attacks on Black creativity, philosophy, pedagogy, and more. These attacks seek to eliminate the presence of Black people from a collective American discourse and visual culture. For them, the presence of Black people, Black culture, and Black history in the United States necessarily means the denigration and devaluation of whiteness, and a threat to the white cultural dominance to which they are entitled.

The presence of rabid white racists who seek to have Black teachers and superintendents fired provides comfort for other white people who do not share their views. Denouncing and condemning white nationalists as guilty of racism and other backwards views is one of the easiest ways for white liberals to proclaim their own relative innocence. But the alt-right mocks white liberals for their white guilt, accusing them of virtue signaling and pandering to nonwhite communities. To deconstruct and explain this paradox of white guilt as virtue for some and vice for others, I turn to an iconic Black art exhibit—Kara Walker’s *A Subtlety, or the Marvelous Sugar Baby*.³⁸ I contend that Walker’s Sugar Sphinx reveals to us that the white desire for redemption is not the cry of people wrongly convicted, but rather that the desire for redemption stems directly from an acute awareness of—and private pride in—white guilt.

37. See Jack Dutton, *Black Authors Are Being Pulled From School Libraries Over Critical Race Theory Fears*, NEWSWEEK (Jan. 14, 2022, 9:18 AM), <https://www.newsweek.com/black-authors-are-being-pulled-school-libraries-over-critical-race-theory-fears-1669403> [<https://perma.cc/2TGA-9DL6>].

38. See Roberta Smith, *Sugar? Sure, but Salted With Meaning*, N.Y. TIMES (May 11, 2014), <https://www.nytimes.com/2014/05/12/arts/design/a-subtlety-or-the-marvelous-sugar-baby-at-the-domino-plant.html> [<https://perma.cc/WU5Z-BPKV>]; Art21, *Kara Walker: “A Subtlety, or the Marvelous Sugar Baby,”* YOUTUBE (May 23, 2014), <https://www.youtube.com/watch?v=sRkP5rcXtys> [<https://perma.cc/F34Y-FT6Y>].

Anyone who had the opportunity to visit Walker's 2014 exhibit knows that there was nothing physically subtle about the installation.³⁹ In fact, Walker's boldness about race and slavery in her work has resulted in her subjection to censorship on several occasions since the 1990s.⁴⁰ The centerpiece of the exhibit—a Black woman reminiscent of Aunt Jemima posed as a sphinx—was enormous, and very nude. A pair of enormous breasts flanked the Sphinx's front, and large genitalia protruded from a gigantic posterior obviously meant to invoke the memory of Sarah Baartman and the Hottentot Venus.⁴¹ The Sphinx's middle finger is extended, parallel with the floor of the sugar refinery, in an apparent gesture that is obscene but not quite obvious until perceived. She, resolute, rebellious, and yet vulnerable because of her nudity, is flanked throughout the refinery by her melting, dripping babies and young children, confectioned of molasses, and appearing to sweat to death under the heat of a plantation sun. The term "subtlety"⁴² honors and vindicates Walker's molasses subjects while also indicting the consumers of her art. Subtleties are confections that are only to be consumed by nobility or royalty; Walker's sugar confections would be consumed by America's intelligentsia and urban cultural elite in the highly gentrified and ever-gentrifying neighborhood of Williamsburg. Walker has described the ability to consume a subtlety as an expression of one's power, and this power—of

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39. See Kristin Iversen, *White People Problems: On Kara Walker and the Way White People Interact With Black Art*, BROOKLYN MAG (June 9, 2014), <https://www.bkmg.com/2014/06/09/white-people-problems-on-kara-walker-and-the-way-white-people-interact-with-black-art> [<https://perma.cc/W3JG-4GB7>] ("Not dissimilarly to Walker's other work, 'A Subtlety' is anything but subtle.").
40. See GWENDOLYN DUBOIS SHAW, SPEAKING THE UNSPEAKABLE 103–04 (2004) (discussing a 1999 decision by the Detroit Institute of Art to pull a Walker exhibit because the exhibit was deemed too controversial); Barry Carter, *Censorship or Common Decency? Newark Library Covers up Controversial Artwork*, NJ.COM (Dec. 2, 2012, 5:55 AM) https://www.nj.com/njv_barry_carter/2012/12/censorship_or_common_decency_n.html [<https://perma.cc/K2E7-VNXD>] (reporting on a decision to cover a controversial Walker exhibit at the Newark Library).
41. Sarah Baartman was an Indigenous Southern African woman who, after working as a wet-nurse for a mixed-race Dutch man, Henrik Cesars, in present-day South Africa, was trafficked and exhibited by Cesars. Cesars brought Baartman to Europe, where he made her a freak-show attraction under the name of Hottentot Venus. She was exhibited for her curvaceous physical features, including her prominent posterior, and her exhibition is considered prototypical of how African people were commodified, exploited, and denigrated by European colonizers during the nineteenth century. She was later exhibited, and likely prostituted, by another man who worked as an animal exhibitor, in Paris. The term Hottentot, a reference to the Khoi people of present-day South Africa, is now considered a derogatory and offensive term. See Justin Parkinson, *The significance of Sarah Baartman*, BBC NEWS MAGAZINE, (Jan. 7, 2016), <https://www.bbc.com/news/magazine-35240987> [<https://perma.cc/348X-Q6LY>].
42. See Art21, *supra* note 38 (capturing Walker's description and definition of subtleties and her incorporation of the concept in the exhibit).

consumption, of destruction—is exactly the power that Critical Race Theory’s opponents are fighting to preserve.

Black visitors began to notice that too many of their (mostly) white counterparts were engaging in extremely disrespectful acts of misogynoir at the sugar factory.⁴³ Visitors were posting photos of themselves appearing to engage in sexual activity with the Sphinx, who of course, represents an enslaved Black woman who might have been subjected to regular sexual violence by the man who owned her. The behavior has been described as “terrible” and “offensive,” inspiring think pieces on “how white people interact with Black art.”⁴⁴ Years later, it seems clear that the Sphinx and her babies were also whispering to us about how white people interact with Black people when they—public people—believe that the witness of Black people—private people—does not matter.⁴⁵ When Black witness does not matter—white people who want to be guilty can be proud to do guilty things. They can be proud to be guilty when they are being guilty amongst each other, and only challenged by the disapproving middle finger of the prone, inanimate Sphinx and the haunted gaze of her innocent, melting molasses babies. This is another subtlety, and it means that the Sphinx’s extended middle finger was definitely not accidental, but rather meant to curse and indict the guilty, while giving the power of witness—the power to observe and condemn—to those willing to complain about the bad behavior they had encountered. This power of witness is also an element of the power of Critical Race Theory that its opponents are fighting against. Thus, the desire for white redemption is much less partisan and much more universal than sophisticated liberal white art patrons might be willing to admit.

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In advance of Martin Luther King Day weekend in January 2022, President Biden traveled to Georgia with Vice President Kamala Harris to deliver a speech on democracy and voting rights.⁴⁶ Several Black voting rights activists snubbed

43. See Iversen, *supra* note 39.

44. See *id.*

45. Lolita Buckner Inniss has described white people and men as public people who can and do “deploy power both by observing and by being observed . . . dismantle and erect visual barriers by shaping laws, rules and norms,” while nonwhite people and non-men, by contrast, are private people “who see little and are little seen.” See Jackson Sow, *Whiteness as Contract*, *supra* note 15, at 1839 (citing Lolita Buckner Inniss, *Video Surveillance as White Witnesses*, AIN’T I A FEMINIST LEGAL SCHOLAR TOO? (Sept. 30, 2012), <http://innissfls.blogspot.com/2012/09/video-surveillance-as-white-witnesses.html> [<https://perma.cc/95XZ-B6ZV>]).

46. See Jewel Wicker, *Georgia Activists Warn Biden Against a “Photo Op” Visit That Lacks Voting Rights Plan*, GUARDIAN (Jan. 11, 2022, 7:38 AM), <https://www.theguardian.com/us-news/2022/jan/11/georgia-biden-harris-visit-voting-rights-bill> (last visited Mar. 18, 2022).

him.⁴⁷ Stacey Abrams notably cited a scheduling conflict that would not permit her to make time to attend the President's speech.⁴⁸ Less subtle statements beseeched the President to stay in Washington D.C. and actually lobby for the passage of voting rights legislation that, to activists and many Black voters, has been deprioritized by the Biden administration. For the activists, there would be no more standing behind and with the President and Democrats without policy to show for. The willingness to be a melting subtlety—a prop, a photo op—had expired. The message to President Biden? Innocent is as innocent does.

Perhaps this is another subtlety that Kara Walker's sugar babies were trying to pass along to their visitors as they slowly melted, their sugary flesh dripping on the ground in the Brooklyn summer's heat, while eager voyeurs snuck their fingers across their bodies next to signs that asked visitors not to touch those bodies. *It is so very difficult to combat your enemies when you must also fight your friends.* The visitors snapped selfies of themselves making faces in front of the Sphinx's large breasts and posted them to Facebook and Instagram, as a photo op that would prove to their friends how cool and cultured they were. Capitalism would destroy the installation, bulldozing it to the ground to make room for gentrification;⁴⁹ thus, the destruction of the factory was imminent and inexorable. But why was it necessary for the sugar babies' visitors to mock, kill, and abuse them before they died? Why was it impossible to respect their wishes? And why was the disrespect so confident, so gleeful? What is the point of being an innocent white liberal if you, too, will cherish and revel in your guilt whenever you have the opportunity to do so?

CONCLUSION: ATONEMENT FIRST

The war on Critical Race Theory is not an attack on the theory of interest convergence⁵⁰ or any other specific concept in the CRT canon; it is a war on Black history, Black thought, Black culture, and Black life in the United States. It is also a recent manifestation of a centuries-long struggle over who has the legal, political, economic, social, and cultural authority to be innocent—and human—in

47. *See id.*

48. *See* Greg Bluestein, *Abrams Camp Rejects "False Rumors" About Her No-Show at Biden Event*, ATLANTA J.-CONST. (Jan. 12, 2022), <https://www.ajc.com/politics/politics-blog/abrams-camp-rejects-false-rumors-about-her-no-show-at-biden-event/3N6Q4IH3UJAQVSD564VYDOXXI> [<https://perma.cc/8SB8-N74A>].

49. The Domino Sugar refinery was gradually demolished to make way for residential towers. *See* Nathan Kensinger, *Artist Kara Walker Says Farewell to the Domino Sugar Refinery*, CURBED: N.Y. (May 23, 2014, 1:05 PM) <https://ny.curbed.com/2014/5/23/10096010/artist-kara-walker-says-farewell-to-the-domino-sugar-refinery> [<https://perma.cc WR22-NMZF>].

50. *See* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

America. This fact is of critical importance, particularly for those legislators, policymakers, and participants in the American educational system who may too easily be tempted to compartmentalize and minimize the attacks as fringe, absurd, and relatively inconsequential. Within the legal academy, faculty, administrators, students, and boards of governors alike must realize that Critical Race Theory, Critical Legal Theory, and Feminist Legal Theory emerged within the legal academy precisely because core law school curricula, faculty hiring and promotion practices, and grading and evaluation conventions also wage war on Black people and other marginalized communities.

The whiteness contract is negotiated by its signatories, but it is sustained by its beneficiaries. Black resistance to the whiteness contract will always be met with violent, ridiculous, vengeful backlash, as it always has been.⁵¹ And if they are acting alone, white people who stand against white supremacy will also be treated as if liable for tortious interference of the contract. Ultimately, while the Ida B. Wellses, Derrick Bells, Ella Bakers, Charles Millses, Lani Guiniers, Kimberly Crenshaws, Patricia Williamses, Gerald Hornes, Stacey Abramses, and Kara Walkers of the world can and will call attention to the racial contract and beseech us to recognize it as the enemy of justice, those peoples whom the contract excludes can only resist the contract. The power of rescission and revocation lie with those for whom it was negotiated. In terms of policy, this means that Black people must recognize that many of their white friends are doing their enemies' work—that they, too, are engaged in gaslighting and ideological violence against Black voters, telling them that they should be grateful as they melt, slowly, under impossible living conditions, like a molasses subtlety.

Within legal academia, perhaps it is time to recognize that there is a wide gulf between diversity, equity, and inclusion (DEI) and racial justice—and that while racial justice is what students have been demanding, DEI is what schools have been offering them in return. Hiring Black faculty to teach “civil rights courses” with no movement on transforming (or abolishing) the student evaluation process and no procedure to make sure that Black faculty are not abused by students or their colleagues is the equivalent of gawking at beautiful molasses structures of enslaved Black children as if one is staring at gorillas at the Bronx Zoo, admiring how interesting and intelligent they are while they writhe in agony, screaming for help, before crumbling into the floor. It does not mean hiring a Black woman as DEI dean and making her responsible for fixing problems the administration has already decided it will do nothing about. It does not necessarily mean that the top cited scholars should not all be white, and that a community that still believes that

51. See Jackson Sow, *Whiteness as Contract*, *supra* note 15, at 1822–23 (describing violent reactions by white people to perceived breaches of the racial contract).

the best scholars still can only be white men (some of whom publish bigoted violence) is a white supremacist one. It means that many institutions that claim to be striving to be antiracist are guilty, guilty, guilty.

The desire for redemption is understandable, and thoroughly human. But redemption is not relative or dependent: One's innocence is not premised upon the guilt of another. The attacks on Critical Race Theory spring from a desire for whiteness to be associated with innocence and valor, coupled with a desire for whiteness to be perpetually privileged with impunity. That is to say, whiteness wants the pleasures of guilt and the appearance of innocence. And in a profoundly subtle irony, whiteness desires the appearance of innocence vis-a-vis the Black people it has substantively and procedurally condemned, placing Black people in a most interesting and precarious position of indispensability while also condemned to a cultural death row of sorts—much like the Sugar Sphinx and her babies. But this is madness; and it is for this reason that white supremacy is ultimately a murder-suicide. Because whiteness exists only in relationship to nonwhiteness, the destruction of the nonwhite necessarily leads to the destruction of the white. The erasure of Black history, Black culture, Black ideas, and Black life is the erasure of Americana. It is the destruction of the American labor force and every cultural export that makes America formidable worldwide. Instead of seeking self-preservation via innocence, America's best chance at survival—at redemption—will come via confession, atonement, and repentance.